THE CONSTITUTION, HERMENEUTICS AND ADJUDICATION:

Points of Departure for Substantive Legal Argument

THE CONSTITUTION, HERMENEUTICS AND ADJUDICATION: POINTS OF DEPARTURE FOR SUBSTANTIVE LEGAL ARGUMENT

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SUMMARY

The Constitution stipulates that its value-commitments are to inform the interpretation of statutes and the development of the common law and customary law. Legislative construction and law-application generally are therefore to be perceived as involving an axiological dimension.

Three hermeneutical traditions are dealt with to the end of clarifying the approaches to be adopted in everyday legal argumentation. The study culminates in the adduction of leads for substantive juridical argument in the process of statutory interpretation and in handling common-law and customary-law sources. These leads are shown to be functional by way of a critical discussion of recent case law and a conspectus of contemporary thought bearing on the nature of customary law.

The social dimension of the legal process is throughout underscored as a factor of significance. Concomitantly, it is registered that the jurisprudence of formalism, so marked an attitude of a previous time, should be abjured to the extent that it is disdainful of value-commitment. Conformably, literalist and literalist-cum-intentionalist perceptions as well as kindred stances are berated.

The penultimate chapter of this thesis suggests an encompassing approach to the interpretation of statutes, comprised of a systematic tabulation of insights previously garnered. The final chapter postulates that common law and customary law are not to be dealt with upon an interchangeable basis, inasmuch as the two

sources go out from radically divergent premises. It then proceeds to elaborate a conceptual framework for dealing respectively with each of these sources.

KEY TERMS

ADJUDICATION AND CONSTITUTIONALISM; COMMON LAW AND CONSTITUTIONALISM; CUSTOMARY LAW AND CONSTITUTIONALISM; HERMENEUTICS AND ADJUDICATION; INTERPRETATION OF STATUTES; JURISPRUDENCE; LEGAL ARGUMENTATION; SOCIAL AND LEGAL THEORY.

GENERAL INTRODUCTION

That the relevant legal issues stemming from the inauguration of a new constitutional order have been pertinently addressed is quite manifest. The ample case law, running into many volumes, attests to this unmistakably. Legal practice, too, exhibits a high measure of concern with constitutional imperatives.

Theoretical issues underpinning the relationship between the Constitution and the regular law have not been specifically dealt with, however – at all events not to the same extent as those of a legal-practical nature. This is in some degree understandable. Jurists have ever been impatient of theory, the pressure of work and constraints of time tending to make everything not strictly relevant irrelevant. This is unfortunate. For theory holds out the possibility of pointing practice in the right direction. It is with the jurist's antipathy to theory in mind that a model, finding elaboration in Chapters VI and VII of this study, has been constructed to serve as a theoretical-practical device. It is presented in what, it is hoped, is a readily assimilable form.

The problems arising in legal practice pose questions of a theoretical nature. This is *a fortiori* the case under a dispensation of constitutionalism. One is led to enquire after the manner in which the Constitution impacts upon the nature of legal argumentation. Questions are raised in this regard as to the adequacy of legal positivism as a jurisprudential orientation. What is to be made of the black-letter-law approach and verbalism? What does the demise of legislative supremacy (parliamentary sovereignty) mean for everyday lawyering? What significance is to be attached to the "intention of the legislature"? If values are to inform legal

argument, then how is the rule of the law, understood as fidelity to law, to be respected? (And how is the jurist to defer to the doctrine of *trias politica*?) Furthermore, questions arise as to the differential means of approach to statutory and non-statutory sources. And, in the same breath, one asks after the methodologies that are indicated in approaching, respectively, the common law and (African) customary law. These are just some of the theoretical concerns which are apt to present themselves in legal practice.

In the course of this study, some light will be shed upon these and cognate issues. Chapter I treats of formalist hermeneutics and its contemporary relevance. "Hermeneutics as explication" is the theme of that chapter. Chapter II deals with phenomenological (ontological) hermeneutics and its present-day juridical significance. The theme of this chapter is "hermeneutics as understanding." In Chapter III, the contemporary legal relevance of critical hermeneutics is examined. Here, as will be seen, an approach which might be said to be grounded in solidity is set forth. Chapter IV is concerned with a critical analysis of the popular perception of adjudication, and seeks in the light thereof to render a more faithful representation of the process. Chapter V is a discussion of the jurisprudential (legal-philosophical) implications of the new Grundnorm-order for legal argumentation. Here we see that western law (legislation and common law) and customary law (indigenous law) cannot be dealt with upon an interchangeable basis.

Insights from Chapters I, II, IV and V go into the making of Chapter VI. Chapter VI is a presentation of strategies for the interpretation of statutes. It is marked off

as "Conclusions (A)", and represents the first part of the model. Insights from Chapters II,III,IV and V enter into the composition of Chapter VII. Chapter VII presents a theoretical framework for the development of the common law and customary law. It is marked off as "Conclusions (B)", and reflects the second part of the model. The theory of developing the common law is set apart from the jurisprudential basis proferred along the lines of which customary law might be developed. Such a cleavage is premised upon the insight that the two bodies of law are not be handled on the same footing.

The model (Chapters VI and VII) is couched in a way which, it is to be hoped, renders its content readily appropriable by busy practitioners, lawyers and academics. Some sort of response is endeavoured to be given to questions likely to arise in legal practice, such as were noticed earlier. The model is designed to be as self-contained, as self-sufficient, as possible. This will relieve the jurist of the burden of having to consult the rest of the study. It is nonetheless inevitable that a lawyer wishing to come to grips with the detail of the model will be forced to look to previous chapters. Copious cross-references are accordingly provided: these should facilitate access to relevant material.

I

THE CONTEMPORARY LEGAL RELEVANCE OF FORMALIST HERMENEUTICS

1. INTRODUCTION

The subject of hermeneutics as it pertains to the legal process has been all but relegated to unimportance in this country. Kruger makes special mention of this point.[1] It is this neglect that is sought to be addressed, and redressed, in the course of this study. As the argument progresses, we shall find ourselves better equipped to handle legal sources. At its conclusion, the reader will have at her disposal a model[2] suggesting a means of dealing with these sources (and upon the basis of which the decisions of the courts in their approach to the law might be subjected to analysis).

Three hermeneutical traditions are discussed in this thesis. This chapter is concerned with formalist hermeneutics. As its name implies, this tradition focuses on the formal texture of legal documents. It seeks to discern what may be

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[1] See Johan Kruger "Towards a New Interpretive Theory" in J. Kruger and B. Currin (eds.) *Interpreting a Bill of Rights* (1994) 103 131. One is inclined to say that as regards any specialized jurisprudential hermeneutics in this country there is nothing very much to speak of, at any rate when the work of scholars such as Steyn, Du Plessis, Van den Bergh and Devenish is left out of account.

[2] The notion of a "model" is perhaps here deserving of some elaboration. Describing a model as abstract or theoretical in nature, Popper seems to contend that it may function as a heuristic device by reference to which matters to which it pertains may be understood. See Karl R. Popper *The Poverty of Historicism* (1986) 136 and 140. A model, then, is an instrumentality for the orientation of understanding.

uncovered by having regard to the sequential ordering of words on the printed page.[3]

In the ensuing chapter, the insights of phenomenological hermeneutics are set forth, and in the chapter thereafter those of critical hermeneutics. Chapter IV examines the deficiencies inhering in the "idealized model" of adjudication – in the light of the discussion – and offers by way of remedy an alternative depiction of the process. Chapter V, largely in the nature of a disquisition, undertakes to unveil the juridical relevance of our novel Grundnorm-order for law-application. With this, Chapter VI advances strategies for the interpretation of statutes, and Chapter VII theoretical guidelines for dealing with, respectively, the common law and customary law. Chapters VI and VII are conclusive in nature, and together constitute the model to which it has been adverted.

1.1 THE OBJECTIVES OF THIS CHAPTER

The aim of this chapter is to elicit those aspects of formalist hermeneutics which show themselves up as of value in the current legal setting.[4] This is, of course, to imply that certain features of the formalist tradition are inappropriate to present-day South African jurisprudence. Largely accounting for this circumstance is the fact that our legal-political order has undergone a paradigmatic transformation.

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[3] Formalist hermeneutics may also be spoken of as philological hermeneutics or the hermeneutics of method.

[4] Formalism connects up very congenially with legal positivism. Dugard asserts that positivism has not well served this country as a basis for juridical thought. See John Dugard *Human Rights and the South African Legal Order* (1978) 397. I am disposed to agree with Dugard in this regard. But there are nevertheless features of formalist hermeneutics which hold themselves out as of substantial

Premised, until recently, on Westminster-principles, our legal system espoused the doctrine of parliamentary sovereignty. This implied unconditional deference to the prescripts of the legislature. Hence the homage paid in so many judgments to the bald wording of statutes. Hence, also, the strenuous quest for their "plain meaning".[5] This was legal positivism regnant. Austin and Hart (not so much Kelsen, for "authentic interpretation" upon his appropriation involved an extra-textual dimension[6]) would have found a very congenial setting for appraising their own theories in the South Africa of that time. The text – conceived of in objective terms[7] – was to reign supreme. Its "plain meaning" was "out there" for the taking. The idea of value-laden statutory construction was not a popular one.

But the climate has changed. The doctrine of legislative sovereignty has given way to that of constitutional supremacy. No longer is the word of the legislature the last. And no longer is a statute (or any of its provisions) to be conceptualized as bearing an "autonomous" signification. It is to a large extent in contemplation of these considerations that specific facets of formalistic hermeneutics lend themselves to be conceived as inapposite to juridical interpretation.

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utility to the legal endeavour. These are not necessarily of positivist inspiration, and it would be foolish to ignore them.

[5] It is highly disputable whether there is any such thing as "plain meaning". The later Wittgenstein, for one, is reported to have denied a correlation of correspondence between word and essential meaning. See George Pitcher *The Philosophy of Wittgenstein* (1964) 223 *et passim*. Instructive too, in this regard, is James B. White *Justice as Translation* (1990) at 35.

[6] See Hans Kelsen *Pure Theory of Law* (1967) 354-5. See also Hans Kelsen *General Theory of Law and State* (1961) 146: "The individualization of a general norm by a judicial decision is always a determination of elements which are not yet determined by the general norm and which cannot be completely determined by it". See, further, Du Toit "The Problem of 'Correct' Interpretation: Freedom and Humanism in Interpretation" 1992 17 *TRW* (2) 20.

[7] Upon this conception, the interpreter is "subject", the text "object", with the former standing outside the constructive process.

In the conclusions to this chapter, those features of the tradition under discussion which facilitate – or at least are compatible with – the ethos of constitutionalism will be enumerated, together with those which do not. In so proceeding, we retain what is salutary, rejecting the indefensible.

1.2 THE FOLLOWING CHAPTER INTRODUCING REMEDIAL NOTIONS

The negative aspects of formalism (to be noted) point to the requirement of action by way of remedy. This is provided in the following chapter. There the heterotelic dimension[8] of legal interpretation is brought out explicitly. All this harmonizes with the reflection that the autotelic claims of the canon of the hermeneutical autonomy of the object[9] are untenable.

With this prelude, we turn to consider various strands to be discerned within the tradition of the hermeneutics of formalism.

2. LITERAL HERMENEUTICS

It would appear that the most pointed expression of the literal-hermeneutical position finds its formulation in Chladenius. Chladenius may in a very meaningful sense be regarded as the progenitor of formalist hermeneutics. He was of a disposition to consider that all that was necessary to resolve interpretive difficulties

[8] There is a social reality to be serviced in the course of legal interpretation. One is not concerned merely with statutory exegesis.

was to apprise oneself of the proper meanings of words and phrases.[10] For Chladenius, interpretation was explication. Hirsch's thesis of the "stable determinacy of meaning" (with which we shall be concerned presently) seems to find a very able prefiguration in Chladenius.[11]

It is of interest that as early as 1689, the German jurist Von Felde proffered notions of a similar tenor to those to be encountered in the writings of Chladenius.[12] For Von Felde interpretation meant no more than the explication to someone of something she found difficult to understand.[13] And for Chladenius likewise: interpretation consisted in imparting to another those concepts which make for full comprehension of a speech or text.[14]

Chladenius's perceptions may be put to good use in the legal context, so long as their limitations are borne in mind throughout. Words which are obscure to the interpreter should as a matter of first recourse be taken up in the "sense" suggested by a comprehensive dictionary, or where appropriate, a legal or other technical lexicon. Adapted to the juridical setting, Chladenius may further be read as urging that interpretation clauses in statutes be taken seriously. These would point up the "sense" of words used in the legislation at hand.

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[9] For a discussion of this canon, see the remarks under 4.1.1, below.
[10] Mueller-Vollmer writes that for Chladenius interpretation was simply verbal explication. See Kurt Mueller-Vollmer *The Hermeneutics Reader* (1986) 8.
[11] The reader is referred in this regard to the discussion under 4.2.1, below.
[12] See Mueller-Vollmer *op cit* 3: "In his 'Treatise on the Science of Interpretation' (1689), the German jurist Johannes von Felde attempted to establish interpretive principles which would be valid for all classes of text, both literary and legal. He also offered a definition of hermeneutics which Chladenius would incorporate into his hermeneutics. To interpret, for von Felde, meant but to explicate to someone that which proves difficult for him to understand."
[13] *Ibid.*
[14] *Ibid* 8. See, in particular, the author's citation of Chladenius.

Chladenius may most pertinently be taken up in relation to the interpretation of penal provisions in statutes. In the case of legal precepts to which attach criminal sanctions, the construction indicated is that which would place a strict interpretation upon their terms.[15] The "principle of legality" enjoins as much.[16] (A generous or liberal interpretation is to proceed in respect of any exclusion of criminal liability, however.[17])

3. LITERAL-CUM-INTENTIONAL HERMENEUTICS

This strand of hermeneutics is very prominent within the tradition under consideration. Droysen, Ast, Schleiermacher, Dilthey, Betti and Hirsch are to be counted among those who espouse the literal-cum-intentional schema in one or other of its variants. Since the work of Betti and Hirsch is too sophisticated to be accommodated exclusively within this schema, only Droysen, Ast, Schleiermacher and Dilthey are here given coverage.

Droysen advised that we ought, in seeking to make sense of inscriptions, to have regard not only to their semantic or "rational" significations, but also to their psychological, emotional and spiritual dimensions.[18] When inscriptions are perceived, they call forth the same inner processes as actuated their authors.[19] Ast's contentions are similar. Ast argued that the interpretation of the "spirit" of a text

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[15] See L.M. du Plessis *The Interpretation of Statutes* (1986) 89.
[16] *Ibid.*
[17] *Ibid* 121.
[18] See Mueller-Vollmer *op cit* 18-19 for a discussion of Droysen's position in this regard.
[19] See Johann G. Droysen "History and the Historical Method" in Kurt Mueller-Vollmer (ed.) *The Hermeneutics Reader* (1986) 119 121: "On being perceived, the utterance, by projecting itself into the inner experience of the percipient, calls for the same inner process".

involves bringing out the "idea" the author had in mind or by which he [*sic*] was unconsciously animated.[20]

Schleiermacher seems to have put literal-cum-intentional hermeneutics on a very sturdy foundation.[21] He maintained that interpretation involves two "moments", the one "grammatical", the other "psychological" (or "technical"). They enjoy an equal status;[22] the art of interpretation involves an appreciation of the circumstances in which one moment should yield to the other[23] – we see, then, that categorially they are of equivalent ranking, but that the context may demonstrate the one or the other as pre-eminent in the circumstances.

Dilthey ventured that a "life-expression" (and by this he meant an inscription) points back to the "lived experience" by which it was informed.[24] Interpretation is explained upon the basis of the formula: "experience-expression-understanding".[25] The interpreter is to "re-live" that past experience[26] which finds its formulation in a written matrix. Here we have an affirmation of a literal-cum-intentional methodology. Dilthey did, however, attempt to proceed beyond this, seeking to

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[20] See F. Ast "Hermeneutics" in G.L. Ormiston and A.D. Schrift *The Hermeneutic Tradition* (1989) 39 39-43. At 43, Ast claims that interpretation is in some sense "geistig". The source of this insight may be elsewhere.

[21] According to Bleicher, it was Schleiermacher's "genius" to have given the leads provided by Ast (and Wolf) a systematic foundation. See Josef Bleicher *Contemporary Hermeneutics* (1980) 13.

[22] See F.D.E. Schleiermacher "[General Hermeneutics]" in Kurt Mueller-Vollmer *op cit* 73 75: "[The] two hermeneutical tasks are completely equal, and it would be incorrect to label grammatical interpretation the "lower" and psychological interpretation the "higher" task".

[23] See F.D.E. Schleiermacher "The Aphorisms on Hermeneutics from 1805 and 1809/10" in G.L. Ormiston and A.D. Schrift *op cit* 57 58.

[24] See Mueller-Vollmer *op cit* 25 in this regard. See also Wilhelm Dilthey "The Understanding of Other Persons and their Life-Expressions" in K. Mueller-Vollmer *op cit* 153: "What is given always consists of life-expressions. Occurring in the world of the senses they are manifestations of mental content which they enable us to know".

[25] See, in this connection, Richard E. Palmer *Hermeneutics* (1969) at 98-123.

[26] See Mueller-Vollmer *op cit* 25 for further elaboration.

establish for the human sciences a solid epistemological foundation.[27] But that is another matter. And we shall not be concerned with it in this study.

If the hermeneutics under discussion is subjected to critical scrutiny, it resolves itself into a brand of literalism. The "intention" of the author appears from the "plain meaning" of the words she chose to employ. So we see that, while laying claim to superiority of conception, literal-cum-intentional hermeneutics is simply literal hermeneutics by another name.[28] This does not seem, however, to have occurred to its adherents.

Nor, for that matter, does it seem to occur to proponents of "intentionalism" in the law. The "intention of the legislature", they persistently maintain, provides the key to the meaning of any statutory provision. Steyn, for instance, proposed that the sovereign rule of legislative interpretation is to ascertain the will- or thought-content of the promulgating organ.[29] When once it has been established what it is that the "words" seek to express as the "true intention", Steyn continues, it remains only to give effect to that intention.[30] One finds oneself implicated in circular reasoning, however, in endorsing these prescripts. The language of a statute is to be construed so as to give effect to the "intention of the legislature". But how is such intention to be garnered? By having resort to the language of the statute! One has to agree with Du Plessis that "intentionalism" as thus expounded is really a literal

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[27] See Paul Ricoeur *From Text to Action* (1991) 59: "Dilthey undertook to endow the human sciences with a methodology and an epistemology that would be as respectable as those of the sciences of nature".

[28] Du Plessis intimates that "intentionalism" (the literal-cum-intentional approach) is little more than "literalism" in one of its guises. See Du Plessis *op cit* 31.

[29] See L.C. Steyn *Die Uitleg van Wette* (1981) 1-2.

[30] *Ibid* 2.

theory "in an intentional disguise".[31] Literal-cum-intentional hermeneutics in the law, as elsewhere, boils down in the ultimate analysis to literal hermeneutics pure and simple.

THE "INTENTION OF THE LEGISLATURE"

Although there are notable jurists who subscribe to "intentionalism" (Meese and Bork to name but two),[32] it is meant here to part ways with them. It has become something of a habit to invoke the "intention of the legislature" in support of one's interpretation, but the question arises whether such an appeal bears anything more than the quality of ritual. Van Heerden thinks not.[33] He claims that the phrase is deployed as a retroactive imputation of intention (he is not suggesting disingenuousness though) on the basis of an interpretation of a statute in line with general juridical sensibilities.[34] Stone's arguments are substantially similar.[35]

One should not quibble with the use of the words "intention of the legislature" in the process of statutory construction. Judicial convention seems to be rather wedded to their employment. One may, however, raise an objection to any

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[31] Du Plessis *op cit* 32.

[32] For a statement of the intentionalist programme, see among others the following sources: Edwin Meese "Address before the D.C. Chapter of the Federalist Society Lawyers Division" in S. Levinson and S. Mailloux *Interpreting Law and Literature* (1988) 25 at 29; and Charles Fried "Sonnet LXV and the 'Black Ink' of the Framers' Intention" in S. Levinson and S. Mailloux *op cit* 45 at 50. These authors write with specific reference to the interpretation of the American Constitution, but their comments are not the less interesting for their particular focus. See, among others, Paul Brest "The Misconceived Quest for the Original Understanding" in S. Levinson and S. Mailloux *op cit* 69 at 96; and William J. Brennan, Jr. "The Constitution of the United States: Contemporary Ratification" in S. Levinson and S. Mailloux *op cit* 13 at 17-18 for an exposé of anti-intentionalist sentiments. These also pertain specifically to the United States Constitution.

[33] See F.J. van Heerden "'n Uitlegteorie" 1989 4 *SAPL* (1) 29 at 44.

[34] *Ibid*: "Die indruk wat mens kry by die deurlees van die groot aantal sake in dié verband is dat die bedoelingsteorie niks anders as 'n fiksie is nie. Die regspreker lê die wet volgens sy regsgevoel uit en skryf dit dan toe aan die bedoeling van die wetgewer."

[35] See Julius Stone *The Legal System and Lawyers' Reasonings* (1964) 33.

perception of the notion as an ideational reality recoverable in principle. This is so for the following reasons, among others – the list does not purport to be exhaustive:

(1) When once a written work has been created, it acquires a meaning which no longer depends upon its author's motives.[36] Interpretation aims to uncover this meaning. Put simply, we seek to unveil the "meaning of the statute", not the "intention of its authors".[37]

(2) To ascribe an intention to a collectivity may be indefensible. The concept of a group-mind poses metaphysical difficulties somewhat refractory to resolution. Quite apart from this, it is noted with Radin that the legislature cannot be deemed to have an intention with regard to provisions set forth by one or two draftsmen; which a considerable percentage of its members rejected; and with respect to which those who did approve them may have entertained widely differing ideas and convictions.[38] Those who vote in favour of a measure often do so on the basis of party-political affiliations, not paying much heed to its merits.

(3) In England at any rate (Dias explains), the courts will interpret legislation upon the foundation of what the law in fact provided, should parliament pass the statute on an erroneous perception of the law.[39] Here the courts do not

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[36] *Ibid* 32.
[37] See R.W.M. Dias *Jurisprudence* (1976) 219 where this seems to find elaboration: "Ascertaining the 'intention of the legislature'.... boils down to finding the meaning of the words used – the 'intent of the statute' rather than of Parliament." The expression "intent of the statute" seems upon my apprehension to speak to a purposivism. See also Du Plessis *op cit* 39, as also other references to like effect.
[38] See Max Radin "Statutory Interpretation" in F. Schauer *Law and Language* (1993) 196.
[39] See Dias *op cit* 219.

seek to give effect to any intention informing the statute[40] – perhaps a tacit judicial acknowledgment of the sterility of the quest for an "intention" in the substantive sense.

(4) The majority of parliamentary representatives, perhaps, do not have any comprehensive training in the law. How, then, can they be expected to harbour any "intention" in relation to provisions for the understanding of which an acquaintance with legal technicality is required?

(5) It is a commonplace that one's intentions often change in the course of giving content to one's efforts. In such a case, which "intention" is to be regarded as decisive? Similar considerations are applicable with respect to debate in the legislative forum.

To sum up, one may say, with Cameron, that in no ordinary sense of the expression is the "intention of the legislature" a reality.[41] Stone moves, in apparent conformity with Van Heerden,[42] that a great deal of the invocation of legislative "intention" is to be taken up as of fictional or ritual significance only.[43]

4. SYSTEMATIC FORMALIST HERMENEUTICS

This sub-heading could be misleading. It should not give the reader to think that the work of the theorists just discussed – Chladenius, Droysen, Ast, Schleiermacher

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[40] *Ibid.*

[41] See Edwin Cameron "Legal Chauvinism, Executive-Mindedness and Justice – L.C. Steyn's Impact on South African Law" 1982 *SALJ* 38 59-60.

[42] See the first paragraph under the heading "The 'Intention of the Legislature'" above.

and Dilthey – is lacking in system. What is meant to be conveyed by the rubric is that the contributions of the hermeneuticists about to be canvassed are comprehensive, purportedly all-encompassing, theories of literary interpretation, purveyed in quasi-prescriptive, systematic terms.

4.1 THE WORK OF EMILIO BETTI

Emilio Betti is one of the most prominent contemporary exponents of methodological hermeneutics. Influenced by Schleiermacher and Dilthey, Betti claims that "we may tentatively characterize interpretation as the procedure that aims for and results in understanding".[44] Objectively valid interpretations are not for him an elusive ideal.

Betti considers interpretation to be a triadic process.[45] The "interpreter" is confronted with a "meaning-full form" (a document of one sort or another) reflecting an "objectivated mind".[46] Being the reverse of creation, interpretation involves a "re-cognition" (literally, knowing again) of meaning.[47] On this score, Betti appears to be in sympathy with the postulates of literal-cum-intentional hermeneutics.

Betti's four "hermeneutical canons" should be noted for their bearing upon the legal-hermeneutical endeavour. Each is discussed in turn.

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[43] See Stone *op cit* 33.
[44] See Emilio Betti "Hermeneutics as the General Methodology of the Geisteswissenschaften" in J. Bleicher *op cit* 51 56.
[45] *Ibid.*
[46] *Ibid.*

4.1.1 THE CANON OF THE HERMENEUTICAL AUTONOMY OF THE OBJECT

The charge that the interpreter affirm the essential hermeneutical autonomy of the object (the "meaning-full form" or document) imports that she should not read it with any extraneous purpose in mind. Meaning is to be derived from the object, not conferred upon it.[48]

One might observe at once that this canon is entirely inappropriate to statutory interpretation. It mandates a construction processed on autotelic lines. It loses sight altogether of the irreducibly heterotelic dimension of the interpretation of statutes. Legislation is invariably construed with reference to an "hors-texte" (or "outside"). Contextual considerations simply cannot be dismissed in so cavalier a fashion.

Legal positivism would hold up this canon as exemplary of its (purported) methodology. Yet, if pressed to its conclusions, even positivism would be forced to deny the applicability of this canon, and in the process to disown certain of its fundamental premises.

The following chapter provides something in the way of a corrective to the notion that a legal text is to be regarded as self-sufficient, as a "thing-in-itself."

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[47] *Ibid* 57: "What occurs here ... is an inversion of the creative process: in the hermeneutical process the interpreter retraces the steps from the opposite direction by re-thinking them in his inner self."
[48] *Ibid* 58.

4.1.2 THE CANON OF THE COHERENCE OF MEANING

This canon, otherwise referred to as the principle of totality,[49] represents an encapsulated statement of the hermeneutical circle. Its tenor, as with the notion of the hermeneutical circle, is that a part should be understood with reference to the whole, and, likewise, that the whole is to be understood by taking into consideration each and all of its constituent parts.[50]

Transposed to the legal-hermeneutical context, this canon would have the jurist seek to understand a provision in a statute by reference to that statute conceived of as a globular totality. The provision is cast into sharper relief when seen within its larger context. This is an important lesson for purposes of this study.

4.1.3 THE CANON OF THE ACTUALITY OF UNDERSTANDING

This canon reflects Betti's injunction, as registered earlier, that the interpreter strive to re-construct authorial intent.[51] The notion of the "intention of the legislature" is one to which he would advise recourse in the interpretation of statutes. In view of the criticisms to which that notion is subject, it is submitted that this canon of Betti's has nothing of profit to offer the jurist.

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[49] *Ibid* 59.
[50] *Ibid.*
[51] *Ibid* 62.

4.1.4 THE CANON OF HERMENEUTICAL CORRESPONDENCE OF MEANING

Also known as the canon of meaning-adequacy in understanding, or the canon of the harmonization of understanding,[52] this principle enjoins the interpreter to adopt a "broad viewpoint".[53] What Betti speaks of as "technical-morphological interpretation" is here of relevance.[54] The interpreter is required to place the object of her constructive efforts within its own particular (specialized) structural context.[55] The object is sought to be understood "in relation to its particular logic and formative principle".[56] It is to be compared with other similar objects (its particular logic), as also situated within the context of its antecedents and successors (its formative principle).[57]

It is submitted that such comments as are ventured in this spirit with specific reference to objects of cultural interest, such as ceramic artifacts and paintings, are of equal pertinence to juridical interpretation.[58] A statutory provision may be rendered open to better understanding for its comparison with other documents prepared at roughly the same time and having a bearing upon that provision. Here

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[52] *Ibid* 84-5.
[53] *Ibid* 85. See further at 85: "According to this canon, the interpreter should strive to bring his [sic] own lively actuality into the closest harmony with the stimulation that he receives from the object in such a way that the one and the other resonate in a harmonious way."
[54] *Ibid* 87.
[55] A conversation with Mr E. Leistner of the Department of Philosophy (UNISA) clarified for me much that, in this regard, would strike one as impenetrable at the first sight.
[56] Betti writes that the technical-morphological moment "aims at understanding the meaning-content of the objective-mental world in relation to its particular logic and formative principle; it is a meaning that can be sensed in these creations and can be reconstructed." See Bleicher, citing Betti, in Bleicher *op cit* 40.
[57] This was brought out in the conversation referred to in n55, above.
[58] This is my submission. However, it does seem to tally with Betti's exposition. See Emilio Betti "Hermeneutics as the General Methodology of the Geisteswissenschaften" in J. Bleicher *op cit* 51 84ff.

one thinks of memoranda (detailing suggestions to the legislature) and excerpts from Hansard (providing objective evidence of surrounding circumstances and preceding deliberations).

Lloyd remarks that in the United States and on the Continent (otherwise than in the United Kingdom), recourse to so-called *travaux préparatoires* is had in fitting instances to establish the "purpose" of legislation. Ministerial or committee reports or debates fall within the compass of admissible referential sources.[59]

Also shedding light on the import of a statutory provision would be its own antecedents: predecessor enactments (or provisions) or statutory precursors, as they might otherwise be termed.

All in all, it seems that the canon of hermeneutical correspondence of meaning has much to offer the jurist.

4.2 THE CONTRIBUTION OF ERIC DONALD HIRSCH

Eric Hirsch may also be taken for our purposes as an exponent of systematic formalist hermeneutics. Hirsch is a hermeneutical realist,[60] seeking to elaborate a theory of literary interpretation based very narrowly upon the concept of the "text" itself.

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[59] See Dennis Lloyd *The Idea of Law* (1964) 283.

[60] For a short commentary on "hermeneutical realism", the reader is referred to Steven Mailloux "Rhetorical Hermeneutics" in S. Levinson and S. Mailloux *op cit* 345 347 and 355. See also Palmer *op cit* 5-7.

Hirsch sets out to defend the notion of "authorial intention" as the touchstone of "valid" interpretations.[61] He is of the view that it is in principle recoverable.[62] Saying that problematic aspects of interpretation relate in the main to the derivation of "implications",[63] Hirsch advances to the end of their resolution a model conceived on the basis of qualitative probabilities.[64]

4.2.1 MEANING AND SIGNIFICANCE

For Hirsch, "meaning' is stable, determinate.[65] It bears the character of fixity. It is to be found in the "text", either in express terms or by implication. It is "out there" for the finding.

"Significance", by contrast, "embraces a principle of change."[66] It is for Hirsch "meaning-as-related-to-something-else".[67] Interpretation is concerned exclusively with the adduction of "meaning". "Significance", which is context-dependent, is outside its province.[68]

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[61] In this regard, the reader's attention is drawn to Eric D. Hirsch *The Aims of Interpretation* (1976) *passim*, especially the first few chapters.
[62] This seems to constitute an implicit motif throughout his work.
[63] See Eric D. Hirsch *Validity in Interpretation* (1967) 61: "Most of the practical problems of interpretation are problems of implication."
[64] See *Ibid* 174: Hirsch seems to agree with J.M. Keynes that probabilities can be qualitative rather than quantitative. "We are content", he says, "to judge that an event is probable, highly probable, or almost certain, without allotting any numerical values to these judgments". *(Ibid.)*
[65] See Hirsch *The Aims of Interpretation op cit* 1-2.
[66] *Ibid* 80.
[67] *Ibid* 79-80.
[68] See, apropos of these reflections, Hirsch *Validity in Interpretation op cit* 57.

These reflections tie in very comfortably with the postulates of legal positivism. The "plain meaning" conception of language, intrinsic to that philosophy, finds an harmonious resonance in Hirsch's thesis of the "stable determinacy of meaning".[69]

Yet, we are confronted with the circumstance that all interpretation proceeds within one or other context. We are already applying the text (if only in notional terms) in the course of its interpretation. Hence Hirsch's distinction between "meaning" and "significance" breaks down.[70] Meaning therefore is not stable and determinate, but a function of context. In the next chapter the ramifications of this insight will be explored more fully.

4.2.2 THE "SHARED TYPE"

Hirsch undertakes to clarify his conception of a "type". Such an entity, for one thing, has categorial limitations, which are decisive as to whether any particular matter is included therein. For another thing, a "type" is always capable of being represented by more than one instance.[71]

"Verbal meaning", upon Hirsch's premises, is a "type". It is a "shared type" which has been learned.[72] Familiarity with the "shared type" ("learned convention") is what enables the interpreter to generate "implications" without their having been

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[69] See Hirsch *The Aims of Interpretation op cit* 1-2 for a statement as to what is imported by the notion of a "stable determinacy of meaning."
[70] Heidegger and Gadamer, for instance, would not find themselves able to sustain this distinction. They would regard it as artificial and ontologically false. In the next chapter, this is brought out in clear terms.
[71] See Hirsch *Validity in Interpretation op cit* 49-50.
[72] *Ibid* 66.

expressly stipulated.[73] Just as a "trait" belongs to a "type", so implications belong to "verbal meaning".[74] The principle pertains also to strings of words (word sequences) and ultimately to the textual item in its entirety.[75] By virtue of her previous experience of texts, or fragments of texts, of a particular "type", the interpreter is in a position to say whether or not such-and-such a meaning is to be implied.

Constructive validity pertains to legitimacy of inference as to "implications". The logic of guessing and validation[76] proceeds on the basis of relevant justificatory evidence[77] to be found in the text itself. This is where judgments of probability come in. The derivation of "implications" is of greater defensibility, the more cogent the textual evidence that is adduced in its support.[78] Such a statement appears to express the tenor of the Hirschean programme.

It also explains Hirsch's position on rules and maxims of interpretation (legal or otherwise). Declaring them to be "provisional guides" or "rules of thumb", Hirsch advances that they express probability judgments in the light of "past experience".[79]

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[73] *Ibid.*
[74] *Ibid.*
[75] This extrapolation would appear to have its basis in the axioms of the Hirschean programme. The notion of an "intrinsic genre" is here of particular interest. See *Ibid* 121 *et passim*.
[76] Hirsch argues that interpretation implicates two moments – a divinatory moment, involving an imaginative hypothesis as to meaning ("guess"), and a critical moment, in which the results of intuition are subjected to a process of validation. See Hirsch *Validity in Interpretation op cit* 164ff.
[77] As to relevant justificatory evidence, see Hirsch *Ibid* 197: "Evidence must be accepted as relevant whenever it helps to define a class under which the object of interpretation (a word or a whole text) can be subsumed, or whenever it adds to the instances belonging to such a class."
[78] See *Ibid* 176: "[The] known aspects of [an] object permit us to place it in a class possessing some of the same traits. *The more we know about the object, the narrower and more reliable we can make the class.*" (my emphasis) The "class" to which Hirsch here refers is substantially assimilable to the notion of a "type".
[79] *Ibid* 203.

4.2.3 RULES AND MAXIMS OF STATUTORY INTERPRETATION

To the end of coming to grips with Hirsch's attitude towards the rules and maxims of statutory interpretation, it is necessary to look to certain notable canons of construction. Thereafter his perceptions are subjected to critical appraisal.

Those canons which are explicitly geared to the derivation of "implications" find expression in such maxims as "ex contrariis",[80] "expressio unius est exclusio alterius",[81] "ex consequentibus",[82] "ex accessorio eius de quo verba loquuntur",[83] "a natura ipsius rei"[84] and "ex correlativis".[85] The canon of "expressio unius est exclusio alterius" is most illustrative for purposes of the theme. It has been claimed to do no more than to draw attention to "a fairly obvious linguistic point": that the stipulation of defined issues compels the inference of the deliberate exclusion of other related ones.[86] It appears to be clear that this consideration, upon Hirsch's suppositions, would lend itself to explanation in terms of his thesis of probabilism.

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[80] See Du Plessis *op cit* 156: "Where an enactment makes express provision for certain circumstances, it is inferred that for opposite circumstances the contrary will obtain."
[81] *Ibid*: "[E]xpression of one thing is the exclusion of the other."
[82] *Ibid* 157: A paraphrastic rendition of Du Plessis's definition might read that where an end-result is prohibited or allowed, all that may by implication conduce thereto is respectively proscribed or permitted.
[83] See V.G. Hiemstra and H.L. Gonin *Trilingual Legal Dictionary* (1981) 183: "If the principal thing is forbidden (or permitted) the accessory thing, too, is forbidden (or permitted)."
[84] Du Plessis says that this maxim implicates inherent relationship. He instances, in exemplification, the entailment of a power to withdraw a regulation within the power to make it. See Du Plessis *op cit* 157.
[85] This maxim involves mutual or reciprocal relationship. Prohibition of the purchase of X implies prohibiting its sale, for example. See Du Plessis *op cit* 157.
[86] See F. Bennion (citing Cross) in F. Bennion *Statutory Interpretation* (1992) 873.

Hirsch's notion of "class" is also integral to his probabilistic premises. As a "trait" belongs to a "type", so an "instance" belongs to a "class".[87] If an "instance" is identifiable as partaking of the character of one or other "class", then the "implications" as to the unknown attributes of that "instance" are to be gathered with reference to the "class" identified. Hirsch contends that the assessment of probability is a "frequency judgment"[88] based upon the interpreter's past experience of other "instances" which she believes to belong to the same "class" as the unknown "instance".[89]

Parallel considerations would appear to inform the rule of statutory interpretation known as the "eiusdem generis" principle (or "limited class" rule). Here, however, it seems that one works the other way round. Instead of undertaking to unveil the attributes of a particular "instance" by reference to the "class" to which one believes it to belong, one here starts off with the "class" (as defined by a series of enumerated "instances") and enquires whether the factual "instance" (as part of the factual dimension of the forensic enterprise) is to be subsumed within its terms. But the principle of probabilism is in this case quite as much applicable. The more extensive the enumeration of "instances" defining the "class", the more accurately would one be able to establish the limits or boundaries of that "class", and the more precise would be one's determination of whether the factual "instance" falls to be subsumed within its terms. (The defining feature of the "limited class", that which characterizes it, is adduced by the attribute or set of attributes each of the items catalogued have in common.[90])

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[87] See Hirsch *Validity in Interpretation op cit* 178.
[88] *Ibid* 176.
[89] *Ibid.*
[90] See R. Sullivan *Driedger on the Construction of Statutes* (1994) 205.

A CRITICAL APPRAISAL

There is no denying that Hirsch's reflections on the standing of rules and maxims of interpretation have considerable merit. But they appear to be deficient in one major respect.

The model purveyed is based upon the textual matter exclusively. The text is conceived of as a set of symbols to which "meaning" is intrinsic.[91] There is no reckoning with the circumstance that the "meaning" that attaches to those symbols may vary with the interpretive context.

Most often, perhaps, Hirsch's model will speak the truth. But as the jurist goes about the business of interpreting a statute, she may find that certain maxims which came to mind at an earlier stage in the exercise no longer seem apposite to her task. By like token, other maxims, which at first sight may not have suggested themselves as applicable, may find themselves of eminent relevance in the final stages of the task. This is precisely because the constructive context may give the text to be understood differently in the course of the jurist's activities as these proceed to culmination.

So, otherwise than Hirsch would enjoin, the rules and maxims of statutory interpretation should not be regarded as measures of first recourse to be applied with a view to the ascertainment of linguistic "meaning". They should rather be

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[91] It is Hirsch's claim that "meaning cannot exceed the semantic possibilities of the symbols used." See Hirsch *The Aims of Interpretation op cit* 87.

seen as devices to be registered as applicable at the end-point of the interpretive proceeding.[92] At that (final) stage, when contextual features have been given their most exhaustive coverage, those rules and maxims which at first seemed relevant, but which now no longer appear apposite, will be "filtered out", and those which did not suggest themselves initially may now demand their registration.[93]

4.2.4 THE LESSONS OF THE HIRSCHEAN PROGRAMME

Notwithstanding the criticisms to which his model is subject, Hirsch may for purposes of this study be harnessed to good effect in a number of respects. These may be enumerated as follows:

(1) Words which are opaque to the jurist should be looked up in an appropriate dictionary or lexicon.[94] (They are part of the "shared type".)

(2) The interpretation clauses of the statute should be consulted.[95] (These "establish" a "shared type", upon which the community of jurists is to draw for the objectives of construing that statute.)

(3) Where idiomatic expressions are encountered, the jurist should seek out their meaning in an appropriate source.[96] (In the case of ordinary idiom, a comprehensive dictionary should confer illumination. In that of legal idiom,

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[92] The end-point of the interpretive exercise constitutes what is described in Chapter VI of this study as "effectuation".
[93] See the discussion of "effectuation" in Chapter VI, below, at IV.
[94] This is what will be referred to in Chapter VI (dealing with the interpretation of statutes) as "dictionary-meaning appropriation." (See the Process of Ingression at I.)
[95] In this regard, it is thought apt to speak of "legislative-definitional observance".

an apposite source of reference should do the same.) Hirsch would consider that idiomatic formulations are part of the "shared type".

(4) Where a word is capable of bearing more than one "meaning" (i.e. is ambiguous), the syntactical context is to serve as a basis for disambiguation. The "shared type", we find, is deployable to the end of resolving ambiguity. (Mayton observes that words vary in meaning according to syntactical context.[97] The emphasis on "core-meaning" (upon essentialist assumptions) simply glosses over this important insight. Wittgenstein urged that words are not to be thought of as bearing intrinsic significations, essential meanings, independently of any context.[98])

(5) Since "grammar" is a "shared type" (based on convention), Hirsch would counsel the jurist to be grammatically responsive. Grammatical responsivity would entail both an appreciation of the rules of grammar and an alertness to deviation therefrom where this occurs. (Here one notices Hotomanus's conception of grammatical interpretation as of the essence of legal explication.[99])

(6) The jurist should be sensitive to the structural dimensions of the sentence. (This follows as a corollary to (5) above.)

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[96] To this one may refer as "idiomatic resolution".
[97] See W.T. Mayton "Law among the Pleanasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation" 1992 41 *Emory Law Journal* 113 123-4.
[98] See, in this regard, George Pitcher *The Philosophy of Wittgenstein* (1964) *passim*.
[99] See Mueller-Vollmer *op cit* 3.

4.3 INSIGHTS OF B.C. LATEGAN

Bell and Cohn list "pronoun reference", "repetition of important words" and "transitional expressions" as three important factors making for coherence and continuity in writing.[100] It is submitted that these factors may also be utilized in seeking to impose structural coherence on the subject-matter of one's reading. As one may say, they make for an appreciation of continuity as between sentences.

(1) As to sentences themselves (and further to point (6), above, urging sensitivity to the structural dimensions of the sentence), Lategan's insights have much to commend themselves.[101] Here an adapted version of his programme is offered. His conception of a "matrix sentence" posits a syntactical unit consisting of a nominal and a verbal element, which may be extended at various points – by a series of qualifications, sub-qualifications and closer definitions.[102] In this way sentence-intrinsic structural analysis is able to proceed.[103]

(2) We should note, incidentally, in the treatment of Lategan that his approach to the statutory totality calls to mind Betti's canon of the coherence of meaning. A clause in a statute is to be construed within the context of the

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[100] See J.K. Bell and A.A. Cohn *Handbook of Grammar, Style and Usage* (1981) 203ff.
[101] See B.C. Lategan "Die Uitleg van Wetgewing in Hermeneutiese Perspektief" 1980 *TSAR* 107-126.
[102] *Ibid* 121-123. The reader's attention is directed specifically to the process of analysis illustrated at 122.
[103] Examples are furnished in the course of Chapter VI of this study, at I(5).

statute as a whole.[104] The structure of the statute (read as a whole) serves as a very cogent pointer to its "purpose". The particular clause is to be read in the light of this "purpose". Such is the methodology of what is understood by "intra-textual contextualization".[105]

5. CONCLUSIONS

In these conclusions, those features of the formalist tradition which are of a salutary tenor are tabulated, together with those which, it is felt, should be renounced. It must be emphasized that this chapter has focused on selected areas of formalist hermeneutics – those which evidence promise of utility within the contemporary legal setting – and does not purport to be a restatement of the entire tradition. It is considered, however, that what has been covered is of a sufficiently edifying character to justify registration of the following conclusions.

A (1) Words which are obscure to the jurist should as a matter of first recourse be appropriated in the "sense" suggested by a comprehensive dictionary, or, where appropriate, a legal or other authoritative lexicon. One should stress the words "as a matter of first recourse", since contextual considerations may subsequently point to their being read in a "modified" sense. It is proposed to refer to this manner of proceeding (of which Chladenius would

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[104] This is what is known as the *ex visceribus actus* approach. See Lategan *op cit* 120ff.

[105] For an exposition of "intra-textual contextualization" (albeit with reference to the interpretation of a supreme constitution and not ordinary legislation specifically), see L.M. du Plessis and J.R. de Ville "Bill of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects" 1933 4 *Stell LR* (3) 356 367ff. This discussion is applicable, given the necessary modifications, to statutes generally.

have considered himself a champion) as *dictionary-meaning appropriation.*[106]

(2) The definition clauses (interpretation clauses) in the various statutes should be heeded to the extent that they are compatible with the constitutional design. Relevant provisions in the Interpretation Act[107] are also to be complied with where necessary. Here we have to do with what might be termed *legislative-definitional observance.*[108]

(3) *Idiomatic resolution* is to proceed by reference to an appropriate source. In the case of ordinary conversational idiom, recourse is advised to general dictionaries of a comprehensive nature. In the case of legal or technical idiom, resort is to be had to an appropriate authoritative legal or technical lexicon or other like source.[109]

(4) *Disambiguation* is to proceed with reference to syntactical context. Thus, a word which, when taken in isolation, bears two or more accepted significations, is susceptible of being given an appropriate meaning when looked upon from the perspective of the sentence as a whole.[110]

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[106] The reader is referred to Chapter VI, at I (1).
[107] Act 33 of 1957 (as amended).
[108] The reader is referred to Chapter VI, at I (1).
[109] The reader is referred to Chapter VI, at I (2).
[110] The reader is referred to Chapter VI, at I (3).

(5) *Grammatical responsivity* implies on the part of the jurist an appreciation of the rules of grammar. As a corollary, it implies also an alertness to deviation therefrom where this occurs.[111]

(6) ***Sentence-intrinsic structural analysis*** may profitably take its cue from Lategan's elaboration. A convoluted sentence refractory to ready assimilation should be reduced to its core – a "matrix sentence" comprised of a nominal and verbal element. One may extend this "matrix sentence" at various points by noting qualifications, sub-qualifications and closer definitions. A schematic representation on this basis should go some of the way towards dissipating confusion.[112]

B (1) The notion of the "intention of the legislature" must be regarded as a chimera. This is not to take issue with the use of the phrase – if members of the legal fraternity feel comfortable with it. It is, however, to insist that the notion is often hospitable to an unreflecting literalism. Literal-cum-intentional hermeneutics is simply literal hermeneutics by another name.

(2) Betti's canon of the actuality of understanding must be rejected. Insofar as it commands recourse to the "intention of the legislature" in the adduction of meaning, it is untenable. (See B(1) above.)[113]

C(1) Betti's canon of the coherence of meaning (principle of totality) comes in useful as indicating the importance of statutory structure to the legal-

[111] The reader is referred to Chapter VI, at I (4).
[112] Consult Chapter VI, at I (5).

hermeneutical endeavour. ("Structure serves to suggest sense" is a handy mnemonic device.) The "purpose" of a statute is often apparent from a perusal of its provisions in their cumulative totality. The particular provision with which the jurist is concerned is to be read in the light of this "purpose".[114]

(2) Hirsch's thesis may be taken as arguing in the same direction as Betti's canon of the coherence of meaning. To the extent that it would advise recourse to as many provisions in the statute as possible in seeking to derive "implications", the Hirschean programme would sponsor *an "intra-textual contextualization"*.[115] (Incidentally, the formal presumption of statutory inter-pretation that words and phrases in a statute bear the same meaning throughout[116] seems to be in harmony with Hirsch's insights in this respect.)

D(1) Betti's canon of the hermeneutical correspondence of meaning is doubly useful for purposes of this study. A statutory provision may be rendered open to better understanding for its comparison with other documents prepared at roughly the same time and having a bearing on the provision. Here one thinks of memoranda (detailing suggestions to the legislature) and excerpts from Hansard and other like sources (providing objective evidence of surrounding circumstances and preceding deliberations). This is the first way in which the canon in question comes in useful for our purposes, and it

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[113] See Chapter VI, at II (2)2.2.
[114] See Chapter VI, at II (1).
[115] Consult Chapter VI, at II (1).
[116] See Du Plessis *op cit* 127.

is dealt with in Chapter VI of this study under the head of "*intentionalization*"[117] (note, not "intentionalism"!)

2. The second way in which Betti's canon of the hermeneutical correspondence of meaning comes in useful for the objectives of this thesis is in its implicit directive to look to the antecedents of the provision under consideration. This is a reference to predecessor enactments (or provisions). This issue is dealt with in Chapter VI of this study under the rubric of the "*axis of statutory precursors*".[118]

E(1) It is agreed with Hirsch that the rules and maxims of (statutory) interpretation are to be conceived of as "provisional guides" or "rules of thumb".[119] Contrary to what Hirsch might contend, however, these rules and maxims are to find their definitive implementation at the end-point of the constructive enterprise, not at its inception.

At that final stage, those rules and maxims which at first seemed relevant, but which now no longer appear apposite, will be "filtered out", and those which did not suggest themselves initially may now demand their registration.[120]

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[117] Consult Chapter VI, at II (2).
[118] Consult Chapter VI, at II (3)3.2.
[119] For further illumination, see also C.J. Botha *Statutory Interpretation* (1996) 2-3; E.A. Kellaway *Principles of Interpretation of Statutes, Contracts and Wills* (1995) 11-12; and R.W.M. Dias *Jurisprudence* (1976) 240.
[120] The reader is invited to consult Chapter VI, at IV, in this regard.

(2) We are given a glimpse in this chapter that the "plain meaning" conception of language (as purveyed under the banner of legal positivism) is untenable, especially within the forensic context. "Meaning" is not stable and determinate, but a function of context. In the next chapter this insight is given further substantiation.[121]

(3) Betti's canon of the hermeneutical autonomy of the object (immanence of the hermeneutical standard) cannot be upheld for legal-interpretive purposes. Treating the statutory text as a "thing-in-itself", as "self-sufficient", it is entirely oblivious to the heterotelic dimension of legal interpretation.

The "meaning" of a statute is dependent upon the context in which it is read, just as is the "meaning" of a concept-word therein contained (however much Hart might wish to sustain the distinction he draws between the "core of settled meaning" and the "penumbra of uncertainty"[122]). With this insight, the interpreter is re-introduced into the picture.

And once again perceived as part of the interpretive endeavour, the jurist brings to bear upon her hermeneutical work the entirety of her juridical pre-understandings – as conditioned by the Constitution. Re-introduced as an agent in the process, she is ever to remain mindful of the injunction to promote the spirit, purport and objects

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[121] The reader's attention is drawn to Chapter II, at 3.4.7.

[122] See H.L.A. Hart *The Concept of Law* (1961) 121ff *et passim*. I have not been able to trace the provenance of the term "concept-word".

of the Bill of Rights in the interpretation of legislation and the development of the common law and customary law.[123]

The circumstance that the jurist is part of the hermeneutical process, not external to it, is enlarged upon in the course of the following chapter.

[123] See section 39(2) of the Constitution (Act 108 of 1996).

II

THE CONTEMPORARY LEGAL RELEVANCE OF PHENOMENOLOGICAL HERMENEUTICS

1. INTRODUCTION

Phenomenological hermeneutics is the second tradition with which this study is concerned. In contrast to formalist hermeneutics, which is very "prescriptivist' in tenor, phenomenological hermeneutics undertakes to describe what in fact takes place in the course of the interpretive process.[1] It makes clear that "meaning" is something that "emerges." It is not ordinarily something actively solicited.[2] Hence the designation of the programme: "phenomenon" is a reference to that which "shows itself in itself."[3] Phelps and Pitts take phenomenological hermeneutics to be the philosophical exploration of the nature and preconditions of all understanding.[4]

Formalist hermeneutics does not command the resources available to the tradition under discussion for making provision for the "hors-texte."[5] The claims of Betti's canon of the hermeneutical autonomy of the object, as noted in the previous chapter,[6] are tantamount to a

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[1] See H.G. Gadamer *Truth and Method* (1975) Introduction xiii. See also, in this regard, T.G. Phelps and J.A. Pitts "Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation" N. Singer *Sutherland Statutory Construction*(1986) vol.3. 289 298

[2] Phenomenological hermeneutics conformably abjures methodologies.

[3] See Martin Heidegger *Being and Time* (1967) 51

[4] See Phelps and Pitts *op cit* 291. See also 312:"[H]ermeneutics is a quest for the characteristics of understanding and the requisite conditions under which all understanding occurs".

[5] The "hors-texte", if this needs reminding, refers to an "outside". See Chapter 1 at 4.1.1. in this connection.

[6] Refer, once again, to Chapter 1 at 4.1.1.

denial of the heterotelic dimension of legal interpretation. Phenomenological hermeneutics supplies something by the way of remedy. Extra-textual contextual considerations are indissolubly bound up with its representation of the constructive enterprise.

Whereas formalist hermeneutics is premised upon an assumption of the interpreter's standing "outside" of the interpretive process, controlling it, phenomenological hermeneutics re-introduces her as a "participant" in the process. The interpreter is not a "tabula rasa" (or blank slate), perceiving the "object" of her construction through a "neutral" mental framework. Her perceptions are inevitable coloured by the preconceptions and "prejudices" which constitute her mind-set. She is a "situated agent," a part of the "tradition" from which these preconceptions and "prejudices" derive.

Transposing these insights to the realm of law, one is given to understand that the interpreter-jurist is called upon to resolve a concrete-existential dilemma.[7] The term "existential context", as here sought to be employed, is a reference to the inclusive "context of social realities," of which the "arrangement of facts" presenting for determination is to be deemed a component. After all, it is the social realities and the (as yet) unprocessed "facts" which cry out with existential insistence for their proper handling in the juridical setting. Hence the use of the term "existential context" to refer to these matters.

[7] Otherwise than in the academic setting, the jurist is not concerned with legal doctrine exclusively, but is expected to bring to bear "practical wisdom" (acquired through experience) upon the handling of a dispute or question thrown up for resolution. It is a trite observation that the law is not a purely academic pursuit.

1.1 THE OBJECTIVES OF THIS CHAPTER

It is the foremost purpose of this chapter to demonstrate (assuming the applicability of a rule or principle) how – bearing in mind the need to provide for an "existential context' (as above defined) in legal interpretation – the "responsiveness' of legal materials is to be rendered compatible with the desideratum of fidelity to law. It is important that the law should be "responsive" to social needs. But it is equally important that it should retain it "integrity" in so being.

We find, as we proceed, that "*purposiveness*" makes for compatibility of this kind. In the case of statutes, the requisite "purposiveness" consists in the constitutional design as harmonized with the "purpose" of the statute, together with the "purpose" of servicing justice. In the case of the common law, the requisite "purposiveness" is to be found in the constitutional design, and the "purpose" of servicing justice (which "purpose" is implicitly suggested by that design). In dealing with customary law, the design of the Constitution is to be appropriated in the "proper cultural perspective," and the "purpose" of servicing justice to be taken up as a disposition to reconcile the parties concerned and to restore harmony in the community.[8]

In interpreting legal materials, the jurist will of necessity bring to bear upon the exercise her entire subliminal wellspring of preconceptions and "prejudices". These derive from her immersion in the legal "tradition". What Du Plessis speaks of as a "new hermeneutical awareness"[9] is in point. It is in essence this wellspring of preconceptions and "prejudices" –

[8] For a fuller elaboration of these points, the reader is invited to turn to the exposé as set out in Chapters VI, III(2)(ii) and VII, I(2)(2) and II(2)(1) of this study.

[9] See Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 60 – 107 *passim*. See further, in this regard, Chapter VI of this study at II 4.2.

from which, with reference to the Constitution, certain (negative) "prejudices" have been expunged, and into which certain (positive) ones have been introduced. Provided that the jurist is properly equipped with this "new hermeneutical awareness," which, as will emerge,[10] is constituted differentially according as western law or indigenous law is at issue, "purposiveness" should make its influence felt without much in the way of conscious effort.

And thus would be made possible the achievement of "responsiveness", at the same time securing fidelity to law.

In the course of the following exposé, these issues are enlarged upon, and related matters dealt with in passing.

1.2 MEANING AND SIGNIFICANCE

In the foregoing chapter, it was adverted to Hirsch's dichotomous perception of "meaning" and "significance."[11] That perception was criticized with reference to the observation that all "meaning" is context-dependent.[12] This observation was Wittgenstein's[13], and it appears also to have been Fuller's.[14] It finds its most telling statement in Gadamer, who, as will emerge, claims that "meaning" is a function of the interpreter's prejudice-horizon.[15]

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[10] See Chapter V of this thesis, at 3.2. (and 3.1).
[11] See Chapter 1, at 4.2.1.
[12] *Ibid.*
[13] See George Pitcher *The Philosophy of Wittgenstein* (1964) *passim.*
[14] See Lon L. Fuller "Positivism and Fidelity to Law – A Reply to Professor Hart" 1958 71 *Harvard Law Review* (4) 630 at 661ff. See, in addtition, Lon L. Fuller *Anatomy of the Law* (1968) 58-9 for exemplification of the point.
[15] J.M Connolly and T. Keutner *Hermeneutics versus Science? Three German Views*(1988) say the following at 56: "Gadamer regards interpretations of 'eminent' texts as undecidable because each such interpretation takes place within the horizon of the interpreter's historically given prejudices, in the light of which the text itself is constituted".

Gadamer has it that the "meaning" which emerges upon reading a text depends upon the nature of the question to which that text is assumed to serve as a response.[16] When the jurist reads a legal text (under the new Constitution), the question she puts to it, even if only at a subconscious level, is: "How is 'purposiveness' to be served within the 'existential context' of the case at hand?" The "meaning" that emerges will be a function of this question. It will be geared to servicing the circumstances of the case. The artificiality of driving a wedge between "meaning" and "significance" should accordingly be obvious.

Madison claims that a "text" represents the "promise" of meaning. Interpretation is the actualization of this "promise."[17] Gadamer's theory would give one to consider, consistently with Madison's point of view, that in the case of great, thought-provoking, "eminent" texts, the interpreter is confronted with an "overdetermination" of meaning.[18] It is this "surplus of meaning" which makes for an open-ended, creative interpretation, one which "confirms the text in its own meaning."[19]

2. AMERICAN REALISM: RESPONSIVENESS

So much by way of introduction. It is time now to consider the contributions of a movement which crusaded for greater judicial responsiveness earlier in this century. American realism, whose protagonists were adamant that the law should be harnessed so as to cater for the exigencies of social life, bore in this insistence a striking resemblance to the sociological

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[16] Gadamer is cited as follows in Phelps and Pitts *op cit* 301: "One addresses a question to the text, a question standing within one's own horizon... . One has reason for wanting to understand, and that reason is really a question put to the text". Phelps and Pitts proceed that, by dint of this, any interpretation will be moulded by the questioner's stance. *(Ibid)* See also Gadamer *Truth and Method op cit* 333.

[17] See G.B. Madison *The Hermeneutics of Postmodernity* (1988) 21 – 2.

[18] *Ibid* 22.

jurisprudence of Roscoe Pound and the programme of the "free law" movement. It held itself out as opposed to formalism and conceptualism in legal reasoning. [20]

Fitzgerald, speaking in a realist spirit, adverts to the lawyer's occupational vice of formalism.[21] This, he claims, leads to undue pre-occupation with legal rules "for their own sake."[22] The social function of the law ought not to be sacrificed on the altar of legal form. The law is to be seen as a part of its social milieu.[23]

Jones purveys the pragmatic dimension of the realist thesis in his contention that there is invariably room for "individualization" (in case-to-case terms) in the application of the law.[24] This is so, he maintains, irrespective of whether the law being applied is case-law precedent or statutory materials.[25]

Harris seems to assent to the need for looking beyond the "paper rules and principles forming part of the tradition of courts."[26] It appears to be his proposition that the social context of law-application should not be ignored in the exercise. This implies a move away from legal autotelism. It imports that there is an "hors-texte" to be serviced.

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[19] *Ibid.*
[20] See Elizabeth Mensch "The History of Mainstream Legal Thought" in David Kairys (ed.) *The Politics of Law: A Progressive Critique*(1990) 13 at 26.
[21] See P.J. Fitzgerald *Salmond on Jurisprudence*(1966) 4. While Fitzgerald writes in a realist temper in the declamation recorded, it is uncertain to the present writer whether he would qualify as a full-blooded realist.
[22] *Ibid.*
[23] *Ibid.*
[24] See Harry W. Jones 'The Practice of Justice" in E.A. Kent (ed.) UU*Law and Philosophy: Readings in Legal Philosophy* (1970) 425 429.
[25] *Ibid* 431.
[26] See J.W. Harris *Law and Legal Science* (1979) 169. The date of publication of this work gives one to consider that Harris is not a realist as such. (The realists, one is reminded, flourished in the earlier part of the twentieth century.) Notwithstanding this, his disquisition appears compatible with realist thought.

Julius Stone proposes that the brand of jurisprudence of which he is an exponent should address itself, as before, to contending with situations which persistently and insistently arise "for practical handling".[27] He considers "obvious conflict, distress, confusion and injustice" to represent the issues which are to be tackled.[28]

Stone was an illustrious exponent of American realism. He set himself the task of demonstrating that behind the form of legal doctrine there is much in the way of elbow-room for doing justice to social realities.[29] Doctrine may be manipulated to this effect and – as he conceives it – quite legitimately. The niceties of juridical conceptualism are downplayed in deference to human, social and economic considerations. Stone would say that a jurist of any acumen would find herself able to make provision for these considerations, upon condition that she abjures legal aestheticism. He puts his case thus: "There is... a danger of forgetting that the adjustment to needs is primary, for the simple and orderly are very attractive in themselves."[30]

Upon this conception, legal dogmatics is to be taken up for a large part as bearing the character of a "smokescreen". Indeed, Stone uses the word "illusory"[31] to describe the nature of the reference of much of its terminology. Such a circumstance is for him much rather a boon than a mark of deficiency.

