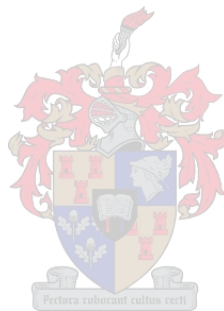


**The significance of postmodern theories of interpretation for
contractual interpretation: A critical analysis**

The significance of postmodern theories of interpretation for contractual interpretation: A critical analysis

by Gerhard du Toit



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Promoters: Prof AJ van der Walt

Prof GF Lubbe

Declaration

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature:.....

Date:.....

English summary

The objective of this study is to examine the significance of postmodern insights regarding interpretation (especially the rejection of intentionalism) and subjectivity for contractual interpretation theory.

In Part One (consisting of chapters 2-5), the leading postmodern insights on interpretation, individual autonomy, texts and intentionalism are discussed. This is done by analysing the present interpretive practice in four chapters: 1) Different theories of interpretation ranging from objectivism and natural law theories to post-structuralism are discussed in chapter 2. 2) In chapter 3 individual autonomy (as advocated by liberal theorists) is contrasted with communitarianism in order to problematize the notion of contracting parties as autonomous, self-regulating beings. By highlighting criticism against liberalism and communitarianism, and also by suggesting critical self-rule as an alternative, the assertion that contracting parties are autonomous and self-regulating is contested. 3) The process of textual definition is critically analysed with emphasis on the position reflected by the application of the parol-evidence rule and also post-structuralist ideas on the definition of texts in chapter 4. It is shown that textual definition consists of interpretation rather than identification. 4) The nature of intention and the process of intention “discovery” are analysed in chapter 5. Because of the centrality of intention in contractual practice, alternative theories on intention (and its role during interpretation) are postulated and it is suggested that post-structuralism can provide a critically reflective theory of intention. It is clear (from the critical analysis of intentionalism) that the way intention is presently approached is theoretically flawed. It is also apparent from the critique of liberal beliefs held regarding the nature of interpretation, subjectivity and the definition of texts that the theoretical foundations of these beliefs are fundamentally flawed. A critical re-imagination of contractual interpretation is necessary.

In Part Two, questions about the justifiability of the present interpretive theories are posed. In chapter 6 the practical implications of a new theoretical basis for contractual interpretation are considered by examining the way various rules of interpretation are influenced by the new theoretical basis of interpretation. Three “rules” are examined: 1) The golden rule of interpretation is examined because of its reliance on

intentionalist assumptions; 2) the parol-evidence rule is examined because of its relation to positivist assumptions about the definition of texts; 3) the relevance of *bona fides* as a substantial remedy during the interpretation of the contract is analysed to reveal assumptions about the nature of legal subjectivity in which the present consideration of the *bona fides* is grounded. It is shown that rules depend not on their content for operation, but rather on the assumptions upon which they are grounded. In short, we do not have to do away with our rules of contractual interpretation, but we have to re-evaluate how we apply those rules.

The final part of this dissertation consists of a summary of the conclusions drawn during the course of this study.

Afrikaanse opsomming

Die doel van hierdie studie is om die belang van postmoderne interpretasie (veral ivm die verwerping van intensionalisme) en subjektiewe teorieë vir kontraktuele interpretasie teorie te ondersoek.

In Deel Een (bestaande uit hoofstukke 2-5), word die belangrikste postmoderne insigte aangaande interpretasie, individuele autonomie, tekste en intensionalisme bespreek. Dit word gedoen deur die huidige interpretasiepraktyke in vier dele te bespreek: 1) In hoofstuk 2 word verskillende interpretasieteorieë bespreek vanaf objektivisme, natuurreg en reëlgebaseerde teorieë, tot postmoderne teorieë soos neo-pragmatisme en post-strukturalisme. 2) In hoofstuk 3 word individuele outonomie (soos aangehang deur liberaliste) gekonstrasteer met kommunitarisme om sodoende die idee van kontrakterende partye as vrye, self-regulerende entiteite te problematiseer. Deur die kritiek teen kommunitarisme en liberalisme uit te lig en kritiese self-regering as alternatief te postuleer word daar gepoog om 'n alternatiewe teoretiese basis vir kontraksinterpretasie daar te stel. 3) Die proses van tekstuele definisie word in hoofstuk 4 krities geanaliseer met klem op die toepassing van die "parol-evidence" reël en ook post-strukturalistiese idees aangaande die definisie van tekste. Daar word geargumenteer dat die definisie van tekste interpretatief eerder as uitkenningsgerig is. 4) Die teoretiese aard van bedoeling en intensionalistiese prosesse word in hoofstuk 5 behandel. Omdat intensie sentraal staan tot kontrakte word alternatiewe teorieë oor die rol van intensie asook die teoretiese samestelling daarvan bespreek en daar word aangevoer dat post-strukturalisme 'n basis daarstel vir 'n reflektiewe kritiese alternatiewe intensionalisme. Daar word geargumenteer dat die huidige teoretiese benadering tot intensionalisme teoreties gebrekkig is. Dit word ook duidelik uit die bespreking in Deel Een dat die huidige grondslag van kontraktuele interpretasie teoreties gebrekkig is en dat 'n kritiese herevaluasie daarvan nodig is.

In Deel Twee word vrae rondom die regverdigbaarheid van die huidige interpretasie teorie gestel. In hoofstuk 6 word die praktiese implikasies van 'n nuwe teoretiese grondslag vir kontraktuele interpretasie ondersoek deur te kyk hoe so 'n nuwe teoretiese basis die toepassing van verskeie interpretasieëls sal raak. Die invloed op drie "reëls" word ondersoek: 1) Die goue reël van kontraktuele interpretasie word

ondersoek omdat dit nou saamhang met aannames oor die aard van bedoeling; 2) die toepassing van die “parol-evidence” reël word bekyk agv die noue band tussen die toepassing van die reël en aannames oor die aard van tekste; 3) die relevansie van *bona fides* as ‘n substantiewe remedie tydens die interpretasie van kontrakte word ondersoek omdat dit nouliks saamhang met aananmes oor die aard van regsobjektiewiteit. Daar word aangetoon dat die reëls toepassing vind op grond van die aannames waarin dit gegrond is, eerder as die inhoud van die reëls self. Die reëls is nie die problem nie, maar eerder die manier waarop ons dit toepas.

In die laaste hoofstuk word die navorsingsresultate van die studie gelys.

Acknowledgements:

It has become customary (and etiquette) to not go into a lot of detail in the acknowledgements, to not mention God in any way and to mention only the necessary. I will not do things this way. All of the following played a definitive role in my development and ability to successfully complete my LLD studies.

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To everyone who prayed, supported, helped, accommodated, understood, criticized, differed, evaluated and administrated: Thank you.

To the Etruscan Poets (By Richard Wilbur)¹:

Dream fluently, still brothers, when young
Took with your mother's milk the mother's tongue

In which pure matrix, joining world and mind,
You strove to leave some line of verse behind

Like a fresh track across a field of snow,
Not reckoning that all could melt and go.

¹ Chapman and Voss *Accents: An anthology from the English-speaking world* (1999) at 181.

Table of contents

Chapter One: Introduction

1	Research problem	1
2	Hypotheses	5
3	Methodology	6
4	Sequence of chapters	8

Part I: Theories and Assumptions

Chapter Two: Meaning in legal interpretation

1	Introduction	10
2	Legal interpretation as a unique field of interpretation	11
3	Plain meaning, objective meaning and natural meaning	
3.1	Introduction	16
3.2	Objective meaning theory	17
3.3	Plain legal language	20
3.4	Metaphysical realism	23
3.5	Summary of objectivist theories	25
3.6	How objective are the objective theories?	27
4	Constraining rules and interpretation	
4.1	Introduction	28
4.2	Rule theories	29
4.3	Criticism against rule theories	33
5	Examining contexts and interpretive communities	
5.1	The role of interpretive communities and contexts in interpretation	35
5.2	Context and community as constraints in interpretation	36
5.3	Legal context as a specific context contextual plain meaning	38
5.4	Contextual plain meaning	40
5.5	Criticism against the use of interpretive communities and context as constraints on interpretation	41

6	Neo-pragmatism	
6.1	Introduction	42
6.2	Criticism of neo-pragmatism	48
7	Deconstruction and legal interpretation	
7.1	Understanding deconstruction	51
7.2	Criticism against deconstruction as a theory of interpretation	56
7.3	Deconstruction and contractual interpretation	59
8	Legal interpretation in a postmodern world (Or maybe postmodern interpretation in a modern legal world)	60
9	Conclusion	65

Chapter Three: Contemplating individual autonomy

1	Introduction	70
2	The liberal theory of rights	
2.1	Introduction	71
2.2	The liberal conception of the self	76
2.3	Criticism of liberalism	79
3	Communitarian theory of law and society	
3.1	Introduction	88
3.2	The communitarian conception of the self	94
3.3	Critique against communitarianism	97
4	Self as I or Self as Us (or neither)	101
5	The critical self and freedom	102
6	Implications for the interpretation of contracts	105
7	Conclusion	107

Chapter Four: Texts

1	Introduction	112
2	Texts as records	
2.1	Introduction	114
2.2	The parol-evidence rule	123
3	Postmodern texts (or definition of texts)	
3.1	Introduction	133

3.2 From parol evidence to just definition	143
4 Conclusion	145

Chapter Five: Intentionalism, intention discovery and intention creation

1 Introduction	148
2 Intentionalism and original meaning	150
3 Intention deduction and intention discovery	158
4 Free reading and intention creation	168
5 Neo-pragmatism and the author	173
6 The author and referentiality	177
7 Are contracts without intention necessarily unintended contracts?	181
8 Conclusion	186

Part II: Theories and Practices

Chapter Six: Theory and the rules of contractual interpretation

1 Introduction	191
2 A brief overview of the application of contractual rules of interpretation	
2.1 Classification and systemization	192
2.2 Text/context	194
3 The golden rule	
3.1 How it works	195
3.2 Presumptions and the golden rule	202
3.3 Postmodernism, intention and the need for a golden rule	
3.3.1 The role of thought and language during intention-formation	205
3.3.2 Dichotomies and intention	209
3.4 Differences between an intentionalist and a postmodern golden rule	210
4 Parol evidence: Letting in the outside (Or is it already inside?)	
4.1 The parol-evidence rule in current contractual interpretation	213
4.2 External evidence: New debates	215
4.3 Criticism against the parol-evidence rule	218
4.4 The nature of texts and textual definition	

during contractual interpretation	220
4.5 Evaluating the parol-evidence rule: Enter postmodern critique	223
4.6 How is the postmodern parol-evidence rule different?	225
5 The dialogic self and good faith in contractual interpretation	
5.1 Good faith and the courts	227
5.2 The present role of good faith and the contractual party	233
5.3 An alternative understanding of the contractual party and good faith	235
5.4 Toehold: Tacit terms and normative contractual parties	239
6 The beginning	241

Chapter Seven: Conclusion

1 Introduction	247
2 Part I (chapters 2-5)	
2.1 Meaning in legal interpretation	248
2.2 Contemplating individual autonomy	251
2.3 Texts	253
2.4 Intending intentionalism, intention discovery and intention creation	255
2.5 End of Part I	256
3 Part II (chapter 6)	
3.1 On rules and outcomes: What role does theory play in the application of rules of interpretation?	257
3.2 End of Part II	261
4 Checking Out... (But not leaving)	261

Bibliography	264
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Cases	273
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1

Introduction

1. Research problem

The objective of this study is to examine the significance of postmodern insights regarding interpretation (especially the rejection of intentionalism) and subjectivity for contractual interpretation.

South African courts view the interpretation of contracts and the attribution of contractual liability as separate but related issues. It is commonly accepted that there must be liability before the contract can be interpreted. To the extent that the contractual agreement is necessarily constituted by declarations of will which attest to the intention to establish obligations, contract would seem to entail a text and amount to a language act (“taalhandeling”) that is determinative of the existence and content of the obligatory relations envisaged by the parties. Once the existence of contractual liability has been ascertained, the court will interpret the contractual text to determine its meaning. The primary strategy is the application of the so-called golden rule of interpretation, namely to look for the intention of the parties. Importantly, the court is not allowed to look at all available evidence regarding the intention of the parties but is constrained by, for example, rules like the parol-evidence rule (consisting of the integration rule and the interpretation rule) in respect of written contracts and the ordinary-meaning presumption. Although there are exceptions, the parol-evidence rule limits the investigation to the written document, while the ordinary-meaning presumption ties the interpretation to the supposedly ordinary meaning of the words of the text. If this process does not leave the court with a clear idea of the meaning of the contract, it may resort to various other presumptions and supplementary rules regarding the meaning of a contract. The traditional approach to contractual interpretation is accordingly of a hybrid nature, presupposing that words can clearly and precisely signify intention and, to the extent that they do not, that rules can accentuate the intention of the parties.

The current contractual interpretive practice rests upon various problematic assumptions about interpretation. The first is that “normal” interpretation is in fact not really interpretation at all, but simply reading the text to see what it means, that is, a purely reproductive process; a replay of the intention of the parties. This presumes that an “ordinary” or “plain” meaning exists and that it can be ascribed to the text without the interpreter or the context influencing the meaning at all. It is also assumed that the creators of the text are autonomous and free to choose between the options available to them and to have this choice accurately reflected by the text. The text is therefore seen as a historical record of the meanings agreed to by the parties and it is assumed that meaning is fixed by the interplay of autonomous choice, text as a historical record and the ability to find and reproduce intention.

It is also assumed in the current practice that the rules of interpretation only play a role when the creators of the text do not make their intention known unambiguously. In these limited instances, it is assumed that the rules of interpretation assist the interpreter in finding the meaning that should be ascribed to the text. At the same time, the rules limit the influence of the interpreter to the minimum. The rules of interpretation are presented as tools that can either extract the intention of the parties from the text or allow the interpreter to come to some acceptable interpretation of the text.

All of these assumptions that underlie the present contractual interpretation practice conflict with postmodern theories regarding the nature of interpretation, the legal subject and texts. Postmodernists accept that meaning is always interpretive and thus always relatively unstable. The theoretical problem with the current practice is that it limits interpretive justifications, and by so doing, limits the possible solutions to contractual disputes. The rules of contractual interpretation (as they are presently applied and understood) are also subject to these limited justifications. The question is how this understanding of the rules of contractual interpretation will stand up to postmodern scrutiny and, if the assumptions prove unfounded, what the consequences will be for the present practice.

This study evaluates the present contractual interpretation practice from the perspective of postmodern theory. Postmodernists recognize that life is complex and that simple answers and generalizations cannot adequately provide answers to life's (complex) questions. In postmodern literature concepts like interpretation, the nature of subjectivity, the nature of texts and also intention are critically analysed and the results of these analyses have important implications for contractual interpretation. Assumptions about the nature of interpretation, legal subjectivity, the definition of texts and the possibility of intention discovery are central to contractual interpretation, and theories like intentionalism (the basis of the present contractual interpretation practice) are based on these assumptions. Postmodernists claim that meanings resulting from the interpretation of the text are created during the interpretive process rather than inhering in the text, that legal subjectivity is a construction rather than a metaphysical reality and that texts are "created" through the interpretive process. Finally, postmodernists question the possibility of discovering intention and the ability of texts to reflect meanings objectively or mechanically.

Postmodern developments in interpretive theory involve new understandings of context (neo-pragmatism) and of language (post-structuralism). Both include insights collectively known as the interpretive turn. The interpretive turn involves acceptance of the interpretive nature of meaning and an application of this insight (that meaning is always interpretive) to legal theory. The most important neo-pragmatist insight is that interpretation always takes place within a context that influences the interpretive process. The origin of meaning cannot be found in the words of the text or in the intention of the author(s) only. Because texts are always created and interpreted in a specific context, circumstances have an important effect on the meaning that is attached to a text. Neo-pragmatists do not see texts as historical records of meaning, because the interpretation of texts depends upon circumstances outside the text. Neo-pragmatists argue that the context wherein individuals find themselves and relations between individuals determine their perception of reality, and as a result they question the possibility of absolute individual autonomy. In short, neo-pragmatism involves a theory about the influence of interpretive context on meaning. Post-structuralism, on the other hand, is more directly concerned with the nature of language. Post-structuralists argue that meaning is the result of hierarchies of preference inherent in

all applications of words rather than the result of a correlation between the signifier (word) and the signified (that which the word connotes). In certain contexts, a word will have a “preferred” or “ordinary” meaning, not because of a shared understanding of the word, but rather because of preference of one meaning over another as the result of the existing power relations (which can be economic, moral or social in origin) in that context. The hierarchical relationships between the preferred and non-preferred concepts are not stable but subject to continuous substitution as power relations shift. Moreover, the preferred concept is often dependent upon the non-preferred. Texts are construed and interpreted through language, and post-structuralists who advocate the “interpretive turn” argue that meaning is always relatively arbitrary in the sense that interpretation always involves the selection of or preference for one possible meaning and the exclusion of others, for reasons that are not necessarily related to or justified by the words of the text or the intention of the authors.

Because contracts are contextualised linguistic acts, it is crucial to understand how the interpretation of contracts is influenced by assumptions about the nature of language and context. By critically analysing the role of assumptions underlying the present contractual interpretive practice (regarding the nature of interpretation, individuality, the definition of texts and finally, the nature of intention) and comparing these assumptions to neo-pragmatist and post-structuralist theories, the reader can re-evaluate the present interpretive practice. Finally, the feasibility of a postmodern interpretive practice can be demonstrated by re-imagining the role of specific contractual rules dealing with intention (the golden rule of interpretation), texts (the parol-evidence rule) and legal subjectivity (the role of *bona fides* during the interpretation of contracts) in the light of postmodern theories (about intention, texts and legal subjectivity). While interpretive justifications (and therefore possible meanings) are limited in the present contractual interpretive practice, meanings abound in a postmodern interpretive practice.

2. Hypotheses

This study is based on the broad hypothesis that South African contractual interpretation practices disguise the contingent nature of interpretation. This hypothesis will be tested by examining both the present interpretive practices and postmodern insights. Under the present interpretive process, meaning is established in a purportedly objective manner with reference to either the intention of the author or the rules of interpretation. While intentionalists argue that interpretation entails the search for the intention of the author, rule-theorists argue that unrestrained interpretation will lead to nihilism and that only consistent application of the rules of interpretation can prevent this.

It is not contended that interpretation is completely arbitrary construction of meaning; but rather that meaning is strongly influenced by contextual and linguistic factors. At the same time, these linguistic and contextual factors cannot render meaning objective or determinate because they are themselves contingent upon other factors. Interpretation is argued to be a meaning-influencing practice rather than a meaning-finding one as assumed by the intentionalists, or a meaning-limiting one, as assumed by rule-theorists.

It is also argued that the present contractual interpretation practice is based on a coherent set of assumptions about the nature of interpretation, the nature of legal subjectivity, the nature of texts and, finally, the nature of intention. This hypothesis is tested by critically analysing the present practice and by comparing it to postmodern insights so that the flaws of the present interpretive practice can be highlighted. It is shown that interpretation is presently often regarded as a meaning extraction practice, individuals are assumed to be autonomous, texts are thought to be records and intention is viewed as a restriction on interpreters. These assumptions collectively form the basis of intentionalist interpretive practice.

It is argued that re-imagining interpretation, legal subjectivity, the definition of texts and intention according to postmodern insights can render the interpretive practice more responsive. The emphasis should fall on justice rather than justification. This is

demonstrated by comparing the present practice regarding the rules of interpretation to a hypothetical postmodern practice. By highlighting the futility of attempts to restrict and absolutely justify interpretations and, on the other hand, by showing that just interpretations always involve some measure of justification it can be reasoned that an interpretive practice (such as the present contractual interpretation practice) aimed solely at justification is theoretically unsound. It is argued that a postmodern contractual interpretation practice is not less justifiable than the present practice (neither are completely justifiable), but is it more just because it provides more meaning possibilities.

It is also argued that a different (postmodern) theoretical basis for contractual interpretation would not necessarily mean that the entire system of interpretive rules has to be done away with, but it will involve a critical rethink of the way rules are applied. This hypothesis is assessed by re-imagining the role of the golden rule of interpretation (which deals with intention), the parol evidence rule (which deals with texts) and also the role of the *bona fides* during interpretation and by observing the significance of a postmodern interpretive practice for meaning possibilities.

3. Methodology

The study consists of a critical analysis, the goal of which is to examine and deconstruct the present interpretive practice, rather than to create a comprehensive and coherent alternative model of interpretation. Critical analysis is a process by which the underlying assumptions, preferences and hierarchical oppositions that make up the rules within a practice are identified with the intention of illustrating the contingency of these assumptions, preferences and hierarchies.

In Part One, postmodern theories on interpretation, individual autonomy, texts and intentionalism are discussed and the relation between these theories is shown. Assumptions about these (interpretation, individual autonomy, texts and intentionalism) underlie the present interpretive practice and these assumptions are demonstrated by critically analysing the present practice. The assumptions identified during the critical analysis are then evaluated against the postmodern insights

identified during the discussions on interpretation, texts, intentionalism and individual autonomy. This is done by analysing the present interpretive practice in four parts: 1) Different theories of interpretation ranging from objectivism and natural law theories to post-structuralism are discussed to problematize the notion of interpretation as “meaning extraction” and to highlight the contingent nature of interpretation. In this way, questions are raised regarding the justifiability of the present way of interpreting contracts. 2) Individual autonomy is contrasted with communitarian views of the persons in order to problematize the notion of contracting parties as autonomous, self-regulating beings. The present interpretive practice rests upon the assumption that contractual parties are free to choose the content of the contract and to have the text reflect this. By highlighting criticism against liberalism and communitarianism, and also by suggesting critical self-rule as an alternative view of the person, the assertion that contracting parties are autonomous and self-regulating is contested and the effect on contractual meanings is assessed. 3) The process of textual definition is critically analysed with emphasis on the application of the parol-evidence rule and also post-structuralist ideas on the nature of texts. In the present practice, texts are assumed to be records of the intention of the parties and the role of the interpreter is to identify the text and then read it. This assumption is contested by showing that textual definition consists of interpretation rather than identification. Texts are to be argued for, not from. 4) The nature of intention and the process of intention “discovery” are analysed. By comparing (and criticising) subjective and objective views of intentionalism, a better understanding is gained of the founding assumptions of intentionalism. It is shown that these assumptions cannot be reconciled with postmodern insights about the nature of language and thought. Because of the centrality of intention in contractual practice, alternative theories on intention (and its role during interpretation) are postulated and it is suggested that post-structuralism can provide a critically reflective theory of intention.

In Part Two, questions about the justifiability of the present interpretive theories are posed. The practical implications of a new theoretical basis for contractual interpretation are considered by examining the way various rules of interpretation could be influenced by a new theoretical basis of interpretation. Three “rules” are examined: 1) The golden rule of interpretation is examined because of its reliance on

intentionalist assumptions; 2) the parol-evidence rule is examined because of its relation to positivist assumptions about the definition of texts; 3) the relevance of *bona fides* as a substantial remedy during the interpretation of the contract is analysed to reveal assumptions about the nature of legal subjectivity in which the present consideration of the *bona fides* is grounded. The rules are first explained as they are presently applied and then the significance of a postmodern interpretive application of the rules is examined.

