

# UNDOING THE PAST THROUGH STATUTORY INTERPRETATION: THE CONSTITUTIONAL COURT AND MARRIAGE LAWS OF APARTHEID

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## SUMMARY

Recent legal scholarship has increasingly focussed on the way in which the law can be employed as a strategy of memory in post-conflict societies. War crimes trials, civil reparation or restitution claims, and the like, have all been extensively discussed as memorial practices. However, the way in which ordinary process of statutory interpretation can be employed to undo the past has thus far received little or now attention. In this article I investigate how the South African Constitutional Court has approached the interpretation of a number of apartheid marriage laws under sections 35(2) of the interim and 39(2) of the final Constitutions. I argue that, far from adopting a purposive approach to statutory interpretation as is often claimed, the court has in fact adopted a very narrow textual approach to statutory interpretation. I claim that this approach to the legislative legacy of the past is both hermeneutically and politically suspect. What is more, it discloses a predilection for monumental, as opposed to, memorial practices of memory.

## 1 INTRODUCTION

For the greatest part of South Africa's modern history our patriarchal common law was supplemented by a series of statutes which were all designed to impose a narrowly understood Christian Nationalist (some claimed civilised) conception of marriage onto a diverse and multi-cultural population.<sup>1</sup> Many of these statutory measures were designed to financially reward members of this population who willingly entered into officially recognised marriages.<sup>2</sup> The inequities and indignities which resulted from this discriminatory use of the law scarcely need recounting.<sup>3</sup>

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<sup>1</sup> A marriage was accordingly only recognised if it was concluded in terms of the Marriage Act 25 of 1961 between two sexually potent (*Joshua v Joshua* 1961 1 SA 455 (GW)) and fertile (*Van Niekerk v Van Niekerk* 1949 4 SA 123 (W)) persons of different sexes but of the same race (s 1(1) of the Prohibition of Mixed Marriages Act 55 of 1949).

<sup>2</sup> For the purpose of this discussion it is sufficient to refer to those laws which have recently formed the subject of the constitutional litigation which will be discussed later. See for example the Intestate Succession Act 81 of 1987, the Maintenance of Surviving Spouses Act 27 of 1990, Aliens Control Act 96 of 1991, and the Judges' Remuneration and

When the new constitutional order came into operation at midnight on 27 April 1994, the interim Constitution explicitly stated that all apartheid laws (including the above-mentioned oppressive marriage laws) would remain in force until such time as these laws were either repealed or declared unconstitutional.<sup>4</sup> However, it soon became clear that a comprehensive revision of the apartheid statute book was not on the cards. It was effectively left to the courts to gradually dismantle the apartheid statutory framework through a process of constitutional and statutory interpretation.

My interest in this article centres on the way in which the Constitutional Court has approached the process of statutory interpretation in this specific post-apartheid context. As a means of getting a manageable grip on the question, I will restrict my attention to the way in which the court has approached the interpretation of a number of the apartheid marriage laws mentioned above. In order to gain a critical perspective on this jurisprudence, the approach or approaches to statutory interpretation which can be distilled from these cases will be compared to the purposive approach which JMT Labuschagne had developed during the late 1970s and early 1980s in anticipation of a future era of constitutionalism. The gist of my argument is that the court has not yet assimilated the basics of this approach and that this leaves its jurisprudence both hermeneutically and politically suspect.

The broader context of the discussion is the growing jurisprudential interest in the role which the law can play as a strategy of memory in post-traumatic societies. War crimes trials, reparation suits and quasi-judicial commissions have all grabbed the attention of contemporary legal scholars.<sup>5</sup> However, little attention has thus far been paid to the role which ordinary processes of statutory interpretation can play in this regard. I hope that this preliminary investigation of the way in which the South African Constitutional Court has responded to the legacy of apartheid by interpreting its marriage laws (or not), will broaden the limited scope of the present jurisprudential interrogation of the relationship between law and the politics of memory.

## 2 STATUTORY INTERPRETATION AS A JURISPRUDENCE OF RESTRAINT

It should be noted right at the outset that the South African courts were not left at sea by the last apartheid legislature about the way in which apartheid legislation should be interpreted in the future. The interim Constitution, which was adopted by the last apartheid parliament in 1993,<sup>6</sup> contained a specific

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Conditions of Employment Act 88 of 1989, which all conferred pecuniary or other benefits on legally registered married couples only.

<sup>3</sup> Part of this history is recounted in more detail in the minority judgments in *Volks v Robinson* 2005 5 BCLR 446 (CC) par [107]-[122] and [163]-[174].

<sup>4</sup> S 229 of the (interim) Constitution of the Republic of South Africa Act 200 of 1993.

<sup>5</sup> See eg, Felman *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (2002); Douglas *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (2001); and Osiel *Mass Atrocity, Collective Memory, and the Law* (1997). The German confrontation with the Nazi past after unification has proved to be one of the more fertile areas of research. A comparison between the German post-unification and the South African post-apartheid experiences remains to be written.

<sup>6</sup> Constitution of the Republic of South Africa Act 200 of 1993.

injunction in section 35(2) to deal with the issue. The section reads as follows:

“No law which limits any of the rights entrenched in [the Bill of Rights], shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in [the Bill of Rights], provided such a law is reasonably capable of a more restrictive interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restrictive interpretation.”

This does not mean that section 35(2) amounted to no more than an unique and pragmatic arrangement typical of the South African constitutional transition. The section was also sold to the new constitutional community on the basis that it embodied a well-known and established interpretive procedure. This procedure found wide-spread application in many constitutional democracies, including those of Germany (where it was known as the principle of *verfassungskonforme Auslegung*)<sup>8</sup> and Canada (where it was known as “reading-down”).<sup>9</sup> Lourens du Plessis, who was partly responsible for the inclusion of this section in the interim Constitution, has gone to great lengths to unpack the jurisprudence behind this principle. His understanding of this jurisprudence, seen through the eyes of German constitutionalism, provides a useful starting point for our discussion.

The German principle of *verfassungskonforme Auslegung* (interpretation conforming to the constitution) does not merely express a technical or methodological concern. It is incidental to the broader constitutional principle of judicial restraint.<sup>10</sup> In fact, constitutionalism itself is understood as no more than the embodiment of a jurisprudence of restraint. The principle of judicial restraint can in turn not be divorced from the principle of subsidiarity in general, and the principle of adjudicative subsidiarity in particular. The principle of subsidiarity obliges a more encompassing superordinate body or community to refrain from taking for its account matters that can be dealt with by a subordinate body or community.<sup>11</sup> As an adjudicative principle, it

<sup>7</sup> Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 121-122 explain the reason for the inclusion of this section as follows: “The ultimate object of these provisions, which curb judicial over-activism in striking down legislation, is to enhance legal certainty during the transition. The multi-party negotiators agreed on the inclusion of section 35(2) without any difficulty.”

<sup>8</sup> Currie *The Constitution of the Federal Republic of Germany* (1994) 28-29 explains *verfassungskonforme Auslegung* (interpretation conforming with the constitution) as a pragmatic tool to reduce the friction inherent in constitutional review. The result is often the same as if the statute had been struck down, but legislative feelings are spared by indulging the presumption that the lawmakers are sensitive to their constitutional obligations. The principle boils down to a presumption of statutory interpretation, namely, that the legislature always seeks to meet its constitutional obligations.

<sup>9</sup> Hogg *Constitutional Law of Canada* 3ed (1992) 809 formulates the principle as follows: “Where the language of a statute will bear two interpretations, one of which would abridge a Charter right, and one of which would not, the Charter can be applied simply by selecting the interpretation that does not abridge the Charter right.” The process of reading-down is subject to an actual or at least potential ambiguity in the language of the statute (906). As he explicitly puts it: “It is only available where the language of the statute will bear the (valid) limited meaning as well as the (invalid) extended meaning: it then stipulates that the limited meaning be selected” (393). Hogg also regards the principle as embodying a “presumption of constitutionality”, *ie* the enacting legislative body is presumed to have meant to enact provisions which do not transgress the limits of its constitutional powers (394).