In this spirit, he recoils from the assumptions from which the idea of codification on the Continent seems at this point and that to have proceeded. The theory was that a ruling on every

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[27] See Julius Stone *Law and the Social Sciences* (1966) 45.
[28] *Ibid.*
[29] See Julius Stone *The Legal System and Lawyers' Reasonings* (1964) *passim.*
[30] *Ibid* 286.

case was to be established with reference to the relevant provisions, the judge's task being perceived as mechanical.[32] Stone rejects any such notions as inimical to his project.[33]

Stone was but a single proponent of American realism. But his work must surely rank as a very clear exposition of some of its most central exhortations. Other realists have given expression to similar insights, though in different terms.[34]

2.1 EVALUATION

Stone's work harks back to presuppositions entered by those who counted themselves affiliates of the "Freirechtsschule" ("free-law" school).[35] These scholars went so far as to assert the propriety of looking for a just disposite rule for the case at hand without recourse to deduction from aprioristic premises.[36] This was certainly a radical proposition.

And it is a proposition which, seriously appropriated, would threaten to undermine the "rule of law," conceived of as the antithesis of "arbitrary rule." The measure of "discretion" which the

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[31] Stone speaks of "categories of illusory reference" in this regard. See *Ibid* 241 ff for a discussion of these categories.

[32] *Ibid* 228-9.

[33] His entire argument in *The Legal System and Lawyers' Reasonings* is devoted to a critique of these kinds of notions.

[34] See J.C. Hutcheson, Jr. "The Judgment Intuitive" in E.A. Kent *op cit* 407 418, for instance. "[W]hether or not the judge is able in his [sic] opinion to present reasons for his [sic] hunch which will pass jural muster, he [sic] does and should decide difficult and complicated cases only when he [sic] has the feeling of the decision, which accounts for the beauty and the fire of some, and the labored dullness of many dissenting opinions". See also Jerome N. Frank "Law and the Modern Mind" in E.A. Kent *op cit* 420 420: "[The]... realists have but one common bond...:skepticism as to some of the conventional legal theories, a skepticism stimulated by a zeal to reform, in the interest of justice, some court-house ways". See, additionally, the interesting article by Michael Clanchy "A Medieval Realist: Interpreting the Rules at Barnwell Priory, Cambridge" in E. Attwooll (ed.) *Perspectives in Jurisprudence* (1977) 176 176-7, in particular.

[35] For a discussion of this movement, see Alf Ross *On Law and Justice* (1974) 141-2.

[36] See Stone *The Legal System and Lawyers' Reasonings op cit* 227.

scholars in question would have accorded the judge is altogether too unbounded for comfort. Not only would the doctrine of the separation of powers be undercut – by reason of judicial legislative activity – but the law would be rendered vulnerable to political manipulation.

American realism, taken to the extreme limit of its programme, would hold the same dangers as those associated with the "Freirechtslehre." In its moderate versions, realism is no doubt of salutary import. But the line between beneficient judicial creativity and judicial legislation is surely a fine one.

Lasswell and McDougal of Yale proposed in the 1940s, in following through the implications of legal realism, that their university should dispense with the traditional law-school curriculum, and teach students rather how to decide questions of policy and give effect to those decisions.[37] Such a proposal was both startling and anti-democratic.[38] A sober perception of the law would speak against its implementation. For its implicit injunction to "openness" upon the scale envisaged would subvert the imperative of fidelity to law.

In appealing to insights of the phenomenological hermeneuticists presently to be discussed, we are furnished with a basis for respecting the "integrity" of the law, while at the same time

[37] See Mensch *op cit* 29.
[38] *Ibid.*

securing its "responsiveness" to social realities. We steer clear in this fashion both of an "autonomous law" and a law exhibiting excess in the direction of "openness."

3. PHENOMENOLOGICAL THINKERS OF HIGH EMINENCE

As noted in the introduction to this chapter, phenomenological hermeneutics has as its mission the description of what comes over us when we are about the business of understanding texts (or anything else, for that matter). It does not purport to be anything in the nature of a checklist of prescriptions, or methodology.

It is to be noticed that Dilthey implicitly urged the interpreter to transpose herself into the historical milieu of which inscription to be deciphered is a part.[39] He placed special emphasis on the notion of "lived experience"[40] in his "philosophy of life,"[41] and this was to point hermeneutics in the direction of phenomenology. Dilthey's labours find something of a parallel in the work of Edmund Husserl.

3.1 EDMUND HUSSERL

Husserl considered that the interpretive process is very much an active one, that to "understand" something requires affirmative input on the part of the construing agent. In order to be quite

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[39] At any rate, this is what I have been given to understand.
[40] *Erlebnis* in Dilthey's terminology.
[41] See, for instance, Wilhelm Dilthey "The Understanding of other Persons and their Life-Expresisions" in Kurt Mueller-Vollmer *The Hermeneutics Reader* (1986) 152 153. See, also, Mueller-Vollmer *op cit* 25 in elaboration of Dilthey's contentions. The reader is further referred to G.L. Ormiston and A.D. Schrift *The Hermeneutic Tradition*

clear as to the meaning of an inscription, one is to "construct" a "corresponding intuition."[42] What that inscription "really means" is to be perceived in that "intuition."[43] Where meanings shade imperceptibly into one another, with boundaries essential to proper apprehension losing their clarity, elucidation proceeds with reference to "intuition."[44] Explicating Husserl generally, Ricoeur writes that in order to bring elucidation to completeness some "corresponding intuition" requires to be supplied.[45] (This is not necessarily Ricoeur's view though.)

It is to be seen from this that Husserl has not yet bridged the subject-object dichotomy as endorsed by Dilthey.[46] The interpreting "subject" in conferring meaning is disjoined from the "object" of construction. This is a thesis Heidegger and Gadamer would not endorse.[47] For all this, Heidegger and Gadamer are considerably indebted to Husserl for their respective analyses.

3.2 ROMAN INGARDEN

Husserl's thought finds an harmonious resonance in the writings of Roman Ingarden. Ingarden, who is very notable in the context of literary theory, distinguishes two types of reading: (i) passive or receptive reading; and (ii) active reading. It is in the second type of reading - active

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(1989)14. One's attention is also directed to Richard E. Palmer *Hermeneutics* (1969) 20 – 3. Consult, generally, Wilhelm Dilthey "The Rise of Hermeneutics" in Ormiston and Schrift *op cit* 101-114.

[42] See Edmund Husserl "Towards a Characterization of the Acts which confer Meaning" in Mueller-Vollmer *op cit* 177 183.

[43] *Ibid.*

[44] Husserl as cited in modified terms in Paul Ricoeur *From Text to Action* (1991) 45.

[45] *Ibid* 44.

[46] Gadamer speaks of "Dilthey's entanglement in the aporias of historicism". See, in this regard Kathleen Wright *Festivals of Interpretation* (1990) 38. See also Table of Contents in Gadamer *Truth and Method.*

[47] Heidegger and Gadamer, as will be seen shortly, advance that the subject-object schema does not afford an appropriate basis for conceptualizing the interpretive process.

reading - that the reader, he says, becomes a "co-creator" of the literary work in apprehending its meaning upon an intuitive basis.[48]

Ingarden claims that active reading involves us in apprehending with "a peculiar originality" the meaning of the text.[49] He says: "We project ourselves in a co-creative attitude into the realm of the objects determined by the sentence meanings."[50] One discerns here a clear affinity with Husserl.

Ingarden's perceptions carry the implication that understanding is in an important sense under the guidance or control of the interpreter. As this notion, like Husserl's, betrays an endorsement of the subject-object dichotomy, it is one to which it would not be open to Heidegger and Gadamer to accede.

3.3 MARTIN HEIDEGGER

The "Lebenswelt" (or life-world), which is foundational to Heidegger's philosophy, appears to have had its conceptual genesis in Husserl.[51] Otherwise than in Husserl, however, the "Lebenswelt" is for Heidegger ontologically antecedent to the bifurcation of the "subject" and the "object" of her construal.[52]

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[48] See Roman Ingarden "On the Cognition of the Literary Work of Art" in Mueller-Vollmer *op cit* 187 at 208, in particular. See this essay generally.
[49] *Ibid* 208.
[50] *Ibid.*
[51] As also, perhaps, in Dilthey.
[52] See Paul Ricoeur *From Text Action op cit* 14-15 for an elaboration of this point.

Heidegger's conception of "worldhood" rejects the Cartesian duality of "ego cogito" and "res corporea."[53] It is a "level of experience anterior to the subject-object relation," upon Ricoeur's restatement.[54] The bipartite (mis)perception of "self" and "not-self" is subordinated to "Being-in-the-world," to existence.

The notion of "Being-in-the-world" is crucial to Heidegger. "Understanding," for him, is integrally a part of what it means to "exist"; it is a mode of "Being-in-the-world."[55] Heidegger grounds the notion of "understanding" in ontology, not in intellectual cognition. It is a process by which "phenomena" make themselves manifest.[56] It is no longer conceived, as it was in Husserl, on the basis of transcendental "subjects" in interaction with external "objects."[57] It is for Heidegger a matter of revelation or disclosure. Indeed, he advances that disclosure or "unconcealment" simply "occurs"; it is not by an act of rape, of robbery, that things are rent from their concealment.[58]

Cognitive manipulation is not at all implicated in the process of "understanding." [59] Heidegger, writes Gadamer, "pursued the intrinsic and indissoluble interinvolvement of authenticity and

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[53] See Martin Heidegger *Being and Time* (1967) 122 – 3.
[54] See Paul Ricoeur "Existence and Hermeneutics" in Josef Bleicher *Contemporary Hermeneutics* (1980) 236 241.
[55] See Martin Heidegger "Being-there as Understanding" iin Mueller-Vollmer *op cit* 215 217: "As a disclosure, understanding always pertains to the whole basic state of Being-in-the-world". Consult Palmer *op cit* 124-139 for an illustrative exposition in this regard.
[56] See Palmer *loc cit.*
[57] For Kant, knowledge was founded upon subjectivity. See, in this regard, J.N. Mohanty "Transcendental Philosophy and the Hermeneutic Critique of Consciousness" in G. Shapiro and A. Sica (eds.) *Hermeneutics: Question and Prospects* (1984) 96 96.
[58] See, in this connection, H.G. Gadamer *Philosophical Hermeneutics* (1976) 225-7. Gadamer explains Heidegger's essential point as follows: "Revealment and hiddenness are an event of being itself". (*Ibid* 226) The words in my text are conceivably from Palmer.
[59] Consult Gadamer *op cit* 227, in this regard. See also Palmer.

inauthenticity, of truth and error, and the concealment that is essential to and accompanies every disclosure and that intrinsically contradicts the idea of total objectivity."[60]

In rendering the observation that "concealment" is essential to disclosure, Heidegger gives us an inkling of his fundamental thesis, which is that no understanding is "presuppositionless."[61] Understanding, as revelation, occurs when presuppositions "break down" as events take their course.[62] Accordingly, "presuppositions" are both a limiting factor, in that they conceal, and a necessary precondition of any understanding at all. Heidegger writes as follows: "Whenever something is interpreted as something the interpretation will be founded essentially upon fore-having, fore-sight and fore-conception. An interpretation is never a presuppositionless apprehending of something presented to us."[63]

It is interesting to reflect that Heidegger is to some significant degree foreshadowed in his elaborations in the writings of Humboldt. Humboldt contends that "[c]omprehension is by no means merely a developing out of the subject, nor a drawing from the object, but rather both at once, for it always consists of the application of a previously present general idea to a new particular instance."[64] Equally Heideggerian is Humboldt's statement that "[l]anguage is the formative organ of thought."[65] Without language, an image cannot emerge as a concept, nor can thought attain "distinctness."[66]

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[60] *Ibid 203.*
[61] See Palmer *op cit* 124 – 139.
[62] *Ibid* 140.
[63] See Heidegger *Being and Time op cit* 191 – 2.
[64] See Wilhelm von Humboldt "On the Task of the Historian" in Mueller-Vollmer *op cit* 105 112.
[65] See Wilhelm von Humboldt "The Nature and Conformation of Language" in Mueller-Vollmer *op cit* 99 100.
[66] *Ibid.*

"Language" figured as an important concern for the later Heidegger.[67] "Discoursing or talking", he says, "is the way in which we articulate 'significantly' the intelligibility of Being-in-the-world."[68] There is "no being without language and no language without being."[69] Language, for him, bears a non-instrumental character.[70] It does not function as a communicative tool.[71] Since the interpreter's "presuppositions" are constituted in language, it functions as both a limiting factor and a prerequisite of all understanding. In these contentions, he seems to anticipate Gadamer, for whom every understanding is linguistically conditioned.[72]

It is clear from this discussion that Heidegger's conception of "understanding" departs materially from that of his predecessors. And its divergence from the corresponding conception implicit within the formalist tradition – as represented by Betti and Hirsch most notably – is still more marked. His manner of conceptualizing "meaning-apprehension" is therefore commonly regarded as revolutionary.

Yet it finds a parallel in the work of Popper. Popper's thesis is that all observation is "theory-laden".[73] All "observations" are conditioned by an "horizon of expectations," a "frame of reference."[74] By these latter terms Popper means to signify much the same thing as the set of "presuppositions" making for "understanding" on the Heideggerian schema. Both Popper and

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[67] See Palmer *op cit 152.*
[68] See Martin Heidegger "Being-there and Discourse: Language" in Mueller-Vollmer *op cit* 233 234.
[69] See Palmer *op cit* 153 in this regard. These words may be Gadamer's.
[70] See Dennis J. Schmidt "Poetry and the Political: Gadamer, Plato and Heidegger on the Politics of Language" in Kathleen Wright (ed.) *Festivals of Interpretation* (1990) 209 221.
[71] *Ibid.*
[72] See the discussion of Gadamer under 3.4., below.
[73] See Karl R. Popper *Conjectures and Refutations*(1989) 47: "[O]bservations...[presuppose]... a frame of reference: a frame of expectations: a frame of theories". See also P.J. Thomas "Wetenskapsfilosofie en die Regswetenskap" 1995 58 *THRHR* (1) 31 37. Additionally, see E.H. Gombrich "The Evidence of Images" in Charles S. Singleton (ed.) *Interpretation Theory and Practice* (1969) 35 43.
[74] See Popper *op cit* 47.

Heidegger would urge that these are constituted by "history", by "tradition." It is the "tradition" in which the interpreter is immersed which informs her "presuppositions". From this it follows that our "understandings" are historically conditioned.

3.4 HANS-GEORG GADAMER

Gadamer, Heidegger's pupil, was greatly influenced by his teacher. Indeed, his exposé shows up this influence at a myriad of points. Like Heidegger, Gadamer is interested in expounding the phenomenology of "understanding", not in elaborating any prescriptive methodologies. And like his teacher, he looks to the notion of the "Lebenswelt" as the basis for this analysis.

3.4.1. THE "LEBENSWELT"

Gadamer suggests that the "Lebenswelt" is prior to the subject-object relation as normally conceived.[75] This appears from his reflection that "[t]he genuine reality of the hermeneutical process seems...to encompass the self-understanding of the interpreter as well as what is interpreted".[76] Gadamer draws upon his famous metaphor of "play" in order to illustrate that the "subject" is embroiled in that process, is part of it, not its autonomous guiding agent from an external vantage point.

Hark his words: "According to all that we have observed concerning the nature of play, this subjective distinction between oneself and the play which is what acting a part is, is not the true

[75] On this point, Gadamer seems to be entirely at one with Heidegger.
[76] See Gadamer *Philosophical Hermeneutics op cit* 58.

nature of play."[77] And again: "The mode of being of play does not allow the player to behave towards play as if it were an object."[78]

3.4.2. ABJURATION OF METHOD

Gadamer's metaphor of the "game" leads him to subordinate epistemology to ontology.[79] Interpretation and understanding find their elucidation not in terms of the former discipline, but with reference to the latter. Method is accordingly to be abjured.

Phelps and Pitts undertake to explicate Gadamer in this regard. They proffer that a method would yield only such an understanding as is implicitly directed by that particular method.[80] For this reason, interpretation is to proceed on the "games" analogy, on a dialectical as opposed to a methodical basis.[81]

Any given methodology cordons off all meaning-possibilities incompatible with the methodology itself. True interpretation imports the setting aside of method the better to remain receptive to the textual meaning.[82]

Now, it is agreed with Gadamer that interpretation involves a dialectic. And this goes for legal interpretation (including statutory interpretation) as well. But his thesis cannot be sustained for purposes of this study insofar as it would tell against the deployment of methodological devices in the construction of the law. In Chapters VI and VII of this dissertation, in which a model is

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[77] See H.G. Gadamer *Truth and Method* (1975) 100.
[78] *Ibid* 92.
[79] See, in this regard, Palmer *op cit passim*.
[80] See Phelps and Pitts *op cit* 298.
[81] *Ibid*.
[82] *Ibid* 313.

set forth, it will be observed that, at this point and that, various methodologies announce themselves as appropriate to the legal-hermeneutical process. With Ricoeur, it is agreed that interpretation implicates two pillars - that of "Verstehen" (understanding) and that of "Erklären" (method), and that they complement each other. More on this later.

While on the subject of method, we should pause briefly to reflect upon the standing of the rules of statutory interpretation as discussed in textbooks and court decisions. As will be seen, the opinion is expressed in this thesis that the canons of statutory interpretation find their definitive relevance in the last phase of the undertaking – in the process of effectuation. Throughout the course of constructive exercise, certain canons come to mind as provisionally pertinent, some of them later to be displaced by others. By the time the end-point of the exercise has been reached, those canons that are of affirmative applicability show themselves up clearly (the others being "filtered out").[83] [84]

It is in the process of effectuation that the application of pertinent canons and maxims is registered – whether it be in mental consciousness, in speech or in writing.[85] With this, it cannot be entirely agreed with Devenish in his assertion that they function as "mechanical devices" in respect of "certain verbal configurations."[86]

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[83] See for future reference Paul Ricoeur "Existence and Hermeneutics" in *Bleicher op cit* 236 243.

[84] The phenomenological process of "concealment' and "revelation", and the enlightenment sponsored by that process, seems particularly apt as a description of the manner in which the maxims and canons of statutory construction flit before the eyes of the interpreter in the course of the exercise, at the end thereof giving themselves to be be understood as applicable or otherwise.

[85] See in this regard, Chapter VI of this study under IV (dealing with the process of effectuation).

[86] See G.E. Devenish *Interpretation of Statutes* (1992) 18.

The canons and maxims of statutory interpretation, as it is agreed with Botha, are not susceptible to deployment in the manner of an algorithm.[87]

3.4.3. THE "INTENTIONAL FALLACY"

Gadamer considers that the author's "intention" is irrelevant to the constructive enterprise. He argues that the central task of hermeneutics is to be identified in the application of the meaning of the text to present circumstances.[88] Schleiermacher, Betti and Hirsch, among others who set store by "authorial intent" in the construction of documents, fall victim to the "intentional fallacy."[89] One agrees with Hoy in this regard that a major problem with "intentionalism" is that it is blind to what Gadamer refers to as "effective-historical consciousness."[90]

In consideration of what has been said in the previous chapter, one quite agrees with Gadamer in these claims as they may be taken to pertain to legislative construction. The "intention of the legislature," as seen in that chapter, is not a viable means to the elicitation of meaning – for the reasons there set out. "Intentionalism" has no real place in the law.

One may say that a statute is to be conceived as a formalized expression of one or more of any number of legislative policies. The "intentions" of its framers in promulgating it –and one may legitimately ask whether anyone is in a position to say what they were as a retrodiction – are, strictly speaking, irrelevant to these "policies." It is therefore not the "intention of the

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[87] See, generally, in the regard, C.J. Botha *Statutory Interpretation* (1996) 2 – 3.
[88] The reader is invited to consult, in this regard, Palmer *op cit* 246 – 247; and 185. See, further, *Ibid* 87, where the importance of application in the interpretive process is highlighted.
[89] Refer to the references in n 88, above.
[90] See D.C. Hoy "Dworkin's Constructive Optimism versus Deconstructive Legal Nihilism" 1987 6 *Law and Philosophy* 321 327-328.

legislature" that we are to adduce as the guiding principle in the interpretation of a statute. It is the goals or objectives finding their immanence in the legislative product which are to serve as this principle.[91]Hence the quest for the *purpose of the statute* (or of its sub-statutory components).

It seems as if the thrust of these perceptions has been anticipated for quite some time in the original formulations of the so-called "mischief rule."[92] This rule represents an early "purpose-oriented" approach.[93]

All this is not, however, to deny the fruitfulness of "intentionalization" (an entirely different matter) in the interpretation of statutes. Sponsored by Betti's canon of the hermeneutical correspondence of meaning, "intentionalization," as we have seen, speaks to the clarification of statutory meaning by comparative recourse to other documents prepared at roughly the same time as the provision at hand, and having a bearing on that provision.[94]

3.4.4. THE FORE-STRUCTURE OF INTERPRETATION

Like his teacher, Heidegger, Gadamer considers interpretation (understanding) to be mode of "Being-in-the-world." It is integral to existence itself. To be is to apprehend meaning. Ontology is the basis of comprehension. The interpreter is part of a "game" in which, as for Heidegger, "disclosure" or "unconcealment" simply "occurs."

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[91] See Ruth Sullivan *Driedger on the Construction of Statutes* (1994) 35 in this regard.
[92] Sullivan says the following:"Historically, purposive analyisis is associated with the so-called mischief rule or the rule in *Heydon's Case*. Although this rule did not originate in *Heydon's Case*, it was there it received its most famous and influential formulation..."(*Ibid* 36).
[93] See R.W.M. Dias *Jurisprudence* (1976) 231: "The approach laid down [in Heydon's case] clearly contemplates a wide inquiry into the policy and *purpose* behind the statute". (emphasis added)
[94] See Chapter 1 under 4.1.4. and 5D (1).

The relationship between interpreter and text Gadamer conceives to be one of "partner and "partner", not "subject" and "object."[95] This relationship is conceptualized along the lines of a conversation or dialectic. The interpreter does not superintend the process. She merely garners "meaning" in the course of a "disclosure."

Yet presuppositions or "prejudices" are indispensable antecedents of any "disclosure." The stock of presuppositions the interpreter brings to bear upon the construction of any given text constitutes the means of its understanding. So we arrive at the conception of the fore-structure of interpretation.

Gadamer expounds the phenomenology of textual interpretation as follows: "A person who is trying to understand a text is always performing an act of projecting. He [sic] projects before himself [sic] a meaning for the text as a whole as soon as some initial meaning emerges in the text. Again, the latter emerges only because he [sic] is reading the text with particular expectations in regard to a certain meaning. The working out of this fore-project, which is constantly revised in terms of what emerges as he [sic] penetrates into the meaning, is understanding what is there." [96] The influence of Heidegger is clearly apparent.

3.4.5. THE TRADITION AND THE "FUSION OF HORIZONS"

Tradition is the source of the presuppositions or "prejudices" which are constitutive of the interpreter's mind-set, and which she brings to bear upon textual understanding. Tradition

[95] See Gadamer *Philosophical Hermeneutics op cit* 18 – 42.
[96] See Gadamer *Truth and Method op cit* 236. "This constant process of new projection is the movement of understanding and interpretation". *(Ibid)*

(ideology in the non-pejorative sense) and authority are rehabilitated in Gadamer.[97] He contends that there is no "unconditional antithesis between tradition and reason."[98] Presuppositions informed by the tradition are accordingly reasonable.

Gadamer enquires after the manner in which the interpreter's horizon and the historical horizon inhabited by the text[99] are rendered capable of merger. He proposes that it is "the tradition", and the link which it forges between past and present, which makes for such a fusion of horizons."[100] The interpreter's "effective-historical consciousness" or *wirkungsgeschichtliches Bewusstsein* (which is in essence her structure of presuppositions) makes for the possibility of dialectical interaction or "conversation" between interpreter and text.[101]

Gadamer rejects the idea that temporal distance is something to be bridged. It is to be regarded, rather, as the vehicle of tradition, the supportive basis of "present understanding."[102]

He reflects that "language" and "tradition" are bound up with each other inextricably.[103] He claims, in the Heideggerian spirit, that "linguisticality" is the basis upon which the "transmitted text and the interpreter can meet."[104] Postulating that "the fusion of horizons that takes place in

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[97] *Ibid* 245.
[98] *Ibid* 250. The "essence of authority", Gadamer says, is to be found in "recognition and knowledge". Authority has nothing to do with obedience, but rather with knowledge". (*Ibid* 248)
[99] I take the words "historical horizon inhabited by the text" from Palmer *op cit* 25.
[100] "Tradition" as noted in n101 below, is considered by Gadamer to constitute the supportive basis of understanding.
[101] In this regard, Bruns in instructive. See G.L. Bruns "The Problem of Figuration in Antiquity" in G.Shapiro and A.Sica (eds.)*Hermeneutics: Questions and Prospects* (1984) 147 159: Gadamer's position is explained to be "that the prior appropriation of a text within a particular tradition of understanding is something that must necessarily take place if there is to be any understanding of the text at all". Ricoeur translates *wirkungsgeschichtliches Bewusstsein* as "consciousness exposed to the effects of history". See Bleicher *op cit* 228.
[102] See H.G. Gadamer "On the Circle of Understanding" in Connolly and Keutner *op cit* 68 76.
[103] See Gadamer *Truth and Method op cit* 400.
[104] *Ibid* 207.

understanding is the proper achievement of language,"[105] he says that "what is said has a claim over one."[106] And herewith, we are furnished with a formulation of the thesis of the non-instrumentality of language.[107] This means that understandings are linguistically conditioned - because presuppositions or "prejudices" are constituted in language.

3.4.6. THE CENTRALITY OF THE "QUESTION"

Gadamer's contentions pertaining to the nature of inquiry read as follows: "All questioning and desire to know presuppose a knowledge that one does not know so much so indeed that is a particular lack of knowledge that leads to a particular question."[108] In construing a text, the interpreter is ineluctably involved in putting a "question" thereto, inasmuch as there would otherwise not be any "motive" for reading it in the first place.

Bultmann proposes that the "question" put to the text arises "out of the claim of the now, out of the problem that is given in the now."[109] This existential dilemma, this "problem that is given in the now," is bound to raise a "question" for resolution.

Now, Gadamer claims that "...the meaning of a [textual extract] is relative to the question to which it is a reply."[110] The meaning that emerges will hence be a function of that question, and hence a function of the "problem that is given in the now."[111] Meaning, then, "reaches far

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[105] *Ibid* 340.
[106] *Ibid* 401. See also, generally, Gadamer *Philosophical Hermeneutics op cit* 95 – 104.
[107] See Gadamer *Philosophical Hermeneutics op cit* 62. See also *Ibid* 68. See, additionally, Gadamer *Truth and Method op cit* 496.
[108] See Gadamer *Truth and Method op cit* 329.
[109] See Rudolph Bultmann "Is Exegesis without Presuppositions Possible?" in Mueller-Vollmer *op cit* 242 246.
[110] See Gadamer *Truth and Method op cit* 333.
[111] Bultmann's wording. (see above)

beyond what [the] author originally intended."[112] This is an unambiguous affirmation of the context-dependence of meaning.

3.4.7. THE COLLAPSE OF THE MEANING–SIGNIFICANCE DISTINCTION

The context-dependence of "meaning" puts paid to Hirsch's attempt to erect a distinction between "meaning" and "significance." One recalls that Hirsch conceived "meaning" to be stable and determinate.[113] But if it varies with context, then it embraces what he understands by "significance."[114] Hence it is submitted that the disjunctive conceptualization of "meaning" and "significance" is untenable.

For these reasons, Gadamer dismisses out of hand any notion of a "uniquely correct interpretation."[115] Interpretation inevitably proceeds with reference to the present, and the "now" does not partake of the attribute of permanence or fixity.[116] Accordingly, "the discovery of the true meaning of a text... is never finished; it is in fact an infinite process."[117] We are always situated within a context, and the task of shedding light upon aspects of our predicament never ceases to embroil our interpretive efforts.[118] Gadamer meets Hirsch's objection that perceptions such as these are propitious to "hermeneutical pluralism" with the retort that the fact that interpretations are "relative" does not mean that they are "arbitrary."[119] With this, he rejects

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[112] See Gadamer *Truth and Method op cit* 335 n277.
[113] See Chapter 1 of this study, under 4.2.1.
[114] Why this is so should emerge plainly upon a reading of what has been said under 4.2.1. of Chapter 1.
[115] See Gadamer *Truth and Method op cit* 107.
[116] See Palmer *op cit* 183 (expounding this insight of Gadamer's)
[117] See *Truth and Method op cit* 265.
[118] *Ibid* 269.
[119] Jean Grondin notes this point. See Jean Grondin "Hermeneutics and Relativism" in Wright *Festivals of Interpretation op cit* 42 48.

out of hand Hirsch's claim that his contentions are likely to sponsor a "Babel of interpretations."[120]

3.4.8. THE "UNDECIDABILITY" THESIS

Gadamer's "undecidability" thesis (referred to also as the thesis of the "openness of the text") implies that the "meaning" of a given text is not susceptible of valid ascertainment, once and for all.[121] The thesis follows from the discussion under 3.4.6. and 3.4.7., above. Couched in a different formulation, it postulates that the validity of a particular interpretation does not preclude the validity of other, differing interpretations.[122]

It may be of interest to note that claims reminiscent of the "undecidability" thesis are to be found in the writings of Nietzsche,[123]Kristeva,[124]Frank,[125]Hamacher,[126]Blondel,[127]Derrida[128] and Nancy,[129] for instance.

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[120] *Ibid* 45. See also 42 – 59 *passim*. This description (wording) is apparently Grondin's.
[121] See Connolly and Keutner *op cit* 2.
[122] See Connolly and Keutner *op cit*. 2.
[123] See, for example, F. Nietzche "Interpretation" in G.L. Ormiston and A.D Schrift (eds.) *Transforming the Hermeneutic Context* (1990) 43 – 57 *passim*.
[124] See J. Kristeva "Psychoanalysis and the Polis" in G.L. Ormiston and A.D. Schrift *op cit* 89 – 105 *passim*
[125] See M. Frank "The Interpretation of a Text" in G.L. Ormiston and A.D. Schrift *op cit* 145 – 175 *passim*.
[126] See W. Hamacher "Hermeneutic Ellipses: Writing the Hermeneutical Circle in Schleiermacher" in G.L. Ormiston and A.D. Schrift *op cit* 177 – 210 *passim*.
[127] See E.Blondel "Interpreting Texts with and without Nietzsche" in G.L. Ormiston and A.D. Schrift *op cit* 69 – 88 *passim*.
[128] See J. Derrida "Sending: On Representation" in G.L. Ormiston and A.D. Schrift *op cit*. 107 – 138 *passim*.
[129] J.-L. Nancy "Sharing Voices" in G.L. Ormiston and A.D. Schrift *op cit* 211 – 259 *passim*.

3.4.9. LEGAL HERMENEUTICS AS EXEMPLARY FOR GADAMER

Gadamer argues that the specific case of legal hermeneutics holds out much in the way of promise for his project of a general hermeneutics. His contentions proceed from the way in which judges on the Continent have taken to the construction of the various codifications.

As a matter of theory, these codifications were designed to describe compendiously the law in force in the respective countries, so that speculation as to the state of the law would be obviated for all intents and purposes. It was proposed in drafting the codes to lay down the law in precise and definitive terms, and thereby to avert uncertainty. Seeing that everything was to receive exact formulation, it was intended to displace precedent entirely as a source of law. But these objectives were not in the event to materialize.

As a matter of practice, judges on the Continent did not disown cases previously decided under the various codes as sources of reference in disposing of novel cases. The "intervening history of interpretation" (*Wirkungsgeschichte*) took on the quality of high persuasive authority. This "tradition" of interpretation impressed itself on the minds of the legal fraternity, becoming a part of their "effective-historical consciousness" (*wirkungsgeschichtliches Bewusstsein*). This was the foundation of the presuppositions or "prejudices" in the light of which the law began to be understood.

In virtue of the "prejudice-horizon", as thus constituted, the exigencies of the "time and situation" ("existential context") of the specific case could be catered for in the interpretation of the codes. Gadamer's "undecidability" thesis was herewith rendered of relevance to

dispositions in terms of these codes as a matter of unplanned, evolutionary development. Such a thesis is one which the codifiers would not have been able to abide. Still, the interests of justice are better served thereby than might have been the case had the codifiers' own perceptions been allowed to prevail.

Gadamer tenders these observations from legal hermeneutics in support of his general-hermeneutical project. We proceed in an opposite direction, searching for what may be learned from general hermeneutics for legal-hermeneutical purposes. Gadamer's reflections as registered here are nothing the less of edification for this circumstance.

3.4.10.a THE "WORLD" OPENED UP BY THE TEXT

The interpreter's *wirkungsgeschichtliches Bewusstsein* (effective-historical consciousness) and the presuppositions or "prejudices" it informs are themselves open to re-evaluation in the light of the "world" disclosed by the text. "Legitimate" as well as "negative" presuppositions are revealed as such in the course of textual meaning-apprehension.

These cryptic observations call for elaboration. Connolly and Keutner explicate Gadamer's position as follows. The interpreter's "negative" presuppositions are "separated out" from her "legitimate" ones when her anticipation of perfection, her expectation of coherence and correctness in what she reads, is frustrated.[130] Her inappropriate presuppositions will give

[130] See Connolly and Keutner *op cit* 30 - 33

themselves to be understood as such in this event. And these presuppositions will require to be suspended if textual comprehension is to proceed.[131]

This means that in her efforts to interpret the text, the construing agent will be compelled to confront her own subliminal preconceptions with regard to the subject-matter of that text.[132] In this regard, Ricoeur writes of "[t]he power of the text to open a dimension of reality."[133] And such an observation is equally of application in the legal milieu.

3.4.10.b THE CONSTITUTION AND ITS "WORLD"

Transposed to the current South African juridical environment, these insights bear pertinently on the way in which constitutionalism is to be conceptualized. In this regard, one should look upon the "text" of the Constitution as embodying a wealth of values to be identified in the last analysis by reference to the emerging standards of the universal "communis opinio populi".[134]

The jurist's "sense of justice" (her "effective-historical consciousness"), as informed by the "tradition" in which she is immersed, is made up of innumerable presuppositions or "prejudices". The vast majority of these "prejudices", probably, are legitimate. The few that are not, the negative "prejudices", are principally such as derive from the repressive agencies of colonialism and apartheid. The "world" opened up by the "text" of the Constitution provides a basis for expunging from the jurist's "sense of justice" these negative "prejudices".

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[131] *Ibid* 32 – 3.
[132] *Ibid* 33.
[133] See Paul Ricoeur *From Text to Action* (1991) 300.
[134] It is submitted that the emerging consensus of international values may be taken as an "index" of natural-law standards.

But that is not all. Certain features of the constitutional enterprise will require to be incorporated into her "sense of justice" as new presuppositions or "prejudices." The jurist's renovated "sense of justice", from which certain "prejudices" have been expunged, and into which other, novel, ones have been incorporated, is what Du Plessis would speak of as a "new hermeneutical awareness".[135]

This "new hermeneutical awareness" is constantly to be re-invigorated. It should not be allowed to stagnate. Discussions with fellow-jurists, probing of grass-roots perceptions, and recourse to international public opinion would, it is submitted, make for its dynamism.

The "new hermeneutical consciousness" the jurist brings to bear upon her task in the indigenous-law context, is, as will appear from a reading of the model (Chapter VII),[136] of a somewhat different complexion.

3.4.11. GADAMER'S POSITION ON THE "CRITIQUE OF IDEOLOGIES"

Since all our preconceptions, and hence all our understandings, are conditioned by "tradition" ("ideology"), there is no room on Gadamer's view for any critique of ideologies.[137] His opponents' contentions are canvassed in some detail in the following chapter.[138]

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[135] See L.M du Plessis and H. Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 60 – 107, especially the last few pages, for an exposition of the "new hermeneutical disposition".
[136] See Chapter VII, II(2)(1). In addition, consult Chapter V, at 3.2. (and 3.1.).
[137] Dieter Misgeld "Poetry, Dialogue and Negotiation: Liberal Culture and Conservative Politics in Hans-Georg Gadamer's Thought" in Wright *op cit* 161 at 171 claims that critical social theory is incompatible with Gadamer's hermeneutics.
[138] In Chapter III we deal with the work of Habermas, as also with that of other thinkers of the same disposition.

3.5. PAUL RICOEUR

Ricoeur is the last phenomenological thinker of high eminence with whose work this chapter is concerned. For purposes of this thesis, Ricoeur's reflections on the complementarity of "explanation" and "understanding" are the most significant aspects of his work.

Ricoeur proclaims his commitment to "method", maintaining that "understanding" should not be sought to be severed therefrom.[139] Exegesis and meaning-apprehension are to proceed on a basis of complementarity.

The "hermeneutic arch" (*arc hermeneutique*) is supported by two pillars: "structural analysis" and "hermeneutic appropriation".[140] The former relates to the linguistic decipherment of a text on the basis of its internal structure, its internal relationships.[141] The latter "restore[s] to the [text] its ability to project itself outside itself...."[142] It should be obvious that "explanation" is what is denoted by the former, and "understanding" by the latter. They interpenetrate each other.[143] Explanation "develops" understanding analytically;[144] understanding "envelops" explanation.[145] The construct of the "hermeneutic arch", as thus appropriated, gives one to regard the dimensions of "Erklären"[146] and "Verstehen"[147] as reciprocally interactive.

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[139] See Paul Ricoeur "Existence and Hermeneutics" in Bleicher *op cit* 236 243:"[W]e will continue to keep in contact with the disciplines which seek to practice interpretation in a methodical manner, and we will resist the temptation to separate *truth*, characteristic of understanding, form the *method* put into operation by disciplines which have sprung from exegesis". (Ricoeur's emphasis)
[140] See Bleicher *op cit* 229 – 32.
[141] See Ricoeur *From Text to Action op cit* 113.
[142] *Ibid* 18. This may be the Editor's Introduction.
[143] *Ibid* 129 and 156. Ricoeur speaks of this internal dialectic as a *Gestalt*. (*Ibid* 163) He proclaims further:"Ultimately, the correlation between explanation and understanding, between understanding and explanation, is the hermeneutic circle"'. (*Ibid* 167)
[144] *Ibid* 142.
[145] *Ibid* 131 and 142.
[146] Or "explanation".
[147] Or "understanding".

Thus one is given to see that it is neither active methodological effort alone nor passive meaning-apprehension exclusively that marks the activity of (statutory) interpretation. It is rather both functioning more or less simultaneously, with one concededly predominating at any particular time, perhaps, which renders a proper accounting of that activity.

In the interpretation of statutes, these insights come in handy. The various components of legislative construction show at many points the complementarity of "Erklären" and "Verstehen". Ricoeur's notion of the "hermeneutic arch" does much in the way of pointing to the ultimately holistic character of the undertaking. In the elaboration of the theoretical framework for the interpretation of statutes to be found in Chapter VI of this study,[148] the relevance of this observation will be made explicit.

4. THE LEGAL THEORY OF RONALD DWORKIN

Dworkin's legal theory evidences a number of parallels with the thrust of the work of the theorists just considered. For this reason it is expounded here in outline. Where necessary it is subjected to critical analysis.

Marmor describes Dworkin's theory as positing that the legal system is not exhaustively defined in terms of "source-based law".[149] It comprises also those norms and standards which are "consistent in principle with the bulk of source-based law."[150] Dworkin takes issue with

[148] See, in particular, Chapter VI under section IV (dealing with the process of effectuation).
[149] See A. Marmor *Interpretation and Legal Theory* (1992) 103.
[150] *Ibid.*

"global internal scepticism". This is a view denying the conceivability of a coherent and unified construction of legal practice.[151]

Dworkin does not regard "rules" as exhaustive of the content of the law. For him, the "principles" immanent in the legal order are also to be accounted for - even for want of their explicit formulation – if the system is to be described precisely.[152] Rules either apply or they do not. Principles, by contrast, are weighted, and pull the decision one way or the other.[153] It is through the interpretation of the law in its entirety that such principles are rendered open to identification.[154]

Confronted with a "hard case", a Hercules[155] would establish its "uniquely correct answer"[156] by bringing out and applying the principles latent in the entire juridical order as interpreted all in a single sweep. This is no mean feat, and no human being would be the equal of its accomplishment. Hence the need to postulate a Hercules.

The real judge, it seems, is to imitate Hercules as best she can. She is to proceed much as if she were a chain-novelist somewhere in the middle of the composition of the story. This would

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[151] See Allan C. Hutchinson "Indiana Dworkin and Law's Empire" 1987 96 *Yale Law Journal* 637 657.

[152] See Ronald M.Dworkin *Taking Rights Seriously* (1977) *passim*. Further consult R.M. Dworkin *A Matter of Principle* (1986) *passim* and R.M. Dworkin *Law's Empire* (1986) *passim*.

[153] See R.M. Dworkin *Taking Rights Seriously* (1977) *passim*.

[154] See the works referred to in n152, above. See also, in describing Dworkin's model, Etienne Mureinik "Security and Integrity" 1987 *Acta Juridica* 197 200: Judges are to "interpret the record in the way which makes it as coherent as possible. That requires them to interpret it as flowing from – as justified by – the set of principles which makes it as coherent as possible".

[155] Hercules, as is well known, is Dworkin's name for that hypothetical judge of superhuman juridical ability, who would be in a position to perform feats of legal construction the accomplishment of which it would not be within the compass of the abilities of a human judge to secure.

[156] Dworkin argues that almost every controversial problem in law admits of a "uniquely correct answer". This is his personal riposte to the claims of global internal scepticism.

imply that everything she does would have to "cohere" with what has gone before.[157] And she would seek to read all that has preceded in its best light.[158] Considerations of "fit" and "political morality" would, on this analogy, point in the direction of a "single right answer"[159] in the interpretation of the law – which bears a resemblance to, even if it diverges from, a chain-novel-enterprise. In short, the judge would seek to project the history of the law (as represented by countless "decisions, structures, conventions and practices") into the future "through what [she] does on the day".[160]

As there is a "single right answer" to (virtually) every legal problem, the notion of propositional truth in law is for Dworkin not one destitute of sense. When lawyers disagree on legal matters they are disagreeing not merely over what it is best to do, but indeed over what is in fact the case.[161] Such is the purport of the single-right-answer thesis.

4.1. CRITICISM OF THE SINGLE-RIGHT-ANSWER THESIS

In making the above claims, Dworkin reveals himself as in some measure a positivist. The interpreter looks upon the law "out there", as it were, from some external vantage point.[162] It is from the law "in itself" and its principles "in themselves" that she is to come by the uniquely

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[157] See R.M. *A Matter of Principle* (1986) 160.
[158] *Ibid.*
[159] *Ibid* 143. The judge must render an interpretation of what has taken place previously which satisfies a test of two dimensions: "it must both fit [legal practice] and show its point or value". (*Ibid* 160)
[160] *Ibid* 159.
[161] *Ibid* 142. Dworkin argues that propositions of law may be "true". This is to say that disagreement on legal construction is "speculative" and not merely "practical". Speculative disagreement relates to what is in fact the case. Practical disagreement relates to what is in fact the case. Practical disagreement, on the other hand, pertains to what it is best to do (from a pragmatic point of view). MacCormick maintains, contrary to Dworkin, that disagreement in the legal-hermeneutical context is "practical". See D. Neil MacCormick *Legal Reasoning and Legal Theory* (1978) 248.
[162] In this respect, Dworkin seems to cling to the subject-object schema.

correct dispositive solution to the problem at hand.[163] (Upon these premises, as Fish points out, the law and its principles constrain their own interpretation.[164])

Fish undertakes to explain the garnering of textual meaning as a function of the practices[165] of the "interpretive community". The subject-object dichotomy he seeks to dismiss as a basis for this undertaking.

Interpretation is not "objective". The text is not a raw datum, a thing-in-itself, constraining its own construction. But, then, neither is interpretation "subjective" – because the individual point of view is always social or institutional.[166]

What Wittgenstein called a "form of life",[167] the context of human discourse and activity within which interpretation takes place, is determinative of the nature of any particular interpretation. Fish's parallel notion is that of an "interpretive community."[168] The nature of any particular construction may equally justifiably be said to be determined by the practices of the "interpretive community".[169]

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[163] See the preceding discussion.
[164] See Stanley Fish "Interpretation and Pluralist Vision" 1982 60 *Texas Law Review* 495 495. See also, generally, Stanley Fish "Wrong Again" 1983 62 *Texas Law Review* 299 – 316.
[165] I encounter word "practices" in R.W. Benson "The Semiotics of International Law: Interpretation of the ABM Treaty" in F. Schauer (ed.) *Law and Language* 1993 495 496, where Stanley Fish is said to refer to the "institutional *practices* of the interpretive community". (emphasis mine)
[166] See Stanley Fish *Is there a Text in this Class: The Authority of Interpretive Communities* (1980) 335 – 6.
[167] See Benson *loc cit.*
[168] *Ibid.*
[169] *Ibid.*

Cotterrell expounds Fish's perception as follows. The factors limiting interpretive possibilities are not to be found in the subject-matter of interpretation.[170] They are rather to be discerned in "the conventions, expectations, shared understandings and structure" of the interpretive community.[171]

Fish's view accordingly diverges somewhat from Dworkin's. Upon the latter's appropriation, the law – the subject-matter of construction – contains within it limitations as to its constructive possibilities. Such is Dworkin's proposition.

As we have seen, however, the construing agent is part of the interpretive process. Her perception of the law and its principles is coloured by her "prejudice-horizon". She finds herself within a particular setting. And this gives meaning to the principles of the law. Such principles do not somehow speak their own meaning. This imports for purposes of this study the transmutation of the single-right-answer thesis into that of the *most-appropriate-answer-in-the-circumstances* as such "*emerges*" (note the connotation of passivity) in the "*fusion of horizons*".

The reason why principles seem to speak their own meaning is that the "interpretive community" of jurists tends to a stable uniformity of outlook. Interpretive communities are, however, not entirely static entities. And constitutionalism seems indeed to command the coming into being of a "legal interpretive community of self-reflection" (to coin a phrase). This is borne out by the discussion of the "new hermeneutical awareness". Hence the dubious propriety of Dworkin's directive to conceive of an immutably and eternally correct answer to every legal problem.

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[170] See Roger Cotterrell *The Politics of Jurisprudence* (1989) 179.
[171] *Ibid.*

4.2 PRINCIPLE VERSUS POLICY

Let us call to mind any one of sundry principles of law embodying the notion of "reasonableness" for purposes of this discussion. Wittgenstein drew attention to the ill-founded programme of seeking to pin down an "essence" to which each word is to be taken to correspond.[172] It would be idle upon his conception, then, to attempt to uncover the essential meaning of the word "reasonableness".

Yet the word does seem to have taken on a specifically defined meaning in legal discourse, a meaning which appears to persist autonomously of any context. Wittgenstein would explain this perception as consequential upon participation in a "form of life" – in the life of juridical argumentation. Such a "form of life" is constituted of the shared enculturative patterns and assumptions of the judicial "interpretive community". It is not the case that the word "reasonableness" bears a meaning "in itself". It is rather the case that stability in the character of the judicial "interpretive community" makes for its semantic determinacy. Such, at any rate, would be the purport of Wittgenstein's protestations.

In Fish, as in Gadamer, the subject-object distinction is transcended.[173] It is neither the interpreter-jurist nor the principle embodying the notion of "reasonableness" that would be decisive of the "meaning" that is appropriated. It is rather the tradition informing the rules and practices of the legal "interpretive community" of which the jurist is a member that would give

[172] See, once again, Pitcher *op cit passim.*
[173] See Stanley Fish *Is there a Text in this Class: The Authority of Interpretive Communities* (1980) 336.

her to apprehend the "generally accepted" meaning. On this score, Wittgenstein's and Fish's understandings are substantially concurrent.

Now, the judicial "interpretive community" is widely regarded as conservative, and, some would say, representative of an atypical spectrum of values. Its interpretation of the principle embodying the notion of "reasonableness" would, according to exponents of critical legal scholarship, tend in the direction of policy-oriented decision-making. The disposition of the case at issue would be dictated by considerations of ideology, of policy. Kerruish considers Dworkin's theory of law to be exemplary as a case of ideology[174] – in accord with these reflections, as it seems.

Accordingly, if critical legal scholars are to be believed, Dworkin's divide between principle and policy cannot be sustained. Principle, Dworkin considers, pertains to the moral rights of individuals, policy to the promotion of general welfare, to leading society in a particular direction.[175] Arguments of principle rather than those of policy, so he claims, are to guide decision-making.[176] But if the two cannot be distinguished, as seems to be the claim of such scholars as Goodrich, Bell and Griffith,[177] then the jurist who proposes to act along Dworkinian lines would give herself to replicate ideology, political ideology in its pejorative sense. In the next chapter, these issues are dealt with more comprehensively.

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[174] See V. Kerruish "Coherence, Integrity and Equality in 'Law's Empire': A Dialectical Review of Ronald Dworkin" 1988 16 *International Journal of Sociology of Law* 51 51.
[175] See Dworkin *A Matter of Principle op cit* 69 and 375.
[176] *Ibid.* 375: "[S]ometimes principle and policy argue in opposite directions". In this event, policy must yield to principle (*Ibid* 375 – 6) See also, Lane's exposition of Dworkin's views in this regard: Jessica Lane "The Poetics of Legal Interpretation" in S.Levinson and S. Mailloux (eds.) *Interpreting Law and Literature* (1988) 269 270.
[177] The work of these scholars is touched upon in the next chapter.

It is enough for the moment to observe that the mood of critical legal scholarship seems to be altogether too defeatist. If principles of law are interpreted in line with the postulates of our model (Chapter VII of this study in particular[178]), there is no good reason why they should figure as vehicles for the reinforcement of ideology. (Concededly, some would need to be jettisoned as incompatible with the constitutional dispensation. This, too, is dealt with in Chapter VII.[179]) Jurists no doubt will continue to rely on principles of law (insofar as salutary) in their professional work, and to this extent one feels justified in assenting to Dworkin's conception of interpretive "fit".

5. FIDELITY TO LAW AND RESPONSIVENESS

Van der Walt explains that the "generality" of legal rules implies their "inherent openness".[180] Their application constitutes the final phase of their integration: application is indispensable to the integrity of these rules.[181] This tallies with Gadamer's insight that responsiveness is essential to integrity.[182] Van der Walt concludes, with this, that "openness" is not inimical to "integrity". In fact, "openness" makes for "integrity".[183]

Van der Walt expounds Ricoeur's "rule of metaphor" as postulating the "dynamic integration of the familiar and the unfamiliar [in which] the integrity of the former is preserved in the latter"[184] Ricoeur claims "that [i]n the metaphorical statement...contextual action creates a *new meaning*

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[178] See Chapter VII, I(1) and I(2), in particular.
[179] See Chapter VII, I(4), in particular.
[180] See J.W.G. van der Walt "Squaring Up to the Difficulty of Life: Hermeneutic and Deconstructive Considerations concerning Positivism and the Rule of Law in a Future South Africa" 1992 3 *Stell LR* (2) 231 238.
[181] *Ibid.*
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid* 236 (Van der Walt's emphasis)

which is indeed an event, since it exists only in this particular context; but at the same time it can be repeated and hence identified as *the same*."[185] And with this, one has an inkling as to how to sustain *fidelity to law* in judicial responsiveness, deferring in this way to the doctrine of the separation of powers.[186]

In this regard, let us note Ricoeur's contention that it is the nature of a literary work to "transcend its own psycho-sociological conditions of production",[187] and in that way to render itself open to any number of possible readings "themselves situated in socio-cultural contexts which are always different".[188] In a word, says Ricoeur, one has to do with *decontextualization* and differential *recontextualization*.[189]

Dallmayr conveys, with reference to Gadamer, that "rule-governance" and "concrete-contextual interpretation" are intimately related,[190] their interconnection *not* being merely extrinsic.[191]

Nonet and Selznick maintain that "[t]here is indeed a *tension* between *openness* and *fidelity to law*, and that tension poses the central problem of legal development".[192] The authors go on to observe that this "dilemma" is not peculiar to law. All institutions are therewith confronted.[193]

A *combination* of "integrity" and "openness" is possible, Nonet and Selznick advance, when an institution is truly *purposive*[194] And this would apply equally with respect to the law.

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[185] See Paul Ricoeur *Hermeneutics and Human Sciences op cit* 170 (my emphasis)
[186] Thus has the writer of this thesis been led to conceive of things.
[187] See Ricoeur *Hermeneutics and the Human Sciences op cit* 91.
[188] *Ibid.*
[189] *Ibid.* (Ricoeur's emphasis, which would correspond to mine.)
[190] See Fred Dallmayr "Hermeneutics and the Rule of Law" in G. Leyh (ed.) *Legal Hermeneutics* (1991) 3 13.
[191] *Ibid.*
[192] See P. Nonet and P. Selznick *Law and Society in Transition* (1978) 76. (emphasis added)
[193] *Ibid.*
[194] *Ibid* 77.

Purposiveness, then, provides the key to the resolution of the apparent impasse suggested by the terms appearing in the head of this section. *Purposiveness,* then, makes for the reconciliation of the concepts denoted, allowing one to steer clear both of an "autonomous law" and of a legal system whose propositions are deployed largely as window dressing. *Purposiveness, in a word, makes for a proper and adequate "fusion of horizons".*

6. CONCLUSIONS

A (1) Ricoeur's conception of the "hermeneutic arch" demonstrates an interplay of active methodological effort and passive meaning-apprehension to mark the character of statutory interpretation. "Erklären" and "Verstehen" are complementary rather than opposed.[195]

(2) From this it follows that, with each component of the constructive endeavour partaking of both these dimensions and each component thereby being linked with every other, the quality of "holism" characterizes the legislative-interpretive undertaking.[196]

(3) Throughout the various phases in the interpretation of a statute, certain maxims and canons will have come to consciousness as potentially applicable to the matter at hand. In the course of the last phase – that of effectuation (as it has been elected to designate it) – those which are inappropriate to the case will have been "filtered out", as Gadamer

[195] See, in this regard, Chapter VI, more particularly the paragraphs introducing the discussion of a framework for the interpretation of statutes.
[196] Consult Chapter VI, more particularly the paragraphs introducing the discussion of a framework for the interpretation of statutes.

might say. Since there is no hierarchy with respect to these maxims and canons,[197] and since so many point in opposite directions,[198] it seems that to look upon them thus is most faithfully representative of their function.[199]

B (1) We go along with Gadamer in abjuring "intentionalism", understood in its narrow sense as mandating some sort of search for the subjective intentions of the lawmakers. As pointed out in the previous chapter, we do not endorse Betti's canon of the actuality of understanding,[200] (which has as its objective the reconstruction of authorial intent). In the case of statutory interpretation, the "intention of the legislature", invoked as a matter of ingrained habit, is not a substantial ideational reality upon which the interpreter might draw with a view to proper construction.[201]

(2) As observed in the foregoing chapter, however, we find in what it has been elected to speak of as "intentionalization" (as contrasted with "intentionalism") a fruitful means of statutory elucidation.[202] In this respect, we part company with Gadamer. Subscribing to Betti's canon of the hermeneutical correspondence of meaning, we applaud efforts to come by pertinent objective manifestations of the various actuating forces ultimately culminating in legislative formulation. As seen, a statutory provision may be rendered open to better understanding for its comparison with other documents prepared at roughly the same time and having a bearing upon that provision. Memoranda (detailing suggestions to the legislature) and excerpts from Hansard and other like sources

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[197] See John Dugard *Human Rights and the South African Legal Order* (1978) 370.
[198] See MacCormick *Legal Reasoning and Legal Theory op cit* 207.
[199] See Chapter VI, at IV.
[200] See Chapter I, under 5 (Conclusions), at 5B (1) - (2)
[201] See Chapter VI, at II (2)2.2.
[202] See Chapter I, under 5 (Conclusions), at 5D (1).

(providing objective evidence of surrounding circumstances and preceding deliberations) may be of great value in this regard.[203]

C (1) We have seen in the course of this chapter that the interpreter's "effective-historical consciousness" or *wirkungsgeschichtliches Bewusstsein* makes for the possibility of dialectical interaction or "conversation" between interpreter and text.

(2) The "effective history" *(Wirkungsgeschichte)* of any given statute may be taken as a reference to the case law decided under that statute. Such case law orients the jurist's understanding of the statute in relation to the concrete-existential dilemma with which she is confronted. In a word, her consciousness of the intervening history of interpretation of the statute allows of the possibility of illuminating its *purpose.* (Needless to say, precedential authority may have to be overruled where the intervening history of a statute is clearly incompatible with constitutionalism.) In treating of the *"axis of effective history"* in Chapter VI of this study[204] we elaborate these issues.

D (1) In the course of this chapter, we have encountered the notion of a "new hermeneutical consciousness". It represents the novel mind-set with which the law is to be approached. The jurist's subliminal sense of justice is subject to re-evaluation in the light of the "world" opened up by the "text" of the Constitution and its inherent value-system.

(2) The jurist's "sense of justice" (her "effective-historical consciousness") as informed by the "tradition" in which she is immersed, is made up of innumerable presuppositions or

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[203] Consult Chapter VI, at II (2).
[204] See Chapter VI, under II (3)3.1. (dealing with the axis of effective history).

"prejudices". The vast majority of these "prejudices", probably, are legitimate. The 'world' opened up by the "text" of the Constitution is to secure both the expungement of those "prejudices" the jurist harbours which are lacking in legitimacy and the incorporation into her "sense of justice" of certain, novel, "prejudices". And thus we are led to the notion of a "new hermeneutical consciousness".[205]

(3) The "new hermeneutical consciousness" ought not to be allowed to vitrify or stagnate. Discussions with fellow-jurists, probing of grass-roots perceptions and recourse to international public opinion should ensure that it remains vibrant.

(4) "Prejudices" deriving from this "new hermeneutical consciousness" would condition the character of the interpretation of legal materials.

(5) The "new hermeneutical consciousness" the jurist brings to bear upon her task in the indigenous-law context, is, as will appear from a reading of the model (Chapter VII),[206] of a somewhat different complexion.

E (1) "Purposiveness" ensures that the disposition reflect the ideal of fidelity to law, on the one hand, and make for responsiveness to social needs, on the other.

(2) The interpreter's *purpose for reading the text*, it would appear to be Greenstein's suggestion, determines the meaning of that text in the circumstances.[207]

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[205] See Chapter VI, at II (4)4.2.
[206] See Chapter VII, at II (2)(1).
[207] See R.K. Greenstein "Text as Tool: Why We Read the Law" 1995 52 *Washington and Lee Law Review* 105 118.

(3) The *purpose* in reading legal texts in present-day South Africa – which by the very nature of things involves providing for an *existential context* (the inclusive "context of social realities", and the "arrangement of facts" it subtends) – should be to uphold the values immanent in constitutionalism, to do justice and, where a statute is at issue, to give effect to *its purpose* in addition.

(4) The *meaning* to be garnered (upon seeking to implement "purpose"), so far as the tenor of phenomenological hermeneutics gives one to understand, is more something that "*emerges*" than is actively solicited. What will "emerge" – upon bringing to bear upon one's reading the necessary "purpose" – is the "most appropriate answer in the circumstances". This contradicts Dworkin's thesis to the extent that the latter would press for a "single right answer" for all time.

Christopher Stone reminds us that the "potential for legitimate ambiguity" is intrinsic to interpretation[208] as things are. That more than one construction may be "satisfactory", he proceeds, does not mean that any interpretation is as worthy as any other,[209] however. The most appropriate answer in the circumstances, I submit, is that which "emerges" in the "fusion of horizons".[210]

(5) The "plain meaning" approach to statutory construction blinkers itself to the circumstance that "purpose" and " existential context" condition "meaning" in the way

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[208] See Christopher D. Stone "Introduction: Interpreting the Symposium" 1985 58 *Southern California Law Review* (1) 1 3.
[209] *Ibid.*
[210] For the relevance of the matter under E., consult Chapter VI, at III (1), and Chapter VII, at I (1) and II (1)1.1.

outlined here. To look upon a concatenation of words in a statute in their purely "literal" signification is to blind oneself to the possibility of their being invested with a *new semantic complexion*.[211]

F (1) Dworkin's model suggests that "hard cases" are to be resolved by having regard to those "principles" which derive from the legal order as construed in its entirety. Such a construction, as undertaken by a Hercules, would yield a "single right answer" in respect of all such cases.[212]

(2) Let us suppose Hercules to have completed his task. The "principle" upon which he might have seized as resolutive of a particular dilemma may be perfectly consonant with the record of the community (and thus perfectly legitimate from the Dworkinian perspective). But it may yet fail to comport with the values immanent in our constitutional enterprise. In this event, Hercules would have misdirected himself in latching onto the principle at issue.

(3) The "principles" of our legal system are, in all probability, salutary for the overwhelmingly greater part of their enumeration. But there are "principles" here and there, perhaps, which simply do not tally with the inherent value-order of our constitutional dispensation. Insofar as Dworkin's model overlooks this important concern, it fails to carry outright conviction.

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[211] See Chapter VI, at III (7) in this regard.
[212] See the discussion under 4, above.

(4) If a particular "principle" of law is deemed ineligible for perpetuation by reason of incompatibility with the constitutional design, a substitute will require to be fashioned. And in the following chapter this issue is dealt with in detail.

III

THE CONTEMPORARY LEGAL RELEVANCE OF CRITICAL HERMENEUTICS

1. INTRODUCTION

In the preceding chapter it was learned that there was no room on Gadamer's postulates for ideological critique.[1] All our understandings are ideologically and linguistically conditioned, such that we cannot transcend the dialogue that we are.[2] Upon these premises, our situatedness precludes any productive critical appraisal of our predicament.

These considerations lead to Gadamer's legitimation of "tradition" and "authority".[3] In the milieu of law, this imports the sacrosanctity of legal-historical originative sources. No critical legal theory is sustainable, just as any critique of ideology is misconceived.