4. Sequence of chapters

Chapters 2, 3, 4 and 5 form Part One, which deals with the general theoretical determinants of meaning. The chapters focus on the basic theoretical foundations of concepts central to contractual interpretation (as identified above), namely theories of interpretation, legal subjects, the definition of texts and, finally, intention and the possibility of intention discovery. The nature of legal interpretation, legal texts and the role of the author in the interpretive process are discussed with emphasis on the influence of postmodernism on each of these fields.

In chapter 2 the nature of legal interpretation is discussed. Positivist or meaning-finding practices are analyzed together with the criticism of these practices. The focus then falls on the gradual shift in the direction of postmodern and post-structuralist interpretive practice with specific reference to its implications for contractual interpretation. The aim of the chapter is to gain a better understanding of the relation between the reader, text and meaning.

Because of its importance in the positivist interpretive practice, Chapter 3 briefly considers the notion of individual autonomy. In this regard, the liberal theory of rights and its notion of the self are examined. When the different theoretical and practical shortcomings of the theory have been identified, communitarianism and its conception of the self are also analyzed and contrasted. Practical and theoretical criticisms of the communitarian position are also investigated. An alternative critical position is postulated against the abovementioned theories. Finally the significance of

the findings in this chapter is drawn for the interpretation of contracts and specifically for the contractual interpreter.

Chapter 4 examines the nature of the text, beginning with historicity. The link between historical perspective and the idea of text is analyzed, bearing in mind the implications for contractual interpretation. The purpose of this chapter is to explore the implications of the definition of texts for discourse and meaning possibilities.

In Chapter 5 the search for intention is explored. The first subject of investigation is the possibility of the discovery of intention and the importance of this notion in the present system of contractual interpretation. The role of the author in the interpretation process is also analyzed. The ultimate goal of this chapter is to contemplate the role that should be afforded to the author in the contractual interpretation in an interpretive model of contractual liability.

Chapter 6 forms Part Two, in which the significance of postmodern interpretive theory for contractual practice is discussed. The theory discussed in the preceding five chapters is applied to selected rules of contractual interpretation in Chapter 6. Here it is shown that the present application of the rules limit the scope for interpretive justification, while the possibilities abound when the interpretive turn is embraced in contractual interpretation. The purpose of the chapter is to provide the reader with examples of the practical effect of the change of interpretive strategy.

The concluding Chapter 7 is deliberately structured as a beginning rather than an end. The purpose of the chapter is to evaluate the research results gathered in the thesis and to provide an experimental framework from which further investigation on the subject can be facilitated.

2

Meaning in legal interpretation

1. Introduction

The purpose of this chapter is to examine recent developments in the field of legal interpretation and their significance for interpretation of contracts. These range from a return to natural law and foundationalism to post-structuralism and neo-pragmatism. The first step in my investigation is to identify the unique features of legal interpretation. The focus then shifts to the plain language movement and the work of natural law theorists. Thereafter the interpretive rule theories are discussed. The next section deals with the contextual and communitarian interpretation theories and includes neo-pragmatism's explanation of the generation of meaning. Deconstruction and post-structuralism are themes for the subsequent section while the relationship between post-structuralism and neo-pragmatism as part of postmodern legal interpretation is discussed in the penultimate section. In the concluding section the significance of the recent interpretive theories is evaluated with reference to contractual interpretation.

2. Legal interpretation as a unique field of interpretation

Robert Cover, in discussing the relationship between interpretation and legal interpretation,¹ argued that legal interpretation and its consequences cannot be understood apart from each other.² Legal interpretation influences lives in a violent and disruptive way. As the result of a legal interpretation, someone might lose his or her freedom, property or dignity. Cover shows that legal interpretation does not create the same interpersonal reality that “normal” interpretation does.³ “Normal” interpretation takes place in a context of unity and persuasion, as interpreters try and find common ground between them in order to create a shared understanding. Even where there is disagreement, interpreters try to find common reasons why they disagree. In other words, they try to ascertain whether they in fact disagree or whether

¹ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601.

² Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1601; Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 648.

³ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1602; Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 9. He argues “...(l)aw is that which licences in blood certain transformations while authorizing other only by unanimous consent...”.

they are merely misunderstanding each other. This type of interpretation brings interpreters together because they are creating shared meaning or reality. Cover distinguishes legal interpretation from this “normal” type of interpretation by arguing that pain (authorized by legal interpretation) destroys the possibility of an interpersonal reality between the inflicter of pain and the victim. Pain in this context is not just physical discomfort, although it includes physical pain. Pain is the collective expression for any discomfort that might result from the imposition of one interpretation on another, be it mental anguish, material dispossession or physical agony.⁴

Martyrdom is used as an extreme illustration of violence as a dimension of interpretive practice.⁵ The martyr proclaims by her act of defiance that she is no longer willing, even in the face of overwhelming force, to accept the tyrant’s normative reality being imposed upon her. She will only accept continuing life if it is on her terms. Just as the death or torture of the martyr is the imposition of one reality upon another, legal interpretation entails the imposition of the interpreter’s reality upon the “victim”, often inflicting pain or deprivation upon the “victim”.⁶ Any interpretation contrary to the prevailing interpretation of law is resisted by the imposition of the authoritative legal interpreter’s⁷ views upon the interpretation of the dissident.⁸ This typically involves criminal sanctions. While legal interpretation ensures the continuing existence of law by imposition of violence upon dissidents, even its adherents⁹ often suffer violence at the hand of legal interpreters. This is illustrated by the civil procedure rules requiring compliance with judgement. Even if the parties agree that the law governs their dispute, the content or precise application of the law is disputed, and more often than not one party prevails. The loser has to suffer the adverse consequences by having the winner’s interpretation of the law

⁴ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 fn 16 at 1607; Twining & Miers *How To Do Things With Rules* (1999) at 375.

⁵ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1604.

⁶ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1605.

⁷ The authoritative legal interpreter is usually the judge or magistrate, but can also be the chairman of a tribunal or an arbitrator or a legislator. For example, The Constitution of South Africa Act 108 of 1996 states in sec 39(2) that the interpretation of statutes can occur in a court, tribunal or a forum. Interpretation can therefore occur in many settings outside of the courts in the traditional sense, but will still fall within this definition of legal interpretation. An authoritative legal interpreter is one that falls within the scope of legal interpretation as described in this section.

⁸ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1607.

⁹ Persons who do not contest the legality of the process.

imposed on him, which often means that he loses property or privileges. The judgement is enforced according to an interpretation of the rules of civil procedure despite the fact that the loser was an adherent of the law, albeit often according to his interpretation of the law.¹⁰

The interpretation of what the law “is”, is a pre-condition to the exercise of violence against the victim.¹¹ Cover illustrates that the victim experiences domination from the outset.¹² The violence does not only start when the victim loses his freedom or property. It starts with the possibility that the subject’s interpretation of the law might be rejected and that of the authoritative legal interpreter imposed upon the subject who then becomes the victim.¹³ The subject is being dominated and the authoritative interpreter dominates from the outset.¹⁴ This also destroys whatever common interpretation there might have existed between the authoritative interpreter and the subject, because it is not the common interpretation that is imposed upon the dissenting subject, but that of the authoritative interpreter. In other words, the divergent experiences (resulting from the violent imposition of hierarchy) of the subject and the authoritative interpreter during the interpretation process destroy the commonality of their interpretations.¹⁵ The possibility that the subject’s interpretation might be rejected and the consequences thereof militate against any meaning that the subject and the authoritative interpreter might have had in common.

Cover argues that legal interpretation, because of its violent nature and violent behaviour, has three distinct characteristics.¹⁶ Legal interpretation is in the first place a practical activity. Secondly, it is designed to generate credible threats and actual

¹⁰ Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 16. Cover argues that a multiplicity of meaning is often undesirable and could result in anarchy. In its place he proposes critical reflection on meaning and revision in the face of such critical reflection.

¹¹ Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 18.

¹² Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1608; Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 648.

¹³ Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 44.

¹⁴ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1609; Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 7. He remarks “... the force of interpretive commitments...do determine what law means and what law shall do...”.

¹⁵ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1609; Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 9-10. Cover states that “...law is that which holds our reality apart from our visions...”.

¹⁶ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1610; Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 649.

deeds of violence and it does this in an effective way. Finally, legal interpretation is a form of bonded interpretation.

Legal interpretation is a practical activity in the sense that an authoritative interpretation in an institutional setting can be expected to be reacted upon in a predictable way by others with pre-existing roles within the institutional setting.¹⁷ Cover explains that practical wisdom is the imposition of meaning upon an institution and the subsequent restructuring of the institution in the light of that meaning.¹⁸ In other words, when the authoritative interpreter “speaks”, someone “listens” and “does”. When a judge gives judgement in a case it is reasonable to expect that judgement to be enforced by the persons in the judicial system according to their institutional job descriptions. When a judge sentences a convicted criminal to go to gaol or gives an order for the ejection of someone from premises, it can be expected that the relevant authority will place the criminal in prison or that the sheriff will forcibly eject the victim of the ejection order if she does not voluntarily comply with the order. The institutional order therefore ties practical acts to the interpretation by the authoritative interpreter.¹⁹ Cover then correctly states that the interpretations are themselves practices. The interpretive act cannot give itself effect.²⁰ For legal interpretation to have an effect in the institutional setting, the authoritative interpreter must have an understanding of the possible institutional response to his interpretation. The judge must know or at least have an idea of the effect that her judgement will have upon the institutional machinery that enforces her judgements, otherwise her interpretation would no longer have the effect that she desired it to have. Legal interpretation as a practical activity involves authorized institutional responses and links between the interpretation and the resulting institutional response.

¹⁷ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1611; Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 9. Here he states that “...law may be viewed as a system of tension or a bridge linking a concept of reality to an imagined alternative- that is, as a connective between two states of affairs both of which can only be represented in their normative significance only through the devices of narrative...”.

¹⁸ Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 44; Van Oenen “Finding Cover” (2004) 15 *Law & Critique* 139 at 143. Van Oenen calls this moment the “...cleaving of origin...”. He explains that any originating act, or legal decision for that matter, involves the reduction from possibilities to solution and that this delineation always involves violence.

¹⁹ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1611; Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 649.

²⁰ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1612.

Legal interpretation is designed to create credible threats and actual deeds of violence.²¹ Cover illustrates that most people avoid the infliction of pain on others because of our psychological, cultural and moral conditioning.²² While there are certain exceptions, for example sadomasochists and people suffering from psychological illnesses, most of us would not intentionally inflict harm on others. However, there are certain social triggers or cues that suppress our avoidance of violence in certain circumstances – for example, I will not hesitate to fight back if someone assaulted me.²³ The elements of inhibition of harm against others and suppression of that inhibition form the conditions in which legal interpretation is possible. Cover demonstrates that these elements make law possible and necessary. Law would not be necessary if our inhibition against violence were perfect; and law would not be possible if the suppression of our inhibition against violence were not possible. Because law depends upon violence, the link between legal interpretation and the suppression of the inhibition against violence is important. Interpretations are distinct from the violent acts that they mandate.²⁴ It is crucial to understand how the violence in the institutional domain of law is authorized and legitimised by the act of legal interpretation. Cover shows that it is the specific institutional and hierarchical context that provides the link between the violent act and the suppression of the inhibition against violence by legal interpretation.²⁵ In the social and institutional setting recognized as a legal context, the interpretations of authoritative interpreters serve as triggers for agentic behaviour.²⁶ While judges seem to provide their audience with their own interpretation of the case at hand, they also engage in a process that overrides the inhibition against violent behaviour of a substantial part of their

²¹ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 649; Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 18.

²² Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1613. “Agentic” relates to the “command and obey” structure between the court and the institutions geared at the implementation of the decisions of the court, much like an agent must act on the legally relevant mandate by her principal.

²³ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1613; Van Oenen “Finding Cover” (2004) 15 *Law & Critique* 139 at 143.

²⁴ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1613; Van Oenen “Finding Cover” (2004) 15 *Law & Critique* 139 at 142. Van Oenen remarks that the distance between the interpretation and the violence it causes is similar to the distinction between the violence of law and the violence that establishes law. The violence that establishes law always has a hand in the violence of the law because all legal violence is ultimately based on the original violence that caused law, but the originating violence is distinct from the legal interpretive violence because only a replay of the original violence can lead to a change in the character of the law. Likewise, violent acts are always ultimately caused by the legal interpretation, but a change in its violent nature requires a different legal interpretation.

²⁵ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1614.

²⁶ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1615.

audience. Legal interpretation therefore creates not only meaning, but also an institutional interpretation of that meaning in order to act upon it.

The act of legal interpretation must be linked to the violent act in some way, in other words there must be a condition of effective domination.²⁷ These conditions flow from the institutional setting.²⁸ The legal system will usually have conditions for violent behaviour and the authoritative interpreter must abide by them.²⁹ For example, the rules of procedure must be followed before someone can be sentenced or the court can give judgement on a matter. Effective domination can only occur in the correct institutional setting. Outside of this setting an interpretation would cease to be a legal interpretation.³⁰

Cover finally regards legal interpretation as bonded interpretation.³¹ This is explained as the continuous vital relationship between the understanding of the text and the actions that follow on that. Legal interpretation cannot be understood apart from the violent acts it occasions. Importantly, while coherent legal meaning is part of legal interpretation, it is potentially in conflict with the need to generate effective action in a violent context.³² This means that what is “right” is not always possible. More importantly, neither the coherent meaning nor the action is possible without an institutional structure of social cooperation.³³ Legal interpretation is bound to the institutional structure for conditions of effective domination but also for the meaning

²⁷ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1616; Van Oenen “Finding Cover” (2004) 15 *Law & Critique* 139 at 141; Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 5 & 18. Cover remarks at 5 that “...[i]n this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse...”.

²⁸ Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 47 & 53.

²⁹ The sheriff will not attach the property of a person because of an utterance made to him by a judge while they were playing a round of golf at the country club. Likewise, even in court, a bailiff would not throw someone in jail simply because the judge remarked that he disliked the person. The conditions for effective domination must be present.

³⁰ It should be kept in mind that the institutional setting is something that needs to be interpreted. It cannot serve as a constraint in the positivist sense of the word. See Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 318.

³¹ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1617; Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 649; Van Oenen “Finding Cover” (2004) 15 *Law & Critique* 139 at 140; Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 11.

³² Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1617; Cover “Foreword: *Nomos and Narrative*” (1983) 97 *Harvard LR* 4 at 40. Cover explains “...[i]nterpretation always takes place in the shadow of coercion...”.

³³ Cover “Violence and the Word” (1986) 95 *Yale LJ* 1601 at 1617.

that is created. Legal meaning consists both of the normative meaning and the action that follows in the institutional setting.

Cover provides us with convincing reasons why legal interpretation is different from other forms of interpretation without expressly preferring one theory of interpretation to another. The positivist and the relativist can agree on this characterization of legal interpretation without having to agree on the exact process by which we get from text to meaning.³⁴ The relevance of Cover's analysis lies in the responsibility he places on the shoulders of the legal interpretive theorist: The theorist must realize that she is dealing with violence and pain in an institutional setting where her findings have real consequences in the world.³⁵ The interpretive process one advocates does not only affect meaning, it also affects whether someone will be heard, evicted or even imprisoned. With this important insight in mind we can now move on to the discussion of the link between legal interpretation and meaning.

3. Plain meaning, objective meaning and natural meaning

3.1 Introduction

In this section various interpretation theories are discussed, ranging from the plain legal language movement (PLLM) and theories of objective meaning to natural law theories (metaphysics). These theories are grouped together because they share the assumption that language, if used correctly, can produce determinate meaning. Central to most of these theories is the assumption that language has a functional nature. Functionalists argue that language serves a pointing out (or sign-signified) function, and if the text creator is careful with the words she uses, and the interpreter can manage to link the text with that which it signifies, misunderstandings will be eliminated. As far as legal interpretation goes, most of the theories discussed in this section involve a search for *the* meaning of the text (as opposed to the postmodern insistence that there will always be more than one meaning), and many of the theories

³⁴ These are the two extremes in legal interpretation. Positivists believe that interpretations are restricted by rules of interpretation, the intention of the author of the text or language itself, while relativists argue that there can be no restriction what so ever on interpretation.

³⁵ Van Oenen "Finding Cover" (2004) 15 *Law & Critique* 139 at 140. Van Oenen reminds us that we will always need interpretations as a cover for legal violence, but that the legal interpretation should always remind us of the violent nature that it occasions in the same way that scar tissue remind us of the pain of the wound.

justify the sense arrived at after the interpretation process as the true, natural or objective meaning of the text.

3.2 Objective meaning theory

The first theory of language under discussion is the objective meaning theory held by legal positivists.³⁶ The main contention of this theory is that language has objective or determinate meaning independent of context. These meanings are usually described as the core meanings of words. This belief has important implications for interpretation. If words have objective meaning, an interpretation of them can be right or wrong.³⁷ Furthermore, the rightness or wrongness of the interpretation can be determined regardless of the context.³⁸

It should be noted that very few scholars contend openly that language has objective meaning, but often their interpretive strategy rests on just this assumption.³⁹ Common examples of this are objective intentionalism as a theory of contractual interpretation⁴⁰ and purposive interpretation in the field of statutory interpretation.⁴¹ With regard to objective intentionalism, the aim is to ascertain what the objectively manifested intention of the author is. If language were not determinate, the meaning of the text would depend on the interpreter alone (and this is precisely what the theory aims to avoid).⁴² As far as purposive interpretation is concerned, the aim is to reconcile the interpretation of the text (in the specific circumstance) with its purpose.

³⁶ Dworkin *The Philosophy of Law* (1977) at 54.

³⁷ Bix *Law, Language and Legal Determinacy* (1993) at 64.

³⁸ Bix *Law, Language and Legal Determinacy* (1993) at 65.

³⁹ Campbell "Grounding Theories of Legal Interpretation" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 32.

⁴⁰ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 29. Where contracts are governed by legislation, objective intentionalism is also often favoured. See for example *Kalil v Standard Bank of SA Ltd* 1967 (4) SA 550 (A) at 556; *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202; *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768; *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*, 2004 (3) SA 160 (SCA) at 166.

⁴¹ Du Plessis *Re-Interpretation of Statutes* (2002) at 96; De Ville *Constitutional and Statutory Interpretation* (2000) at 141; De Ville "Meaning and Statutory Interpretation" (1999) 62 *THRHR* 373 at 376; Botha *Statutory Interpretation: An Introduction for Students* (1998) at 31; *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) at 159-160; *McLean v SASOL Mine (Pty) Ltd Secunda Collieries*; *McLean v SASOL Pension Fund* 2003 (6) SA 254 (W) at 268-269; *Nkosi and another v Bührman* 2002 (1) SA 372 (SCA) at 388; *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) at 739.

⁴² See further chapter 5.

If language were not determinate, the purpose of the statute would not be of much use, since it would be just as indeterminate as the text itself.⁴³

The positivist model of interpretation distinguishes between interpretation in the weak sense and interpretation in the strong sense.⁴⁴ Uncontroversial interpretation or interpretation in the weak sense occurs when the meaning of the text is readily available to the interpreter. Positivists do not see this as a construction of meaning, but simply as a deduction of meaning from the text.⁴⁵ Interpretation in the strong sense, on the other hand, is required to make a text interpretable in the weak sense. Positivists contend that interpretation in the strong sense is only necessary when there is some vagueness, ambiguity or obscurity in the text because the author neglected to make sure that the text reflected clearly what he wanted it to reflect.⁴⁶ The strong interpretation of the text therefore leaves interpreters with a text that is clear and precise. The interpreter can then proceed to “read” or interpret the text in the weak sense and deduce the plain or ordinary meaning from the text.⁴⁷ It is clear from this distinction that positivists argue that there is a difference between rule making and rule application.⁴⁸ It is also assumed that it is preferable that the interpreter should not have creative input and that the instances where this is permitted are limited to the

⁴³ See further chapter 5 section 3.

⁴⁴ Campbell “Grounding Theories of Legal Interpretation” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 31.

⁴⁵ Campbell “Grounding Theories of Legal Interpretation” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 31; Schwarzschild “Mad Dogmas and Englishmen: How Other People Interpret and Why” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 93. It is also telling that positivists almost always talk of judges when they are discussing interpreters. Interpreters should not make meaning, but if someone has to creative, let it be the judges. Hopefully they will be responsible!?! This shows how deeply the idea that interpreting in the weak sense is regarded as the norm and interpretation as creation the exception have been embedded.

⁴⁶ Campbell “Grounding Theories of Legal Interpretation” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 31; Schwarzschild “Mad Dogmas and Englishmen: How Other People Interpret and Why” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 93.

⁴⁷ Campbell “Grounding Theories of Legal Interpretation” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 31. The same assumption that the PLLM make is of course also made here. It is assumed that interpreters share a socio-linguistic context, in other words they agree what words mean on a general level.

⁴⁸ In positivist legal theory rule making consists of the creation of texts aimed at regulating behaviour. On the other hand, rule applying happens when the (rule) text (which is assumed to already have meaning) is applied to a specific situation. It is often argued that interpretation of legal texts is only concerned with the latter.

situation where the text creator “slipped up” and did not express himself clearly enough.⁴⁹

Positivist lawyers are encouraged to be “careful speakers”.⁵⁰ Morrison explains that a careful speaker is one who takes care with expression and investigates the possible meanings inherent in his speech.⁵¹ If a speaker or author foresees that a certain expression might be ambiguous, he will substitute that expression with one that has more determinate meaning, or take care to explain the expression to his audience. In short, the author of the text must predetermine the possible interpretations that the text he creates allows for. The second aspect of careful speaking involves interpretation. A careful interpreter is one who constantly questions the speaker or author’s intention.⁵² By so doing the interpreter is always aware of the meaning of the text. The careful speaker/interpreter can only be more successful than the normal interpreter if the text and meaning (signifier and signified) can be predetermined by careful consideration and the author of the text can communicate his intention unambiguously to the careful interpreter. In South Africa the courts often call for objective interpretation of contracts.⁵³

⁴⁹ Campbell “Grounding Theories of Legal Interpretation” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 31; Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 144.

⁵⁰ Morrison “Excursions into the Nature of Legal Language” in Schauer (ed) *Law and Language* (1993) at 20.

⁵¹ Morrison “Excursions into the Nature of Legal Language” in Schauer (ed) *Law and Language* (1993) at 20.

⁵² Morrison “Excursions into the Nature of Legal Language” in Schauer (ed) *Law and Language* (1993) at 20. Presence and by implication face to face communication is preferred to non-presence or writing.