<sup>10</sup> Du Plessis *Re-interpretation of Statutes* (2002) 30 141.

<sup>11</sup> Du Plessis 29.

implies that legal disputes should be decided as far as possible by avoiding the constitutionalisation of the issues involved.

Du Plessis suggests that this approach to constitutional interpretation also makes good constitutional sense in the post-apartheid context. This is so because of (i) the fact that the Constitution is not interpreted by the Constitutional Court alone but by an open community of interpreters with a plurality of perspectives and meanings;<sup>12</sup> (ii) the weak institutional position of the Constitutional Court within this community of interpreters;<sup>13</sup> (iii) the opportunities which this approach creates for a mediated dialogue between the legislature and judiciary;<sup>14</sup> and (iv) the fact that the Constitution is a written text which is in need of constant interpretation and reinterpretation.<sup>15</sup>

The idea of statutory interpretation as a form of judicial restraint (that is, as a means of avoiding constitutional confrontations with the legislature) embodies the essence of what Du Plessis elsewhere called the memorial (as opposed to the monumental) constitution.<sup>16</sup> Monuments and memorials share a concern with memory but differ significantly in the way in which they remember. Monuments celebrate victories while memorials commemorate the dead. Monuments institute new understandings and meanings of past events. Memorials mark the limits of our ability to understand and give meaning to past events and traumas. Monuments are bold and self-confident. Memorials are reserved and tentative.<sup>17</sup> Du Plessis argues that the Constitution contains both monumental and memorial elements.

Where apartheid legislation has to be interpreted, Du Plessis's distinction assumes an added significance. One could say that the principle of restraint as it is embodied in section 35(2) recognises the need to deal with the apartheid past in a memorial and not a monumental fashion. The injustices of the past are called to memory by incrementally and interpretively reworking the apparently fixed, apparently natural, apparently legal meanings which were authoritatively assigned to events, things, words and persons in the past. The fact that the very same legislative instruments can gradually but constantly be given new interpretive twists serves both to remind us of the arbitrary and unjust nature of their application in the past, and to warn us against repeating the same neutralisation, naturalisation and legalisation of meaning in the present. It is not only the substance of meaning but also the way in which legal meaning is produced that requires our attention. This point is crucial to the rest of our discussion.

Section 35(2) requires that we produce new legal meanings out of the material of the past in an interpretive fashion (by contrast, for example, to the production of new meaning through remedial "reading-in"). We are called

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<sup>12</sup> Du Plessis 136. See also Du Plessis "Legal Academics and the Open Community of Constitutional Interpreters" 1996 *SAJHR* 214.

<sup>13</sup> Du Plessis 171.

<sup>14</sup> Du Plessis 28.

<sup>15</sup> Du Plessis 29.

<sup>16</sup> Du Plessis "The South African Constitution as Memory and Promise" 2000 *Stell LR* 385.

<sup>17</sup> The differences between these two practices or politics of memory cannot be explored here in any more detail. For powerful yet tentative attempts to do so see Snyman "Interpretation and the Politics of Memory" 1998 *Acta Juridica* 312; and Van Marle "Lives of Action, Thinking and Revolt – A Feminist Call for Politics and Becoming in Post-apartheid South Africa" 2004 *SAPR/PL* 605.

upon to respond interpretively to the injustice of the past, that means, not by monumentally imposing new incontestable and closed meanings in the place of the old, but by constantly reminding ourselves of the fluid, contestable, interpretive and therefore political nature of all legal meaning. If Du Plessis's distinction is applied in this context, one could say that the principle of constitutionally conforming interpretation forms part of the memorial constitution, while the constitutional remedies (like reading-in) form part of the monumental constitution.

The discussion of the jurisprudential background to section 35(2) will have to be restricted to these brief comments. In the following section I begin to explore how the courts have distilled a specific method of statutory interpretation from the section. The question whether this method gives proper expression to the jurisprudence of restraint, or allows for a proper memorialisation of apartheid legislation, will be addressed a little later.

### 3 SECTION 35(2) OF THE INTERIM CONSTITUTION AND THE BIRTH OF THE NEW TEXTUALISM

As soon as the jurisprudence of restraint is understood as an incidence of the principle of subsidiarity, it becomes clear that it does not exclude a potentially aggressive form of judicial activism. Restraint in this context simply means keeping that activism to its own domain. It is therefore not surprising that the question of limits has from the outset been part of the jurisprudence which has come to surround section 35(2) of the interim Constitution. How far can the interpreter go in assigning new meanings to old legislation in order to prevent that legislation from being declared inoperative, or to promote the spirit, purport and objects of the Bill of Rights in terms of section 35(3)? Du Plessis himself grants a very limited degree of judicial activism in this regard. The principle of *verfassungskonforme Auslegung* can only be invoked "where more than one interpretation of a provision is grammatically achievable".<sup>18</sup> This means that the alternative meaning must not grammatically distort (let alone change or alter) the original wording of the provision in question.<sup>19</sup> Whatever the reasons for Du Plessis's limited understanding of the principle might be, it is this understanding which was right from the outset adopted by the Constitutional Court.

The court held in *S v Bhulwana; S v Gwadiso*<sup>20</sup> that the words "until the contrary is proved" could not be read down to mean "unless the evidence raises a reasonable doubt" because the "unambiguous language of the phrase" left no room for such a reading.<sup>21</sup> Whether or not this implied that section 35(2) could only be invoked where the language of the legislation was ambiguous, it made clear that the "reasonably capable" test of the proviso in section 35(2) referred to the wording of the legislation (as opposed to the scheme of the legislation as a whole). This is a questionable but extremely important assumption. It gave the jurisprudence of restraint an

<sup>18</sup> Du Plessis "The Jurisprudence of Interpretation and the Exigencies of a New Constitutional Order in South Africa" in Bradfield and Van der Merwe (eds) *Meaning in Legal Interpretation* (1998) 8 13.

<sup>19</sup> Du Plessis 141.

<sup>20</sup> 1996 1 SA 388 (CC).

<sup>21</sup> Par [28].

unnecessarily narrow textualist slant and effectively precluded the development of an “authentic” purposive approach to statutory interpretation under the interim Constitution.<sup>22</sup> The development of such an approach would have required that the reference to “law” in the proviso to section 35(2) be read as if it referred to the legislative scheme of the statute as a whole, rather than to the words of a particular section in the statute. The question would then have become whether the unconstitutionality of the statute could be avoided by giving the statute a new purpose and not whether the existing words of the statute could be given a new meaning.

This is, however, not what happened. The judgment of Marais JA in *Minister of Safety and Security v Molutsi*<sup>23</sup> underscores this fact. Marais JA argued that section 35(2) limited the scope of statutory interpretation under section 35(3) of the interim Constitution (the injunction that statutes should be interpreted with due regard to the spirit, purport and object of the Bill of Rights). It followed that a court was not empowered by the Constitution to “assign to either a pre-constitution or post-constitution statute a meaning which *its language could not reasonably bear* or which was in flat contradiction to *the ordinary and plain language used in the statute*”.<sup>24</sup> On this basis, Marais JA held that the words “cause of action” could not be read down to mean “proximate cause of action”. More telling is his remark that the “intractable” language of the legislation “fortunately” saved him from “having to consider what the true import” of the provision was.<sup>25</sup> A sufficiently clear text could still preclude an investigation into the purpose of the statute in question. What would happen if the clear text was obviously in violation of the Constitution is not clear.

When the final Constitution was adopted in 1996<sup>26</sup>, it did not again contain a provision similar to section 35(2) of the interim Constitution. Section 39(2) of the final Constitution, however, included a slightly amended restatement of section 35(3) of the interim Constitution. The new section demanded that statutory interpreters “promote” the spirit, purport and objects of the Bill of Right (as opposed to merely interpret statutes “with due regard to” that spirit).