Critical hermeneutics is distrustful of these claims. Habermas opposes himself to Gadamer's thesis. He proposes that the assumptions of that thesis are impeachable – particularly the assumption that "legitimating acknowledgement" and the "consensus" upon which "authority" is based are achieved without coercion.[4]

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[1] See Chapter II, under 3.4.11.
[2] See, in this regard, H.G. Gadamer "Reply to My Critics" in G.L. Ormiston and A.D. Schrift (eds.) *The Hermeneutic Tradition* (1989) 273 292.
[3] See Gadamer *Truth and Method op cit* 248-50.
[4] See Jürgen Habermas "On Hermeneutic's Claim to Universality" in K. Mueller-Vollmer (ed.) *The Hermeneutics Reader* (1986) 294 316.

Habermas advances that such a statement simply fails to reckon with the phenomenon of "systematically distorted communication".[5] Arguing that force is sustained "through precisely the ... illusion of freedom from force which characterizes a pseudo-communicative agreement",[6] he urges that in the absence of a proviso, in principle, of "universal and dominance-free agreement",[7] it is impossible to set apart "dogmatic acknowledgement" from "true consensus".[8] And, as will be seen, Habermas discerns in his conception of the "ideal speech situation"[9] an instrumentality through which communicative distortions are to find some measure of resolution.

As noted, Gadamer recoils from the idea of a critical hermeneutics. It is to be noticed, too, that a strand of Marxist-oriented thought would have no difficulty in relegating to the status of "bourgeois ideology" the very notion of a hermeneutics of critique.[10] The "regulative idea" of "communication free of domination" would be taken up from this perspective as a "no-where",[11] a "utopia" in the pejorative sense.

In what follows, it is endeavoured to establish what in the way of utility is to be culled from the critical-hermeneutical tradition for purposes of contemporary legal argumentation.

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[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] We discuss the notion of the "ideal speech situation" under 4.1.3., below.
[10] See Josef Bleicher in Bleicher *op cit* 165.
[11] *Ibid.*

1.1 THE OBJECTIVES OF THIS CHAPTER

The term "ideology" may be used to denote simply the framework of reigning ideas of the day, upon which our thought-patterns are premised. Employed thus, it is not necessarily pejorative in connotation. Yet, the conception of "ideology" is often of a more specific denotation as conjuring up ideational distortion through the mechanism of authoritarian power-relationships. The programme of the critique of ideology is committed to unveiling such distortion, with a view to human "emancipation".

Colonialism, apartheid and (possibly) capitalism, in its more materialistic forms, have conduced to distortion in our legal order. Furthermore, forces of greater subtlety may conceivably have worked to the same effect – on an imperceptible level. Critical legal theory addresses itself to the examination of these and related issues.[12]

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[12] The literature of critical legal scholarship is of immense breadth and quite ponderous. Much pertains to "deconstruction", a way of doing things associated with the French intellectual, Jacques Derrida. In this regard, see J.M. Balkin "Deconstructive Practice and Legal Theory" in F. Schauer *Law and Language* (1993) 385 403 and 406 *et passim*. See also, for instance, Clare Dalton "An Essay in the Deconstruction of Contract Doctrine" in S. Levinson and S. Mailloux (eds.) *Interpreting Law and Literature*(1988) 285; C. Douzinas and R. Warrington "On the Deconstruction of Jurisprudence: Fin(n)is Philosophiae" in P. Fitzpatrick and A. Hunt (eds.) *Critical Legal Studies* (1987) 33; Emily F. Hartigan "Derridoz Law Written in Our Heart/Land: 'The Powers Retained by the People' " 1993 67 *Tulane Law Review* 1133; Mark Poster "Interpreting Texts: Some New Directions" 1985 58 *Southern California Law Review* 15 16-17. See, in general, on critical legal theory, also the following sources: Robert W. Gordon "New Developments in Legal Theory" in David Kairys (ed.) *The Politics of Law* (1990) 413; Hugh Collins "Roberto Unger and the Critical Legal Studies Movement" 1987 14 *Journal of Law and Society* (4) 387; David Nelken "Critical Criminal Law" in Fitzpatrick and Hunt *op cit* 105; P. Ireland, I. Grigg-Spall and D. Kelly "The Conceptual Foundations of Modern Company Law" *Ibid* 149; Francis Snyder "New Directions in European Community Law" *Ibid* 167; Nikolas Rose "Beyond the Public/Private Division: Law, Power and the Family" *Ibid.* 61; Hugh Collins "The Decline of Privacy in Private Law" *Ibid* 91; Peter Fitzpatrick "Racism and the Innocence of Law" *Ibid* 119.

Van Blerk describes critical legal theory as envisaging a "wholesale political assault on legal liberalism and its institutions."[13] It seeks, she says, to unmask the ideology sustaining domination and exploitation within the juridical order, so as to show up a possible alternative.[14]

Kennedy, bringing critique to bear upon the law, ventures comments on legal education that are anything but complimentary. It is submitted that his trenchant criticisms go rather too far,[15] however.

Curzon claims that critical legal scholarship emphasizes "the very close links between law and politics".[16] Such scholarship dismisses the notion of legal "neutrality".[17] Speaking in this vein, it seems that Davis is of a disposition to regard Dworkin's schema as conducive, in greater or lesser measure, to the entrenchment of political ideology.[18]

It is submitted, then, with due regard to these sentiments, that legal interpretation requires the jurist to remain alert to the impact of our ignominious political history on the law. It will be attempted in concluding this chapter to expound, with reference to the material here to be considered, a means of approach to aspects of the South African legal tradition bearing the taint of ignominy – with a view to remedial action in their respect. Accordingly, it is sought to deal with the

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[13] See A.E. van Blerk "Critical Legal Studies in South Africa" 1996 (113) *SALJ* (1) 86 89.
[14] *Ibid.*
[15] Kennedy's animadversions upon legal education are particularly astringent. See Duncan Kennedy "Legal Education as Training for Hierarchy" in Kairys *op cit* 38 40-41.
[16] See L.B. Curzon *Jurisprudence* (1979) 263.
[17] *Ibid.*
[18] See D.M. Davis "Integrity and Ideology: Towards a Critical Theory of the Judicial Function" 1995 112 *SALJ* (1) 104 127.

identification of the features of the law in question, and thereafter to disinter what may be done to the end of making good their shortcomings.

This brings out the essential tenor of our project – conceived as a two-stage process. The first stage involves the identification of legal-ideological distortion. In this stage, we adopt an approach parting ways to some extent with Habermas (we deploy the notion of a "new hermeneutical awareness", not that of "communicative rationality" in the strict sense). The second stage is to be seen as the deployment of a variant of the Habermasian model with the objective of dealing with the raw material out of which a novel legal proposition might be fashioned to take the place of that deemed to embody ideological distortion. The first stage is discussed under 3. below, the second under 4. and 5. following thereupon.

Before embarking upon the subject-matter of this chapter, it may be instructive to apprise oneself of certain perceptions embodying a tangible element of critique. We turn now to consider them.

2. THE VIEW OF LAW AS IDEOLOGY IN ESSENCE

Goodrich, Bell and Griffith are amongst those theorists whose conceptions of law as geared to the propagation of ideology (using the term pejoratively) are most notable. A short account of their respective views follows.

2.1. PETER GOODRICH

Goodrich inveighs against structuralism in law, against the perception that the law is an internally consistent whole.[19] He proposes that it should not be looked upon as a "self-sufficient object of study".[20] Very robust and forthright in his claims, he argues that legal language is auto-referential,[21] and that the denotation of its categories is illusory.[22] In the latter contention, he is anticipated in the writings of Julius Stone (for a synopsis of which the reader is referred to the discussion of American realism in the preceding chapter).[23] Unlike Stone, however, Goodrich maintains that the categories in question make for the implementation of political choices intimately associated with a very narrowly defined, uniform and homogeneous grouping – the legal profession itself.[24]

With this, he advances that the law should be studied upon an interdisciplinary basis.[25] Goodrich makes out a case for deconstruction,[26] urging that any adequate legal philosophy should reckon with the social and political values encoded in "the syntactic and discursive processes of the law".[27]

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[19] See Peter Goodrich *Legal Discourse* (1987) 4. See, also, in particular, Peter Goodrich *Reading the Law* (1986) 117-8.
[20] See Goodrich *Legal Discourse op cit* 128.
[21] See Goodrich *Reading the Law op cit* 151.
[22] *Ibid* 150 and 153.
[23] See Chapter II, under 2.
[24] See Goodrich *Reading the Law op cit* 219.
[25] *Ibid* See also Goodrich *Legal Discourse op cit* 207.
[26] *Ibid.*
[27] See Goodrich Legal Discourse op *cit* 81.

2.2. JOHN BELL

Bell puts forward the contention that the "interstitial legislator model" most satisfactorily explains the nature of adjudication in hard cases.[28] Dworkin's "rights model", with its accent on arguments of principle, Bell dismisses as a misleading representation of the judicial function.[29] It is arguments of policy not qualitatively dissimilar to those that give shape to decisions taken by legislators, at various levels (and by certain executive officials), which go into the making of the judicial determination.[30] Or so, at any rate, Bell contends.

In short, Bell contests the claim that a sharp divide exists between adjudication and other state activities.[31]

With these reflections, he maintains that judges are "very much political actors",[32] in that they give direction to society through the medium of their choices.[33]

2.3. JOHN GRIFFITH

Like Bell, Griffith is of the view that judges are political actors. He is very strident and polemical in his assertions, which helps to explain the broadside issued at him

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[28] See John Bell *Policy Arguments in Judicial Decisions* (1983) *passim.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid* 247.
[32] *Ibid.*
[33] *Ibid.*

by Lord Denning.[34] "[J]udges in the United Kingdom", Griffith says, "cannot be politically neutral ...."[35]

It is Griffith's complaint that the senior judiciary (he is writing with the English legal system in mind) frequently fails to give a sensible interpretation of the "public interest".[36]

He argues that the formative and enculturative experience of the senior judiciary in the United Kingdom has impressed upon them "a strikingly homogeneous collection of attitudes, beliefs and principles, which to them represent the public interest".[37] Indeed, Griffith goes so far as to say that among the considerations that for them are embraced by the notion of the "public interest" are certain political views that would normally be "associated with the Conservative Party".[38]

Individuals with a common group experience, Tuckett advances, tend to "share common subjective definitions of the situation".[39] A scholar in the mould of a Goodrich, a Bell or a Griffith would translocate this general sociological postulate to the judicial arena specifically. She would consider a very narrowly defined compendium of values to inform the interpretation of statutory, case-law and other materials.

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[34] See Lord Denning's denunciation of Griffith on the leaf preceding the subject-matter of Griffith's thesis in J.A.G. Griffith *The Politics of the Judiciary* (1991).
[35] *Ibid* 225.
[36] *Ibid* preface (no page cited).
[37] *Ibid* 198.
[38] *Ibid* 199.
[39] See David Tuckett (ed.) *An Introduction to Medical Sociology* (1976) 21.

2.4. A SHORT COMMENT ON THE VIEWS DISCUSSED

The view of law as ideology in essence (ideology here taken up in the pejorative sense) strikes one as altogether too negative, too defeatist, too pessimistic. It assuredly does not make for enthusiasm in the treatment of authoritative sources. More than this, it blinds one to the fact that (as conveyed in the foregoing chapter) one is able to come by a proper dispositive solution to the problem at hand by eliciting the "most appropriate answer in the circumstances" as it "emerges" in the "fusion of horizons".[40] As has been seen, the "meaning" of legal-textual materials is dependent upon the "purpose" the interpreter has in mind in reading them.[41] It is agreed with Williams that legal dogmatics does not constrain conclusions, but rather defines the ambit of the juristic debate, so that the law is deployable in the interests of axiological adequacy.[42] This is a much more positive demeanour.

But these remarks are not to deny that the law has lent itself, at this point and that, to the encodement of distortion. And it is to critical hermeneutics and its resources that we turn in contemplation of this circumstance.

For a first thing, it is turned to the means of *identifying* distortion.

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[40] See Chapter II, under 6 (Conclusions), more particularly at E.
[41] *Ibid.*
[42] See Joan C. Williams "Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells" 1987 62 *New York University Law Review* 429 495.

3. THE "NEW HERMENEUTICAL AWARENESS" AND LEGAL-IDEOLOGICAL CRITIQUE: THE NOTION OF "DISSONANCE"

In the preceding chapter, we came upon the notion of a "new hermeneutical awareness".[43] It was explained that it refers to the jurist's "sense of justice", from which certain presuppositions or "prejudices" have been expunged, and into which other, novel, ones have been incorporated – all this with reference to the constitutional enterprise.[44] The "new hermeneutical awareness" is this "sense of justice" – swept clean and refurbished.

It was further noted in the previous chapter that the "new hermeneutical awareness" partakes of an element of dynamism. It should on no account be allowed to stagnate or vitrify.[45] In order to ensure its vigour and vibrancy, the jurist should involve herself in discussions ("dialogue"/"speech"/"communication") with fellow-jurists. Also indicated would be ongoing "probing" of grass-roots perceptions as well as international public opinion, and the consultation of public-international-law materials.[46] Recourse to the last-named materials (and international public opinion) is of considerable importance, seeing that constitutional values are to be identified in the ultimate analysis by reference to the emerging standards of the universal "communis opinio populi" of civilized nations.[47]

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[43] See Chapter II, under 3.4.10.a and b, and under 6.(Conclusions), more particularly at D.
[44] *Ibid.*
[45] *Ibid.*
[46] See, generally, *Ibid.*

It follows from this that the "new hermeneutical awareness" has a *natural-law-type* constituency.[48] The jurists's perceptual framework is of a natural-law orientation.

If a rule or principle of law offends against the jurist's *implicit natural-law orientation*, we have to do with what it has been elected to refer to as "*dissonance*". It goes without saying that "dissonance" should not be inferred upon any frivolous basis. One may say that it is in those instances where the "*new hermeneutical awareness*" the jurist brings to bear upon her perception of a rule or principle *meets with opposition* that one has to do with "dissonance". Diagnostic of "dissonance", then, is the malalignment of the "new hermeneutical awareness" and the rule or principle.

Upon the basis sketched, it would not be difficult to elude the temptation to deal with precedent and legal dogmatics in a high-handed, cavalier fashion. Precedent and legal dogmatics are to be respected. Perelman's principle of inertia stipulates as much.[49] It is in instances of "dissonance" alone that a rule or principle of law may be jettisoned.

With this we see that the "new hermeneutical awareness" provides a basis for legal-ideological critique – for eliding a rule or principle where necessary. But it does

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[47] See section 39 (1)(b) of the final Constitution (Act 108 of 1996), which reads as follows: "When interpreting the Bill of Rights, a court ... must consider international law". It is submitted that this subsection supports the inference as registered in the text.

[48] It is submitted that the emerging consensus of values of the "communis opinio populi" of civilized nations may be taken as an "index" of natural-law standards.

[49] See Robert Alexy *A Theory of Legal Argumentation* (1989) 267-8, in discussing the "stabilization function" of legal dogmatics, where he says the following: "The reasons for [a] new solution must be sufficiently strong as to justify not only the new solution but also the break with tradition. Perelman's principle of inertia therefore holds. Whoever puts forward a new solution carries the burden of proof".

not on its own account command the resources for arguing and finding an appropriate legal proposition to take its place.

Thus, "dissonance" signals the elision of an aspect of our legal tradition. But it is a cue for something else as well – for critical-argumentative deployment in the law. We have to look to critical argumentation as a means of finding an apt dispositive solution.

Under 4., below, it is treated of the method of filling the lacuna left by the elision of a rule or principle, and under 5., below, of the material of which the dispositive norm is to find its crafting.

4. THE RESOURCES OF CRITICAL ARGUMENTATION

Under this head we are interested principally in matters of procedure. Under the following head (5), the focus is more on substance. Critical hermeneutics claims to furnish a procedural rationality for the justification of norms. One has to do, therefore, with norms for the justification of norms – second-order norms or "meta-norms".

Among the foremost exponents of critical hermeneutics is the German philosopher, Jürgen Habermas. He is in substantial accord with Gadamer in relation to many issues,[50] but he believes that the latter is too trustful of the beneficence of

[50] Habermas's agreement with Gadamer seems to pertain most notably to their shared conviction that meaning-apprehension has a "fore-structuration". For a discussion of the fore-structure of interpretation, see Chapter II, under 3.4.4.

"tradition". We have seen that for Gadamer there is no place for any critique of ideologies.[51]

From the discussion under 3., above, it is clear that we already have a basis (in the "new hermeneutical awareness") for the criticism of extant legal manifestations. Our deployment of critical hermeneutics and its resources is therefore to the end not of passing judgment on ideology (we already have a basis for this), but of filling the lacuna left by the rule or principle of law it has been seen fit to jettison. The question to arise, then, is, "What sort of dispositive norm is to fill the lacuna left by the elision of this rule or principle?"

Our deployment of Habermas is therefore in the interests of establishing a *normative standard* for the justification of just such a dispositive norm. This standard he considers to reside in his conception of the "ideal speech situation".[52]

4.1 JÜRGEN HABERMAS

As emerges from the above two paragraphs, we are not interested for purposes of this chapter in Habermas's critique of ideologies as such. As it is, we have a criteriological filter capable of being harnessed to this end – finding its immanence in the "new hermeneutical awareness". The thought of Habermas cannot, however, be properly understood in the absence of a consideration of his position on ideological critique. It is necessary, therefore, in order to gain insight into his notion of the "ideal speech situation", to go into his contentions in that regard.

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[51] See, once again, Chapter II, under 3.4.11.

4.1.1 A CRITICAL APPROACH TO TRADITION

Held furnishes us with comments suggesting the objectives of the Habermasian programme. This project undertakes to formulate a social theory having as its objective "the self-emancipation of people from domination".[53]

Dreyfus explains that the "hermeneutics of suspicion" undertakes to emancipate the participants in social life by unveiling the "deep meaning the everyday practices serve to suppress ...."[54] Gadamer comments that this programme is pursued in the "critique of ideology".[55]

Habermas tells us that a consensus, apparently effectuated through "rational" means, "may ... well be the product of pseudocommunication".[56] Depth hermeneutics, he says, teaches us that "the dogmatism of the traditional context is the vehicle ... for the repressiveness of a power relationship which deforms the intersubjectivity of understanding as such and systematically distorts colloquial communication".[57] His hermeneutics of suspicion therefore postulates that "every consensus in which interpretation terminates" must be regarded as conceivably having been "pseudocommunicatively compelled".[58]

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[52] For an elaboration of the concept of the "ideal speech situation", the reader is invited to turn to 4.1.3., below.
[53] See David Held *Introduction to Critical Theory* (1989) 250.
[54] See Hubert Dreyfus "Beyond Hermeneutics: Interpretation in Late Heidegger and Recent Foucault in G. Shapiro and A. Sica (eds.) *Hermeneutics: Questions and Prospects* (1984) 66 80-81.
[55] See H.-G. Gadamer "The Hermeneutics of Suspicion" in G. Shapiro and A. Sica *op cit* 54 58. Needless to repeat, Gadamer does not espouse ideological critique.
[56] See Jürgen Habermas "On Hermeneutics' Claim to Universality " in K. Mueller-Vollmer *op cit* 294 314.
[57] *Ibid.*
[58] *Ibid.*

It is Gadamer's "uncritical acceptance of tradition"[59] that constitutes the subject-matter of Habermas's objections.[60] Because Habermas thinks of language as an ideological instrumentality, it is his view that the anticipatory structure of prejudices making for understanding should itself emerge as an object of critical appraisal.[61]

4.1.2 REFLEXIVITY

Yet, critical theorists of the Frankfurt school acknowledge that their programme is conceived as a part of the tradition it undertakes to subject to scrutiny.[62] The words of Ricoeur are most apt in this regard: "[U]pon what will [the critique of ideology] concretely support the reawakening of communicative action if not upon the creative renewal of cultural heritage?"[63]

Habermas's contentions speak in conformity with these perceptions. The following quotation here seems in point: "Communicative action can be understood as a circular process in which the actor is two things in one: an *initiator* who masters situations through actions for which he is accountable and a *product* of the traditions surrounding him, of groups whose cohesion is based on solidarity to

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[59] The citation is from Ormiston and Schrift in G.L. Ormiston and A.D. Schrift *The Hermeneutic Tradition* (1989) 21.
[60] *Ibid.*
[61] This is Habermas's standpoint as set out in Ormiston and Schrift *loc cit.*
[62] See Alan How *The Habermas-Gadamer Debate and the Nature of the Social* (1995) 14: "Critical Theory has always been 'reflexive' in acknowledging that it is a part of the same social historical processes which it seeks to analyse." Incidentally, How opposes the idea of a critical hermeneutics.
[63] See Paul Ricoeur *From Text to Action* (1991) 306.

which he belongs, and of processes of socialization in which he is reared".[64] Another observation suggesting a parallel insight, as it is submitted, reads as follows: "The shared lifeworld offers a storehouse of unquestioned cultural givens from which those participating in communication draw agreed-upon patterns of interpretation for use in their interpretive efforts".[65] And, in a similar vein thus: "[A]greement in the communicative practice of everyday life rests simultaneously on intersubjectively shared propositional knowledge, on normative accord, and on mutual trust".[66]

4.1.3 THE "IDEAL SPEECH SITUATION"

These remarks on "communicative action" lead us to a consideration of Habermas's key concept of the "ideal speech situation". In this counterfactual set-up, all impediments to proper discursive procession – whether internal or external – have been resolved.[67] A "rational consensus", that is, a consensus achieved under these conditions, is for Habermas the singular touchstone of veracity or of normative correctness.[68]

As Alexy notes, a major objection raised to the concept of the "ideal speech situation" pertains to its counterfactuality.[69] Habermas is fully aware of this objection, yet it does not lay him low.

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[64] See Jürgen Habermas *Moral Consciousness and Communicative Action* (1990) 135 (Habermas's emphasis).
[65] *Ibid.*
[66] *Ibid* 136.
[67] See Held *op cit* 343-4.
[68] *Ibid.*

Habermas claims that the "ideal speech situation" is "neither an empirical phenomenon nor a pure construct, but rather an inescapable underpinning for discourse reciprocally assumed by the parties".[70] He proceeds that "[t]he structure of possible speech is such that in performing a speech act we counterfactually behave as though the ideal speech situation were not a mere fiction but rather a present reality; this is just what is meant by an 'underpinning'."[71] Alexy writes that this version of the conception of the "ideal speech situation" eludes the reproach of unrealizability:[72] "It is definitely possible to pursue an ideal that can never be realized".[73]

Upon Habermasian postulates, then, the "ideal speech situation" is no pure construct but something actually presupposed in "every empirical linguistic utterance aimed at serious discourse".[74]

In this regard, Habermas speaks in these terms: "Argumentation is a reflective form of communicative action and the structures of action oriented toward reaching understanding always already presuppose those very relationships of reciprocity and mutual recognition around which *all* moral ideas revolve in everyday life no less than in philosophical ethics."[75] And in like terms the following: "[T]he proponents of discourse ethics rely on a type of argument that draws attention to the

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[69] See Alexy *op cit* 121-2.
[70] Habermas as quoted in Alexy *loc cit.*
[71] Habermas *Ibid.*
[72] *Ibid.*
[73] *Ibid (per* Alexy).
[74] Quotation from Habermas in J.W.G. van der Walt "The Relation between Law and Politics: A Communitarian Perspective" 1994 III *SALJ* (1) 152 154.
[75] See Habermas *Moral Consciousness and Communicative Action op cit* 130 (Habermas's emphasis).

inescapability of the general presuppositions that *always already* underlie the communicative practice of everyday life and that cannot be picked or chosen ...."[76]

Illustrating the tenor of his remarks, Habermas proposes: "In the attitude oriented toward reaching understanding, the speaker raises with *every* intelligible utterance the claim that the utterance in question is true (or that the existential presuppositions of the propositional content hold true), that the speech act is right in terms of a given normative context (or that the normative context that it satisfies is itself legitimate), and that the speaker's manifest intentions are meant in the way they are expressed".[77]

Habermas's conception of "communicative rationality" is that of a process at once pertaining to a particular context and transcending it.[78] It is, however, anti-foundationalist. His arguments in this regard should be registered in his own words: "[D]iscourse or argumentation is a more exacting type of communication, going beyond any particular form of life. Discourse generalizes, abstracts, and stretches the presuppositions of context-bound communicative actions by extending their range to include competent subjects beyond the provincial limits of their own particular form of life".[79]

Alexy suggests that Habermas's consensus attained under ideal-speech conditions is the equivalent of the agreement of Perelman's *auditoire universel* (universal

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[76] *Ibid* (Habermas's emphasis).
[77] *Ibid.* 136-7 (Habermas's emphasis).
[78] See J.W.G. van der Walt "The Relation between Law and Politics: A Communitarian Perspective" 1994 III *SALJ* (1) 152 158-9.
[79] See Habermas *Moral Consciousness and Communicative Action op cit* 202.

audience).[80] The universal audience is defined as the entirety of humanity in a situation of argumentational competence.[81] Assent on the part of the *auditoire universel* is the touchstone of rationality in argumentation.[82]

Habermas's conception of rationality finds something of a parallel in Popper's critical rationalism.[83] Embodied in the latter conception is the notion of argument. Also embodied in it is the notion of mutual criticism and intersubjectivity.[84] These features are in some sense reminiscent of the concept of an "ideal speech situation". They seem to be epitomized in the spirit of concession as expressed by Popper in these terms: "I may be wrong and you may be right, and by an effort we may get nearer to the truth".[85] Popper concludes that rationalism depends upon social institutions designed to protect the freedom of criticism.[86]

Merleau-Ponty's conception of "reasonableness"[87] is akin in many respects to Habermas's.[88] What it entails is an endeavour to come by uncoerced agreement with others through the medium of unrestricted dialogue.[89]

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[80] Alexy *op cit* 163: "Perelman's agreement of the universal audience is Habermas's consensus arrived at under ideal conditions."
[81] *Ibid*: "The universal audience may... be defined as the totality of human beings in the state in which they would find themselves if they were to develop their argumentational capabilities."
[82] *Ibid* 160.
[83] See Karl R. Popper *The Open Society and its Enemies* (Vol II) (1962) 225-38 *et passim*.
[84] *Ibid* 226-7 (Conceptual emphasis registered in text mine.)
[85] *Ibid* 238.
[86] *Ibid*.
[87] For an exposition of this conception, consult G.B. Madison *The Hermeneutics of Postmodernity* (1988)72.
[88] *Ibid*.
[89] *Ibid*.

Apel purveys the notion of an "ideal communicative community".[90] It is a presupposition of every act of communication. Yet its reference is to an ideal to which it is but possible to aspire.[91]

4.1.4 DISCOURSE ETHICS

Habermas's principle of discourse ethics and the related principle of universalization express a procedural foundation for the justification of norms. They therefore function as "meta-norms". According to the principle of discourse ethics, "[e]very valid norm would meet with the approval of all concerned if they could take part in a practical discourse".[92] The principle of universalization Habermas formulates in the following terms: "For a norm to be valid, the consequences and side effects that its *general* observance can be expected to have for the satisfaction of the particular interests of *each* person affected must be such that *all* affected can accept them freely".[93] At a subsequent point in his disquisition, he phrases the principle thus: "For a norm to be valid, the consequences and side effects of its general observance for the satisfaction of each person's particular interests must be acceptable to all".[94]

Making clear that discourse ethics is of a procedural character and does not set up substantive claims, Habermas says: "Discourse ethics does not set up substantive orientations. Instead, it establishes a *procedure* based on presuppositions and

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[90] Josef Bleicher notices this. See Bleicher *op cit* 151.
[91] *Ibid.* For an interesting perspective on the critique of ideology as involving both "explanatory" and "meaning-apprehending" components, one may refer to K.-O. Apel "Scientistics, Hermeneutics, Critique of Ideology: An Outline of a Theory of Science from an Epistomological-Anthropological Point of View" in Mueller-Vollmer *op cit* 321-345 *passim,* and, in particular, 338-341.
[92] See Habermas *Moral Consciousness and Communicative Action op cit* 121.

designed to guarantee the impartiality of the process of judging".[95] He continues that the "procedure of discursive will formation" is to be distinguished from the "substantive content of argumentation.[96] Discourse ethics is thus a "*procedure* of moral argumentation".[97] It undertakes to ground moral norms in communication.[98]

Habermas says of "practical discourse" that argumentation secures that "all concerned in principle take part, freely and equally, in a co-operative search for truth, where *nothing coerces anyone except the force of the better argument.*"[99] He goes on to argue that practical discourse is a "warrant" of the correctness or fairness of normative agreement:[100] "Discourse can play this role because its idealized, partly counterfactual presuppositions are precisely those that participants in argumentation do in fact make."[101]

4.1.5 THE INTERNAL FORUM

It seems that Habermas means his rationality to apply also to internal (private) cogitation. He accepts nevertheless that there are limitations to its appropriability in this respect: "Arguments played out in 'the internal forum' [i.e. set in the 'inner life of the psyche']... are not equivalents for real discourses that have not been carried out ...."[102] Such arguments are "merely virtual events" which "in specific

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[93] *Ibid* 120 (The emphasis is Habermas's).
[94] *Ibid* 197.
[95] *Ibid* 122 (emphasis Habermas's).
[96] *Ibid.*
[97] *Ibid* 197 (my emphasis).
[98] *Ibid* 195.
[99] *Ibid* 198 (emphasis mine).
[100] *Ibid.*
[101] *Ibid.*
[102] See Jürgen Habermas "Justice and Solidarity" in Milton Fisk (ed.) *Justice* (1993) 89 95 (The words "inner life of the psyche" are to be found at 94.)

circumstances, can simulate a procedure that cannot be carried out".[103] This does not pose an insurmountable objection to their acceptability, he claims, when it is considered that actually occurring discourses themselves proceed "under limitations of time and space and social conditions that permit only an approximate fulfillment of the presuppositions, usually made counterfactually, of argumentation".[104]

4.2. ROBERT ALEXY

A number of scholars have sought to build on Habermas's work. Thompson, for instance, lends some interesting perspectives to the programme as outlined.[105] Alexy, however, is of pre-eminent significance for us in this regard – since his labours are specifically geared to the formulation of a theory of legal argumentation.

4.2.1 NORMS FOR THE JUSTIFICATION OF NORMS

Harnessing insights culled from much notable antecedent theorizing, Alexy arrives in the end at a detailed set of "meta-norms" for the orientation of discourse. In the first place, he sets out an enumeration of (advocated) conditions of "general

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[103] *Ibid.*
[104] *Ibid.*
[105] See John B. Thompson *Critical Hermeneutics* (1981) 173.

practical discourse".[106] Proceeding from this, he seeks to elicit an ensemble of procedural principles appropriate to the "special case" of "legal discourse".[107]

The "meta-norms" of the special case of legal discourse have a different formulation from that which they have in the case of general practical discourse. An important reason for this, one is given to consider, resides in the fact that law and legal dogmatics narrow down the range of application of practical discourse in legal reasoning.[108]

THE INTERNAL FORUM [109]

To the extent that legal justification is premised upon discourse and consensus of a hypothetical character, it implicates, for Alexy, a measure of uncertainty.[110] Yet it seems that he does not consider this to vitiate the utility of the "meta-norms" of discourse theory in the legal context.[111] It appears, upon his conception, that they do not cease for this reason to apply as criteria for the justification of first-order normative statements in law.[112]

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[106] For the "meta-norms" of "general practical discourse" as formulated by Alexy, consult Alexy *op cit* 297-300 (appendix).
[107] For the "meta-norms" of "legal discourse" as formulated by Alexy, see Alexy *op cit* 300-302 (appendix).
[108] Alexy observes that legal discourse differs from general practical discourse in the important respect that is proceeds within the confines of the legal system. See Alexy *op cit* 212, 220 and 272.
[109] The term "internal forum" as used to designate the inner locus of private (mental) cogitation, as appears from the foregoing discussion, has been taken from Habermas. Once again, see Habermas "Justice and Solidarity" in Fisk *op cit* 89 95. See also 4.1.5., above.
[110] See Alexy *op cit* 294.
[111] *Ibid.*
[112] *Ibid.*

4.3. EVALUATION

It requires no great insight to appreciate that the conception of the "ideal speech situation" may prove problematic of deployment in day-to-day legal argumentation. It is simply fraught with too many imponderables, representing, however otherwise Habermas may see it, a "detached" procedural-rational utility (at any rate for legal purposes). In colloquial discourse, actual or soliloquized, there are almost invariably factors operating to preclude an uncoerced consensus. External and internal discursive inhibitions as well as strategic manipulation of the communicational process[113] by participants intent upon having their way speak very much against the possibility of dissipating distortions in communication. (The same remarks would seem to apply with respect to parallel notions advanced by Alexy.)

But this much is not to argue that no variant on the Habermasian theme is deserving of consideration for our purposes. What we have to do in order to avoid an appeal to the will-o'-the-wisps of his design is to bring Habermas very much closer to the ground. We have to furnish him with a more tangible instrumentation.

4.3.1 For the objectives of expiscating a substitute for a rule or principle no longer deemed worth of continued existence in the *common-law context*, the instrumentation in question is provided by translating Habermas's ideal of "communication free from domination" into the paradigm of "*rational forensic*

[113] See in this regard Habermas *Moral Consciousness and Communicative Action passim.*

deliberation". [114] This paradigm represents a procedural rationality that is both contextualized and situated.

For, after all, it is this mode of argumentation (the procedural rationality of the courtroom) in which the jurist has been nurtured. She appeals to its norms and standards by the very nature of things. We may say, then, that "rational forensic deliberation" represents an internalized legal-discursive model.

The internalized structure of "rational forensic deliberation" relieves the jurist of having to appeal to the vague and indeterminate meta-norms of the "ideal speech situation". The point is that she already has a presuppositional basis for rule- or principle-selection.

4.3.2 Where a rule or principle of *customary law* (in one or other of its mangled versions) speaks for a replacement, matters are otherwise. Since an entirely different cultural context is at issue, and since its worldview is so fundamentally at odds with the western equivalent,[115] it is submitted that there can be nothing to supplant "*actual deliberation*" among traditional experts and non-expert community assessors (sitting together with the judicial officer) as a means to finding a substitute rule or principle. Actual deliberation is not to be conceived as a construct. It is a reference to an *actually occurring discourse.*

We see, then, that in the customary-law context, the variant on the Habermasian design presenting for appropriation is actual deliberation, real dialogue. It is

[114] This is a reference to the manner of arguing cases in court. "Rational forensic deliberation", understood thus, is a variant on the Habermasian theme, grounded in solidity.

important to note that where cherished organizational arrangements are at issue, it may not be indicated to follow Habermas in his intimation that a discourse should seek to detach itself from its localized particularity in quest of generalizability. For if a culture constitutes the locus of the self-identity of its members, it may be wise not to seek to disrupt its wholesome features in order merely to implement some more "generalized" norm or principle.

It is submitted, therefore, that actual deliberation should be tied very closely to the localized particularity of the setting of legal adjudication in the indigenous-law context.

With this exposition of critical argumentation,[116] we turn to consider the nature of the raw material upon which it is to work in the interests of adducing an apt rule- or principle-substitute.

5. THE MATTER OF CONTENT

Whereas the previous head (4) was concerned with procedure, what claims our attention here is substance. Our focus is shifted to the nature of the raw material from which a new rule or principle might be fashioned to take the place of the old.

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[115] We deal with this matter in greater detail in Chapter V of this study, more particularly at 3.

[116] It may be of interest to note that Jackson has sought to bring to bear upon the theory of argumentation in law his particular version of Greimasian structuralist semiotics. For a controversial thesis, one might consult Bernard S. Jackson *Semiotics and Legal Theory* (1985) *passim*. Jackson's more recent thinking finds expression in Bernard S. Jackson's *Making Sense in Law* (1995), and Bernard S. Jackson *Making Sense in Jurisprudence* (1996).

Although Unger probably did not intend his work to be appropriated in quite the way it is in what follows, it is proposed to tap his insights to profit in relation to the issue as identified. Let us hear what he has to say.

5.1 ROBERTO UNGER AND LEGAL DOCTRINE

Unger conceives his version of critical legal scholarship as a means to the "disentrenchment" of the "formative contexts" of social life, such that these contexts will ever remain open to self-revision.[117] For him, "formative contexts" represent "frozen politics",[118] and the notions of "disentrenchment" and "negative capability" point the way to continued self-correction.[119] Disentrenched contexts are not so much weaker structures as frameworks embodying resources for their own differential reproduction.[120]

Unger considers conventional legal practice simply to confirm a given "formative context" in its own entrenchment.[121] He therefore ventures that an "expanded doctrine" ("enlarged doctrine") is essential to his project of an "empowered democracy".[122] This expanded or enlarged doctrine is continuous with conventional sources, but proceeds outwards ultimately in defiance of them.[123]

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[117] See R.M. Unger "The Critical Legal Studies Movement" 1983 96 *Harvard Law Review* (3) 563 648-651. See also, incidentally, R. M. Unger *Social Theory* (1987) 156.
[118] See R. M. Unger "The Critical Legal Studies Movement" 1983 96 *Harvard Law Review* (3) 563 649.
[119] *Ibid* 650: "Disentrenchment means not permanent instability, but the making of structures that turn the occasions for their reproduction into opportunities for their correction." As to the notion of "negative capability", see *Ibid:* "Negative capability is the practical and spiritual, individual and collective empowerment made possible by the disentrenchment of formative structures."
[120] See *Ibid* 651.
[121] This seems to be the tenor of the first part of his article. *Ibid* 563-586.
[122] *Ibid* 576ff. On p 592 is spoken of an "empowered democracy."
[123] *Ibid* 577-8 *et passim.* See, especially, 602ff.

What he speaks of as "deviationist doctrine" is here at issue.[124] Unger proposes that deviationist doctrine illustrates the "contentious internal development" of received doctrine and arrangements.[125]

Unger, as seen, speaks of an "enlarged" or "expanded" doctrine. As a proponent of critical legal scholarship, he seeks to broaden the ambit of "legitimate doctrinal activities".[126] He would therefore take "extant authoritative materials" as points of departure for an elaboration of the proposed "deviationist doctrine".[127]

"Deviationist doctrine" is thus predicated upon "internal development".[128] It premises itself upon what there is already. Aspects of the legal tradition which are partially submerged may be used as starting points for the construction of an alternative doctrine.[129] Thus is brought out Unger's disillusionment with mainstream legal scholarship.

5.2. A NEW TWIST TO UNGER: "READY-MADE DEVIATIONIST DOCTRINE"

Unger's conception of "deviationist doctrine" apparently embraces academic doctrinal elaborations taking as their premises those aspects of conventional legal doctrine which are normally submerged. It is avowedly "anti-utopian", in that it claims extant materials to constitute its supportive matrix, but it is nonetheless rarefied and rather indeterminate of denotation. For this reason, it is submitted that

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[124] See article, *passim*.
[125] *Ibid* 673.
[126] *Ibid* 577.
[127] *Ibid* 577 ff.
[128] *Ibid* 580 and 582. See in particular the discussion at 582.
[129] *Ibid* 618: "Though the counterprinciples may be seen as mere restraints upon the principles, they may also serve as points of departure for a different organizing conception of [a] whole area of law."

"deviationist doctrine", upon the Ungerian appropriation, represents too indistinct a source of reference to be employable upon a ready and easily defensible basis by the practising jurist.

I have coined the term "*ready-made deviationist doctrine*" to signify something other than what Unger has in mind. By virtue of its semantic denotation exclusively (and not by reason of the specific meaning he attaches thereto), the term "deviationist doctrine" sounds as a fitting appellation by which to designate doctrinal replacements or substitutes. The circumstance that the term emanates from Unger is in some sense contingent: the simple fact is that it has the right ring. "Ready-made deviationist doctrine", as the phrase is used in this thesis, is to be appropriated as a reference to *already existing doctrinal sources* (even if such existence be but implicit) *which provide the raw material for the fashioning of replacements or substitutes for legal rules or principles deemed unworthy of perpetuation.* Our legal heritage, explicit and implicit, the norms of public international law, and comparable foreign materials count as among these sources. The "living" indigenous law, and the jural postulates underlying that law, are also to be ranked as "ready-made deviationist doctrine" (where the case implicates an indigenous-law context).

The norms and standards of "ready-made deviationist doctrine" require to be consistent with the "new hermeneutical awareness" (as actualized by the constitutional dispensation) if they are to serve as dispositive principles in the legal

forum.[130] Accordingly, only those which are imbued with a *natural-law-type* constituency[131] should, I submit, be eligible for application.

6. CONCLUSIONS

A (1) The "new hermeneutical awareness" provides a basis for legal-ideological critique. It has a natural-law-type constituency. When this "awareness", which the jurist brings to bear upon her perception of a rule or principle, meets with opposition, one has to do with "dissonance" Elision of the rule or principle in question may then be indicated.[132]

(2) If the "new hermeneutical awareness" is properly honed, it should be capable of giving one to be able to discern whether an ostensibly innocuous rule or principle (one that is not "obdurate" on the face of it) should be jettisoned. An example is provided in the model.[133]

(3) The "new hermeneutical awareness" should further be capable of assessing whether a particular dispensation for which the law apparently does not make provision is in need of remedy. Two hypothetical cases are discussed in the model.[134]

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[130] It will be remembered that it is inconsistency with the "new hermeneutical awareness" that prompts the rejection of a particular rule or principle. It should be obvious that it is to be required that a potential substitute be in conformity with this "awareness".

[131] The "new hermeneutical awareness", as explained under 3., above, has a natural-law-type constituency.

[132] See the exposition under 3. above. For the relevance of the matter under A(1) for our purposes, see Chapter VII, at I (4), in particular.

[133] In this regard, the reader is referred to Chapter VII of this study, under I (4)4.5.

[134] See, in this connection, Chapter VII of this thesis, under I (3)3.1.

B (1) The "new hermeneutical awareness" to be brought to bear upon the construction of indigenous-law sources is capable of full realization only from within the framework of reference of the autochthonous world-view.[135] (This explains why it is recommended that there be "community participation" in the taking of decisions.)

This "new hermeneutical awareness" is called into being by the Constitution and its values – *but as these are interpreted in their "proper cultural perspective" and in line with indigenous jural postulates*.[136] The norms of public international law also go into the making of this "awareness".[137] These norms, however, are to be construed within the indigenous cultural context,[138] as it is submitted.

(2) The "new hermeneutical awareness" to be brought to bear upon indigenous-law sources is, as it follows,[139] of a *somewhat different complexion* from that operative in dealing with common law (or statutes).

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[135] This aspect is explored more fully in Chapter V of this study, under 3. Consult Chapter VII, at II (2)(1).
[136] In Chapter V of this study, it is sought to substantiate this insight (under 3.).
[137] Or so, at any rate, I would submit. This is because the value-order immanent in the Bill of Rights is defined to some extent with reference to the norms of public international law. See, again, section 39(1)(b) of the Constitution. Consult Chapter VII, at II (2)(1).
[138] This submission imports that their appropriation should be context-sensitive. Consult Chapter VII, at II (2)(1).
[139] From B(1), above.

(3) If this "awareness" (of an indigenous-law complexion) meets with opposition (in the form, say, of a distorted, text-book formulation of the law), one has to do with "dissonance". It may then be indicated to jettison the rule or principle in question.

C (1) If a rule or principle of our law has been elided, something may require to be done in order to secure a replacement.[140]

(2) It should be endeavoured in eliciting such a replacement to establish some sort of "*continuity*" with our legal tradition. Recourse should therefore be had to what is already immanent in our legal tradition – even if it does not find express formulation.[141] Seeking "continuity" on this basis speaks to approximately the same concerns as does Perelman's "principle of inertia".

(3) The procedures implicit in "*rational forensic deliberation*"[142] are to be deployed in order to identify an appropriate element of "*ready-made deviationist doctrine*"[143] to serve as a replacement. The doctrine latched upon would require to comport with the "new hermeneutical awareness" (and its implicit natural law).[144] What is said here (at C (3)) applies to the *common law.*[145]

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[140] See the discussion in the text, under 3., above.
[141] See the discussion of the cases in Chapter VII at I (4)4.4 in this regard.
[142] See the exposition in the text, under 4.3.1., above.
[143] Refer to the text, under 5.2., above.

(4) In the *indigenous-law context*, what is denoted by "*actual deliberation*"[146] is to be deployed to the end of identifying an appropriate element of "ready-made deviationist doctrine" to serve as a replacement. In this context, the "ready-made deviationist doctrine" to be seized upon is constituted of an appropriate amalgam of "*living law*" and *indigenous jural postulates*[147] as established by means of "actual deliberation".[148] The dispositive precept would require to comport with the "new hermeneutical awareness" (of a somewhat different complexion from that operative in the common law). This differently constituted "awareness" is equally imbued with a *natural-law-type* constituency, however.

D In instances of "*dissonance*", it is more than likely that some sort of overruling of precedent cases will be necessary. In South Africa, as in England,[149] overruling is of retrospective effect. Lloyd and Freeman explain that retrospectivity implies that a prior decision found to be manifestly unjust or absurd is declared not merely to have been bad law, but not to have been the law at all.[150]

Prospectivity, on the other hand, refers (in its most straightforward sense) to the applicability of the rule to be jettisoned to the case at

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[144] The jettisoned element of the legal tradition was expunged by reason of its incompatibility with the "new hermeneutical awareness". It should not require stating that the element elected to serve as a substitute is to measure up to compatibility in this regard.
[145] Consult Chapter VII, at I (4)4.2 (and 4.2.1) in this regard.
[146] See the exposition in the text, under 4.3.2., above.
[147] This aspect will be enlarged upon in Chapter VII of this study, at II.
[148] See Chapter VII, at II (1)1.2 (and 1.2.1) in this connection.
[149] See D. Lloyd and M.D.A. Freeman *Introduction to Jurisprudence* (1979) 856.
[150] *Ibid.*

hand – with the substitute rule of novel conception declared as applicable to future instances of the same type.[151] Prospective overruling on this basis, Lloyd and Freeman observe, is not without its drawbacks, however.[152] With this, one may note that certain variants on the theme have been proposed.[153]

There may be something to be said for the "prospective overruling" of precedent in one or other of its variants in a particular instance of "dissonance".[154] Propriety in this regard is to be adjudged with reference to all the relevant circumstances.

[151] *Ibid* 857-9.
[152] *Ibid.*
[153] *Ibid.*
[154] Consult Chapter VII, at I (4)4.1 in this regard.

IV

THE "IDEALIZED MODEL" OF ADJUDICATION: AN APPRAISAL OF ITS SHORTCOMINGS

1. INTRODUCTION

David Kairys speaks of the "idealized model" of law-application.[1] Such a model presupposes, for one thing, that "the law on a particular issue is pre-existing, clear, predictable and available to anyone with reasonable legal skill".[2] For another thing, it assumes that "the facts relevant to the disposition of a case are ascertained by objective hearing and evidentiary rules that would reasonably ensure that the truth will emerge".[3] All that requires to be done in order to determine the outcome of the particular case is to apply the self-evident proposition of law to the facts as incontrovertibly established.[4] Any reasonably competent and fair judge will arrive at the correct decision.[5]

The "idealized model" of adjudication evokes the image of the judge as an automaton. Upon its conception, she is to proceed much as might a properly programmed computer fed with all appropriate information. Yet, Kairys notes, it is this model (perhaps in a "softer" form to allow

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[1] See David Kairys *The Politics of Law* (1982) 2.
[2] *Ibid* 1-2.
[3] *Ibid.*
[4] *Ibid:* "[T]he result in a particular case is determined by a rather routine application of the law to the facts...."
[5] *Ibid:* "[E]xcept for the occasional bad judge, any reasonably competent and fair judge will reach the 'correct' decision". It is of importance to note that Kairys himself opposes the assumptions of the 'idealized model" of judging.

for the humanness of the judge[6]) which commands the general public perception.[7] It is a comforting representation; for it depicts the judicial function as in alignment with the desideratum of fidelity to law in a manner most readily assimilable to popular appreciation.

1.1. OBJECTIVES OF THIS CHAPTER

It is a proposed in the pages that follow to subject the "idealized model" of adjudication to analysis, and in that process to bring out its shortcomings. Such deficiencies as are identified as intrinsic to the conception are sought to be addressed with reference to what actually occurs in practice.

In the light of insights pointed up by these practicalities, a more faithful portrayal of adjudication is provided.[8] This is done with a view to its incorporation in the theoretical disquisition furnished in Chapters VI and VII of this study.

2. THE "IDEALIZED MODEL" CLOSELY EXAMINED

It would be as well in introducing the discussion to look at the structure of the syllogism as suggestive of a hypothetico-deductive methodology of law-application.

We may turn initially to consider the "aletheic syllogism":

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[6] The observation enclosed in parentheses is mine.

All x are Y. This is the major premise.
x^1 is an x. This is the minor premise.
x^1 is Y (Conclusion)

This is the basic format of the Aristotelian syllogism.[9] It will be noticed that Hirsch's class-instance model is very much in point.[10] In the above example, "x" represents a "class". Y is denotative of an attribute of that "class". The term "x^1" stands for an "instance" of the "class" represented by "x". And from this we able to deduce (infer) that the quality denoted by Y inheres in x^1.

The major premise is established by way of *induction.* This means that in the light of the entirety of our prior experience[11] no instance of x has been found which does not bear the quality of Y.

The minor premise is established by way of observation. It is an embodiment of a proposition which is considered to be self-evident. By virtue of one's familiarity with the class denoted by "x", one is in a position to claim that "x^1", is an instance of that class.[12] (This represents the process of *subsumption.*)

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[7] See Kairys *op cit* 2.
[8] See under 3., below (Conclusions to this chapter).
[9] The Aristotelian syllogism is often exemplified as follows: All men are mortal (major premise) Socrates is a man (minor premise) Therefore: Socrates is mortal (conclusion). If x is taken to represent the class "men", Y the attribute of mortality, and x1 Socrates, the symbolic format in the text is translatable into the above syllogism.
[10] See Chapter I, under 4.2.2. and 4.2.3. for details.
[11] Of course, an exceptional instance may be chanced upon in our subsequent experience. Even a single exception would show the major premise to be false. Popper's work is important in this regard. See the writings of Popper as listed in the bibliography, and his scholarship generally.

The conclusion is established by way of *deduction.* Assuming the validity of the major and minor premises, it follows automatically that the instance "x^1" bears the attribute of Y.

It is considered that Aristotle would have confined the applicability of the "aletheic syllogism" to the natural world. Let us turn our attention to the variant of the syllogism that may be taken as applicable in the legal setting.

If p then q (Major premise)

p (Minor premise)

∴ q (Conclusion)

This is what is spoken of as the "normative syllogism". For purposes of this discussion, the major premise represents a proposition of law, and the minor premise one of fact.

To establish the major premise, one has merely to find the appropriate rule or principle of law in the authoritative sources, or, if necessary, to distil such from case-law precedents by way of *induction.*

In our example, the major premise, "If p then q", is the pertinent proposition of law. The term "p" stands for the operative facts, and the term "q" for the legal consequences. Such is the structure of the majority of legal rules or principles: if such and such are the facts (p), then the legal consequences will be thus and so (q). (Such a formulation, it must be noted, captures

[12] Seeing that one has been exposed to many books (the "class"), one is able to say that this particular "object' is an "instance' of the "class", that is, is a book.

"prescriptive" legal rules and principles, not their "descriptive" counterparts. A rule to the effect that "a minor is a person under age x", for instance, is not capable of being accommodated within its symbolic schematic.)

The minor premise, being a proposition of fact, is elicited by way of techniques and methods sanctioned by the *law of evidence.*

Deduction is at issue where it is found that the minor premise, in the example above, is indeed represented by "p". In that event, it would mean that the designated legal consequences (q) are to be implemented.

It is observed that the "idealized model" of adjudication partakes very much of the character of what might be termed the "rigid normative syllogism".[13] (Some scholars contend, however, that the greater part of legal reasoning proceeds along the lines of the "enthymeme" or "rhetorical syllogism".[14] This means that the operative reasoning is non-syllogistic,[15] but is merely subsequently forced into the semblance of a syllogism.)

As will be seen in the course of this essay, we elect to abide with notions of the "normative syllogism" and "subsumption". But the "rigid normative syllogism" is rejected out of hand. The latter construct is incapable of accommodating the *evaluative dimension* of legal argumentation.

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[13] This is my coinage.

[14] In some such vein as this, Farrar proposes that legal reasoning is in its essence practical reasoning. See John H. Farrar *Introduction to Legal Method* (1977) 51 – 2.

2.1. THE NEED FOR INTERPRETATION

Thus far, the discussion under 2. has assumed the brute givenness of legal propositions and operative facts[16]. This has been done for the sake of simplifying the argument at its outset. In order to bring the exposition more into line with the actualities of adjudication, it is necessary to suggest certain corrective qualifications. These relate most notably to the question of interpretation.

Suppose that we have a legal rule, "If p then q". Such a rule does not exist in uninterpreted form. It requires construction. By the same token, the facts brought to light in terms of the law of evidence are not uninterpreted data. It is only when both the law and the facts have been properly construed that the "normative syllogism" is amenable to activation (or inactivation), and the process of subsumption set in motion (or stultified). This will become clearer in due course.[17]

Chapter II of this study has shown that the normative text (in which the legal precept expressible as "If p then q" is embodied) does not bear a determinate meaning which is forever stable.[18] The positivist presuppositions of any such idea falter when it is considered that the "meaning" of that text is dependent upon the interpreters's "prejudice-horizon" and the

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[15] See, in this regard, William Zelermyer *Legal Reasoning* (1960) 4: "[I]f logic enters the picture it comes in incidentally and not deliberately". Note, further, the classic dictum of Oliver Wendell Holmes as cited in Richard A. Wasserstrom *The Judicial Decision* (1961) 16: "[T]he life of the law has not been logic; it has been experience".
[16] See, in particular, the conclusions to this chapter, under 3., below, at A for criticism of this view.
[17] The conclusions, under 3., below, are once again indicated for consultation, particularly at C (1) – (4).
[18] See Chapter II of this study, especially, under 3.4.8., dealing with the "undecidability thesis".

"question" she puts to the text out of "claim of the now", out of the problem with which her resources are confronted.[19] In different contexts, the same normative text would "mean" different things. (We have seen how this implies that the distinction between "meaning" and "significance" breaks down.[20])

The "meaning" that *emerges* in the hermeneutical process is not something actively pursued. It is rather a matter thrusting itself upon the interpreter, so to speak. She is confronted with a "meaning" which is a function of her "pre-understanding" and the "question" she must inevitably put to the text by reason of the problem pressing for its resolution.[21] (Endowed with a "pre-understanding" of a different constitution, or faced with a problem of a different order, the interpreter would be confronted with a different "meaning".)

That the "meaning" of the normative text cannot be fixed once and for all is implied in Gadamer's "undecidability" thesis.[22] The text does not have a meaning "in itself" independently of any interpretive context.[23] The Hirschean programme loses much of its force when confronted with this consideration. That is why the conception of a pre-existing legal precept to be found "out there", somehow, in a pre-interpretive form, which Hirsch's model would seem to sponsor, does not appear well-founded.

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[19] See Chapter II, generally.

[20] See, in this regard,, Chapter II, under 3.4.7., setting out a rejection of the dichotomous perception of "meaning" and "significance". See, further, 3.4.8., describing the "undecidability" thesis.

[21] For an exposition of these issues, see Chapter II *passim.*

[22] Once again, refer to Chapter II, under 3.4.8.

[23] It is Hirsch's view that "meaning" somehow resides "in" the text. He is therefore to be classified as a hermeneutical realist. It will be recalled that, for Hirsch, "meaning" cannot transcend the semantic possibilities of the symbols employed. See E.D. Hirsch *The Aims of Interpretation* (1976) 87. Consult, further, the discussion in Chapter II of this study, under 4.2.

It is for this reason that the normative syllogism resists deployment along mechanical lines. The major premise is not "out there", patiently awaiting the jurist's appropriation thereof. Nor, for that matter, is the minor premise a recalcitrant, brute datum. What are to count as the "facts" is a matter of interpretation no less than the question as to what is to be accounted the legal precept. It is the selfsame *pre-understanding* which informs the understanding of the normative text that is involved in the processing of the "facts". The "facts" are understood as such in virtue of this pre-understanding.

2.2 PERCEPTIONS IN THIS VEIN AS REGISTERED BY LEGAL SCHOLARS

Just in case the insights as expressed above seem eccentric or counterintuitive, it is necessary to record the views of scholars of eminent standing tending to their confirmation. The "idealized model" of adjudication bolsters public confidence in the administration of justice, seeing that it is popularly considered that is on the strength of its underlying assumptions that the rule of law, understood as fidelity to legal precept, is upheld.[24] It has been seen, however, in the course of Chapter II of this study, that fidelity to law does not imply automaticity, and that it is most sensibly conceptualized in terms of the notion of "purposiveness".[25] This point will receive further clarification in the course of the present chapter.[26]

For the moment, it is sought to be content with an exposition of the perspectives of legal scholars having a bearing upon the discussion under 2. and 2.1, above.

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[24] See this chapter, under 1., above (the introduction).
[25] See Chapter II, under 5 (treating of fidelity to law and responsiveness).

Varga argues that the "ideal of logical deducibility" is at a remove from the reality of judicial decision-making.[27] Holmes's dictum to the effect that the life of the law has not been logic so much as experience, she reflects, militates against the relegation of the administration of justice to an exercise of a mere mechanical order.[28] Herz claims, in keeping with this, that the proposition that "the greater includes the lesser", though sounding right, is in law only sometimes true.[29] That evaluative elements enter into the constitution of the judicial decision over and above stringent ones seems to be implicit in Herz's repudiation of the formula as a magic solvent of difficulties.[30]

Alexy cites Larenz to the effect that one can no longer seriously maintain that law-application is simply an exercise of subsumption "under abstractly formulated major premises".[31]

Kelsen, likewise, is astute enough to perceive the vacuity of any version of the 'idealized model" of law-application: "the individualization of a general norm by a judicial decision is always a determination of elements which are not yet determined by the general norm and which cannot be completely determined by it".[32] This is a tacit disavowal of the possibility of reasoning in the legal forum from antecedently available premises.

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[26] See the present chapter *passim*, and particularly under 3., the conclusions.
[27] See Csaba Varga "Heterogeneity and Validity of Law: Outlines of an Ontological Reconstruction" in C.Varga(ed.) *Law and Philosophy* (1994) 209 213.
[28] See Csaba Varga "Macrosociological Theories of Law: A Survey and Appraisal" in C.Varga *op cit* 43 54.
[29] See Michael Herz "Justice Byron White and the Argument that the Greater includes the Lesser" 1994 *Brigham Young University Law Review* 227 227.
[30] *Ibid passim.*
[31] See Robert Alexy *A Theory of Legal Argumentation* (1989) 1. *Ibid*: "This observation by Karl Larenz marks one of the few points of agreement in contemporary discussions of legal methodology".
[32] See Hans Kelsen *General Theory of Law and State* (1961) 146.

Tur states Kelsen's position to be that a "general norm" laid down by the legislature is "incomplete".[33] It is brought to refinement and completion in its application to specific situations.[34]

Bentham espoused the "idealized model" of adjudication. On Berger's account, Bentham considered that legal problems would automatically find their resolution upon application of the provisions of the law, if set out in the definitive language of codification.[35] This was Bentham the legal positivist.

Berger relates that history has demonstrated the falsity of Bentham's assumptions.[36] The French experience gives the lie to any belief that judges can read off solutions to problematic instances without creative involvement.[37] Judicial *evaluation* is integral to the legal-hermeneutical enterprise, something which apparently eluded Bentham.

Fuller presses the argument that no statute emanates from the legislature in a fully "made" form.[38] A rule of law prohibiting vehicles in the park, for example, stands in need of interpretation.[39] *Evaluation* is necessary. For the jurist is not to be guided simply by the

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[33] See Richard Tur "Positivism, Principles and Rules" in Elspeth Attwooll(ed.) *Perspectives in Jurisprudence* (1977) 42 64.
[34] *Ibid:* "In its application to the fact-situations of concrete cases [the general norm] is refined and completed".
[35] See Michael Berger "Codification" in Attwooll *op cit* 142 144 –5.
[36] *Ibid.*
[37] *Ibid:* "[T]he experience of the French codes, and particularly that of the French civil code, shows that their success owes a greater deal to the continuing creativity of the judges entrusted with the interpretation of their provisions".
[38] See Lon L. Fuller *Anatomy of the Law* (1968) 59 *et passim.*
[39] *Ibid* 58.

wording.[40] She must have regard, too, to some notion of "what is fit and proper to come into a park".[41]

Nerhot points to the inadequacies of the "idealized model" of law-application when he dismisses as naïve the notion that legal rule and fact "are supposed to be presented, fully elaborated, to an interpreter , who has only to fit them together in order to be able to lay down the law".[42]

Alf Ross suggests that it is apparently a "universal phenomenon to pretend" that law-application is a matter of logical deduction from juridical precepts pure and simple.[43] Evaluation on the part of the judge is implicated.[44] Dias is to the same effect: "Nothing could be further from the truth than the belief that judges simply apply laws".[45]Evaluative considerations are operative in the adjudicative process.[46]

It is when one begins to consider the pervasiveness of reasoning by analogy[47] in the law that the "idealized model" of adjudication first threatens to falter. The model at issue is premised on inductive and deductive reasoning exclusively. But these types of reasoning avowedly ignore the role of evaluation in the legal process. It is in analogical reasoning that evaluation in law poses itself as a force of moment.[48]

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[40] *Ibid* 59.
[41] *Ibid.*
[42] See Patrick Nerhot "The Law and its Reality" in P. Nerhot (ed.) *Law, Interpretation and Reality* (1990) 50 52.
[43] See Alf Ross *On Law and Justice* (1974) 154.
[44] *Ibid.*
[45] See R.W.M. Dias *Jurisprudence* (1976) 293.
[46] *Ibid:* "The very nature of the process imports choice and discretion which are guided by values".
[47] See Peter Goodrich *Reading the Law* (1986) 77: "Analogy...plays a pervasive...role in legal reasoning and legal justificatory argument."