⁵³ *Mackay v Legal Aid Board* 2003 (1) SA 271 (SE) at 287; *NBS Bank LTD v Cape Produce Co (Pty) Ltd & Others* 2002 (1) SA 396 (SCA) at 408; *South African Eagle Insurance Co Ltd v NBS Bank Ltd* 2002 (1) SA 560 (SCA) at 573; *Church of the Province of Southern Africa, Diocese of Cape Town v CCMA & Others* 2002 (3) SA 385 (LC) at 394; *ABSA Bank Ltd v Deeb & Others* 1999 (2) SA 656 (N) at 662. Contractual interpreters often argue that the interpretation of contract is merely a way of reading a contract and that it should never amount to a construction of a contract for the parties. This so-called “objective reading” of the contract terms corresponds exactly with the positivist contention that normal interpretation is actually no interpretation at all, because the interpreter is merely extracting meaning that is already there in the text. The parties to the contract are seen as the only creative parties (in the sense that they are the only creators of meaning) provided if they express themselves properly. The statement that “the court will not make a contract for the parties” seems to suggest that the ideal situation with regard to interpretation of contracts is one where the court does not have to take any responsibility for the meaning that is attributed to the contract. The parties to the contract must create the meaning that the court can choose whether to enforce or not. Situations where the meaning of the contract is not immediately “apparent” are frowned upon, since the court has to make a decision with regard to the meaning. These situations are usually blamed upon poor language use and in extreme circumstances upon a lack of consensus between the parties. The distinction between objective interpretation and interpretation as a choice rests upon the assumption that contractual language can

3.3 Plain legal language

The Plain Legal Language Movement (PLLM) arose in South Africa in response to the historical tendency of drafting legal instruments in obscure legal jargon.⁵⁴ The PLLM affords a central role to language in the process of development, because language is identified as the “vehicle” for the transmission of information and culture.⁵⁵ The aim of the movement can therefore be described as the improvement of communication through the use of plain legal language, and through this improvement the promotion of development.

Legal language is portrayed by the PLLM as a “language for special purposes”.⁵⁶ This means that legal language was formed with specific (legal) concepts in mind. Legal language corresponds with the objects, people and processes it denotes because it is formulated through logical thinking and abstraction.⁵⁷ It is a language created by lawyers, concerning the law (as opposed to everyday language concerning many things). Legal language is regarded as potentially more precise, shorter and intelligible than everyday English.⁵⁸ Legal language is oriented towards legal institutions rather than the public at large and it is precisely this orientation that renders legal language unintelligible to the general public.⁵⁹ The problem is thus not so much communication between lawyers as between lawyers and non-lawyers. The point is that lawyers, versed in this language (much like a scientist versed in the use of scientific symbols) know what other lawyers mean when they use this language, and the problem is not so much that lawyers do not understand each other but rather that

simply be read if it is clear enough. In sections 5 and 6 this assumption will be subjected to critical scrutiny.

⁵⁴ Viljoen & Nienaber “Introduction” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 9; Omar “Plain Language, the Law and the Right to Information” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 57.

⁵⁵ Alberts “Plain Language in a Multilingual Society” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 91.

⁵⁶ Alberts “Plain Language in a Multilingual Society” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 90; Morrison “Excursions into the Nature of Legal Language” in Schauer (ed) *Law and Language* (1993) at 19.

⁵⁷ Alberts “Plain Language in a Multilingual Society” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 90.

⁵⁸ Alberts “Plain Language in a Multilingual Society” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 91; Morrison “Excursions into the Nature of Legal Language” in Schauer (ed) *Law and Language* (1993) at 22.

⁵⁹ Alberts “Plain Language in a Multilingual Society” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 91; Morrison “Excursions into the Nature of Legal Language” in Schauer (ed) *Law and Language* (1993) at 22.

the public at large (who is not necessarily versed in this language) does not understand lawyers.⁶⁰

Daniels states that the key to good plain legal language communication is to achieve a balance between precise communication and plain communication.⁶¹ The important assumption is therefore that understanding is somehow linked to the language usage, and if we can get the art of communication right, the problems of indeterminacy will disappear. If we can get a perfect measure of our audience, and if we ensure that we communicate in language that is “plain” to that audience and we formulate what we want to say precisely in that “plain” language, the result will be perfect understanding of the communication.⁶²

⁶⁰ Fine “Plain Language Communication: Approaches & Challenges” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 19; Campbell “Grounding Theories of Legal Interpretation” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 31. Derrick Fine defines plain legal language in general as the capacity of the community, government and legal sector to communicate plainly and effectively. Plain language is defined as clear, understandable and accessible language that is user friendly. He distinguishes between interpreters at different levels of linguistic sophistication and interpreters who are all from a specific level. Fine places language on a continuum from difficult to plain. He argues that text creators must always attempt to create texts that are as plain as possible. The “plainness” of language is determined by the audience, the complexity of the material and what Fine calls “plain language skill”. The PLLM assumes that enhanced understanding flows from communication that is as simple as possible. It follows from this that the use of plain legal language in communication, especially legal communication, will overcome many of the interpretive difficulties encountered by legal interpreters.

⁶¹ Daniels “Plain Language in the Current Practice of Drafting” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 82.

⁶² Daniels “Plain Language in the Current Practice of Drafting” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 82; Alberts “Plain Language in a Multilingual Society” in Viljoen & Nienaber (eds) *Plain Legal Language for a New Democracy* (2001) at 90. The standardization of language is presented as the solution to the problem of different audiences. The PLLM argues that precise communication is only possible if the receiver and the sender of the message attach the same meaning to the message. Various strategies are proposed to achieve standardization of language. The first strategy is to ensure that the linguistic labels (signifiers) attached to objects (signified) correlate across the different audiences. The ideal situation for the PLLM is where one signifier signifies one signified. In other words, the linguistic label must be attached to only one object. Standardization of terms is required when creating new signifiers. The creator must make sure of the underlying meaning of the signifier that he creates and its translation into other audiences.⁶² Five ways of creating new signifiers are identified. Standardization of the present system of language is preferred to the creation of new terms.

The second strategy is to eliminate culture- and context-specific signifiers. This is believed to be possible if the communicator has a sound knowledge of her own language and the language of the targeted cultural group. The communicator must translate the culture-specific signifier into the general language signifier. In this way the problem of signifier differentiation can be eliminated.

The third strategy is to deal with the interrelationship of terms across different audiences. The meanings of terms often change when they are used in conjunction with other terms. The PLLM proposes to deal with this by not studying the terms in isolation, but to study them as concepts. They want to capture the meaning that results from the relationship between the terms rather than to study the terms in isolation.

Excusus: the plain meaning rule

The notion of plain or ordinary meaning plays an important role in contractual interpretation.⁶³ According to South African courts, the so-called plain meaning rule of contractual interpretation requires that words must be afforded their plain, ordinary and popular meaning when a contract is interpreted, unless the context suggests otherwise.⁶⁴ The burden of proof is on the party who contends that the meaning of the text in issue deviates from the ordinary meaning.⁶⁵ The rule itself can have at least two understandings that are important in order to establish possible views courts might hold of plain meaning. The first understanding of the rule is that meaning exists on a general level that is readily accessible to the interpreter, and that interpreters can assume that the parties to the contract communicate on this general level, except when the context suggests otherwise. This level of communication is called ordinary or popular communication and it correlates closely with the contentions of the plain legal language movement. The context that will require deviation from the plain meaning is the exception to the general rule. This understanding of the rule seems to be the most likely one if one keeps in mind that the onus of proving meanings other than the plain meaning rests on the person who avers such meanings. The implication of this understanding of the rule is that the use of ordinary language, when drawing up contracts, will greatly diminish the interpretive difficulties encountered with the interpretation of contracts. This also means that this rule will fail where the PLLM fails because the rule and the PLLM rest upon similar assumptions about the nature of communication.

However, there is a second understanding of the rule according to which, context plays the central role. The rule then requires the court to investigate the context of each case to interpret the contract; only if the context does not prescribe a conflicting meaning the interpreter can take the words of the contract to have their ordinary meaning. The fact that the onus of proof is on the party who claims that a specific contextual meaning is correct is not fatal to this understanding of the rule, because

⁶³ *Coertzen v Gerard NO & Another* 1997 (2) SA 836 (O) at 845; *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A) at 38; *Da Meyer Consultants CC v Allied Electronics Corporation Ltd & Others* 1994 (4) SA 451 (W) at 454; *De Ujfalussy v De Ujfalussy* 1989 (3) SA 18 (A) at 23.

⁶⁴ This rule was first formulated by Wessels AJ in *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464-5.

⁶⁵ *Cornelius Principles of the Interpretation of Contracts in South Africa* (2002) at 121.

plain meaning is dependent upon the discharge of this onus. The finding of a plain meaning is either the result of a proven special context (which will render the meaning general in that context) proven by the onus discharger,⁶⁶ or by a failure to prove such a special context, the imposition of the courts' idea of plain meaning. In other words, the meaning that is ultimately decided upon would either be an imposed plain meaning (if the averrer fails to discharge the onus) or a proven plain meaning. This understanding does not align with the contentions of the PLLM because the court does not suggest that plain meaning is the norm and context the exception. Rather, the court uses plain meaning as the exception when the context does not provide the interpreter with the meaning. This plain meaning claim is much softer in the sense that the court recognizes that it imposes something on the parties by using plain meaning, because context provides the meaning and the court will only fall back on plain meaning when it cannot "read" the context. Unlike the first understanding of the rule, the present one does not suggest that the use of plain language will clarify meaning or simplify the interpretive process, since contractual meaning is seen as the result of context rather than the plain meaning of the language used.⁶⁷

3.4 Metaphysical realism

The theory of interpretation known as metaphysical realism can be described as the opposite of the plain language theories. The PLLM argues that effective communication results from the study and effective use of signifiers or words, while the metaphysical realists argue that effective communication results from the study of the signifieds or the real world out there. Metaphysical realists contend that any communication is based on a metaphysical understanding of language.⁶⁸ In other words, when we speak we intend to convey meaning based on the way things are rather than the way language portrays it. Language is regarded as an imperfect tool for describing reality.⁶⁹ Metaphysical realists agree that language may be ambiguous, but language should not be the focus of our efforts to avoid ambiguity. We should rather look at the way things really are.

⁶⁶ If he (the party who has to discharge the onus) claims that the relevant meaning is plain meaning because the context in which the contract was concluded was a general context. In other words he wants the court to accept *his* plain meaning and not impose plain meaning *as they see it*.

⁶⁷ The role of context in the interpretive process is discussed in sections 4 and 5 of this chapter.

⁶⁸ Bix *Law, Language and Legal Determinacy* (1993) at 137.

⁶⁹ Bix *Law, Language and Legal Determinacy* (1993) at 138.

In the place of the positivist semantic theory, metaphysical realists propose a theory according to which the meaning of signifiers is determined by the actual reality of the signified.⁷⁰ This theory implies that meaning is not dependent upon the whims of the communicators but founded upon reality. The content of meaning depends upon the characteristics of the actual object rather than the word that signifies the object. Reality provides a standard against which meaning can be measured. Consequently, different opinions regarding the meaning of terms can exist and a differentiation between belief and reality can be maintained.

Metaphysical realists have proposed a very specific method of interpretation based on two contentions. The first contention is that there are real answers to our questions in the real world — there exists a reality beyond language that can provide real answers to our real questions.⁷¹ The second contention is that legal interpreters must look at this “real” reality when they interpret legal texts.⁷² The interpreter must look beyond the text to the “actual expressions” of the authors or the “actual” meaning that the text intended to convey. The metaphysical realist is therefore looking for something outside of language in the “real” world that determines the meaning of indeterminate terms.⁷³ This means that the meaning of a term is independent of the interpreter and that meaning can be established and determined objectively.⁷⁴

⁷⁰ Bix *Law, Language and Legal Determinacy* (1993) at 158.

⁷¹ Remember that metaphysical realists argue that our communications are based on a conscious or unconscious belief that a metaphysical reality exists out there. Our language is a system of imperfect signifiers pointing to the signifieds that form the reality that we want to communicate. We want to express reality as it is, but we are hampered by language. See Bix *Law, Language and Legal Determinacy* (1993) at 138; Radin “Reconsidering the Rule of Law” in Schauer (ed) *Law and Language* (1993) at 302.

⁷² Bix *Law, Language and Legal Determinacy* (1993) at 138; Radin “Reconsidering the Rule of Law” in Schauer (ed) *Law and Language* (1993) at 302.

⁷³ Bix *Law, Language and Legal Determinacy* (1993) at 149. More specifically, metaphysical realists believe in natural rights. This entails four assumptions. The first assumption is that moral entities exist independently of the belief in their existence. This “morality” exists alongside of our perception and even our linguistic reality. It is something, according to the metaphysical realists, that we must try to know the true nature of because we do not construct it but are influenced by it. The second assumption is that rights exist as a distinct part of moral entities. Rights are something concrete alongside our understanding rather than through our understanding. The third assumption is that rights are pre-legal and pre-conventional entities, in other words they exist independently of such laws and conventions. The fourth assumption is that people have rights simply by virtue of being human beings. Rights are fundamental in the sense that they are not earned or acquired. See Moore “Natural Rights, Judicial Review & Constitutional Interpretation” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 211; Radin “Reconsidering the Rule of Law” in Schauer (ed) *Law and Language* (1993) at 303 fn 106.

⁷⁴ Bix *Law, Language and Legal Determinacy* (1993) at 149.

According to metaphysical realist semantic theory words mainly have an ostension function.⁷⁵ Words are acts of pointing to some real thing in the real world. Words are not the summary of a person's belief regarding that word, or even some communal consensus of meaning.⁷⁶ However, the connection of the term to the real object is done by the community.⁷⁷ The community ascribes certain attributes to the real object and its kind. Following this, the word or signifier is attached to the object or signified that fits the attributes assigned to the real kind.

The metaphysical realists criticize the semantic theory held by the PLLM and other positivists, according to which meaning must be associated with the properties that the speaker associates with that term.⁷⁸ Two shortcomings are identified with regard to this semantic theory.⁷⁹ The first is the inability of a theory that rests upon the beliefs of the speakers to explain disagreement. Because the speakers provide the terms with meaning, a speaker cannot be wrong in her assessment of meaning and positivists are theoretically forced to conclude that the speakers are speaking about different things when they disagree about the meaning of a term.⁸⁰ A positivist semantic theory cannot distinguish between changes in the signified as supposed to changes in belief about the signified either.⁸¹ In other words, the meaning of the signifier in the positivist scheme will sometimes change even though the signified stays the same, and the meaning can stay the same even if the signified changes. Both these contentions rest upon an assumption that meaning without an objective basis is delivered into the hands of the speaker to shape it as she pleases. The speakers cannot agree that they disagree because they do not have any way to measure right or wrong. The speakers cannot differentiate between change in substance and change in perception because they cannot measure where perception starts and substance ends.

⁷⁵ Bix *Law, Language and Legal Determinacy* (1993) at 162. "Ostension" is described in the Oxford Dictionary as the act of "...directly demonstrating that which is signified by the term...". See Allen (ed) *The Concise Oxford Dictionary of Current English* (1992) at 840.

⁷⁶ Bix *Law, Language and Legal Determinacy* (1993) at 162.

⁷⁷ Bix *Law, Language and Legal Determinacy* (1993) at 163.

⁷⁸ The PLLM contend that we must agree about the meaning of terms so that a plain language can be created that will facilitate better communication. The speakers must agree what they want to say when they use certain terms. If X & Y agreed that Z=1 even if Z=2 the PLLM will be happy. Metaphysical realists would argue that we should rather look at the true nature of Z. That way we can objectively evaluate the value of Z when there is a disagreement.

⁷⁹ Bix *Law, Language and Legal Determinacy* (1993) at 158.

⁸⁰ Bix *Law, Language and Legal Determinacy* (1993) at 158.

⁸¹ Bix *Law, Language and Legal Determinacy* (1993) at 158.

These criticisms against the positivist model are also based on the assumption that there is in fact a reality apart from our linguistic comprehension of the world, in other words a metaphysical reality.

3.5 Summary of objectivist theories

Objectivist positivists argue that we do not understand each other when and because we do not take enough care when we speak to make sure that our signifiers correspond with our intended signifieds. They hold that interpretation in the strong sense is only necessary when and because we do not speak carefully. If we spoke carefully and chose our signifiers carefully so that they correspond with our intended signified, meaning indeterminacy would be prevented. This approach therefore assumes that the perfect correlation between signifier and signified already exists, it is only for the speaker to make these matches successfully. The PLLM argues that misunderstandings result from the use of specialized language, cultural linguistic differences and diverse signifier-signified relationships. They propose to solve these problems by simplifying the speaker-audience relationship and agreement regarding the signifier-signified relationship. If we use “plain” language and agree about the meaning of that language, we will understand each other perfectly. Metaphysical realists, on the other hand, argue that the relationship between signifier and signified is not perfect and that this imperfection is the cause of indeterminacy. They assert that the true nature of the signified should be the subject of investigation. If we want perfectly correlating signifiers and signifieds we must determine the true nature of the signifieds and attach to them signifiers that reflect the true nature of the signifieds. That way we can judge when an utterance or script is true, false or based on a misunderstanding. Although positivism, the PLLM (as a specific form of objectivist positivism) and metaphysical realism seem to be irreconcilably different, they share the assumptions that meaning determinacy is dependent upon a correlation between the signifier and the signified. To sum up, the PLLM, positivists and metaphysical realists depend upon the possibility that signifiers and signifieds can correlate and that strong interpretation can be avoided by thus avoiding indeterminate meaning. All these theories assume that objective or reliable meaning is possible and that it can be established independently of the context and of interpretation.

3.6 How objective are the objective theories?

Stanley Fish argues that in order to claim that the real world correlates with language, one has to make extensive claims regarding the nature of reality, the structure of the mind, the dynamics of perception, the autonomy of the self, the independence of fact from value and, most importantly, the independence of meaning from interpretation.⁸² The following discussion centers on Fish's arguments against the assumption that language is a purely formal description of being. Because the legal positivists and natural (or metaphysically realist) lawyers share the assumption that language and what it signifies can correlate, I will discuss Fish's criticism of their position as a general critique of objectivism.

Because objectivists argue that language (and, by implication, communication) can be determinate if signifiers correlate with the signified, the possibility must exist that the signifiers do not correlate with the signifieds.⁸³ In other words, for it to be better that we say exactly what we mean, and assuming that we can in fact say what we mean, it must be possible that we can say what we do not mean. This by itself does not upset the notion of objective meaning as advanced by objectivists, but it introduces the need to distinguish between what we mean and what we do not mean. If signifiers can correlate exactly with signifieds, one must be able to distinguish between cases where signifiers do correlate and when they do not. We cannot know if the signified correlates with the signifier without this distinction. In other words, for someone to be able to know what I mean, they must be able to know what I do not mean. The problem facing objectivists is the linguistic situatedness of the distinction between correlations of signifier and signified and non-correlation. Language can only signify because it can also miss-signify. We can only understand that an apple is an apple because we can say that a pear is an apple or an apple is a pear and know that it is not.⁸⁴ Words that cannot be appropriated for different meanings cannot be words, because words can only be intelligible when opposed to other words.⁸⁵ The very element that objectivists want to limit provides us with crucial elements of meaning.

⁸² Fish "How Ordinary is Ordinary Language?" in *Fish Is There a Text in This Class?* (1980) at 97.

⁸³ Fish "How Ordinary is Ordinary Language?" in *Fish Is There a Text in This Class?* (1980) at 101.

⁸⁴ I do not mean this in a metaphysically realist way, in other words that we know the true nature of an apple. An apple can also be a computer or an example of the genus fruit, which might also include a pear etc The point is that signifiers must be divorced or separate from the signified in order for them to have any usefulness.

⁸⁵ This specific occurrence is called *difference* and it is explained in more detail in the section 7.

To summarize: Objectivists cannot (objectively) distinguish between true and untrue statements without resorting to an unrealistic description of language.

There are various other objections to the contentions of objectivists, for example the lack of an all-inclusive interpretive community from which one can judge meanings,⁸⁶ the linguistic situatedness of meaning and the consequent lack of an objective Archimedes point of reference from where we can agree on meaning.⁸⁷ Most of these criticisms are discussed in the remainder of this chapter because they flow from the discussion of other interpretive practices.

4. Constraining rules and interpretation

4.1 Introduction

Many theorists, especially positivists, are uncomfortable with the notion that interpreters construct meaning.⁸⁸ Meaning relativism is portrayed as a state of anarchy where the law cannot be effective and the application of law to a particular situation is arbitrary and unrestrained. Many theorists recognize that language does not have objective meaning and that objective theories of interpretation are untenable. However, most of these critics believe that meaning is best managed when one can limit the possible interpretations of a text. Since language-use fails to constrain the possible meanings of texts, such theorists resort to rules of interpretation to limit the possible meanings that can be attached to a text. These rules are perceived to play an important role in contractual interpretation, where the ultimate interpretive catastrophe is perceived to be a court that uses subjective judgement when interpreting a contract.⁸⁹

⁸⁶ This objection complicates the task of all objectivists, but is especially fatal to the PLLM. Without some common ground (or interpretive community) from where “plain meaning” can flow we can never have meaning that is accessible to all persons because some people will always stand outside the interpretive community that is regarded as the common ground. As a result no meaning can ever be completely plain.

⁸⁷ This objection renders the theory of the metaphysical realists at the same time meaningless and impossible to implement. The theory is meaningless because even if a “real world out there” exists we cannot know it. Because we cannot measure or evaluate the “real world” against language, we cannot conform to that reality.

⁸⁸ Fiss “Objectivity and Interpretation” (1982) 34 *Stanford LR* 739 at 740.

⁸⁹ See *ABSA Bank Ltd v Deeb & Others* 1999 (2) SA 656 (N) at 663; *Phone-a-Copy Worldwide (Pty) Ltd v Orkin & Another* (1986) (1) SA 729 (A) at 734; Detmold “Law as the Structure of Meaning” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 164.

4.2 Rule theories

A good place to start the discussion of this approach is to look at the rule theorist's definition of the role of rules of interpretation. William Twining wrote the following about rules of interpretation: "... 'Rule' is used here to mean a general norm mandating or guiding conduct or action in a given type of situation...".⁹⁰ The general idea of the rules of interpretation is to guide the behaviour of the interpreter in such a manner that the meaning that the interpreter produces is pre-determinable to a large extent. In other words, while it is acknowledged that the interpreter plays an important part in the process where meaning is produced, the rules of interpretation are an attempt to limit the role of the interpreter.

Rules of interpretation have four characteristics that play an important part in the rule theorist's interpretive strategy. The first characteristic is the normative or prescriptive nature of the rules:⁹¹ Rules say what must be done in a situation rather than what is done in a situation. Rules prescribe rather than describe. Secondly, rules are general in that they govern behaviour in different circumstances and contexts rather than in specific contexts:⁹² Rules must be applicable in different scenarios. The third characteristic of rules is that they guide and serve as standards of behaviour for interpreters.⁹³ Dworkin affirms this by arguing that the best justification of a legal finding or interpretation is to show that it conforms to existing authority and that it is justified in the light of the institution.⁹⁴ Finally, rules provide justification for behaviour according to those rules.⁹⁵ Rules are said to be the means by which values can be implemented.⁹⁶

Rule theorists have specific ways of dealing with open texture or vague language (of the interpreted text) that might inhibit the application of the rules of interpretation.

⁹⁰ Twining & Miers *How To Do Things With Rules* (1999) at 123.

⁹¹ Twining & Miers *How To Do Things With Rules* (1999) at 123; Radin "Reconsidering the Rule of Law" in Schauer (ed) *Law and Language* (1993) at 284.

⁹² Twining & Miers *How To Do Things With Rules* (1999) at 123; Radin "Reconsidering the Rule of Law" in Schauer (ed) *Law and Language* (1993) at 284.