For a brief moment of time there was uncertainty about the implication of these changes. In *De Lange v Smuts*<sup>27</sup> Ackerman J held that the fact that the final Constitution did not include a section similar to section 35(2) was not of any true significance as the old section merely expressed a sound principle of constitutional interpretation which was recognised in other open and democratic societies whose constitutions, like the South African constitution, did not contain an express provision which incorporated this principle.<sup>28</sup> The same interpretive approach should be adopted under the 1996 Constitution

<sup>22</sup> The term is used by Devenish *Interpretation of Statutes* (1992) 36 to distinguish between a “qualified purposive approach” where a purposive reading of legislation is only employed to resolve cases of textual ambiguity, and an “authentic purposive approach” where legislation is interpreted according to its *ratio* in all cases, even if it requires the alteration of the wording of the text.

<sup>23</sup> 1996 4 SA 72 (A).

<sup>24</sup> 85D-F (my emphasis).

<sup>25</sup> 85J.

<sup>26</sup> The Constitution of the Republic of South Africa, 1996.

<sup>27</sup> 1998 3 SA 785 (CC).

<sup>28</sup> Par [85].

in terms of section 39(2) as that under the interim Constitution in terms of section 35(2).<sup>29</sup> What Ackerman J failed to explain is why the sound principle that statutory interpretation should avoid unconstitutionality should continue to be understood in a narrow textualist sense (as the proviso to section 35(2) had seemingly required). In a minority judgment, Mokgoro J expressed some well-founded reservations about simply equating the two interpretive regimes. She described section 35(2) as particularly “benevolent” or “benign” to the legislative text.<sup>30</sup> Section 39(2), on the other hand, was less permissive and not subject to the limitations which section 35(2) had imposed on the old section 35(3). In her mind the new section 39(2) thus allowed for a far more robust and activist process of statutory interpretation.

With hindsight these comments seem to mark a watershed in the recent development of our law. If the more robust approach to statutory interpretation under section 39(2) had been followed as Mokgoro J suggested it should, the door would probably have been opened to the development of a fully fledged purposive approach to statutory interpretation. This approach would no longer have been hemmed in by an unqualified fidelity to the grammatical possibilities of the text. The need to create the constitutional remedy of reading-in might never have arisen in the form that it did. However, as the recent marriage law cases of the Constitutional Court clearly show, this is not the road which the Constitutional Court chose to follow.

In the next section I provide a close reading of these cases in order to gain a better understanding of the new textualist method of statutory interpretation which the court had first distilled from section 35(2) of the interim Constitution, and then assimilated into section 39(2) of the final Constitution. At the same time I explore a few traces of resistance from within the ranks of the court to the new textualism which dominates the interpretation of statutes under section 39(2) of the Constitution.

## **4 REINTERPRETING APARTHEID’S MARRIAGE LAWS**

### **4.1 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs***

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*<sup>31</sup> the Constitutional Court had to decide whether the special provision which was made in section 25(5) of the Aliens Control Act 96 of 1991 for the “spouse” of a permanent resident, discriminated unfairly and unjustifiably against the unmarried same-sex life partners of permanent residents. The Minister of Home Affairs argued that it did not (or that it was not ripe to decide whether it did) because, on a proper interpretation of the section in terms of section 39(2) of the Constitution, the term “spouse” included permanent same-sex life partners.<sup>32</sup> The regional committee which was

<sup>29</sup> This approach was endorsed by the court in *Investigating Directorate: SEO v Hyundai Motor Distributors: in re Hyundai Motor Distributors v Smit* 2001 1 SA 545 (CC) (par [23]).

<sup>30</sup> Par [135].

<sup>31</sup> 2000 2 SA 1(CC).

<sup>32</sup> Par [22]-[23].

responsible for the administration of the act could still very well interpret the section in this fashion. The court should give the committee the chance to first explore the interpretive possibilities which the Constitution created.

The court unanimously rejected this argument. Ackerman J, who wrote the judgment of the court, held that the argument on behalf of the Minister confused the interpretation of legislation under section 39(2), and the process of altering the words of a statute through the constitutional remedies of reading-in and severance under section 172 of the Constitution. According to Ackerman J, these two processes were “fundamentally different” in nature.<sup>33</sup> Both the fact that Ackerman J insisted on drawing this distinction and the way in which he then proceeded to attach significance to each of the two processes, have turned out to be of decisive importance for the later development of the court’s jurisprudence.

The principle that statutes should as far as possible be interpreted to conform to the Constitution was accepted and restated by Ackerman J to mean that “where it is reasonably possible to construe a statute in such a way that it does not give rise to constitutional inconsistency, such a construction should be preferred to another construction which, although also reasonable, would give rise to such inconsistency”.<sup>34</sup> The limits of reasonableness in this context are reached when the meaning of the words in question becomes distorted.<sup>35</sup> Because the process is an interpretive one, it is limited to what the text is reasonably capable of meaning.<sup>36</sup> In order to illustrate what he meant by an “interpretive” process (as opposed to an amending process) Ackerman J explained, with an appeal to a dictionary, that the ordinary meaning of the word “spouse” connoted a married person, either husband or wife.<sup>37</sup> The word “spouse” could therefore not reasonably be interpreted (by a regional committee or otherwise) to include unmarried same-sex life partners. To do so would be to distort the linguistic meaning of the term.

In as far as the section restricted its special advantage to “spouses” only, it was unconstitutional and had to be declared so in terms of section 172 of the Constitution. Only then was it open to the constitutional interpreter to remedy the defect in the legislation by altering its wording to include the phrase “or partner, in a permanent same-sex life partnership” after the word “spouse” in the legislative text.<sup>38</sup>

Ackerman J cited no authority for the statement that the interpretation of legislation must, hermeneutically speaking, stop short before the modification of the legislative text begins. His only point of reference seems to be the Constitutional Court’s own earlier interpretation of section 35(2) of the interim Constitution. From what was said above, it should be clear that this section provides no or very little textual support for the distinction between the interpretation of legislation on the one hand, and the alteration

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<sup>33</sup> Par [24].

<sup>34</sup> Par [23].

<sup>35</sup> *Ibid.*

<sup>36</sup> Par [24].

<sup>37</sup> Par [25].

<sup>38</sup> Par [86].



of legislation, on the other, which Ackerman J here sought to introduce into our law.

There is equally no or very little support to be found amongst South African writers for the “fundamental difference” between the two processes which Ackerman J so boldly announced. Even a conservative writer and apartheid judge like LC Steyn, who has frequently been taken to task for the regressive nature of his hermeneutics and jurisprudence, had argued against literalists that *woordwysigende* (word-altering) interpretation formed an essential and legitimate interpretive activity.<sup>39</sup> In the preface to the 1981 edition of his work *Die uitleg van wette*, the new authors conceded that this principle was now universally accepted in our law. The continued inclusion of Steyn’s arguments in this regard was nevertheless justified as follows:

“Even if the walls of Jericho had already fallen in a jurisprudential sense, there is, with respect, no reason why students should not be taught that there indeed had been such walls, why they had to fall, and why they should guard against any attempt to rebuild these walls out of the rubble.”<sup>40</sup>

That Ackerman J managed to start and finish the rebuilding of the walls in three short paragraphs without challenge is one of the remarkable intellectual feats in the history of our law. Steyn was of course not alone in his defence of word-altering statutory interpretation. Writing at the beginning of the 1990s, Devenish also insisted that “an amendment of a statute by judicial interpretation” was merely an application of the ordinary technique of extensive interpretation. Both processes rested logically on the same hermeneutic principle.<sup>41</sup> However, it was JMT Labuschagne who, during the 1980s and early 1990s, developed the most sophisticated and comprehensive hermeneutical support for word-altering statutory interpretation.