Hahlo and Kahn describe analogical reasoning as "an imperfect form of induction from one particular to an adjacent one".[49] It involves, says Goodrich, the "predication of a relevant similarity between the precedent and instant cases".[50] He continues that *evaluation* is essential to the drawing of analogies.[51]

Cairns claims that it is only very exceptionally that the solution to a juridical dilemma would hinge upon a purely logical argument.[52] Devenish notices consistently herewith that juridical reasoning involves a "deontic element".[53] This implicates evaluation in the ethical and moral sense.[54]

Cockrell draws attention to Dugard's critique of the judiciary under the old order;[55] judges conceived their interpretive function in very narrow terms.[56] This was a "mechanical" or "phonographic" conception,[57] downplaying the role of *legal values* in interpretation.[58]

Cowen in the same spirit registers his agreement with Dugard that statutory interpretation cannot proceed on the lines of an algorithm.[59]

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[48] *Ibid.*
[49] See H.R. Hahlo and E.Kahn *The South African Legal System and its Background* (1968) 308.
[50] See Peter Goodrich *Reading the Law* (1986) 77.
[51] *Ibid.*
[52] See Huntington Cairns *Legal Philosophy from Plato to Hegel* (1967) 14 – 15.
[53] See G.E. Devenish "The Nature of Legal Reasoning involved in the Interpretation of Statutes" 1991 *Stell LR*(2) 224 235.
[54] *Ibid.*
[55] See Alfred Cockrell "Rainbow Jurisprudence" 1996 12 *SAJHR* (1) 7-8.
[56] *Ibid* 8.
[57] *Ibid.*
[58] *Ibid.*
[59] See D.V. Cowen "The Interpretation of Statutes and the Concept of 'The Intention of the Legislature'" *Casebook for the Interpretation of Statutes* (Unisa) (1986) 100 115.

With this we may note with Dlamini that legal positivism has helped to sustain the myth that the courts function mechanically (especially in the enterprise of statutory interpretation).[60]

These reflections, it is submitted, are enough to support the contentions raised earlier bearing adversely on the representative accuracy and quality of the "idealized model" of judging. What has perhaps not been brought to the fore in quite the requisite degree, however, is the negation of a categorical disunion of "law" and "facts" that is implied in the repudiation of the "idealized model". It is to this matter, then, that we now turn.

2.2.1. THE DISJUNCTION OF "LAW" AND "FACTS" RELATIVIZED

Zaccaria speaks of the relativization of the distinction commonly erected as between the "quaestio iuris" and the "quaestio facti".[61] Rigaux similarly contends it to be misguided to conceive of an absolute disjunction of "pure normativity" from "the reassuring coarseness of facts".[62]

Kaufmann's conception of law-application is instructive in this regard. In practical lawyering, what is required is, on the one hand, a *"construction of the case"*, and, on the other, an *"interpretation of the norm".*[63] In the "construction of the case", the essentials of the case are worked out in the light of the norm. In this way is produced a *Sachverhalt,* a "legally relevant

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[60] See A.M. Dlamini "Is there a Literal Interpretation in Law?" 1991 6 *SAPL* (1) 16 30.
[61] See G.Zaccaria "Hermeneutics and Narrative Comprehension" in P.Nerhot (ed.) *Law, Interpretation and Reality* (1990) 251 272.
[62] See. F. Rigaux "The Concept of Fact in Legal Science" in Nerhot *op cit* 38 39. At 46, Rigaux exclaims that "the fact is inseparable from the single legal description that necessarily belongs with it. Accordingly, the distinction between fact and law must be judged as artificial...."

case".[64] In the "interpretation of the norm", what is required is its concretization in the light of the case at hand. The product is a *Tatbestand,* a "normative framework that can accommodate reality".[65]

It is of importance to note that, for Kaufmann, the *"construction of the case"* and the *"interpretation of the norm"* are not consecutive in point of time.[66] They "coincide in a relation of mutual conditioning".[67] What is accomplished is a "correspondence" of case and norm speaking to a *Sachverhalt* and a *Tatbestand.*[68]

Nerhot asserts in this vein that "the assignment of meaning to a legal text and its application to a specific case" constitute a "unitary process".[69]

Varga proposes conformably that legal reasoning does not proceed in essentials from "some *formally* ambiguous deductive subsumption" (emphasis added).[70] The "decisive moment" is represented rather by the formulation of the major and minor premises (propositions respectively of "law" and "fact") in the "concrete-sociological-situation of law-application"[71] (that is, I submit, the concrete-existential context).

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[63] See Arthur Kaufmann "Preliminary Remarks on a Legal Logic and Ontology of Relations" in Nerhot *op cit* 104 111.
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] See Patrick Nerhot "Interpretation in Legal Science: The Notion of Narrative Coherence" in Nerhot *op cit* 193 214.
[70] See Csaba Varga "Law as a Social Issue" in C. Varga *Law and Philosophy* (1994) 459 463 – 4.
[71] *Ibid.*

Let us tie together these thoughts with the insight of phenomenological hermeneutics that *application* is integral to the interpretation of a legal rule or principle. Goodrich claims it to be "meaningless" to speak of *the sense of a rule or principle* in abstraction from "*the moment and situation of its application*" in a court judgment.[72]

2.2.2. THE "PRE-UNDERSTANDING" AS MAKING FOR NORM-FACT COINCIDENTATION

The substance of Chapter II of this study was devoted in a very large measure to the analysis of the fore-structuration of understanding.[73] In order to understand something, it is necessary that one be equipped with a "frame of reference" by which such understanding may be oriented. Simply put, meaning-apprehension requires some prior appropriation of the subject-matter at issue, in a word, a "pre-understanding".

The "tradition" of appropriation of any given subject-matter constitutes the source of those "pre-understandings" which make possible, and condition the quality of, meaning-apprehension within a specific context.[74] Implied in this observation is the fact that "pre-understandings" are socially conditioned. In the sphere of law, the academic and practical training of the jurist, as also her experience as a participant in social life, go into the making of her juridical "pre-understandings".

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[72] See Goodrich *Reading the Law op cit* 159 – 60.
[73] See Chapter II, generally, and, in particular, the discussion under 3.4.4.
[74] See Chapter II, under 3.4.5., especially.

In reading a legal provision, the jurist is *already conceptualizing concrete situations* to which it apparently is of application. And this she does on the basis of a "preliminary understanding" of that provision – a "pre-understanding".

The "pre-understanding" in question makes possible a sort of *"pattern-matching"* of the *hypothetical concrete situations* the jurist has in mind and any *real concrete situations* with which she may be confronted. The "ought" (the norm) and the "is" (the facts), which, by reason of their functioning at different levels, would otherwise be entirely incommensurable, lend themselves to *"coincidentation"*[75] upon the strength of a socially-conditioned *"pre-understanding"*.

2.2.3. "NARRATIVE MODELS" OF TYPIFICATIONS OF ACTION, LOADED WITH TACIT SOCIAL EVALUATIONS

Nerhot claims that to understand a legal text is to *represent situations to oneself* upon the basis of its reading.[76] A "quasi-identification" with the "facts" as presented is possible by virtue of this *representation of situations.*[77]

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[75] I take the term "coincidentation" from Arthur Kaufmann "Preliminary Remarks on a Legal Logic and Ontology of Relations" in Nerhot *op cit* 104 111 – 2.

[76] See Patrick Nerhot "Interpretation in Legal Science: The Notion of Narrative Coherence" in Nerhot *op cit* 193 220.

[77] *Ibid* 222. It is possible that Nerhot takes the term "quasi-identification" from Ricoeur. Nerhot continues (at 222): "Understanding a text, interpreting, is bound up with the representation of reality; a mimetic activity, as Ricoeur says, insofar as it produces something, namely specifically the arrangement of facts through their being fitted into the plot".

Jackson proposes, in substantially the same vein, that the understanding of abstract legal propositions and conceptions proceeds by way of subconscious *narrative models of typifications of action* and our reactions to them.[78] The particular *explicit narrative* of the minor premise is subsumed within the legal proposition at hand by virtue of a perception of *sufficiency of similarity.*[79] Jackson advances herewith that "the narrative construction of fact [in the courtroom] is compared with the *narrative model* underlying the (often conceptually expressed) rule of law to be applied".[80] (emphasis added)

It is to be considered, in the light of these reflections, that the conception of a *"pre-understanding"* (alternatively, a *"prejudice-horizon")* may be taken as synonymous in principle with what Jackson refers to as a *"narrative model of typifications of action, loaded with tacit social evaluations".*

2.2.4 THE "NORMATIVE SYLLOGISM" AND "PURPOSIVENESS"

So we see that underlying any legal proposition of a prescriptive sort is a *"narrative model" of typifications of action, loaded with tacit social evaluations.* This is more or less what Gadamer would refer to as a *"pre-understanding".* It informs the jurist's perception of the *"norm"* and the *"arrangement of facts",*[81] organizing them into a *stable configuration (Gestalt)* of *"legal*

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[78] See Bernard S. Jackson "The Normative Syllogism and the Problem of Reference" in Nerhot *op cit* 379 396.
[79] *Ibid* 397.
[80] *Ibid* 399.
[81] I take the conception of an "arrangement of facts" from P. Nerhot "Interpretation in Legal Science: the Notion of Narrative Coherence" in Patrick Nerhot (ed.) *Law, Interpretation and Reality* (1990) 193 222. My appropriation of this conception seems to be somewhat at odds with Nerhot's use of the term.

norm" and *"legal facts".*[82] It is on the basis of this Gestalt that the "normative syllogism' is activated, alternatively inactivated.

Now, read with the proper *"purpose"*, and looked upon in the light of the *"context of social realities"* (to which context such "purpose" subsumes a commitment), the legal proposition concerned may be rendered open to conceptualization from an *"adjusted prejudice-horizon"* (to perception by way of a *novel "pre-understanding").* This may give the *evaluative dimension of the "narrative model"*[83] underlying the proposition to undergo an *adjustment.* In this event, the *"norm"* and the *"arrangement of facts"* would be organized into a *new stable configuration (Gestalt)*[84] of *"legal norm"* and *"legal facts".* This is as much as to say that subsumption may variously take its course or be precluded where the converse was the position formerly.

3. CONCLUSIONS

A (1) The "idealized model" of adjudication found an esteemed exponent in the persona of Pollock. Pollock registered the assumption that the "same decision always happens on the same facts".[85] Goodhart, in explicating Pollock's standpoint, spoke of the determination of a dispute in a way that might have been predicted in advance. The law reports, so it was contended, provide the material for such prediction.[86]

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[82] I have come by the notion of a "stable configuration" or "Gestalt" as here employed on the basis of Jackson's exposition of the work of J.B. Best in B.S. Jackson *Making Sense in Jurisprudence* (1996) 154.

[83] We have seen that Jackson speaks of a "narrative model of typifications of action, loaded with tacit social evaluations". By reason of this qualitative ladenness, it appears to me legitimate to write of the "evaluative dimension" of such a "narrative model".

[84] See n82, above.

[85] See Sir Frederick Pollock "The Science of Case Law" in F. Pollock and A.L. Goodhart (ed.) *Jurisprudence and Legal Essays* (1963) 169 171.

[86] See A.L. Goodhart in Pollock and Goodhart *op cit* xxxii (Introduction)

It has been made plain in the course of this chapter that the sort of "slot-machine jurisprudence" which these views tend to suggest is not, and cannot be, reflective of the judicial function. Levi, for one, imports that the idea that the law is a system of antecedently available rules which are applied by a court is a "pretence".[87] The rules, he proceeds, undergo modification with their application.[88]

Jensen, for another, proposes that legal reasoning, though cast in the mould of inference, scarcely ever partakes in essence of inferential processes.[89]

(2) With this it is proposed[90] that syllogistic subsumption under known rules along mechanical lines fails to capture the kernel of law-application. Lubowski implicitly impugns the credentials of this way of looking at things – as expressed in the "idealized model" of adjudication.[91]

B One should add, perhaps, that the "idealized model" also fails to reckon with the contingency of the absence of a clear and unmistakably self-evident rule or principle to govern the case. In such an instance, the major premise of the normative syllogism being a matter for discovery, *second-order justification* would be required.[92]

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[87] See E.H. Levi *An Introduction to Legal Reasoning* (1949) 3 – 4.
[88] *Ibid.*
[89] See O.C. Jensen *The Nature of Legal Argument* (1957)1.
[90] By the present writer, that is.
[91] See A.Lubowski "Democracy and the Judiciary" in H. Corder (ed.) *Democracy and the Judiciary* (1989) 13 14.
[92] See D. Neil MacCormick *Legal Reasoning and Legal Theory* (1978) 101 ff.

C (1) The "pre-understanding" the jurist brings to bear upon her perception of a legal provision is the operative factor in making for the activation, alternatively the inactivation, of the normative syllogism. Spoken of also as a "prejudice-horizon" or a "narrative model" (of typifications of action, loaded with tacit social evaluations), it informs the jurist's understanding both of the *"norm"* and of the *"arrangement of facts"* presenting for disposition.[93]

(2) "Pre-understandings" are socially conditioned. In the sphere of law, the academic and practical training of the jurist, as also her experience as a participant in social life, go into the making of her juridical "pre-understandings". One may say, then, that "pre-understandings"[94] have an *evaluative dimension.*

(3) In informing the jurist's perception of the "norm" and the "arrangement of facts", the "pre-understanding" organizes them into a *stable configuration (Gestalt)* of *"legal norm"* and *"legal facts"*. It is on the basis of this Gestalt that the "normative syllogism" is activated, alternatively inactivated.[95]

(4) Now, if the legal provision is read with the right "*purpose*" (as informed, among other things, by the spirit of the Constitution), and looked upon in the light of the *"context of social realities"* (to which context that "purpose" subsumes a commitment), the provision in question may be rendered open to conceptualization from an *"adjusted*

[93] See the discussion under 2.2.2., above.
[94] See the discussion under 2.2.2., above.
[95] See the discussion under 2.2.4., above.

prejudice-horizon" – or, otherwise stated, to perception by way of a *novel "pre-understanding"*. We have seen, under C(2), above, that "pre-understandings" have an *evaluative dimension.* Accordingly, the evaluative dimension of the *"narrative model"* underlying the provision would undergo *adjustment.* In such a case, the "norm" and the "arrangement of facts" would organize themselves into a *new stable configuration (Gestalt)* of *"legal norm"* and *"legal facts"*. And subsumption would occur where previously it did not – or would be precluded where formerly it took its course.[96]

D It is now appropriate to embrace the opportunity of exemplifying these insights. Let us assume the existence of a prohibition reading that dogs are not to be brought into the park.[97] To it we shall refer as the *"norm"*. Suppose, further, a tame cheetah to be left prowling in the park, whether or not on a leash. To this we shall refer as the *"arrangement of facts"* (or the "unprocessed facts").

It is obvious that the application of the "rigid normative syllogism" would preclude subsumption. A cheetah is simply not a dog. The bye-law, upon this conception, would be inapplicable to the case at hand.

But this would be a disposition suitable only to a mechanical jurisprudence. The "pre-understanding" brought to bear upon the perception of the "norm" in the event of acceding to this sort of logomachy would be that of a socially-conditioned literalism.

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[96] For the relevance of the discussion under C (1) – (4) for our purposes, the reader is referred to Chapter VI, at III (2) and Chapter VII, at I (2)(5) – (7).

[97] This is an adapted version of an illustration furnished in G.E. Devenish "The Nature of Legal Reasoning involved in the Interpretation of Statutes" 1991 *Stell LR* (2) 224 227.

If approached with the appropriate sort of *"purpose"* – which is sensitive to the *"context of social realities"* – the bye-law would lend the *evaluative dimension of the "narrative model"* underlying it to undergo an *"adjustment"*. This would mean that the evaluative dimension of the "pre-understanding" which the jurist brings to bear upon her perception of the "norm" takes on a new character.

The *novel "pre-understanding"* ("narrative model") would organize the "norm" and the "arrangement of facts" (unprocessed "facts") into a *new stable configuration (Gestalt)* of *"legal norm"* and *"legal facts"*, such that the normative syllogism would be activated and subsumption given to take its course. The person allowing the cheetah to prowl in the park will be convicted of transgressing the bye-law.

It is to be observed that, in accordance with this axiologically more satisfactory approach, the "norm" and the "arrangement of facts" are interpreted in a one-step operation. There is no brain-racking work to be performed concerning the meaning of the word "dog" in the major premise (the "norm") or the taxonomic status of a "cheetah" in the minor premise (the "arrangement of facts").

In the following chapter, we are specifically concerned with what axiological adequacy commands in virtue of the Grundnorm-order established by the Constitution. Among the matters discussed is the quality of the "purpose" which the jurist is to bring to bear upon her perception of a legal provision. This is most decidedly an issue about which the Constitution

has something to say. And we shall also see how the "context of social realities" (to which "purpose" is committed) is to be conceptualized in the light of constitutionalism.

V

THE NEW GRUNDNORM-ORDER: A CONSIDERATION OF ITS IMPLICATIONS FOR LEGAL ARGUMENTATION

1. INTRODUCTION

Thus baldly stated, the title of this chapter is likely to sound presumptuous. The ramifications into forensic argument of the new Grundnorm-order are probably so many, so great a horde, that any attempt to define them within the compass of a single chapter in an academic treatise would be susceptible to a response of bemused sympathy for a pathetic naïveté. In defence of the undertaking, it is noted that what is here sought to be set forth are the specifically jurisprudential, or legal-philosophical, implications of the new Grundnorm-order for legal argumentation, and nothing of the detail or particulars.

In this chapter we are principally interested in illuminating the influence of the Constitution on the "purpose" which the jurist brings to bear upon her perception of the law. And since that "purpose" subsumes a commitment to the "context of social realities",[1] we are at the same time interested in discerning the lines along which the latter context is to be conceptualized. The insights acquired in pursuance of these objectives find their enumeration in the conclusions to this chapter.[2]

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[1] For a prefigurative account of "purpose" as committed to the "context of social realities", see Chapter IV of this study under 2.2.4. and 3. (the latter being the conclusions to the chapter). See also Chapter II, under 6.E. (of the conclusions).

[2] See the conclusions at 4., below.

In view of the consideration that western law and indigenous law go out from entirely different premises,[3] it seems fitting to discuss the subject-matter of this chapter as it pertains to their respective spheres under different heads. Concordantly, the concluding observations registered in this chapter bear a different complexion in accordance with whether they treat of western law or indigenous law.[4]

2. THE SPHERE OF WESTERN LAW

Here one is concerned with legislation and with the Roman-Dutch and English constituents of our legal heritage, as amplified by case-law authority. The jurisprudential implications of the new Grundnorm-order for legal argumentation in this sphere now serve for discussion.

2.1 THE GRUNDNORM

Kruger identified as the *Grundnorm* of Chapter III of the Interim Constitution the notion of a "democracy based on freedom and equality".[5] The parallel notion of an "open and democratic society based on human dignity, equality and freedom" suggests itself as the *Grundnorm* of the legal dispensation ushered in by the Final Constitution.[6]

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[3] See, in this regard, G.J. van Niekerk *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective* (unpublished LL.D. thesis) (1995) 168: "Indigenous laws are underscored by wholly different jural postulates. Indigenous starting points for legal reasoning are different and this makes the conceptions of law and justice in an indigenous context very different to the Western conceptions".

[4] See the conclusions under 4., below.

[5] Chapter III of the Interim Constitution was the Bill of Rights. For an exposition of the Grundnorm of Chapter III as Johan Kruger perceived it to be, see J. Kruger "Is Interpretation a Question of Common Sense? Some Reflections on Value Judgments and Section 35" 1995 28 *CILSA* (1) 1 15ff.

[6] This is my own observation, based on Kruger's exposition.

Constitutional interpretation, it seems, is at bottom concerned with making choices on the basis of those express and implicit values which are integral to this notion. These values lend themselves to sharper definition (and perhaps amplification) when seen in the light of the norms of public international law, which the court is obliged to consider in interpreting the Bill of Rights.[7] It may accordingly be ventured that the new *Grundnorm* has been defined to some extent with reference to international-law standards.

Since these standards are assumed to reflect a more or less universal acceptation, they constitute, or may be deemed to constitute, a type of *natural law.* Recourse to comparable foreign law, on the authority of the permissive stipulation contained in section 39(1)(c),[8] may render this natural law easier of appropriation in some degree. The universal "communis opinio populi", so far as ascertainable, may be taken as a criterion of axiological adequacy in the law.

Seeing that all law is to comport with the *Grundnorm,* every legal precept is in principle measurable for compliance with the postulates of the natural law described.

2.2 THE GRUNDNORM AND NATURAL LAW

Botha advances that the notion of the material *Rechtsstaat* refers to a political order committed to a "system of fundamental values".[9] This is substantially what the Constitution is designed to implement[10] – as with written constitutions the world over.

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[7] See section 39 (1)(b) of the Final Constitution (Act 108 of 1996).
[8] See this stipulation in Act 108 of 1996 (the Final Constitution).
[9] See C.J. Botha *Statutory Interpretation* (1996) 14.
[10] Together with an infrastructure providing for the separation of powers, checks and balances, and the principle of legality, among other things perhaps. See Botha *loc cit.*

Boulle, Hoexter and Harris write that in the American constitutional amendments of 1787, the "natural rights of moral philosophy" found formulation as foundational positive-law equivalents.[11]

Brown writes that American constitutional theory resonates with the idea of natural-law philosophy.[12] The doctrine of "judicial supremacy", he says, is illustrative in this regard.[13] Brown contends that "historical evidence" demonstrates both the American Constitution (with its Bill of Rights) and the Magna Carta to have been renderings of natural law.[14]

Lloyd proposes that the [United States] Constitution is, at bottom, a "natural-law document".[15] It allows for the assimilation to the corpus of the law of "natural rights", providing for their "recognition and enforcement as legal rights".[16]

Erasmus says that the notion of the "constitutional state" imports that governmental power is subject to "higher constitutional values".[17] Such power should be exercised so as to promote these values[18] – values of a natural-law description.[19]

One might observe, tangentially, that the presumptions of statutory interpretation have at times been regarded as a common-law surrogate for a Bill of Rights.[20] Devenish asserts

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[11] See L.J. Boulle, C. Hoexter and B. Harris *Constitutional and Administrative Law* (1989) 29.
[12] See B.F. Brown "Natural Law: Dynamic Basis of Law and Morals in the Twentieth Century" in Mark R. MacGuigan *Jurisprudence* (1966) 310 315.
[13] *Ibid.*
[14] *Ibid.*
[15] See Dennis Lloyd *The Idea of Law* (1964) 84.
[16] *Ibid.*
[17] See Gerhard Erasmus "Limitation and Suspension" in D. van Wyk, B. de Villiers, J. de Waal and D. Davis *Rights and Constitutionalism* (1994) 629 635.
[18] *Ibid.*
[19] That they are of a natural-law description is my own reflection, not Erasmus's.
[20] See L.M. du Plessis and J.R. de Ville "Bill of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects" 1993 4 *Stell LR* (3) 356 361.

that they reflect a natural-law jurisprudence.[21] If this is so, one may consider the fundamental-rights provisions, which assimilate the purport of these presumptions,[22] to be declaratory of iusnaturalist assumptions.

The natural law in contemplation is one which may be described as *"reasonably objectively ascertainable"*.[23] It may be identified as the emerging "communis opinio populi" of civilized nations, determinable to some extent by recourse to the norms of public international law, and ascertained with greater facility, perhaps, by reference to judgments of foreign jurisdictions.

Cockrell suggests that the new constitutional dispensation holds out the invitation to embrace substantive as opposed to merely formal reasoning in law.[24] He raises in this regard the notion of *moral and political reasoning.*[25] This conception should, it is submitted, be informed by emerging trends in international human-rights law – in order to establish alignment with the purport of *natural law.*

2.3 SPECIFIC ISSUES

Cockrell expressly states that reasoning on the basis of a fundamental-rights document is not likely to proceed without difficulty.[26] There are specific issues which are liable to bring numerous problems in their wake in this regard. It is necessary o expound these

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[21] See G.E. Devenish *Interpretation of Statutes* (1992) 221.
[22] That the fundamental-rights provisions assimilate the purport of the presumptions is registered implicitly in C.J. Botha *Statutory Interpretation* (1996) 52.
[23] My own wording.
[24] See A. Cockrell "Rainbow Jurisprudence" 1996 12 *SAJHR* (1) 1 *passim,* esp. at 8.
[25] *Ibid* 10.
[26] *Ibid* 12, where Cockrell claims that constitutional adjudication is all about hard choices.

instances of special complexity in order the better to come by a faithful understanding of what the "new hermeneutical awareness"[27] involves. The first of these issues is represented by the liberty-equality dialectic.

2.3.1 THE LIBERTY-EQUALITY DIALECTIC

Du Plessis and Corder write that neither an invariably "freedom-centred" nor an invariably "equality-centred" reading of the provisions of the Bill of Rights is to be indicated in constitutional interpretation.[28] They propose that "[i]instead a hermeneutical equilibrium will somehow have to be achieved".[29]

MacCormick points to the "standing tension" between liberty and equality:[30] "Individual freedom in a market economy can and does result in great inequalities of material well-being".[31] The "good society", he proffers, is one which seeks to hold in balance the ideals of "liberty" and "material equality".[32]

It is interesting to note in this regard that Currin and Kruger propose that "liberty" and "equality" should be "mutually complementary".[33]

MacCormick advances that a legal order maximizing the freedom of property-owners (with regard to their property) and encouraging the most extensive freedom of "market

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[27] To be discussed subsequently under 2.4., below.
[28] See L.M. du Plessis and H. Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 140.
[29] *Ibid.*
[30] See D. Neil MacCormick *Legal Right and Social Democracy* (1982), preface v.
[31] *Ibid.*
[32] *Ibid.*
[33] See B. Curring and J. Kruger "The Protection of Fundamental Rights in the Constitution of the Republic of South Africa, 1993: A Brief Contextualization" in J. Kruger and B. Currin (eds.) *Interpreting a Bill of Rights* (1994) 132 136.

transactions" would arguably defeat the objective of substantive equality.[34] Restrictions on the liberty of property-owners and market liberties, he proposes, may therefore be justified in order to secure fairness in economic terms.[35]

For all this, he contends it to be a "bogus argument" to suggest that "bourgeois liberties" such as "freedom of speech, freedom from arbitrary arrest and seizure, freedom of religion, conscience, and opinion, freedom to come and go in public places as one chooses, political rights of participation"[36] and the like militate against "a fair distribution of economic goods".[37] These liberties are essentially "neutral" insofar as the "distribution and allocation of economic goods" is concerned.[38]

Having taken these points, we acquiesce in the following observations as registered by their respective authors:

(1) Davis, Chaskalson and De Waal write that the principles immanent in the constitutional text may constitute a warrant for the development, where necessary, of *positive rights* (as distinct from exclusively "negative defensive rights") securing for all South Africans *equal* participation in the shaping of their political destiny.[39]

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[34] See MacCormick *op cit* 148-9.
[35] *Ibid*: "[T]here is good ground for arguing that liberty of property-owners and market liberties ought to be restricted to whatever extent is necessary to secure other no less basic rights to individuals".
[36] *Ibid* 149-50.
[37] *Ibid.*
[38] *Ibid.*
[39] See D.M. Davis, M. Chaskalson and J. de Waal "Democracy and Constitutionalism: The Role of Constitutional Interpretation" in D. van Wyk, B. de Villiers, J. de Waal and D. Davis *Rights and Constitutionalism* (1994) 1 126 (my emphasis).

With this, the authors contend that we should not be held to a merely formal conception of "equality".[40] The status of the millions of poverty-stricken South Africans should decidedly not be left out of account.[41]

Davis states that we have much to learn from the experience of the Indian Supreme Court for purposes of our own constitutional enterprise. The post-Emergency Court demonstrated its commitment to egalitarianism in its interpretation of the Indian Constitution.[42] Davis cites the court in this regard to the effect that "equality must not remain a mere idle incantation but must become a living reality for the large masses of people".[43]

(2) Du Plessis writes that second-generation rights are capable of being harnessed so as to render more meaningful the liberal-democratic rights of the first-generation categorisation.[44] Instancing the right to a fair trial as a fundamental first-generation right, he claims that it is diminished in significance if a party to a law-suit is unable to afford legal representation.[45] However, should the state be required by reason of "second-generation impulsion"[46] to provide such representation, the right to a fair trail would acquire more substantial meaning.[47]

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[40] *Ibid* 129.
[41] *Ibid.*
[42] See Dennis Davis "Equality and Equal Protection" in Van Wyk, De Villiers, De Waal and Davis *op cit* 196 204.
[43] *Ibid.*
[44] See L.M. du Plessis "Conceptualising 'Law' and 'Justice'(2): Just Legal Institutions in an Optimally Just Society" 1992 3 *Stell LR* 357 369.
[45] *Ibid.*
[46] "Second-generation impulsion" is my own coinage.
[47] See Du Plessis *op cit* 369: "[The right to a fair trial] can be fully and 'richly' restored if the state can – in a 'second-generation fashion' – be compelled to act positively and provide the ... party with a legal representative".

(3) Hawthorne contends that parties to contracts seldom transact upon a footing of true equality. The author further maintains that many contracts are concluded from necessity.[48]

With this, she subjects the theory of the matter to critical examination. "Freedom of contract" presupposes the possession of equal resources by the bargaining parties. The actual resources of the contracting parties should be taken into account by the law by reason of inequality in fact. The "equality" provision in the Constitution, Hawthorne urges, may be harnessed in the interests of incorporating the doctrine of inequality into the law of contract.[49]

2.3.2 PERSONHOOD AND THE COMMUNITY

Another issue of special complexity speaks to the relationship between the "self" and the community, and the role of the law in its mediation. This is an issue to which the ongoing debate between liberals[50] and communitarians is very much addressed. It goes to the matter of personal identity.

In MacCormick's assertion that "human individuality presupposes social existence"[51] and in Popper's argument from the "autonomy of sociology",[52] one is able to discern an

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[48] See L. Hawthorne "The Principle of Equality in the Law of Contract" 1995 58 *THRHR* (2) 157 163.
[49] *Ibid 176.*
[50] See John Rawls *A Theory of Justice* (1972) for an elegantly written, very comprehensive and even moving exposé of the liberal position. It was intended to serve as a riposte to utilitarian views which at the time of its writing were gaining politico-theoretical ground. The book, in its turn, elicited a response from those who considered liberalism to be inadequately attuned to the significance of "community" for social existence. Theorists who took up this position were to become known as "communitarians".
[51] See MacCormick *Legal Right and Social Democracy op cit* 251.
[52] See Karl R. Popper *The Open Society and its Enemies* (Vol II) Chapter 14. Popper's thesis is that sociology is not reducible to psychology (*Ibid* 89). It is rather the case that psychology should be interpreted in the light of sociology (*Ibid* 93).

affirmation of antiatomism.[53] This means that personal identity does not predate participation in social life. There can be very few indeed who, today, would accede to atomism in its stark claims.

Plato and Aristotle appear to be the archetypal communitarians in western political theory. Cairns explicates Plato's attitude as opposed to the individual interest as such.[54] Van Eikema Hommes reveals Aristotle's ethics to argue along the same lines.[55]

It is important to observe that both Plato and Aristotle identified the "community" with the *polis*, the city-state of Greek conception. State and community are thought of synonymously. The political organization was the community.

Avineri and De-Shalit observe that it is not quite true to say that communitarians all propagate the interests of the political community.[56] Concededly, some do, notably Walzer, who identifies the community with one's country.[57] Others, however, see the community in non-political terms.

2.3.2.1 With the above by way of introductory orientation, it is now turned to consider briefly some historical perspectives bearing upon the contemporary debate as between liberals and communitarians.

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[53] See Stephen A. Gardbaum "Law, Politics and the Claims of Community" 1992 90 *Michigan Law Review* 685 733ff for an account of the position going by the name of "antiatomism".
[54] See Huntington Cairns *Legal Philosophy from Plato to Hegel* (1967) 41.
[55] See H.J. van Eikema Hommes *Major Trends in the History of Legal Philosophy* (1979) 29.
[56] See S. Avineri and A. de-Shalit (eds.) *Communitarianism and Individualism* (1992) 8.
[57] *Ibid.*

Cairns writes that upon the Kantian paradigm that type of society which assured the highest degree of liberty was to be regarded as the best.[58] Right signified the conditions under which the actions of one person could be harmonized with those of every other in terms of a "universal law of freedom".[59]

Kant, taking the position of extreme subjectivism, proposes that "autonomy.... is the basis of the dignity of human....nature".[60] Such a view presupposes that "personality" is temporally prior to communal experience. To that extent it must be rejected.

Hegel provides something in the way of a corrective to Kantian subjectivism. He writes that "the particular person is essentially so related to other particular persons that each establishes himself [sic] and finds satisfaction by means of the others....",[61]

Individual interest is dependent upon the "community" or "communities" in which "personhood" is sourced. The welfare of such "community" or "communities" therefore constitutes a bulwark against alienation or anomie. Hegel is here in point: "Particularity by itself, given free rein in every direction to satisfy its needs, accidental caprices, and subjective desires, destroys itself and its substantive concept in this process of gratification".[62] It is paradoxical, though

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[58] See Cairns *op cit* 395.
[59] *Ibid* 396.
[60] See Immanuel Kant "Fundamental Principles of the Metaphysic of Ethics" in J.W.G. van der Walt (compiler) *Reader for LWE406L, LWE407-M and MSRGLW-3* (1991) 124 162.
[61] See G.W.F. Hegel "Philosophy of Right" in Van der Walt *op cit* 170 170-1.
[62] *Ibid* 171.

nonetheless apparently true, that individual interest and the interest of the "community" or "communities" at issue may at some point concur.

2.3.2.2 So much by way of historical orientation. A fleeting reconnaissance of contemporary thought is now in order.

Daniel Bell puts forward the communitarian thesis as telling against central premises of liberal-political theory. Liberalism does not, upon its postulates, account adequately for the importance of community "for personal identity, moral and political thinking, and judgements about our well-being in the contemporary world".[63]

Mulhall and Swift point out that a major plank in the communitarian critique of liberalism is represented by the claim that the latter misconceives the degree to which the communal sphere defines personal identity and shapes values.[64]

Communitarians believe that liberalism is unable to accommodate the dimension of "commitment". Their charge is that it downplays the significance of those obligations which are constitutive of personal identity.[65] Personal autonomy, as conceived upon classical-liberal premises, it is claimed, is chimerical as a characterization of what "personhood" implies.[66]

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[63] See Daniel Bell *Communitarianism and its Critics* (1993) 4.
[64] See Stephen Mulhall and Adam Swift *Liberals and Communitarians* (1992) 13.
[65] See Allen E. Buchanan "Assessing the Communitarian Critique of Liberalism" 1989 *Ethics* 852 852-3, for a potted summary of some of the more significant themes in communitarian thought. Buchanan, it is to be noted, does not subscribe to communitarianism as conventionally portrayed: "I will argue that liberal society affords impressive resources for making and sustaining commitments, resources that communitarians have underestimated." (*Ibid* 867)
[66] Communitarians in any meaningful sense of that designation would assent to this thesis. For substantiation of the thesis, see S. Woolman and D. Davis "The Last Laugh: Du Plessis v. De Klerk, Classical Liberalism,

2.3.2.3 It is not proposed in this study to equate the notion of "the polity" with that of "community". Any such equation would lose sight of the fact of cultural diversity within the South African society. There are many and various "communities" in our "polity" – communities which make for the flourishing of "personhood". It is not inconceivable that a subject's personal identity may find its anchorage in more than a single "community". Ethnic communities, vocational communities, religious communities – these and others may constitute the loci of an individual's self-identity, making her what she is. And we must not neglect to mention "communities of choice" (as contrasted with "communities of origin") as possible sources of identity. No doubt the fact of being-a-South-African-citizen (or a person subject to South Africa's legal jurisdiction) may also, through her subjection to the state's laws, operate to some extent in constituting the person who she is. But that the polity should alone determine an individual's self-identity is a perception that simply glosses over the role in this regard of constituent communal configurations.

One has to guard against the error of the "communitarian shuffle": the facile equation of "polity" and "community".[67] The "polity" is to be taken, it is submitted, as synonymous with the overarching "political community", embracing numerous, diverse, sometimes but not invariably overlapping "communities".[68]

Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions" 1996 12 *SAJHR* (3) 361 386ff.

[67] See Woolman and Davis *op cit* 388 n 86.

[68] I have been unable to trace the source of this insight, but it is probable that it is Charles Taylor's. Woolman and Davis *op cit* 387 n 86 speak of "linguistic, religious, social, class, racial, ethnic, gender, national and political groupings which may overlap, but which are never identical, and which often conflict with one another".

The terms "polity" and "community" should therefore be employed carefully, with due regard to their distinctive denotations.

The polity (or state) should additionally be distinguished sharply from the notion of "civil society".[69] The latter may be taken as a reference to the interlocking network of relationships among people generally. The version of communitarianism adopted in this study is within a "delimited zone" (as suggested by real, genuinely (and not merely presumed) convergent interest) sensitive to the interests of civil "society" as thus defined. In the adjudicative forum, this would translate into promoting socio-economic equality and suppressing violent and appropriative crime, among other things.

But the version of communitarianism we adopt (in addition to looking to the interests of civil "society" within the "delimited zone" as described) speaks far more pertinently to the interests of the various constituent "communities" within the larger "society". Insofar as individuals find their self-identity and "personhood" in virtue of their immersion in any one or more of these "communities", it would seem necessary that the interests of such communal configurations be protected. It is submitted that an autochthonous "community" would serve as a case in point (assuming always that it is benign and non-oppressive).

In the light of this discussion, it is possible to conceive of the "public interest" as bearing a dual reference. On the one hand, it may be taken to connote the interests

[69] Totalitarian states apparently do not observe any such distinction. See J.L. Brierly *Law and Government* (date of publication unspecified) 30.

of the society in its larger conception (within the "delimited zone"). On the other, it is to be appropriated as denoting the interests of the particular community or communities at issue in the case. When the jurist undertakes to serve the "public interest", she should seek to ensure - where this is necessary – that both categories of interests are catered for, and the context of the case will determine where the emphasis is to reside in the circumstances.

One is impressed with the idea that the Constitution implicitly mandates a concern for the public interest in both of its references. The Constitution displays quite unambiguously a solicitude for the dignity and worth of the individual.[70] But if the dignity and worth of the individual is to receive proper consideration, the interests of the community or communities in which her "personhood" is sourced should be adequately accommodated within the juristic evaluation. The public interest as it pertains to the "community" of "communities" at issue is therefore implicitly purveyed in the Constitution.

Furthermore, the public interest as it pertains to the larger civil "society" seems to be vouched for in the scheme and structure of the Constitution in both explicit and implicit terms.[71]

2.3.3 JUSTICE AND THE CONSTITUTION

A third issue of special concern pertains to the inherence of aspirations of substantive justice in the constitutional ordering itself.

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[70] The entirety of the Bill of Rights (Chapter II of the Constitution) speaks in this vein.
[71] The preamble, the founding provisions and the Bill of Rights are most telling in this regard.

It is here to be noted that one must not lose sight of its "justice"-objectives in reading the Constitution. The solemn commitment to "social justice" in the preamble is telling in this regard. Furthermore, the *Grundnorm* we have identified as an "open and democratic society based on human dignity, equality and freedom"[72] implicitly suggests a balancing of interests with a view to actualizing these aspirations. What Cornell refers to as a "synchronization of interests"[73] is here in point.

At many points in the Constitution is a balancing of interests more or less explicitly conveyed. Here one thinks of the general limitation clause[74] and the various internal limitations.[75]

With these reflections in mind, one would not be unjustified in asserting that it is integrally a part of the design of the Constitution that the interests of "justice" should be serviced. Its scheme and structure implicitly mandates the "doing of justice".

(When reading the Constitution in an indigenous-law context, the notion of "justice" should be taken up in a manner in keeping with indigenous-law conceptions. This imports an accent not on the equilibration of conflicting rights, but on the reconciliation of the

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[72] See the discussion under 2.1., above.

[73] See Drucilla Cornell "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation" 1988 136 *University of Pennsylvania Law Review* 1135 1211. Synchronization speaks to "competing rights situations and real conflicts between the individual and the community". (*Ibid*)

[74] See section 36 (1) of the Constitution.

[75] An instance of an internal limitation is to be found in section 16 (2) of the Constitution, which provides express derogation from the right to freedom of expression (as set out in section 16 (1)). Another is to be found in section 22, which, after stipulating that every citizen has the right to choose her trade, occupation or profession freely, goes on to provide that the practice thereof may be regulated by law.

parties to the dispute, and the restoration of harmony in the community. More on this later.)[76]

In an article published prior to the advent of constitutionalism, Van der Vyver proposed that as much "justice" be read into the law as the words would permit.[77] This proposal was meant to apply not only to legislation (original and delegated) but also to case-law precedents and the common law.[78] It is submitted that Van der Vyver's point would be *a fortiori* of relevance under the present dispensation.

2.3.4 THE APPLICATION OF CONSTITUTIONALLY ENTRENCHED RIGHTS IN THE CONTEXT OF RELATIONSHIPS APPARENTLY UNREGULATED BY RULES OF LAW[79]

Something must be said of this matter at this point. The operation of fundamental-rights provisions in the context of relationships ostensibly ungoverned by rules of law has been a controversial issue. Such operation has been opposed upon the apparent assumption that, in Woolman's words, "judicial review [of this area of social life] poses a significant threat to personal and group autonomy in this country".[80]

The conception of autonomy reflected in this assumption is that purveyed by classical liberalism. It is a notion of formal autonomy. If one is prepared to endorse a more substantive notion of personal autonomy (in which the socially-constructed nature of the

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[76] See the discussion under 3.1., below.
[77] See J.D. van der Vyver "The Jural Credo: Justice as the Essence of Legal Ethics and a Component of Positive Law" 1989 52 *THRHR* (2) 157 179.
[78] *Ibid.*
[79] See Woolman and Davis *op cit* 401-3 n 119 for a discussion of this matter.

personality is recognized), the objection to the application of constitutionally-entrenched rights to relationships of the type described falls away.[81]

2.3.5 DRITTWIRKUNG: CONSTITUTIONAL PENETRANCE

It is proposed to touch briefly upon this issue here. The doctrine of "irradiation" derives from the experience of German constitutional law. "Drittwirkung", as it is otherwise know, implies that all rules of the ordinary law are to be construed and applied in the light of the supreme law.[82]

"Drittwirkung" is of two types – direct and indirect. The direct version posits the extension of fundamental-rights provisions to cover the relationships between legal subjects on a horizontal basis.[83] The indirect version, on the other hand, is simply an injunction to the courts to ensure that the fragrance of those provisions be allowed to permeate the interpretation of all legal norms.[84] In Germany, it is "indirect Drittwirkung" that is generally accepted.[85]

Both direct and indirect Drittwirkung seem to be stipulated for in our Constitution. That direct horizontality is contemplated appears to admit of no doubt.[86] Yet this circumstance does not preclude "mittelbare Drittwirkung" where such is indicated.

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[80] See S. Woolman "Defamation, Application and the Interim Constitution: An Unqualified and Direct Analysis of Holomisa v Argus Newspapers Ltd." 1996 113 *SALJ* (3) 428 448.
[81] See Woolman and Davis *op cit* 401-3 n 119 in this regard.
[82] See Davis, Chaskalson and De Waal *op cit* 89.
[83] *Ibid* 92.
[84] This is also known as "mittelbare Drittwirkung".
[85] See Davis, Chaskalson and De Waal *op cit* 92.
[86] Sections 8 (2) and (3) bear this out very amply.

In Chapter II, mention was made of the so-called "categories of illusory reference" in the law. Stone was seen there to urge that these allow for judicial responsiveness in the appropriate degree.[87]

In Chapter III, it was noticed that certain proponents of critical legal scholarship have contended that these selfsame "categories" allow for the infusion into the law of judicial ideology in the pejorative sense.[88]

"Mittelbare Drittwirkung" on the basis of the Constitution would permit the jurist to clear the hurdle of excessive "openness" in the law as well as that represented by the defeatism of authors such as Goodrich. Sensitivity to "purpose" and the "existential context" would make for "mittelbare Drittwirkung" in what, it is submitted, is the most appropriate fashion.[89]

2.4 THE "NEW HERMENEUTICAL AWARENESS"

This matter was broached at length in Chapter II of this study.[90] It refers to the jurist's "sense of justice", from which certain presuppositions or "prejudices" have been expunged, and into which other, novel, ones have been incorporated – all this with reference to the constitutional enterprise.[91]

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[87] See Chapter II of this study, under 2. (dealing with American realism and responsiveness).
[88] See Chapter III of this study, under 2. (especially the discussion of Goodrich's standpoint, under 2.1.).
[89] See Chapter IV of this study, under 3. (the conclusions), especially at C(4), where the significance of "purpose" and the "context of social realities" is brought out. (Note that the "existential context" is synonymous with the inclusive "context of social realities".)
[90] See Chapter II of this study, under 3.4.10.a. and 3.4.10.b.
[91] See also Chapter III of this study, under 3., for a short exposition of the "new hermeneutical awareness".

In the course of the present chapter, we have expounded the relevance of the new Grundnorm-order and the natural law it has imported.[92] The *"new hermeneutical awareness"*, correspondingly, would partake of such a *natural-law* constituency.

In addition, we have in the course of this chapter dealt with specific issues[93] which are liable to throw up problems of a legal-political character. *The "new hermeneutical awareness" should display a committed sensitivity to these issues* – the liberty-equality dialectic, personhood and the community, justice and the Constitution, fundamental-rights application in the context of relationships ostensibly ungoverned by rules of law, and the matter of constitutional penetrance.[94]

It seems as if there is something going for Davis's insight that constitutionalism is about contestation.[95] Davis maintains in the same breath that fixation upon "ordinary language" speaks to "political closure".[96] The "new hermeneutical awareness" should accordingly be re-invigorated where necessary – by way of debate, dialogue and reference to the emerging consensus of values of the "communis opinio populi".

2.5 THE "NEW HERMENEUTICAL AWARENESS", "PURPOSE" AND THE "CONTEXT OF SOCIAL REALITIES"

(1) Suffused with the "new hermeneutical awareness", the jurist would bring the appropriate "purpose" to bear upon the "context of social realities" for which her

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[92] See 2.1. and 2.2. of this chapter.
[93] For a discussion of these specific issues, see 2.3., as also the sub-paragraphs, 2.3.1., 2.3.2., 2.3.3., 2.3.4. and 2.3.5.
[94] See the cross-references noted under n93, above.
[95] See Dennis Davis "The Twist of Language and the Two Fagans: Please Sir May I have some More Literalism!" 1996 12 *SAJHR* (3) 504 508.

determination is to provide. We see, then, that "purpose" subsumes a commitment to the "context of social realities" by the very nature of things.

(2) "Purpose" is informed by the constitutional design. Since, as we have seen, it is integrally a part of that design that the objectives of "justice"[97] should be serviced, "purpose" is further informed by those objectives. "Justice" implies a "synchronization" of interests[98] - public and private, as well as competing private, interests. Whatever the nature of the dispute, public interest should be taken into account – insofar, at least, as it relates to the "community" or "communities" sourcing personal identity.[99]

(3) The "context of social realities" (of which the "facts" of the case constitute a component) pertains most notably to such issues as:

(i) the importance of transparency[100] in the course of political and public activity;

(ii) the human, social and economic aspects relevant to the determination;[101]

(iii) a concern for the "community" or "communities" which constitute a source of "personhood";[102]

(iv) the exigencies of life in, and the welfare of, the larger "society";[103]

(v) a concern for human dignity[104] and substantive equality;[105] and

(vi) a concern for liberty (in its proper conception).[106]

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[96] *Ibid.*
[97] See the discussion under 2.3.3. of this chapter.
[98] See the discussion under 2.3.3. of this chapter.
[99] For an exposition of this matter, see the discussion under 2.3.2. of this chapter.
[100] See section 1(d) of the Constitution, where the importance of the values of "accountability, responsiveness and openness" is registered.
[101] See *Baloro v. University of Bophuthatswana* 1995 (8) BCLR 1018 (B) at 1065C.
[102] See the discussion under 2.3.2. of this chapter.
[103] See 2.3.2.3. of this chapter.
[104] Human dignity (in its comprehensive conception) may be regarded as the basis of all human rights.
[105] See the discussion under 2.3.1., above.

It follows from the above that the jurist's construction of a statutory provision or her interpretation of a common-law rule or principle would be influenced by her mind-set as thus constituted.

In the event of *"dissonance"* – where a common-law rule or principle and her "new hermeneutical awareness" meet with opposition – the jurist should seek a replacement that would comport both with "purpose" and with the "context of social realities". This she might do by appealing to the notion of *"rational forensic deliberation"*.[107]

3. THE SPHERE OF INDIGENOUS LAW

Neethling advances that we shall be required to pay "serious and urgent attention" to the status of indigenous law in South Africa.[108] It would no longer be acceptable to relegate it to mere marginal significance.[109] Van Niekerk's perceptions are of like tenor. It is her suggestion that in order to uphold the legitimacy of the South African legal system in the sight of those still living by traditional institutions, it is necessary to accord indigenous law its rightful place in that system.[110] With this by way of preface, the jurisprudential implications of the new Grundnorm-order for legal argumentation in the sphere of indigenous law now serve for discussion.

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[106] It is spoken here of liberty "in its proper conception", since it is qualified by considerations of communal interaction. See the discussion under 2.3.2., above.

[107] See, in this regard, Chapter III, under 6 (the conclusions), more particularly at C.

[108] See J. Neethling "A Vision of South African Private Law – Independent Co-existence or Reconciliatory Synthesis?" 1993 34 *Codicillus* (2) 60 65.

[109] *Ibid.*

[110] Van Niekerk writes: "Indigenous law should receive full recognition and enjoy the same status as Western law." (Van Niekerk (LL.D. thesis) *op cit* summary, as annexed). *Ibid* 327: "This system of law should exist alongside the Western component of South African law. If the South African legal system is to be legitimised it should be brought closer to reality and closer to the needs of the community. In short, effect should be fiven to the norms, the processes and the values of both systems of law".

3.1 THE GRUNDNORM

The values integral to the *Grundnorm,* as identified above, as well as the norms of public international law – which would impart a natural-law fragrance to the construction of indigenous law – should be interpreted in line with traditional indigenous jural postulates and in their proper cultural perspective.

Let us notice what Van Niekerk has to say in this regard. Van Niekerk proposes that South African society affirms a "common nucleus of core values".[111] She goes on to claim that different cultures within the society nevertheless have different conceptions of these values.[112]

Suggesting that in indigenous law, *human dignity, equality and freedom* should be read with the communitarian basis of the social structure in mind, she claims that to understand these ideals in purely individual-human-rights terms would be to misread in some degree the indigenous-law position.[113]

A concern for *human dignity* is very much in evidence in indigenous culture. While individualism is not apparent, individualization most certainly is.[114] Bennett states that "the African social and legal system assured human dignity in all material respects".[115]

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[111] See Van Niekerk (LL.D. thesis) *op cit* summary (as annexed).
[112] *Ibid.*
[113] *Ibid* 312.
[114] *Ibid* 261-2.
[115] See T.W. Bennett *Human Rights and African Customary Law* (1995) 5.

Van Niekerk's proposition is that the analysis of traditional indigenous law and its underlying jural postulates demonstrates that *gender inequality* is a feature not so much of the traditional law as of the distorted manifestations of that law.[116] Bennett proposes that prior to colonialism, the standing of indigenous women was probably better than it is today. Capitalism and codification of customary law by white officialdom, he urges, greatly facilitated a decline in their status.[117] Bennett further notes that anthropologists have been able to confirm that in some societies women had considerable power and autonomy – in the days before colonialism and capitalism.[118]

We must note with Van Niekerk that it would be difficult, and sometimes inappropriate, to apply the western concept of *"freedom"* in an indigenous-law context.[119]

As to the notion of *"justice"* itself, David and Brierley are in point. The authors reflect that "native justice" [sic] aims at a reconciliation of the parties, and the restoration of harmony in the community.[120] It seeks to establish peace, not to effect "the strict enforcement of law".[121] Elias claims that the African judge is a peace-maker, his objective being to reconcile the disputants with each other.[122] Van Niekerk contends that indigenous decision-making is directed towards the elimination of conflict through the medium of community participation. Transparency, she argues, is emphasized in communal interaction.[123]

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[116] See Van Niekerk *op cit* 11.
[117] See Bennett *op cit* 83-4.
[118] See T.W. Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 305.
[119] See Van Niekerk *op cit* 308-9.
[120] See R. David and J.E.C. Brierley *Major Legal Systems in the World Today* (1978) 508.
[121] *Ibid.*
[122] See T.O. Elias "The Nature of African Customary Law" in J.C. Smith and D.N. Weisstub (eds.) *The Western Idea of Law* (1983) 88 89-90.
[123] Van Niekerk *op cit* 252-3.

The obligations of each person are heavily weighted, there being little room on the African conception of the social order for the notion of individual rights in the western appropriation.[124] David and Brierley draw attention, in this spirit, to the fact that African justice is accordingly not geared to the enforcement of "rights" or to the attribution to each her due.[125] Bennett registers that the indigenous normative system placed emphasis upon an individual's duties. Her rights did not receive the same accent. To have stood by one's rights would have been regarded as anti-social.[126] One was "expected to compromise one's interests for the good of all".[127]

This philosophy of "ubuntu" is an expression of autochthonous African communitarianism. It is in essence a philosophy of "care" and "concern", in accordance with which it is not simply the needs of the community as a whole that are looked after, but those of each member of the community individually.[128] The individual personality is a reflection of her community, and, correlatively, the community derives its existence from the individuals who constitute it.[129]

Van Niekerk cites Otite to the effect that "African socialism" reflects a humanistic, equalitarian communitarianism.[130] Fraternity, familyhood, benevolence and interdependence rank as among its features.[131]

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[124] See David and Brierley *op cit* 507.
[125] *Ibid* 508.
[126] See Bennett *Human Rights and African Customary Law op cit* 5.
[127] *Ibid.*
[128] See, in this regard, Van Niekerk *op cit* 250-4.
[129] *Ibid* 252: "Although man [sic] is at the centre of things, man [sic] can be defined only in relation to other men [sic]. But the community can likewise be defined only with reference to its individual members ...." Further: "The common good must always be seen in relation to the individual as an inextricable component of that community". (*Ibid* 254)
[130] *Ibid* 254.
[131] *Ibid.*

3.2 THE "NEW HERMENEUTICAL AWARENESS" AS TAILORED TO THE INDIGENOUS-LAW CONTEXT

All the above (under 3.1) tends to suggest a "new hermeneutical awareness" of a somewhat different complexion from that appropriable in the sphere of western law. *Human dignity, equality and freedom* – as well as the notion of *"justice"* itself – bear a different connotation in the indigenous-law context.

It is suggested that the "new hermeneutical awareness" of this somewhat different composition is capable of full realization only from within the indigenous-law perspective. It is on this basis that it is recommended that there be community participation in decision-making, and that the "outsider" judge not undertake the exercise in the absence of such involvement.

3.3 THE "NEW HERMENEUTICAL AWARENESS", "PURPOSE" AND THE "CONTEXT OF SOCIAL REALITIES"

(1) It is submitted that upon appropriation of the "new hermeneutical awareness" as tailored to the indigenous-law sphere, the proper "purpose" would be brought to bear upon the "context of social realities" for which the determination is to provide. (As in the western-law sphere, we see that "purpose" subsumes a commitment to the "context of social realities" by the very nature of things.)[132]

[132] See the discussion under 2.5., above, for purposes of comparison.

(2) "Purpose" is informed by the values entrenched in the Bill of Rights *as interpreted in their proper cultural perspective*[133] (and with a view to bringing the law in step with its own jural postulates).[134] The "justice"-objectives of the Constitution – also conditioning the quality of the "purpose" under discussion – are to be conceived as involving the reconciliation of the disputant parties as well as the restoration of harmony in the community.[135]

(3) The "context of social realities" (of which the "facts" serving for decision are a component) pertains most notably to such issues as:

(i) transparency in the course of public dealings;[136]

(ii) a concern for "community" ("ubuntu");[137]

(iii) the human, social and economic aspects relevant to the determination;[138]

(iv) the high importance of human dignity[139] (and substantive equality);[140] and

(v) liberty as understood in indigenous law.[141]

(4) Bennett claims that the "living law" (of the indigenous people) is pervaded by generalized norms embodying a requirement of reasonable behaviour.[142] "Purpose"

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[133] It would be Van Niekerk's suggestion that the values entrenched in the Bill of Rights should be "interpreted in their proper cultural perspective where circumstances so demand". (Van Niekerk *op cit* summary, as annexed).

[134] These are the "basic axioms" or starting-points for legal reasoning in indigenous law. See Van Niekerk *op cit* 160 and 168.

[135] See discussion under 3.1., above.

[136] Transparency is also of high importance in indigenous law. See 3.1., above, where it is registered that transparency is emphasized in communal interaction.

[137] Again, see discussion under 3.1., above.

[138] As with western law, it seems that these factors are also of consequence in indigenous adjudication.

[139] As registered above, under 3.1., human dignity is of high importance in indigenous law.

[140] The conception of equality, however, may have to be understood in indigenous-law terms. (Again, see 3.1., above).

[141] That is to say, not in its western conception. (See 3.1., above)

[142] Mokgoro J., in *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at 735 I-J, n 9, cites Bennett as stating this much.

as committed to the "context of social realities" would allow for the *irradiation* of these norms through the "reasonableness"-requirement.[143] Thus are they to be brought into line with the values in the Bill of Rights as construed within their proper cultural perspective. This is done with a view to bringing the law into harmony with its own jural postulates.

(5) Van Niekerk urges that government documents, textbooks, and "fossilised law reports" frequently convey a distorted image of the true indigenous-law position.[144] Explaining this observation, she asserts that where indigenous-law application was entrusted to white officialdom, operating on the basis of the precedent system, the versions of the law that emerged were out of keeping with social reality and inconsistent with indigenous jural postulates.[145] In short, they represent an "adulterated" indigenous law.[146]

Bennett comments on the "isolation" of customary law in the purely formal sense. He urges that legal positivism has worked towards its decontextualization, disjoining it from "its social and moral/ethical background".[147] Few, if any, texts dealing with customary law, he says, are "direct, personal accounts of community practice".[148]

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[143] The citation *loc cit* reads as follows: "[Customary law] is pervaded by generalized norms, usually characterized by a requirement for reasonable behaviour, which provide a starting point for the introduction of fundamental rights"‖ Professor Bennett explained to me that the customary law in question is that which obtains in the community (the "living law"), and not that which finds expression in written or codified form.
[144] See G.J. van Niekerk "Indigenous Law in South Africa – A Historical and Comparative Perspective" 1990 31 *Codicillus* (1) 34 42.
[145] See Van Niekerk (LL.D. thesis) *op cit* 153.
[146] *Ibid.*
[147] See T.W. Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) preface v.
[148] *Ibid* 1.

Reflecting that there is inevitably a "discrepancy between legal theory and social reality", he goes on to say that in the case of customary law this discrepancy has taken on the quality of a "serious disjunction". Bennett asserts that this is largely to be accounted for by the "one-sided political process".[149]

In the event that one is up against a textbook-formulation of indigenous law, it is very conceivable that the rule or principle concerned and one's "new hermeneutical awareness" (as tailored to the indigenous-law sphere) will meet with opposition. *"Dissonance"* describes this situation. A replacement may require to be sought which would comport both with "purpose" and with the "context of social realities". *Actual dialogue* among members of the community may be required in the interests of its ascertainment.[150] The substitute dispositive precept, as will be seen in Chapter VII of this study, finds its raw material in the *"living law"* of the indigenous peoples and the *underlying jural postulates* of that law.[151]

Van Niekerk suggests that dispute-resolution in indigenous law should avail itself of the input of "community participation".[152] She proposes the institution of dispute-resolution structures "in which the community may participate collectively and openly".[153]

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[149] *Ibid* preface v.
[150] See Chapter VII of this study, under II 1.2.
[151] See Chapter VII, under II 1.2.
[152] Van Niekerk (LL.D. thesis) *op cit* 328.
[153] *Ibid.*

4. CONCLUSIONS

4.1 In the sphere of western law, the insights of this chapter are useful in the following respects:

(i) "Purpose" is to be informed by constitutional design.[154]

(ii) Seeing that it is taken up in the spirit of the Constitution, "justice" is to inform the notion of "purpose".[155]

(iii) "Justice" (in the western context) implies the "synchronization of interests"[156] – public and private, as well as competing private, interests.[157]

(iv) Whatever the nature of the dispute, public interest should be taken into account – insofar, at least, as it relates to the "community" or "communities" sourcing personal identity.[158]

It is upon this basis that "purpose", as it is conditioned by the Constitution, might be conceived.[159]

Where a statute is at issue, the "statutory purpose" is to be harmonized with the "purpose" as thus expounded.[160]

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[154] See 2.5., above, at (2).
[155] See 2.5., above, at (2).
[156] See 2.5., above, at (2).
[157] See 2.5., above, at (2). See, again, Cornell *op cit* 1211.
[158] See the discussion under 2.3.2., above.
[159] See in this regard Chapter VI, at III (2), and Chapter VII, at I (2).
[160] In this regard, see the discussion in Chapter VI, under II (4.), dealing with what has been styled the "harmonization of designs".

In the very nature of things, "purpose" subsumes a commitment to the "context of social realities"[161] (of which the "facts" of the case constitute a component). The "context of social realities" pertains most notably to such issues as:

(i) the importance of transparency in the course of political and public activity;

(ii) the human, social and economic aspects relevant to the determination;

(iii) concern for the "community" or "communities" which constitute a source of "personhood";

(iv) the exigencies of life in, and the welfare of, the larger "society";

(v) a concern for human dignity and substantive equality; and

(vi) a concern for liberty (in its proper conception).[162]

Read with the right "purpose" (as committed to the "context of social realities") the evaluative dimension of the "narrative model" underlying the legal provision in point may undergo an "adjustment". The result is that the "norm" and the "arrangement of facts" may organize themselves into a novel stable configuration *(Gestalt)* of "legal norm" and "legal facts". And subsumption would take its course where previously it did not – or would be precluded where the normative syllogism would formerly have been activated.[163]

4.2 In the sphere of indigenous law, the insights of this chapter are useful in the following respects:

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[161] See the discussion under 2.5., above, at (1).
[162] See the discussion under 2.5., above, at (3). I have repeated myself verbatim here by reason of the significance of these reflections. Consult, in this regard, Chapter VI, at III (2) and Chapter VII, at I (2).
[163] In order to refresh her memory on these issues, the reader is referred to Chapter IV, under 2.2.4.