⁹³ Twining & Miers *How To Do Things With Rules* (1999) at 124; Radin "Reconsidering the Rule of Law" in Schauer (ed) *Law and Language* (1993) at 284.

⁹⁴ Eg rules of interpretation and precedent. See Dworkin *Law's Empire* (1986) at 243. In sections 5 and 6 below, the institutional part of Dworkin's statement will be discussed in more detail.

⁹⁵ Twining & Miers *How To Do Things With Rules* (1999) at 124; Radin "Reconsidering the Rule of Law" in Schauer (ed) *Law and Language* (1993) at 284.

⁹⁶ Twining & Miers *How To Do Things With Rules* (1999) at 129.

The first way to deal with a vague text is to use the rules of interpretation to ascertain what value must be placed on the text.⁹⁷ In principle this means that vague words are determined by the surrounding words that are not vague. The second strategy (of rule implementation) is to require of the interpreter to choose among permissible meanings the one that is in line with the policy that governs the interpretation of the text.⁹⁸ For example, when interpreting a contract a South Africa interpreter could be asked to choose the meaning that is the closest to the intention of the parties to the contract, because that is the policy of interpreting contracts. The last strategy is to revert to the status quo and assume that a vague text only proposes to change the status quo as far as change is indisputably required by the surrounding language.⁹⁹

The rules of interpretation have a specific function in the rule theorist's scheme of interpretation, namely to guide behaviour.¹⁰⁰ This presupposes that rules can in fact guide behaviour in the direction that the rule-maker intended. In other words, if I make a rule that evidence outside of a contractual text may not be considered to determine the meaning of that contractual text, I must assume that the application of the rule will make a difference in the eventual outcome of the interpretation of the text. The meanings that can be produced must be different, more specifically limited in quantity, under the application of the rule than otherwise. The rules should also guide the interpreter to the kind of meanings that the rule theorist intended when she composed the rules.

Some rule theorists do not make the strong claim that interpretive rules will guide the interpreter to specific meanings. Instead, they argue that the utility of rules of interpretation lies in their clarification function.¹⁰¹ If we take the various rules into consideration we obtain a so-called holistic picture of the interpretive task and

⁹⁷ Bix *Law, Language and Legal Determinacy* (1993) at 31.

⁹⁸ Bix *Law, Language and Legal Determinacy* (1993) at 31.

⁹⁹ Bix *Law, Language and Legal Determinacy* (1993) at 31.

¹⁰⁰ Twining & Miers *How To Do Things With Rules* (1999) at 147; Fiss "Objectivity and Interpretation" (1982) *Stanford LR* 34 739 at 744; Radin "Reconsidering the Rule of Law" in Schauer (ed) *Law and Language* (1993) at 287; Levinson "Law as Literature" in Schauer (ed) *Law and Language* (1993) at 350. Levinson calls this belief weak textualism. Weak textualism is the belief that one has found a scientific method of interpretation. The method of interpretation is regarded as universally applicable. Strong textualists, on the other hand, hold beliefs that are neo-pragmatist and discussion of their theoretical positions will fit in with the discussion of the role of context and community in section 6.

¹⁰¹ Twining & Miers *How To Do Things With Rules* (1999) at 372.

generate meanings that are relevant to our specific circumstances.¹⁰² This approach is similar to the contextual theorist's position that is discussed in the next section. These theorists mostly recognize that language is not determinate, but they seek a way of interpreting that will limit the indeterminacy to the minimum. They assume that the interpreter who looks at the interpretive task from the most angles will get the whole picture and the best answer to his interpretive problem.¹⁰³

There are also rule theorists who argue that law itself is a constraining rule.¹⁰⁴ They differ from contextualists because they argue that law has a constraining function, rather than a constraining effect.¹⁰⁵ These theorists argue that the law does not create new meanings; it rather allows us to find the lawful relation between competing meanings.¹⁰⁶ Detmold explains this concept by referring to the interpretation of contracts.¹⁰⁷ He begins by assuming that two parties, who approach the court to adjudicate their case, have two different interpretations of the contract, namely X and Y. The court must decide which interpretation entails a lawful relationship between the parties. Detmold argues that the court cannot create its own meaning and impose it on the parties, but must find the lawful relationship between the parties' interpretations. In other words the answer, or acceptable interpretation, lies somewhere between X and Y. The judge might think that the real interpretation is Z but she is bound to find only the relationship between X and Y that will be lawful. This conception of the law itself as a constraining rule rests on two assumptions. The first is that the court can know exactly what the parties' interpretations are and know this without itself having to interpret X and Y. This assumption has to do with the nature of communication. For this assumption to be valid, perfect communication of meaning must be possible, in particular perfect communication of the intention of the

¹⁰² Twining & Miers *How To Do Things With Rules* (1999) at 373; Du Plessis "The Jurisprudence of Interpretation and the Exigencies of a New Constitutional Order in South Africa" 1998 *Acta Juridica* 8 at 20; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 45.

¹⁰³ Twining & Miers *How To Do Things With Rules* (1999) at 373; Du Plessis "The Jurisprudence of Interpretation and the Exigencies of a New Constitutional Order in South Africa" 1998 *Acta Juridica* 8 at 20; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 45.

¹⁰⁴ Fiss "Objectivity and Interpretation" (1982) 34 *Stanford LR* 739 at 744.

¹⁰⁵ Contextualists argue that we get meaning because of the special nature of law as a context for interpretation. Their view of interpretation is discussed in the next section of this chapter. The rule theorists, on the other hand, argue that law has a function to create certain meanings. In other words, law is something that we can use to get specific meanings out of a text.

¹⁰⁶ Detmold "Law as the Structure of Meaning" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 164.

¹⁰⁷ Detmold "Law as the Structure of Meaning" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 164-5.

text creator. The second assumption is that the interpretation of the lawful relationship between X and Y by the court could be both constraining and unoriginal.¹⁰⁸ The interpreter must be limited in what it can do because of the legal nature of the interpretive task.¹⁰⁹

Owen Fiss also argues that law places inherent restrictions on the legal interpreter by its institutional nature.¹¹⁰ His view of the practice differs from that of Detmold in that he goes further to state that the legal interpreter's interpretations can be measured against the institutional rules of interpretation to see if it is objectively correct.¹¹¹ Fiss claims that the rules of interpretation are not simply standards or principles held by the legal interpreter, but rather the elements that constitute the legal profession.¹¹² The legal profession is presumably held together by the interpretive rules and the legal interpreter's adherence to them. Fiss might be making one of two claims. The first is that interpretation is limited in a non-absolute way by an interpretive community.¹¹³ However, Fiss is also making another claim. He seems to be suggesting that the interpretive practice in which an interpreter is situated is absolutely restrictive.¹¹⁴ The claim is that any interpretation that does not fall within the boundaries set by legal interpretive practice cannot be a legal interpretation.¹¹⁵ The assumption is of course that we already know what a legal interpretation entails. We know the rules and the rules are objective and uncontroversial because everyone must know *the* rules and not their *interpretation* of the rules. If the rules were something that must be interpreted, Fiss would be back to square one.

¹⁰⁸ I mean unoriginal in the sense that the continuum of possible meanings is provided by the parties and not a product of judicial interpretation.

¹⁰⁹ Detmold "Law as the Structure of Meaning" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 165.

¹¹⁰ Fiss "Objectivity and Interpretation" (1982) 34 *Stanford LR* 739 at 744; Levinson "Law as Literature" in Schauer (ed) *Law and Language* (1993) at 362.

¹¹¹ Fiss "Objectivity and Interpretation" (1982) 34 *Stanford LR* 739 at 745.

¹¹² Fiss "Objectivity and Interpretation" (1982) 34 *Stanford LR* 739 at 745.

¹¹³ This would also place this discussion in the wrong section. It would fit better under the discussion of the influence of context and interpretive community in the next section.

¹¹⁴ Fiss "Objectivity and Interpretation" (1982) 34 *Stanford LR* 739 at 745, 751, 752, 762 and 763; Levinson "Law as Literature" in Schauer (ed) *Law and Language* (1993) at 365.

¹¹⁵ Levinson "Law as Literature" in Schauer (ed) *Law and Language* (1993) at 364.

Frederick Schauer shares the belief that law itself can be a constraining rule but qualifies this with two contentions about the nature of constraining rules.¹¹⁶ The first contention is that rules are only effective in a system of assumptions and practices.¹¹⁷ One can only measure compliance with a rule against contexts and assumptions that already exist. For example, if one would want to enforce a rule that reads “no dogs allowed”, one must have some idea what a dog is. Schauer claims that precedent provides necessary contexts and assumptions.¹¹⁸ The second contention regarding the effectiveness of rules is that rules owe their effectiveness to the internalization of rules as reasons for action by rule-followers.¹¹⁹ In other words, rules can only be effective if persons adhere to the rules because they recognize the rules as something to be adhered to.

Schauer’s contentions regarding the nature of rules move his position closer to contextualism than genuine rule theory. It also shows how closely related rules of interpretation are to other theoretical positions on interpretation. Someone who advocates that the rules of interpretation must play a part in the interpretive process is not necessarily a positivist and can be classified as a contextualist without a great leap of imagination. On the other hand, it also shows how dependent rule theorists’ contentions are on more fundamental beliefs about interpretation. If the positivist contention that rules can constrain interpreters is to prevail, rules have to be objective and above interpretation.¹²⁰ If this is not the case the rules can be just as indeterminate as the language that it is supposed to interpret and as a result the interpreter will be just as unconstrained.

4.3 Criticism against rule theories

I will now turn to the criticism of rule theory. The focus will be on strong rule-theorism, the kind that contends that application of rules of interpretation can stabilize meaning and make it determinable. Strong rule-theory can be described as a position

¹¹⁶ Schauer “Rules and the Rule-Following Argument” in Schauer (ed) *Law and Language* (1993) at 317.

¹¹⁷ Schauer “Rules and the Rule-Following Argument” in Schauer (ed) *Law and Language* (1993) at 317.

¹¹⁸ Schauer “Rules and the Rule-Following Argument” in Schauer (ed) *Law and Language* (1993) at 317.

¹¹⁹ Schauer “Rules and the Rule-Following Argument” in Schauer (ed) *Law and Language* (1993) at 317.

¹²⁰ Levinson “Law as Literature” in Schauer (ed) *Law and Language* (1993) at 346.

where a set of rules is imposed between the reader and the text.¹²¹ These rules specify the weight and relevance that should be afforded to the material and define the procedural circumstances under which the interpretation must take place.¹²² The rules must ultimately guide the interpreter to the meanings that are appropriate in the institutional setting.¹²³ Two underlying assumptions are present here. The first is that rules can be imposed between the reader and the text, in other words from the outside into the interpretive situation. This position also depends upon the assumption that the rules of interpretation are themselves above interpretation in the sense that they already have meaning by the time they are imposed on the interpretive situation. This meaning must be accessible to the interpreter without her having to interpret the rules. The second assumption is that the institution has meaning that it views as appropriate. More specifically, it is assumed that the members of the institutional setting have a shared vision of what can be regarded as ideal meaning.

The assumption that rules are outside of the interpretive process, with a meaning independent of the interpretive situation that they are applied to, is important to rule theorists because it provides an objective tool which can shape interpretations to correlate with the institutional expectations. If this was not the case and interpretive rules were subject to interpretation, different interpreters could interpret the rules differently and rules would lose their utility.¹²⁴ The problem for rule theorists is that rules are in fact texts and they must be interpreted in every situation where the interpreter attempts to apply them.¹²⁵ A good example is provided by the so-called golden rule of interpretation of contracts. This rule states that effect must be given to the subjective intention of the parties to the contract once it becomes known.¹²⁶ The subjective intention is distinguished from the expressed intention of the parties.¹²⁷

¹²¹ Fish "Fish vs. Fiss" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 120.

¹²² Fish "Fish vs. Fiss" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 120; Twining & Miers *How To Do Things With Rules* (1999) at 123; Levinson "Law as Literature" in Schauer (ed) *Law and Language* (1993) at 350.

¹²³ Levinson "Law as Literature" in Schauer (ed) *Law and Language* (1993) at 350; Fish "Fish vs. Fiss" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 120.

¹²⁴ Fish "Fish vs. Fiss" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 121.

¹²⁵ Fish "Fish vs. Fiss" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 121.

¹²⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 28.

¹²⁷ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 28.

The words of the contract must be given the meaning that the parties originally intended (subjective intention), in other words the meaning that they had in mind when they drafted the contractual text. The rule seems clear enough, but it actually opens up various other inquiries, for example: what evidence is allowed in order to find the subjective intention and what if the subjective intentions differs? Efforts to answer these questions will inevitably lead to more questions. The point is that rules of interpretation must also be interpreted and the rules are subject to exactly the same interpretive circumstances as other texts.¹²⁸ Rules can only constrain in so far they are interpreted to do so.

The second assumption, namely a shared institutional vision of ideal meanings, is important to rule theorists because it allows the interpreter to measure her interpretation against the institutional ideal.¹²⁹ If there were no institutional ideal the rules would have no purpose, because there would be no reason to attempt to constrain interpretation. This assumption is false because of the institutional situatedness of both the rules and the ideal.¹³⁰ The rules point towards the ideal and cannot be formulated without an idea of the ideal that the rules are supposed to promote. The golden rule of interpretation can only be understood if one can imagine why such a rule exists, presumably to promote liability by consensus. The rule is situated within an institution where such a rule makes sense. The institutional ideal is therefore linked to the rule and, by implication, to the interpretation of the rule. The ideal can therefore only be a shared ideal in so far it is interpretively possible. The second effect of the institutional situatedness of the ideal is that it can only be constraining in so far as the contextual and communal factors allow. The ideal can only bind the interpreter if he can be bound by institutional and contextual factors.

5. Examining contexts and interpretive communities

5.1 The role of interpretive communities and contexts in interpretation

During the preceding discussions of the nature of legal interpretation the notions of interpretive context and interpretive communities were raised with regard to various

¹²⁸ Fish "Fish vs. Fiss" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 121.

¹²⁹ Fish "Fish vs. Fiss" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 122.

¹³⁰ Fish "Fish vs. Fiss" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 122.

theoretical positions.¹³¹ In this section these concepts will be analyzed and their role in the interpretive process will be discussed. The discussions will range from the view that these concepts can make meaning determinable to the latest theories that contradict the determinacy view.

5.2 Contexts and community as constraints in interpretation

We begin with HLA Hart's explanation of the "general rule".¹³² Hart argues that law cannot exist without the possibility of the communication of shared standards of conduct. He contends that law consists of communications of general standards of conduct to individuals that require of these individuals to act in certain ways under certain circumstances.¹³³ This communication, according to Hart, is best done by means of general rules. When the public can understand the general rule, individuals can draw logical conclusions regarding the desired actions. If a general rule states that "no vehicles are allowed in the park", the individual can see that this rule would include her car, because it might pose a danger to other park users.¹³⁴ Hart argues that the individual can, through general rules, reasonably perceive what the legislator intended to achieve with the rule because he assumes that the legislature and the public share some kind of understanding regarding the meaning of words. Friedrich Waismann's view of the nature of law is very similar to that of Hart with regard to the role of context. He argues that law is always and can only be socially and contextually situated.¹³⁵ Laws are designed to operate in a specific society and to represent the dominant characteristics of that society. Both these writers show that legal interpretation is at least generally dependent upon shared understandings.

Brian Bix takes this insight one step further. He argues that our concept of meaning is dependent upon shared understanding. Bix uses the Wittgensteinian example of colour to explain this.¹³⁶ Wittgenstein stated that the concept of "colour" is dependent

¹³¹ See for example the discussions of the PLLM (section 3.4) and the rules of interpretation (section 4.2) in the preceding sections.

¹³² See Hart *The Concept of Law* (1961) at 123. I follow Bix's interpretation of Hart; see Bix *Law, Language and Legal Determinacy* (1993) at 8-9.

¹³³ Bix *Law, Language and Legal Determinacy* (1993) at 8.

¹³⁴ Bix *Law, Language and Legal Determinacy* (1993) at 9.

¹³⁵ Waismann *The Principles of Linguistic Philosophy* (1965) at 76.

¹³⁶ Bix *Law, Language and Legal Determinacy* (1993) at 43; See also Bix *Law, Language and Legal Determinacy* (1993) fn 36 at 43; Detmold "Law as the Structure of Meaning" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 155.

upon general agreement regarding the colour of things, and that the case where colour is undetermined is the exception. If differences in individual judgements and instabilities in the world caused us to get different results every time we interpreted a text or measured a colour, then not only would the results that we get from the interpretation cease to have meaning, but the practice of interpretation or measuring colour would cease to have meaning.¹³⁷ If one person came upon a new concept but could not communicate that concept to anyone else, that person would not know that the concept he perceives is a new concept, because there would not be any way for him to distinguish that concept from what is already known.¹³⁸ The communal understanding provides a space where communication is possible precisely because difference and sameness is possible.

Unlike Hart and Waismann, Bix does not claim that law is dependent upon a common understanding. He claims that the very act of understanding is dependent upon a common understanding of the concept. Our interpretive community and nothing else creates our reality.¹³⁹ Our social situatedness creates the framework out of which we understand. Understanding is a circular concept. We understand because we have prejudices, but the very act of understanding also makes us question these prejudices.¹⁴⁰ The prejudices that “survive” the questioning are separated from those that are false. Yet, because we are historical beings, we never have complete knowledge of our prejudices and any knowledge of ourselves must remain partial.¹⁴¹ Understanding originates from a historical and cultural perspective that forms our

¹³⁷ Bix *Law, Language and Legal Determinacy* (1993) at 43; Detmold “Law as the Structure of Meaning” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 156.

¹³⁸ Detmold “Law as the Structure of Meaning” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 156. Detmold explains this by using the concept of colour differentiation. If I were the first person on earth to distinguish between colours, while the rest of the world saw things in black and white, I would not be able to communicate this concept to them because there is no common denominator between us. We have no way of distinguishing what is new from what is not. My different black cannot be explained to the person who sees in black and white because I have no way of distinguishing it from his concept of black. Because I cannot distinguish it, I cannot know that I am different from him. It is only when more of us start to see colour that our shared experience can be related and contrasted against the norm.

¹³⁹ Detmold “Law as the Structure of Meaning” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 156.

¹⁴⁰ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 134.

¹⁴¹ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 134.

understanding of what is important and what interests are worth pursuing.¹⁴² If I interpret a text from an intentionalist background, I will value that which I perceive as the intention of the author. Every interpretation brings the interpreter in conflict with his perspective. The interpreter is not finally bound to his present perspective, but continually exposed to further development of his perspective by his social position.¹⁴³ Understanding is always a product of past experience and present perception. This process is not a “fresh outlook” or totally new input, but rather a fusion of past interpretations that link the text, read with past experience, to the new perception.¹⁴⁴

5.3 Legal context as a specific context

Robert Cover and others also show how legal interpretation takes place in a context where there is a denial of meaning.¹⁴⁵ This makes legal interpretation unique. Under normal circumstances interpretations are privileged or suppressed according to the preference of the day. We might interpret literature according to one school today and according to another tomorrow. However, in the legal sphere the losing interpretation is violently denied and the losing interpreter often has to suffer adverse consequences because of this. The finality and adversity of legal interpretation is unique and necessary for law to exist. If interpretations and the decisions between interpretations could be revisited perpetually, no judicial decision would ever be made for fear of mistake or a change in preference.

Like Cover, Arthur Glass highlights the fact that legal interpretation always takes place in a limiting context and therefore interpreters always presuppose that the law has authority and that this approach to law limits their interpretive efforts.¹⁴⁶ The author bases this contention on three characteristics of law as a special context. The

¹⁴² Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 134.

¹⁴³ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 134.

¹⁴⁴ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 134.

¹⁴⁵ See the discussion on Cover in part 2 of this chapter. See also Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 122.

¹⁴⁶ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 143.

first characteristic is the prescriptive nature of law.¹⁴⁷ Interpreters must contend with the fact that law, as a system, is always aimed at providing guidance for behaviour. When we interpret law-texts, we interpret them with the purpose of finding what kind of behaviour the law allows or disallows.¹⁴⁸ Secondly, the interpreter must accept that the interpretation of the text is prescriptive.¹⁴⁹ It is not sufficient that the law is prescriptive; the interpreter must also accept that the law is prescriptive.¹⁵⁰ The interpreter is not free to simply “read” the law, since this is not legal interpretation. The interpreter must realize that she is formulating prescriptive meaning. The final characteristic of interpretation of law is the presupposition that law provides answers to legal questions.¹⁵¹ When a problem is identified as a legal problem, the interpreter already assumes that a legal answer exists for that problem. Glass goes on to accept that all these factors culminate in limiting the authority of the legal interpreter. It is crucial, he argues, that the interpreter cannot amend the texts or ignore them.¹⁵² The work of the interpreter in this theoretical model is simply to find what texts mean in every circumstance. Interpreters are also required to justify their interpretations by way of established law.¹⁵³ The author further states that this theoretical model of interpretive practice is how interpreters should interpret and he accepts that there are instances when “in the real world” legal interpreters do not interpret this way. However, he regards this as an unfortunate result of intentional disregard for the

¹⁴⁷ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 143.

¹⁴⁸ Although this is not the only explanation of legal interpretation, purposive or teleological interpreters regard the nature of interpretation as such. Rule theorists often formulate teleological interpretation as a rule of interpretation. See for example Du Plessis *Re-Interpretation of Statutes* (2002) at 96; De Ville *Constitutional and Statutory Interpretation* (2000) at 141; De Ville “Meaning and Statutory Interpretation” (1999) 62 *THRHR* 373 at 376; Botha *Statutory Interpretation: An Introduction for Students* (1998) at 31; *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) at 159-160; *McLean v SASOL Mine (Pty) Ltd Secunda Collieries; McLean v SASOL Pension Fund* 2003 (6) SA 254 (W) at 268-269; *Nkosi and another v Buhrman* 2002 (1) SA 372 (SCA) at 388; *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) at 739.

¹⁴⁹ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 143.

¹⁵⁰ This point seems to link Glass with Cover and others who also make this point. The legal interpreter must always keep in mind that her interpretations will have repercussions. It will prescribe behaviour to a person and deny that person’s interpretation of permissible behaviour.

¹⁵¹ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 143.

¹⁵² Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 143.

¹⁵³ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 143.

relevant legal materials or gaps in the legal meaning system.¹⁵⁴ He argues that the nature of the legal system is one where texts demand to be read in their clear and literal sense but also in context.¹⁵⁵

5.4 Contextual plain meaning

Many contextualists argue that “contextual plain meaning” can be used as a strategy to find the meaning of terms.¹⁵⁶ Bix and others explain plain meaning as the unreflective attachment of meaning to words within a social context.¹⁵⁷ The word might seem to have only one meaning in that social context but it can mean something radically different in another context. The point these authors make is that interpretation is based on context and interpretive communities. They assert that this strategy will yield acceptable results every time it is used correctly, because each community has unreflective meaning for the words they use.¹⁵⁸ For example, if one interprets a contract in the building industry, one should try to find out what actors in this industry regard as plain meaning, and interpret the contract accordingly. This strategy is based on the assumptions that knowledge of an interpretive community can make meaning more determinate and that an interpreter can know exactly how the interpretive community a person is part of influences his perceptions.