<sup>39</sup> Steyn *Die Uitleg van Wette* (1981) 55-68. Steyn argued that words should be read to be other words or as not appearing in legislation at all if the intention of the legislature cannot be achieved in any other way (55). This was the logical result of the so-called literalist-cum-intentionalist approach which he defended against the pure literalists. Steyn insisted that there was no logical difference between extensive interpretation, restrictive interpretation and modificative interpretation (58). Steyn also responded to the old claim that the interpretive modification of legislation amounts to an act of legislating or law-making itself. According to him this statement rested on a misunderstanding of the nature of legislation. It is the will of the legislature (the spirit of the laws) and not the words of the legislature (the letter of the laws) that makes legislation (68).

<sup>40</sup> Steyn xv.

<sup>41</sup> Devenish 93-98. Devenish noted in this regard that the South African law at the time was beset by a number of anomalies and inconsistencies. If the modification of the language of a statute is permissible in our law, as he claimed that it was, then the court should also be allowed to fill a gap or omission in the legislation (98). Devenish pointed out that the degree of modification which “will be acceptable to the courts will depend on the theory of interpretation implicitly adopted by the courts”: “The literal approach permits a modification in exceptional cases of absurdity and ambiguity respectively ... *A fortiori* a purposive or value-orientated theory of interpretation permits a greater measure of modification of language” (93). Devenish himself favoured a consistent purposive approach to statutory interpretation and argued that “[t]he teleological theory of interpretation by its very nature necessitates acceptance of the principle of modification of language in order to bring the meaning of the words into line with the purpose of the law in general, which according to Voet, is ‘justice and reason’. Modification of language is essential in order to develop a consistent and dynamic jurisprudence of statutory interpretation” (97).

## 4 2 A short interlude (JMT Labuschagne and the end of statutory interpretation as Ackerman J understands it)

Labuschagne insisted for many years that we do away with both the term and the practice of statutory interpretation. In one of his last publications before his untimely death, he wrote that “the use of the phrase ‘legal interpretation’ as an independent concept is becoming increasingly frustrating because a legal norm, regardless of its source, is not interpreted but formed. The term ‘interpretation’ has a too mechanical connotation”.<sup>42</sup> In so far as Ackerman J not only insisted on using the term, but on distinguishing it from any process by which the legislative text is altered or even strained, the frustration which was expressed by Labuschagne is particularly apposite and understandable.

Labuschagne claimed that all word cultures were undergoing a series of universal evolutionary processes.<sup>43</sup> As far as the law was concerned, this evolution essentially involved a shift from iconic justice to communicative justice.<sup>44</sup> Applied to the field of statutory interpretation, this shift could be traced through four distinctive phases of development.

The first phase was characterised by the holy origin and status of legislation and the infallible nature of those who made and declared the meaning of that legislation.<sup>45</sup> The second phase was entered with the rise of independent judiciaries in the West. Within the early *trias politica* the legislature retained its infallible and sovereign status and judges their apparently declaratory function. The legislation and legislative text of the (previously holy) legislature equally retained its holy or iconic status. First the literalist and then the intentionalist approaches to the legislative text arose in this context. Interpretation was judged on the basis of the logical or formal relationship which it showed in the abstract to the text which was interpreted. Yet, the door was opened for the beginning of judicial intervention where gaps existed in legislation or in cases where logic led to absurdity.<sup>46</sup> In the third phase of development, the literal meaning of the text and the intention of the legislature were discarded in favour of the purpose of the legislation. This new phase was highlighted by the development of the functionalist and sociological jurisprudence of the American Realists during the first decades of the 20<sup>th</sup> century. The fourth and final phase of development was reached with the arrival of the constitutional state. In this phase judges are given the task, not only to give functional effect to the purpose of legislation, but also to ensure that the legislative purpose conforms in all cases to basic human

<sup>42</sup> Labuschagne “Die Opkoms van die Rasonele en van Individualiserende Geregtigheid by Regsuitleg-en Vorming: Opmerkings Oor die Disintegrasie van Refleks- en Ikgeregeregtheid” 2004 *THRHR* 614 616 (my translation).

<sup>43</sup> Labuschagne “Die Heilige Oervader, Regsevolusie en Redematige Administratiefregspeling” 1995 *SAPR/PL* 444.

<sup>44</sup> Labuschagne 2004 *THRHR* 615.

<sup>45</sup> Labuschagne “Die Leemtebegrip by Wetsuitleg as Anachronisme: ’n Regsantropologiese Verklaring” 1999 *THRHR* 300.

<sup>46</sup> Labuschagne “Die Opkoms van die Teleologiese Benadering tot die Uitleg van Wette in Suid-Afrika” 1990 *SALJ* 569 570.

rights standards.<sup>47</sup> The task of the interpreter of statutes is to bring the legislative process to both a sensible (practical) and just (equitable) conclusion. As the complexity of society increases, the scope of the judicial discretion which is needed to achieve this result equally increases. It becomes increasingly difficult to legislate in universal terms. The task of the judge becomes increasingly to find novel ways of furthering the purpose of the legislative scheme. This phase also brings an end to statutory interpretation (as it has traditionally been understood) which is replaced by the law of norm generation (*regsnormvorming*).<sup>48</sup>

Already during the purposive phase of development, the dynamic or organic nature of the legislative process was accepted. The final, constitutional, phase represents merely a specific application of that insight. From this perspective, a legislative act is not brought to completion by its embodiment in a legislative text. The legislative text merely represents a "structural act".<sup>49</sup> The legislative process is only completed with the creation or establishment of a "functional act".<sup>50</sup> To ensure that the structural act becomes functionally operative, it is sometimes necessary to alter the wording, punctuation and structure of a statute.<sup>51</sup> The important point is that the alteration of the "structural norm" (or legislative text) does not take place beyond the ordinary process by which a "functional norm" for the specific legal situation is actualised or formed.

The point of this brief discussion of Labuschagne's purposive approach to statutory interpretation is not to defend its merits (which are substantial), but merely to highlight that a complex and rich body of work already existed in our law when the Constitutional Court was called upon to develop an approach to the interpretation of apartheid legislation under the new Constitution. This body of work celebrated a purposive approach to statutory interpretation and seemingly only waited for the crucial constitutional moment to become actualised. Many writers have argued that this actualisation was indeed effected with the introduction of section 39(2) of the Constitution into our law.<sup>52</sup> If the approach to statutory interpretation which Ackerman J adopted in *National Coalition* is compared to the purposive approaches which Labuschagne and Devenish had earlier advocated, it becomes clear that these writers have completely misunderstood the interpretive reach which the Constitutional Court is willing to allow

<sup>47</sup> Labuschagne "Die Leemtebegrip by Wetsuitleg as Anachronisme: 'n Regsantropologiese Verklaring" 1999 *THRHR* 300 302.

<sup>48</sup> Labuschagne "Regsnormvorming: Riglyn Vir 'n Nuwe Benadering tot die Tradisionele Reëls van Wetsuitleg" *SAPR/PL* 205.

<sup>49</sup> Labuschagne "Gewone Betekenis van 'n Woord, Woordeboeke en die Organiese Aard van Wetsuitleg" 1998 *SAPR/PL* 145 148.

<sup>50</sup> Labuschagne "Die Dinamiese Aard van die Wetgewingsproses en Wetsuitleg" 1982 *THRHR* 402 404.

<sup>51</sup> Labuschagne "Op die Voetspoor van die Wetgewingsproses: Woord, Punktuasie- en Struktuurwysigende Uitleg" 1986 *SAPR/PL* 58.