(i) "Purpose", as ever, is committed to the "context of social realities".[164]

(ii) "Purpose" is informed by the values entrenched in the Bill of Rights *as interpreted in their proper cultural perspective* (and with a view to bringing the law in step with its own jural postulates).[165] The "justice"-objectives of the Constitution – also conditioning the quality of the "purpose" under discussion – are to be conceived as involving the reconciliation of the disputant parties as well as the restoration of harmony in the community.[166]

(iii) The "context of social realities" (of which the "facts" serving for decision are a component) pertains most notably to such issues as:

(a) transparency in the course of public dealings;

(b) a concern for "community" ("ubuntu");

(c) the human, social and economic aspects relevant to the determination;

(d) the high importance of human dignity (and substantive equality); and

(e) liberty as understood in indigenous law.[167]

(iv) The "living law" (of the indigenous peoples) is pervaded by generalized norms embodying a requirement of reasonable behaviour.[168] "Purpose" as committed to the "context of social realities" would allow for the *irradiation* of these norms through the "reasonableness"-requirement.[169] Thus are they to be brought into line with the values in the Bill of Rights as construed within their proper cultural

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[164] See the discussion under 3.3., above, at (1).
[165] See the discussion under 3.3., above, at (2).
[166] See the discussion under 3.3., above at (2). Consult Chapter VII, at II (2).
[167] See the discussion under 3.3., above, at (3). I have repeated myself verbatim here by reason of the significance of these reflections. Consult in this regard Chapter VII, at II (2).
[168] See the discussion under 3.3., above, at (4).
[169] See the discussion under 3.3., above, at (4). Consult Chapter VII, at II (3).

perspective. This is done with a view to bringing the law into harmony with its own jural postulates.[170]

(v) In explanation of (iv) above, the following should be noted. The "norm" and the "arrangement of facts" are more intimately interrelated than is the case with western law. A "narrative model" of typifications of action, loaded with tacit social evaluations, links the two – making, if you will, for subsumption or non-subsumption, as the case may be. (The words "if you will" are used advisedly, because the autochthonous administration of justice does not conceive of the application of a rule known in advance to the facts of the case as typically a part of the enterprise.)[171]

Now, "purpose" (as committed to the "context of social realities") may make for the "adjustment" of the evaluative dimension of the "narrative model" underlying the norm. This is as much as to say that the norm in question may be *irradiated* through the "reasonableness"-requirement.[172] And "subsumption" (if one is so inclined to speak of it)[173] may possibly proceed where previously it did not – and conversely.

(vi) When we speak of the evaluative dimension of the "narrative model" and the "adjustment" it may undergo, we are alluding to conceptions intrinsic to the culture concerned. Homologues of such conceptions, if entertained by the "outsider"

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[170] See the discussion under 3.3., above, at (4).
[171] See Chapter VII at II (2)(4).
[172] See the discussion under 3.3., above, at (4).
[173] One is tempted in this context to speak of "subsumption in metaphorical terms". This is because indigenous law is a non-specialized legal system, and a strict separation of "norm" and "proposition of fact" – artificial even in western terms – is likely to appear all the more artificial in this context.

judge, may prove misleading. Communal participation in the decision accordingly seems to be essential.[174]

4.3 In the event of *"dissonance"*, the manner of filling the lacuna is to proceed in accordance with the insights set forth in Chapter III of this study.[175] The method of approach would vary with whether the common law or the indigenous law is at issue.[176] In Chapter VII of this study, the processes involved in filling the lacuna in each of these spheres are illustrated in comprehensive terms.[177]

[174] See, in this regard, Chapter VII of this study, at II (2)(6).
[175] See Chapter III, especially at 6 (the conclusions).
[176] See Chapter III, especially at 6 (the conclusions).
[177] See Chapter VII, under I (4) 4.2. and 4.4. and II (2)(7) and II (4).

VI

CONCLUSIONS (A): A PRESENTATION OF STRATEGIES FOR THE INTERPRETATION OF STATUTES

I. The Process of Ingression

(1) Dictionary – Meaning Appropriation and Legislative-Definitional Observance

(2) Idiomatic Resolution

(3) Disambiguation

(4) Grammatical Responsivity

(5) Sentence-Intrinsic Structural Analysis

II The Process of Purposive-Definition

(1) Intra-Textual Contextualization

(2) "Intentionalization"

(3) Statutory "Historicization"

3.1 The Axis of Effective History
3.2 The Axis of Statutory Precursors

(4) Harmonization of Designs

4.1 Excursus: The Presumptions of Statutory Interpretation
4.2 The Notion of a "New Hermeneutical Consciousness"
4.3 The "New Hermeneutical Consciousness" and the Harmonization of Designs

III. Axiological Performance

(1) The "Fusion of Horizons": A Basis for Fidelity to Law

(2) A Model of Axiological Performance: Metatheory

(3) Departure from Precedent where Necessary

(4) Value-Competition making for Difficulty in Harmonizing Designs

(5) Axiological Performance: Some Exemplary Judgments

(6) "Mittelbare Drittwirkung" in Statutory Interpretation

(7) Axiological Performance and Literalism: Departure from "Plain Meaning"

7.1 Restrictive Interpretation

7.2 Extensive Interpretation

7.2.1 Analogical Interpretation
7.2.2 Interpretation by Implication

7.3 Modificative Interpretation

IV. The Process of Effectuation

GENERAL

It is not the purpose of this model to expound the "law of interpretation" (of statutes or otherwise). Such may be found in any good textbook on the subject. In what follows, an encompassing theory is set out in order to bring together stratagems employed by lawyers in their daily interpretive activities. The elaboration of such a theory appears to be something of a desideratum, and this the more so with the coming into being of a new constitutional dispensation.[1] Understanding what one does , rather than merely doing it, affords a basis for doing it more proficiently. And this understanding should be acquired the better to give effect to the ideals to which our fledgling democracy professes to aspire.

Section 39(2) of the Constitution provides that every court, tribunal or forum is to promote the spirit, purport and objects of the Bill of Rights in the construction of legislation, and in the development of the common law and customary law.[2] The aspirations defined by the notion of an "open and democratic society based on

[1] Act 200 of 1993 inaugurated an interim (or transitional) Constitution. It represented a framework within which a final Constitution, ultimately finding its formulation in Act 108 of 1996, could be negotiated.

[2] Section 39(2) reads: "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."

human dignity, equality and freedom"[3] encapsulate what this subsection indicates as requiring promotion in the tasks it identifies.[4] International law and foreign law (properly deployed) make for a more concrete perception of the type of society envisaged.[5]

It is entered that international law - and more particularly the standards of humanity, human dignity, and respect for the person it lays down – is of especial importance as a compendium of guidelines for the attainment of the society in contemplation.[6] It is from the premises of international law that substantive moral argumentation may proceed in the legal-hermeneutical context. Since these premises are "reasonably objectively ascertainable", we are not confronted with anything like indeterminacy in the extreme sense. The natural-law flavour of these norms should be permitted to permeate every aspect of legal interpretation.[7] Of course, the context of the matter may demand adjustment. In the case of customary law, for example, the indigenous cultural milieu would still necessitate an appeal to these natural-law elements - but in a different appropriation.[8]

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[3] The preamble to the Constitution speaks of a "democratic and open society." The first of the founding provisions, section 1, registers the values of human dignity, equality and freedom (s.(1)(a), and in its sub-section (d) the value of "openness". Further, there is affirmation of these values in section 7(1), the subsection introducing the Bill of Rights, and in section 36(1), the limitations clause. In Chapter V of this thesis, the notion of an "open and democratic society based on human dignity, equality and freedom" was identified as the Grundnorm of our new legal order. See Chapter V, 2.1, and 3.1.

[4] The "spirit, purport and objects of the Bill of Rights" (section 39(2)) gives itself to be understood as the value-compendium intrinsic to the notion in question. This is so because section 39(1)(a) provides: "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."

[5] See, in this regard, subsections 39(1)(b) and (c).

[6] Recourse to international law is *peremptory* in the interpretation of the Bill of Rights (s.39(1)(b)).

[7] The emerging *communis opinio populi* of civilized nations may be taken as an "index" of natural-law standards.

[8] International-law norms should be regarded as every bit as applicable in the construction of customary law as elsewhere – but in an appropriation sensitive to the communitarian concerns of the culture in question and its distinctive features. In this connection, assistance may be derived

1. AN OPEN AND DEMOCRATIC SOCIETY BASED ON HUMAN DIGNITY, EQUALITY AND FREEDOM

It would be in place, before proceeding further, to summarize what our study has pointed up as essential to an adequate and practicable grasp of this concept.

1.1 AN OPEN AND DEMOCRATIC SOCIETY

A society of this description is unconditionally opposed to totalitarianism and authoritarianism. It is a society which values transparency[9] in the course of political and public activity. Both as between government and citizenry (the "vertical"dimension) and as between citizens themselves (the "horizontal" dimension) there should be transparent intercourse. Such a society places a premium on debate and dialogue.[10]

An "open society" would, additionally, allow for the flourishing of its constituent "communities" - for that of its various, heterogeneous, sometimes, albeit not necessarily, overlapping communal configurations. In a communitarian spirit, the jurist should seek to uphold the ideals of these constituent "communities" – in which the "self" is sourced , and from which it derives meaning and value. An

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from the provisions of the African Charter of Human and People's Rights of 1981 (the Banjul Charter).

[9] The importance of "accountability" and "responsiveness" is registered in s. (1)(d) of the Constitution.

[10] See the remarks of Davis A.J. in *Rivett-Carnac v. Wiggins* 1997(4) BCLR 562 (C) at 571J-572A.

"open society," upon this appropriation, would be sensitive to the question of "personhood".[11]

1.2 HUMAN DIGNITY AND EQUALITY

In this country, the disparities between the haves and the have-nots being what they are, the actualization of substantive human dignity and equality is of fundamental importance. In the absence of concern for these values in their substantive sense, the various "freedom" rights would find themselves considerably depreciated.[12]

There is no doubt a standing tension between "liberty" and "equality."[13] It is to be observed, nonetheless, that "freedom of speech , freedom from arbitrary arrest and seizure, freedom of religion, conscience, and opinion, freedom to come and go in public places as one chooses, and rights to participate in the political process" are, in general "neutral as between different systems of distribution and allocation of economic goods."[14] It is therefore a "bogus" argument to suggest that these "bourgeois liberties" militate against a fair distribution of economic goods.[15]

1.3 FREEDOM

As for "freedom" itself, quite independently of its relationship to "equality", one might observe that it should embrace the notion of interdependence, without

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[11] See Chapter V, 2.3.2.
[12] Those who are poverty-stricken, for example, are far more interested in obtaining adequate nourishment and shelter than in parading about a particular, abstractly-defined freedom-right.
[13] See MacCormick *Legal Right and Social Democracy* (1982) v.
[14] *Ibid* 149-50.
[15] *Ibid.* See also, Chapter V, 2.3.1.

denying the value of individual autonomy.[16] The conception of an "unencumbered self", flowing from the premises of classical liberalism, simply fails to capture the meaning of "freedom".

1.4 "JUSTICE" AND THE SYNCHRONIZATION OF INTERESTS

The Constitution is concerned with "justice". This is reflected, for one thing, in the preamble, in which "social justice" is registered as a solemn aspiration. For another thing, and bearing in mind that "justice" imports an equilibration of interests, one finds at many points in the Bill of Rights an implicit recognition of potentially conflicting interests . The general limitation clause,[17] the internal limitations,[18] and the scheme and structure of the Bill show this up very clearly. And the commitment to an "open and democratic society based on human dignity, equality and freedom" impliedly suggests the balancing of interests in a way that would best express that commitment.

It is submitted that as "justice" is imported thereby, the notion of the synchronization of interests" is apposite to the workings of a modern legal system[19]. (Such is imported by the conception of justice.) "Public interest" is to be synchronized with "private interest". So too, is one "private interest" with another . In the former case, public law will generally be at issue, in the latter,

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[16] See O'Regan J.'s comments in *Bernstein and Others v. Bester NO and Others* 1996 (4) BCLR 449 (CC) at 512 D-F.

[17] Section 36(1).

[18] Such as are to be found, for example, in section 16(2), which derogates from the right to freedom of expression in delimited instances, and in section 22, which qualifies the right to freedom of trade, occupation and profession by providing that the practice of such may be regulated by law.

[19] "Synchronization of interests" is a conception purveyed by Cornell. She claims synchronization to be the goal of a modern legal system. See Cornell "Institutionalization of Meaning, Recollective

private law. Even in the latter instance, where ostensibly only private interests are in question, and contrary to what Dworkin might tell us,[20] the "public interest" should feature in the evaluation. This is so at least to the extent that it pertains to the "community" or "communities" in which "selves" are sourced, and from which they derive meaning and value in life.

As for the "public interest", it is important to note that it has a twofold reference: to the interests of the "community" or "communities" involved; and to the interests of the "society" as a whole. Both should be taken into account in resolving a dispute, and the case will decide where the emphasis is to reside.

One should not lose sight of the fact that it is integrally a part of the design of the Constitution that the purpose of "justice" should be serviced. So, when one conceives of the import of the Bill of Rights, one should not be blinded to its "justice" – objectives.

2. A SHIFT OF MIND-SET

The first three paragraphs of this chapter and the discussion under 1.1 to 1.4, above, point to a juristic shift of mind-set. It is with "new spectacles" that the lawyer reads the law. This aspect will be enlarged upon in canvassing what Du Plessis refers to as a "new hermeneutical consciousness".[21]

Imagination and the Potential for Transformative Legal Interpretation" 1988 *Univ. of Pennsylvania* LR 1135 1211 ff. See, generally, Chapter V, 2.3.3.

[20] For Dworkin, justice is a matter of individual right. See Dworkin *A Matter of Principle* 32. So liberal a stance as this does not adequately accommodate the concerns of community.

[21] See Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 1994 60 60 – 107, especially towards the end where the term "new hermeneutical disposition" is introduced.

The shift of mind-set would require us to proceed differently according as the matter of our concern is the interpretation of statutes, the development of the common law, or the development of customary law. Statutes are qualitatively divergent from unwritten law, for the objectives of this discussion, in that they embody policies not generally to be discerned in the latter sources. Further, common law and customary law are to be treated differently, inasmuch as the former is premised on western individualistic premises, and the latter on communalistic, African ones.

Consistently with these reflections, the presentation will focus, firstly, on the interpretation of statutes, secondly, on the common law, and, lastly, on customary law. And, that said, we launch upon this task without more ado.

A THEORETICAL FRAMEWORK FOR THE INTERPRETATION OF STATUTES

In what follows, we deal with ordinary statutes. The interpretation of the Constitution itself may require to proceed by way of specialized approaches of its own. These are not discussed here. Other works should be consulted by interested readers in this regard. And so - back to ordinary statutes.

It would be useful to conceptualize the exercise of statutory interpretation as involving four distinct, albeit very much interrelated, processes. To each of these processes specific hermeneutical strategies are appropriate. In this section these strategies are dealt with comprehensively.

To introduce the discussion, one may remark that Ricoeur's notion of the "hermeneutic arch"[22] comes in handy as pointing to the ultimately holistic character of statutory construction. The two pillars of the "hermeneutic arch" – that of "Verstehen" (understanding) and that of "Erklären" (explanation)[23] are bridged by their mutual interpenetration.[24] Just as "understanding" (the existential moment) envelops "explanation",[25] so "explanation" (the objective moment) develops "understanding" along analytical lines.[26] "Verstehen" is identified in the capacity of the text to project itself outside itself.[27] "Erklären", by contrast, is exemplified in clarifying the internal structure of the text itself[28]. The interplay of understanding and explanation tells in favour of a measure of interdependence of the four processes in the interpretation of statutes.

The processes in question are the following:

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[22] See, in this regard, Ricoeur *Hermeneutics and the Human Sciences* (1981) 161. See also Bleicher *Contemporary Hermeneutics* (1980) 229 – 32. See, generally, on the significance of the "hermeneutic arch" for our purposes, Chapter II, 3.5 and 6.A(1), (2) and (3).

[23] See Bleicher *op cit* 229 – 32.

[24] See Ricoeur *From Text to Action* (1991) 129 and 156. Ricoeur speaks of this internal dialectic as a "Gestalt" (*Ibid* 163). Further: "Ultimately, the correlation between explanation and understanding, between understanding and explanation, is the hermeneutic circle". (*Ibid* 167). See also Ricoeur *Hermeneutics and the Human Sciences* (1981) 161.

[25] See Ricoeur *From Text to Action* (1991) 131 and 142.

[26] *Ibid* 142.

[27] *Ibid* 18.

(1) The Process of Ingression;

(2) The Process of Purposive–Definition;

(3) Axiological Performance; and

(4) The Process of Effectuation.

The process of ingression represents an effort to "break the ice", as it were. It involves the jurist in seeking to make sense of the provision(s) for the moment indicated as pertinent to her concerns by the situation she confronts. It implicates for the most part the pillar of "Erklären". Yet, to the extent that what is meant to be deciphered is sought to be related to an "outside" (or "hors-texte"), the pillar of "Verstehen" also is involved.

The process of purposive-definition represents the means whereby the jurist undertakes to clarify the "purpose" in the light of which the problem at hand is to find its resolution. Once again, the pillar of "Erklären" predominates. But that of "Verstehen" is nonetheless evident – insofar as the jurist proceeds with an eye to the resolution of a problem.

Axiological performance aims at an intuitive perception of the proper disposition of the case in line with constitutionalism. That being so, the pillar of "Verstehen" is here most conspicuous. However, since this phase presupposes activities intrinsic to the processes of ingression and purposive-definition – which are mainly concerned with "Erklären" – the latter pillar is also partly constitutive thereof. The inference from this of processual interrelatedness is strengthened by

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[28] *Ibid* 113.

the observation that the elements of "Verstehen" discernible in ingression and purposive-definition are seemingly taken up in the dimension of "Verstehen" elemental to axiological performance.

The process of effectuation, the final phase in the interpretation of statutes, consists in the articulation of conclusions, whether such be in mental consciousness, in speech, or in writing. As such, it is concerned primarily with "Erklären". However, since it is premised on proper axiological performance, it partakes also very substantially of the dimension of "Verstehen".

The notion of the "hermeneutic arch" thus demonstrates a high measure of interdependence of the four processes in the interpretation of statutes.

With this we launch ourselves upon a discussion of the strategies appropriate to each of the processes described.

I. THE PROCESS OF INGRESSION

This process is concerned with elucidation. It seeks to bring out the "sense" of the statutory provision(s) at hand. Yet the astute reader will observe that some perception of the "facts" of the problem is necessary merely to identify those provision(s) as relevant. (In due course, other provisions may be identified as pertinent as further "facts" emerge.) This "fact-dependence" of provision-identification underscores the heterotelic character of legislative construction.

Being preponderantly of an "Erklären" nature, however, the process of ingression is amenable to representation along the following axes:

(1) Dictionary-meaning appropriation and legislative-definitional observance;

(2) Idiomatic resolution;

(3) Disambiguation;

(4) Grammatical responsivity; and

(5) Sentence-intrinsic structural analysis.

These axes are treated of seriatim:

(1) DICTIONARY-MEANING APPROPRIATION AND LEGISLATIVE-DEFINITIONAL OBSERVANCE

Dictionary-meaning appropriation is a reference to the mode of coming by the "meaning" of words. It is what Chladenius would have advised as among the sovereign tools of statutory interpretation.[29] It is considered with Du Plessis, however, that such a tool is useful no more than the extent to which it enables one to "get under the skin" of an enactment, to establish a "point of entry" into the meaning of the statute.[30] But to that extent it is valuable. One might say that dictionaries, legal and otherwise, lexicons, general and specialized, and other legitimate aids in seeking out the "meanings" of words, constitute the "open sesame" of the portals of sense.

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[29] See the discussion of Chladenius in Chapter I of this study, section 2. See also Chapter I, 5.A(1).
[30] See, in this regard, the discussion in Du Plessis *The Interpretation of Statutes* (1986) 50.

Needless to say, where words (and phrases) bear a legal-technical sense, they should be appropriated in that sense.[31]

Legislative-definitional observance is to be understood as compliance with the norms of statutory interpretation as they find expression in statutory form.[32] These are indisputably "legal" rules, in contrast to other rules of interpretation the status of which as such is debatable.[33] Coming to mind in this connection is the Interpretation Act, 33 of 1957 (as amended), as also the definition clauses[34] which are to be found in multitudinous statutes. To the extent to which these legislative-definitional imperatives are consistent with the Constitution, they require observance; their observance must proceed in such a way, however, as to "promote the spirit, purport and objects of the Bill of Rights." It is considered that "fuzziness" of meaning – of both words and phrases – may dissipate upon the correct application of these rules.

One's attention is drawn to the definition clause in the (recently promulgated) Administrative Adjudication of Road Traffic Offences Act, 46 of 1998, for purposes of illustration. The word "agency" is defined to mean the "Road Traffic Infringement Agency" as established by the Act.[35] Further, the "Director-General" means the "Director-General of the national Department of

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[31] Words such as "negligence", and phrases such as "reasonable person" and "undue preference", would suggest a legal-technical appropriation.
[32] See Chapter I, 4:2.4.(2) and 5A(2).
[33] As regards the latter category of rules, it is submitted that they should be regarded primarily as of *ex post facto* application, functioning mainly as "rules of thumb". A perception of them as such is reflected in the discussion of the process of effectuation.
[34] Or interpretation clauses.
[35] See section (1)(ii) of Act 46 of 1998.

Transport,"[36] and the "Minister", the "Minister of Transport".[37] It is self-evident that these (among the others embodied in the clause) are "legal" stipulations: they hold, as is typically provided, "unless the context otherwise indicates."[38] It should be needless to remark that they make for a sharper perception of "meaning".

(2) IDIOMATIC RESOLUTION

A second axis comes into consideration where a concatenation of two or more words (as, for example, a phrase) is encountered which has a "meaning" which is not reducible to a synthesis of the meanings of each of the words taken in isolation.[39] In this event, one has to do with idiom, with conventionalized speech-behaviour such as has acquired subtle nuances of signification through usage. The first thing to do in this case is to recognize the collocation of words as "idiom", that is, to identify them as such. One may have to do with ordinary idiom or specialized legal idiom. In the case of the former, one would probably find its "meaning" in a comprehensive dictionary, for example, Webster,[40] and in the case of the latter, in an inclusive legal lexicon.

Two examples may help to illustrate this point:

(i) In ordinary conversational idiom, "greener pastures" has a significance which is not reducible to a synthesis of that of its two constituent components. When reading statutes, one should be alert to identify "as

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[36] See section (1)(viii) of the above Act.
[37] See section (1)(xvii) of the Act.
[38] This proviso is embodied in the opening statement of section 1 of the Act.
[39] See Chapter I, 4.2.4(3) and 5A(3).

idiomatic" a phrase such as this. The problem is then half-solved: one finds its "meaning" in a comprehensive dictionary.

(ii) In legal idiom, "judicial notice" has a legal meaning not reducible to a synthesis of that of its two constituent components. The first step is to identify the phrase "as idiomatic", the second to recognize its character as "legal" idiom. The matter is two-thirds-solved: one finds its "meaning" in a legal lexicon.

Elaborating further, one may take section 3(1) of the Administrative Adjudication of Road Traffic Offences Act, which institutes the Road Traffic Infringement Agency as a "juristic person".[41] It goes without saying that the identity of the agency has been defined in terms of legal idiom. A legal lexicon, then, would be the indicated source of reference in pointing to the nature of the institution.

As for what may be termed "technical idiom", one's attention is drawn to section 14(1) of the same Act. The provision embodies a behest directed to the Road Traffic Infringement Agency to maintain accounting records reflecting its affairs and business in accordance with "generally accepted accounting practice."[42] The phrase in inverted commas may fairly be said to have taken on the quality of

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[40] Or one or other version of the Oxford English Dictionary

[41] Section 3(1) of Act 46 of 1998 reads: "The Road Traffic Infringement Agency is hereby established as a juristic person responsible to the Minister."

[42] Section 14(1) of the Act provides: "The agency must, in accordance with generally accepted accounting practice, keep such accounting and related records as are necessary to represent fairly the state of affairs and business of the agency and to explain its transactions and financial position."

technical idiom, and its meaning is to be established by recourse to an appropriate authoritative lexicon.

(3) DISAMBIGUATION

Disambiguation is necessary in circumstances where a word or phrase in a syntactical unit is capable of bearing more than one meaning.[43] In this event, syntactical context would afford a basis for "proper meaning-attribution". (We see, then, that even at this early stage there is a need for "contextualization", albeit only at the level of the sentence. When we come to consider the process of purposive-definition, the matter of "contextualization", will loom larger on the agenda, and be observed to transcend the confines of syntactical units.)

At the same time, one may note that the very recognition of the need for disambiguation in certain instances is a tacit acknowledgement that linguistic "essentialism", as conceived on the "excision" approach, and as sustained on the "pointer theory" of language, is a misconceived basis upon which to approach the texts of the law. Wittgenstein, as we have seen,[44] advanced that it is an error to maintain that there is an "essence" to which each word may be said to correspond. We must look to the entire context of the sentence if we are to interpret correctly. Of some relevance are the remarks of Lord Greene in *Re Bidie*[45], as cited by Schreiner J.A. in his dissenting judgment in *Jaga v. Dönges*.[46]

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[43] See Chapter I, 4.2.4(4) and 5A(4).
[44] See Chapter II, 1.2. for an oblique prefiguration of this point.
[45] 1949, Ch. 121 at 129. It is to be observed that Lord Greene advised recourse both to the immediate context in which the word occurs and to the general context of the Act in ascertaining the meaning of that word. It is the former context with which we are presently concerned. (Cited in report at 663H – 664B).
[46] See *Jaga v. Dönges* 1950 (4) SA653(A), in particular the judgment of Schreiner J.A. (minority judgment) at 662ff.

(4) GRAMMATICAL RESPONSIVITY

Grammatical responsivity has a twofold prescriptive significance. In the first place, it directs one to have regard to conventional grammatical rules and principles in seeking to decipher the import of syntactical units. The jurist is aware of most of these, but in the event of uncertainty resort to a handy source of reference is obviously indicated.[47] In the second place, grammatical responsivity commands the correction of errors of syntactical formulation, assuming the incontestability of what was proposed to be conveyed, and the patent marring thereof by want of compliance with conventional rules of language.[48]

One could extend the principle underlying grammatical responsivity to cover instances where it is not an error of the above description that is at issue, but instead one of inappropriate wording. Where it is *certain* what was proposed, but the legislature used a word or phrase incorrectly so that the formulation does not tally with the proposition, then, it is submitted, it would be entirely in order to correct the mistake.

(5) SENTENCE-INTRINSIC STRUCTURAL ANALYSIS

Intra-provisional structural analysis relates to the elucidation of a statutory provision. A provision may consist of a number of syntactical units. It should in the ordinary course of events be easy enough to discern linkages among these

[47] In this regard, Fowler immediately springs to mind.
[48] In this event, the jurist is to be certain in her mind as to the purport of the provision at hand. See, generally, as regards grammatical responsivity, Chapter I, 4.2.4 (5) and 5A(5).

syntactical units, so as to impose upon them some conceptual coherence.[49] What may present itself as difficult is the task of unravelling the import of a long, convoluted sentence, something not rarely encountered in legislative materials. In this event, recourse to *sentence-intrinsic structural analysis* may be indicated.

Sentence-intrinsic structural analysis is deserving of some elaboration. Lategan discusses the issue in depth,[50] and here an adapted version of his insights is provided. One may, it is suggested, when confronted with a long and complicated sentence in a statute, undertake to make sense of it by reducing it to what might be called its "mandatum"[51] (or, if need be, in the case of an extremely complex sentence with more than one "mandatum", its "mandata"). The "mandatum" is a reference to the essential "prohibition", "command", "permission" or "empowerment"[52] sought to be conveyed by the language. Such a "mandatum" should be assimilable to the format of a "matrix sentence". The "matrix sentence" in turn is comprised of a "nominal element" and a "verbal element".[53] It constitutes the core-message[54] of the sentence, to the nominal and verbal elements of which "qualifications", "sub-qualifications" and "closer definitions" may be

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[49] Vigilance as to "pronoun reference", the "repetition of important words", and "transitional expressions" would go a long way towards achieving a perception of continuity. See Bell and Cohn *Handbook of Grammar, Style and Usage* (1981) 203 – 212.

[50] See Lategan "Die Uitleg van Wetgewing in Hermeneutiese Perspektief" 1980 *TSAR* 107. See Chapter I, 4.3 for a discussion of Lategan's work. See also 5A(6) of the same chapter.

[51] The term "mandatum" is here appropriated in a somewhat eccentric sense as denoting a statutory imperative, irrespective of whether it be positive in tenor, negative or facilitative. Facilitatives are regarded as imperatives for purposes of this discussion inasmuch as they presuppose the conceivability of their revocation, with the latter implying a reinstatement of a positive or negative statutory imperative.

[52] "Permissions" or "empowerments" are the facilitatives referred to in n.46 above.

[53] See Lategan *op cit* 121.

[54] Lategan's perceptions are adapted to our purposes in this exposition.

added.[55] (It is suggested, further, that if a complex sentence found in a statute embodies no "mandatum", that is, "prohibition", "command", "permission" or "empowerment", and has a purely descriptive import, one may proceed by analogy with this approach, seeking to discern its core-message in its most irreducibly elemental form, as opposed to any "mandatum". This core-message may then be taken as a "matrix sentence".) Upon this basis, it may be possible to acquire a certain clarity as to the meaning-content of otherwise intractable language.

These observations call for exemplification. A few examples of sentence-intrinsic structural analysis are therefore provided.

Take section 28 of the Administrative Adjudication of Road Traffic Offences Act[56] (providing for the reduction of demerit points):

> 28. If demerit points have been incurred by any person, the issuing authority contemplated in section 26(2) must reduce the total number of points recorded in the national contraventions register against that person with one point for every three months, or such other number of points or period as may be prescribed, during which no demerit points were incurred by that person, except for the time the court found that the court process had been deliberately delayed by that person to obtain a reduction in points.

The initial step is to educe from this provision its "mandatum". That "mandatum" should be taken up as a "matrix sentence", comprised of a nominal element (NE) and a verbal element (VE). Analysis would then proceed as follows, shedding light in this way on the import of the section:

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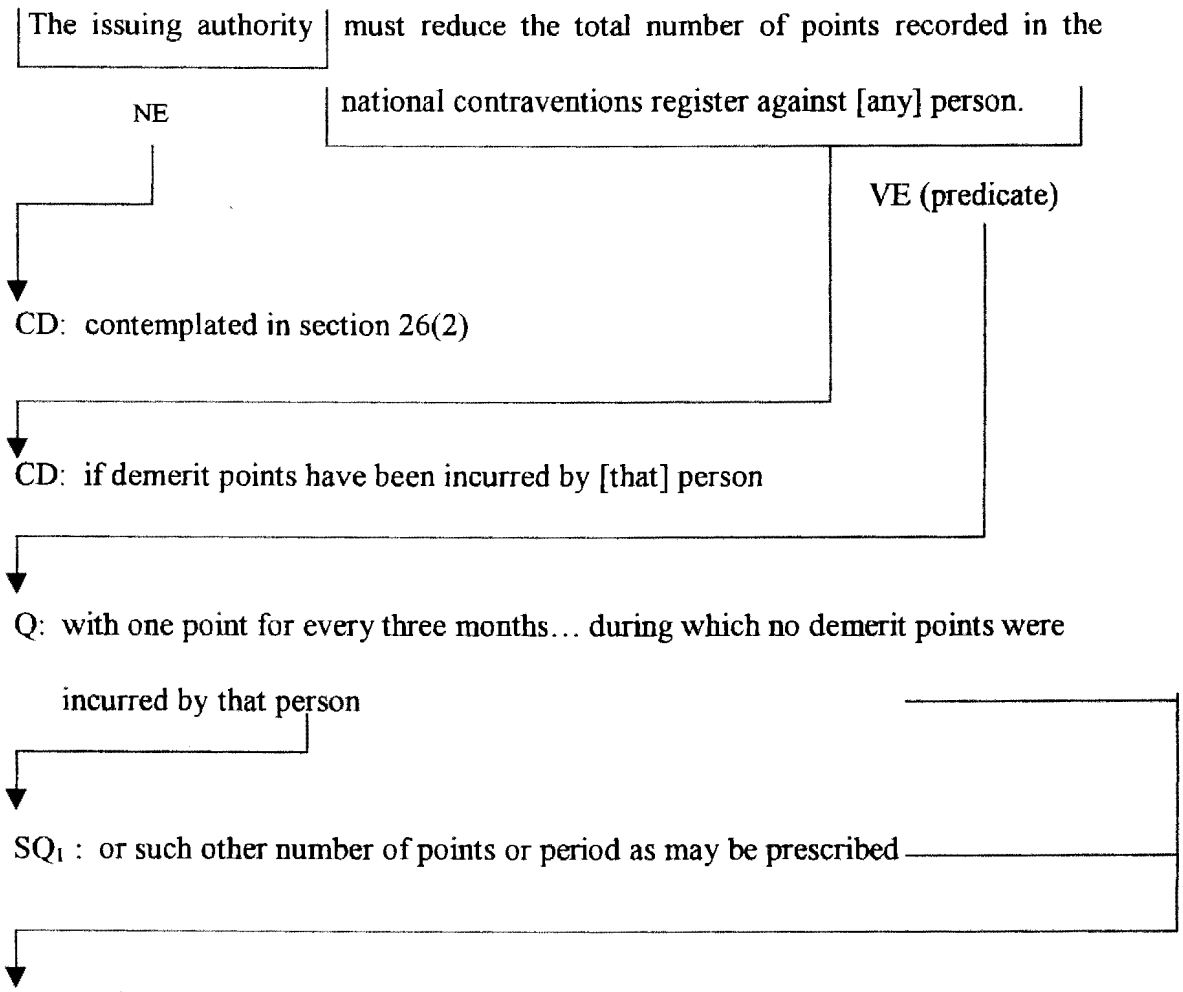
[55] See Lategan *op cit* 123: "Sowel die nominale gedeelte...as die verbale gedeelte...[kan] deur 'n hele reeks kwalifikasies en subkwalifikasies en nadere omskrywinge uitgebrei [word]... ."
[56] Act 46 of 1998.

Discerning the "mandatum" (Matrix sentence = NE + VE):



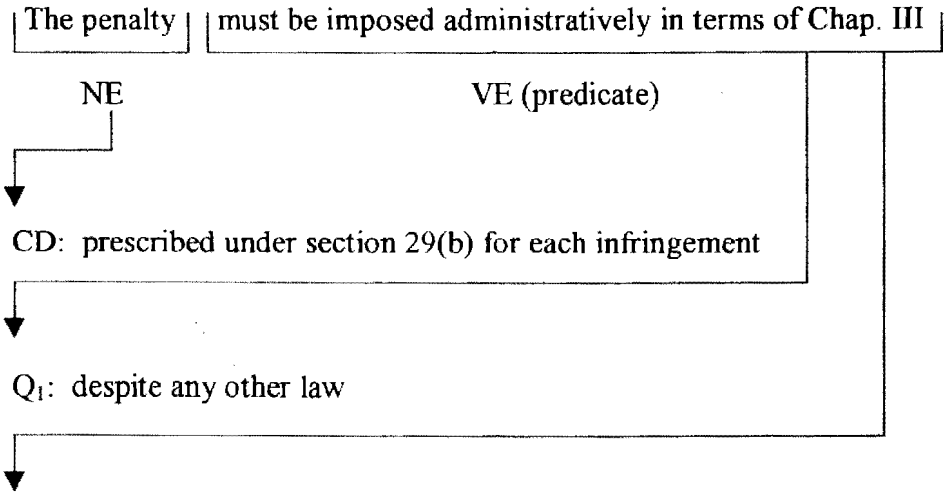
(CD = closer definition; Q = qualification; SQ = sub-qualification)

We may take as a further example section 31(1) of the same Act.

Section 31(1)[57], pertaining to penalties, is in the following terms:

> 31. (1) The penalty prescribed under section 29(b) for each infringement must, despite any other law, be imposed administratively in terms of Chapter III, subject to the discount contemplated in section 17(1)(d).

Discerning the "mandatum":



Let us take section 33(1) of the Act[58] (pertaining to access to information) as yet a further example:

> **33.** (1) Any person may, upon payment of the prescribed fee, ascertain his or her demerit points position from the national contraventions register at the office of any issuing authority, registering authority or driving licence testing centre.

Discerning the "mandatum" (in this instance, in the nature of a "permission" or "empowerment", that is, a "facilitative"[59]):

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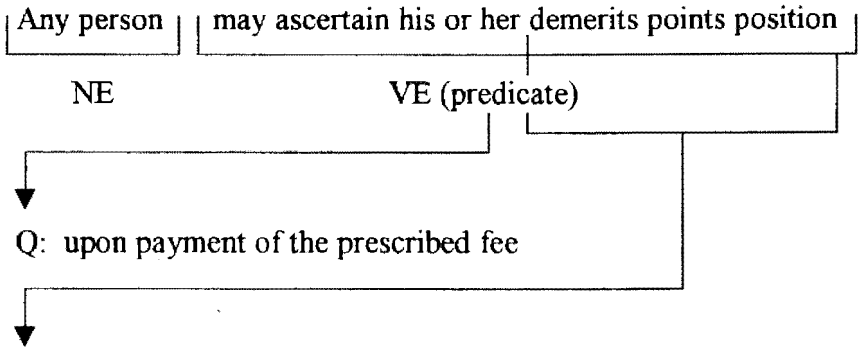
[57] Of Act 46 of 1998.
[58] Act 46 of 1998.
[59] For "facilitatives", see n.46, above.

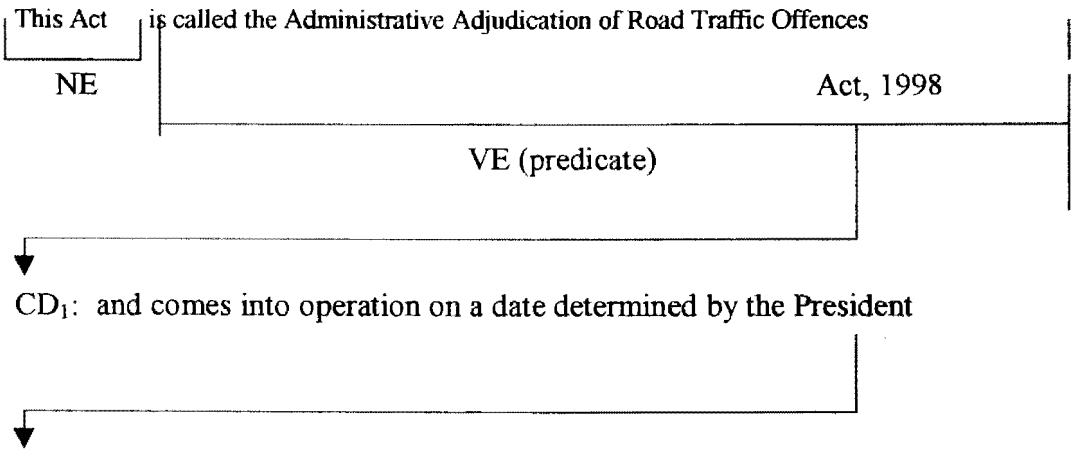


CD: from the national contraventions register at the office of any issuing authority, registering authority or driving licence testing centre.

Section 36(1)[60] may be taken as a provision of purely descriptive import (unless we are prepared to discern therein a vague "empowerment"). The same methods of sentence-intrinsic structural analysis as find application with respect to a normative proposition are applicable by analogy.

> **36.** (1) This Act is called the Administrative Adjudication of Road Traffic Offences Act, 1998, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

Discerning the "semantic core":



[60] Of Act 46 of 1998.

The principles illustrated in these few, very mundane, instances are capable of extrapolation, given enterprise and ingenuity, to much more complex syntactical structures. It is hoped that their general thrust has been brought to the fore in these analyses in a way that may inform sentence-intrinsic structural analysis generally.

Having observed the directives implied in the five axes of the process of ingression, the uncompromising positivist would contend that her task is done for all intents and purposes. She would respond that the meaning-content of the section(s) at hand has been elicited, and that all that remains to complete her labours is to apply, in mechanical fashion, the semantic content as "established" to the "brute data" of the matter in question.

The trouble with this approach, which seems to reflect the unarticulated theoretical premises held by a good many South African lawyers of an earlier time, is that it is disdainful of any value-commitment. It is entirely oblivious to issues of justice. Under a dispensation of constitutionalism, particularly, it falls miserably short of what is demanded of the juristic mien.

The process of ingression is the first phase of statutory interpretation. But it is only the first phase. The second phase – the process of purposive-definition – mirrors a demeanour of value-commitment, and augments the first to the extent of its deficiencies.

As the term implies, purposive-definition is concerned with bringing out as clearly and as comprehensively as possible the "purpose" in the light of which the constructive process is to take its course. This phase is now considered at length.

II. THE PROCESS OF PURPOSIVE-DEFINITION

For purposes of this exposition, we discuss the process of purposive-definition in terms of the following methodologies:

1) Intra-textual contextualization;
2) "Intentionalization";
3) Statutory "historicization"; and the
4) Harmonization of designs.

Intra-textual contextualization, "intentionalization" and statutory "historicization" are geared to the derivation of the purpose of the statute, alternatively the purpose of the assemblage of sections or subsections of which the provision(s) at issue is(are) a part.

The methodology of the "harmonization of designs" involves the assimilation of the "purpose" of the statute (alternatively, the "purpose" of the assemblage of sections or subsections of which the provision(s) at issue is(are) a part) as thus derived to the "purposes" (design) of the Constitution.[61] When the provisions and

[61] For the relevance of the "harmonization of designs" in this regard, see Chapter V, 4.1.

the "facts" to which they relate are revisited in the light of this "harmonized design" (we might term this recurrence a "reversion to particularity"), they render themselves open to *possible "reconceptualisation"*. Hence the poverty of relying upon ingression exclusively.

With that by way of preface, each of the four stated methodologies will be canvassed in turn.

(1) INTRA-TEXTUAL CONTEXTUALIZATION

Betti and Hirsch are very much in point in a discussion of this step in purposive-definition. Betti's canon of the coherence of meaning is as a matter of fact synonymous with intra-textual contextualization.[62] One is to look to the globular totality of a statute in order to discern its purpose. By the same token, if the purpose of the sections or subsections of which the pertinent provision forms a part is at issue, one is to have regard to their schematic entirety as a means of its ascertainment.[63]

Hirsch's probabilism[64] embodies the same import as Betti's principle of totality.[65] Hirsch may be read as conveying that the construction of a statutory provision entails the examination of as many circumjacent provisions as practicable, and ideally the statute as a whole. This would ensure the highest degree of accuracy in drawing implications as to "meaning". (Consistently herewith, and bearing on the

[62] See the discussion of Betti in Chapter I of this study, 4.1.2. See also 5C(1) of the same chapter.
[63] This seems to follow as a corollary.
[64] See the discussion of Hirsch in Chapter I of this study, and 4.2.

subject of implications, Du Plessis expressly observes that they are inferable from other provisions in the statute.[66] The formal presumption that a word or phrase bears the same meaning throughout an enactment[67] is also attuned to this sort of inference.)

The jurist would do well at least to read those sections in the vicinity of the provision at hand, assuming that she considers that it is unnecessary in the circumstances to peruse the statute in its every stipulation. She would do well, too, in order to acquire an impression of its general tenor, to take note of the preamble to the statute, the "objects" clause, [68] the long title, the various headings, marginal notes and schedules. Even an "impressionistic" perception of the statute may go some of the way towards sensitizing the interpreter to its configurational purport.

Where the Afrikaans version of the statute is extant, it too may be used for purposes of intra-textual contextualization.[69] (The other-language version is treated as part of the "text" in the interests of servicing this approach.[70])

These observations ventured, it may be as well to register L.C. Steyn's admonition that "[a]l is 'n bepaling op sigselwe ook hoe duidelik, durf die uitlegger van 'n wet,

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[65] As his canon of the coherence of meaning is otherwise known. (See Chapter I of this study). See also, in this regard, 5C(2) of Chapter I.
[66] See Du Plessis *The Interpretation of Statutes* (1986) 156.
[67] *Ibid* 127: Du Plessis writes that this presumption should "be regarded as a valuable means towards *intra-textual contextualization....*" (emphasis added)
[68] An "objects clause" is to be found in section 2 of Act 46 of 1998. As it is an explicit statement of purpose, no interpretation should proceed in the absence of a consultation of its every provision.
[69] See, generally, Du Plessis *The Interpretation of Statutes* (1996) 122 – 3.
[70] *Ibid.*

wat sy taak ook maar enigsins na behore wil verrig, geen betekenis daaraan toeskryf alvorens hy nie die hele wet nagesien het nie."[71]

1.1 Intra-textual Contextualization in Illustration

Some of the most edifying exemplifications of theory-deployment are to be found in the decisions of our courts. It is, furthermore, the propositions they enunciate which are authoritative, for the time being at all events. It is therefore fitting to consider the approach of our courts to intra-textual contextualization.

1.1.1 Minority Judgment of Schreiner J.A. in Jaga v. Dönges[72]

In this case, Schreiner J.A. was called upon to give meaning to the words "has been sentenced to imprisonment" in section 22 of the Immigration Regulation Act, 22 of 1913 (substituted by Act 15 of 1931).[73] The question arose whether the terms of the language were such as to bring suspended sentences of imprisonment within their reference.[74]

Schreiner J.A. observed at the outset of his judgment that the "context" within which the words were to be construed embraced both the language of the rest of the statute "throwing light of a dictionary kind on the part to be interpreted" and, more importantly, "the matter of the statute, its apparent scope and purpose, and, within limits, its background."[75] The judge in the result concluded that suspended sentences did not come within the meaning of sentences contemplated by section

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[71] See Steyn *Die Uitleg van Wette* (1981) 137.
[72] 1950 (4) SA 653 (A) at 662 ff.
[73] See judgment at 662 E – F.
[74] See 665 E – 667 H.
[75] See 662 H.

22 of the Act[76], intimating that the "context" did not permit of such a construction.[77]

What the court did in essence was to have regard to the scheme of the Act as a whole in seeking to establish the meaning of the words "has been sentenced to imprisonment" in section 22. The preamble bore very pertinently upon the elucidation of that scheme. From its configuration, the *purpose* and policy of the Act could be educed. (This is why Schreiner J.A.'s modus operandi might be termed "teleological".[78]) Now that the "purpose" had been laid bare, it was possible to revisit the language in contention in the section in the light of this "purpose", and thereby to uncover its meaning. (Such a recurrence has been alluded to as a *reversion to particularity*.[79])

Had this case presented for decision today, it would not have been sufficient merely to have had regard to the "purpose" and policy of the Act in ascribing meaning to the contentious wording. It would have been necessary, in addition, to utilize the purposes and values inherent in the Constitution itself in doing so, harmonizing those purposes and values with the statutory "purpose".[80]

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[76] Act 667 H.
[77] Act 667 H.
[78] The epithet "teleogical" imports end- or goal-orientation. The Greek word "telos" is etymologically significant.
[79] See the third paragraph under II, above.
[80] These matters will receive appropriate attention in due course.

1.1.2 Prokureur-Generaal, Vrystaat v. Ramokhosi[81]

This case provides a graphic illustration of intra-textual contextualization within the contemporary setting. The respondent had been arrested in connection with an alleged burglary. Having been denied bail in the regional court, and successfully having appealed such refusal, he was confronted with the attorney-general's attempt to neutralize his good fortune.(The attorney-general applied in this instance for leave to appeal to the (then) Appellate Division of the Supreme Court.)[82] In the course of his judgment, Edeling J. set out his reasons for favouring the respondent's case, but in view of his conclusion that there were reasonable prospects that another court would disagree with his view of the law, he allowed the attorney-general's application to appeal.[83]

Let us take a look at the substance of the decision. The case hinged on the interpretation of section 60(11) of the Criminal Procedure Act, 51 of 1977 (as amended). This anomalous subsection provided that "where an accused is charged with an offence referred to (a) in Schedule 5; or (b) in Schedule 1, which was allegedly committed whilst he or she was released on bail in respect of a Schedule 1 offence, the Court shall order that the accused be detained in custody... unless the accused... satisfies the Court that the interests of justice do not require his or her detention in custody."[84] The court expressed its doubts as to the constitutionality of this subsection,[85] but for purposes of its decision went out from

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[81] 1996 (11) BCLR 1514 (O).
[82] The facts of the case find formulation most pertinently at 1517 A – D of the judgment. (See also headnote, at 1514 – 1516.)
[83] See 1543 F – H of the judgment.
[84] Section 60 (11) of the Criminal Procedure Act, 51 of 1977 (as amended).
[85] See 1529 F – H.

the premise that it was not unconstitutional.[86] (The doubts in question owed their origin to the provisions pertaining to release on bail as embodied in section 25(2)(d) of the Interim Constitution.[87])

Edeling J. examined a number of neighbouring subsections, notably subsections 60(1)(c), 60(2)(b), 60(2)(c), 60(3) and 60(10), emphasizing as he did so the inquisitorial nature of bail proceedings and the duty of the court to ensure that such information be placed before it as would enable it to determine whether it was in the interests of justice that an accused be released on bail.[88] The fact that subsection 60(11) placed the onus on the accused to satisfy the court of the circumstances it stipulates (that is, that the interests of justice do not require his or her detention in custody) does not, the judge held, vitiate the inquisitorial character of bail applications, or derogate from the tenor of subsections 60(3) and 60(10) to that effect.[89]

Accordingly, it transpires that in this case intra-textual contextualization went to the purport of circumjacent subsections (and not to that of the Act in its entirety). Section 60(11) was to be construed having proper regard especially to subsections 60(3) and 60(10).[90]

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[86] At 1530 A.
[87] At 1529 F – H.
[88] See judgment at 1526 G – 1527 B.
[89] See, in particular, 1528 H of the judgment.
[90] *Ibid.*

But that is not all. In contrast to the circumstances *of Jaga v. Dönges*,[91] the matter under discussion was to be determined within the value-framework of a supreme constitution. The judge emphasized at the outset that the point of departure in applications for bail, in accordance with section 25(2)(d) of the Interim Constitution, was that an accused is *prima facie* entitled to be released on bail; it was only where the interests of justice require otherwise that such a grant is impermissible.[92] The interests of justice is the dominant consideration.[93] It was with these concerns in mind that section 60(11) was to be approached.

Reverting specifically to section 60(11), apparently in the light of these considerations, the judge held that as it placed an onus on the accused, the provision was to be strictly interpreted.[94] This, it is to be observed, is consistent with the constitutional ethos.[95] As the word "charged" as used in the subsection was to be given its strict legal sense, as opposed to its popular meaning,[96] the accused, not having been "charged" as thus defined, could not be brought within the terms of the subsection, which was accordingly not applicable.[97] He was therefore not saddled with any onus,[98] and even supposing that he had been, he would have discharged it.[99]

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[91] *Supra.*
[92] See judgment at 1523 F – G.
[93] Judgment at 1525 F.
[94] See judgment at 1532 D.
[95] The constitutional purport would tell in favour of a restrictive construction of provisions imposing burdens.
[96] Judgment at 1532 D – E.
[97] Judgment at 1535 J.
[98] Judgment at 1536 A.
[99] Judgment at 1536 D.

1.1.3 Magano v. The District Magistrate of Johannesburg[100]

This judgment provides a very elementary, though nonetheless instructive, example of intra-textual contextualization. The facts of the case are simple enough. Because the prosecution believed that there was evidence linking the applicants to more serious offences, the magistrate was persuaded to grant a postponement of the bail application.[101] Van Blerk A.J., relying upon section 25(2)(d) of the Interim Constitution, held that the right of an arrested person to be released from detention "unless" the interests of justice require otherwise is such as to cast upon the state the onus of establishing disentitlement on that basis.[102] The judge considered that a statement alleging the possible complicity of one or both applicants in more serious crimes was insufficient to discharge that onus.[103] The postponement should accordingly not have been granted.[104]

During the course of the proceedings, counsel for the respondents argued that the grounds upon which the magistrate's decision could be reviewed were limited to those enumerated in section 24 of the Supreme Court Act, 59 of 1959, none of which was present in the instant case.[105] Van Blerk A.J. turned his attention to section 7(4)(a) of the Interim Constitution, reading to the effect that a competent court may be approached for relief in the event of a fundamental right having been

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[100] 1994 (2) BCLR 125 (W).
[101] At 127 C – D, Van Blerk A.J. writes: "It is not clear what the precise reasons for the grant of the postponement were, but it would appear that the [magistrate] granted it on the basis that it was in the interests of justice that the State be afforded a postponement of a day and a half to conduct... ballistic tests and for further investigations."
[102] Judgment at 128 E – G.
[103] Judgment at 133 F – G.
[104] *Ibid.*
[105] Judgment at 130 B.

infringed or threatened.[106] Did the court have any option but to have section 24 of the Supreme Court Act declared unconstitutional[107] – if the correctness of counsel's arguments was conceded? The answer is apparently 'no'. If counsel's arguments were correct, the section could not pass constitutional muster.

Section 24(1) provides as follows: "The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division are –

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding officer;

(c) gross irregularity in the proceedings;

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence."[108]

Plainly, one can discern nothing in this subsection entitling the applicants to approach the Supreme Court (as it was then known) for relief. Yet section 24(1) must be read together with section 24(2). It was the defect of counsel's argument that it did not reckon with the possibility of simple intra-textual contextualization. Section 24(2) reads that "[n]othing in this section shall affect the provisions of

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[106] See judgment at 131 F – I.

[107] Under the 1993 Constitution, it was only exceptionally that the (then) Supreme Court would have had jurisdiction to pronounce upon the constitutionality of an Act of Parliament. (See *Park-Ross v. The Director, OSEO* 1995 (2) BCLR 198 (C) at 202 D – F.) However, as it seems to me, the court upon suspecting unconstitutionality would ever have been in a position to trigger the sequence of events culminating in an order to that effect. (In terms of the current dispensation, the superior courts may make an order concerning the constitutionality of an Act of Parliament – but until confirmed by the Constitutional Court an order of invalidity is without force – see section 172 (2)(a) of the Constitution).

[108] Section 24(1) of the Supreme Court Act, 59 of 1959.

any other law relating to the review of proceedings in inferior courts."[109] Of course, the Constitution was a "law" within the meaning of the words "any other law,"[110] and so counsel's contentions were not sustainable. Not only was it a foregone conclusion that the court could be approached for relief (by reason of constitution fiat), but section 24 did not require to be declared invalid![111]

The appropriate modus operandi may be summed up as follows: Section 24(1) is to be read in the light of the purpose suggested by section 24(2), which by its language conveys that the former subsection does not purport to be exhaustive in its terms. This purpose is then to be assimilated to the "purposes" of the Constitution, so as to achieve a "harmonized design". In the light of this "harmonized design", the power to review proceedings in the lower courts on the basis mentioned finds its affirmative substantiation.

1.1.4 The Dissenting Judgment of O'Linn J. in DTA of Namibia v. Prime Minister of the Republic of Namibia[112]

More will be said about this judgment subsequently. For the moment, we are concerned with it only to the extent that it discloses aspects of intra-textual contextualization.

The provision at issue was section 93(4) of the Electoral Act, 24 of 1992 (Namibia). O'Linn J. held that marginal notes bear some weight in determining

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[109] See section 24(2) of the Supreme Court Act, 59 of 1959.
[110] See judgment at 132 F.
[111] "Declared invalid" – in the ultimate culmination of events, that is! See n 101.
[112] 1996(3) BCLR 310 (NmH) at 321ff.

the "intention of the legislature."[113] (It would perhaps be pedantic to quibble with the judge's use of this phrase. Although one would be more inclined to speak of the "purpose" of the legislation, judicial convention seems to be rather wedded to expressing itself in these terms.) The judge moreover had resort to other provisions in the Act in order to shed light on the meaning of the disputed section.[114]

One is forced to concede that the above exercise did not reflect an instance of "purely" intra-textual contextualization. It was inextricably interwoven with elements of historical contextualization. The latter issue is covered under the rubric of statutory "historicization."[115]

(2) "INTENTIONALIZATION"[116]

Also apposite to the elucidation of the purpose of an enactment is the methodology of "intentionalization." As was implied two paragraphs previously,[117] the enterprise of statutory interpretation does not seek to unveil anything in the nature of the "intention of the legislature." "Intentionalization" is not a reference to any such undertaking. While concededly pertaining to the genesis of a statute,[118] it

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[113] See judgment at 327 E-F. At G, the judge observes, too, that a *heading* in the enactment and the marginal notes converge in bringing out the "intention of the legislature" (statutory "purpose" as we should be more inclined to speak of it).

[114] Most notably section 94 of Act 24 of 1992 (Namibia). See the judgment, in this regard, at 323 C-F.

[115] See (3) below, and more particularly 3.2, which broaches issues relevant to the axis of statutory precursors.

[116] "Intentionalization" must here by understood as denoting an effort to come by *objective manifestations of the various actuating forces* ultimately culminating in legislative formulation. It does not refer to an attempt to ascertain the subjective intentions of the lawmakers. Hence the inverted commas! (The word is used in a metaphorical sense.)

[117] In the discussion under 1.1.4, above.

[118] This methodology may be taken to partake of what is spoken of as "genetic interpretation". (Du Plessis's personal communication)

looks upon the subjective dispositions of the lawmakers as irrelevant to the interpretive process. It would disown Betti's canon of the actuality of understanding (which has as its object the reconstruction of authorial intent).[119] "Intentionalization" would nonetheless affirm as reflective of its essential thrust his *canon of the hermeneutical correspondence of meaning*[120] — with its emphasis on the "particular logic and formative principle" of the statute or its sub-statutory components. As pointers to meaning-adequacy,[121] factors such as the circumstances surrounding the passing of a statute and deliberations preceding its promulgation[122] might require investigation if there is to be compliance with this canon.[123]

It must be emphasized that "intentionalization" is a mode of contextualization. It seeks to relate the provision(s) at issue to the historical circumstances in which it (they) was (were) conceived. *Rand Bank Ltd. V. De Jager*[124] affords an apt illustration of this methodology.

2.1 Rand Bank (Ltd) v. De Jager [125]

The decision in this case concerned the interpretation of the Prescription Act, 68 of 1969 within the context of the law of suretyship.[126] Baker J. observed that the Act

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[119] See the discussion of Betti in Chapter I of this study, 4.1.3. See also 5B(1) and (2) of the same chapter.
[120] See the discussion of Betti in Chapter I of this study, at 4.1.4. See also 5D(1) of the same chapter.
[121] The canon at hand is also known as that of "meaning-adequacy in understanding". See Chapter I of this study, at 4.1.4.
[122] See Du Plessis *The Interpretation of Statutes* (1986) 133-4.
[123] The canon, it will be remembered, dictates reference to the particular logic and formative principle of the matter in question.
[124] 1982(3) SA 418(C).
[125] *Supra.*

was largely the work of the late Professor J.C. de Wet, and deemed it meet to consult the latter's memorandum (together with a supplementary memorandum) with the object of shedding light on its import.[127] (The court assumed that it was entitled to do so.[128]) The extent of the judge's reliance on the two memoranda is clearly apparent from even a cursory reading of the report. Baker J. did note that Parliament may not have implemented each and every one of the professor's suggestions: "Whatever Prof. De Wet may have written in his memoranda, it does not follow that Parliament intended to do exactly as he had suggested".[129] This, however, did not detract from the obvious value the court attached to these sources. It was from the tenor and substance of these documents that the judge sought to establish the purpose of the statute.[130]

It is suggested, conformably with the approach of the court in this case, that there is no good reason in principle why materials of this sort should not be deemed valuable and admissible sources of reference in illuminating the purport of a statute in appropriate instances. Devenish seems to be correct in advancing that the inauguration of the constitutional state portends a climate hospitable to an unrestricted contextual methodology[131] in the construction of legislation.

2.2 Fully conscious of repeating ourselves, it is to be underscored that, despite any confusion that may result from similarities of nomenclature,

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[126] See 419ff of the judgment. (See also headnote, at 418.)
[127] For the judge's citation of the supplementary memorandum, see judgment at 425B.
[128] At 443E.
[129] At 443B.
[130] "Intentionalization" is therefore (as a methodology) an important means to purposive-definition.
[131] See Devenish *Interpretation of Statutes* (1992) 288-93 *passim*.

"intentionalization" has nothing whatever to do with making sense of any presumed "intention" harboured by the framers of a statute. A good part of this thesis has been devoted to a critque of any approach to interpretation that would premise itself upon the notion of the "intention of the legislature".[132] And this is as well. For even as distinguished a writer as Steyn failed to appreciate that it is its *purpose* we are after, and not the subjective volitions of its makers, when we wish to make sense of an enactment.[133] (Cowen and Du Plessis note the "unbridged gap" in Steyn, a coinage intended to convey the latter's facile and erroneous equation of his own literalist-cum-intentionalist approach and the purposive approach of Roman-Dutch law as expressed by Everhardus, for instance.[134])

It is of interest that in the recent case of *Fedsure Life Ass. v. Greater Johannesburg Transitional Metropolitan Council,*[135] the court acknowledged the poverty of the "intention" approach: "I cannot be expected to divine all the workings of [the lawmaker's] mind."[136] Unfortunately the court (per Goldstein J.) regressed a step further, however: "I must ... give effect to the ordinary meaning of the language of the lawmaker...."[137] Cowen comments rather sardonically on the attempt to maintain a divide between "intentionalism" and "literalism." He quotes a foreign judge (Coleridge J.) as having posited that the sole legitimate enquiry pertains to

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[132] This is why Betti's canon of the actuality of understanding and Hirsch's statement to a similar effect are not sustainable. See, in particular, Chapter I, section 3, for an elaboration of these issues. See also Chapter II, 3.4.3.

[133] See, in this regard, Steyn *Die Uitleg van Wette* (1981) 2.

[134] Cowen "The Interpretation of Statutes and the Concept of 'The Intention of the legislature' " 1980 (43) *THRHR* 100 at 118 writes of the "unbridged gap" in Steyn. At the outset of this article, Cowen records the principle of Roman-Dutch law expressed by Everhardus as *ex ratione legis colligitur mens legis* (at 101). The maxim conveys "purposivism", not any intentionalist programme. See also Du Plessis *The Interpretation of Statutes* (1986) 36.

[135] 1997(5) BCLR 657 (W).