Contextualism, like objectivism, involves a search for constraints on the interpreter. Whereas objectivists claim that language has objective meaning, contextualists argue that meaning comes from the context of the text. However, there is a subtle difference regarding the “objectivity” of each claim. Most objectivists allege that any text has (and will always have) one correct interpretation. Contextualists accept that different contexts will lead to different meanings of a single text. As it will become clear, the latter position is closer to postmodernism.

¹⁵⁴ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 144.

¹⁵⁵ Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 144.

¹⁵⁶ Bix *Law, Language and Legal Determinacy* (1993) at 75; Campbell “Grounding Theories of Legal Interpretation” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 31; Glass “A Hermeneutical Standpoint” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 144.

¹⁵⁷ Bix *Law, Language and Legal Determinacy* (1993) at 73; Campbell “Grounding Theories of Legal Interpretation” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 31.

¹⁵⁸ Bix *Law, Language and Legal Determinacy* (1993) at 75.

5.5 Criticism against the use of interpretive communities and context as constraints on interpretation

In her discussion on the nature of rules, Margaret Jane Radin provides telling criticism against the contextualist claim that the interpretive community and context can provide an objective basis for adjudicating the truth of meaning.¹⁵⁹ She begins by arguing that rules always depend upon the existence of a social practice in which rules make sense.¹⁶⁰ If society were not in the habit of following rules and there were no institutional structure for the application of rules, our concept of rules would not exist. We interpret rules as rules because we already have an idea what it is to interpret rules. A person who reads the sign "Do Not Litter" in a park can only comprehend what he is expected to do because he already has an idea what it is to follow a rule. He will not throw his candy wrapper on the ground because he can imagine what would happen if he did throw the wrapper on the ground and the warden saw him. He is conditioned to understand the concept of rules. Rule making and rule following are not seen as radically different activities because of the socially situatedness of rules. Rules are created every time that we act on those rules and undermined every time that we ignore them.¹⁶¹ The important aspect for our argument is the social contingency of rules. Rules, according to this definition, do not exist before the context. The rules do not make out the background against which we act, but are themselves contingent upon the context and the application or "misapplication" of them.¹⁶² As a result, one cannot say before the context exists what the context is going to be like and what its influence will be on the rule.¹⁶³ There is a dynamic interaction

¹⁵⁹ Radin "Reconsidering the Rule of Law" in Schauer (ed) *Law and Language* (1993) at 299.

¹⁶⁰ Radin "Reconsidering the Rule of Law" in Schauer (ed) *Law and Language* (1993) at 299; Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 966 explains normativity in much the same way.

¹⁶¹ Radin argues that rules cannot be understood outside of a practice or outside of a social setting. Because rules do not stand outside the context, rules must be applied in the context for the rule to be valid. If the rule is ignored in the context it loses effectiveness because of its dependence upon the context. If a judge refuses to apply the parol-evidence rule in a situation where it might previously have been applied, she is denying legitimacy to the rule in that context. If she extends the application of the rule to a situation where the rule would previously not have been applied she is extending the validity of the rule. In other words she is creating a "new" rule.

¹⁶² Radin "Reconsidering the Rule of Law" in Schauer (ed) *Law and Language* (1993) at 300. Misapplication in this context is not a value judgement in the sense that it is a deviation from the "true" application. It should rather be seen as a creative application of the rule to a situation that it was previously not thought of to apply. Steven Winter uses the term 'slippage' to mean the same thing: Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 996.

¹⁶³ Radin "Reconsidering the Rule of Law" in Schauer (ed) *Law and Language* (1993) at 301.

between the rule and the context, from which both emerge changed. Like the rule, texts are subject to interpretation in context rather than through context. The context is not the glasses through which the text is read. The context does not only change the way we see the text, but the text also influences what we see as the context.

“Contextual Plain Meaning” as a constraint on interpretation is a strategy based on the assumptions that knowledge of an interpretive community can make meaning more determinate and that an interpreter can know exactly how the interpretive community a person is part of influences his perceptions. Even if we accept these assumptions (which I do not) the strategy is still bound to fail to provide an objective basis from which we can judge the correctness of a given meaning. Any interpreter, and in fact any text creator, is bound to be part of any number of interpretive communities and therefore can potentially attach any number of different communal connotations to a text. In our building contract example, a builder might also be a freemason and think of a word in his Masonic capacity, while the other party to the contract might think of the text purely in a building context. The interpreter would still have to choose among the meanings and in the process prefer one contextual interpretation to another. Even if the parties do not belong to different interpretive communities, subtle differences within the overall interpretive context can influence the meaning of the text. If one takes the building contract as an example, the parties might decide that they will work towards a joint reading of the contract. This joint interpretation might be done in a reconciliatory fashion, in other words, differences will be minimized. On the other hand, the parties might be in a very adversarial mood, and as a consequence differences in opinion regarding the meaning of the contract will abound. The same overall context is present, but different meanings emerge.

6. Neo-pragmatism

6.1 Introduction

This brings us to neo-pragmatist interpretive practice. One of the leading theorists in this field is Stanley Fish and I concentrate mainly on his work. The main project of neo-pragmatism is to provide an anti-foundationalist explanation for meaning. This means that they want to explain meaning as context-bound and interpretational. The

central claim of neo-pragmatists is that meaning is context-bound.¹⁶⁴ They further claim that it is impossible to have meaning or understanding that operates across contexts and that such a meaning would be superfluous because we are only called to understand in specific contexts. They argue against the possibility of nihilism and meaning indeterminism as well as objective linguistic meaning¹⁶⁵ because literal meaning is the product of interpretive communities (and therefore not merely arbitrary, as argued by nihilists) rather than an inherent feature of language (“out there” to simply find, as argued by objectivists).¹⁶⁶

The first claim made by neo-pragmatist scholars is that the characteristics that we usually attribute to language are actually part of the interpretive system (context or interpretive community) in which the interpretation takes place.¹⁶⁷ Interpretation is not a free activity where the interpreter can impose any meaning on the text. The interpreter is constrained by the institutional norms and boundaries that she perceives or understands to be part of the interpretive context. If I were to interpret a contract of sale of a house and I had to interpret the clause “All garden tools on the estate at the time of sale will be deemed part of the fixed property on the estate”, I would immediately assume that the tools belonged to one of the parties to the contract, because one can generally not dispose of the things of a third party without his consent. However, if I read the same clause in a municipal by-law I might come to the conclusion that the municipal council intended to include all garden tools regardless of the owner thereof. The meaning is limited by what I perceive to be the context. While individuals are not normally entitled to dispose of the property of third parties, the state is sometimes allowed to do so. If I read the same contractual clause in relation to the municipal by-law, I will no longer assume that the tools belong to the parties because of the impact of the by-law. While the language stays the same, the meaning differs because the context differs. Any text can have infinite possible meanings, depending upon the context.

¹⁶⁴ Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 304

¹⁶⁵ Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 305; Fish “Fish vs. Fiss” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 126.

¹⁶⁶ Levinson “Law as Literature” in Schauer (ed) *Law and Language* (1993) at 351.

¹⁶⁷ Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 306; Levinson “Law as Literature” in Schauer (ed) *Law and Language* (1993) at 351.

The fact that any text can have an infinite number of possible meanings does not mean that it does.¹⁶⁸ For any text to have an infinite number of meanings, that text must be absolutely non-contextual. In other words, the text must exist across all contexts and free of contextual constraint. However, there is no such space. Every space or room for language is inherently contextual. Any text will always be part of a context and a situation where the meaning will be accessible.¹⁶⁹ The text depends upon the context for meaning, but this does not make the meaning determinate.

Some meanings are more “normal” than others.¹⁷⁰ Meanings can be ranked according to normality and as Fish shows, that ranking is always already there. If we take the clause “All garden tools will be deemed part of the fixed property on the estate”, the meaning of property as the property of the contractual parties is more “normal” than the meaning of property as all property (belonging to anyone). When we read the clause, the first meaning is the most likely one we will think of. If we read the municipal by-law first, the second meaning (property meaning all property) will likely be the most “normal” reading. In each situation our perceptions of “normal” will differ because of our institutional prejudices or pre-understandings of the likely meaning will differ.¹⁷¹ This does not mean that one cannot imagine the second meaning in situation one and the first meaning in situation two: The fact that one reading in context is more “normal” than another does not make meaning determinate, since contexts are not universal and there are thus no “normal” meanings of language in the universal sense.¹⁷²

¹⁶⁸ Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 307; Fish “Fish vs. Fiss” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 126; Levinson “Law as Literature” in Schauer (ed) *Law and Language* (1993) at 351-353.

¹⁶⁹ Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 307; Fish “What makes an Interpretation Acceptable?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 341.

¹⁷⁰ Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 307.

¹⁷¹ Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 308.

¹⁷² Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 309. The meanings that seem universal are usually the result of very widely shared beliefs regarding the meaning of that term. In other words, a very large interpretive community will yield widely shared assumptions and therefore widely shared meaning. See also Fish “What makes an Interpretation Acceptable?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 341.

Fish rejects the notion of a two-stage interpretive process in which the interpreter scrutinizes the text and then gives it meaning.¹⁷³ He argues that there is no stage where the interpreter hears an utterance before he confers meaning upon it. By “hearing” the utterance the interpreter already confers meaning on the terms used. He already has knowledge of the purposes and a prejudice surrounding the usage of the words, so that when he hears it, it is already heard in context.¹⁷⁴ Meaning indeterminacy can therefore only occur in a situation where the interpreter does not have these purposes and prejudices to guide him. Fish correctly argues that such a state does not exist.¹⁷⁵ This does not mean that an interpreter cannot be wrong in his assessment of the context of the word;¹⁷⁶ a contractual interpreter can interpret the term in our example wrongly. However, the mistake is not a result of a misunderstanding of the language or the text, but rather a misunderstanding regarding the context of the text. The interpreter thinks property equals property of the parties in an unlegislated sense, while the parties meant property equals all property in conformity with the existing legislation. The misunderstanding is a result of wrong contextual presumptions. If the parties correct the interpreter, his presumptions shift to presumptions that he holds regarding the interpretation of legislated terms. He interprets from a new angle or context with its assumptions and prejudices.¹⁷⁷ It is important to note that the interpreter did not misunderstand the inherent properties of the language. A closer look at the text would not have yielded better results, since it was never a misreading.¹⁷⁸

An interpreter is limited with regard to his interpretations by his context, but it does not mean that he is always limited by the same interpretive understandings. In other

¹⁷³ Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 310; Fish “Fish vs. Fiss” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 126.

¹⁷⁴ Fish “Is There a Text in This Class?” in *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 310; Fish “What makes an Interpretation Acceptable?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 342.

¹⁷⁵ Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 310-311.

¹⁷⁶ Wrong in the sense that a misunderstanding results between the communicator and the listener.

¹⁷⁷ Fish “Is There a Text in This Class?” in *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 311; Fish “What makes an Interpretation Acceptable?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 340-341.

¹⁷⁸ Fish “Is There a Text in This Class?” in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 311; Levinson “Law as Literature” in Schauer (ed) *Law and Language* (1993) at 354.

words, the prejudices and assumptions that shape meaning are not static, rigid or permanent.¹⁷⁹ Interpretive contexts are constantly modified and expanded by interpretation. If the interpreter is confronted by a text that is unintelligible, she (so to speak) falls back on common ground. The interpreter latches onto an aspect of the text that she understands in the sense described above, and from there she works through the text until the text is intelligible. The interpreter thus modifies and adds to her existing interpretive background the new understanding as a new pre-understanding. If she comes across the text or something similar she would be able to interpret it.¹⁸⁰ The point that Fish makes is that the understanding by interpretation and the coming to understand a novel text are not broadly speaking different processes and neither is dependent upon the text for understanding.¹⁸¹ The interpreter is still dependent upon his pre-understanding, even in the case of new understanding. It is important to note that the route to new understanding is not an imposition of meaning but a modification of the pre-understanding already in place.¹⁸² The new meaning stands in relation to the meaning that was already in place.

In order to understand the neo-pragmatist view of interpretation we have to take a closer look at the concept of context. As already mentioned, context for the neo-pragmatist is always already present. Any interpretation takes place in a context that is already there prior to the interpretation.¹⁸³ The first characteristic of this context is that it contains norms and structures that provide meaning in the interpretive process.¹⁸⁴ The interpreter is constrained by these norms in his interpretation. Words do not mean anything by themselves. In so far as they do mean something, that

¹⁷⁹ Fish "Is There a Text in This Class?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 314-315; Levinson "Law as Literature" in Schauer (ed) *Law and Language* (1993) at 353.

¹⁸⁰ Fish "Is There a Text in This Class?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 315.

¹⁸¹ Fish "Is There a Text in This Class?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 316; Fish "What makes an Interpretation Acceptable?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 340.

¹⁸² Fish "Is There a Text in This Class?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 316.

¹⁸³ Fish "Is There a Text in This Class?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 318; Fish "Fish vs. Fiss" in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 126.

¹⁸⁴ Fish "Is There a Text in This Class?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 318; Fish "Fish vs. Fiss" in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 127-129; Levinson "Law as Literature" in Schauer (ed) *Law and Language* (1993) at 353.

something is defined by the interpretive context through the norms and practices contained in that context.¹⁸⁵ The second characteristic of context is its social nature.¹⁸⁶ The context is not a fixed structure within language that produces meaning, but rather a privileged relationship of one meaning over another in a certain interpretation. As the situation or circumstances change, one such privilege gives way to another. Context is not a stable concept against which meaning can be measured because of this fact. The third characteristic of context is that everyone is always in context.¹⁸⁷ Every person is always situated within a system of beliefs and prejudices that will shape her outlook and interpretation.¹⁸⁸ Any experience will take place from within this structure and will be shaped by this structure. This means that nothing can be completely relative because we always already believe something. Our experience and consciousness are formed by beliefs about things and about the nature of things, therefore we can never believe anything about something because that would override our consciousness. The final characteristic of context is that it is never completely individualistic. In other words, context is always linked to the communal.¹⁸⁹ The individual understands and can communicate with the other because the individual and the other share some view of reality. Fish strikingly observes "...Disagreements are not settled by the facts, but are the means by which facts are settled...".¹⁹⁰ This illustrates that observations of the facts are always unstable and are only momentarily settled by the interpreter being convinced by one of the sides to the disagreement.¹⁹¹

¹⁸⁵ Fish "What makes an Interpretation Acceptable?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 349.

¹⁸⁶ Fish "Is There a Text in This Class?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 318.

¹⁸⁷ Fish "Is There a Text in This Class?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 319; Fish "What makes an Interpretation Acceptable?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 342-343; Fish "Fish vs. Fiss" in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 127.

¹⁸⁸ Fish "What makes an Interpretation Acceptable?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 347.

¹⁸⁹ Fish "Is There a Text in This Class?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 320; Fish "What makes an Interpretation Acceptable?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 338; Fish "Fish vs. Fiss" in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 127.

¹⁹⁰ Fish "What makes an Interpretation Acceptable?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 338; See also Fish "Fish vs. Fiss" in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 129. Fish discusses here why people disagree about the meaning of the constitution. It makes for interesting reading.

¹⁹¹ Levinson "Law as Literature" in Schauer (ed) *Law and Language* (1993) at 354

He agrees with someone that reality is the way they think it is, although that does not settle reality into a determinate concept.¹⁹²

To summarise, while Fish claims that context influences the meaning of a text, he does not claim (as contextualists do) that contexts make meaning determinate. There will always be interpretations other than the dominant interpretation because there will always be more than one context and interpretive community.

6.2. Criticism of neo-pragmatism

Neo-pragmatism is not without its critics. Owen Fiss and other rule theorists argue that neo-pragmatism is nihilism because the interpreter is unconstrained in his interpretation.¹⁹³ However, neo-pragmatist scholars have defeated these criticisms convincingly. By far the most telling and important criticism comes from fellow postmodern scholars like Rosemary Coombe regarding the complacent nature of the neo-pragmatist interpretive model.¹⁹⁴

Most of these critics agree that meaning is socially constructed and they accept the neo-pragmatist explanation of interpretive communities.¹⁹⁵ They also accept the contention that these social constructions are unstable and cannot provide the interpreter with a stable platform from which she can determine truth in a metaphysical sense. The interpreter's role in the interpretive process is seen as decisive and it is accepted that there are no metaphysical realities, only interpreted realities.¹⁹⁶

Coombe begins by looking at interpretive communities as a referent in interpretation. Owen Fiss contends that an interpretive community provides the interpreter with a type of bounded objectivity or, to put differently, he argues that the interpretive

¹⁹² Fish "What makes an Interpretation Acceptable?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 340.

¹⁹³ See for example Campbell "Grounding Theories of Legal Interpretation" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002); Fiss "Objectivity and Interpretation" (1982) 34 *Stanford LR* 739.

¹⁹⁴ Coombe "Same As It Ever Was: Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603.

¹⁹⁵ Coombe "Same As It Ever Was: Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603 at 611.

¹⁹⁶ Coombe "Same As It Ever Was: Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603 at 611.

community can constrain the interpreter.¹⁹⁷ In this argument Coombe finds the essence of contextualist and neo-pragmatic thinking. She states that contextualists and neo-pragmatists use these arguments to try and find a source of constraint on the interpreter that will leave her interpretation politically more neutral.¹⁹⁸ She argues that these interpretive communities have just the opposite effect: no interpreter can escape the perspectives that come with their particular backgrounds and experiences.¹⁹⁹ Not only are the influences particular to the interpreter political, but the conventions that guide interpretation in general reflect the values of privileged groups in power as well.²⁰⁰ Coombe goes on to state that the interpretive communities and conventions that guide interpretation are not static but the product of a constant struggle, and hence the definition of the interpretive community is itself continually being interpreted and politically negotiated.²⁰¹ If we simply accept that the meanings that we have are the product of interpretive communities and context without reflecting on the process by which those communities gained ascendancy, we are in danger of rejecting all non-privileged (and by implication marginalized and non “legal”) meanings. Coombe says to do so is to “...effectively assign legitimacy to the victors by virtue of their victory...”.²⁰²

Coombe accepts most of Fish’s contentions about the nature of interpretation but disagrees with what she classifies as the silencing of the experience of the other.²⁰³ She argues that the interpretation process always affirms the legitimacy of the experience of some while denying the experience of others. The particular aspect of Fish’s theory that seems to cause this problem is the process of settling differences between interpretations.²⁰⁴ Coombe reads Fish as saying that differences between

¹⁹⁷ Fiss “Objectivity and Interpretation” (1982) *Stanford LR* 34 at 744.

¹⁹⁸ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 618.

¹⁹⁹ Coombe argues that in the Canadian context, this background would usually be white, economically privileged and male. See Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 619.

²⁰⁰ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 619.

²⁰¹ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 619.

²⁰² Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 620.

²⁰³ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 631.

²⁰⁴ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 630.

interpretations are settled by a political, social and institutional method that is itself subject to constant change. It is argued that this process will always result in the acceptance of the dominant political agenda to the exclusion of the weaker voices.²⁰⁵ This result is portrayed as inevitable because, Coombe argues, Fish wants us to believe that there will always be a dominant context in which an interpretation will be seen as obvious.²⁰⁶

This view of Fish and neo-pragmatist theory lends itself to two readings. The first is a superficial reading regarding the responsibility of the reader. Coombe might be arguing for a responsible reader in the sense that the reader should as far as possible have regard for the conflicting understandings of the text being interpreted.²⁰⁷ Any interpretation should be justifiable and there is never an excuse for complacency. With this I would wholeheartedly agree. However, Coombe could (although I do not think she is) also be making a claim about the nature of the interpretive community, namely that an interpretive community can be wilfully changed and utilized to improve the inclusion of the fringe understandings of meaning. With this I would not agree. Interpretive communities are always already in place. Even our idea of an interpretive community is constituted by one. If this is the reading that Coombe intends, she is making the mistake that Fish warns against repeatedly.²⁰⁸ She is dividing interpretation into a two-stage process in which the interpreter identifies the text and then proceeds to interpret according to the interpretive community of her choice. Fish shows that the options open to the interpreter in the first stage are already determined by the interpretive context. The interpreter can of course broaden her interpretive perspective, but she is never in the position to choose freely, because the options will be predetermined.²⁰⁹ As Cover so strikingly warns us, legal interpretation is always about the denial of one interpretation.

²⁰⁵ Coombe "Same As It Ever Was: Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603 at 632.

²⁰⁶ Coombe "Same As It Ever Was: Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603 at 633.

²⁰⁷ Coombe "Same As It Ever Was: Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603 at 651-652.

²⁰⁸ Fish "Is There a Text in This Class?" in Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) at 310; Fish "Fish vs. Fiss" in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 126.

²⁰⁹ Fish explains that one can come to a new understanding but that the new understanding is not an outside inside relation, but rather a broadening and a complementing of existing knowledge. See also

7. Deconstruction and legal interpretation

7.1 Understanding deconstruction

Lawyers have to deal with the increasingly common notion that meaning does not reside in language.²¹⁰ Literary theorists, anthropologists, and linguists are showing that words themselves are only arbitrary symbols that bear no necessary relation to the real world. The language that we use to describe this world constructs it rather than reflecting it, and it does so in a contextually distinct manner.²¹¹

Jacques Derrida and other deconstructionists claim that there is no single objective interpretation of any text. The text authorizes innumerable interpretations and there is no such thing as one correct interpretation.²¹² Deconstruction is a practice developed by Derrida to attack Western metaphysical thought by showing how it (metaphysical thought) privileges ideas and concepts²¹³ that form the basis of the Western belief system. Derrida argues that in each concept there resides one privileged and one suppressed idea.²¹⁴ Deconstruction is an attempt to show that the privileged idea depends upon the suppressed idea for meaning.²¹⁵ Every concept has its opposite against which that term can be understood. The rules of logic ask for a “different” or an “opposite” from which a definition can flow. The basis of any definition of a concept is its differentiation from other concepts.²¹⁶ Derrida does not deny the

Winter “Contingency and Community in Normative Practice” (1991) 139 *University of Pennsylvania LR* 963.

²¹⁰ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 215.

²¹¹ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 611.

²¹² Abrams “Rationality & Imagination in Cultural History” in Fischer (ed) *Doing things with Texts* ((1991)) at 125; Van Marle “Law’s Time, Particularity and Slowness” (2003) 19 *SAJHR* 239 at 250; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2524; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 120.

²¹³ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 215; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2523.

²¹⁴ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 215; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2524.

²¹⁵ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 215; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2525; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 121.

²¹⁶ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2526; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 121.

existence of these oppositions but asks that we look for that “opposite”. What Derrida wants to show is that which we have forgotten. He wants to recall that on which meaning is dependent but which is not immediately apparent, namely the “other”.²¹⁷

Deconstructionists argue that signs are iterable. If one wants to understand a sign, that sign must be compatible with differing circumstances and contexts.²¹⁸ If one had to invent new signs every time that one wants to communicate, we would never know what signs meant. It is a property of words that they can be repeated in many differing contexts.²¹⁹ This is called iterability. The sign and that which it signifies must be separate. If the sign were always attached to the signified, the sign would have to be in the presence of the signified in order for a connection to be made between the sign and the signified. The sign would be an aspect of the signified, because the sign would not be apart from the signified. However, if we want to communicate the signified to someone else the sign must be apart from the signified, so that we can “give” the listener something that the listener can connect with a signified. The meaning that accompanies a sign is therefore not dependent upon the intention of the speaker and it is not a product of the sign itself either. The meaning of the sign is dependent upon a shared understanding of the sign.²²⁰

According to the deconstructionists, language is a purely arbitrary and unstable differential system.²²¹ This is explained with the concept of *différance*. *Différance* is a

²¹⁷ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 751; Van Marle “Law’s Time, Particularity and Slowness” (2003) 19 *SAJHR* 239 at 250; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 122.