<sup>52</sup> Mdumbe "Has the Literal/Intentional/Textual Approach to Statutory Interpretation been Dealt the Coup de Grace at Last?" 2004 *SAPR/PL* 472; Kentridge and Spitz "Interpretation" in Chaskalson (*et al*) *Constitutional Law of South Africa* (1999) 11-8; and De Ville *Constitutional and Statutory Interpretation* (2000) 59.

interpreters under section 39(2) of the Constitution. The Ackerman J of *De Lange* has won out, not the Mokgoro J.<sup>53</sup>

### 4 3 *Satchwell v Minister of Home Affairs*

The judgment in *National Coalition* has remained the framework within which the Constitutional Court has subsequently developed its section 39(2) jurisprudence and interpretive approach to apartheid legislation. In *Satchwell v President of the RSA*,<sup>54</sup> for example, the court held unanimously that sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989, which conferred certain financial benefits on the "surviving spouse" of a deceased judge, was unconstitutional because it did not confer those same benefits on the surviving "partner, in a same-sex life partnership in which the partners have undertaken reciprocal duties of support". To counter the defect the necessary words were read into the sections. As is required in our law, the remedy of reading-in was preceded by the question whether the sections could be interpreted to conform to the Constitution. Madala J, who wrote the judgment of the court, held that the sections could not. His reasons all confirm the narrow textualist approach to the matter which Ackerman J had introduced earlier. The "ordinary meaning" of the term "spouse" referred to "a party to a marriage that is recognised by law".<sup>55</sup> What is more, the term did not have any other more inclusive linguistic meanings.<sup>56</sup> The context in which the term was used in the legislation, in the third place, in any case did not suggest anything but the ordinary meaning of the term. As a result, the term "spouse" could not reasonably be interpreted to include unmarried couples, whether of a permanent heterosexual or same-sex life partnership.

The neatness of the process by which Madala J came to his conclusion is beyond doubt. So is its conventionality. The ordinary meaning of the words in the statute is the starting point. The legislative context in which the words are used is called upon as a secondary aid to the interpretation of the text. Where the ordinary meaning and the textual context mutually support each other, the interpretive process is brought to a close. No further enquiry into the purpose of the statute or the way in which the text of the statute should be modified to promote that purpose is undertaken. Should any curative constitutional action be needed after the textual interpretation of the statute,

<sup>53</sup> Some of the leading writers on statutory interpretation in South Africa have implicitly expressed their support for this outcome. Botha *Statutory Interpretation: An Introduction for Students* (2005) 98-100 insists in so many words that the modificative interpretation of legislation, what is often misconstrued as the law-making function of the courts, must not be equated to the physical alteration of the text as promulgated. The text remains, it is only its meaning that is modified. The purposive approach involves *betekeniswysigende* (meaning altering) interpretation not *woordwysigende* (word altering) interpretation (98-100). Du Plessis likewise distinguishes between an *extensive interpretation* of a text and *the modification of that text* by reading new words into it (143). Du Plessis claims that there are good democratic reasons to maintain the distinction. Tampering with the words of legislation threatens the horizontal division of power in the state and elevates the interpreter to legislator (229). Du Plessis also suggests that in future the adaptation of legislation or reading-in should be restricted to cases where "legislation is impugned on constitutional grounds" (232).

<sup>54</sup> 2002 6 SA 1 (CC).

<sup>55</sup> Par [9].

<sup>56</sup> *Ibid.*

the remedy of reading-in should be applied. A simple and workable two step solution to the interpretation of apartheid legislation had seemingly crystallised in our law.

#### 4 4 *Daniels v Campbell*

Less than two years after *Satchwell* the meaning of the term “spouse” again arose for determination by the court in *Daniels v Campbell*.<sup>57</sup> This time, however, the earlier consensus in the court was put under pressure and, surprisingly, gave way. The judges of the court began expressing differences of opinion, both about what the term “spouse” in apartheid legislation meant, and about the proper interpretive approach that should be adopted under section 39(2) of the Constitution in order to arrive at that meaning. Madala J, who was responsible for the judgment in *Satchwell*, distanced himself from the meaning which the majority of the court was now attaching to his earlier judgment.

The question before the court was whether the term “spouse” in the Maintenance of Surviving Spouses Act 27 of 1990 could be interpreted to include the partners in a Muslim marriage which had not officially been solemnised in terms of the Marriage Act. The majority of the court held that it could; the minority that it could not. In reaching this conclusion, the majority significantly relied on not one, but two different interpretive approaches. The first approach was predominantly textualist and in keeping with the approach which the court had adopted in *National Coalition* and *Satchwell*. The second approach was predominantly purposive, and introduced a potentially far-reaching new dimension into the interpretation of statutes under section 39(2) of the Constitution.

The textualist argument can easily be reconstructed from the judgments of Sachs J and Ngcobo J and went something like this: Section 39(2) places a duty on the court to prefer an interpretation of legislation that falls within constitutional bounds over one that does not, provided that such an interpretation is not unduly strained and can be reasonably ascribed to the legislative provision in question. In the case at hand, two unstrained meanings can reasonably be given to the term “spouse”. The first meaning dates from the era of apartheid and restricts the term to “partners in a legally recognised and solemnised marriage”. The second meaning is wider and extends the term to “partners in all monogamous marriages which have been concluded under any tradition or system of religion, personal or family law” (whether those marriages have been officially solemnised or not). Which of the two meanings in fact reflects the ordinary meaning, dictionary meaning or *prima facie* meaning of the term is open to debate, but actually besides the point, as the term can reasonably bear both meanings.<sup>58</sup>

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<sup>57</sup> 2004 5 SA 331 (CC).

<sup>58</sup> Sachs J, *eg*, suggests that the wider meaning reflects the way that the term is generally understood and used. He even goes so far as to state that “it is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word “spouse” than to include them. Such exclusion as was effected in the past did not flow from courts giving the word “spouse” its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice of prejudice than to the dictates of the English language” (par [19]).

Because both the meanings can reasonably be ascribed to the term “spouse”, the meaning which best conforms to the Constitution should be adopted. That is the wider and more inclusive meaning. Partners to a Muslim marriage were spouses.

The majority of the court did not restrict itself to this linguistic approach to the interpretation of the statute but also endorsed a second, slightly different approach to the matter. This second approach is particularly prominent in the judgment of Sachs J. It is explicitly non-textual in character. The reasoning went something like this: the case could not be decided by merely looking at the linguistic meaning of the word “spouse” in the abstract (as it is used in the dictionary). The true meaning of the word could only be determined by looking at the socio-economic and legislative context of the case as a whole. This context included the object or purpose of the legislation. The aim or purpose of the legislation in question was to provide some financial relief to widows (who would otherwise remain a marginalised and vulnerable group in our patriarchal society). The term “spouse” should be interpreted to ensure that this aim or purpose is indeed realised as far as possible.

From this vantage point it is not difficult to conclude, as Sachs J in fact did, that the “manifest purpose of the Acts would be frustrated rather than furthered if widows were to be excluded from the protection the Acts offer, just because the legal form of their marriage happened to accord with Muslim tradition and not the Marriage Act”.<sup>59</sup>

Note that the question under this second approach is whether widows of Muslim marriages are functionally (as opposed to linguistically) similar to the widows of legally recognised marriages. The question is not whether the two widows can both be included under the same conceptual definition. The relevant context in question is patriarchy, not the dictionary. As Sachs J put it:

“The central question ... is not whether it had been open to the applicant to solemnise her marriage under the Marriage Act, [*ie* to bring her under the definition of the term ‘spouse’] but whether, in terms of ‘common sense and justice’ and the values of our Constitution, *the objectives of the Acts would be furthered* by including or excluding her from the protection provided.”<sup>60</sup>

Although Sachs J carefully introduced this purposive reading of the term “spouse” on the back of the dominant textualist approach (the purposive reading was merely used to bolster the textualist reading), the groundwork had been laid for the development of a distinctly new approach to the interpretation of apartheid legislation. This approach would be far less “benevolent” to the legislative text (as Mokgoro J had put it). However, the roots of this alternative are not the only ones that can be discerned in the judgment. In a minority judgment delivered by Moseneke J (supported by Madala J) the outlines of exactly the opposite approach to the question were traced. The critique of this minority was directed at the majority’s understanding of the boundaries which the legislative text imposed on the interpretive process. In Moseneke J’s view, these boundaries were much narrower than the majority believed. The dispute was therefore essentially

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<sup>59</sup> Par [23].

<sup>60</sup> Par [25].

about the *narrowness* of the textualist approach which the court should adopt.