[136] See judgment at 663D.

the intention to be found in the words of the statute. In another case, the same judge ventured the remarkable statement that the expressed meaning is equivalent to the intention.[138] With this, one should observe that it is neither the "ordinary meaning of the language" (as presupposed by literalism) nor, as the "intentionalists" might claim, the intention as expressed thereby, that should be allowed to guide the interpretive process. It is the value-system underpinning the Constitution together with the purpose of the statute or its substatutory components that should give direction to the endeavour.

(3) STATUTORY "HISTORICIZATION"

The purpose of a statute is also, in appropriate instances, to be garnered along the two principal axes of statutory "historicization" – that of effective history, and that of statutory precursors. These are discussed in turn.

3.1 The Axis of Effective History

Du Plessis writes of "custom" as part of the historical context of a statute.[139] On account of the fact that previous decisions are of great importance in the interpretation of legislation, I am inclined to view the case-law as decided under any item of legislation ("specific judicial custom" as one might speak of it) as intrinsic to the notion of "custom" in this sense.[140]

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[137] At 663D.
[138] See Cowen *op cit* 109.
[139] See Du Plessis *The Interpretation of Statutes* (1986) 134.
[140] Du Plessis would disagree (*Ibid* 135).

Precedential authority pertaining to the construction of a given statute is, as we have seen, what Gadamer would call its effective history (*Wirkungsgeschichte*).[141] It is the intervening history of the interpretation of that statute.[142] It provides the basis, on Gadamer's thesis, upon which the "fusion" of the historical horizon inhabited by the statutory text and the interpreter's own horizon may be effectuated.[143] Such "effective history" orients the interpreter's understanding of the statute. The greater her immersion therein, that is, the more complete her "effective-historical consciousness," the more adequate will be her construction of the text with regard to the concrete-existential dilemma confronting her.[144]

In South Africa the doctrine of *stare decisis* obtains. Precedents are generally binding, and this goes as well for judgments bearing on the meaning of statutes. This circumstance warrants celebration, since previous decisions hold out the possibility of illuminating the *purpose* of the statute at hand.

A caveat should be entered, however. The *Wirkungsgeschichte* of the statute may require re-evaluation, seeing that the era of constitutionalism has dawned.[145] Such "effective history" may have been dictated by authoritarian and repressive ideology. Or, it may simply no longer square with the value-system inaugurated

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[141] See the discussion of Gadamer in Chapter II of this study, at 3.4.5, 3.4.9, and 6C(1) and (2).
[142] The terms "effective history" and "intervening history of interpretation" appear to be synonymous.
[143] For a discussion of the "fusion of horizons" as set out in Gadamer, see Chapter II of this study, at 3.4.5. The words "historical horizon inhabited by the text" emanate from Palmer *op cit* 25.
[144] Gadamer renders the notion of "effective-historical consciousness" as *wirkungsgeschichtliches Bewusstsein*. See, once again, Chapter II of this study, at 3.4.5.
[145] In such a case, a departure from the tenor of previous judgments would seem to be indicated.

by the Constitution.[146] In either case it would be futile – indeed counter-productive – to seek to derive intimations as to purpose from precedent.

3.2 The Axis of Statutory Precursors

An often invaluable aid to the inference of "purpose" may be found along the axis of statutory precursors. "Predecessor enactments" may shed light on the interpretation of language refractory to analysis on linguistic lines.[147]

It is to be observed that, as with "intentionalization" (dealt with under (2) above), Betti's *canon of the hermeneutical correspondence of meaning* is implicated along the axis of statutory precursors.[148] The canon of meaning-adequacy in understanding (or of the harmonization of understanding), as it is also known, involves what Betti terms a "technical-morphological" method or strategy.[149] Such a strategy is geared to the comprehension of "the meaning-content of the objective mental world in relation to its particular logic and formative principle."[150] Upon the present apprehension, it enjoins the interpreter to have regard to the specialized field of concern of which the matter to be construed is part and parcel.[151] It would also mandate an examination of the identifiable antecedents of the particular

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[146] One might, for instance, conceive the Constitution to place more emphasis on "equality" (in relation to "unencumbered liberty") than was previously the case. Precedential authority would then require re-assessment.

[147] See Du Plessis *The Interpretation of Statutes* (1986) 132-3 for a brief discussion of this matter.

[148] This canon is otherwise known as the canon of meaning-adequacy in understanding. See Chapter I of this study, at 4.1.4.

[149] See Bleicher's discussion in Bleicher *Contemporary Hermeneutics: Hermeneutics as Method, Philosophy and Critique* (1980) 40.

[150] These are Betti's words as cited in Bleicher *Ibid.*

[151] A discussion with Mr E. Leistner of the Department of Philosophy (Unisa) was illuminating in this regard.

matter.[152] In both cases the interpreter would be called upon to undertake fairly extensive historical research.[153] When we broached the methodology of "intentionalization" in elaborating the approach of the court in *Rand Bank (Ltd) v. De Jager,*[154] it was observed that the judge had recourse to memoranda throwing light upon the meaning to be ascribed to the Prescription Act. Those memoranda formed part of the "particular logic and formative principle" of that Act. It must be said that in the *Rand Bank* case the court also undertook an analysis along the axis of statutory precursors (when it conducted research into the antecedents of the provision in question – also part of its "particular logic and formative principle."[155])

3.2.1 The assistance furnished by an approach premised on the methodology under discussion is evident from a reading of the judgment in *SANTAM Insurance Ltd. v. Taylor.*[156] There the court was confronted with a provision of great prolixity and convolution – in the form of section 22(1) of the Compulsory Motor Vehicle Insurance Act, 56 of 1972 (as substituted by section 2(a) of Act 23 of 1980). Botha J.A. maintained that "[s]earching for the intention of the Legislature on the question at issue merely by studying the words used in the section is to my mind an unrewarding, unedifying and finally abortive exercise."[157] No useful purpose would be served, the judge continued, by seeking to subject that section to linguistic or grammatical analysis.[158]

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[152] This was also brought out in the discussion referred to in n151, above.
[153] See nn151 and 152 above.
[154] *Supra.*
[155] Or, at any rate, as I have been given to understand.
[156] 1985(1) SA 514(A).
[157] See judgment at 524C.
[158] At 524E.

Something was to be gained by looking at the historical background of the legislation, however. The statute in question was for many years a part of the corpus of our legislation, and on several occasions had been the subject-matter of amendment.[159] The court reflected that the policy of the legislature until 1980 had been consistent throughout;[160] it was only then, when section 22(1) of the Act had been amended by section 2(a) of Act 23 of 1980, that a change in legislative policy was registered.[161] Such a retrospect of the life of the statute seems to have left the court in no doubt whatever as to the *purpose* and objects of that section.[162]

3.2.2 Minority Judgment in DTA of Namibia v. Prime Minister of the Republic of Namibia. [163]

With this, one may revert to the above judgment insofar as it pertains to historical contextualization along the axis of statutory precursors. O'Linn J. took a broad view of the matter,[164] as Betti might have put it: the judge endeavoured to interpret the Electoral Act, 24 of 1992 (Namibia) in relation to its "particular logic and formative principle". This entailed his concern with parallel South African legislation — "precursor enactments".[165] Such researches elicited for him the inference that section 93(4) of the Act was a product of poor statutory draftsmanship, and that its omission to confer upon the court the power to order

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[159] See judgment at 527ff.
[160] At 528F.
[161] At 529D-E.
[162] See 530B-531D.
[163] 1996(3) BCLR 310 (NmH) at 321ff.
[164] As commanded by the canon of meaning-adequacy in understanding.
[165] See judgment at 327ff.

inspection of sealed election material (in the absence of such being required for the purposes of instituting or maintaining a prosecution for any offence in relation to the election in question) was an oversight.[166] Upon this observation, O'Linn proceeded to supply the omission – with reference to the provisions of the Constitution.[167] Not being the majority judgment, however, the decision obviously did not bear dispositive force.

In fine, it is noted that recourse to the two axes of statutory "historicization" with a view to the disclosure of statutory or sub-statutory purpose was already implicitly enjoined in Schreiner J.A.'s comments in *Jaga v. Dönges*.[168]

(4) HARMONIZATION OF DESIGNS

As foreshadowed in the introduction to the process of purposive-definition, the methodology of the harmonization of designs involves dove-tailing the purpose of the statute (or that of certain of its provisions) with the design of the Constitution.[169] The methodologies of intra-textual contextualization, "intentionalization" and statutory "historicization" embody mechanisms for the elucidation of statutory or sub-statutory purpose. When once that purpose has been brought to light, the jurist should ensure its alignment with the design of the Constitution in a way that accords full meaning to the mandates and inherent value-system of the latter.[170] It is suggested that congruence-realization along

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[166] See judgment at 327B (See also headnote at 310 – 313.)
[167] Judgment at 329I, 331F, 332D, 333F and 335G-H.
[168] It will be recalled that Schreiner J.A. argued that its "background" is to some extent part of the "context" of a statute. See, again, *Jaga v. Dönges* 1950(4) SA 653(A) at 662H.
[169] See the introductory paragraphs under II, above. See Chapter V, at 4.1, additionally.
[170] The injunction embodied in section 39(2) of the Constitution is to this effect.

these lines would frequently implicate her in imputing a purpose to the statute (or its sub-statutory components) in the light of constitutionalism. This conferment it has been deemed appropriate to speak of as an "*attribution of purpose*".[171] (Should harmonization in the event prove impossible of accomplishment, it would be necessary to consider that the statute or one or more of its provisions may be incompatible with the Constitution, and on that basis liable to invalidation.)

4.1 Excursus: The Presumptions of Statutory Interpretation

One may say something at this juncture respecting the presumptions of statutory in interpretation. Du Plessis and De Ville remark that theirs is the value-regulative function normally associated with a Bill of Rights.[172] The design of the Constitution has absorbed the purport of the presumptions for the most part. But this does not perforce imply that they are now superfluous for all purposes.[173] Those presumptions which amplify and reinforce the spirit and objectives of the Bill hold out the potential of far more meaningful application than they would within a dispensation of parliamentary supremacy.[174] It does not follow from the fact that its spirit is taken up in the Constitution (section 233 entrenches "reasonableness" as a criterion in the interpretation of statutes) that the presumption that enactments are not aimed at achieving unjust or inequitable results, for instance, goes by the board.[175] Du Plessis and De Ville write that the presumption may still be used as an exhortation to preferential reliance upon the

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[171] I take the notion of the "attribution of purpose" from Devenish "Teleological Evaluation: A Theory and Modus Operandi of Statutory Interpretation in South Africa" 1991 *SAPL* 62 81.
[172] See Du Plessis and De Ville "Bill of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects" (1993) 3 *Stell LR* 356 361.
[173] *Ibid.*
[174] *Ibid* 363.

most just and equitable meaning of an ambiguous provision.[176] The same presumption (and section 233 itself) may be harnessed to the end of construing penal provisions restrictively.[177]

The harmonization of designs would involve the application of the presumptions to the extent to which they still obtain. Particularly would it imply the pressing into service of those which enhance the spirit and objects of the Bill of Rights.[178]

4.1.1 Matinkinca v. Council of State, Ciskei [179]

This case is important as indicating the essential function of the presumptions of statutory interpretation. The issue raised concerned the constitutionality of a Special Indemnity Decree, 7 of 1993. The statute provided for the indemnification of government officials in respect of certain offences committed on a particular day. On that day, a number of people were shot and killed, and others injured, near Bisho stadium.[180] The court in the result declared the Special Decree null and void as being incompatible with the Ciskei Constitution (Ciskei Constitution Decree, 45 of 1990).[181]

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[175] *Ibid* 362.
[176] *Ibid.*
[177] It is submitted that it would generally be most just and equitable to construe penal provisions along restrictive lines.
[178] Such as the presumption just discussed (that enactments are not aimed at achieving unjust or inequitable results). See, also, Du Plessis and De Ville *op cit* 362 (last sentence on page).
[179] 1994(1) BCLR 17 (Ck).
[180] See judgment at 19D-G.
[181] Judgment at 39 I.

In the course of its judgment, the court had fairly extensive recourse to the writings of Professor T.J. Kruger.[182] The latter's claim that a statute is to be interpreted in the light of the spirit and objectives of the Constitution was given full endorsement.[183] Likewise were approved certain other of his insights, most notably for our purposes the following:

(i) A value-judgment approach, as opposed to one premised on positivist assumptions, is appropriate to the interpretation of statutes within a fundamental-rights dispensation.[184]

(ii) The need for the application of the presumptions under such a dispensation for the most part lapses.[185] In shedding light upon this observation, Kruger is cited as contending that the "spirit and objectives" of the Constitution obtain as the supreme and most comprehensive value-system in a human-rights dispensation. Of particular importance in this regard is the "unwritten constitution", that is, those values underpinning, and implicit in, the highest law.[186]

One may take these remarks to bear upon the essential function of the presumptions. Their value-regulative thrust is largely sustained by the written and unwritten Constitution. This is not however to imply their redundancy; it is agreed with Du Plessis and De Ville that those which retain a residual

[182] Judgment at 25-6.
[183] At 25J.
[184] At 26A.
[185] At 26C.
[186] At 26D.

independent justice-servicing potential may yet be deployed to good effect. Such deployment would be intrinsic to the harmonization of designs.

4.2 The Notion of a "New Hermeneutical Consciousness" [187]

On the relationship between the statute at hand and the Constitution, the Hirschean programme furnishes certain interesting perspectives. As regards both the statute and the Constitution, Hirsch would say that their "meanings" cannot transcend the semantic possibilities of the language of which they are comprised. The jurist stands beyond them as a neutral, theory-independent tribunal in judging of the "significance" of each when compared with the other. To the extent that the statute shows up deficiencies when juxtaposed to the Constitution, she brings to bear upon the former a critical disposition. This leads her to make good the shortcomings of the statute, thereby bringing it into line with constitutionalism. Or so Hirsch, at any rate, would be inclined to tell us.[188]

This is a very mechanistic way of looking at things. It does not serve the interests of value-laden adjudication. Gadamer's model furnishes much that may be harnessed by way of remedy. His conception of the "separating out" of prejudices is particularly relevant to the discussion. Gadamer would say that the jurist's

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[187] The term appears to be Professor L.M. du Plessis's coinage. See Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 60-107 *passim*. The "new hermeneutical disposition" involves more than mere assimilation of new skills. It points to an attitudinal investment, an understanding of the new political dispensation and the demands of human-rights protection in the domestic as well as the international context. (*Ibid*, towards the end of the discussion).

[188] See Chapter I of this study, at 4.2.

subliminal sense of justice is subject to *re-evaluation* in the light of the "world" opened up by the "text" of the Constitution and its inherent value-system. Her inappropriate prejudices are to find their expungement from ("separation out" of), and certain novel appropriate ones their incorporation into, her subconscious perceptual framework. She will undoubtedly have to refresh her appreciation of the value-compendium intrinsic to the new legal order every so often, and from time to time her new subliminal sense of justice will require to be brought to consciousness.

Popper is well-known for his thesis that all observation is theory-laden.[189] Translated into the juridical setting, this means that the quality of the jurists's perception of a statute (for instance) is conditioned by her subliminal sense of justice and her prior acquaintance with the law. Given what has been said in the foregoing paragraph about the influence of constitutionalism on the jurist's mind-set, one may be justified in asserting that the quality of her perception of a statute in current circumstances would be essentially a function of her new subliminal sense of justice.

And so we arrive at the notion of a "new hermeneutical consciousness".[190] It is constituted of "prejudices" many and varied, which are preconditions of the understanding of the law, and account for the character of that understanding in any given instance. For the most part, these "prejudices" may be expected to operate below the threshold of consciousness. But every so often it will be

[189] See Popper *Conjectures and Refutations* (1989) 47: "[O]bservations... [presuppose] .... A frame of expectations: a frame of theories". (emphasis added).

necessary for the jurist to renew their vitality, to invigorate them. It would be a salutary habit every once in a while to "externalize" them, to debate them among colleagues, and where necessary to give them a fresh turn in the light of changed circumstances. The "new hermeneutical consciousness" ought not to be allowed to vitrify or stagnate.

One's "prejudices" lend colour to one's interpretation. It would thus be inadvisable to concede any "stable determinacy of meaning". The distinction between "meaning" and "significance" breaks down. There is no duality of meaning-apprehension and evaluation. *Evaluation is intrinsic to meaning-apprehension.* Hirsch's model loses sight of these important considerations.[191]

4.3 The "New Hermeneutical Consciousness" and the Harmonization of Designs

Evaluation being integral to meaning-apprehension, the methodology of the harmonization of designs should ordinarily occur as a one-step process. Only in particularly difficult cases, with which we shall be concerned in due course,[192] would it be necessary to consider the matter on an intellectual level, and undertake a conscious evaluation. Provided that the "prejudices" one brings to bear upon one's understanding of the law remain vibrant and vigorous, the harmonization of designs should occur virtually automatically.

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[190] See Chapter II, 3.4.10.a and 3.4.10.b. See also 6D(1) – (5) of the same chapter.

[191] See Chapter I of this study at 4.2.1, where Hirsch is observed to drive a wedge between "meaning" and "significance", urging the invariance of the former and the context-dependence of the latter.

[192] See the discussion under the head of III(4), below: value-competition making for difficulty in harmonizing designs. See also the discussion of the case of *Concorde Plastics (Pty) Ltd. v. NUMSA* 1997(11) BCLR 1624 (LAC) under III(5), below.

4.3.1. A Case Illustrating the Harmonization of Designs

Hlatshwayo v. Hein[193] provides an apt illustration of the manner in which the purpose of a statute is to be harmonized with the design of the Constitution, so as to give full effect to the value-system the latter represents. Summary judgment had been granted in the magistrate's court for the eviction of the appellants from the respondent's farm.[194] The issue in dispute was whether the Land Claims Court (in which this matter was heard) had jurisdiction to entertain an appeal against this judgment. Both judges held that it did not.[195]

The subsidiary issue, that of an appropriate costs order in the circumstances, is more pertinent to our objectives under this head. The general principle advanced in the superior courts is that costs should follow the result. The court held that in the interpretation of section 33(1)(f) of the Land Reform (Labour Tenants) Act, 3 of 1996, which was the basis of the Land Claims Court's power to award costs, regard had to be had to the public-interest nature of the litigation before it, and that it should not be bound to adhere to the usual approach of the superior courts in exercising its powers in this respect.[196]

The purpose of the Act was to redress large-scale breaches of human rights which had occurred in the past.[197] Section 22 of the Interim Constitution (Section 34 of the Final Constitution) entrenched the right to have justiciable disputes settled by a

[193] 1998(1) BCLR 123 (LCC).
[194] See judgment at 125H-I.
[195] Judgment at 126 A – B. (See also headnote, at 124 E.)
[196] See judgment at 134D – 135A. (See also headnote, at 125A – G.)
[197] See headnote (at 125F).

court or other forum.[198] The Land Claims Court held that if, in its interpretation of the provisions regulating its powers in relation to costs awards, it were to follow the general principle as mentioned, and make an adverse costs order, it might deter legitimate litigants from coming to court, thereby undermining the entire *object of the Act*.[199] The court took judicial notice of the fact that most rural black people were prevented from accumulating substantial wealth, and maintained that potential litigants in raising their rightful claims might risk losing what few capital assets they have (such as livestock and farming equipment, which may be their sole means of pursuing a livelihood) if an order entitling the successful party to his or her costs were to issue as a matter of course.[200] Where matters of public interest arose, it would frequently be appropriate to deprive the successful party of his or her costs.[201] In the circumstances of the case at hand, it was decided that no order as to the costs of the proceedings in the Land Claims Court would be made.[202]

Several comments suggest themselves. The court's disposition was plainly sensitive to the interests protected by the Constitution. It was likewise actuated by the objects of the Land Reform (Labour Tenants) Act. The *harmonization* of these interests and objects appears to have proceeded in the absence of grappling with any complex or refractory conceptual difficulties. Furthermore, it is possible to discern an "attribution of purpose" to the statute in the light of the Constitution: in interpreting section 33(1)(f) of the Act, the court looked upon its import with the

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[198] See the respective sections in the Interim and the Final Constitutions.
[199] At 136G.
[200] See judgment at 136 G-H.
[201] At 138D.
[202] At 138I – 139A.

"purpose" of doing justice to section 22 of the Interim Constitution (section 34 of the Final Constitution).

III. AXIOLOGICAL PERFORMANCE

Axiological performance is directed towards an intuitive perception of the proper disposition of the case at hand in line with the ideals of constitutionalism. As such, and as its name implies, it is concerned with the implementation of values. It has to do with giving them meaning and substance within a specific context – with concrete-existentialization. It is accordingly action-oriented in a larger measure than the processes of ingression and purposive-definition.

Proper axiological performance demands an accounting of all pertinent social realities. American realism (as exemplified in the work of Stone) holds out much that may be harnessed to good effect in this regard. Its commitment to the human, social and economic aspects of the administration of justice, which do not find expression in abstract legal formulation, is to be commended.[203]

Transposed to contemporary South Africa, American realism would command the pursuit of "social justice", as such is registered in the constitutional preamble.[204] It would require that the liberty-equality dialectic be addressed, and the dictates of "substantive equality".[205] And it would urge that the interests of the "community"

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[203] For a discussion of relevant aspects of American realism, see Chapter II at 2. of this study (dealing with the contemporary legal pertinence of existential hermeneutics).
[204] See the preamble to the Constitution in this regard.
[205] See Chapter V of this study at 2.3.1. for an exposition of these issues.

or "communities" which are implicated in the case at hand be serviced – as well as those of the larger "society".[206]

The elasticity of language (including statutory language) makes for the possibility of implementation of these considerations. Du Plessis advances that it would be myopic to conceive of "the inherent flexibility of the ordinary or popular meaning of language" as purely an impediment to proper construction. He contends that such a feature "very often serves the cause of justice with remarkable effect."[207]

Baloro v. University of Bophuthatswana [208]

This judgment expressly approved the principal tenets of American realism. The applicants were "expatriate" members of staff of the respondent university. There were demonstrations against these "foreign nationals", and a moratorium was placed on their promotion while locals were elevated to higher ranks.[209] Section 8(2) of the Interim Constitution (the "equality" clause) was in point. The court held that it was not in keeping with one's expectations of an institution of learning propagating the credo of "academic freedom" that it should discriminate, or be party to discrimination, against anyone, still less members of its staff, on the basis of social or ethnic origin.[210] Friedman J.P. concluded that the university and its co-respondents had acted in gross violation of section 8(2); it was a clear case of

[206] See Chapter V of this study at 2.3.2. The inquiry into the nature of "personhood" is particularly in point here.
[207] See Du Plessis *The Interpretation of Statutes* (1986) 105.
[208] 1995 (8) BCLR 1018 (B).
[209] For the issues raised in this case, see 1023J – 1031I. (See also headnote at 1019 – 1023.)
[210] At 1066E – F.

unfair discrimination. In the result, the judge confirmed the rule *nisi* granting the applicants specified relief.[211]

In the course of his reasons, the judge advanced conformably with the intimation above,[212] that the insights of the American realists are apposite to the functions of the courts in terms of section 35 of the (Interim) Constitution.[213] In order to "promote the values which underlie an open and democratic society based on freedom and equality", the judges, he said, were to act as "social engineers" and "social and legal philosophers".[214] Section 35 required the courts to engage in the creative activity of generating new law where necessary.[215] That section, furthermore, vested them with "an almost plenipotentiary judicial authority to decide according to a sense of natural justice; 'equity', 'ius naturale', 'aequitas' all being enshrined in the Constitution."[216] And in the application of that section they were entitled to have regard, among other things, to the human, social and economic aspects relevant to their decisions.[217]

Friedman J.P.'s observations as here set out warrant a critical appraisal. One quite agrees with the judge that the *human, social and economic aspects* relevant to the court's decision are admissible in coming thereby. But his arguments to the effect of the courts' being vested with some "plenipotentiary judicial authority" are difficult to sustain. These contentions do scant justice to the doctrine of the

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[211] At 1067I – J.
[212] At the commencement of the discussion of this judgment.
[213] See judgment at 1063C-D.
[214] At 1063H.
[215] At 1064B.
[216] At 1064C.
[217] At 1065C.

separation of powers, and the notion of fidelity to law[218] as an indispensable juridical imperative.

It is the merit of American realism that it stresses the need for a *responsive* law. Yet, it should ever be borne in mind that a legal system that is excessively "open" (in Nonet and Selznick's sense)[219] runs the risk of capitulating in the end to political opportunism. This was pointed out in expounding the tenets of the Free-Law school.[220] The expansion of judicial power of a kind with that of Friedman J.P.'s description is not something one would readily be inclined to concede in the absence of considerable circumspection.

(1) THE "FUSION OF HORIZONS": A BASIS FOR FIDELITY TO LAW

Legal positivism is liable to promote a system of law functioning autonomously of its social context.[221] American realism taken to the outer limits of its programme would tend to the sort of expansion of judicial power berated in the foregoing paragraph. One's task, then, is to steer clear both of legal positivism and of undue "openness" (in Nonet and Selznick's sense).

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[218] It has been considered appropriate to refer to the notion in question as that of "fidelity to law". It is very frequently rendered as the "rule of law". The latter designation, however, has acquired numerous subtle overtones of meaning, so much so that a debate as to one or other of its features is liable to involve the participants in argument at cross-purposes. "Rule of law" is perhaps best reserved for employment when used synonymously with "constitutionalism". Fidelity to law demands that adjudication proceed in accordance with law, and not upon any arbitrary basis.

[219] Openness" in this sense signifies responsiveness, the quality of accommodation. See also in this regard Nonet and Selznick *Law and Society in Transition: Toward Responsive Law* (1978) 76-77.

[220] See Chapter II (at 2) of this study for a brief exposition of the thought of the exponents of this school.

[221] See in this regard Nonet and Selznick *op cit* 95. See also Van der Walt squaring up to the Difficulty of Life: Hermeneutic and Deconstructive Considerations concerning Positivism and the Rule of Law in a Future South Africa" 1992 3 *Stell LR* (2) 231 232.

An approach which Van der Walt contends may work towards securing *fidelity to law*, at the same time allowing an adequate measure of *responsiveness* is that premised on the notion of the rule of law as "rule of metaphor".[222] It is proposed to consider likewise.

Van der Walt elaborates on the "rule of metaphor" as importing a dynamic integration of the "familiar" and the "unfamiliar", in which the integrity of the former is preserved in the latter.[223] Within the juridical setting, the "rule of metaphor" postulates the application of a legal text in an "unfamiliar" context in a way that sustains both its integrity and its resilience in the face of novel circumstances. Its purport is therefore conceptually synonymous with Gadamer's "fusion of horizons".[224] Concrete-existential application of the text involves a merger of the historical "horizon" it inhabits and the interpreter's own "prejudice-horizon". In the process, justice is done both to the text and to the circumstances for which it may have to provide.

Purposiveness, Nonet and Selznick claim, is the particular quality of an institution making for a balance between its integrity and responsiveness.[225] Translocated to the domain of legal-textual construction, this insight commends "purpose" as the guiding principle in concrete-existentialization. If approached with the right sort of "purpose", statutory application would neither derogate from the integrity of the

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[222] See Van der Walt "Squaring up to the Difficulty of Life" (1992) *2 Stell LR* 231 234-6.
[223] *Ibid* 236.
[224] *Ibid.*
[225] See Nonet and Selznick *Law and Society in Transition* (1978) 77.

text nor compromise its resilience in catering for the problem at hand. In a word, such "purpose" would allow of a proper "fusion of horizons".[226]

The "fusion of horizons" (as thus facilitated through the notion of "purpose") implies a mutability of signification. Such is Gadamer's "undecidability" thesis.[227] Meaning is context-relative. Upon this assumption, the jurist would be precluded from seeking to uphold an unjust or inequitable construction by alleging an obduracy of legal-textual import, a "stable determinacy of meaning".[228]

What this comes down to is that the potential for legitimate ambiguity is a necessary element in interpretation.[229] This does not mean, though, that any interpretation is as good as any other.[230] Consistently with the thrust of Hoy's hermeneutical pluralism,[231] the jurist should strive for the most apposite decision in the circumstances – as it *emerges* in the "fusion of horizons". And thus is "fidelity to law" to be accomplished.

(2) A MODEL OF AXIOLOGICAL PERFORMANCE: METATHEORY

(i) Two terms are involved in the mediation of axiological performance: "purpose and "existential context".

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[226] See Chapter II at 5. See also 6E(1) – (5) of the same chapter.
[227] See Chapter II of this study at 3.4.8 and 3.4.9 for details concerning Gadamer's "undecidability" thesis.
[228] Legal positivism, which would subscribe to the "stable determinacy of meaning" thesis, is therefore to be abjured.
[229] See C.D. Stone "Introduction: Interpreting the Symposium" 1985 58 *Southern California LR* (1) 1 3.
[230] *Ibid.*

(ii) The process of purposive-definition brings out the first of these terms. The methodology of the "harmonization of designs" reconciles statutory or sub-statutory purpose with the design of the Constitution. One remembers, moreover, from the discussion under 1.4, above,[232] that the constitutional scheme contemplates the "synchronization of interests": public and private, as well as competing private, interests. Accordingly, it is integrally a part of the constitutional design that the purpose of "justice" should be serviced. It follows from this that

(i) the purpose of the statute or its sub-statutory components;

(ii) the constitutional design; and

(iii) the purpose of "justice"

constitute a *single, composite, threefold "purpose"*.

(iii) *"Existential context"* is a reference to the broad "context of social realities" (of which the "arrangement of facts" serving for determination must be deemed a component). The "context of social realities" pertains most notably to such issues as:

(i) the importance of transparency in the course of political and public activity;[233]

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[231] See Hoy "Dworkin's Constructive Optimism versus Deconstructive Legal Nihilism" 1987 6 *Law and Philosophy* (3) 321 356.
[232] See 1.4 at the beginning of this chapter.
[233] See 5.1(d) of the Constitution (Act 108 of 1996).

(ii) the human, social and economic aspects relevant to the determination;[234]

(iii) a concern for the "community" or "communities" which constitute a source of "personhood";[235]

(iv) the exigencies of life in, and the welfare of, the larger "society";[236]

(v) a concern for human dignity and substantive equality; and

(vi) a concern for liberty (in its proper conception).[237]

(iv) "Purpose" subsumes a commitment to the broad "context of social realities." The issues itemized under (iii) (i) – (vi), above, figure as matters to which, as seen under 1.1 – 1.4 *supra*[238] (where the ideals of an open and democratic society based on human dignity, equality and freedom were canvassed), the design of the Constitution is most emphatically committed.

(v) Underlying the specific statutory norm (dealt with in the process of ingression) is a "*narrative model*" of typifications of action, *loaded with tacit social evaluations*.[239] This is what Gadamer would speak of as a "pre-

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[234] The American realists would have emphasized these considerations in law-application. See Chapter II at 2 of this study for details.

[235] See Chapter V (at 2.3.2) of this study insofar as it bears upon the relationship between community and selfhood.

[236] The larger "society" is conceptually to be distinguished from the notion of the community. Those who conflate these concepts render themselves open to reproof as being party to the solecism referred to as the "communitarian shuffle". See Woolman and Davis "The Last Laugh: Du Plessis v. De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions" 1996 12 *SAJHR* (3) 361 387-8 n86.

[237] See, in this regard, Chapter V, 2.5(3) and 4.1.

[238] See 1.1-1.4. at the beginning of this chapter.

[239] See Jackson *Making Sense in Law: Linguistic, Psychological and Semiotic Perspectives* (1995) 152-4. The "narrative model" and the "representation (to oneself) of situations" are synonymous. Both may be taken to reflect the "pre-understanding" orienting meaning-apprehension. See the discussion in Chapter IV at 2.2.2. and 2.2.3.

understanding".[240] It informs the jurist's perception of the "norm" and the "arrangement of facts", organizing them into a stable configuration (Gestalt) of *legal norm* and *legal facts*.[241] Subsumption or non-subsumption proceeds on the basis of this Gestalt.[242]

(vi) The *threefold "purpose"* (noted in (ii) above) – which, as mentioned in (iv), is committed to the "context of social realities" – may make for an "adjusted prejudice-horizon", a *new "pre-understanding"*. In a word, the *evaluative dimension of the "narrative model"* (see (v) above) would undergo *adjustment*.[243] And so the "norm" and the "arrangement of facts" would be organized into a *new* stable configuration (Gestalt) of "legal norm" and "legal facts". Subsumption may now be observed to take place where previously it did not – and conversely.[244]

(vii) Since the "*context of social realities*"[245] is one to which the threefold "purpose" has subsumed a commitment, (see (iv) and (vi) above), it would lend its force to the activation, alternatively the inactivation, of the normative syllogism. The "context of social realities" may make for an *adjustment to the evaluative dimension of the "narrative model"*. The

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[240] See the discussion of Gadamer's conception of "prejudice" or "pre-understanding" in Chapter II of this study, at 3.4.

[241] The reader is invited to consult Chapter IV, 2.2.4 in this regard, as also 3C(1) – (3) of the same chapter. See the references to Kaufmann, Rigaux, Nerhot, Zaccaria and others in Chapter IV of this study (in this regard). The "narrative model" of Jackson's conception makes for this configurational organization.

[242] On the notion of Gestalt, Jackson cites the insights of J.B. Best. See Jackson *Making Sense in Jurisprudence* (1996) 154. See also Chapter IV, 2.2.4 and 3C(3) in this connection.

[243] The "narrative model", as seen, is loaded with tacit social evaluations. When it is said that the evaluative dimension of the "narrative model" undergoes adjustment, it is meant that these evaluations take on a new complexion.

"norm" and the "arrangement of facts" would then be organized into a *novel* stable configuration (Gestalt) of "legal norm" and "legal facts". And where formerly it did not occur, subsumption may be seen to proceed – and conversely.

(3) DEPARTURE FROM PRECEDENT WHERE NECESSARY

In the discussion of statutory "historicization", it was said that the "intervening history of interpretation" of a statute, its *Wirkungsgeschichte*, may prove of value in its construction.[246] Axiological performance may, however, necessitate a re-evaluation of the case law decided under the statute, or any of its provisions.

Where it appears that ideological distortions have conduced to a particular construction – upheld in the case law – the jurist would do well to consider, consistently with Gadamer's thesis of the openness of the text, that there may be room for another interpretation.[247] Bell, Goodrich and Griffith consider that what Stone refers to as "categories of illusory reference"[248] — concepts such as

"reasonableness", "duty of care" and "public interest" – are eminently liable to acquire a political complexion in the course of years of judicial interpretation.[249] This sort of consideration is one the jurist would do well to bear in mind. In a

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[244] See Chapter IV, 3C(4) in this regard.
[245] See Chapter IV, at 3C(4).
[246] See, in particular, the discussion of the axis of effective history (under II (3)3.1 above).
[247] Gadamer's thesis of the "openness of the text" is otherwise known as his "undecidability" thesis. (See Chapter II of this study, at 3.4.8.)
[248] See the discussion of Stone in Chapter II, at 2.
[249] See Chapter III, and in particular the discussion of the work of these writers at 2.

deserving case, axiological performance, as mediated by "purpose" and "existential context", should be permitted to dictate a different outcome.

Even where ideological considerations (in the pejorative sense) are not at issue (or not distinctly so), a divergent result may be dictated on this basis. The following is an instance pointing this up.

Prokureur-Generaal, Vrystaat v. Ramokhosi[250]

This case has already been discussed. What is meant to be portrayed here is how concrete-existentialization, as informed by "*axiological performance*", may necessitate a re-evaluation of the "intervening history of interpretation" of a particular statutory provision, and a departure from precedent in consequence.

It will be remembered that the court held in this case that the provisions of section 60(11) of the Criminal Procedure Act, 51 of 1977 (as amended) did not alter the inquisitorial character of bail proceedings.[251] In a previously decided case, *S. v. Mbele*,[252] it was asserted that the subsection precluded the judicial officer from acting inquisitorially or investigatively.[253] Edeling J. in the course of his judgment in *Ramokhosi* departed from *Mbele* to this extent.[254]

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[250] *Supra.*
[251] See the discussion under 1.1.2 , above.
[252] 1996 (1) SACR 212(W).
[253] See judgment at 1527ff.
[254] At 1534 C – D. (See also headnote at 1516E.)

(In the event, as it will be recalled, it was held in the course of this judgment that section 60(11) did not fall to be applied at all, inasmuch as the accused was not "charged" within the meaning of the subsection.[255] One might look upon the reasoning process as involving an "adjusted prejudice-horizon" informing the evaluative perception of the provision, and thereby ruling out the possibility of subsumption.[256])

(4) VALUE-COMPETITION MAKING FOR DIFFICULTY IN HARMONIZING DESIGNS

It was observed earlier[257] that the harmonization of the "purpose" of a statute and the design of the Constitution should ordinarily present no serious difficulties. Imbued with a "new hermeneutical consciousness", the jurist would in the general run of things come up against few obstacles to accomplishing the harmonization of designs. It was observed, however, that circumstances could arise where the exercise would prove problematic.[258]

Readily coming to mind in this regard is the sort of case where it has not yet been ascertained which of two or more competing constitutional values is to govern its disposition. For *ex hypothesi* one cannot harmonize designs if one is ignorant of one of them. Here the ignorance would pertain to the design of the Constitution.

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[255] See the discussion under 1.1.2, above.
[256] The evaluative dimension of the "narrative model" underlying section 60(11) underwent adjustment to the extent that the word "charged" was to be given a specific meaning.
[257] See II (4)4.3 above.
[258] See, again, II (4)4.3 above.

Axiological performance presupposes the harmonization of designs. So here we have a real problem. It is not intractable, however. Assuming the pertinence of a particular statutory provision, "*existential context*" is to be deployed as a means of indicating the constitutional value to be accorded pre-eminence in the circumstances. One's task consists in identifying the value *in the particular situation* most clamant for protection in the light of its relative importance in the overall constitutional scheme.[259]

This having been done, the harmonization of designs becomes possible, and thereafter axiological performance.

(5) AXIOLOGICAL PERFORMANCE: SOME EXEMPLARY JUDGMENTS

A critical appraisal of some relevant cases would make for an enhanced appreciation of the principles discussed under (2) – (4) above. We turn without more ado to consider some noteworthy judgments.

Hlatshwayo v. Hein[260]

This decision, as seen, provides an apt illustration of the harmonization of designs. Upon implementation of that methodology, it became possible to establish the "purpose" in the light of which section 33(1)(f) of the Land Reform Act, pertaining to the question of costs, was required to be read in the circumstances of the case.

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[259] See *Holomisa v. Argus Newspapers* 1996(6) BCLR 836(W) at 853 F-G, and 854 B-C, as cited in *Concorde Plastics v. NUMSA* at 1646 B-D. See also the headnote to the latter case at 1626I-J: "...[I]n [the] situation...most clamant for protection in the light of its relative importance in the overall constitutional scheme" is how the headnote reads.

[260] *Supra.*

The "purpose" in question (being threefold) embraced the "purposes" of the statute and the Constitution (as harmonized) and the "purpose" of servicing justice.[261]

Such a threefold "purpose", together with the "existential context", made for axiological performance. The "existential context" embraced not only the "arrangement of facts", but also the broader "context of social realities" (of which the former concededly formed a part). Appreciation of the "context of social realities" implied attention to the social and economic inequalities pervading the society. In making the order it did as to costs, the court sought to give meaning to the notion of *substantive equality* (as opposed to equality in its mere formal conception).[262]

Van Zyl v. Commissioner for Inland Revenue[263]

In this case, the applicant, a liquidator of a company, sought an order to the effect that interest earned on funds invested by him in terms of section 394(1)(b) of the Companies Act, 61 of 1973 (as amended) in the course of the winding-up of the company did not constitute a receipt or an accrual of that company and was therefore not taxable in the hands of the company in terms of the Income Tax Act, 58 of 1962 (as amended).[264]

In the case of the insolvency of an individual, the trustee is not under any duty to pay tax in respect of income accruing to the insolvent estate. It was contended on

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[261] See discussion under 4.3.1, above.
[262] The decision was therefore sensitive to the human, social and economic considerations relevant to the issue.
[263] 1997 (3) BCLR 404 (C).

behalf of the applicant that the legislature deemed it meet that the consequences of the liquidation of a company should approximate as closely as possible to those of the sequestration of an insolvent individual, and therefore that a parallel regime should apply with regard to the former.[265] The court maintained that such a contention could not be sustained. The position of "liquidator" was not at all fully to be equated with that of "trustee". Whereas the liquidator merely assumes the management of the company in liquidation, the trustee is in law owner of the assets of the insolvent estate. Income earned during a liquidation vests in the company. By contrast, income earned during a sequestration vests in the trustee. The argument as to substantial equivalence of régime fell to be dismissed.[266]

It was further contended on behalf of the applicant that section 35(3) of the Interim Constitution, read with section 8 thereof (the "equality" clause), required that the consequences of sequestration and of winding-up should so far as possible be rendered harmonious.[267] The court did not accede to this argument either, pointing to the fact that the equality provision outlawed unfair discrimination (as, for instance, discrimination against certain categories of persons who had in the past been disadvantaged). Discrimination was indeed part of the design of the Income Tax Act, but such discrimination was not unfair.[268] In the result, the application was dismissed.[269]

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[264] See judgment at 406 B-C. (See also headnote at 404 I–J.)
[265] At 407 F-I. (See also headnote at 405 A-B).
[266] See judgment at 407J – 408C. (See also headnote 405 B-F.)
[267] At 413 A-B. (See also headnote at 405 G-H.)
[268] At 413 H-I.
[269] See judgment at 414 (conclusion).

The metatheory gives us to understand the judgment as follows. The "purpose" of the statute or its sub-statutory components was to be established, using the methodologies of purposive-definition. The latter process would also involve the court in harmonizing that "purpose" with the design of the Constitution. The purpose of "justice", being integrally a part of that design, was to be linked to the (harmonized) result. A single, composite threefold purpose would lend itself to apprehension in consequence.

Axiological performance as mediated by "purpose" and "existential context" could now take its course. "Purpose" and the "context of social realities" – to which it subsumes a commitment – would give the evaluative dimension of the "narrative model" underlying the operative provisions to remain much as it had been previously. The "norm" and the "arrangement of facts" were therefore to organize themselves into the same stable configuration (Gestalt) as formerly they might have of "legal norm" and "legal facts". And the result is that the application would fall to be dismissed.

(It may be important to notice that the court did not present its argument along the lines of this theoretical exposition. Its reasoning from the premises of the Constitution was very much a matter of incident. Nevertheless, the judge's manner of proceeding, as embodied in the judgment, is entirely compatible with the above scheme. Had he elected to undertake an analysis in keeping with the processual detail of the metatheory, however, he might have cast into sharper relief the demands of value-laden adjudication.)

S. v. Letaoana[270]

The appellant was arrested at the scene of a motor vehicle accident, and charged with culpable homicide, in the alternative, reckless or negligent driving of a motor vehicle in contravention of section 120(1) of the Road Traffic Act, 29 of 1989.[271] He was denied bail in the magistrate's court. Such refusal was prompted by the circumstance that he had no assets to speak of at all, as also by the fact that there were concerns for his own safety.[272] The judge held that the magistrate had misdirected himself, and released the appellant on bail of R1 000.[273]

In coming to this decision, the court had to deal with legislative amendments to the Criminal Procedure Act, 51 of 1977: section 60 was substituted in its entirety by section 3 of Act 75 of 1995.[274] It is interesting that the judge proceeded with sub-statutory intra-textual contextualization; section 60(4)(b), it was held, was required to be read with section 60(6). The section as an entirety governs bail applications. The sort of intra-textual contextualization undertaken pointed to the "purpose" of the section.

The judge then turned to section 35(1)(f) of the (Final) Constitution, which provides for the right of a person arrested for allegedly having committed an offence to be released from detention "if the interests of justice permit, subject to

[270] 1997 (11) BCLR 1581(W).
[271] See judgment at 1583 H-I.
[272] At 1594 B-J.
[273] At 1595 G-H.
[274] At 1586 E.

reasonable conditions".[275] Section 39(2) of the Constitution, he took occasion to observe, differs from its predecessor in that whereas "due regard" was previously mandated with respect to the "spirit, purport and objects of the Bill of Rights" in construing legislation, the current imperative is formulated in the word "promote".[276] It means to "further" or "advance", and is more affirmative in its tenor.[277] With this, it is to be considered that the judge understood the design of the Constitution to impact upon the matter at hand.

It appears that the court undertook to harmonize the "purpose" of section 60 with the design of the Constitution.[278] (It appears, too, that such harmonization engendered the "attribution of purpose" to the section[279] in the light of the Constitution.)

Axiological performance, as mediated by "purpose" and "existential context," could now take its course. Once again, "purpose" subsumes a commitment to the "context of social realities". In this case, the "context of social realities" pertained to the interests of accused persons in securing bail for one thing. For another, it conjured up the picture of people committing horrendous crimes upon their release on bail, and of public outrage in consequence.

What happened in this case was that the *evaluative dimension of the "narrative model"* underlying section 60 underwent an *adjustment* (by reason of "purpose"

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[275] At 1589 A.
[276] See judgment at 1591 C.
[277] *Ibid.*
[278] At 1591 D.

and the "context of social realities"), such that the "norm" and the "arrangement of facts" organized themselves into a *novel* stable configuration of "legal norm" and "legal facts". Subsumption proceeded accordingly. The court held that denying bail in deserving cases was no way to address problems attending its concession.[280]

Fedsure Life Assurance v. Greater Jhb. Transitional Metropolitan Council[281]

In this case, the question arose whether it was in order for a transitional metropolitan council to levy contributions from those of its substructures with surpluses of income over expenditure, and to make them over to those with deficits.[282]

Counsel for the applicants raised the contention that section 178(2) of the Interim Constitution, Act 200 of 1993, militated in its terms against the propriety of such a scheme. That section provided that any moneys levied by the council would require to be "based on a uniform structure for its area of jurisdiction". It would not be lawful, so proceeded the contention, for contributions to be levied along the lines described.[283]

Premier's Proclamation, 35 of 1995 set forth in an annexure the powers and duties of transitional metropolitan councils. Section 23(c) of the annexure allowed for the levying of an equitable contribution from any substructure.[284] Goldstein J.

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[279] *Ibid.*
[280] See judgment at 1595 G.
[281] 1997 (5) BCLR 657(W).
[282] See judgment at 659 B-J. (See also headnote at 657 F–H.)
[283] See judgment at 662F-H.
[284] See judgment at 661A, where section 23 (c) is cited.

advanced that section 23(c) may well contemplate the type of redistribution entailed by the scheme, seeing that constituent parts of the area were interdependent, and bearing in mind the movement of people, goods and services within that area.[285] The judge further noted section 35(3) of the (Interim) Constitution, and drew attention to the provisions of its section 8 (the "equality" clause).[286]

In the result, the court concluded that the requirements of section 178(2) of the Constitution as to "uniform structure" did not render the scheme unlawful: uniformity of treatment at every level and in every respect was not required.[287] The judge seems to have been committed rather to a vision of *substantive equality*. The scheme was justified by reason of the disparity of resources and infrastructural development between substructures.[288]

Stated in terms of our model, it was sought in this case to harmonize the "purpose" of the Proclamation and the design of the Constitution. An astute reader of the judgment might further be tempted to read the court's argument as implying an "attribution of purpose" to section 23(c) of the Proclamation in the light of the supreme law.

Axiological performance is mediated by "purpose" and "existential context." The "context of social realities" (to which "purpose" is committed) would engender an

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[285] At 661J – 662A.
[286] At 665D-F.
[287] At 666C-D. (See also headnote at 658 I.)
[288] At 666B.

advertence to the social and economic inequalities as between the various substructures.

This circumstance would entail an *adjustment* to the *evaluative dimension of the "narrative model"* underlying section 23(c), such that the "norm" and the "arrangement of facts" would organize themselves into a *new* stable configuration of "legal norm" and "legal facts". And subsumption would occur where previously it might not have been possible.

DTA of Namibia v. Prime Minister of the Republic of Namibia: [289]

This judgment has been dealt with previously in passing. It is now broached in its detail. The facts of the case are not difficult of articulation. The applicant sought an order allowing the inspection of sealed election material on the grounds of alleged electoral irregularities. The majority of the court dismissed the application. The dissenting judgment expressed a view to the contrary.[290]

Hannah J. (with whom Mtambanengwe J. concurred) delivered the majority judgment. The provision at issue was section 93(4) of the Electoral Act, 42 of 1992 (Namibia). In terms of the strict wording of the subsection, the court had the power to make the order requested only upon its being satisfied that the inspection was required for the purposes of instituting or maintaining a prosecution in respect of an electoral offence.[291]

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[289] 1996(3) BCLR 310 (NmH).
[290] O'Linn J.'s dissenting judgment is to be found on pages 321ff of the report.

Hannah J. sought to give effect to the *plain meaning* of the provision. He cited with approval a dictum enunciated by a judge of repute in 1832: "Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."[292] The court admitted that its approach might work injustice, but contended that it was for the legislature to correct the defect.[293] The applicant could not pray in aid the Constitution to buttress his case. The court simply did not have the power to make the order.[294]

The positivist demeanour of the majority would be congenial to a dispensation of parliamentary supremacy. But it is misconceived within an order of constitution-alism. It would be entirely inappropriate to base one's approach upon the dictum cited by the court in present-day South African circumstances. Much to be preferred is the reasoning of O'Linn J. in his dissenting judgment.

O'Linn J. clearly sought to establish a threefold "purpose" upon which to base his reading of the provision at issue: the "purpose" of the statute, the design of the Constitution, and the "purpose" of justice. In elucidating the purpose of the statute, he undertook, as we have seen, the methodologies of intra-textual contextualization and statutory "historicization".[295] He then sought to harmonize the designs of the statute and the Constitution, and one may very well discern an

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[291] See judgment at 315J.
[292] This proposition emanated from Tindal C.J. in *Wartburton v. Loveland* (1832) 2D & C1 (HL) 480 at 489. It is cited in the decision at hand at 317B of the report.
[293] See 317B-C, and 316J-317A.
[294] See 318H-I.
[295] See the discussions under these respective heads, in this chapter, under II (1) and II (3).

"attribution of purpose" to the statute in accordance with the tenets of constitutionalism.

The "purpose" as thus established (which subsumes a commitment to the "context of social realities") lent *a new evaluative dimension to the "narrative model"* underlying subsection 93(4). The "norm" and the "arrangement of facts" concomitantly organized themselves into a *new* stable configuration (Gestalt) of "legal norm" and "legal facts". And, at the same time, this entailed the activation of the normative syllogism (where formerly subsumption would not have occurred). O'Linn J. maintained that the omission of the words "for the purpose of a petition questioning an election or return" (as they were embodied in a precursor enactment) from section 13(4) was probably a result of bad draftsmanship.[296]

In the light of these findings, O'Linn J. was disposed, it seems, to supplement a *casus omissus* (a contingency not provided for by the legislature in so many words[297]) in the light of the Constitution. The usual rule is that the common law obtains in these circumstances,[298] and so the judge's proclivity seems rather daring. However, it should be borne in mind that he *did not propose to legislate* – precursor legislation provided the material upon which he considered himself in a position to draw. Indeed, had he intended to go very much further than this, he may well have misdirected himself.

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[296] At 327B.

[297] See Hiemstra and Gonin *op cit* 166, whre a *casus omissus* is defined as a "contingency not provided for by the statute."

We should, however, remember that O'Linn J.'s was a minority judgment, and that his dispositions are therefore to be read as in the subjunctive mood.

Molutsi v. Minister of Law and Order [299]

The plaintiff instituted an action for damages against the defendant in respect of the fatal shooting of her husband by a member of the South African Police.[300] It was necessary for the court to determine whether the action had become time-barred in terms of the relevant legislation,[301] as the defendant contended.

Section 32 of the Police Act, 7 of 1958, stipulated for a period of six months within which proceedings were required to be commenced subsequent to the cause of action.[302] A Presidential Proclamation issued in terms of section 237(3) of the Interim Constitution, Act 200 of 1993, provided in its section 17 for a much more equitable and flexible approach to the matter of limitations. Subsections 17(1) and 17(2) laid down certain requirements as to time, and subsection 17(5) granted the court the power to dispense with these requirements in the interests of justice.[303]

The judge held that the effect of the Proclamation was to repeal section 32 of the Police Act.[304] In any case, a literal reading of that section (with its objectionable features) would not tally with the interpretive injunctions of section 35 of the

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[298] See Du Plessis *The Interpretation of Statutes* (1986) 151. See also Steyn *Die Uitleg van Wette* (1981) 16.
[299] 1995 (12) BCLR 1658 (W).
[300] See judgment at 1660B-C.
[301] The statutory provision in question was section 32 of the Police Act, 7 of 1958. (See also flynote at 1658 C–D.)
[302] At 1660D.

[303] See judgment at 1662A-C. (See also headnote at 1658F–H.)

Constitution.[305] If section 32 of the Police Act were applicable (note the subjunctive character of the stipulation), it would necessitate a construction that would less severely curtail the rights guaranteed in terms of sections 8 and 22 of the Constitution.[306]

The sole provision of law governing the issue, then, was section 17 of the Proclamation.[307] In the light of the facts of the case, the court was actuated to exercise its powers of dispensation with the requirements relative to time as conferred by section 17(5).[308] In the result, the judge held in favour of the plaintiff.[309]

Subjecting the decision to analysis in terms of the metatheory, we may say the following. The judge looked to the structure of the Proclamation in order to ascertain its "purpose". One may read his reasons as attempting a harmonization of designs, too, as well as servicing the "purpose" of justice. And thus was a composite threefold "purpose" brought to light.

This threefold "purpose" subsumes a commitment to the "context of social realities". The judge accounted for this context by adverting to the various exigencies that arise in relation to the institution of proceedings against the Police Service.[310] The *evaluative dimension of the "narrative model"* underlying section

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[304] At 1661J.
[305] At 1670G.
[306] At 1670E.
[307] At 1668C-D.
[308] At 1669F-H.
[309] At 1671B-C.
[310] At 1668H.

17 underwent an *adjustment*, such that the "norm" and the "arrangement of facts" organized themselves into a *new* stable configuration (Gestalt) of "legal norm" and "legal facts" – and this in a way that activated the normative syllogism.

And thus was axiological performance, as mediated by "purpose" and "existential context", exemplified in this judgment.

Concorde Plastics (Pty) Ltd. v. NUMSA [311]

Under III (4) above,[312] the issue of value-competition making for difficulty in the harmonization of designs was adumbrated. In the course of discussing this case, it will be endeavoured to demonstrate the modus operandi to be adopted in dealing with this type of problem.

The facts of the case are these. The managing director of a private company, Mr Fellgiebel, was met with allegations that he had indulged in acts of sexual harassment and abusive language towards his employees.[313] Clearly dismayed by these allegations, he sought to vindicate his reputation in a defamation suit – which the court in the end decided in his favour.[314]

Some two months prior to the determination of the defamation action by Stegmann J., Mr Fellgiebel dismissed seven employees on the grounds of disloyalty, in that

[311] 1997 (11) BCLR 1624 (LAC).
[312] See III(4) above.
[313] See judgment at 1628B-H.
[314] See 1650C.

evidence had been tendered against him in the course of the trial.[315] In fact, only two employees actually testified, the remaining five having done nothing more than obey the subpoena and present themselves at court.[316] The Industrial Court ruled that the dismissals were substantively fair, though procedurally irregular.[317]

In the Labour Appeal Court, Marcus A.J. found that the dismissals were substantively unfair, and ordered the reinstatement of the employees.[318] The judge considered that the two witnesses who had been called upon to testify faced a thorny dilemma. They were required on pain of legal sanction to tell the truth, and this carried the risk of conflict with their employer.[319]

In coming to his decision as to "substantive unfairness", Marcus A.J. was required to give meaning to the term "unfair labour practice" as defined in the Labour Relations Act, 28 of 1956. In so doing, he was bound, in terms of section 35(3) of the Interim Constitution, to reckon with the values underpinning constitutionalism. In this case, the need arose to equilibrate conflicting rights.

It was incumbent upon the court to balance the employees' rights (to fair labour practices and to access to court) and the employer's (to freedom of association and to engage freely in economic activity).[320] The Constitution itself gave no ready answer as to which of these rights should prevail in a conflict. It was necessary,

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[315] See 1640D-E.
[316] *Ibid.*
[317] At 1631D.
[318] See 1649C-D, 1650A, and 1651C.
[319] At 1640D.
[320] See 1645I-J. Regard was also required to be had to the employer's right to fair labour practices (*Ibid*).

therefore, for the judge to formulate a basis for such ascertainment. Its purport was the identification of the value *in the situation* most clamant for protection in the light of its relative importance in the overall constitutional scheme.[321] In the circumstances of this case, *access to court* answered to the description of the value in question.[322] That value was foundational to the stability of the society and the amicable resolution of disputes.[323]

It followed from this that, in dismissing the employees upon the grounds proferred, the employer had given his actions to be comprehended within the notion of an "unfair labour practice".[324]

Bringing the metatheory to bear upon this judgment, one appreciates immediately that the *harmonization of designs*, as a precondition to formulating the necessary threefold "purpose", *could not take place automatically.* It was not possible to accomplish this step in the abstract. (This was because it could not be known in advance which of the values taken up in the Constitution was to lend its force to the interpretation.)

Here, as ever, axiological performance involved "purpose" and "existential context". In this case, "purpose" was the unknown term.

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[321] At 1646B-C. In this, the court drew upon the observations of Cameron J. in *Holomisa v. Argus Newspapers* 1996(6) BCLR 836(W) at 853F-G and 854B-C. The wording is culled from the headnote at 1626I–J. See n 259, above.
[322] At 1644G.
[323] See 1644G-1645H.
[324] See 1647E.

"Existential context" refers to the broad "context of social realities" (of which the "arrangement of facts" serving for determination must be deemed a component). In looking to the "existential context", the court took account of the importance of the forensic arena to life in the modern polity, and of that of giving evidence in a litigious forum. The more narrowly defined "arrangements of facts" were such as point up the value of access to court as pre-eminent in the circumstances. (The judge was astute to note that if the "arrangement of facts" were otherwise, for example, should the employees have perjured themselves, the value to be accorded primacy might have been another.[325])

We see, then, that the "*existential context*" served as an instrument in coming by a composite, threefold "purpose".The *evaluative dimension of the "narrative model"* underlying the concept of an "unfair labour practice" underwent an *adjustment* in the light of this "purpose", such that the "norm" and the "arrangement of facts" organized themselves into a *new* stable configuration (Gestalt) of "legal norm" and "legal facts". Concomitantly with this, subsumption was to take its course.

Bernstein v. Bester N.O. [326]

This case concerned the constitutionality of sections 417 and 418 of the Companies Act, 61 of 1973 (as amended).[327] It was contended that these provisions were incompatible with a number of constitutionally entrenched rights; they stipulated for the interrogation of persons as to the affairs of a company in the

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[325] See 1647F-G.
[326] 1996(4) BCLR 449(CC).
[327] See judgment at 453G-454A. (See also headnote at 450E.)

event of its liquidation.[328] In the result, the court held that they were not unconstitutional (except to the extent already decisively indicated in a previous judgment).[329]

Looming large in this instance was the right to privacy (as embodied in section 13 of the Interim Constitution). In terms of section 418(5)(b)(iii)(aa) of the Companies Act, a person who, having been duly summoned under section 417 or 418 to the examination, fails without *sufficient cause* to answer fully and satisfactorily any question *lawfully* put to him in terms of section 417(2) or section 418, shall be guilty of an offence.[330] According to Ackermann J., sufficient cause for not responding in the manner required to a question posed is to be found in the fact that the answer thereto would threaten a fundamental right, unless such right was restricted in a manner in keeping with the limitations clause (section 33(1)).[331] One could, as the judge points out, rephrase this by saying that in such an event the question would not be one lawfully put,[332] with the consequence that the examinee would not be obliged to answer.

It is to be observed that these remarks bear the quality of high generality. In any specific case, "purpose" and "existential context" would mediate axiological performance. As regards "purpose", the above comments reflect the manner in which the harmonization of designs is to proceed, and concomitantly therewith an

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[328] See the reproduction in their terms at 455E-457E of the judgment.
[329] See 504F. The judgment in point (rendering a finding of partial invalidity with respect to the provisions of section 417) was *Ferreira v. Levin NO, Vryenhoek v. Powell NO* (CCT 5/95).
[330] See 482D-E.
[331] See 482E-F.
[332] See 482F.

"attribution of purpose" to the statute. The "context of social realities" (to which "purpose" subsumes a commitment) would *affect the evaluative dimension of the "narrative models"* underlying the provisions in question. The result would be that the "norms" and the "arrangements of facts" may organize themselves into *new* stable configurations of "legal norms" and "legal facts". And the normative syllogism would be variously activated or inactivated.

A case decided along these lines (that is, with the indicated sensitivity to "purpose and the "context of social realities"), would perhaps promote a *reconsideration* of pre-constitutional judicial decisions with respect to the law of "privacy" in this regard. A *re-evaluation* of the *Wirkungsgeschichte* ("effective history") of the provisions in question would be in the offing.[333]

Ackermann J. notices very significantly that the development of the law of "privacy" in relation to sections 417 and 418 requires a case-by-case determination.[334] Here we have a clear affirmation of the crucial role of "existential context" in the interpretation of legislation.

Nel v. Le Roux N.O. [335]

Substantially similar in its thrust to *Bernstein v. Bester*,[336] is the judgment in *Nel v. Le Roux N.O.* In this case, it was the constitutionality of section 205 of the

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[333] See the discussion under III (3) above.
[334] At 483D. (See also headnote at 451J–452A.)
[335] 1996(4) BCLR 592 (CC).
[336] *Supra.*

Criminal Procedure Act, 51 of 1977 (as amended) that was in issue.[337] Section 205 established what, on the fact of it, is a somewhat repressive mechanism for procuring information from a recalcitrant witness in respect of an alleged offence. Such a person may be required to appear before a judicial officer for an examination by a representative of the prosecuting authority.[338] Section 189 is incorporated by reference in section 205.[339] It provides for a sentence of up to two years' imprisonment in respect of a refusal to produce evidence in the absence of a "just excuse".[340] Ackermann J. upheld the constitutionality of section 205.[341]

In the course of his reasons, Ackermann J. commented that if any of the examinee's fundamental rights were infringed, the latter would have a "just excuse" for his or her refusal to answer a question, unless the section 189 compulsion to do so was in the circumstances a justifiable limitation of the right at issue within the terms of the derogation clause (section 33(1)) of the (Interim) Constitution.[342]

The court noted that judgments concerning the proper application and interpretation of section 205, which were delivered in the pre-constitutional dispensation, would not of necessity reflect the meaning to be attached to the notion of a "just excuse" within the wording of the section. A considerable body of case law, then, may require emendation.[343]

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[337] See judgment at 595E.
[338] See the terms of the section as reproduced in the judgment at 595F-596B.
[339] See judgment at 597A.
[340] See 598C.
[341] At 607A.
[342] At 600B.
[343] At 603E-F.