²¹⁸ Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 123.

²¹⁹ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 749; Van Marle “Law’s Time, Particularity and Slowness” (2003) *SAJHR* 19 239 at 250; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) *Southern California LR* 64 2504 at 2523; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 123.

²²⁰ Van Marle “Law’s Time, Particularity and Slowness” (2003) 19 *SAJHR* 239 at 250; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2523; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 123.

²²¹ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 215; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2523; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 123.

word play on the French word *différer*, which means both to differ and to defer.²²² This term connects the differing of the one concept from the other, with the deferral of the one concept of the other and the deferral of the one concept to the other.²²³ The second idea that is central to deconstruction is the idea of “trace”.²²⁴ Deconstructionists argue that terms are always in opposition to other terms. “Light” in our example is in opposition to “darkness”. As the concept of *différance* illustrates, these oppositions between the idea and its opposite always define meaning. But when we speak, we use only one idea, while the opposite is absent. It is here that trace becomes important. When one idea or term is used there is always a trace of the opposite term or idea that leaves its mark on the term that is used.²²⁵ When we use the word “light”, the word “darkness is absent”, but it is still necessary for the understanding of “light”. The trace of the other that is absent makes deconstruction possible.²²⁶

The main deconstructionist project is the identification of hierarchical oppositions and the temporary reversal of those oppositions.²²⁷ The aim of this reversal is to show the possibilities inherent in a hierarchical shift as well as the unstable nature of

²²² Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 751. The concept of *différance* can be explained using the ideas of “darkness” and “light”. Firstly, “light” differs from “darkness”. “Light” is something other than “darkness”, a separate concept so to speak. “Light” is outside of “darkness”. It cannot be like “darkness” and “darkness” cannot be like “light”. The one concept is separate from and distinct from the other concept. If “light” is the concept while the opposing concept is the other, the non-concept. Secondly, the concept defers to the other. “Light” is the opposite of “darkness”. “Darkness” is that which is the other to “light”. “Light” is separate from “darkness” and this separateness is measured against “darkness”. The “lighter” the concept is, the less “dark” it is. The “light” moves from the “darkness” and the “darkness” moves from the “light”. Finally, one concept defers the other concept. It is “light” when it is not “dark”. When it is “light” the “darkness” is that which is conspicuous in its absence. When it is “light” it cannot be “dark” because the one concept displaces the other concept. The one concept always comes in the place of the other concept & they cannot occupy the same space at once. Therefore, if it is “light”, it will be different from when it is “dark”, it will at the same time be less “dark” than “darkness”, but also “darker” than a “lighter” place and finally it will not be “dark” when it is “light”.

²²³ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 215; Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 752.

²²⁴ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 752; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2525.

²²⁵ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 752; Van Marle “Law’s Time, Particularity and Slowness” (2003) 19 *SAJHR* 239 at 250; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 121.

²²⁶ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 752

²²⁷ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 746; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2525.

hierarchical oppositions.²²⁸ If A is the rule and B the exception, the project of deconstructionists is to show that A is not the rule because of its metaphysical qualities, but because of a decision. This relationship will then be temporarily reversed so that B is the rule and A the exception, to observe the possibilities inherent in a hierarchical shift. The shift is only temporary because the aim is not to establish a new hierarchy, but rather to observe the consequences of the shift.²²⁹ Any hierarchical opposition can be deconstructed this way.²³⁰ The aim of this type of investigation is to disentangle us from our accustomed modes of thinking and to explore the inherent possibilities of the other interpretation. There is always another interpretation possible.²³¹

Deconstruction shows that the reasons for privileging one interpretation over another are often also the reasons for the reversal of the hierarchy.²³² The faults of the unprivileged are often also true of the privileged, and the advantages of the privileged are often also true of the unprivileged. The aim of this type of analysis is to unsettle the privileged concept and to show that its privileging is more arbitrary than is at first apparent. Balkin provides a striking example using the privileging of speech over writing.²³³ Balkin identifies various reasons why speech is often privileged over writing, the most striking and common being the fact that writing is often merely a record for what is being said. Because people do not use phonetic signs when writing, alterations and misunderstandings creep in. The problem is thus that writing is only a

²²⁸ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2525.

²²⁹ Van Marle “Law’s Time, Particularity and Slowness” (2003) 19 *SAJHR* 239 at 251.

²³⁰ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 747; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2525.

²³¹ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 747-748. The main Derridian project is the exposition of the bias in Western philosophy for the metaphysics of presence. This involves the privileging of the immediately perceivable over the absent. That which is the most basic is foundational, that which is simple is true. This is not necessarily a case of perception with the senses, but rather the expression of metaphysical values. Western philosophy uses the privileged as the norm & explains the other or the opposite in terms of the privileged norm. He shows that objective, self-evident and plain meanings (such as discussed in sections 3.1-3.5) and contextual or communal meanings (such as discussed in sections 5.1-5.4) are the result of the metaphysics of presence. Importantly, this type of reasoning (metaphysics of presence) disguises the other possible meanings. Derrida uses deconstruction to highlight the continual presence of these other meanings in interpretation.

²³² Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) *Southern California LR* 64 2504 at 2526.

²³³ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 755-758.

sign or representation of speech. But, as Balkin illustrates, speech is only a sign for thought, and therefore subject to the same problems as writing.²³⁴

Deconstructionists undermine hierarchies of preference using the logic of supplement.²³⁵ This technique is used where one concept is defined as the norm and another is defined as a supplement to the norm in exceptional circumstances. The word “supplement” includes two important ideas. The first idea is that the preferred concept is a whole concept apart from the supplement.²³⁶ The supplement is not a part of the preferred concept, nor is it an ingredient of the preferred concept. The second idea included in the notion of supplement is that the preferred concept cannot account for all circumstances.²³⁷ There will be circumstances where the preferred concept will not suffice, and a need exists for the non-preferred concept to supplement the preferred concept in these circumstances. Deconstructionists argue that for a preferred concept to be able to be supplemented in the first sense, it must have the lack identified in the second sense.²³⁸ If the preferred concept is complete, it does not need supplementation and it can be used independently. This crucial insight shows that the use of the preferred concept is dependent upon the non-preferred concept.²³⁹ A good example of this particular relationship between the preferred concept and the non-preferred concept can be found in the contractual presumption that there are no superfluous words in a contract.²⁴⁰ It is presumed that the parties thought about every

²³⁴ In contractual theory just the opposite is true. Written contracts are preferred to oral ones because the perception is entertained that a written contract is easier to prove than an oral contract. Contracts are based on the intention of the parties and the argument goes that it is easier to lie about one’s intentions if it is not recorded. It is very hard to deny that you agreed to the contents of a document if the document is signed by your own hand. However, if the contract document were missing, a written contract would have to be proven in the same manner as an oral contract. The fact that one was written and one was oral does not affect the provability of a contract. The ease of production of the evidence will decide the ease of proof. An oral contract concluded in front of ten witnesses would be easier to prove than a written contract where the document is missing. The reason for privileging written contracts over oral contracts, namely ease of proof, becomes the very reason for the privileging of oral contracts in certain circumstances. See for example *Tesven CC & Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 275; Rule 18(6) of the Uniform Rules of Court.

²³⁵ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 758-761; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2527.

²³⁶ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 758.

²³⁷ Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 759.

²³⁸ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2527.

²³⁹ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2527. This insight is known as the “dangerous supplement”. This is the case because there is always a struggle for ascendancy between the concepts. The relationship is not stable. See also Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 123.

²⁴⁰ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 123.

word that they inserted into the contract and that the contract contains no superfluous, tautologous or meaningless words. The exception to this presumption is that words can be ignored if no sensible meaning can be attributed to the words.²⁴¹ The presumption itself is a separate entity; it can stand on its own. However, if it is used alone it can have unjust results in circumstances where the contract contains words that are unintelligible and as a consequence the contract would have to be struck down as being unintelligible. The supplement is the proviso that unintelligible words can be ignored. The implementation of the presumption is therefore dependent upon the exception. The underlying assumption is that parties pay attention when they conclude a contract, but the presumption and its supplement also prove the opposite. Parties often do not pay attention when they conclude contracts and therefore a supplement is necessary. The whole process can be repeated over and over again.

7.2 Criticism against deconstruction as a theory of interpretation

Deconstruction is not without its critics. Paul Cilliers has identified the most important of these criticisms together with their rebuttals.²⁴² The first criticism is that deconstruction is relativistic.²⁴³ Cilliers calls this type of criticism a knee-jerk reaction against deconstruction and postmodern positions in general. The accusation of relativism is levelled at deconstructionists because of the perception that deconstructionists hold a position that any meaning goes because truth is supposedly not objectively knowable.²⁴⁴ It is argued that if any meaning is made up of a number of oppositions it cannot be objectively established and cannot provide us with anything to work from. We are always stuck with a word that might mean something different the next moment.

True relativism is impossible. If “everything is relative”, the claim of complete relativity is rebutted. If everything is relative, then the statement that everything is relative is true and everything is therefore not relative. If the statement is false, then

²⁴¹ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 123.

²⁴² Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) Inaugural lecture delivered at Stellenbosch in March 2004. Hereafter as Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004).

²⁴³ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 5; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2535, 2538.

²⁴⁴ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2510.

some things must be true and then everything is not relative any more!²⁴⁵ One would have to agree with Cilliers that a true relativist is simply a disappointed foundationalist, because the claim itself is an indication that the accuser thinks in foundational terms. If something is not objectively true then, according to this line of thinking, it is not worth much. The deconstructionist will agree that finding objective knowledge is impossible but she will not agree that this means that anything goes.²⁴⁶ Deconstruction is simply a process by which that we do have is investigated to try to come to a better understanding of the process of generating understanding.²⁴⁷ The deconstructionist works with the same meanings as the foundationalist. The difference is in their attitude to that meaning. The deconstructionist is prepared to accept that she might be wrong while the foundationalist basks in an arrogant self-assurance that she is right because of the position that she occupies. The foundationalist forecloses any discussion on her view of meaning by occupying a right-wrong position. The deconstructionist invites discussion of her view of meaning.

The second criticism identified against deconstruction is the so-called performative contradiction.²⁴⁸ Philosophers like Habermas bring this claim against deconstruction especially when defending reason against the deconstructive onslaught.²⁴⁹ The performative contradiction involves a contradiction between the result of an enquiry and the method used. Critics of deconstruction argue that deconstructionists inevitably depend upon the very things that they want to disprove in order to do so. When deconstructionists want to disprove reason, so the argument goes, they show that reason exists by the process of proof.²⁵⁰ What is said at a locutionary level is contradicted by what is done at a performative level.

²⁴⁵ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 5.

²⁴⁶ Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 123.

²⁴⁷ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 5; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2538; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 116.

²⁴⁸ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) 5-7.

²⁴⁹ Habermas *The Philosophical Discourse of Modernity: Twelve Lectures* (1987) 185–210; Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1053; Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 5.

²⁵⁰ Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1053; Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 6.

Cilliers argues that there are three reasons why this type of criticism must fail. The first is that the performative contradiction rests upon the assumption that we can adequately distinguish between what is being said and how it is said.²⁵¹ This distinction in turn depends upon the ability to judge between meaning (what is said) and meaning exchange (how we say it) from an objective point of view, an Archimedes point. It is this type of thinking that deconstruction opposes. As a result the critic is at least back to square one and at most defeated.²⁵² The second reason why the performative contradiction fails to be persuasive when applied to deconstruction is because deconstruction theory acknowledges that it works with this kind of contradiction.²⁵³ In fact, deconstructionists embrace this kind of contradiction. Cilliers argues that the way deconstructionists talk should reflect the difficulties inherent in language. To accuse deconstructionists of performative contradictions is to accuse them of doing what they set out to do. They are reflecting the complexities inherent in language and the inherent contradictory nature of their language theory. They want to show that saying one thing is always contradicting oneself in a sense.²⁵⁴ The final argument against the performative contradiction is that the reasoning called for in the performative contradiction test stems from intellectual arrogance.²⁵⁵ Deconstructionists show that we have limits to our understanding of language and the use thereof. To make claims about the nature of language in the absolutist terms of the performative contradiction is to make claims about language (that cannot be completely understood as a system) and in the process close off further inquiry into the nature of language.

²⁵¹ Schlag “Normativity and the Politics of Form” (1991) 139 *University of Pennsylvania LR* 801 at 888-893; Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 6.

²⁵² Objective points of adjudication cannot be proven. The critic of deconstruction is back where he started. If we work with “proof” (the foundationalist position) he is defeated. However, as any deconstructionist would remark: We are open to be convinced otherwise.

²⁵³ Schlag “Normativity and the Politics of Form” (1991) 139 *University of Pennsylvania LR* 801 at 925; Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 6.

²⁵⁴ If we look at the concepts of *différance* and *trace* this becomes apparent. When I call something “light” I am also calling it “darker” than something “lighter” than it and I am calling it lighter than something darker. In the concept “light” lingers the absent “darkness” and also the other way round. See also Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1053; Schlag “Normativity and the Politics of Form” (1991) 139 *University of Pennsylvania LR* 801 at 925.

²⁵⁵ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 6.

The final objection against deconstruction that Cilliers discusses is the accusation that deconstructive positions are always weak positions.²⁵⁶ The argument is that deconstructionists cannot claim to have a definite position on anything. Deconstructionists, or so the argument goes, always have to resort to vague claims that offer little resistance to rigorous interpretation.²⁵⁷ However, meaning is not attributable to some external guarantee of meaning but to its differentiation from other meanings.²⁵⁸ There is nothing vague about this differentiation. The deconstructive claim is also not that meaning is fuzzy, but that there are limits to the objectivity of meaning.²⁵⁹ The point is not that meaning does not exist. It does exist and can be witnessed all around us every day. The point is that meaning is not fixed. It changes from one circumstance to the next. There is a constant “play” between the differences that constitute meaning.²⁶⁰

7.3 Deconstruction and contractual interpretation

The final aspect that needs to be looked at is the potential impact of deconstructive interpretation on contractual interpretation. Deconstruction helps us to imagine contractual interpretation as something other than a purely intentionalist exercise. It allows us to examine contractual interpretation and the assumptions underlying the practice. In this way, one can examine why texts, intentions and contractual parties are depicted in a certain way, and also how unsettling the basic assumptions underscoring the present depictions (of texts, intentions and contractual parties) might influence the way we see (and interpret) contracts. It allows for the examination of the reasons why we prefer one theory (or one set of assumptions for that matter) to another. At the end of the examination one should be able to evaluate these reasons. This will hopefully leave us with a better understanding of the reasons why we do things the way we do and how changes will affect the present system of interpretation

²⁵⁶ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 7; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2535; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 123.

²⁵⁷ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 7; Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2537.

²⁵⁸ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 7; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 123.

²⁵⁹ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 7.

²⁶⁰ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 7.

and ascription of liability. In the following chapters deconstruction is the main strategy aimed at the unsettling of the present hegemonies in contractual interpretive practice, particularly with regard to texts, intentionalism and individual autonomy.

8. Legal interpretation in a postmodern world (or, perhaps, postmodern interpretation in a modern legal world)

Postmodernism is characterized by four basic contentions.²⁶¹ The first contention is that the self is a cultural, historic, social and linguistic creation. The second is that there are no foundational principles from which we can verify other assertions. Thirdly, knowledge of reality is always merely a belief that can only apply to the context in which it is asserted. Finally, language is socially and culturally constituted and as a result all interpretations and even the texts themselves are social constructions.²⁶² As a result of these factors knowledge is always mediated through our social, historical, cultural and linguistic circumstances and it changes as the circumstances change.²⁶³ The truth can never be transparent to us because it is always mediated through language and thus subject to the same conditions as language.²⁶⁴ Postmodernists claim that all activities are interpretive in nature and the theories of language are thus of paramount importance.²⁶⁵

Two theories of language are discernible in postmodern theory, namely post-structuralism and neo-pragmatism.²⁶⁶ These theories have been discussed under the

²⁶¹ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2508.

²⁶² Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2508; Campbell "Grounding Theories of Legal Interpretation" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 40; Davies "Authority, Meaning, Legitimacy" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 115.

²⁶³ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2509; Campbell "Grounding Theories of Legal Interpretation" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 40; Davies "Authority, Meaning, Legitimacy" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 115.

²⁶⁴ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2509.

²⁶⁵ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2514; Campbell "Grounding Theories of Legal Interpretation" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 40; Davies "Authority, Meaning, Legitimacy" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 115.

²⁶⁶ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2514.

headings of neo-pragmatism and deconstruction, but it remains to be shown how these theories interact.²⁶⁷ Neo-pragmatism focuses on the social construction of knowledge while post-structuralists emphasize the role of language and the structures underlying language in our understanding.²⁶⁸ Post-structuralists argue that there is nothing outside of the text while neo-pragmatists argue that there is no text outside of our interpretations.²⁶⁹ Peter Schanck argues convincingly that these differences are merely different ways of conceptualizing the same ideas.²⁷⁰

The central contention of both neo-pragmatism and post-structuralism is that the truths that we have are always evaluated from within our own knowledge system. According to both theories, there are generally accepted criteria within particular contexts against which we can determine whether something is true or not.²⁷¹ Therefore, while we do not have an objective standpoint from which to determine truth, we are not left helpless. The reason why the two different theories exist is not because one is more true than the other one. The reason probably lies with the predecessors of each theory.

Post-structuralism developed from structuralism.²⁷² Structuralism is a theory regarding the nature of language. The basic idea was that signs refer to thoughts or ideas and not to things. Meaning was seen as the result of the relationships between signs. The theory held that the relationship between the signifier and the signified was purely arbitrary and that the meaning that we attribute to signs is produced by the relationship (structure) between signs.²⁷³ The system of language is held to predate the individual and to the structuralist, the system of language (relationship between words, structure of language) produces meaning. The important difference between

²⁶⁷ See sections 6 and 7.

²⁶⁸ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2514.

²⁶⁹ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2515, 2542, 2543.

²⁷⁰ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2515.

²⁷¹ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2517; Coombe "Same As It Ever Was: Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603 at 613.

²⁷² Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2520.

²⁷³ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2520; Davies "Authority, Meaning, Legitimacy" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 116.

structuralism and post-structuralism is that structuralists hold that one can ultimately know language if one understands the linguistic systems and structures underlying language.²⁷⁴ The structures of language are seen as a sort of objective framework which, if understood, can lead us to better understanding of meaning.²⁷⁵ Post-structuralists counter that these structures and codes of language are themselves interpretations and that they cannot hold any objective status.²⁷⁶

Neo-pragmatism, like post-structuralism, developed out of a modernist theory of meaning. In this case it was pragmatism. Pragmatism has two main contentions, namely that objective truth cannot exist and that truth can be identified by looking at “the way things work”.²⁷⁷ Leading proponents of the theory argued that language is the social, historic and culturally contingent content of our thoughts, and as a result everything that we think or feel must be in linguistic terms.²⁷⁸ What we have is what we received from others before us and so on. Neo-pragmatism is pragmatism divorced from the early scientific methods that were used by pragmatists to try and understand and ultimately know the way language works. The neo-pragmatist recognizes that we can never know language and never fully understand how it works and how we employ it. We are bound to know just that which we already can know.²⁷⁹ The possibilities of meaning depend upon our position in history.

The differences between neo-pragmatism and post-structuralism turn on three aspects. Firstly, where the post-structuralist would argue that self-evident meaning will disintegrate when we look at the alternative or silent meanings inherent in any meaning, the neo-pragmatist will accept that there are self-evident meanings but argue

²⁷⁴ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2521.

²⁷⁵ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2522.

²⁷⁶ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2522; Davies “Authority, Meaning, Legitimacy” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 116.

²⁷⁷ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2540.

²⁷⁸ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2540; Graff “‘Keep off the Grass,’ ‘Drop Dead,’ And Other Indeterminacies: A Response to Sanford Levinson” in Schauer (ed) *Law and Language* (1993) at 380.

²⁷⁹ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2542; Graff “‘Keep off the Grass,’ ‘Drop Dead,’ And Other Indeterminacies: A Response to Sanford Levinson” in Schauer (ed) *Law and Language* (1993) at 377.

that these meanings are contingent upon a shared understanding.²⁸⁰ The origin of meaning is disputed. The second disagreement lies in the importance of interpretation. Post-structuralists inherently look for more or marginalized meanings in interpretation. An interpretation that highlights this is preferred while it is kept in mind that this preference is itself a social construction.²⁸¹ Neo-pragmatists on the other hand argue that no interpretation can claim special status but that the merits of one meaning over another should be measured against the communal standard.²⁸² The third difference lies in the conceptualization of the interpretive process.²⁸³ While neo-pragmatists have a simple yet inclusive model of interpretation, the post-structuralist model is complex involving many elements such as trace and *différance*.²⁸⁴

Postmodern theories of interpretation and their adherents' denial of objective truth must not be seen as an attempt to find closure. The very task of the postmodern interpreter is to try to restore life to its original complexity, in the process letting go of notions like closure.²⁸⁵ A critical analysis, be it a neo-pragmatist investigation into the context or a post-structuralist deconstruction of a text, has at its core the necessity of creating an opening.²⁸⁶ The text is prised open to reveal that which lies hidden, the invisible context or the perpetual opposites that constitute meaning. This process is very helpful to the legal interpreter. She will always have an avenue open to her for a new interpretation. Even in the most entrenched concepts in the legal system there is an inherent possibility that things can be different. No interpretation is ever final.

²⁸⁰ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2570; Davies "Authority, Meaning, Legitimacy" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 118.

²⁸¹ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2571.

²⁸² Graff "'Keep off the Grass,' 'Drop Dead,' & Other Indeterminacies: A Response to Sanford Levinson" in Schauer (ed) *Law and Language* (1993) at 377.

²⁸³ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2571.

²⁸⁴ Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California LR* 2504 at 2571.

²⁸⁵ Van Marle "Law's Time, Particularity and Slowness" (2003) 19 *SAJHR* 239 at 251.

²⁸⁶ Van Marle "Law's Time, Particularity and Slowness" (2003) 19 *SAJHR* 239 at 251.

Coombe illustrates this with the example of a rape case.²⁸⁷ The problem for the legal interpreter is not finding the truth, but finding what is just. The interpreter can no longer justify the meanings that she arrived at by arguing that they are simply the way things are. Nothing is just the way it is. Everything is subject to interpretation and the meaning that is found is again open to interpretation. This does of course not mean that the interpreter is busy with perpetual invention of meaning. The neo-pragmatist insights go against exactly this view. Pure invention can only happen in a non-contextual space and there is no such space.²⁸⁸ In most legal systems legal interpretations will reproduce the contextual factors that make such interpretation possible.²⁸⁹ However, this should not blind us to the potential for change that is always inherent in any context. Postmodern interpretive strategies allow us to look behind the privileged social visions that form the contexts in which law is interpreted.²⁹⁰

Postmodern interpretive practice shows us that there is no “normal” condition.²⁹¹ Any version of normality is always in conflict with other versions thereof and the privileged condition has not always been privileged and will not always be privileged. The version that prevails is always based on social, historical and cultural conditions and therefore susceptible to change.²⁹² Language reproduces the social conditions that help produce that linguistic possibility.²⁹³ Postmodernism allows us to look into the

²⁸⁷ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 615. Recent research shows that in rape cases, often neither the rapist nor raped lies about the situation where the alleged rape took place, but that they understood the same situation very differently. The rapist often claims that the raped led him to believe that she wanted intercourse, while the raped is convinced that she did not lead the rapist on. It is a question of multiple truths rather than one truth and one lie.