Moseneke J held that the term “spouse” could not be read in terms of section 39(2) of the Constitution to include all married couples, but had to be restricted to legally married couples only. When read in this manner the word “spouse” had a discriminatory effect. The legislative provisions in question had accordingly to be declared unconstitutional. It could thereafter be remedied by a process of reading-in. The starting point of this line of reasoning lay in the confirmation that the method of construction which was laid down in section 35(2) of the interim Constitution was now, without reserve, to be found in section 39(2) of the final Constitution. This meant that the proviso which was built into section 35(2) of the interim Constitution also applied to section 39(2) of the Constitution:

“[The] affirmative duty to ‘read’ legislation in order to bring it within constitutional confines is not without bounds. An impugned statute may be read to survive constitutional invalidity only if it is reasonably capable of such compliant meaning. To be permissible, the interpretation must not be fanciful or far-fetched but one that reasonably arises from the challenged text without unwarranted strain, distortion or violence to the language.”<sup>61</sup>

That this passage has been designed to give the principle of *verfassungskonforme Auslegung* or reading-down its narrowest possible meaning should be clear. The narrow textual or linguistic bounds within which this interpretive method can operate is tautologically restated no less than six times. All fanciful, far-fetched, unreasonable, strained, distorted and violent uses of language are prohibited. Plato is banning the poets from the city. The only difference is that Platonic conceptions of language have been thoroughly discredited in the 20<sup>th</sup> century by Wittgensteinian pragmatics and Saussurian and post-structuralist linguistics. It is Moseneke J himself who ironically reminds us that “clarity of language does not rest on any ‘objective quality’ of language itself, but on the reader and the context”.<sup>62</sup> That he can move from here to a finding that the majority misunderstood the ordinary meaning of the word “spouse” is bewildering. Why in any case should Moseneke J be so keen to insist on the correct interpretation of the ordinary meaning of the word “spouse”, if he himself shortly before reminded us that the interpretive approach laid down by section 35(2) of the interim Constitution is still operative in our law? Was the whole point of that section not to mandate constitutional interpreters like himself to move away from the *prima facie* (read ordinary or dictionary) meaning of legislation?

The ordinary meaning argument therefore does not take Moseneke J very far. When it runs dry, he slightly adapts it and begins to appeal to the “legal meaning” of the text.<sup>63</sup> What Moseneke J fails to make clear, however, is where the legal (as opposed to the ordinary) use of language would rate on his list of out-of-bounds language uses. Does the legal not amount to the fanciful or even the violent?<sup>64</sup> The question is made even more pertinent as

<sup>61</sup> Par [83].

<sup>62</sup> Par [88].

<sup>63</sup> Par [89].

<sup>64</sup> Cover *Narrative, Violence, and the Law: The Essays of Robert Cover* (1992) 223 describes statutory interpretation as “bonded interpretation” which takes place in a field of violence and death.

Moseneke J seems to imply that the present legal meaning of the term “spouse” must be equated with the meaning of the term which courts had developed during the long years of racial oppression in our land. This traps us and the text of the legislation, he seems to imply, in a circle of violence which can only be broken if the legislation is declared unconstitutional.<sup>65</sup>

The weakness of these two linguistic arguments prompts one to ask what really was driving Moseneke J to prefer an outright declaration of unconstitutionality to a nuanced reinterpretation of the statute in question. Why was Moseneke J so vehemently opposed to the interpretive engagement with the legacy of the apartheid past? He tries for a third time to justify his position with an appeal to the legislative text:

“[The] main judgement conflates the meaning that the Acts can reasonably bear with the constitutional remedy the applicant and others similarly situated might be entitled to. These processes ought to be two separate enquiries; the first goes to interpretation, and the second to remedy. Otherwise the meaning of the text becomes subservient to a preferred outcome of relief.”<sup>66</sup>

However, we have already begun to sense that something more lies behind this rhetorical appeal to the “meaning of the text”. The following remark confirms that suspicion:

“The problem of readily importing interpretations piecemeal into legislation is the precedent it sets. Courts below will follow the lead and readily interpret rather than declare invalid statutes inconsistent with the Constitution. However, constitutional reinterpretation does not come to this Court for confirmation.”<sup>67</sup>

The interpretive principle and approach encapsulated in section 39(2) of the Constitution, the idea of judicial restraint and memorial constitutionalism, poses a risk to the rule of law if it is not carefully delimited and controlled. Law is made by a single centralised legislature. The application of that law is undertaken by many different courts. If these courts were allowed and encouraged to interpretively adapt legislation according to their reading of what will be in conformity with the constitution, legal fragmentation and uncertainty will arise and the rule of law will be threatened. The real problem is that the interpretive development of legislation or the determination of legal meaning will not be centralised. Constitutional reinterpretation of legislation should be avoided because it is a process over which the Constitutional Court has no direct control (unlike the process of reading-in which has to be approved and certified by the Constitutional Court).

One should appreciate the boldness with which these considerations of institutional politics are put forward. If the meaning of legislation depends in the end on the readers of the legislation, as Moseneke J earlier suggested, then the only way of controlling the range of meanings which is legally allowed to circulate in society is by directly controlling the readers themselves (if not by eliminating unwanted or uncontrollable readers from the greater interpretive enterprise itself). The rule of law is therefore ensured, not by the texts of the law, but by the institutional politics which

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<sup>65</sup> Par [99].

<sup>66</sup> Par [86].

<sup>67</sup> Par [104].



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controls the reading of those texts. It turns out that the process of constructing a non-violent, non-fanciful, unstrained and undistorted meaning out of a legislative text requires far more violence and institutional politics than Moseneke J himself initially cared to suggest.

We come away from the judgment in *Daniels* with a majority judgment in which the court's largely textualist understanding of the interpretive process under section 39(2) of the Constitution has been reconfirmed; a minority judgment in which we are exhorted to avoid that approach to apartheid legislation as far as possible and, to that end, in which the approach is restated in such narrow textualist terms as to make it practically useless; and a second majority judgment in which the traces of a purposive alternative to both these textualist approaches can be discerned. Even so, after all has been said and done, all three of these approaches resulted in exactly the same substantive relief to the applicant – she became entitled to the legislative benefits which were in the past reserved for legally married widows only. If this fact creates the impression that I am merely trying to blow up a storm in a tea-cup by teasing out the differences between these approaches, the recent Constitutional Court judgment in *Volks v Robinson*<sup>68</sup> provides a powerful reminder to the contrary.

#### **4 5      *Volks v Robinson***

The case again involved the meaning of the term “spouse” in the Maintenance of Surviving Spouses Act 27 of 1990 (the same apartheid act which entertained the court in the *Daniels* case). This time it was not the surviving partner in a religious marriage who approached the court, but the surviving partner of a monogamous heterosexual life partnership. In the majority judgment of the court, Skweyiya J held that the term “spouse” was not reasonably capable of being interpreted in terms of section 39(2) of the Constitution to include heterosexual cohabitants.<sup>69</sup> To include unmarried persons under the term “spouse” would be to unduly strain the ordinary meaning of the term (which, following *Daniels*, meant partners to a marriage either by law or religion). In addition, the textual context in which the term “spouse” was used in the statute made it clear that it was restricted to married persons.<sup>70</sup>

This interpretation of the term “spouse” was also adopted in two minority judgments. What divided the court was whether this interpretation discriminated unfairly and unjustifiably against the surviving partner in a unmarried life partnership. The majority held that it did not; the two minorities that it did. While this question, strictly speaking, no longer involves the nature of statutory interpretation under section 39(2) of the Constitution, the different interpretive approaches which the court adopted in answering the question before it go to the heart of our discussion.

In his minority judgment, Sachs J declared his total disagreement with both the substance of the conclusion which the majority reached, and the

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<sup>68</sup> 2005 5 BCLR 446 (CC).

<sup>69</sup> Par [40]-[45].