The same observations as were noted in relation to the theoretical underpinnings of any practical implementation of the abstract formulations in *Bernstein v. Bester NO* are relevant to the "concretization" of Ackermann J.'s pronouncements in this case. It suffices to notice, once again, that what might be spoken of as a *re-evaluation* of the "effective history" (or *Wirkungsgeschichte*) of the operative provisions may be necessitated.

(6) "MITTELBARE DRITTWIRKUNG"[344] IN STATUTORY INTERPRETATION

The observant reader will have noticed that the last three cases canvassed implicate open-ended, potentially value-laden, terms. *Concorde Plastics* was concerned with the meaning of "unfair labour practice", *Bernstein* with that of "sufficient cause", and *Nel* with that of "just excuse".

Stone (together with his fellow American realists) would speak of these terms as "categories of illusory reference". By that he would wish to have his point registered that the jurist is fundamentally free insofar as their construction is concerned, and that, armed with this knowledge, she should give full effect to considerations of justice and social realities.[345]

Goodrich, Bell and Griffith would maintain that these terms are the very things by way of which ideological distortions are most likely to enter into the fabric of the

[344] The reference here is to the "radiating effect" of constitutional values – concededly on an indirect basis – on the construction of statutes. See Chapter V of this study at 2.3.5.

law. Open-ended phrases like these, they would hold, are simply conduits through which predominant political values will find their juridical expression.[346]

Stone's views are fundamentally wholesome. Pressed to the outer limit of their conception, however, they are liable to render the law altogether too "open" (in Nonet and Selznick's sense). On the other hand, the pessimism engendered by Goodrich and scholars of a like disposition does little to bolster the confidence of the jurist grappling with a practical problem.

Our theoretical framework – harnessing the concepts of "*purpose*" and "*existential context*" – is geared both to the implementation of Stone's concern for social realities (without pressing his point too far) and to providing an antidote to any such defeatist sentiments as might attend the work of a jurist cognisant of the demeanour of critical legal scholarship.

Axiological performance, as mediated by "purpose" and "existential context" allows for *mittelbare Drittwirkung* in what, it is submitted, is the most appropriate fashion.

(7) AXIOLOGICAL PERFORMANCE AND LITERALISM: DEPARTURE FROM "PLAIN MEANING"

The discussion under III (2)-(6), above, has surely made plain that literalism fails to account for the essential nerve of statutory interpretation. When the provisions

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[345] See the discussion of Stone in Chapter II, at 2.
[335] See Chapter III of this study, at 2.

analysed along the five axes of the process of ingression, and the "arrangement of facts" to which they relate are revisited in the light of the threefold "purpose" noted (with its commitment to the "context of social realities"), they render themselves open to *possible reconceptualisation.*[347]

The "plain meaning" approach is barren inasmuch as it blinkers itself to the possibility of the investment of the provisions at hand with a *new semantic complexion.* In a *reversion to particularity* this is all too likely to occur.[348]

7.1 Restrictive Interpretation

Let us turn initially to the device of restrictive interpretation as a means of statutory exegesis. Interpretation along these lines may well be to be applauded when penal and other onerous provisions are at issue, for instance.

What is to be deprecated generally is a literalism which would insulate itself from violation in the constructive enterprise even to the extent of allowing an injustice.

7.1.1 The "eiusdem generis" rule [349]

Restrictive interpretation is perhaps best exemplified in the application of the *eiusdem generis* rule. *S. v. Kohler*[350] affords a neat illustration of its application. There the Heidelberg Town Council Poultry Regulations made it an offence to

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[347] See the opening paragraphs of the discussion under II, above, the process of purposive-definition.
[348] See *Ibid.*
[349] This, as has been seen in Chapter I, at 4.2.3, is a means of restrictive interpretation. Literally translated, it means "of the same kind".

keep poultry within the jurisdiction of the council without the necessary permit. The appellant kept peacocks in defiance of the regulations. What had to be established was whether the peacocks were "poultry" within the meaning of section 1 of the Administrator's Notice 164 of 11 February 1996, in terms of which Notice the regulations in question were promulgated.[351] Section 1 defined "poultry" as "any fowl, duck, goose, turkey, guinea fowl, partridge, pheasant, pigeon or the chickens thereof, or any other bird."[352]

Hirsch, one remembers, would seek to define the "category" or "class" represented by the words "or any other bird" with reference to the type of birds enumerated in the definition.[353] And this is what the court did in invoking the *eiusdem generis* rule as a solvent of its difficulties. It held that as a "peacock" was either a fowl or a pheasant within the definition of "poultry" as noted, the appellant had been rightly convicted of a contravention of the relevant regulations.[354]

Now, there is no basis in law or justice upon which this decision can be faulted. Problems could conceivably arise, however, upon a mechanical application of the rule in question. Hirsch would have us always determine the "class" with reference to its defining "instances".[355] Say, for example, that an enactment prohibits the possession of "guns, firearms, automatic pistols and other weapons" within a municipal precinct. Hirsch would say that the "class" represented by the

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[350] 1979(1) SA 861(T).
[351] See the judgment at 862, generally. (See also headnote at 861.)
[352] *Ibid.*
[353] See the discussion in Chapter I of this study, at 4.2.2 and 4.2.3 in this regard. The exposition of the class-instance relationship and the type-trait model is particularly relevant in this context.
[354] See judgment 863D-F. (See also headnote at 861.)
[355] Once again, refer to the discussion of Hirsch in Chapter I of this study, at 4.2.2 and 4.2.3.

"instances" stipulated is that of "automated weaponry", and this would indeed be a legitimate inference. But a conclusion to this effect *may conceivably be adequate only to the phase of ingression.* Supposing certain "non-automated weaponry" to be as destructive as their automated equivalents, *axiological performance* as mediated by "purpose" and "existential context" may speculatively demand that these, too, should come within the meaning of the "class" of prohibited weapons. *The eiusdem generis rule would in that event be deemed to be inapplicable.* (Restrictive interpretation would frustrate axiological performance.)

7.1.2 The "cessante" rule [356]

The *cessante* rule reads to the effect that if the rationale of a legal precept no longer subsists, that precept ceases to find application. Implementation of this rule is also a mode of restrictive interpretation.[357] Take a hypothetical provision: "If x occurs, steps shall be taken by the Court to equalize the position as between the parties." On the face of it, this provision means what it says; the phase of ingression would find as much. Suppose, however, that the parties had already made arrangements to even out the position as between themselves. *Axiological performance* as mediated by "purpose" and "existential context" would then obviate the need for the court to take any particular steps. In this instance, *axiological performance would command a restrictive interpretation.*[358]

7.1.3 ***Axiological Performance requiring Restrictive Interpretation***

[356] The full rendering of the rule is *cessante ratione legis cessat et ipsa lex.* It is to the effect that in the event of the lapsing of the rationale of a rule, such a rule ceases to be of application.
[357] See Du Plessis *The Interpretation of Statutes* (1986) 152.

(The Two Mistry-Judgments)

The two judgments in *Mistry v. Interim National Medical and Dental Council of South Africa*[359] also demonstrate restrictive interpretation as a means to axiological performance. Section 28(1) of the Medicines and Related Substances Control Act, 101 of 1965, in terms of which certain items in the possession of a medical practitioner (the applicant) had been seized in the course of an inspectorial investigation pursuant to allegations of misconduct, served as an important subject-matter of construction in this case.[360] In the result, the court referred the question of the constitutionality of section 28(1) to the Constitutional Court, inasmuch as it impinged upon the right of privacy entrenched in section 13 of the (Interim) Constitution.[361] But for purposes of disposing of the matter at hand, the subsection was required to be dealt with upon the assumption of its compatibility with the supreme law.

The court conceived its task (as implied in section 35(3) of the Interim Constitution) as that of "reading down"[362] section 28(1) in accordance with the provisions of section 232(3) of the Constitution, so as to import an objectively justiciable requirement of *reasonableness*. Such an interpretation meant that an item could be seized only if there were reasonable grounds that it would afford

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[358] We see, then, that axiological performance may variously enjoin or counsel against restrictive interpretation.
[359] 1997(7) BCLR 933(D) and 1997(10) BCLR 1460(D).
[360] See first judgment at 946G ff.
[361] See first judgment at 964I.
[362] There is no equivalent of the "reading down" provision in the Final Constitution. This does not in any way mean, however, that such a strategy will not prove of value in many cases. "Reading down" (even for want of its express stipulation in the Final Constitution) should be resorted to when this is deemed necessary to proper axiological performance.

evidence of a contravention of the Act.[363] In consequence, the court ruled that several items that were seized were to be returned, on the basis that no such reasonable grounds could be said to exist in their regard.[364] McLaren J. reached this conclusion upon a *restrictive interpretation* of the subsection (which, in essence, is what "reading down" in terms of section 232(3) of the [Interim] Constitution amounts to).

This case calls for several comments. Firstly, the (Final) Constitution contains no equivalent of section 232(3). This in no way implies, however, that a restrictive interpretation along the lines undertaken by the judge in this matter would be inappropriate to present-day circumstances. The absence of a "reading down" provision most certainly does not signal that this sort of approach would not now be apposite in a fitting case.

Secondly, our attention is drawn to counsel's contention, as noted in the second *Mistry* judgment, to the effect that it might have been better had the court read down section 28(1) so as to import into it the element of "reasonableness in the constitutional sense" (and not merely an "objectively justifiable requirement of reasonableness").[365] What "reasonableness in the constitutional sense" entails is that the power stipulated for in the subsection would have to be exercised so as not to infringe the fundamental right, or where it does so, that the derogation is

[363] See first judgment at 953H – 954C.
[364] See first judgment at 964F.
[365] See second judgment at 1467B.

permissible in terms of the limitation clause.[366] This aspect is mentioned as an alternative approach to restrictive interpretation by way of "reading down".

Thirdly, section 233 of the (Final) Constitution entrenches "reasonableness" (and consistency with international law) as a touchstone of statutory interpretation.[367] This section may be read as pointing, in suitable instances, to the restrictive interpretation of a provision where such would square it with this requirement.

To conclude the subject of axiological performance necessitating restrictive interpretation, the reader is referred to the discussion of the *Ramokhosi* case, more particularly that part relating to the meaning to be attached to the word "charged" as used in section 60(11) of the Criminal Procedure Act, 51 of 1977 (as amended).[368] It is reiterated as a concluding observation that the construction of provisions imposing burdens and penal provisions should generally proceed on a restrictive basis.[369]

7.2 Extensive Interpretation

A discussion of extensive interpretation is also relevant to the matter of axiological performance. Extensive interpretation is of two principal varieties: analogical interpretation, and interpretation by implication. These are discussed seriatim.

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[366] See second judgment at 1466I-J.

[367] Section 233 reads: "When interpreting any legislation, every court must prefer my reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

[368] See the discussion under 1.1.2, above.

[369] This was noted in introducing the matter of restrictive interpretation.

7.2.1. Analogical Interpretation

This thesis has shown up the pervasiveness of reasoning by analogy in the law. Forensic argument is saturated through and through with efforts, very often quite strained, to indicate resemblances of aspects of the case at hand to precedent instances. In countenancing the "extension" of the "meaning" of words of a *statutory provision* to cover the circumstances of a given case, however, our law has been rather diffident.

It is perhaps the "positivist" conception of the law that is in some measure to account for this general hesitance. There seems to be no reason, however, why interpretation on the basis of analogy should not be admissible in fitting circumstances where a statutory provision is at issue. Recall the example: "No dogs in the park".[370] The process of ingression would yield an understanding of the by-law in its literal sense: a dog is a dog. *Axiological performance*, as mediated by "purpose" and "existential context", may, however, render the significance of the of the words of the by-law applicable as much to tame cheetahs as to dogs.[371] The primordial values of human dignity, equality and freedom might conspire in their cumulative effect to produce such an interpretation, along with the right to life (section 11) and the right to freedom and security of the person (section 12).

We may take another example: "Compensation shall be paid to victims of natural disasters." The process of ingression demonstrates the "meaning" of this provision

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[370] See Chapter IV, at 3D, where this example was furnished.
[371] This is what was concluded in the course of the discussion of this hypothetical.

as unproblematic. A "natural disaster", after all, is a flood, drought, earthquake, or the like. If, however, from the scheme of the statute in its entirety, as read with the appropriate hermeneutical consciousness,[372] a "purpose" may be inferred to compensate also those disadvantaged by acts of state, then, it is suggested, the latter category of persons is compensable as well. This would be a bold and enterprising construction, but one which, it is submitted, would be quite justified. Axiological performance, as mediated by "purpose" and "existential context", may dictate the legitimacy of such an interpretation. It goes without saying, however, that a conclusion as radical as this ought not to be drawn upon a facile basis.

7.2.2. Interpretation by Implication

Du Plessis discusses interpretation by implication as a mode of extensive interpretation.[373] To a large extent, this categorisation is defensible – for the activity denoted involves the elicitation of a "meaning" not immediately apparent from a literal reading of the words taken in themselves. The "meaning" at issue is nevertheless *implicit* in the words as strung together – at all events, in the sight of those who are members of the legal speech-community.[374] For this reason, interpretation by implication is not "extensive" in the full sense of the term.

One remembers that Hirsh said that an "implication" belongs to a "meaning", as a "trait" belongs to a "type" (or, as a part belongs to the whole).[375] By virtue of our familiarity with the "shared type" (the texts of the law), we are able to "generate"

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[372] The reference here is to the "new hermeneutical consciousness".
[373] See Du Plessis *The Interpretation of Statutes* (1986) 156.
[374] The insights of Wittgenstein and Fish, as broached in Chapter II of this study, at 4.1, are here of relevance.

implications without their being given to us directly. This is the principle of "learned convention".[376] The derivation of implications – the core issue of interpretation for Hirsch – proceeds on the basis of judgments of probability:[377] one says, "... in this context, the words at issue probably mean thus and so, and we can say this by reason of our acquaintance with the character and structure of legal texts, which is our common stock of (juridical) knowledge."[378]

Du Plessis enumerates the considerations that may give rise to interpretation by implication thus:[379]

(i) Other provisions of the enactment;

(ii) *Ex contrariis*, within which notion he is of a mind to include *expressio unius est exclusio alterius*;

(iii) *Ex consequentibus*;

(iv) *Ex accessorio eius de quo verba loquuntur*;

(v) *A natura ipsius rei*; and

(vi) *Ex correlativis.*

(i) As to the derivation of implications from other provisions of an enactment, the reader is invited to revert to the discussion of *intra-textual*

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[375] See Chapter I of this study, at 4.2.2.
[376] See Chapter I of this study, at 4.2.2.
[377] For Hirsch, it will be recalled, problems of interpretation resolve themselves into questions concerning the derivation of implications. And all this takes place within a framework of probabilism. (See Chapter I of this study, at 4.2.2.)
[378] This is my own formulation.
[379] Du Plessis *op cit* 156-7.

contextualization. The case of *Ramokhosi* as canvassed under that head is of particular relevance in this respect.[380]

(ii) The idea that the negation of A would entail the negation of X where it is expressly stipulated in a statutory provision that A should entail X finds crisp formulation in the maxims *ex contrariis* and *expressio unius est exclusio alterius*.[381] Suppose that a statute provides that if A should occur, a compensatory fine shall be levied. It may be inferred that in the absence of the occurrence of A, no compensatory fine is to be levied.

When all is said and done, it seems as if the import of the maxims at issue is not so much to "extend" the meaning of the words of the statute as to render homage to their full literal signification. The underlying principle accords well with the Hirschean programme in its fundamental conception. There are times, for all this, when a *clear departure from literal meaning* may be warranted, if not compelled, and *extension in the true sense* indicated or mandated. In such instances, Hirsch's framework would be inadequate as a source of guidance. *Axiological performance*, as mediated by "purpose" and "existential context", may demand, to elaborate on our example, that even in occurrences not assimilable to A in terms, the compensatory fine is to be levied.

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[380] See the discussion under 1.1.2, above.

[381] Du Plessis renders the import of the *ex contrariis* principle as follows: "Where an enactment makes express provision for certain circumstances, it is inferred that for opposite circumstances the

(iii) The maxim *ex consequentibus* expresses the notion that where an end-result is prohibited or allowed, all that may by implication conduce thereto is respectively proscribed or permitted.[382] Say, for instance, that a statute prohibits the coining of money. Upon the assumption that "keeping a mint" is virtually always directed towards the prohibited end, Hirsch would agree that the latter "activity" is to be implied within the concept of "coining money". Let us assume, however, that a mint is kept as an investment, with the object someday of selling it. In this case, *axiological performance*, as mediated by "purpose" and "existential context", would compel a legal conclusion of a different tenor: the person keeping the mint would not be liable to conviction in respect of the named offence.

(iv) What has been noted in relation to (iii) above is of equal relevance to the principle underpinning the maxim *ex accessorio eius de quo verba loquuntur*. Hiemstra and Gonin render it thus: "[If] the principal thing is forbidden (or permitted) the accessory thing, too, is forbidden (or permitted)."[383]

(v) The principle conveyed by the maxim *a natura ipsius rei* (literally, "from the nature of the thing as such") is expressible as the inclusion within a matter of those things which by nature or custom are associated with it.[384] A statute empowering a board to make regulations in respect of one or

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contrary will obtain". (*op cit* 156). The maxim *expressio unius est exclusio alterius* conveys that the expression of one thing implies the exclusion of the other. (*Ibid*).

[382] Du Plessis *op cit* 157.

[383] See Hiemstra and Gonin *Trilingual Legal Dictionary* (1981) 183.

other matter would for instance normally imply the grant of the power to withdraw them.[385] Hirsch, one thinks, would be disposed to read in this implication. It is, however, possible to envisage circumstances in which *axiological performance*, as mediated by "purpose" and "existential context", would run counter to such an implication, for example, where the withdrawal of the regulations would mean an abrogation of vested rights.

(vi) Implications may also be derived *ex correlativis*. Mutual or reciprocal relationship is here in point.[386] Prohibition of purchase implies prohibition of sale; equally, if letting is prohibited, then so is hiring.[387] Hirsch would agree with a reading along these lines. The legislature's "willed type" – a "shared type" that has been learned – seems to compel these implications.

Yet, not a great deal of imagination is required to conceive of instances in which *axiological performance*, as mediated by "purpose" and "existential context", might speak against pursuing one's construction in this "mechanical" way. One can think of circumstances in which it may be unjust to punish hiring simply because letting has been made punishable.

7.3 Modificative Interpretation

The process of ingression may be relied upon to elicit the "plain meaning" of a provision. *Axiological performance*, as mediated by "purpose" and "existential

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[384] *Ibid* 153.
[385] See, in this regard, Du Plessis *op cit* 157.
[386] Du Plessis *op cit* 157.
[387] *Ibid.*

context" may, however, point up that "plain meaning" as a decided obstacle to its consummation. In that instance, one would be faced with an apparent impasse.

I would suggest that in a case such as this, the jurist would be within her legitimate bounds in *modifying the plain meaning* of the provision to the extent that this is necessary to proper axiological performance. Our courts have in the past been reluctant to undertake anything of this order. But that was largely attributable to the then regnant juridical paradigm of parliamentary sovereignty. This paradigm having been supplanted by that of the constitutional state, objections to this mode of interpretation are considerably weakened. Concededly, the interpreter does not have *carte blanche* in this regard. It is *only to the extent* that it is essential to *proper axiological performance*, and no further, that modificative interpretation should be deemed to be admissible. And it is *only to the case at hand* that such modificative interpretation should be held to pertain. For within a different "existential context", axiological performance might perhaps not be frustrated by the "plain meaning" of the words of the provision at issue.

If the qualifications noted in the above paragraph are borne in mind, the jurist should be able to undertake this type of interpretation where necessary, at the same time respecting the separation of powers and doing justice to the notion of fidelity to law.

IV. THE PROCESS OF EFFECTUATION

The process of effectuation consists, in essence, in the precise formulation of the results of one's interpretive efforts, whether such be in mental consciousness, in

speech, or in writing. It would involve the actual enunciation of those canons and maxims of statutory interpretation which are seen to be finally determinative of the issue. *Throughout the preceding phases*, certain *maxims and canons* will have come to consciousness as *potentially applicable* to the matter at hand. By now, those which are *inappropriate* to the case will have been *filtered out*, as Gadamer might say.[388] So we see that the application of maxims and canons, so far from constituting a starting point in the interpretation of statutes, is to be seen as the end-point of the enterprise.[389] There being no hierarchy with respect to these interpretive guidelines,[390] and with so many of them arguing in opposite directions,[391] it seems that to look upon them along these lines renders the most faithful representation of their function.

It is submitted that where a departure from precedent is necessitated in virtue of a re-evaluation of the *Wirkungsgeschichte* of the statutory provision(s), there may be much to be said for raising the possibility of "prospective overruling".[392] Considering this possibility should form part of the formulation of one's interpretive results, and hence is integral to the process of effectuation.

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[388] Gadamer does not use, so far as I am aware, the term "filtered out". But he would no doubt acquiesce in the propriety of its use in this context.

[389] This constitutes something of a departure from conventional doctrine. It is believed, however, that this conception provides a more faithful representation of the circumstances surrounding the application of the maxims in question. See Chapter I of this study, at 5E(1), as also Chapter II, at 6A(3).

[390] See Dugard *Human Rights and the South African Legal Order* (1978) 370: "There is no hierarchy of rules of statutory construction... each judge may select that which he feels best suited to the statute before him."

[391] See MacCormick *Legal Reasoning and Legal Theory* (1978) 207: "The trouble... about such 'rules' and 'canons' is that they tend to 'hunt in pairs'; for almost any one of them another can be found which in an appropriate context will point to a different result from that which it itself indicates".

[392] See, in this regard, Lloyd and Freeman *Introduction to Jurisprudence* (1979) 856-9. The authors express themselves against prospective overruling (in England). Their discussion is nonetheless instructive.

In this, the last, phase of statutory interpretation, it may be necessary in circumstances pointing to a "casus omissus" to register, in explicit terms, the applicability of the common law. In rare instances of this kind, a "casus omissus" is to be noted as requiring supplementation in the light of the new value-order itself.[393]

Here, too, one marks explicitly whether acts done contrary to statutory provisions are null and void.[394] In so recording, one appeals to the ethos of the constitutional order as an important basis of substantiation, together with the scheme of the enactment.[395]

The conclusive entry of the applicable statute as being in or out of line with the precepts of constitutionalism is part and parcel of this phase as well. This discussion has presupposed the constitutionality of the relevant legislation. But it is in the process of effectuation that the jurist undertakes to answer this question decisively – for so far as she is concerned.

Effectuation establishes a certain finality to the enterprise. Thereafter, the jurist no longer entertains any conscious intention to revisit the question. She harbours a reservation, however, to the extent that should subsequent knowledge engender a

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[393] See the discussion of the case of *DTA of Namibia, supra,* without its cautionary remarks concerning the extend to which a court would be justified in going with a view to the supplementation of a *casus omissus.*

[394] See Du Plessis *The Interpretation of Statutes* (1986) 143-7. See also Steyn *op cit* 192ff.

384 It is submitted that it is no longer adequate to appeal only to the statute itself in so recording – it is necessary to take the cue from the ethos of constitutionalism additionally.

suspicion that the effectuation was misconceived, she would be prepared to examine the matter afresh.

SUMMARY AND CONCLUSIONS

In this chapter is set forth a theory of statutory interpretation. The inception of the enterprise is identifiable in the process of ingression. The following are the five axes of the process:

(1) Dictionary-meaning appropriation and legislative-definitional observance;

(2) Idiomatic resolution;

(3) Disambiguation;

(4) Grammatical responsivity; and

(5) Sentence-intrinsic structural analysis.

Compliance with the import of these pointers should secure for the jurist a "gateway" into the meaning of the provision at issue. To stop at this juncture would be adequate to a literalist endeavour. But value-laden adjudication demands much more. Hence the process of purposive-definition. On the basis of the following four methodologies is "purpose" to be gathered in consonance with that process:

(1) Intra-textual contextualization;

(2) "Intentionalization";

(3) Statutory "historicization" (which methodology implicates two axes, to wit, the axis of effective history and the axis of statutory precursors); and

(4) Harmonization of designs.

The harmonization of designs is indispensable to axiological performance. The "new hermeneutical awareness" the jurist brings to bear upon her efforts would normally ensure that the reconciliation implicit in the former notion (of statutory or sub-statutory and constitutional design) takes place in the absence of conscious appraisal. (Value-competition may make for an exception in this regard.)

Axiological performance is committed to concrete-existentialization. It aims at an intuitive perception of the proper disposition of the matter at hand in line with constitutionalism.

The process of effectuation, following immediately upon axiological performance, involves the registration in mental consciousness, in speech or in writing of the results of the constructive exercise. Provisional finality is thereby established.

So much by way of summary. Something must now be said about the status of the interpretive processes as described. As an initial observation, they are decidedly not canons of construction. Rules and canons of interpretation, unlike the

processes in question, partake of a juridical character - constituting as they do a part of our legal tradition. (More on this presently.)

On a more affirmative note, the model as comprised of these processes is to be conceived as serving two distinct, albeit related, functions. In the first place, it represents a way of seeing things which, if made known to the jurist and taken to heart, would enable her to carry out her tasks with greater proficiency. In many activities in daily living, one's performance is largely unreflective. Consciousness of what one is about would frequently improve such performance. The same is to be said for the interpretation of statutes. A knowledge of what the exercise entails (as supplied by way of the model) would allow the jurist to deploy her talents to better effect.

In the second place, the model has a criteriological function. It may be used in order to analyze court decisions bearing upon the interpretation of statutes - with a view to the assessment of compliance with its processes. The model would then serve as a basis for pointing up deficiencies in statutory construction; and it would further suggest a means to their rectification.

In the light of these remarks, the reader may be inclined to ask herself why it is not enough simply to abide by the traditional rules and canons of statutory interpretation. After all, these maxims and stipulations are suffused with legal significance. They are taught as part of the legal curriculum, and have been down through the generations of lawyers. The short answer to such perplexity is to be

found, as we have seen in expounding the process of effectuation, in the insight that the *application* of maxims and canons, far from constituting a point of departure in the interpretation of statutes , is to be seen rather as the end-point of the enterprise. Throughout the antecedently occurring processes, certain maxims and canons will have come to the jurist's awareness as of potential applicability to the matter at hand. But in the course of effectuation, those which are inapposite to the disposition will find their identification as such.

It is not herewith intended to disparage the importance of the traditional rules and maxims of construction, but merely to mark a shift of emphasis. These canons should constitute as much part and parcel of the jurist's stock-in-trade as ever they were previously. But it is only at the end-point of the constructive enterprise that they are to find application. And this signifies a break with the former "lore", according to which these rules were to operate as incipient directives.

Finally, it may occur to the reader to ask herself whether the processes expounded in the model are consecutive in point of time. The "hermeneutic arch" provides something in the way of a response. Such notion has been employed to demonstrate processual interrelatedness. There is probably much "intermeshing" in practice, such that it would be misconceived to look upon the processes described as "discrete". Further, aspects of one process may present anteriorly (in temporal terms) to those of a previously described process - depending upon the circumstances of the case. The "hermeneutic arch" brings this out fairly clearly. So, it may be said that the interpretive processes do *not necessarily* take their

course in a linear temporal sequence (reflecting the order suggested by the model). What is important, however, is that once the exercise of construing a statute has been completed (in a situation of its application), *it should be possible to say that none of the processes has been passed over in dereliction.*

VII

CONCLUSIONS (B): A PRESENTATION OF STRATEGIES FOR THE DEVELOPMENT OF THE COMMON LAW AND CUSTOMARY LAW

I. A Theoretical Basis for approaching the Common Law

(1) The Common Law and Fidelity to Law.

(2) Axiological Performance in Handling Common-Law Sources: Metatheory

(3) Axiological Performance in Handling Common-Law Sources: The Theory in Practice.

3.1 Rights-Applicability in the Context of Private Relationships apparently ungoverned by a Rule of Law.

3.2 Exemplary Common-Law Decisions

3.2.1 Excursus: "Mittelbare Drittwirkung"

3.3 Value-Competition in the Common Law: Its Resolution.

(4) Dissonance

4.1 Overruling Precedent

4.2 Filling the Lacuna: A Metatheory

4.2.1 Rational Forensic Deliberation

4.3 Fidelity to Law and the Separation of Powers

4.4 Dissonance and the Development of the Common Law in Judicial Decisions: The Theory in Practice.

4.5 Departure from an Ostensibly Innocuous Rule or Principle.

II. A Theoretical Basis for approaching Customary Law

(1) The Relevance of the Model

1.1 The Appeal of Gadamer

1.2 The Appeal of Habermas

1.2.1 Access to "Living Law" and Indigenous Jural Postulates: Processual Aspects.

(2) Metatheory of Customary-Law Application

(3) "Mittelbare Drittwirkung" in Indigenous Law

(4) Select Concrete Instantiations of Proceeding in Cases of "Dissonance"

4.1 General

4.2 Specific Examples

I. A THEORETICAL BASIS FOR APPROACHING THE COMMON LAW

In approaching the common law, one might take very much the same line as one does in interpreting statutes. It is possible to discern a number of similarities in the respective methodologies informing these activities. By the same token, however, there are some marked differences.

Among these differences, the most obvious is the entire absence of the processes of ingression and purposive-definition from the methodologies appropriate to the common law. There is no need, as there is in the case of statutory construction, to go about the decipherment of complex legislative formulations in applying the common law. Nor is there any necessity to launch upon some sort of conscious teleological-definitional stratagem in the latter undertaking. Further, although the process of effectuation is common to both, there is nothing comparable to the application of the rules and maxims of statutory interpretation in giving effect to the common law.

As with statutory interpretation, to note now the similarities, *axiological performance* is all-pervasive. The "new hermeneutical consciousness" is as much in point. It should be revitalized where necessary – by discoursing with fellow jurists, exchanging ideas at symposia, and taking cognisance of international public opinion. It should on no account be allowed to congeal.

Informing the "new hermeneutical consciousness" – here, as in the case of statutory interpretation – are the values underlying an "open and democratic society based on human dignity, equality and freedom" (as understood with reference to the norms of public international law). Informing it, too, as being integrally a part of the Grundnorm-order, are the objectives of "justice". The latter notion is to be conceived as involving the "synchronization of interests". The discussion in the first three paragraphs and 1.1 – 1.4 of the previous chapter, bearing upon these issues, is equally of relevance in the present context.

(1) THE COMMON LAW AND FIDELITY TO LAW

Nonet and Selznick's view that "purposiveness" makes for fidelity to legal precept, while at the same time securing its responsiveness to social needs is as applicable to the common law as it is to the interpretation of statutes.[1] Gadamer's thesis of the "openness of the text", hereby called to mind, is likewise equally pertinent to the handling of common-law materials.[2] And, with this, one is led to Hoy's hermeneutical pluralism, with its implicit injunction to strive for the most appropriate answer in the circumstances.[3]

In the common law, in seeking to implement the "most appropriate answer" in the circumstances, one is to work with a *twofold purpose* (in contrast to the threefold

[1] See the discussion under III (1) of the preceding chapter, above, on the "fusion of horizons" as a basis for fidelity to law.
[2] See the same discussion (under III (1) of the preceding chapter).
[3] See the same discussion (under III (1) of the preceding chapter).

purpose operative in the interpretation of statutes). [4] This twofold purpose relates to the constitutional design and the "purpose" of justice - with the latter effectively taken up in the former.[5] There is, of course, no "statutory purpose" to be serviced – and this makes the enterprise distinctive. Yet, as with the interpretation of statutes, the approach now under discussion should reckon with the (twofold) purpose as a *single, composite purpose.*

(2) AXIOLOGICAL PERFORMANCE IN HANDLING COMMON-LAW SOURCES: METATHEORY

(1) Two terms are involved in the mediation of axiological performance: "purpose" and "existential context".

(2) It is to be remembered that the constitutional scheme envisages the "synchronization of interests": public and private, as well as competing private, interests. This means that it is integrally a part of the constitutional design that the purpose of "justice" should be serviced. From this it follows that (i) the constitutional design; and (ii) the purpose of "justice" constitute a *single, composite, twofold "purpose"*.

(3) "*Existential context*" refers to the inclusive "context of social realities" (of which the "arrangement of facts" presenting for determination are to be deemed a component). The "context of social realities" pertains most notably to such issues as:

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[4] The discussion in Chapter V, at 4.1, should give the reader to perceive why this is so.
[5] See the metatheory (below) as to why this is the case.

(i) the importance of transparency in the course of political and public activity;

(ii) the human, social and economic aspects relevant to the determination;

(iii) a concern for the "community" or "communities" which constitute a source of "personhood";

(iv) the exigencies of life in, and the welfare of, the larger "society";

(v) a concern for human dignity and substantive equality; and

(vi) a concern for liberty (in its proper conception).[6]

(4) "Purpose" subsumes a commitment to the broad "context of social realities". The issues enumerated as (3)(i)-(vi), above, are matters to which the design of the Constitution is committed in very emphatic terms.

(5) Let us now suppose a common-law rule or principle to be in point. Underlying this rule or principle is a "*narrative model*" of typifications of action, *loaded with tacit social evaluations*.[7] The model informs the jurist's perception of the "norm" and the "arrangement of facts", organizing them into a stable configuration (Gestalt) of *legal norm* and *legal facts*. Subsumption or non-subsumption proceeds on the basis of this Gestalt.

(6) The twofold "purpose" – which is committed to the "context of social realities" – may make for an "adjusted prejudice-horizon", a *new "pre-understanding*". Stated differently, the *evaluative dimension* of the

[6] See Chapter V at 4.1 in this regard.

"narrative model" may undergo *adjustment*. And, in this event, the "norm" and the "arrangement of facts" would organize themselves into a *new* stable configuration (Gestalt) of *legal norm* and *legal facts*. Subsumption may now be observed to take place where previously it did not – and conversely.

(7) Since the "*context of social realities*" is one to which the twofold "purpose" is committed (see (6) above), it would lend its force to the activation, alternatively the inactivation, of the normative syllogism. The "context of social realities", then, may make for an *adjustment* to the *evaluative dimension* of the "narrative model". The "norm" and the "arrangement of facts" would then be organized into a *novel* stable configuration (Gestalt) of "legal norm" and "legal facts". And where formerly it did not occur, subsumption may now be seen to proceed – and conversely.

(8) It may happen that a rule or principle of the common law, by reason of its obduracy, its incompatibility with the new order, or otherwise, *frustrates axiological performance* (as mediated by "purpose" and "existential context"). In this event, a departure from the rule or principle would be required. And a substitute would need to be crafted in order to fill the lacuna. We deal with this matter in due course.[8]

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[7] The same remarks as were applicable in this regard with reference to the interpretation of statutes are of relevance here.

[8] See the discussion of "dissonance", under (4), below.

(3) AXIOLOGICAL PERFORMANCE IN HANDLING COMMON-LAW SOURCES: THE THEORY IN PRACTICE

In what follows, it is attempted to demonstrate the workings of the model with reference to some noteworthy decisions. It is repeated that it does not diverge radically according as it operates in the context of statutory interpretation or with respect to the common law. Before setting out on the course identified, however, it is necessary to discuss an important issue, the more so for the ease with which it is liable to be overlooked.

3.1 Rights-Applicability in the Context of Private Relationships apparently ungoverned by a Rule of Law.

Woolman and Davis have underscored the significance of this matter.[9] It seems that they identify themselves with the thrust of critical legal scholarship in speaking of relationships for which the law ostensibly does not make provision. Critical theorists would argue that in seeking to leave a domain of social life unregulated by a rule, the law signals its tacit approval of the prevailing dispensation.[10] There is therefore "law" governing the relationships in point, but it manifests itself only in its absence.[11] Woolman and Davis contend that the Constitution may demand a re-evaluation of existing dispensations of this character, and

[9] See Woolman and Davis "The Last Laugh: Du Plessis v. De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions" 1996 12 *SAJHR* (3) 361 401-403 n 119. Consult Chapter V, at 2.3.4, in this regard.

[10] This seems to be a recurrent motif in the writings of many of those espousing critical legal scholarship.

require the application of its fundamental-rights provisions to the end of ameliorating hardship.[12]

Despite there being no identifiable rule or principle of law governing these situations, the formula of "*axiological performance as mediated by purpose and existential context*" is committed to their resolution. The examples furnished here show up "purpose" and the inclusive "context of social realities" as making for axiological performance along these lines.

Regard being had to the facilities made available for the perpetuation of "apartheid" at a level as between legal subjects – a "privatized apartheid,"[13] one should consider the right of "equality" as it operates as between citizens to be of outstanding importance. The subject-matter under this sub-title is therefore discussed with particular reference to this right.

Three-Stage Analysis

The jurist may do well in circumstances where these concerns are potentially at issue to undertake a three-stage analysis[14] such as has been proposed by Woolman and Davis. The first stage of the analysis would relate to the question of

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[11] Such a proposition is perhaps not uncontroversial.
[12] See Woolman and Davis *op cit* 401-403 n 119.
[13] Woolman and Davis write: "The Constitution's commitment to the construction of a new society which emerges out of the ashes of Apartheid necessitates a thorough examination of the manner in which existing regimes of private power can subvert that commitment". (Woolman and Davis *op cit* 400)
[14] See Woolman and Davis *op cit* 401-403 n 119.

"application", the second to that of "rights", and the third to that of "limitations".[15] As regards the question of application, section 8(2) is of relevance: "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." With respect to the question of rights, what is required to be established is whether the right at issue has been facially infringed, and with regard to that of limitations whether, supposing facial infringement of such right to have been demonstrated, the restriction is "reasonable" and "justifiable" within the terms of the limitations clause, section 36.[16]

Two Hypotheticals

Woolman and Davis discuss two "hypotheticals" illustrating the manner in which the analysis as outlined above may be given substantiality. The authors compare the case of a female chess-player excluded from an all-male chess club with that of a prospective employee excluded from membership of a firm exclusively by reason of her ethnicity.[17] In both instances, the right sought to be protected is manifestly that of "equality". Application analysis – in terms of section 8(2) as quoted above – would entail a reference to section 9(4): "No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)." (Among the grounds catalogued in the latter subsection are "gender" and ethnicity.[18]) In both cases, the authors point out, the right to "equality" would in

[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*

all probability be deemed to be of application.[19] Likewise, both the excluded female chess-player and the disappointed would-be employee would probably be in a position to make out a case that their right to "equality" has *prima facie* been infringed.[20] This is what rights analysis would summon for inquiry.[21] As regards the question of limitations analysis, it may be conjectured that it would be found to be "reasonable" and "justifiable" within the terms of section 36 that the chess-player in the example should be excluded as she has been, but that it would certainly not be found to be reasonable and justifiable that the job applicant should be discounted from eligibility on the grounds of her colour.[22] It follows that "reasonableness" and "justifiability" in limitations analysis are to be ascertained in social context, and this consideration should allay fears of "indiscriminate" intrusion in the name of state power on relationships deemed to have the quality of being "private."[23] At the same time, limitations analysis would not permit the entrenchment of inequality and the practice of "privatized apartheid" by citadels of private power.[24]

With this issue thus canvassed, it is turned immediately to some noteworthy judgments illustrative of the workings of the model with respect to common-law sources.

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[19] *Ibid.*
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*

3.2. Exemplary Common-Law Decisions

Myburgh v. Voorsitter van die Schoemanpark Dissiplinêre Verhoor[25]

In this case, a recreation club took disciplinary proceedings against the applicant. What the court had to decide was whether the applicant was entitled to legal representation at his hearing.[26] Noting that at common law there was no right to legal representation except before courts of law in the strict sense, the judge cited authority to the effect that in the case of a tribunal created by contract, the rights of the person concerned are to be gathered from the contract itself.[27] In this instance, the contract provided for "representation".[28] On the authority of *Lamprecht v. McNeillie,*[29] the judge held that the word was not to be taken to mean "legal representation".[30] It remained to establish whether there was anything in the Constitution to gainsay these conclusions, and to afford the applicant relief in the form claimed. The court held in the negative, dismissing the application.[31]

This case may be analysed along the lines of the model. Axiological performance is mediated by "purpose" (constitutional design and justice) and "existential context". The "context of social realities", to which "purpose" subsumes a commitment, pertained in particular to the difference in character between criminal and other proceedings. The *evaluative dimension of the "narrative model"*

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[25] 1995(9) BCLR 11 45(0).
[26] See judgment t 1146H.
[27] At 1146I – 1147F. See, in particular, the judge's citation of the case of *Turner v. Jockey Club of South Africa* 1974 (3) SA 633(A), at 1147D-F of the report being considered. (See also headnote at 1145 I.)
[28] At 1147G.
[29] Cited as case no. 492/92 (appeal court).
[30] At 1148C. (See also headnote at 1145J–1146A.)
[31] At 1150E and H.

underlying the common-law principle as stated did *not* undergo any adjustment. (Another way of putting this would be to say that the judge's pre-understanding remained as it had been –was not affected.) The "norm" and the "arrangement of facts" conformably organized themselves into the *same* stable configuration (Gestalt) of "legal norm" and "legal facts" as they had in the past. This is as much as to say that subsumption took its course quite as it had always done.

Ryland v. Edros[32]

Here the court had to determine as a threshold issue whether contractual relationships arising from a potentially (but not actually) polygamous union, solemnized by Muslim rites, were to recognized and enforced.[33] In *Ismail v. Ismail*,[34] the highest court in the land held that such were void on the grounds of "public policy".[35] In the instant case, the judge said that the *Ismail* decision took into account the views (or presumed views) of only one group in the plural society in branding a contract as offensive to "public policy".[36]

Bringing to bear upon the matter the value-system inaugurated by the Interim Constitution, the judge held that the principles of equality and tolerance of diversity (recognition of the plural nature of the society) were to "radiate" or inform the concepts of "public policy" and *boni mores*. [37] In the result, he concluded that the threshold issue was to be decided affirmatively.[38] He empha-

[32] 1997 (1) BCLR 77(C).
[33] See judgment at 85B-C.
[34] 1983 (1) SA 1006(A).
[35] At 85B-C.
[36] At 90G.
[37] At 91I-J.
[38] At 94B.

sized that his finding was not necessarily applicable in respect of contractual terms of the type under discussion which are agreed to in the context of a marriage that is actually (as opposed to merely potentially) polygamous.[39]

This decision is instructive for our purposes. The common-law rule at issue is that *contracts which offend against public policy are void.*[40] Axiological performance is mediated by "purpose" and "existential context". "Purpose" (the design of the Constitution and "justice") which subsumes a commitment to the "context of social realities" (the latter speaking in this case to the diversity and heterogeneity of the South African society) gave the *evaluative dimension* of the narrative model underlying the rule to *undergo adjustment.* The "norm" and the "arrangement of facts" were to organize themselves into a *new* stable configuration (Gestalt) of "legal norm" and "legal facts" in a way that precluded subsumption – where previously the normative syllogism would have been activated.

Rivett-Carnac v. Wiggins [41]

This was a defamation suit. The plaintiff, a professional valuer, alleged that the defendant's criticism of his report amounted to defamation.[42] The court held that although it was robust in form, such criticism was not to be conceived as an attack on the plaintiff's professional reputation.[43] The judge maintained that the boundary between actionable and non-actionable criticism was to be drawn with reference to the value attaching to public debate and deliberation in respect of matters of public

[39] See 92C-D of the judgment.
[40] Such is the proposition of law which one may affirm as relevant.
[41] 1997 (4) BCLR 562 (C).
[42] See, in this regard, judgment at 572D-H. See also 567I.

concern.[44] The Constitution sought to promote openness and transparency.[45] In the result, the action could not succeed.[46]

Analysing the decision with reference to the model, we may note that the judge reasserted the test to be applied in determining whether material is defamatory. It is so *if it lowers the plaintiff in the estimation of reasonable persons generally*.[47] Axiological performance is mediated by "purpose" and "existential context". "Purpose" subsumes a commitment to the "context of social realities". The latter context involved the circumstance that professionals often disagree (even robustly) and that dissensus is a feature of the enterprise of valuation.[48] Insofar as it pertained to that context, "purpose" pointed up the values of transparency, deliberation and debate in matters of public concern as of particular importance. The *evaluative dimension of the "narrative model"* underlying the principle underwent *adjustment*, such that the "norm" and the "arrangement of facts" organized themselves into a *new* stable configuration of "legal norm" and "legal facts". Subsumption did not proceed, then, where previously it might have.

The result was the judge's holding that the conception of "reasonable persons" embodied in the principle is to be taken to refer to reasonable persons in a society placing emphasis on transparency, deliberation and debate in matters of public concern.[49]

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[43] See judgment at 574H-I.
[44] At 573C-D.
[45] At 571J-572A.
[46] At 575B.
[47] At 571B.
[48] At 574I.
[49] See headnote at 563J-564A, and 571C-572B, in this regard.

3.2.1 Excursus: Mittelbare Drittwirkung

The decisions (just discussed) in *Ryland* and *Rivett-Carnac* provide very neat exemplifications of the process of *mittelbare Drittwirkung* at work. Whereas in *Ryland*, the concept of "public policy" was suffused with new meaning in the light of the constitutional ethos, in *Rivett-Carnac* this was true in respect of the notion of the "reasonable person". Both decisions are obviously circumscribed in their effect, but the ambit of the principle they illustrate is potentially very broad.

The principle of *mittelbare Drittwirkung* has important implications for the development of the common law. Van Aswegen notes with respect to the law of delict specifically that the values underlying fundamental rights may be deployed as policy considerations in the determination of "wrongfulness", "remoteness" and "negligence".[50] Van der Walt agrees. Urging Burchell's point that the principles of our law of delict are expansive in their conception, he proposes that the open-textured conceptions which govern delictual liability hold themselves out as amenable to development in the light of the values immanent in the Bill of Rights.[51]

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[50] See Van Aswegen "The Implications of a Bill of Rights for the Law of Contract and Delict" 1995 11 *SAJHR* (1) 50 60.

[51] See Van der Walt "Justice Krigler's Disconcerting Judgment in Du Plessis v. De Klerk: Much Ado about Direct Horizontal Application (Read Nothing)" 1996 4 *THRHR* 732 740.

Goodrich would suggest that ideological preferences are the principal determinants of the meanings that are in the event attached to these open-textured conceptions.[52] I submit that while his point is perhaps not entirely without substance, it is unduly pessimistic. "Categories" and concepts of such wide connotation as "wrongfulness", "remoteness" and "negligence" lend themselves most eminently to catering for social realities. Stone has demonstrated as much. Stone can, however, be taken too far; if pressed beyond a certain point, his thesis threatens to subvert the notion of "fidelity to law".[53] There is no cause for despair, though, if we are prepared to invoke the concept of *purposiveness* (as instantiated in the values of the Constitution) as a means of surmounting the tension between the *integrity* of a legal rule or principle and its *responsiveness* to social needs.[54] And this is precisely what we do in allowing of *mittelbare Drittwirkung* in the process of axiological performance.[55]

Moeketsi v. Attorney-General, Bophuthatswana [56]

In this matter, the applicant sought a permanent stay of criminal proceedings against him on the grounds that his right to a fair trial had been breached, and more particularly his right to be tried within a reasonable time.[57] The court found that it was indisputable that there had been a delay, but, in view of the fact that the

[52] See the discussion of Goodrich in Chapter III of this study, at 2.1.
[53] See the parallel exposition in the previous chapter under the head of "mittelbare Drittwirkung" in statutory interpretation (Chapter VI,III(6)).
[54] As Nonet and Selznick's observations proclaim. See the discussion, under III (1), in Chapter VI.
[55] See the exposition referred to in n 51, above.
[56] 1996 (7) BCLR 947 (B).
[57] See judgment at 949D-H.

applicant had largely been responsible therefor, among other related reasons, concluded that the application fell to be dismissed.[58]

In coming to this conclusion, the judge examined the common law and the influence of the Constitution thereupon. He proposed, rather controversially,[59] that the principle that an accused person is entitled to be tried expeditiously had become entrenched in our law prior to the advent of the Constitution.[60] In interpreting section 25(3)(a) of the Interim Constitution, which conferred a right to be tried within a reasonable time after having been charged, the court had comparative recourse to the legal position in several foreign jurisdictions, namely the United States, Canada and the European Community, as it was entitled to do by virtue of the permissive constitutional stipulation.[61]

Bringing the model to bear upon this judgment, we may say that the judge understood the common law to lay down that *an accused is entitled to a speedy trial, and, where it has been denied him or her (assuming exceptional circumstances) is entitled to a permanent stay of the prosecution.*[62] Axiological performance implicates "purpose"and "existential context". "Purpose" (the design of the Constitution, as illuminated by foreign authorities) was attuned to the consideration that guilty persons should be duly convicted and should not avert

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[58] See 971B-972C.
[59] The word "controversially" is used as signalling that the judge seems to have been alone in so proposing. The reader is invited, for purposes of comparison, to peruse the discussion of the decisions in *Coetzee v. Attorney-General, KwaZulu-Natal* 1997 (8) BCLR 989 (d) and *Wild v. Haffert NO* 1997(7) BCLR 974 (N).
[60] At 959H.
[61] The permissive constitutional stipulation, if this requires noticing here, is to be found in section 39(1) (c).
[62] See judgment at 970G-H.

that fate by reason of an oversight or mistake capable of being remedied.[63] The "context of social realities" embraced that consideration. *The evaluative dimension of the "narrative model"* underlying the principle at issue *underwent no adjustment* to speak of, such that the "norm" and the "arrangement of facts" organized themselves into a "legal norm" and "legal facts" in quite the same way as they might have previously. And subsumption, as formerly, could not occur.

Coetzee v. Attorney-General, KwaZulu-Natal [64]

In this case the question arose whether a permanent stay of the prosecution was the appropriate remedy in circumstances where there had been a very considerable delay in commencing the trial.[65] The applicants, indicted for the murder and robbery of one Mxenge,[66] claimed that the answer was in the affirmative.

In seeking to resolve the issue, the court took occasion to comment that the notion that an unreasonable delay in the commencement of a trial may undercut an accused's right to a fair trial was apparently not part of our pre-constitutional jurisprudence.[67] (Compare, in this regard, the observations of the court in *Moeketsi*.[68]) The judge made it clear that an accused's *right to a fair trial as such has long been recognized in our law*, nonetheless.[69] Section 35(3) of the Final Constitution guarantees the right to a fair trial, with subsection 35(3)(d) thereof stipulating as included therein a requirement as to the commencement and

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[63] See judgment at 970E.
[64] 1997 (8) BCLR 989 (D).
[65] See judgment at 991I-992A.
[66] At 991H.
[67] At 1000 H-I.
[68] *Supra*.
[69] At 1000B.

conclusion of the trial "without unreasonable delay".[70] By reason of the silence of our common law on the question specifically to be determined, Thirion J. turned his attention to decisions of the English courts in point, adverting to their persuasive force and arguing that our own law would have developed along parallel lines.[71] The judge concluded that if on account of an unreasonable delay in bringing the accused to trial, the latter is prejudiced to the extent that he *can no longer be fairly tried*, the charge would require to be dismissed or the prosecution permanently stayed.[72] This was not so in the circumstances of the instant case, and the application was accordingly dismissed.[73]

Analysing this decision with reference to the model, we arrive at the following picture. Axiological performance is mediated by "purpose" and "existential context". "Purpose" (the design of the Constitution, as illuminated by foreign authorities) and the "context of social realities" (pertaining to the necessity for the prosecution of accused persons without hindrance upon an unworthy pretext) entailed that the evaluative dimension of the "narrative model" underlying the principle that an accused has a right to a fair trial remained much as it had been before. The "norm" and the "arrangement of facts" organized themselves into the same stable configuration (Gestalt) of "legal norm" and "legal facts" as formerly they might have, with the result that the operation of the normative syllogism was precluded (as it would have been previously).

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[70] See section 35(3)(d) of the (Final) Constitution.
[71] At 1003 I-J.
[72] At 1005 B.
[73] At 1008 I-J.

Wild v. Hoffert NO [74]

This case was similar in many respects to that of *Coetzee* (as just discussed). The applicants were charged with dealing in, alternatively possessing cocaine, and attempted murder.[75] (The last charge – that of attempted murder – was subsequently dropped.)[76] They sought an order permanently staying the prosecution, proffering in justification therefor the circumstance that their right to be tried within a reasonable time, as embodied in section 25(3)(a) of the Interim Constitution, had been violated.[77] The court (per Booysen J., McCall J. concurring) found itself unable to accede to this request.[78] It was held that there was little room for a finding that the applicants would be adversely affected as regards the quality of their defence by reason of the delay.[79] Though they had assuredly suffered prejudice on account thereof, the delay did not compromise their right to a fair trial.[80]

The court referred to the (as then unreported) case of *Coetzee v. The Attorney-General, KwaZulu.*[81] As in that case, the judge seems to have approved the approach of the English courts on the matter.[82] (And it appears, likewise, that he took as a point of departure the common-law principle that an accused is entitled to a fair trial.)[83]

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[74] 1997 (7) BCLR 974 (N).
[75] See judgment at 975J.
[76] See 976C.
[77] See 976D-F.
[78] At 987H.
[79] At 987G-H.
[80] 987E as read with 987G-H.
[81] *Supra.*
[82] See 981G.
[83] See 982A.

As regards the model, the same comments as were noted in analysing the case of *Coetzee* are applicable to an analysis of the decision in this case.

(The reader is referred to the *Moeketsi* case for purposes of comparison.)[84]

S. v. Nombewu [85]

The appellant in this case sought to overturn his conviction of robbery in the regional court, as well as the sentence imposed.[86] The basis of his case was that certain evidence had been admitted against him which ought to have been excluded on the grounds of unconstitutionality.[87] Rejecting this claim, the court on appeal confirmed the conviction, varying the sentence in an upward direction.[88]

The evidence at issue consisted in the pointing-out of a motor vehicle.[89] The defence argued that the reception of this evidence was unconstitutional because although the appellant had been given the customary warning in terms of the judges' rules that he was not obliged to say anything in answer to the charge, and that if he did so, it could be used against him in evidence, he had not been forewarned to the same effect with respect to the pointing-out.[90]

The court engaged itself in an analysis of the common-law position with regard to the law of criminal procedure and the admission of evidence. I note that the gene-

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[84] *Supra.*
[85] 1996 (12) BCLR 1635 (E).
[86] See judgment at 1639 C.
[87] At 1640 B.
[88] At 1647 E.
[89] At 1639 F-G.
[90] At 1641 B-E. (See also headnote at 1636 E.)

ral principle at common law seems to have been that all relevant evidence was admissible, irrespective of how it had been obtained. There does not appear to have been any consensual affirmation of the court's discretion to exclude such evidence.[91] For all this, however, the court remarked that there had been of late *some acknowledgement of a general discretion to exclude for reasons of public policy* evidence admissible in terms of the rules of evidence.[92] This represented Erasmus J.'s view of the common law as it obtained prior to the inauguration of the Constitution. He considered that this "general discretion", when filtered through section 35(3) of the Interim Constitution, vested the courts with the competence to exclude evidence to the end of ensuring that the accused have a "fair trial".[93] In this regard, value-judgments would be relevant to the assessment of "fairness", and hence to the public-policy rationale for the exclusion of otherwise admissible evidence in fitting circumstances.[94] In the present case, the court concluded that the exclusion of the pointing-out evidence would bring the administration of justice into disrepute, not so its inclusion.[95]

The model displays the court's manner of proceeding as follows. Axiological performance is mediated by "purpose" and "existential context". "Purpose" subsumes a commitment to the "context of social realities". The latter context relates in this case to the policy of the law to synthesize the conflicting interests of society in (i) maintaining pre-trial procedural safeguards as against (ii) having all relevant

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[91] See in this regard the interesting discussion (albeit now dated) in Hoffmann and Zeffertt *The South African Law of Evidence* (1986) 223ff.
[92] At 1657 J – 1658 A.
[93] At 1658 D-E.
[94] At 1658 I – 1659 B.
[95] At 1663 F.

and admissible evidence brought in against an accused.[96] In view of this, the evaluative dimension of the "narrative model" was largely unaffected, with the result that the "norm" and the "arrangement of facts" organized themselves into the same stable configuration of "legal norm" and "legal facts" they previously assumed. And the narrative syllogism, as before, was not to be activated.

Du Preez v. Truth and Reconciliation Commission [97]

The Promotion of National Unity and Reconciliation Act, 34 of 1995 in its section 30(2) provides for the right of a person implicated in the course of proceedings before the Truth and Reconciliation Commission to be heard as to his or her side of the story.[98] The subsection does not, however, make provision for rights of those yet to be implicated to be adequately notified as to the time and place when evidence affecting them would be placed before the Commission and as to the allegations to be levelled against them.[99]

Corbett C.J. held that these rights found their embodiment in principle in the common law,[100] and that their omission from section 30(2) was accordingly no reason for depriving the appellants of their benefit. The common-law rules of natural justice were here in point.[101] Embracing more than the *audi alteram partem* principle, these rules postulate that the body in question is required to act fairly,[102] and apply where, as here, the persons concerned have a "legitimate

[96] See judgment at 1655 D.
[97] 1997 (4) BCLR 531 (A).
[98] See judgment at 537H, where section 30(2) is reproduced.
[99] See 541D-E. (See flynote at 531E–F.)
[100] At 541F-G. (See also headnote at 532E–F.)
[101] At 541F-G.
[102] At 542D.

expectation" to a fair hearing. In the circumstances of the present case, fairness imported reasonable and timeous notice of the time and place when evidence affecting them would be placed before the commission, as also information as to the substance of the allegations against them, in sufficient detail.[103] The court took these matters into account in reinstating in qualified terms the order of the court of first instance.[104]

For purposes of this discussion, let us assume that the common law at the time this judgment was delivered was as it had been prior to the decision in *Administrator, Transvaal v. Traub*[105] (in which the "legitimate expectation" test found its authoritative formulation). Let us assume, further, that it was a "legitimate expectation" to a fair hearing that was under threat in this case – and not any existing right, privilege or liberty.

Upon these suppositions, the common-law rule requiring for the application of the rules of natural justice a threat to an existing right, privilege or liberty would not have comported with section 24(b) of the Interim Constitution, which expressly stipulated for the contingency of a "legitimate expectation". "Purpose" as a mediating conception in axiological performance, together with the "context of social realities", would under these circumstances have transformed the evaluative dimension of the "narrative model" underlying the common-law rule, so as to organize the "norm" and the "arrangement of facts" into a *novel* stable

[103] At 545E-F (See also headnote at 532I).
[104] At 546H-J.
[105] 1989 (4) SA 731 (A).

configuration (Gestalt) of "legal norm" and "legal facts". The normative syllogism would correlatively have been activated, where previously this might not have occurred.

These comments are naturally in the subjunctive mood. In the matter at hand, there was obviously no need to proceed in this way.

S. v. Botha [106]

In this case, the accused was charged with fraud.[107] The question arose whether he would have a fair trial if the record of his bail application, at which in ignorance of the privilege against self-incrimination he furnished testimony tending to that result, were to be admitted in evidence at the main trial.[108] The court decided this question in the negative.[109]

The court held that an accused should not have to choose between his right to release on bail and his privilege against self-incrimination.[110] (The (Interim) Constitution stipulates for both: for the former, in its section 25(2)(d), and for the latter in its section 25(3), which provides for the right to a fair trial.) There should be no spill over from the bail hearing into the trial; for, if there is spill over, the accused would fear giving evidence at his bail application, and this would prove

[106] 1995 (11) BCLR 1489 (W).
[107] See judgment at 1491 G.
[108] See 1490 J – 1491 D.
[109] At 1496 D.
[110] At 1495 F. (See also headnote at 1490 G.)

detrimental to his chances of being released on bail.[111] The court held that an accused ought not to be confronted with such a dilemma.[112]

Invoking the model, "axiological performance" is mediated by "purpose" and "existential context". "Purpose" (the design of the Constitution and "justice"), together with the "context of social realities", made for a ***transformation*** of the *evaluative dimension of the "narrative model"* underlying the common-law privilege against self-incrimination. The "norm" and the "arrangement of facts" organized themselves into a *novel* stable configuration of "legal norm" and "legal facts", with the result that the narrative syllogism became activated.

(Importantly, the "context of social realities" here pointed to the need for an accused person at his bail hearing to give evidence which – while going towards undermining the state's case at that stage – would tend to incriminate him if admitted in evidence at the trial.)

3.3 Value-Competition in the Common Law: Its Resolution

No exertions have been spared in bringing to the surface the "non-positivistic" character of the approach to be adopted in handling common-law sources. The evaluative dimension of one's perception of rules and principles of the common law has consistently been highlighted in the course of the preceding discussion. Furthermore, it has throughout been demonstrated that this dimension is amenable

[111] At 1495 F.
[112] At 1495 F.

to qualitative alteration in the event of such being required in the light of the "new hermeneutical awareness".

The internalization of this "awareness" as a perceptual framework would normally render relatively easy of application in the development of the common law the norms and values inhering in the constitutional compendium. Real difficulties do, however, arise in situations where values are "in competition", so to speak. It has been dealt with this problem in a different context,[113] and it would seem necessary at this point to enlarge upon its significance. By analogy with the approach to the parallel difficulty in the field of the interpretation of statutes, it appears that we are on safe ground in proposing that *one is here to identify, with reference to the "existential context", that value the protection of which most closely illuminates the constitutional scheme.* This is what was done in the *Concorde Plastics* case.[114]

Instructive as illustrating the manner of proceeding in common-law context is the case of *Holomisa v. Argus Newspapers Ltd.*[115] To introduce the matter, let us rehearse the thesis developed in Bell's and Griffith's studies. Bell contends that value-judgments of a distinctively political complexion inform the judicial interpretation of concepts such as "duty of care" and "public interest".[116] Griffith's contentions, as we have noted, are to similar effect, though much more vociferous.[117] We should take the point that where it is quite patent, as it seems to

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[113] The issue of value-competition in the interpretation of statutes is canvassed in Chapter VI, III (4).
[114] 1997 (11) BCLR 1624 (LAC).
[115] 1996 (6) BCLR 836 (W).
[116] See the exposition of Bell's point of view in Chapter III of this study, at 2.2.
[117] See the elaboration of Griffith's suggestions in Chapter III of this study, at 2.3.

have been in *Holomisa*, that apartheid (or colonialism) has given rise to distortion in the law, it may be necessary to jettison an established "principle", and to replace it with a substitute reflecting the values inherent in the constitutional ordering.