²⁸⁸ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 635.

²⁸⁹ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 634.

²⁹⁰ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 637; Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* 743 at 755.

²⁹¹ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 638.

²⁹² Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 638.

²⁹³ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 650.

margins of society and contexts to challenge the “normal positions” and to show that things can in fact be different.²⁹⁴

The question arises whether postmodern interpretation claims for itself the preferred status that it denies positivist theories. Are postmodern theorists not claiming to have reached the transcending position that they are denying other theorists?²⁹⁵ If the world we lived in or are embedded into happens to be a simple, singular system this criticism would be valid. If the world were simple, postmodernists would be claiming to know more about life than the positivist and they would claim to have the right answer. But the world that we live in is not simple or singular. It is complex and constantly changing. The world around us provides the resources that make criticism possible and necessary.²⁹⁶ Language, like the world, is complex. Small changes might have big consequences.²⁹⁷ The complexity of things makes postmodern interpretation possible and necessary.²⁹⁸

9. Conclusion

In this chapter the different theoretical positions on interpretation (especially interpretation of legal texts) were discussed together with the main criticism against each theory. The chapter started out with a discussion of the uniqueness of legal interpretation as explained by Robert Cover. In essence, legal interpretation differs from other types of interpretation because of the violent nature of legal interpretation. Where normal interpretation is characterized by (indeed aimed at creating) a space where inter-personal interaction can be facilitated, legal interpretation is characterized by the lack of a shared experience between the participants. During the process of legal interpretation, one participant’s interpretation is often violently denied and, importantly, the violent denial results in violent consequences (such as incarceration,

²⁹⁴ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 638.

²⁹⁵ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 642.

²⁹⁶ Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 642; Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 4.

²⁹⁷ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 4.

²⁹⁸ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 4; Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 642.

deprivation of property, loss of dignity etc) for the party whose interpretation is denied. Cover lists the unique characteristics of legal interpretation as follows:

- Legal interpretation is a practical activity aimed at occasioning practical acts of violence. In other words, legal interpretation is aimed at achieving certain effects. A judgement is handed down *because* it is assumed that someone will act on that judgement.
- Legal interpretation is designed to create threats and actual deeds of violence. There is a whole institutional system aimed at enforcing authoritative legal interpretations.
- Legal interpretation is bonded interpretation. This means that legal interpretation cannot be understood apart from the violent acts it (legal interpretation) occasions, and also, the violent acts cannot be understood apart from the interpretation.

Cover's analysis of the nature of legal interpretation leads us to the important insight that working with (and theorizing about) legal interpretation is a serious business with potentially serious consequences. One should always keep in mind that any theory of legal interpretation (if accepted) will have real consequences for real people.

In section 3 various objective meaning theories were examined, including objectivism, plain legal language theory (PLLM) and natural law theory. All of these theories are aimed at eliminating misunderstandings and, by so doing, perfecting communication, based on the assumption that clear objective meaning is possible. Objectivists contend that language itself has independent (objectively certifiable) meaning and that careful language use eliminates misunderstandings. Consequently, careful authors can guide interpreters to the meaning she (the author) intends to convey with the text. The PLLM contends that misunderstandings are the result of special-language (like legal language) use. They hold that standardization of terms and their meanings (correlation between signifiers and that which they signify) will minimize misunderstandings because there will be a correlation between what we say and what we mean. Metaphysical realism (as an example of natural law theory) is based on the contention that language has a pointing out (ostension) function, and perfect understanding is the result of a successful connection of the word (signifier) with that which it represents (signified). Metaphysical realists argue that one must look past the text (and the different meanings inherent in that text) to the actual intended message. The main criticism against all three theories is that the possibility

of a correlation between signifiers and what they signify is dependent upon the possibility that signifiers do not correlate with only one signified. There must be the possibility of metaphoric communication. The problem facing objectivists is the linguistic importance of the possibility of a correlation of signifier and signified and possibility of non-correlation. Language can only signify because it can also missignify. The very element that objectivists want to limit (non-correlation of signifiers and signifieds) provides us with meaning.

In section 4 the influence of rules of interpretation on the elimination of misunderstanding is examined. (*The*) rules of interpretation are often the result of anxiety about the meaning possibilities inherent in language. The rules are used as a way of eliminating some of the meaning possibilities, and many rule-theorists argue that consistent application of (*the*) rules will lead to a situation where the outcome of the interpretation process is predictable. The main problem with the rule-based approach to interpretation is that (*the*) rules are also linguistic texts and are therefore subject to the same conditions of interpretation as any other text. Interpreting with rules involves interpreting rules and the outcome is just as determinate (or indeterminate) as any other interpretive process. The rules can only delineate insofar as they have meaning.

Context and interpretive communities (as the subject of section 5) are also used to try to restrict the possible meanings of legal texts. Many interpretation theorists argue that careful consideration of the legal context in which a text is created eliminates possible meanings other than the contextually correct meaning. In other words, if we look closely at the circumstances that gave rise to the text, we will be able to objectively interpret the text. Other theorists believe that the interpretive assumptions of the legal community serve as constraints on the legal interpreter. Accordingly, the extent of the possible meanings that can result from a legal interpretation is restricted to those meanings that are legally relevant. The greatest difficulty facing these theorists (who believe that either (or both) context or the interpretive community can restrict interpretation) is that any interpreter is always bound to interpret any context from her unique perspective and is bound to be part of many diverse interpretive communities. A context can only constrain an interpretation insofar as that context can be reproduced. Any reproduction is subject to the interpretation of the original

text (or context) and therefore subject to the same conditions as any other interpretation. As far as interpretive communities are concerned, any person is at the same time subject to various interpretive communities (and by implication interpretive influences), and the dominance of one interpretive community is not guaranteed. To rely on an interpretive community to restrict an interpretation is to rely on constantly shifting and fluctuating dichotomies of influence on the interpreter. Interpretive communities do not make interpretation determinate, but rather add to the complex meaning possibilities inherent in any text.

Neo-pragmatism is the postmodern equivalent of pragmatism. Like pragmatists, neo-pragmatists reject the notion of objectively certifiable meaning and they share (with pragmatists) the belief that meaning can only exist after interpretation. Both theories of interpretation hold that meaning is the product of our interpretive communities, context and historic situatedness. However, neo-pragmatists reject the belief (held by pragmatists) that ultimate knowledge (and subsequent control) of the way we interpret is possible because of our historic situatedness. Our interpretive communities and the context in which we find ourselves will always influence us, but not in a predictable way. There is always a dynamic tension between the various interpretive communities and contexts that influences any given interpreter. For the neo-pragmatist, any meaning is merely a product of the interpretation framework (which includes the context of the interpretation and the interpretive communities in which the interpreter finds himself) that is not rigid but fluid and any examination of the framework is merely an interpretation. The main criticism against neo-pragmatism is that it leaves the “authorization” of meaning in the hands of the powerful (or dominant interpretive community) and marginalizes the meanings of the weaker interpretive communities. Because neo-pragmatists deny interpreters access to the influences on interpretation (they argue that interpretive communities are always already in place), the marginalized in society are left without recourse. Neo-pragmatists rejoin by arguing that although interpretive communities are always already in place, the interpreter is always free to broaden the influences on interpretation by including the marginalized and weak in the decision-making processes.

Post-structuralism (the subject of section 7) developed out of structuralism. Both theories hold that language predates understanding and that language consists of

purely arbitrary relations between signs and what they signify. Meaning is the result of interplay between the signs and not the result of a relationship between the sign and that which it signifies. While structuralists hold that one would ultimately be able to know how language works, post-structuralists contend that this is not possible. Post-structuralists hold that signs are iterable, that is: they are repeatable in many contexts. Meaning exists of a preferred concept and a non-preferred concept. The preferred concept is always dependent upon the non-preferred and the process by which this is shown is called deconstruction. Deconstruction is used to show how preferred concepts are dependent upon the non-preferred, and how the preferred concept is supplemented by the non-preferred. In legal interpretation deconstruction is often utilized to highlight the dependency of concepts like individual autonomy upon various preconditions that are often contradictory. Various criticisms have been levelled against deconstruction, ranging from allegations that post-structuralism is a relativist theory to arguments that post-structuralists are guilty of a performative contradiction. Post-structuralists have been able to successfully defend the theory against these criticisms and post-structuralism is at present the most promising theory of interpretation as far as highlighting marginalized and critical meanings go.

In the following chapters post-structuralist interpretive techniques are used to highlight the deficiencies of present contractual interpretation theory and post-structuralism (allied occasionally with neo-pragmatism) provides a basis from which an alternative approach is suggested.

3

Contemplating Individual Autonomy

1. Introduction

In this chapter the concept of individual autonomy is examined with reference to liberal, communitarian and critical theories of the self. Each theory is first discussed in broad terms and then with specific emphasis on each theory's description of the individual or self.

Any theory of interpretation necessarily involves a theory of self. Meaning (as the product of interpretation) is always aimed at influencing human behaviour. Interpretation always involves a text (created by a person/s) and a text is always interpreted (by a person/s). Therefore, any understanding of an interpretation process (such as the interpretation of contracts) necessarily involves an understanding of the nature of text creators and interpreters. Moreover, to evaluate assumptions about interpretation, there is a need to study theories of the self and evaluating assumptions about the nature of the contracting party. To understand (and ultimately criticize) the South African contractual interpretation practice, assumptions about the nature of the contractual party (text creator) and interpreter must be discussed. Interpretation and legal subjectivity go hand in hand. Understanding the one is impossible without reference to (and an understanding of) the other.

One of the purposes of this chapter is to show that common assumptions about individual autonomy and its significance for interpretation are contested and dubious at best. It will be shown that the concept of individual autonomy is a construction rather than a natural state of affairs. While liberal theories seem to be a description of the actual state of things, with the maximization of individual freedom as the ideal, communitarian critique will show that this is not the case. At the same time, communitarian views of the self do not establish a sound basis for interpretation theory either.

The ultimate goal of this chapter is to sever contractual interpretation from the autonomy assumptions of atomistic individualism that serve as a basis for present

practice. By looking at the (often communal) nature of contract construction, contract can possibly be imagined as being both a purely private medium of exchange and a social instrument that could be construed to maximize benefit for both the individual participants and society at large.

It should be noted that liberalism and communitarianism (and to an extent critical theories of the self) are not totally homogenous theoretical concepts. Deep divisions between divergent liberal, communitarian and critical views characterize both theories. It is not my intention to discuss either theory comprehensively. I intend to give an overview of each theory to sketch the outlines of the divergent views that exist and to postulate a critical theory of the self, particularly that of Frank Michelman, as an alternative. The endeavor to understand the role of contractual parties in the creation of meaning differently is intended to provide possible points of departure rather than a comprehensive alternative to the present hegemony of liberal theory, at least as far as the authorial role in interpretation is concerned.

2. The liberal theory of rights

2.1 Introduction

Liberalism in the modern commercial society can be characterized as the proposition that the ascendancy of the egocentric and isolated individual is the ideal way of life.¹ The individual will is valued as an end in itself and detached from any perceived greater social or communal order. The assumption is that establishment of community is predated by the existence of asocial individual subjects engaged in the pursuit of self-interest.² The individual is seen as the point of origin of consciousness, choice and action.³ Politics and the law in society are merely tools allowing individuals to pursue their own self-interest and the satisfaction of their own desires.⁴ The fundamental quest of all individuals is described as an interest in liberty and

¹ Gazra "Hegel's Critique of Liberalism and Natural Law: Reconstructing Ethical Life" (1991) 9 *Law and Philosophy* 371 at 372; Van Blerk *Jurisprudence: An Introduction* (1998) at 127.

² Gazra "Hegel's Critique of Liberalism and Natural Law: Reconstructing Ethical Life" (1991) 9 *Law and Philosophy* 371 at 383; Van Blerk *Jurisprudence: An Introduction* (1998) at 136; Lipkin "In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism" (1996) 45 *DePaul LR* 263 at 269.

³ Michelman "The Subject of Liberalism" (1994) 46 *Stanford LR* 1807 at 1813;

⁴ Gazra "Hegel's Critique of Liberalism and Natural Law: Reconstructing Ethical Life" (1991) 9 *Law and Philosophy* 371 at 379; Dyzenhaus "Liberalism, Autonomy and Neutrality" (1992) 42 *University of Toronto LJ* 354 at 355.

autonomy.⁵ Liberals argue that persons should be granted space to live their lives in accordance with their own wishes, as long as they do not interfere in a harmful way with the lives of others.⁶ Liberals presuppose that individuals who are granted the maximum possible freedom will end up maximizing their own benefit and that the result would benefit all. To sum up, liberalism values strong individual rights and liberties to enable persons to live according to their own conceptions of good.⁷

State action with regard to the freedom of individuals is mainly sanctioned in accordance with the harm principle. This principle allows state intervention only when an activity (that triggers the intervention) is harmful to individuals (or more specifically individual autonomy).⁸ Most liberals argue that the division between the public and private realms must be maintained.⁹ In this theory, the public realm is perceived as the space where the autonomous private life of the individual is facilitated.¹⁰ For example, while the state might prohibit pornography in public because of its perceived negative moral impact, it cannot prohibit it in the private because it would lead to coerced perfectionism.¹¹ Equality (in the liberal sense) is not the sum of the individual preferences.¹² The state must therefore be morally neutral and only prohibit those things that negatively or harmfully impact on the autonomy of other individuals.¹³ The ideal state is one that does not prescribe its conception of

⁵ Dyzenhaus "Liberalism, Autonomy and Neutrality" (1992) 42 *University of Toronto LJ* 354 at 355; Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 471 at 779; Van Blerk *Jurisprudence: An Introduction* (1998) at 136.

⁶ Dyzenhaus "Liberalism, Autonomy and Neutrality" (1992) 42 *University of Toronto LJ* 354 at 355 and at 369; Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 741 at 780.

⁷ Michelman "The Subject of Liberalism" (1994) 46 *Stanford LR* 1807 at 1814; Hutchinson "Indiana Dworkin and Law's Empire" (1987) 96 *Yale LJ* 637 at 646.

⁸ Dyzenhaus "Liberalism, Autonomy and Neutrality" (1992) 42 *University of Toronto LJ* 354 at 355; Van Blerk *Jurisprudence: An Introduction* (1998) at 138.

⁹ Dyzenhaus "Liberalism, Autonomy and Neutrality" (1992) 42 *University of Toronto LJ* 354 at 364

¹⁰ To put it very simply, the public realm is the place where we decide what may be done in private. This is seen as a social contract between individuals to work towards the maximisation of their autonomy. The precise nature of this proposed social contract differs substantially depending on the definer. See Van Blerk *Jurisprudence: An Introduction* (1998) at 127-141.

¹¹ Coerced perfectionism seems to be a state where all is well (in the communal sense), but not because of the maximization of individual autonomy, but rather because of the overriding pursuit of the greater social good. In such a state moral majoritarianism is the rule.

¹² Dyzenhaus "Liberalism, Autonomy and Neutrality" (1992) 42 *University of Toronto LJ* 354 at 366. In other words a liberal state is not a moral majoritarian conglomerate. It must facilitate all the preferences of the society subject to the harm principal. Individuals must be allowed to act according to their own beliefs so long as those beliefs do not infringe on those of others.

¹³ Dyzenhaus "Liberalism, Autonomy and Neutrality" (1992) 42 *University of Toronto LJ* 354 at 364; Lipkin "In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism" (1996) 45 *DePaul LR* 263 at 264.

good (in the private sphere).¹⁴ However, the public realm can be regulated to provide an atmosphere that promotes individual autonomy.¹⁵ The only areas where the state is required to be non-neutral are the preservation of freedom and autonomy.¹⁶ The ideal seems to be the creation of an environment where the widest number of opposing views can be accommodated.¹⁷ According to liberal theory, freedom is situated in limiting state power, because the individual would then be free to form the social unions that she pleases.¹⁸ In so doing, the state ensures that individual choice is maximized, which in turn would lead to the maximization of public good.¹⁹

Liberty further includes the right of individuals to participate in collective decision-making (essentially rule making) and to pursue the opportunities that the rules make available.²⁰ The right to be an equal member of a self-governing community is seen as crucial for the ultimate realization of the self.²¹ Liberalism envisages a government of laws, not men.²² The political is portrayed as an arena for discussion of the opposing doctrines held by persons. This also implies that individuals must agree to make politics the arena for such discussion.²³ Many liberal theorists argue that this agreement takes the form of a contract concluded by individuals before the advent of society.²⁴ This contract contains the rules of engagement (so to speak). The goal of

¹⁴ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 268.

¹⁵ Public hate speech can for example be prohibited because the affected persons are hindered in living out their autonomy as a cultural group. See Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 264.

¹⁶ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 302-303.

¹⁷ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 268.

¹⁸ Dyzenhaus “Liberalism, Autonomy and Neutrality” (1992) 42 *University of Toronto LJ* 354 at 368; Michelman “The Subject of Liberalism” (1994) 46 *Stanford LR* 1807 at 1815.

¹⁹ It is assumed that individuals, when granted freedom, will maximise their own interests, and by so doing maximise the collective good.

²⁰ Baker “Property and its Relation to Constitutionally Protected Liberty” (1986) 134 *University of Pennsylvania LR* 471 at 816.

²¹ Baker “Property and its Relation to Constitutionally Protected Liberty” (1986) 134 *University of Pennsylvania LR* 471 at 748; Michelman “The Subject of Liberalism” (1994) 46 *Stanford LR* 1807 at 1816.

²² Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 267.

²³ Michelman “The Subject of Liberalism” (1994) 46 *Stanford LR* 1807 at 1816.

²⁴ Michelman “The Subject of Liberalism” (1994) 46 *Stanford LR* 1807 at 1821; Hutchinson “Indiana Dworkin and Law’s Empire” (1987) 96 *Yale LJ* 637 at 646. Rawls and other liberal theorists argue that there was never a social contract, but rather individual realization of inter-subjective being. See Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at fn 21.

dialogue is the creation of a deliberative culture that performs social inquiries to resolve conflicts.²⁵ A deliberative culture presupposes that clear, decisive methods exist to resolve conflicts.²⁶ Deliberation is regarded as a neutral way of solving conflict. The answer that survives the deliberative gaze is clothed in moral authority, and is seen as the result of a transcending objective process that stands neutral to actual cultural and social practices.²⁷ Conflict must be resolved in one of the arenas allocated to the resolution of such conflict --law-like conflicts in court and other conflicts in politics--. In this process, people get to choose the rules by which they want to be governed in the political process.²⁸ The courts must test these rules against the paramount value of liberty enhancement, because it is the reason for the conclusion of the social contract in the first place.

Liberals argue that judges must approach their job in a dispassionate spirit.²⁹ The role of the judge is to apply the rules in as objective a way as possible. Judges should be aware of their feelings and prejudice, and purge themselves of such influences before deciding a case.³⁰ By sustaining a stance of “disinterestedness” judges are perceived to be able to adjudicate between the arguments presented to them objectively and according to the law and not according to individual emotions.³¹ When interpreting statutes, judicial officers must pay due regard to the intention of the legislature and the purpose of the statute and take care not to usurp the role of the legislature.³² Only by doing that can the judiciary stay true to the principle of government by law, not men.

²⁵ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 328.

²⁶ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 329.

²⁷ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 329.

²⁸ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 267; Hutchinson “Indiana Dworkin and Law’s Empire” (1987) 96 *Yale LJ* 637 at 646.

²⁹ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 298.

³⁰ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 298.

³¹ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 298.

³² Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 299.

The role of a supreme constitution in the liberal scheme is to promote participation in democracy.³³ The role of the judiciary when interpreting the constitution is to perfect representative democracy.³⁴ Because politics is governed by the rule of the majority, it can be misappropriated to infringe on the autonomy of minorities. The role of the court when interpreting the constitution is therefore to combat infringements on the rights of the marginalized in society in order to promote a truly representative democracy.³⁵ The constitution is a framework of fundamental rights and liberties aimed at providing a minimum set of values in the quest for autonomy.³⁶ The role of these rights and liberties is to act as a set of principles against which the actions of state and also private (non-state) actions can be measured and evaluated. The point is to establish whether the action under scrutiny in fact advances liberty and autonomy. According to the liberal conception of a constitutional dispensation, constitutional mechanisms provide ways of reaching public agreement, while permitting individuals to act on their views in their private lives.³⁷ This description of a constitutional dispensation reinforces the liberal ideal of a strict division between the public and private spheres of life.

The development of liberalism as a way of life (and its attribution of authority over the self to the individual) is seen as a historical product.³⁸ Liberals argue that authority was not always seated in the self. Practices like slavery, serfdom and male

³³ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 301; Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 284.

³⁴ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 301.

³⁵ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 302; Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 302.

³⁶ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 308; Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 302.

³⁷ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 284.

³⁸ Baker “Property and its Relation to Constitutionally Protected Liberty” (1986) 134 *University of Pennsylvania LR* 471 at 780; See also Mensch “The Colonial Origins of Liberal Property Rights” (1982) 31 *Buffalo LR* 635 at 693. Mensch shows how the liberal conception of property rights came into being in colonial New York. Far from being the natural state of affairs, she argues that property rights as we know them are the result of an uneasy marriage between the idea that property results from the hierarchal relationship between the king and subject and the idea that property rights result from the utilisation of the property.

domination demonstrate that liberty or self-control did not always lie with the individuals themselves.³⁹ However, because of the historical development of autonomy it is so deeply embedded in political, economic and ethical practices that it can be regarded as natural.⁴⁰ Baker argues that careful investigation of most political institutions, moral commitments and communication practices will show that individualism is a prerequisite for the said institutions.⁴¹ He avers that even exceptions to the rule that the self must have control over the self are aimed at furthering individualism.⁴²

2.2 The liberal conception of the self

The liberal theory of law and society conceives the self (the person) as an atom (or building block) of society. The self is independent of other selves and is self-authenticated and commands itself.⁴³ Persons are perceived to be in charge of their own thoughts and actions. Michelman asserts "...[The liberal self is] a spontaneous author of plans and doer of acts inspired by its own cognitions, calculations, and desires..."⁴⁴

Michelman argues that most liberal theorists would agree that a liberal "person" must have the following attributes:⁴⁵

- Each subject must be ethically separate.⁴⁶ This means that each individual subject leads his or her own life, distinct from the lives of other subjects. Each life must also have a distinct field of value. This means that people's lives

³⁹ Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 471 at 782.

⁴⁰ Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 471 at 782; Hutchinson "Indiana Dworkin and Law's Empire" (1987) 96 *Yale LJ* 637 at 646.

⁴¹ Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 471 at 783.

⁴² He demonstrates this with the rule that parents have control over children. He argues that this control of the parent over the child is not to promote the interest of the parent over that of the child, but rather to promote the development of the child in order for the child to become autonomous. See Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 471 at 783.