<sup>70</sup> Par [41].

approach which was utilised to reach that conclusion.<sup>71</sup> The second issue finally brings the differences between the textualist and purposive approaches, which were still latent in the *Daniels* judgment, to a head. Sachs J explained that he rejected the interpretive approach of the majority, not because it was illogical, but because of the narrow definitional framework in which the legal logic unfolded.<sup>72</sup> The majority solved the dispute by defining what a marriage is and highlighting which duties flowed logically from that definition. It then interpreted the provisions of the act within this definitional framework and found that a widow's right to claim maintenance was a logical extension of the duty of support which living spouses owed each other.<sup>73</sup> Because no equivalent duty of support arises by law in the case of life partnerships, it was not illogical and thus not unfair to differentiate between married and unmarried partners for the purposes of the act.

Sachs J's response to this approach to the issue is both terse and telling:

"I do not accept that it is appropriate to examine the entitlements of the surviving cohabitant in the context of what the common law would provide during the lifetime of the parties. To do so is to employ a process of definitional reasoning which presupposes and eliminates the very issue which needs to be determined, namely, whether for the limited socially remedial purposes intended to be served by the Act, unmarried survivors could have a legally cognisable interest which founds a constitutional right to equal benefit of the law."<sup>74</sup>

With this statement Sachs J essentially reconfirmed the purposive approach which he began developing in *Daniels*. The legal dispute should not be approached on the basis of the linguistic definition of the term "marriage" in the act, neither on the basis of the common law implications which follow logically from that definition, but on the basis of the social purpose of the act and the best way to further that purpose. The rules of logic which the majority employed only held as a result of the artificial (read legal) way in which the framework for their operation had been chosen. What was fair in a constitutional sense could not be determined within that framework. What was fair could simply not be reduced to what was logical. The "impeccable" logic of the legal argument became irrelevant as soon as the framework itself was redrawn. This is the interpretive strategy which Sachs J employed.

The interpretative framework of the act, he held, should not be located in matrimonial law but in family law.<sup>75</sup> The question then becomes, not how "marriage" is defined and whether unmarried people could be included under that legal category (which they obviously could not), but what the purposes of marriage law are within the context of family law. Once the function of marriages and matrimonial law within family law are identified, the question becomes whether the same functions could be performed by other functionally (as opposed to conceptually) similar relationships (which they obviously could). In Sachs J's own words, one should shift the focus from a

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<sup>71</sup> Par [151].

<sup>72</sup> *Ibid.*

<sup>73</sup> Par [56] and [87].

<sup>74</sup> Par [151].

<sup>75</sup> Par [152].

“decontextualised” to a “contextual” approach,<sup>76</sup> or from a “definitional” to a “functional” approach.<sup>77</sup> Sachs J concluded that the purposes of the statute (to protect widows and persons similarly positioned) will be frustrated if the protection of the statute was not in principle, but always depending on the facts of each case, extendable to the surviving partner of a life-partnership.<sup>78</sup>

The judgment in *Volks* finally and dramatically highlights the presence of two clearly defined but diametrically opposing interpretive approaches in the Constitutional Court. What is more, the two approaches resulted in two different substantive outcomes to the dispute. Even so, the case did not revolve directly around the meaning of the statutory provision in question. It revolved around the constitutional implications of that meaning. The most recent and controversial of all the marriage law cases, *Fourie v Minister of Home Affairs*,<sup>79</sup> takes us right back to the narrower question at hand.

#### 4 6 *Fourie v Minister of Home Affairs*

Having found that the modern South African common law recognises same-sex marriages, the interpretive question which confronted the Supreme Court of Appeal in *Fourie* was whether the marriage formula in the Marriage Act 25 of 1961 could be interpreted to accommodate those types of marriages. The majority of the court held that it could not; the minority that it could. The differences between the two judgments stem from the different approaches to the interpretation of the statute which the respective justices had adopted. For this reason the case is the most spectacular example of the tensions which mark the Constitutional Court’s approach to statutory interpretation.

Writing on behalf of the majority of the court, Cameron JA immediately takes the questions back to the basic approach to statutory interpretation which was formulated by Ackerman J in the *National Coalition* case.<sup>80</sup> To recall, the approach rests on (i) a clear distinction between interpretive techniques and constitutional remedies; and (ii) a textualist understanding of those interpretive techniques. As Cameron JA points out, in terms of that approach, the court may assign “a broad meaning to a word whose purport was not certain” but had to do so “without changing the word”.<sup>81</sup> The marriage formula which was inherited from apartheid required a public declaration of the parties that they take each other as “lawful husband (or wife)”.<sup>82</sup> The words “husband” and “wife” could not reasonably be given a wider meaning which would include the partners in a same-sex marriage. This meant that the marriage formula could not be updated interpretively in terms of section 39(2) of the Constitution to allow for same-sex marriages. The marriage formula had to be declared unconstitutional and remedied by an appropriate reading-in.<sup>83</sup> (The technical difficulty with which the court was

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<sup>76</sup> Par [162].

<sup>77</sup> Par [172].

<sup>78</sup> Par [190]; and [213]-[216].

<sup>79</sup> 2005 3 BCLR 241 (SCA).

<sup>80</sup> Par [28]-[29].

<sup>81</sup> Par [31].

<sup>82</sup> S 30(1) of the Marriage Act 25 of 1961.

<sup>83</sup> Par [33].

confronted was that the constitutionality of the formula had, in an apparent oversight, not been challenged before it.)

In a minority judgment, Farlam JA took a completely different approach to the interpretation of the statutory marriage formula.<sup>84</sup> He held that it was not necessary to declare the present marriage formula unconstitutional (a course of action which was in any case not open to the court), as the formula could simply be updated in accordance with section 39(2) of the Constitution to make provision for same-sex marriages. This required a slight change to the wording of the legislation to include “or lawful spouse” after the words “lawful husband (or wife)”.<sup>85</sup> Although this amounted to an alteration of the legislative text, the alteration was a legitimate part of the ordinary process of statutory interpretation. This is so simply because of the nature of legislation and the legislative process. Legislation is made to stay operational, or to always remain speaking, for as long as it is on the statute book.<sup>86</sup> To ensure that legislation remains operative, the interpreter can safely work under the presumption that the legislature intends the original wording of the legislation to be updated where and when necessary. Farlam J calls this “the presumption of updating interpretation” and claimed that it was a settled presumption of ordinary statutory interpretation.<sup>87</sup>

This approach to the interpretation of apartheid legislation under section 39(2) of the Constitution departs radically, as Cameron JA rightly points out, from the textualist approach which the Constitutional Court had thus far adopted to the interpretation of statutes. It could at best be regarded as an extension of the purposive approach which Sachs J began to develop in *Daniels* and *Volks*. It is precisely this fact which commends it. Farlam JA is not concerned with the meanings (ordinary or not, strained or not) of the terms “husband” and “wife” and the question whether same-sex partners could be incorporated into those meanings. All his attention is directed at the purpose of the marriage formula in the context of the Marriage Act, the common law, and the constitutional order as a whole. That purpose, he claims, is to enable all persons who can get married in terms of the common law to get married.<sup>88</sup> The present marriage formula has clearly become outdated in the light of the development of the common law and serves only to obstruct and no longer to further that purpose. As an interpreter of the act, Farlam J claimed that his duty was to see to it that the marriage formula was updated, within the bounds set by the purpose of the act, to enable same-sex couples to get married.<sup>89</sup> In this way the statute could remain relevant in the changing circumstances.

In support of this purposive approach to statutory interpretation, Farlam JA relies on the work of Francis Bennion.<sup>90</sup> Bennion in turn associates himself, and has been associated with, the theory of dynamic statutory interpretation which has been developed by William Eskridge.<sup>91</sup> Both

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<sup>84</sup> Par [132]-[138].

<sup>85</sup> Par [138].

<sup>86</sup> Par [136].

<sup>87</sup> Par [136]-[137].

<sup>88</sup> Par [135].

<sup>89</sup> Par [138].

<sup>90</sup> Bennion *Statutory Interpretation* (2002) 762-782.