Holomisa v. Argus Newspapers Ltd. [118]

In this case, the court fashioned a new rule of the common law. As to this, we shall have more to say in due course.[119] For the present, we may note that the case concerned the relative priority of the values of "freedom of speech" and "dignity" in the context of allegedly defamatory remarks made in the course of free and fair political activity.[120]

Axiological performance is mediated by "purpose" and "existential context". In this case "purpose" was the unknown term, its not having been possible to determine in advance which of the two values protected by the Constitution should enjoy precedence. "Existential context" implicates both the "arrangement of facts" and the wider "context of social realities". The "arrangement of facts" pertained to the entitlement (or disentitlement) of a public figure to damages for false defamatory statements made about him in the course of free and fair political activity. The broader "context of social realities" pertained to the circumstance

[118] *Supra*
[119] See the discussion of this case under 4.4 below.
[120] See judgment at 840F-841H. See also 852ff.

that the role of the media is especially important to a society based upon openness and accountability.[121] The "*existential context*" was therefore such as to point up the primacy of the value of "freedom of expression" over that of "dignity" in the circumstances.[122] (The judge implicitly conveyed that had the "facts" been otherwise–for example, had the issue involved non-political speech – matters might conceivably have been different).[123]

"Purpose" had now been ascertained ("freedom of expression" as a pre-eminent value in the circumstances). Such "purpose" imbued the judge with a *novel "prejudice-horizon"* with respect to the common-law rule before him. In this case, the *evaluative dimension of the "narrative model" underlying such rule was not capable of assimilation to this novel "prejudice-horizon"*.[124] For this reason (axiological performance having been frustrated by reason of the obduracy of a common-law rule), it was necessary for the judge to fashion a new rule of the common law in order to dispose of the issue. This was in point of fact a case of "dissonance". In the event of "dissonance", novel rules require to be crafted in the

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[121] At 855E.

[122] At 854C, Cameron J. writes as follows: "The determination of a right's constitutional importance *in each situation* unavoidably involves the evaluation of competing values. The value whose protection most closely illuminates the constitutional scheme to which we have committed ourselves should receive appropriate protection in that process". (Emphasis added. It seems to me that the words "in each situation" betoken an acknowledgment of the importance of the "existential context" in the exercise.)

[123] Cameron J. expresses himself thus: "The defence derived ... from the Constitution, applies in the first instance to defamatory untruths published in the sphere of *political activity*". (At 865A, emphasis mine). See also 865E-F of the judgment.

[124] One may say that the rule was not axiologically adequate. It gave the "upper hand" to the interest in reputation over that of freedom of speech and expression, with the (apparently acquiesced in) result of stifling the media. The rule found its formulation most illustratively in the case of *Neethling v. Du Preez* 1994 (1) SA 708 (A), as cited by Cameron J. at 849E-F. It betrayed, so far as the judge was concerned, a clear pejoratively political-ideological preference.

nature of things. And the manner of their crafting is something we deal with under that head ("dissonance").[125]

Shabalala v. Attorney-General of the Transvaal [126]

This case decided definitively that the blanket docket privilege (the "Steyn" privilege) could not be sustained as constitutional,[127] and laid down guidelines as to the manner of conducting criminal proceedings with specific reference to this finding.[128] The values which vied for the status of primacy were, on the one hand, the right to access to information and the right to a fair trial, and on the other, the interest in upholding the proper ends of justice.

In the course of its judgment, the court held that it was not possible to lay down hard and fast rules in the abstract. Its guidelines were to be understood as such. The "*existential context*" would in each instance give direction to the development of the law relative to docket privilege. In some matters, that context would point up as primary the right of access to information and the right to a fair trial, in others, the interest in upholding the proper ends of justice. Each case was to be considered on its own facts, and the law was to be developed conformably with this insight.[129]

Mandela v. Falati [130]

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[125] See the discussion under (4), below.
[126] 1995 (12) BCLR 1593 (CC).
[127] See judgment at 1616E.
[128] At 1615A-1616E. (See also headnote at 1595 C–1596 C.)
[129] Mahomed D.P. writes as follows: "The details as to how the Court should exercise its discretion in all these matters must be developed by the Supreme Court [*sic*] *from case to case* ...." (At 1617E-F, emphasis added).
[130] 1994 (4) BVLR 1 (W).

Here the plaintiff sought the extension of an interim interdict restraining the defendant from making public material allegedly defamatory of her.[131] Obviously in competition were the right to freedom of expression and the right to human dignity. In the event, the court, affirming the priority of the former right in the circumstances, approved a rule to the effect that any system of prior restraint bears a heavy presumption against its constitutional validity, and the party seeking to uphold such a restraint bears a heavy burden of establishing justification for its imposition.[132] The court concluded that the interim order was to be discharged.[133]

The judge substantiated his reasoning by reference to authorities asserting the primacy of the right to freedom of speech. He contended that it is the freedom without which the other freedoms would not long endure.[134] And thus his decision.

Now, it is no doubt the case that the right to freedom of expression is of foundational importance. Even so, one is left to speculate whether anyone can say that it surpasses in significance the rights to human dignity and equality (for example), assessed upon an abstract, decontextualized basis. Yet this is what the court seems to suggest.[135]

Despite this suggestion, the judge appears to have adopted the correct approach. It was by recourse to the "*existential context*" that he held the right of free speech to

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[131] See judgment at 3 C-F.
[132] At 8H. See also headnote at 2I-J.
[133] At 9F.
[134] At 8E-F.
[135] At 8E: "Political philosophers are agreed about the primacy of the freedom of speech".

trump that of reputation. The "arrangement of facts" pointed up the former right as of overriding consequence in the matter. And the broader "context of social realities" reinforced this value-election.

(4) DISSONANCE

In instances of "dissonance", axiological performance is frustrated by reason of the obduracy of a rule or principle of the common law. Diagnostic of "dissonance" is the situation where the "new hermeneutical consciousness" the jurist brings to bear upon her perception of a particular rule or principle meets with opposition. Here there is malalignment of her renovated "sense of justice" – deprived of certain "prejudices" (expurgated) and incorporating other, novel ones - with the rule or principle she confronts. To put it in a nutshell, in the case of dissonance the *evaluative dimension of the "narrative model" underlying the rule or principle is not capable of assimilation to the jurist's "novel prejudice-horizon"*.[136]

4.1 Overruling Precedent

It is probable, in circumstances where a rule or principle is considered ineligible for further existence in its extant manifestation, that precedential authority may require to be overruled. Kentridge A.J. raises in this connection the possibility of prospective overruling.[137] It may be desirable, depending on the circumstances.[138]

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[136] This is another way of saying that the rule or principle is not axiologically adequate. See Chapter III, at 3, for an elaboration of the notion of "dissonance". See also 6A(1) of the same chapter.

[137] See the judgment of Kentridge A.J. in *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC) at 694F.

4.2. Filling the Lacuna: A Metatheory

In undertaking to jettison an inappropriate rule or principle of the law, the jurist may have to reckon with a resultant lacuna, a space in the law for the provision of which specific strategies seem to be indicated. The *material source* upon which she may be counselled to draw for purposes of coming to grips with the problem has been dubbed "ready-made deviationist doctrine".[139] By this term is signified the entirety of our legal tradition, very broadly understood, to the extent to which it holds out the possibility of delivering up an appropriate substitute for the rule or principle deemed undesirable of perpetuation.

"Ready-made deviationist doctrine" is sufficiently comprehensive in conception to include not only the explicit features of our legal tradition, but also those aspects thereof which are latent or immanent therein. It would accordingly embrace also the "potentiality" of our juridical heritage – what Cornell has called the "might have been" in our law.[140] Customary international law to the extent that it is applicable may be viewed as part of the "might have been" in our tradition.[141] Also forming part of the "might have been" is foreign law[142] insofar as circumspection gives reason to confide in its being apposite to the circumstances at hand.

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[138] See Chapter III, at 6D, in this regard.
[139] See Chapter III of this study, at 5.2, for an elaboration of our conception of "ready-made deviationist doctrine".
[140] See Cornell "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation" 1988 136 *Univ. of Pennsylvania LR* 1135 1145 *et seq.*
[141] See section 232 of the Constitution: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". (An untraceable source speaks of it as an "alternative common law.")
[142] Which is to be treated with caution, inasmuch as it derives from a different setting.

Needless to say, "ready-made deviationist doctrine" would also embrace broad moral conceptions underpinning the law.[143]

4.2.1. Rational Forensic Deliberation

The "ideal speech situation" is far too elusive a metric for argumentation in the courtroom context. It would not serve as a standard for debating the merits of appropriating any particular feature of the "ready-made deviationist doctrine" in the forensic setting. The variant of the Habermasian programme which, it is submitted, may be harnessed to this end it is proposed to call "rational forensic argumentation".[144]

It is not denied that the ideal of communication free from domination has merit to the degree that it sponsors a thorough contestation of the matter at hand, legal and factual. A transparent ventilation of the issues, bringing in as many legal and non-legal factors (stringent and non-stringent elements) to bear upon the assessment of a dilemma, may well prove desirable. But this is a far cry from compliance with the imponderables of an "ideal speech situation".[145] It is submitted that the best approximation – the closest practicable analogue – to this hypothetical set-up (for legal purposes) is to be found in the *model of courtroom argumentation* itself.

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[143] Here one thinks of the *boni mores*, the legal convictions of the community. It is necessary to point out that these may bear a different construction in the customary-law milieu.

[144] This is a reference to the model of courtroom adjudication, internalized by jurists, and serving as a frame of reference deployable in doctrinal assessment. See, in this connection, Chapter III at 4.3.1. See, further, 6C(3) of the same chapter.

[145] The "ideal speech situation", as pointed out in Chapter III, at 4.1.3, is of a counterfactual character.

Since the lawyer is immersed in the tradition of courtroom argumentation, the standard of "rational forensic deliberation" commends itself as a criterion for evaluating the desirability of taking up an aspect of the "ready-made deviationist doctrine" with a view to catering for the concrete situation presenting for resolution.

"Rational forensic deliberation" refers to the *procedural rationality of the courtroom.* It embodies standards and criteria of discourse to which, by reason of their having become "second-nature" to her, the jurist is able to appeal with the greatest of facility. As such, it is very much a "situated rationality". It is a part of the lawyerly instinct in undertaking to evaluate the appropriateness of doctrinal importation to entertain a *notional appeal* to this rationality. Even in the absence of any awareness of her so doing when confronted with this kind of problem and seeking its resolution, the jurist tends to transport herself notionally into the courtroom setting. And she is in the process equipped with a criteriological basis for appraising the pros and cons of taking up a potentially relevant doctrine.

One might consider the appraisal in question to implicate the following steps:

(1) The new rule or principle to be appropriated must be *adequate to axiological performance*, and its mediating terms of "purpose" and "existential context". It is here, in order to ensure such adequacy, that the construct of "rational forensic deliberation" is particularly relevant.

(2) In catering for "purpose", "rational forensic deliberation" would as a preliminary measure indicate a special sensitivity to the *norms of public international law*[146] in searching for an appropriate "ready-made deviationist doctrine". That doctrine should comport in all material respects with those norms.[147]

(3) In servicing the "*twofold purpose*" (the design of the Constitution and the purpose of justice), "rational forensic deliberation" would reckon with the particular provision(s) of the Bill of Rights at issue; the matter of "transparency"; the notion of the "open society" and the conception of "community" ("communities"); human dignity, substantive equality, and the liberty-equality dialectic; the notion of "freedom" (and interdependence); and the synchronization of interests (public and private, and private and private).

(4) Since the "twofold purpose" subsumes a commitment to the inclusive "*context of social realities*", rational forensic deliberation" would in the nature of things take heed of that context in reckoning with the abovementioned issues. In particular, would it have regard to the *human, social and economic aspects* relevant to the decision.

(5) "Rational forensic deliberation" is to be deployed in *ensuring that the "narrative model" underlying the proposed choice of "ready-made deviationist doctrine" meets with sufficiency.* This means that it is equal both to "purpose" (see (2) and (3) above) and to the inclusive "context of social realities" (see (4) above).

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[146] This is because our Grundnorm has to a considerable degree been defined with reference to the norms of public international law.

(6) The "narrative model", if meeting with sufficiency (see (5) above), should assure that the "arrangements of facts" in the matter are encoded in juridical consciousness as the "facts of the case" or "legal facts" in a way that would serve the mediating terms of "purpose" and "existential context". The "narrative model" would then be adequate to axiological performance.

(7) If the "narrative model" meets with adequacy in this respect, it is an indication that the proposed choice of "ready-made deviationist doctrine" is an *appropriate* one.

N.B. The above guidelines specify in detail the issues to which the construct of "rational forensic deliberation" is to address its concerns in evaluating potentially relevant novel doctrine. But for practical objectives:

(i) "purpose" (the design of the Constitution and "justice"); and

(ii) social realities (including the "facts")

encapsulate the matters to which such doctrine is required to be equal when measured by the yardstick of "rational forensic deliberation". One may thus *simplify* the stepwise procedure, as set out above, upon this basis for ordinary purposes.

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[147] This involves an assessment of the doctrine in question as to adequacy.

4.3. Fidelity to Law and the Separation of Powers

The above discussion would appear to give concern for the integrity of the *iudicis est ius dicere sed non facere* principle. But there should be no problem. For one thing, that principle has never been of absolute application. It cannot be denied that judges do legislate in some measure. And in some cases this may be for the good.

For another thing, one might understand the principle of precedent and the doctrine of *stare decisis* as a specialized legal application of Perelman's principle of inertia, which reads to the effect that an opinion which has been accepted in the past may not be abandoned without sufficient reason.[148] It is submitted that the implementation of "ready-made deviationist doctrine" would not unduly perturb Perelman. For, after all, what it comprehends is already immanent in our legal tradition, even if it is unexpressed. One has to concede that it may not be as "immediately present" as conventional sources, however.

From this it follows that Dworkin's notion of "fit" is meaningful as suggesting *some sort of continuity* with our legal tradition in deciding disputes. Even in the case of "dissonance" this is the case. Otherwise than Dworkin's hermeneutics would have it, however, there is much reason for dismissing the single-right-

[148] See Chapter III of this study, at 3, where Perelman's formulation as here noted is remarked upon. See also 6C(2) of the same chapter.

answer thesis, and preferring instead Hoy's pluralism in terms of which the *most appropriate answer in the particular circumstances* should be the objective.

4.4 Dissonance and the Development of the Common Law in Judicial Decisions: The Theory in Practice

The cases discussed below illustrate some lines to be followed in giving a new formulation to the common law. The manner of selecting an apposite element of the "ready-made deviationist doctrine", as also that of appealing to the construct of "rational forensic deliberation" in doing so, is sought to be brought out in concrete terms.

Foreign law – insofar as its appropriateness to the circumstances presenting for resolution is clear – is incontestably part and parcel of the "ready-made deviationist doctrine". But it must be approached with circumspection. This point was registered very clearly in *Nortje v. Attorney-General of the Cape*.[149] Equally manifest in taking the point was Tebbutt J.'s judgment in *Part-Ross v. Director, Office for Serious Economic Offences*.[150] In *S. v. Majavu*,[151] the court availed itself very liberally of foreign legal materials in seeking to throw light on the problem confronting it: Canadian law, the law of the United States of America, Australian law, European law, Irish law, the law of the United Kingdom, and the law of New Zealand. It is submitted that the jurisdictions to which recourse was had are not all

[149] 1995 (2) BCLR 236 (C) at 240I and 247D.
[150] 1995 (2) BCLR 198 (C) at 208D-E. See also *Qozoloni v. Minister of Law and Order* 1994 (1) BCLR 75E at 80C.
[151] 1994 (2) BCLR 56 (CkGD).

fully comparable to the South African legal setting. Marais J.'s cautionary remarks in *Nortje*[152] (decided after *Majavu*) might well be taken to berate the sort of overzealous indiscriminate cosmopolitanism to which the jurist may tend in her less guarded moments.

Mandela v. Falati [153]

This judgment has been discussed previously, with reference to the issue of value-competition.[154] Here it is merely noted that the court took to a rule of American law, enunciated in *New York Times Co. v. United States*,[155] as an appropriate dis-positive precept. That was the "ready-made deviationist doctrine" upon which it relied.

Applying the metatheory, one might discern an appeal to the construct of "rational forensic deliberation" in the court's concern for "transparency" ("*purpose*"), as also in its perception that concealment has led to the commission of appalling crimes ("*context of social realities*"). The "narrative model" underlying the proposed choice of "ready-made deviationist doctrine" proved equal both to "purpose" and to the inclusive "context of social realities". In addition, it allowed of the processing of the "arrangement of facts" into "legal facts", so as to make for proper axiological performance. The court's election of a "ready-made deviationist doctrine" was accordingly an appropriate one.[156]

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[152] See judgment at 240ff.
[153] 1994 (4) BCLR 1 (W).
[154] See under 3.3., above
[155] 403 US 713 (cited at 8H of the report)
[156] The court might conceivably have taken to another – equally appropriate — deviationist doctrine. Appropriateness would find its ascertainment in terms of the metatheory.

Qozoleni v. Minister of Law and Order [157]

This case is instructive as illustrating the use of wisdom already immanent in the legal tradition, albeit partially submerged perhaps, as a "ready-made deviationist doctrine".

The "arrangement of facts" was uncomplicated. The applicant, relying upon the right to information – and the right to equality – sought discovery of the contents of a police docket in order to pursue civil proceedings against the state for unlawful arrest and detention and an alleged assault.[158] The tenor of pre-constitutional case law in respect of such matter was to uphold police docket privilege even in civil cases.[159] The court held that these cases were no longer binding, as the claim of privilege requires justification in terms of the limitation clause: the party seeking to withhold information must prove that such conduct complies therewith.[160] In the result, it was held that the applicant was entitled to be apprised of the contents of the police docket.[161]

Substantiation of this result was already to be found in our law – as a matter of *qualified immanence.* The observations of Jones J. in *Mazele v. Minister of Law and Order,*[162] a decision rendered prior to the commencement of the (Interim) Constitution, may be said to have been appropriated by the court in the case under discussion as a "ready-made deviationist doctrine".

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[157] 1994 (1) BCLR 75 (E).
[158] See judgment at 78A-D.
[159] See judgment at 89G-H. (See also headnote at 77E–G.)
[160] At 89 I-J.
[161] At 91 H.
[162] 1994 (1) SACR 406 (E), cited at 90H – 91C of the report.

Applying the metatheory, one might discern an appeal to the construct of "rational forensic deliberation". Such deliberation would engage with the argument that not to allow a plaintiff recourse to the relevant materials, the defendant all the while being in possession thereof, would be manifestly unfair. (There were no longer any criminal proceedings pending against the applicant, which, if there were, might have justified some measure of violation of the principle of "equality of arms" – to the extent allowed by the limitation clause.) This sort of argumentation evinces a concern with substantive equality ("*purpose*") as well as with the "*context of social realities*".[163]

"Rational forensic deliberation", further, would enquire whether the "narrative model" underlying the proposed choice of "ready-made deviationist doctrine" is commensurate with both "purpose" and the inclusive "context of social realities". (In addition, whether it allows of the processing of the "arrangement of facts" into "legal facts", so as to make for proper axiological performance.) If so, the court's election of the "ready-made deviationist doctrine" would be appropriate.[164]

Fedics Group v. Matus [165]

This is another judgment evidencing a degree of reliance upon the *immanent resources* of our legal tradition. In short, the question to arise was whether

[163] See discussion under 4.2.1, above.
[164] See discussion under 4.2.1, above.
[165] 1997 (9) BCLR 1119 (C).

evidence obtained in violation of constitutional rights was admissible – in this case, in the context of proceedings in respect of unlawful competition.[166]

In its survey of the South African law of evidence, the court observed that in terms of the traditional approach, evidence had been held to be admissible if relevant, regardless of the manner in which it had been obtained.[167] There was no longer any room for the application of this approach, with a new value-order inaugurated. The court recorded its having been invited to follow the leads provided by *S. v. Motloutsi*,[168] which laid down that in criminal proceedings, evidence obtained by deliberate and conscious violation of the constitutional rights of an accused should be excluded in the absence of extraordinary excusing circumstances.[169]

Attempting to formulate a principle to govern the situation at hand, Brand J. turned his attention to the legal position both in South Africa and in several foreign jurisdictions, the United States, Ireland, Australia, New Zealand and Canada.[170] It would appear that the judge took counsel's point that in the majority of countries the courts retain a discretion to allow evidence notwithstanding its having been obtained by way of a violation of constitutional rights.[171] What the court was not prepared to do, however, was to extend the principle enunciated in *S. v. Motloutsi*[172] to cover civil proceedings, those now under discussion.[173]

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[166] See judgment at 1200 G, 1200 I, 1221 D and 1221 E-F. (See also headnote at 1119 G-H.)
[167] See 1214 C-D.
[168] 1996 (2) BCLR 220 (C), cited at 1218 G of the report.
[169]. At 1218G. (See also headnote, 1199 I.)
[170] See judgment at 1214ff
[171] See 1218 F.
[172] *Supra.*

Giving his reasons for refusing this extension, the judge drew pertinently upon the *immanent potentiality* of the South African legal tradition. Such pointed up the fundamental differences of principle between civil and criminal trials. In a criminal case, the accused enjoys the privilege against self-incrimination, and has the right to remain silent. Nor is he obliged to disclose documents bearing adversely on his case. In a word, the state is required to prove its case without the accused's assistance.[174]

Matters are otherwise in a civil case. A litigant is obliged to disclose his case. He is further required to discover all documents in their effect potentially detrimental to his chances of success.[175] Moreover, the courts have the power to grant *Anton Piller* orders – decrees of conceivably enormous consequence – upon a well-founded apprehension of concealment or destruction of vital evidence.[176]

The *immanent potentiality* of our tradition thus militated against the applicability of a rule such as *Motloutsi's* in a civil case. It suggested rather a principle to the following effect: if a litigant seeks to introduce evidence obtained by way of a deliberate violation of constitutional rights, he will be required to explain why he could not achieve justice through the ordinary procedure (including where appropriate, the *Anton Piller* procedure).[177] In exercising its discretion, the court will have regard to the type of evidence obtained.[178] Evidence which could never

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[173] See 1219 B ff.
[174] At 1219 D-F. (See also headnote at 1200 A–B.)
[175] At 1219 F. (See also headnote at 1200 B.)
[176] At 1219 G – 1220 A. (See also headnote at 1200 B–C.)
[177] At 1220 B. (Consult, too, headnote at 1200 C–D.)
[178] At 1220 C. (Headnote at 1200 D.)

have been lawfully obtained is opposed to evidence which would eventually have been obtained through lawful means. With regard to the latter category of evidence, the court would be far more likely to exercise its discretion in favour of its admission.[179]

In casu, the court held, the violation of the constitutional rights of dignity and privacy was not conscious or deliberate.[180] Further, the evidence was such as would ultimately have been legitimately obtained.[181] For these reasons, the court exercised its discretion in favour of allowing the tainted documents in evidence.[182]

Upon application of the metatheory to this judgment, we see that the court took up a "*ready-made deviationist doctrine*" as indicated by the *immanent potentiality* of our legal heritage. In appealing to the construct of "*rational forensic deliberation*" as a basis for justifying the appropriation of the principle at hand, one may point to the various arguments from the respective distinguishing features of criminal and civil proceedings advanced by the court. The content of such arguments derived from the tradition, and went towards eliciting a dispositive principle.

Protea Technology Ltd. v. Wainer [183]

This judgment may also be read as advancing resort to the *immanent resources* of our legal heritage in handling situations of "dissonance". It exemplifies a manner

[179] At 1220 C-E. (Headnote at 1200 D.)
[180] At 1221 G. (Headnote at 1199 H.)
[181] At 1222 G.
[182] At 1223 F. (See also headnote at 1200 E.)
[183] 1997 (9) BCLR 1225 (W).

in which a balance may be achieved between continuity and development in the law.

The facts of the case were that the first respondent had acted in violation of a restraint-of-trade agreement with the applicants, and that all respondents had brought themselves within the scope of the delict of unlawful competition.[184] The applicants sought a final interdict restraining these activities, which was granted in the result.[185]

The primary issue pertained to the admissibility of evidence adverse to the respondents' case obtained in contravention of the Interception and Monitoring Prohibition Act, 127 of 1992 (by way of telephone tapping).[186] In clearing this first hurdle, Heher J. pointed out that although the Act made provision for criminal consequences in respect of the manner in which the evidence had been obtained, this did not affect its admissibility.[187]

Now the court in point of fact doubted that the first respondent's right of privacy had been infringed.[188] It nevertheless proceeded from the premise that it had been.[189] On this assumption, it was necessary to decide whether evidence procured on these argumentatively illicit lines was to be deemed inadmissible. This constituted the core issue for determination in this case.

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[184] See judgment at 1228 C. (See also headnote at 1225 I–1227 F.)
[185] At 1228 C and 1264 A – 1265 A.
[186] See 1233 B ff.
[187] See 1235 B-D and 1237 D-E.
[188] See 1241 G.
[189] See 1241 G.

Heher J. expressed the common-law rule as to admissibility as providing that all evidence – however obtained – is admissible, subject to the court's discretion to exclude it.[190] The Constitution warranted a departure from this formulation. It necessitated a balancing of interests; each case was to be considered on its own facts.[191] The judge maintained that evidence secured in breach of a fundamental right was eligible for admission only if section 36(1) – the limitation clause – permitted of such.[192] Heher J. appears to have stipulated for the application of a *boni mores* test in this determination.[193] In applying the test, he proposed that "right-thinking members of society" would not censure the steps taken to the end of the applicants' self-preservation.[194] The evidence accordingly having been admitted, the applicants' case had to succeed.[195]

Analysis of the reasoning in terms the metatheory indicates the use of *a "ready-made deviationist doctrine"* in the form of a *boni mores* test. This sort of criterion lends itself most eminently to accommodating development within a framework of continuity. This is so as the *boni mores* embody criteria of considerable flexibility. "*Rational forensic deliberation*" would be capable of harnessing these criteria to the best utility in the circumstances of any particular case. The standards of "right-thinking members of society" provide a practicable compendium of starting points

[190] At 1241 J.
[191] See 1242 C-D.
[192] At 1242 B.
[193] See 1243 H.
[194] At 1243 H-I.
[195] See 1264 A – 1265 A. See also headnote at 1227 E-G.

– as well as evaluative measures in appraising conclusions – in an appeal to the construct of "rational forensic deliberation".

The *boni mores*, furthermore, constitute part of the immanent resources of our legal tradition.

S. v. Botha [196]

The "Steyn" privilege was at issue in this case. On the basis of constitutional imperative – and reflecting that the privilege was misconceived at its very inception, there having been no good reason to depart from the holding *in R. v. H.*[197] in the way the court did in *R. v. Steyn*[198] — Le Roux J. held that it could no longer be sustained.[199] The judge saw fit to adopt the principles laid down in the Canadian case of *R. v. Stinchcombe*[200] as a framework for replacing the blanket privilege.[201]

The "*ready-made deviationist doctrine*" upon which the court relied was South African precedent – *R. v. H. and S. v. Van Rensburg*[202] - as well as foreign law – *R. v. Stinchcombe*.[203] It is noteworthy that the judge deemed it fit to establish a measure of *continuity* with our tradition in seeking to dispose of the issue. As a

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[196] 1994 (3) BCLR 93 (W).
[197] 1952 (4) SA 344 (T).
[198] 1954 (1) SA 324 (A).
[199] See judgment at 120 B-C.
[200] 1992 LRC 69.
[201] See headnote at 95 F–G.
[202] 1963 (2) SA 343 (N).
[203] *Supra.*

matter of fact, the foreign authority relied upon subsumes the principle articulated in *S. v. Van Rensburg*.[204]

One may discern an appeal to "*rational forensic deliberation*" in the judge's perception that foreign decisions are to be treated with circumspection.[205] The construct in question would mandate an enquiry after the appositeness of a foreign disposition to local conditions. Social realities would require to be taken into account in determining appropriateness.

S. v. Melani [206]

One may note that this judgment was criticized in *Nombewu, supra*.[207] This does not, however, detract from its value as illustrative of an appropriable *modus operandi*.

The operative facts were these. The admissibility of certain pointing-out evidence was at issue.[208] The accused was informed that he was not required to point anything out.[209] He was not warned, however, that any pointing-out evidence could be used subsequently at criminal proceedings.[210] Having met with constitutional challenge, the evidence, the court held, should nonetheless be allowed.[211]

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[204] At 115B. This case is reported at 1963 (2) SA 343 (N).
[205] At 110H.
[206] 1995 (5) BCLR 632 (E).
[207] *Supra*.
[208] See judgment at 634 G-J.
[209] At 636 E. (See also headnote, 632 I)
[210] At 636 E-F. (See also headnote, 632 I)
[211] See judgment at 644 G.

In reaching this decision, Froneman J. sought to establish *continuity* with parts of our own legal tradition. In this respect, his reference to the decisions in *S. v. Forbes*[212] and *S. v. Hammer*[213] is worthy of note. Having regard to *foreign materials*, the judge formulated what he called a "compromise approach",[214] which would cater for the legitimate interests of the accused as well as those of society at large. In terms of this approach, the court was to have a discretion to exclude evidence obtained in contravention of the Constitution, depending on the facts of the particular case.[215] The test to be adopted, the judge went on to proffer, is that embraced in the Canadian criterion of "bringing into disrepute the administration of justice".[216]

Analysis of this reasoning upon the metatheory discloses that the court adopted a "*ready-made deviationist doctrine*" taking the form of leads from *South African case law* and materials emanating from *foreign jurisdictions*.

"*Rational forensic deliberation*" as a construct enabled the court to select an *appropriate* principle. The judge contended with the approach that evidence ought to be admissible, provided that it is relevant (the old position in English law and our common law).[217] The factor telling against its adoption was its incompatibility with value-systems premised upon written constitutions.[218]

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[212] 1970 (2) SA 594 (C), cited at 642 G of the report.
[213] 1994 (2) SACR 496 (C) , cited at 642 G of the report.
[214] See 642 B.
[215] At 642 B.
[216] See 643 C-D.
[217] See 642 A.
[218] See 642 D-E.

The court then turned to the general American approach that all evidence obtained in an unauthorized manner was to be excluded.[219] The circumstance that this line of proceeding does not offer adequate protection to society weighed heavily with the court in its refusal to sanction its adoption.[220]

These considerations pointed to the applicability of the "compromise approach" as above outlined. Parallel processes were to be found in English statutory law, the Canadian Charter, and the common law of Ireland and Australia.[221]

We notice in the judgment, then, an appeal to "rational forensic deliberation" in weighing up the advantages and disadvantages of the different modes of proceeding, and in arriving in the result at a conclusion supported by what the court found to be the best arguments of social policy.

Holomisa v. Argus Newspapers [222]

This case has been broached earlier.[223] Here we are concerned with the manner of crafting a novel rule of the common law to supply the *lacuna* left by an elision of a rule found to be incompatible with our constitutional enterprise.[224]

Cameron J. endeavoured to establish some sort of *continuity* with our tradition in fashioning a new rule of the law of defamation. In this regard, he referred to

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[219] At 642 B.
[220] At 642 E-F.
[221] See 642 B-C.
[222] 1996 (6) BCLR 836 (W).
[223] See discussion under 3.3. above, pertaining to the resolution of value-competition in the common law.
[224] See, especially, the judgment at 859 ff.

Nasionale Pers v. Long,[225] *Hassen v. Post Newspapers*[226] and the writings of Professor J.M. Burchell[227] in support of the negligence-based approach[228] to defamation liability he was to adopt. (The judge, however, noted that these "authorities" spoke in a context quite different from that in which the judgment was being delivered, and expressly avowed his citation of them to have been primarily in the interests of historical "continuity".)

The court's excursions into *foreign materials* are more interesting. Aspects of the law of the United States were dealt with, their import in the end having been discounted as inappropriate for implantation.[229] Cameron J.'s treatment of the decision of the Australian High Court in *Theophanous*'s case[230] seems to have been far more favourable and sympathetic.[231] That case laid down a "reasonableness" standard, which the judge claimed to provide a basis for protecting reputation and freedom of expression alike.[232]

On this basis, the judge came to the conclusion that "a defamatory statement which relates to free and fair political activity is constitutionally protected, even if false, unless the plaintiff shows that, in all the circumstances of its publication, it was *unreasonably made*."[233](my emphasis)

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[225] 1930 AD 87, cited at 863 C of the report.
[226] 1965 (3) SA 562 (W), cited at 863 F of the report.
[227] See 863 H-I.
[228] See 863 C.
[229] See judgment at 659 D ff.
[230] *Theophanous v. Herald & Weekly Times Ltd.* (1994) 124 ALR 1 (HC).
[231] See 862 E – 863 A.
[232] See 862 G-H and 863 B.
[233] At 864 B.

The metatheory demonstrates the "*ready-made deviationist doctrine*" to have comprised elements of both South African and foreign law. The construct of "*rational forensic deliberation*" may be used to explain why, in overruling *Neethling v. Du Preez*[234] (which widened the common-law defamation action and correlatively narrowed the ambit of freedom of expression, in apparent sympathy with the reigning ideas of the day)[235] Cameron J. was not prepared to go to the other extreme and approve the ruling in *New York Times Co. v. Sullivan.*[236] The latter (American) decision very substantially underrates a public official's right to reputation by requiring the proof of "actual malice" for success in a defamation action.[237]

"Rational forensic deliberation" may also be discerned in the argument that the new defence the court proposed was limited to the context of political activity.[238] A different dispensation may be appropriate in non-political discussion,[239] for example.

It is significant that in *McNally v. M & G Media, supra,*[240] the case at hand was held to have been wrongly decided.[241] However this may be, its *modus operandi* is superbly illustrative.

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[234] 1994 (1) SA 706 (A).
[235] See 849 E-H, and 848 D. See also 851 C-D. (Consult headnote at 838 E–F.)
[236] 376 US 254 (1964), cited at 859 D of the report.
[237] See 859 D-E, and 861 A-B.
[238] See the discussion in the judgment at 864 ff on the ambit of the constitutional protection.
[239] Such an inference may be garnered from a reading of the judgment at 865 D-H.
[240] 1997 (6) BCLR 818 (W).
[241] At 825 I.

4.5 Departure from an Ostensibly Innocuous Rule or Principle

Occasionally, axiological performance may require the amendment of a common-law rule which is not "obdurate" on the face of it.[242] This sort of contingency is best illustrated by an example.

Kotze en Genis v. Potgieter [243]

In this case, the court was called upon to decide on the enforceability of a covenant in restraint of trade embodying restrictions on competition of duration and location.[244] It was urged by the respondents that the restrictions were unreasonable, contrary to public policy and the public interest, and opposed to the Constitution.[245] It was contended that there should be a return to the position in English law in terms of which a clause such as that at issue was *prima facie* invalid, the onus resting on the party seeking to enforce it to demonstrate its reasonableness.[246]

The court refused to accede to this argument, following instead the decision in *Magna Alloys and Research v. Ellis*,[247] where it had been held that such clauses are *prima facie* enforceable, the onus of proving otherwise resting on the party

[242] Consult, in this regard, Chapter III, 6A(2).
[243] 1995 (3) BCLR 349 (C).
[244] See judgment at 350 G-H. (See also headnote at 349 F–G.)
[245] See 350 I. (See also headnote at 349 G.)
[246] See 352 A-B.
[247] 1984 (4) SA 874 (A), cited at 350 I-J of the report.

contending that they should not be enforced.[248] In the result, the judge held that the covenant in restraint of trade at hand was in any event not unreasonable.[249]

Several comments suggest themselves. Firstly, section 26(1) of the (Interim) Constitution, which provides for the protection of the right to engage freely in economic activity and to pursue a livelihood, might by virtue of section 35(3) have been permitted to prevail in its thrust over the argument from sanctity of contract. The classical-liberal premises of that argument, presupposing antecedently free and equal bargaining agents, are difficult to sustain.[250]

Next, the question of competing values may have been resolved by arguing that in the circumstances of the case, the value of *substantive equality* (and "social justice") was most clamant for protection in the light of the overall constitutional scheme.[251] By giving meaning to the notion of "substantive equality", one might reverse the priority – so that "freedom of trade" may enjoy precedence over "sanctity of contract" in approaching restraint clauses.[252]

Finally, on the application of the model to these issues, one may find the "*ready-made deviationist doctrine*" in English law. The rule at issue has been stated

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[248] At 350 I-J.

[249] See 353 A-B: "Ten slotte wil ek net opmerk dat al sou die bewyslas op die applikante gerus het, ek geen huiwering sou gehad het om te bevind dat hulle hul daarvan gekwyt het nie." (See also headnote at 350 D–E.)

[250] See Chapter V, 2.3.2, of this study – where the liberal-communitarian debate is given coverage – for elaboration.

[251] This proposition, it will at once be appreciated, harks back to the discussion above of the *Concorde Plastics* and *Holomisa* cases.

[252] See in this regard Van Aswegen "The Implications of a Bill of Rights for the Law of Contract and Delict" 1995 11 *SAJHR* (1) 50 66-7, where the author considers this a possibility. Van

above. And its appositeness to current circumstances would require to be "proved" with reference to the notion of "*rational forensic deliberation*".

II. A THEORETICAL BASIS FOR APPROACHING CUSTOMARY LAW

In speaking of customary law, one should not lose sight of its pervasive significance in the lives of millions of South Africans. Justine White's comments in this context are of interest.[253] So , too, are those of Albie Sachs (presently a Judge of the Constitutional Court), who has appealed for a "special tolerance" to be manifested towards customary law.[254]

Two edifying precepts should be noticed. Firstly, the jurist is to be on her guard against accepting the various black-letter versions of indigenous law[255] as faithful representations of the true indigenous-law position. Secondly, she ought to consider that the issue clamant for resolution may possibly demand a disposition in terms of indigenous rather than western law, her more profound immersion in the latter tradition notwithstanding. With regard to the implementation of this second

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Aswegen records that participants in the market are rarely economic equals. She says that this is especially true as regards the position in contemporary South Africa (*Ibid* 67).

[253] See White "Constitutional Litigation and Interpretation, and Fundamental Rights" 1994 *Annual Survey of South African Law* 24 44: Justine White reflects that in the year under review (1994), the courts did not show themselves to be appropriately receptive to the values of the indigenous peoples.

[254] As cited in Bennett *Human Rights and African Customary Law: Under the South African Constitution* (1995) 21. See also 21 n 82.

precept, the enactment of statutory provisions regulating internal-conflict-of-laws questions may prove of considerable assistance.[256]

(1) THE RELEVANCE OF THE MODEL

Applied to the indigenous-law milieu, the model as purveyed requires adjustment in one or two important respects. In essentials, however, it retains the form it bears in its common-law applicability.

1.1 The Appeal of Gadamer

The pre-colonial law, according to Van Niekerk, represents the purest form of indigenous law.[257] The repressive agencies of colonialism and apartheid, as well as misunderstandings engendered by looking upon that law through western spectacles, made for its distortion.[258] At grassroots-level, where development took place free from western influence, there was no substantial divergence from the fundamental jural postulates underlying the law.[259] The "norms in action", the

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[255] In this regard, one thinks of the law reports of the (erstwhile) Native Appeal Court, for example. Also coming to mind are textbook versions of customary law, written by white officials earlier in this century. See, generally, in this regard, Chapter V, at 3.3.(5).

[256] See, in this regard, Van Niekerk *The Interaction of Indigenous Law and Western Law in South Africa: A HistoriCal and Comparative Perspective* (unpublished LLD. thesis) (1995) 327-8: "[C]ertain and detailed rules for the internal conflict between indigenous law and Western law should be legislated. These rules should take cognisance of indigenous mechanisms to resolve internal conflicts. These mechanisms should not be ignored, regardless of whether they are legal rules or mere conflict sensitivities".

[257] Van Niekerk *op cit* 52: "As far as can be determined, pre-colonial indigenous law is the purest possible form of indigenous law".

[258] See Van Niekerk's thesis *passim*.

[259] *Ibid* 325

"living law", reflected at each point the influence of novel social circumstances, while remaining faithful to the basic axioms of the system.[260]

Now, it would be considered by Gadamer that those "prejudices" which derive from the tradition as it developed naturally are "legitimate", while those which inform the jurist's point of view from the distortions are not.[261] The Constitution presents an opportunity for a revision of the jurist's subliminal perceptions – for a re-appropriation of the tradition and of those "prejudices" it sponsors, and for a repudiation of those informed by the distortions.[262] This might be possible should the values the Bill of Rights entrenches be interpreted in their proper cultural perspective, and in accordance with the underlying jural postulates of indigenous law.[263]

Gadamer may be appropriated as arguing for the potentiality of these jural postulates to cater for a diversity of novel social circumstances. And this is indeed what was demonstrated where indigenous law was allowed to develop naturally as a "living law" in harmony with its underlying postulates. Today, if a problem out of the ordinary were to arise, a "fusion of horizons" would allow for a proper determination in the particular circumstances. The "integrity" of the jural postulates would remain uncompromised by their "responsiveness".[264]

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[260] This seems to be Van Niekerk's general perception. *Ibid passim.*
[261] See discussion of Gadamer in Chapter II of this thesis, at 3.4.
[262] See in this regard the exposition of Gadamer in Chapter II, 3.4. See also Chapter V of this thesis, at 3, where the relationship between the Constitution and indigenous law is discussed. Further consult 4.2 of the same chapter.
[263] See Chapter V of this study at 3 and 4.2.
[264] This would be Gadamer's standpoint.

1.2 The Appeal of Habermas

In the context of the development of the common law, the variant on the Habermasian theme that was proposed is the construct of "rational forensic deliberation". In the case of "dissonance" in indigenous law, it is considered that there is no substitute for "*actual deliberation*"[265] among community assessors and indigenous-law experts in the interests of eliciting the proper amalgam of "living law" and indigenous jural postulates[266] for disposing of the matter. This is so because the context of the discussion may be alien to the "outsider" judge. Criteria of justification which she might invoke in appealing to the construct of "rational forensic deliberation" may be entirely irrelevant in that context. Needless to say, "actual deliberation" is a very situation-specific version of the Habermasian programme.

1.2.1 Access to "Living Law" and Indigenous Jural Postulates: Processual Aspects

How is "*actual deliberation*" along these lines to be secured? The following are ventured as proposals. First, the Bench should be appropriately constituted[267] (perhaps as a collegiate bench), with both indigenous-law experts and non-expert representatives of the community hearing the case, together with the presiding officer. The non-expert representation would modulate expert opinion with regard to the indigenous jural postulates, ensuring that such opinion is not subversive of

[265] See, in this regard, Chapter III, at 4.3.2. Further consult 6C(4) of the same chapter.
[266] The reader is referred in this regard to Chapter III at 6C(4).

wholesome general lifestyle-arrangements as expressed in the "living law". In their turn, the experts would undertake to secure that the non-expert portrayal of the "living law" is a faithful one. They would also seek to align that "living law" with the indigenous jural postulates.

Second, the presiding ("outside") officer should assume the role of "referee" in securing proper input from both the indigenous-law experts and the non-expert representatives. She should seek to ensure that the conditions of dialogue are fair, and that each of the participants has an appropriate opportunity to advance and defend assertions.[268]

(2) METATHEORY OF CUSTOMARY-LAW APPLICATION

(1) As elsewhere, axiological performance in customary law is mediated via the notions of "purpose" and "existential context". "Purpose" here entails, however, that (i) the values enshrined in the Bill of Rights should be interpreted in their proper cultural perspective (and with a view to bringing the law in step with its own jural postulates);[269] and that (ii) the concerns of justice be addressed by laying emphasis on

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[267] There has recently been talk on the television news of instituting "community courts". It is unclear to me precisely what are the mandates of these institutions. If they are entrusted with the application of indigenous law, it is to be recommended that they be appropriately constituted.

[268] Section 180 (c) stipulates that national legislation may provide for the participation of people other than judicial officers in court decisions. The enactment of appropriate statutory measures to the end of implementing the proposals in the text may be a recommendation, and may be undertaken in pursuance of this subsection.

[269] The diffuse postulate of the "harmony of the collectivity" sponsors a concern with several specific jural postulates: status order; family idea; common-kin principle; hamlet spirit. These constitute important premises for legal reasoning in indigenous law. (See Van Niekerk (unpublished LL.D. thesis) *op cit* 196.)

reconciliation, and the restoration of harmony[270] in the community. (The "twofold purpose" of servicing the design of the Constitution and catering for the exigencies of "justice" speaks respectively to each of these entailments.)[271]

These comments suggest a "new hermeneutical consciousness" of a somewhat different complexion from that operative in dealing with common-law materials (or statutes in general). It embodies appreciably distinctive perceptions of human rights, and of the notion of "justice". In fact, it is only from within the framework of reference of the autochthonous world-view that the "new hermeneutical consciousness" is here capable of full realization. (Hence the recommendation of community participation in the taking of decisions.)

The "pre-understandings" ("prejudices") deriving from this "consciousness" make for a proper understanding of customary law and its processes.

Further, with regard to "purpose", one should not forget that the norms of public international law[272] should be harnessed in imparting a natural-law fragrance to the interpretation of customary law. But –

[270] It has been said that the emphasis in dispute resolution in customary law is not so much on law and order in the western conception as on the resolution of the disturbed equilibrium in the community. Justice in the indigenous-law context must therefore be taken up in a rather different sense from that suggested by the equilibration of conflicting rights. See David and Brierley *Major Legal Systems in the World Today* (1978) 508 for the first proposition.

[271] Consult, generally, Chapter V at 4.2, in this regard.

importantly – these norms should be construed within the indigenous cultural context.[273]

(2) "Existential context" is a reference to the inclusive "context of social realities" (of which the "arrangement of facts" presenting for determination are to be deemed a component). The "context of social realities" in indigenous culture relates most notably to such issues as:

(i) transparency in public dealings;[274]

(ii) a concern for "community" ("ubuntu");

(iii) the human, social and economic aspects relevant to the determination;

(iv) the high importance of human dignity (and substantive equality);[275] and

(v) liberty as it is understood in indigenous law.[276]

(3) "Purpose" subsumes a commitment to the inclusive "context of social realities". The matters itemized as (2) (i)-(v), above, are issues to which the design of the Constitution is to be perceived as committed.

(4) The "norm" and the "arrangement of facts" are more intimately interrelated than is the case with western law. A "narrative model" of

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[272] This should ensure the compliance of indigenous law with internationally accepted norms and standards.
[273] The norms should therefore receive a very context-specific interpretation.
[274] Transparency was an important indigenous-law principle. (See Van Niekerk *op cit* 278, for instance.)
[275] Human dignity was very highly prized in indigenous law.
[276] Liberty must not here by understood in the western sense.

typifications of action, loaded with tacit social evaluations, links the two – making, if you will, for subsumption or non-subsumption, as the case may be. (The words "if you will" are used advisedly, because the autochthonous administration of justice does not conceive of the application of a rule known in advance to the facts of the case as typically a part of the enterprise.)

(5) The "twofold purpose" (committed to the "context of social realities") may make for a new "pre-understanding" – a modification to the evaluative dimension of the "narrative model", in other words. And "subsumption" (if one is so inclined to speak of it) may possibly proceed where previously it did not – and conversely. (Because the "context of social realities" is one to which "purpose" subsumes a commitment, that "context" may effectuate quite the same thing.)

(6) When we speak of the evaluative dimension of the "narrative model" ("pre-understanding"), and the modification it may undergo (making for a new "pre-understanding"), we are alluding to conceptions *intrinsic to the culture* concerned. Homologues of such conceptions, if entertained by the "outsider" judge, may prove misleading. The participation in the decision of experts and assessors drawn from the community accordingly seems to be essential.[277] [278]

[277] See the discussion under 1.2.1., above.
[278] Chapter V at 4.2 should be consulted on these matters in general.

(7) Finally, one has to do with the case where the formulation of an indigenous-law principle frustrates axiological performance. (Here one thinks of a textbook-formulation, for instance – one which embodies a "distorted" version of indigenous law.) This signals "dissonance".[279]

"Dissonance" suggests the appropriation of a "ready-made deviationist doctrine". The latter would consist in an amalgam of (i) indigenous jural postulates (to the degree that these are not disruptive of wholesome general lifestyle-arrangements as expressed in the "living law") and (ii) the "living law" itself. Such a deviationist doctrine is to be identified by "actual deliberation" (among indigenous-law experts and community assessors) as discussed above.[280]

(3) "MITTELBARE DRITTWIRKUNG" IN INDIGENOUS LAW

Upon the assumption that the evaluative dimension of the "narrative model" underlying the customary-law principle is substantially assimilable to the "novel prejudice horizon" (as implicitly purveyed in the metatheory under points (1) – (6) above), "mittelbare Drittwirkung" would seem to be indicated as the manner of development of the norm. As a matter of fact, points (1) – (6), above, secure the effectuation of this indirect approach.

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[279] See (4) below.

[280] It is submitted that both indigenous-law experts and non-expert community representatives should give their input in the identification of the amalgam in question. And this, I submit, should be done along the lines described under 1.2.1., above .

Sachs J. has proposed that the *indirect approach* to the development of customary law would enable courts closer to the ground to bring it into line with the Constitution on an incremental, case-by-case basis.[281]

According to Bennett, "living" customary law is pervaded by *generalized norms*, usually characterized by a requirement for *reasonable behaviour*.[282] These norms provide a point of entry for the infusion of the values entrenched in the Bill of Rights – read in their proper cultural perspective.[283] "*Reasonableness*" in indigenous law is not what the term signifies in the general South African law, and is therefore to be informed by these values as thus read.[284] It is a concept informed by the public policy and *boni mores* of a culturally different community.

All in all, it seems as if "mittelbare Drittwirkung" along these lines would best secure the objectives both of constitutionalism and of indigenous-cultural preservation. The approach would, it is suggested, enhance the legitimacy of our new value-compendium in the sight of those still living by traditional institutions.

(4) SELECT CONCRETE INSTANTIATIONS OF PROCEEDING IN CASES OF "DISSONANCE"

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[281] See the judgment of Sachs J. in *Du Plessis v. De Klerk* 1996 (5) BCLR 658 (CC) at 740 E-G.
[282] In the same judgment, Mokgoro J. cites Bennett as maintaining that customary law "is pervaded by generalized norms, usually characterized by a requirement for reasonable behaviour, which provide a starting point for the introduction of fundamental rights". (Quotation from Bennett in judgment *Ibid* 735 I-J (n 9). Professor Bennett clarified this point for me, saying that the customary law in contemplation is that as it obtains in the community, not such as finds expression in written and codified form. See also Chapter V, n 143.
[283] See n 282, above. Consult also Chapter V, 4.2 (iv) and (v).

4.1 General

In interpreting indigenous law in line with the imperatives of the Constitution, the jurist should endeavour to conform that law to its own basic axioms. These axioms differ from their counterparts in western law. Whereas starting points for legal reasoning in systems subsumed by the latter category place emphasis on the maintenance of "law and order" and foster individualism to a degree that is sometimes conducive to alienation, the axioms of legal justification in indigenous law stress the aspirations of communal equilibrium. Ubuntu and concern for "community" is not the less solicitous for the interests of the individual, as a human being with inherent dignity, for its want of a conception of the person as a monadistic entity.

Under this head we deal with "dissonance", as alluded to in terms of point (7) of the metatheory, above. In this instance, an extant version of indigenous law (usually "distorted") frustrates axiological performance.

With this prelude, we turn immediately to some illustrative scenario-delineations.

4.2 Specific Examples

4.2.1 Van Niekerk instances the legal position as regards capacity to litigate as a case showing up the way in which misunderstandings became entrenched in the

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[284] The values in the Bill of Rights require to be interpreted in their proper cultural perspective. They ought not to be deployed in their western appropriation.

law, and furnishes suggestions as to the manner in which the situation *should have been* handled.

In the pre-colonial law (the most pristine form), all the members of a group were represented by the family head in legal and social matters. This did *not* mean that in so doing he acted in his own interests.[285] White officialdom, however, misunderstood what was actually occurring. The enactment of the Black Administration Act, 38 of 1927, bears this out very amply. In seeking to codify in writing the indigenous law as they perceived it, they laid down that the women were perpetual minors, only the men having full legal capacity.[286]

Van Niekerk comments that had the indigenous jural postulates informed the line of development of the law, no distinction would have been drawn between men and women as regards capacity to litigate.[287] Even in western terms, the law would have been non-discriminatory.

4.2.2 There are some who contend that the institution of bridewealth (marriage goods) "objectifies" women.[288] In the pre-colonial law, bridewealth served, among other things, as a symbol of the *bond between the two families*.[289] Today, however, the institution has taken on a commercial character; it contributes to the subordination of women, and jeopardises their financial security upon divorce.[290]

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[285] Van Niekerk *op cit* 303.
[286] *Ibid.* See also 303 n 152.
[287] *Ibid.*
[288] *Ibid* 299.
[289] *Ibid.*
[290] *Ibid* 300.

The solution to this problem, Van Niekerk argues, is to be found along the lines of the adaptation of the institution in accordance with its underlying indigenous-law principles. We would, then, retreat from the notion that the marriage goods are to satisfy the immediate economic needs of the woman's group. We would, further, move away from the idea that the institution justifies a husband's refusal to support his wife and children upon divorce. We would also retreat from the perception that it is no more than a purchase price for the woman.[291] In conformity with the pre-colonial symbolic function of bridewealth noted above, the woman would no longer readily be looked upon as an economic commodity.[292] Thus conceived, the institution would no longer be unfairly discriminatory.

4.2.3 Pre-colonial indigenous law and its jural postulates argued in favour of the protection of the *dignity* of children, and their physical and emotional welfare. Van Niekerk urges that urbanization and altered social and economic circumstances require that the law once again be adapted so as to conform it to its jural postulates in this respect.[293]

4.2.4 The circumstance that the head of the family represents the group has conduced to the *misconception* that the husband is the owner of individual property, and accordingly that the wife has no proprietary capacity.[294]

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[291] *Ibid.*
[292] *Ibid* The amount of bridewealth to be paid "would again take on reasonable proportions". (*Ibid*).
[293] *Ibid* 292.
[294] *Ibid* 303.

In pre-colonial law, both men and women have a limited proprietary capacity.[295] (Concededly, the head of the family represents the family and administers its property for the family as a whole.)[296] In practice, the courts granted men full proprietary capacity (not so, the women).[297] Van Niekerk proposes that this mis-apprehension as judicially entrenched falls to be cured by extending women's proprietary capacity, in order to bring it on a par with that of men.[298] If this is done, the rule will be re-aligned with the indigenous jural postulates.[299] It would, further, be attuned to the prevailing market economy and changed circumstances.[300] It may be possible in this way to address the issue of discrimination on this score.

4.2.5 Claims for maintenance within the same agnatic group are unknown in indigenous law.[301] The principle is that everything in the group belongs to all members communally; the group should provide for the needs of each of its members.[302] It was never intended that children should be destitute when their father died.[303]

In the light of changed circumstances – and, in particular, having regard to the development of *individual ownership* (at least for men) – the rule would indeed be

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[295] *Ibid* 319.
[296] *Ibid.*
[297] *Ibid.*
[298] *Ibid.*
[299] *Ibid.*
[300] *Ibid.*
[301] *Ibid* 321.
[302] *Ibid.*
[303] *Ibid.*

discriminatory against children.[304] Van Niekerk proposes that a solution is to be found in changing the rule – *so as to give the child an enforceable claim against his father's estate.*[305] Such a solution would bring the rule more in line with underlying indigenous-law principles.[306]

4.2.6 As pointed out in 4.2.5 above, the notion of an enforceable right to maintenance within the same agnatic group was foreign to indigenous law.[307] With reference to the underlying jural postulate that the extended family should be continued through its members, and to the "family idea" that members should be physically and emotionally supported by the group,[308] it may be decided that a son who has been adopted by a woman according to indigenous law has an action against the estate (in the western sense of the word) of the deceased adoptive parent.[309] Such a holding would bring the indigenous law into re-alignment with its underlying jural postulates.[310]

4.2.7 In the pre-colonial law, widows and children *cannot inherit.* This is because of the principle of universal succession through the oldest male. The latter did not succeed in his personal capacity, but for the benefit of the family as a whole. Security for widows and children was thus afforded.[311]

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[304] *Ibid.*
[305] *Ibid.*
[306] *Ibid.*
[307] See 4.2.5., above.
[308] *Ibid* 290.
[309] *Ibid* 289.
[310] *Ibid* 290. In this regard, the reader is referred to Van Niekerk's discussion of the decision in *Kewana v. Santam Insurance Co. Ltd.* 1993 (4) SA 771 (Tk) at 289-90 of her thesis.
[311] *Ibid* 301.

Over the years the concept of individual ownership by men evolved.[312] (The concept of an *estate* belonging to an individual is foreign to the pre-colonial law.)[313] By reason of the extended-family dimension, if the court in the event decides that a widow can indeed inherit, a specific amount should be indicated, taking into account the other dependants.[314] (Alternatively, the court may rule that the widow and the other dependants have a claim for maintenance against the estate.)[315]

Van Niekerk contends that if in a particular case, the widow and children are destitute, the court should intercede on their behalf as outlined above.[316] It would be inappropriate to apply western law simply because individual property is at issue.[317] The law should be developed in its proper cultural perspective, and in line with its underlying jural postulates.[318]

It is agreed with Van Niekerk on these points (4.2.1-7), subject to the reservation that the changes she recommends do not disrupt any wholesome general lifestyle-arrangements (as expressed in the "living law").

The notion of "actual deliberation" is relevant in cases of "dissonance". Indigenous-law experts and community assessors (non-expert community representatives) would collaborate in the identification of a proper amalgam of (i)

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[312] *Ibid* 302.
[313] *Ibid.*
[314] *Ibid.*
[315] *Ibid.*
[316] *Ibid.*
[317] *Ibid.*
[318] *Ibid.*

indigenous jural postulates (to the degree that these are not disruptive of wholesome general lifestyle-arrangements as expressed in the "living law") and (ii) the "living law" itself, as the appropriate dispositive deviationist doctrine.

SUMMARY AND CONCLUSIONS

(1) The common law and customary law cannot be dealt with on an interchangeable basis. This is because the premises from which they derive are wholly divergent.

(2) So far as the common law is concerned, the approach to be adopted (assuming the compatibility of the rule or principle at issue with constitutionalism) is very much the same as that applicable in respect of the interpretation of statutes. Of course, there is here no "statutory purpose" to be serviced. Furthermore, the processes of ingression and purposive-definition, very important in legislative construction, do not find any place in the enterprise. But the process of effectuation is as applicable to the common-law, barring any concern with maxims or canons of construction. And axiological performance proceeds in virtually identical fashion.

(3) Where a rule or principle of the common law for one or other reason frustrates axiological performance, a departure therefrom may be warranted. In order to fill the lacuna, the jurist should seize upon a "ready-made deviationist doctrine". She should appeal to the construct of "rational forensic deliberation" as a yardstick for determining the adequacy of such

doctrine to "purpose" (the design of the Constitution and "justice") and "social realities" (including the "facts"). Circumspection is required in a high degree. And prospective overruling, depending upon the circumstances, may be indicated.

(4) In the case of customary law, the assumptions the jurist brings to bear upon her perceptions are informed by a "new hermeneutical consciousness" of a somewhat different complexion[319] from that operative in dealing with common-law materials (or statutes in general). For this reason, proper axiological performance may here require input in the form of community participation in decision-making.

(5) Where the formulation of an indigenous-law principle frustrates axiological performance (here one thinks of a textbook-formulation, for instance, which embodies a "distorted" version), one has to do with "dissonance". In this event, a "ready-made deviationist doctrine", consisting in an amalgam of indigenous jural postulates (to the extent that these are not disruptive of wholesome general lifestyle-arrangements as expressed in the "living law") and the "living law" itself, might be appropriated. Such a deviationist doctrine is to be identified by way of "actual deliberation" among indigenous-law experts and community assessors.

As with the interpretation of statutes, the processes pertaining to the development of the common law and customary law as here outlined might be used both as an

ensemble of guidelines, and as a criteriological basis for the analysis of court decisions bearing on these matters.

AN ENDNOTE

This study has reached its conclusion. Its objectives having been to delineate a theoretical basis for the construction of statutes, and the handling of common-law and customary-law sources, it is hoped that it has succeeded to some extent in meeting them.

One may conceive of a theory as a tool or instrument, a means of approach. Armed with such a means, the jurist is better able to execute her functions than she would be if she were content to proceed upon a casuistic, unco-ordinated basis. It has been said that nothing is quite so practical as a good theory.

Instances have been furnished in the course of this chapter of the theory in its practical dimensions. Its utility as a tool has been demonstrated at several distinct points. This is not to say that it is without its shortcomings. Refinements as suggested by constructive criticisms would most certainly amplify its value. Indeed, among the indications for further research would be studies undertaken to the end of elaborating just such refinements.

If this study has by some unfortunate turn not accomplished quite everything it was proposed at the outset to achieve, it is to be hoped that it has nevertheless succeeded in dispelling once and for all the misapprehension that the juridical

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[319] Refer, in this connection, to Chapter V at 3.2 (and 3.1).

enterprise is a process from which value-considerations may be divorced. Unhappily, our pre-constitutional jurisprudence to a large extent misconceived its role on this score. The stage has now been set for perceptual correction.

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Supreme Court Act, 59 of 1959.

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Abbreviations

Acta Juridica = Actual Juridica

Annual Survey = Annual Survey of South African Law

CILSA = The Comparative and International Law Journal of Southern Africa

Codicillus = Codicillus

De Jure = De Jure

Duke L.J = Duke Law Journal

Harvard L.R = Harvard Law Review

SAJHR = South African Journal of Human Rights

SALJ = South African Law Journal

SAPL = South African Public Law

Stell L.R. = Stellenbosch Law Review

THRHR = Tydskrif vir die Heedendagse Romeins-Hollandse Reg

TRW = Tydskrif vir Regswetenskap

TSAR = Tydskrif vir die Suid-Afrikaanse Reg

Yale LJ = Yale Law Journal