<sup>91</sup> Eskridge *Dynamic Statutory Interpretation* (1994) 49.

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Bennion and Eskridge insist that legislation is not something static and even more, that legislation cannot be reduced to the textual form in which it has been cast at the promulgation of the legislation. Legislation is essentially a purposive undertaking by a legislature of which the initial textual embodiment is merely a conditional or preliminary statement (a structural act in the words of Labuschagne). The purposive undertaking in question might require authoritative restatements as time goes on and the circumstances and assumptions upon which the legislative text initially rested change. Because the legislature cannot constantly adapt the language of its legislation to the new circumstances, it is left to the courts in the most pressing cases to provide the purposive undertaking of the legislature with a new operational language. An absolute fidelity to the text misunderstands both the nature of legislation and the legislative process.

One would have thought that the principle of updating statutory interpretation would have been recognised as an essential part of statutory interpretation after the fall of apartheid, where, as was mentioned above, the legislature has not embarked on an extensive revision of the apartheid statute; and where, so it is often assumed, a purposive approach to statutory interpretation has been introduced by section 39(2) of the Constitution. From the discussion above it should be clear that the opposite has in fact happened. The point is underscored by Cameron JA's rejection of the interpretation of the marriage formula which Farlam JA proposes. Cameron JA is quick to remind Farlam JA that in our law a clear distinction is now drawn between the interpretation of legislation and the amendment of legislation. He goes on to explain that updating statutory interpretation is now merely of historical relevance to our law, as it is something that was devised for jurisdictions which do not or did not have the ample remedies of constitutionalism which South African courts now possess.<sup>92</sup>

If this is indeed the case, then the South African law of statutory interpretation has paid a high price for the gains which have been achieved by the introduction of the new constitutional order. Hermeneutically speaking, our law of statutory interpretation is now closer to the textualism of old than any sound and consistent purposive or contextual approach, such as the ones which were advocated during the 1980s by writers like Devenish and Labuschagne. The attempt by Cameron JA to deny the force of these hermeneutical insights with an uncritical appeal to the positive law will not do. The attempt by Farlam JA to broaden the debate by bringing the theoretical work of other statutory interpreters to bear on the issue was much needed and should be welcomed.

## 5 CONCLUSION

It is fair to say that the Constitutional Court has not been particularly creative in exploring the opportunities which the principle of *verfassungskonforme Auslegung* or reading-down offered the cause of legal and societal transformation in post-apartheid South Africa. This has largely been as a result of the textualist interpretation which the court has attached to that principle in its interpretation of, first, section 35(2) of the interim Constitution

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<sup>92</sup> Par [131].

and then section 39(2) of the final Constitution. The court has from the outset been more concerned with the bounds or limits of this principle than with its transformative potential. The fact that some of the senior justices of the court have begun arguing for an even more restricted use of section 39(2) might in due course render statutory interpretation in post-apartheid South Africa irrelevant as a strategy of collective memory. This would be an unfortunate result both as far as the hermeneutics of our interpretive practices and the democratic nature of our politics are concerned.

Hermeneutically speaking, the danger of the new textualism in statutory interpretation is that it could easily spill over to constitutional interpretation itself. The way in which Ackerman J introduced the new textualist approach into our law in *National Coalition* suggests that this might already have happened. The approach was introduced without discussing the merits of competing hermeneutic approaches, as if the approach which Ackerman J adopted followed naturally or logically from the text of the Constitution itself. The approach itself is characterised by questionable conceptual distinctions which quickly combine to form a fixed method to be followed in all cases, even where the method results in a completely impractical and inequitable result (as it did in *Fourie*). Cameron JA's desperate and highly ironic appeal in that case to the church to save him from his interpretive dilemma suggests that the interpretive work around section 39(2) has been completed and that the meaning of the section for statutory interpretation lies beyond contestation. Cameron JA was certainly not willing to ask any probing questions about the way in which he came to be painted into his interpretive corner.

As Cameron JA's remark about the historical relevance of updating statutory interpretation makes perfectly clear, the new textualist understanding of statutory interpretation under section 39(2) is completely dependent on the existence of the section 172 constitutional remedies (severance and reading-in). The statutory revision of apartheid legislation can be limited to the extent that it has been by the court, only because the necessary alterations to the legislation can be achieved through other means. I have already suggested that this is a hermeneutically unsound limitation (or even misunderstanding) of the interpretive process. It is an equally unsound political limitation of the democratic process. The problem is that the constitutional remedies (unlike the interpretive techniques) are reserved for use by the Constitutional Court itself, or under its direct supervision only. For somebody like Moseneke DP this is precisely what commends the neat distinction between interpretive techniques and constitutional remedies. However, the centralising tendencies which are built into this distinction pose a threat to the democratisation of legal meaning in post-apartheid South Africa. In fact, the centralised control of meaning in the apartheid state is perfectly mirrored by this juricentric approach to legal interpretation in its post-apartheid successor.

William Eskridge has remarked recently that legal interpreters would do well to remember that courts are not the only institutions in society which interpret legislation. He advocates a bottom-up approach to statutory interpretation precisely because the political and contestable nature of legal meanings are better accentuated thereby:

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“Viewing statutory issues from the perspective of actors lower in the legal hierarchy enables us to see more clearly how statutory interpretation reflects the dynamics of political conflict and balance ... The struggle for meaning occurs when different communities of interpretation form around a statutory issue. The communities of interpretation contest with one another about what the statute should mean, each one jockeying for position within and without the formal channels of government and developing arguments for their different interpretations.”<sup>93</sup>

By limiting the scope of what ordinary courts and other interpretive agencies at the centre of local interpretive communities can effectively achieve in the interpretive revision of our apartheid legacy, the Constitutional Court has severely undermined the transformative capacity of the law in our transitional society. The way in which Ackerman J introduced the new textualist approach in *National Coalition* is a case in point. By prematurely taking the interpretive issue out of the hands of the regional committee, the court has reduced the places and opportunities for disruptive and participatory democratic action and politics in our society. Little remains of the jurisprudence of restraint which Du Plessis initially saw embodied in section 35(2) of the interim Constitution after this centralisation of judicial power. Where Du Plessis insisted on an open community of constitutional interpreters in which the Constitutional Court resisted the temptation of taking centre stage, Ackerman and Moseneke JJ seem to insist on a closed and highly centralised community of constitutional interpreters in which the Constitutional Court is the only stage.

The Constitutional Court’s engagement with the apartheid marriage laws has now reached its final conclusion in the *Lesbian and Gay Equality Project v Minister of Home Affairs* case.<sup>94</sup> In this case the constitutionality of the existing marriage formula in section 30(1) of the Marriage Act was directly challenged. In bringing this challenge, the parties in question did not ask for the marriage formula to be updated in terms of section 39(2) of the Constitution (as was applied for on appeal in the *Fourie* case). The Constitutional Court decided to hear the two cases together and took this gap to proceed with the matter in both cases on the basis of a literal interpretation of the existing marriage formula. This formula was duly declared unconstitutional and remedied in terms of section 172 of the Constitution by reading the words “or spouse” into the formula. Farlam JA’s attempt in *Fourie* to creatively update the wording of the statute accordingly does not receive any further attention. The fact that none of the Constitutional Court judges even deemed it necessary to respond (even disapprovingly) to Farlam’s JA approach to the interpretation of the marriage formula is a dangerous sign of complacency. It simply and sadly reconfirms the Constitutional Court’s drive to centralise the interpretive production of statutory meaning. However liberating the Constitutional Court’s engagement with the marriage laws of apartheid might in hindsight turn out to have been, the unfortunate fact will remain that this same engagement has, hermeneutically and politically speaking, also opened the door to what might still turn out to be an extremely reactionary approach to constitutional and statutory interpretation.

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<sup>93</sup> Eskridge 71-72.

<sup>94</sup> Case number CCT 10/05 (as yet unreported). The case was heard and judgment delivered together with the judgment in the *Fourie* case (case number CCT 60/04).