⁴³ Michelman "The Subject of Liberalism" (1994) 46 *Stanford LR* 1807 at 1809. Michelman is a republican liberal theorist himself, but provides a very detailed description of the typical liberal self.

⁴⁴ Michelman "The Subject of Liberalism" (1994) 46 *Stanford LR* 1807 at 1809.

⁴⁵ Michelman "The Subject of Liberalism" (1994) 46 *Stanford LR* 1807 at 1812.

⁴⁶ Michelman "The Subject of Liberalism" (1994) 46 *Stanford LR* 1807 at 1812; Van Blerk *Jurisprudence: An Introduction* (1998) at 136.

must not be assessed as a collective, but each life must be assessed individually.

- Each subject must be interest-bearing.⁴⁷ Subjects must be capable of being affected differently by events and the influence upon each individual's well-being must be capable of independent assessment.
- Each subject must be self-activating.⁴⁸ This means that each subject can contemplate its own interests, understand its reason for doing something and accommodate action according to that understanding.
- Each subject must be communicative.⁴⁹ This means that each subject is capable of intentionally influencing the reasoning of another subject and is itself subject to such influence from another subject.
- Each subject must be self-conscious or reflective.⁵⁰ This means that the subject must be aware of itself as an ethically separate, interest-bearing, self-activating and communicative subject.

In liberal theory, persons are defined as “selves gaining identity in terms of their activities, their personal relations, their values and capacities, their projected or hoped for futures, their individual histories and their collective traditions”.⁵¹ Because of this definition of the self, much of the identity of the self is realized and defined by the things around them, in other words the material world.⁵² This relation to the material world requires persons to control their environment in order to control their own identity. Property rights are necessary to protect the self's control over the objects that define and occupy the spaces that are entwined with their developing and present identity.⁵³ Personhood is central to the liberal claim and the relationship between the selves and specific objects (in which selves invest some degree of their identity)

⁴⁷ Michelman “The Subject of Liberalism” (1994) 46 *Stanford LR* 1807 at 1812; Van Blerk *Jurisprudence: An Introduction* (1998) at 136.

⁴⁸ Michelman “The Subject of Liberalism” (1994) 46 *Stanford LR* 1807 at 1812; Van Blerk *Jurisprudence: An Introduction* (1998) at 136.

⁴⁹ Michelman “The Subject of Liberalism” (1994) 46 *Stanford LR* 1807 at 1812; Van Blerk *Jurisprudence: An Introduction* (1998) at 136.

⁵⁰ Michelman “The Subject of Liberalism” (1994) 46 *Stanford LR* 1807 at 1812.

⁵¹ Baker “Property and its Relation to Constitutionally Protected Liberty” (1986) 134 *University of Pennsylvania LR* 471 at 745.

⁵² Baker “Property and its Relation to Constitutionally Protected Liberty” (1986) 134 *University of Pennsylvania LR* 471 at 745 and 46; Van Blerk *Jurisprudence: An Introduction* (1998) at 136 and 138-141.

⁵³ Baker “Property and its Relation to Constitutionally Protected Liberty” (1986) 134 *University of Pennsylvania LR* 471 at 746; Van Blerk *Jurisprudence: An Introduction* (1998) at 139.

justifies legal protection of the control of such objects.⁵⁴ Strong property rights are therefore crucial to the liberal notion of autonomy.

Individualism and the realization of the self are perceived to flow from conformity with certain collective structures.⁵⁵ The self can reasonably expect of other selves to conform to these collective structures to the extent that these structures embody respect for individual equality and autonomy. A system of law must therefore respect the twin values of autonomy and individual equality for it to be legitimate.⁵⁶ Baker argues that the self can only reach her full capability in moral and communicative action if these twin values are seen as prerequisites for legality.⁵⁷ Dyzenhaus argues that there cannot be true self-determination if one cannot rise above the circumstances in which one is born.⁵⁸ A liberal society is one that makes the self's ambitions, rather than the self's circumstances, the determinant of her fate.

The self is an individual that includes a physical body and a personality. The self is the locus of the decision-making authority over itself, as far as that decision-making does not involve another self's body or resources without consent.⁵⁹ This means that the self constitutes and controls itself, but in relation to other selves. The autonomous self is that which is left alone (to mind its own business) except for the limits imposed by the offence and harm principles when a minimum level of economic and health well-being is provided.⁶⁰

Finally, because of the deliberative nature of liberalism, the individual is also said to possess the capacity for practical reason,⁶¹ which presupposes that the self has a conception of good and a sense of justice. However, this is not enough. Rawls argues

⁵⁴ Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 471 at 762; Van Blerk *Jurisprudence: An Introduction* (1998) at 138-141

⁵⁵ Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 471 at 778.

⁵⁶ Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 471 at 778; Van Blerk *Jurisprudence: An Introduction* (1998) at 140.

⁵⁷ Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 471 at 778.

⁵⁸ Dyzenhaus "Liberalism, Autonomy and Neutrality" (1992) 42 *University of Toronto LJ* 354 at 364

⁵⁹ Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 471 at 782.

⁶⁰ Dyzenhaus "Liberalism, Autonomy and Neutrality" (1992) 42 *University of Toronto LJ* 354 at 361.

⁶¹ Lipkin "In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism" (1996) 45 *DePaul LR* 263 at 279.

that the self must also possess an idea of the extent of the so-called basic terms of social life.⁶² The self must further recognize that there are other selves similarly situated to herself, and that the democracy that she forms part of recognizes and encourages multiple conceptions of good.⁶³ A self is regarded as reasonable if she is willing to modify and revise her conception of good in the face of social conflict if it is in the interest of social cooperation. This principle is of course not absolute because it must be measurable against the *über*-value of individual autonomy and the possibility of multiple truths. The reasonable self always tries to justify his actions to others on grounds he cannot reasonably reject.⁶⁴

An acceptance of liberalism has important theoretical implications for any description of an author or interpreter. Liberal theorists regard the author of a text as autonomous, and consequently, her wishes for (or intentions with) the text is of paramount importance. The author is assumed to be in control of the interpretive process through her creation of the text. Any meaning resulting from the interpretive process must be attributable to the author of the text; otherwise it is no longer authorized. The interpreter is not given any scope for interpretive creativity since his aim should be to replay the intention of the author as accurately as is possible.

2.3 Criticism of liberalism

Liberalism as a theory of law and society has been widely accepted in South African jurisprudence. Our courts accept the premise that individuals are autonomous, which is the central claim of liberalism.⁶⁵ It is also this contention, namely that persons are autonomous, which constitutes the first target of communitarian criticism.

Communitarians contend that self-realization is a prerequisite for autonomy. Without an understanding of herself, there cannot be any autonomous decision-making by the self. The self is the locus of decision-making in liberal theory, and a sense of self-

⁶² Rawls *Political Liberalism* (1993) at 62; Lipkin "In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism" (1996) 45 *DePaul LR* 263 at 279.

⁶³ Lipkin "In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism" (1996) 45 *DePaul LR* 263 at 279.

⁶⁴ Lipkin "In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism" (1996) 45 *DePaul LR* 263 at 280.

⁶⁵ See for example *Bernstein and Others v Bester and Others* 1996 (2) SA 751 (CC) at 788; *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at 870-887.

understanding (before the decision is made) forms the basis of any liberal dispensation. In short, for the liberal argument to succeed, the self must have a sense of (or understand) herself before she makes any social connection or decision. The communitarian attack focuses on the origin of that understanding. Communitarians argue that the liberal contention that understanding originates from the individual cannot be upheld, because understanding is built on previous understanding or pre-understanding, and that understanding is again built on pre-understanding.⁶⁶ This pre-understanding is community-specific because the individual understands only as the pre-understanding allows. In other words, the individual only understands or reasons within the possibilities open to him.⁶⁷ These possibilities are particular to the community that is here and now. Knowledge is historical, contextual and contingent because of this communal influence.

The second critique of liberalism is centered on the self-destructing tendency of liberalism. Liberal theorists contend that the ultimate realization of the self can only be achieved by state regulation of the public and non-intervention in the private. The problem that emerges is that the public is being weakened and the private strengthened because of commercial reality.⁶⁸ The prioritization of the pursuit of wealth and property weakens the identification of individuals with the social.⁶⁹ Because of the exclusionary nature of liberal property and personal rights, the identification with such rights leads to the perception that the private is preferable to the public, since the non-interventionist liberal state does not interfere with the private. This leads to the gradual privatization of the public.⁷⁰ Because of the non-interventionist stance regarding the private sphere, the very tools that were supposed to ensure the maximization of autonomy are being neutralized by autonomy. The minimum economic levels necessary for an autonomous life cannot be attained

⁶⁶ Christodoulidis "The Suspect Intimacy Between Law and Political Community" (1994) 80 *ARSP* 1 at 4.

⁶⁷ Christodoulidis "The Suspect Intimacy Between Law and Political Community" (1994) 80 *ARSP* 1 at 4.

⁶⁸ Van der Walt "Un-doing things with words: the colonization of the public sphere by private property discourse" 1998 *Acta Juridica* 235-28.

⁶⁹ Gazra "Hegel's Critique of Liberalism and Natural Law: Reconstructing Ethical Life" (1991) 9 *Law and Philosophy* 371 at 375.

⁷⁰ This trend can be seen in South Africa with regard to the privatisation of the telephone networks, the power supply, rails systems etc and the resultant lack of regulation thereof (especially concerning affordability. Many formerly public services are now run by the private sector). See Van der Walt "Un-doing things with words: the colonization of the public sphere by private property discourse" 1998 *Acta Juridica* 235-28.

because the privatization of the providers of services makes it too expensive for a large part of the population.⁷¹ The liberal role afforded the state will therefore eventually lead to the demise of autonomy, because the state will disappear and with it the public. As Dyzenhaus concedes "...[v]ital social relations might in fact disintegrate without help from the state...".⁷² Liberal theorists thus have to revise their insights regarding the realization of autonomy.

The third criticism of liberalism centers on the liberal conception of property rights. Liberal theorists often proclaim that property rights have to protect the individual against the exploitation of his rights by others because of the strong identification persons are seen to have with property.⁷³ Identity is linked with property and property plays an important role in upholding the autonomy of the individual.⁷⁴ Individual autonomy is the goal of liberalism and its conception of property rights reflect that. This exclusive conception of property leads to the entrenchment of existing property relations and resistance to change. Furthermore, the exclusive property rights that are supposed to protect individuals against unjust exploitation often leads to the protection of the property rights of past exploiters.⁷⁵ This is especially evident in the South African context in the case of land reform.⁷⁶ The liberal conception of property

⁷¹ See Van der Walt "Overview of Developments since the Introduction of the Constitutional Property Clause" (2004) 19 *SA Public Law* 46-89; Van der Walt "Property rights and hierarchies of power: an evaluation of land reform policy in South Africa" (1999) *Koers* 259-294; Van der Walt "Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African land-reform legislation" (2002) 119 *SALJ* 254-289; Van der Walt "Exclusivity of ownership, security of tenure, and eviction orders: a critical evaluation of recent case law" (2002) 18 *SAJHR* 371-419; <http://www.landaction.org/display.php?article=67> "[t]he privatisation of Eskom has ensured that electricity prices will rise above inflation, and that poor people pay more for power than rich people. The Eskom thugs turn the lights off in millions of poor homes when people cannot afford to pay, and criminalize the poor when they fight against these policies. The denial of basic services to the poor is a gross human rights violation... Poor people are also being evicted from their own private homes when they are too poor to pay for water and electricity." In South Africa, the state has begun to realize that this might be a problem and initiatives like the basic water ration are aimed at combating the effects of privatization on the poor. However, the collapse (and immanent collapse) of many rural municipalities serve as a reminder that we are a long way from realizing a balance between the rights (and needs) of the poor and the monetary pressures on the state.

⁷² Dyzenhaus "Liberalism, Autonomy and Neutrality" (1992) 42 *University of Toronto LJ* 354 at 369

⁷³ Baker "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania LR* 741 at 747.

⁷⁴ See section 2.1 above.

⁷⁵ Fisher "The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights" in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 287.

⁷⁶ See Van der Walt "Overview of Developments since the Introduction of the Constitutional Property Clause" (2004) 19 *SA Public Law* 46-89; Van der Walt "Property rights and hierarchies of power: an evaluation of land reform policy in South Africa" in LM du Plessis (ed) 1999 *Koers Potchefstroom University* 259-294; Van der Walt "Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African land-reform legislation" (2002) 119 *SALJ* 254-289; Van der Walt

rights seems to be objective and it is precisely this that masks the inevitable moral and social decisions that underlie the existence of such rights.⁷⁷

Possibly the most compelling and relevant criticism against the liberal conception of law came from the critical legal studies movement or CLS.⁷⁸ The CLS identified three contradictions central to liberal thought.⁷⁹ The first contradiction is between the mechanical application of rules in dispute resolution, which is thought to advance individualism and self-reliance, and the application of ad hoc standards that are situation-sensitive, that are seen as advancing altruism. This contradiction is illustrated by South African jurisprudence on eviction.⁸⁰ The second contradiction in liberal thought is between the belief that values and desires are arbitrary and individually conceived, while ethical and social truths are established objectively received because facts and reason are objective. This contradiction can be observed in

“Exclusivity of ownership, security of tenure, and eviction orders: a critical evaluation of recent case law” (2002) 18 *SAJHR* 371-419; *Baartman and Others v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA); <http://www.irinnews.org/webspecials/landreformsa/South-Africa.asp>; <http://www.landaction.org/display.php?article=67> and <http://www.nkuzi.org.za/land-reformsa.htm> where it is reported that “...[I]t is estimated that seven million inhabitants of farmland face eviction by 60000 farmers who own the land. This is ascribed directly to the liberalization of the South African society. The notes of a think-tank meeting in Pretoria, the capital, organised to seek ways out of the impasse on land reform in the region, reflect the results of these difficulties: ‘Land redistribution to provide land for the landless in rural areas has been very slow, and falls far below the government’s target of transferring 30 percent of agricultural land by 2015...’ and ‘...At the current rate, it (land reform) is unlikely to reach 5 percent by that date,’ the meeting concluded. Also noted was the ‘general failure to deliver post-transfer support services to land reform farmers’...”. For more on land reform see http://land.pwv.gov.za/legislation_policies/white_papers.htm; <http://www.anc.org.za/ancdocs/history/mbeki/2002/tm0208.html>; <http://www.info.gov.za/speeches/2002/0202281146a1001.htm>

⁷⁷ Mensch “The Colonial Origins of Liberal Property Rights” (1982) 31 *Buffalo LR* 635 at 639.

⁷⁸ For a general history and account of the movement see Unger *The History of the Critical Legal Studies movement* (1986); Kelman *A Guide to Critical Legal Studies* (1984).

⁷⁹ Kelman *A Guide to Critical Legal Studies* (1984) at 3; Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 289.

⁸⁰ In *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at 21 the Supreme Court of Appeal stated that the only elements to be proven in order for an owner to be entitled to an eviction under art 26(3) of the Constitution of South Africa act 108 of (1996) 45 was ownership and possession by the lessee. In *Ndlovu v Ngcobo*; *Bekker and another v Jika* 2003 (1) SA 113 (SCA) at 123, the same court interpreted the same area of constitutional law to include an investigation into the circumstances of the unlawful occupier before an eviction order can be granted. The point is that while mechanical rules of law are perceived to promote individual autonomy, liberals realize that the mechanical application of rules might lead to unjust and socially immoral results. However, note that *Brisley* was decided on the basis of sec 26(3) of the Constitution, while *Ndlovu* was decided on the basis of the PIE act (Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, sec 4), which necessitates consideration of the circumstances. While sec 26(3) expressly require that all circumstances be taken into account, the court (in *Brisley*) interpreted “all relevant circumstances” as simply consisting of the common law onus of ownership and possession. Conversely, the *Ncobo*-test includes a PIE inquiry (PIE requires that attention be paid to circumstances expressly mentioned in the act) that goes much wider than the *Brisley*-test.

the jurisprudence on the role of *boni mores* in contracts.⁸¹ The third contradiction is between the commitment to an intentionalist discourse, where human actions are perceived to result from human intent and determinist discourse, while human action is perceived to result from existing structures. Fisher argues that these three contradictions form part of an underlying trauma of liberalism identified by Duncan Kennedy.⁸² Kennedy argues that the goal of individual freedom and the means of attaining individual freedom are mutually incompatible. As members of society we impose upon others and have imposed upon ourselves collective hierarchical structures of power and welfare that are supposed to protect individuality. The place attained on this hierarchy depends mostly on accidents of birth or genetic endowment. The hierarchy that is supposed to protect and encourage individualism implies the type of control that curbs individualism. The goal of individual freedom is at the same time dependent upon and incompatible with the communal coercive action that is necessary to achieve that goal.

The CLS critics also contend that predictability in legal decision-making does not result from clear and accessible rules that guide judges, but from two related aspects of legal culture.⁸³ The first is a shared understanding of a proper legal system, the extent to which the existing hierarchy must be maintained or altered and, lastly, the “plain meaning” of rules, conventions that govern each dispute and politics.⁸⁴ This particular understanding of the system of law rather than the rules themselves provides the answers.⁸⁵ The second aspect of legal culture that aids the predictability of legal decisions is the dominant position afforded to one of the contradictory

⁸¹ In *Eerste Nasionale Bank van Suidelike Afrika Bpk. v Saayman NO* 1997 (4) SA 302 (SCA) the court reached a unanimous decision regarding the validity of an act of surety. However, the majority chose to base their decision on the factual deficiencies of the act of the surety (at 315-317) and the minority based their decision on the so-called *boni mores* principle of contract (at 318-330). The minority judgement has subsequently been rejected in the *Brisley*-case at 13 for lack of a factual basis. The court in *Brisley* chastises the minority judge for not sticking to the facts and trying (!) to invent a new and vague ground to escape contractual liability. The point is that both the majority judges and the minority judge came to the same conclusion in *Saayman*, yet the justification of the majority was somehow more acceptable because it is perceived to be based on a factual reality.

⁸² Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 289. See also Kennedy “The Structure of Blackstone’s Commentaries” (1979) 28 *Buffalo LR* at 211-212.

⁸³ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 290.

⁸⁴ Singer, “The Player and the Cards: Nihilism and Legal Theory” (1984) 94 *Yale LJ* at 22.

⁸⁵ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 290.

impulses always present in law. Some impulses carry more weight than others. Values like individualism, formal realizability (the question: Can it be done?) and free will are presumed to be applicable while values relating to altruism, sensitivity to context and determinism are assumed to be applicable only in special circumstances.⁸⁶ Mechanical rules are favoured over *ad hoc* standards, objective facts and reasons are privileged over individual desires and values and intentionalism is privileged over determinism. This does not mean that legal decision-making is determinate. The CLS critics argue that any lawyer can argue any case in a number of ways, drawing arguments from the “mainstream legal discourse”.⁸⁷ The result is that there is no integrated justificatory system supporting and shaping the legal order.⁸⁸

The CLS scholars also criticize the liberal conception of rights. This criticism flows from the abovementioned criticisms against liberalism in general. Three distinct themes can be identified.⁸⁹ The first criticism is the so-called indeterminacy critique.⁹⁰ Two reasons are advanced to support the indeterminacy thesis. The first reason why rights are indeterminate is because of the way they are construed by the courts. Individual rights are often balanced against the social interest.⁹¹ The courts also routinely balance competing rights.⁹² These practices lead to the indeterminacy of rights because the content of the right depends upon the social circumstances as well as other rights involved in the dispute. The second and more fundamental reason for the indeterminacy of rights is connected with the interpretation of rights. Rights are not interpreted in a vacuum but in a particular social setting. Abstract rights must be interpreted in a social setting, which implies that there is already a certain understanding as to the content of the rights. The interpretation of, for example, the right to emergency medical care will differ in a very affluent society and in a poor

⁸⁶ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 290; Kelman *A Guide to Critical Legal Studies* (1984) at 4.

⁸⁷ Kelman *A Guide to Critical Legal Studies* (1984) at 13.

⁸⁸ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 291.

⁸⁹ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 292.

⁹⁰ Tushnet “An Essay on Rights” (1984) 62 *Texas LR* at 1371-1375; Van Blerk *Jurisprudence: An Introduction* (1998) at 151-152.

⁹¹ See for example *Soobramany v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at 771. The Constitutional Court balances the right of access to emergency medical care of the applicant against the availability of resources.

⁹² In the *Soobramoney* case at 773 par 11 the court balances the right of access to emergency medical care of the applicant against the rights of the general public to reasonable medical care.

society, which means the right does not have an independent content. It can mean many things depending upon the social setting of the interpretation.

The second theme that is identified is the so-called inhibitory nature of the language of rights.⁹³ The CLS scholars argue that the use of “rights language” stunts our imagination. This concern is divided into two issues. The first is that rights language cannot describe the rich texture of our existence and restricts our capacity for good communication.⁹⁴ By clothing things and experiences in rights language we are often prohibited from examining those concepts truly critically. When value does not correspond with rights value, value can be lost in the act of communication, because rights are perceived to have independent value. The second issue relating to the language of rights flows directly out of the liberal conception of rights. Rights are perceived to create opportunities for community and to promote autonomy,⁹⁵ but this illusion obscures the actuality of the dichotomy underlying autonomy and community. Our desire for autonomy and our yearning for community are fundamentally opposed. By obscuring this, rights language leads us to believe that we have been delivered from this dichotomy and therefore stunts our imagination and efforts to create a better world.⁹⁶

Although not part of the mainstream CLS movement, Lipkin extended the “inhibitory nature” critique.⁹⁷ He argues that so-called political neutrality towards social cultures in a liberal system is in fact a culture in itself. The liberal view of culture is that all cultures must be allowed within the structures created to facilitate culture. Individuals must be free to move to or embrace any culture that they like within the limits that are

⁹³ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 293; Tushnet “An Essay on Rights” (1984) 62 *Texas LR* at 1382-4.

⁹⁴ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 293; Van Blerk *Jurisprudence: An Introduction* (1998) at 155.

⁹⁵ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 293; Van Blerk *Jurisprudence: An Introduction* (1998) at 155.

⁹⁶ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 293; Kelman *A Guide to Critical Legal Studies* (1984) at 62-3 and 289-90.

⁹⁷ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 314.

justifiable.⁹⁸ Liberal theorists value autonomy and deliberative reflectionism as core values.⁹⁹ Individuals can therefore not only choose the culture that they prefer, but also reject those that they judge to “fail” the test of deliberative reflection. In this way liberalism becomes a super-culture that transcends other cultures in order for individualist deliberative reflection to take place.¹⁰⁰ Instead of deliberation from within culture, specific sets of (liberal) values are incorporated into the culture through the liberal process of deliberative reflection. Difference is negated and conformity is imposed in the deliberative process. That which is liberally justifiable is highlighted while the rest is played down. Culture no longer exists as a unique entity, but rather becomes a mutation of liberal justifications and the original (pre-liberal) culture. The liberal culture therefore inhibits cultural diversity rather than promoting it.

Lipkin further states that the liberal culture of tolerance towards “other” cultures is both inadequate and pernicious.¹⁰¹ It is inadequate because it expresses the wrong attitude towards multi-cultural life.¹⁰² Lipkin argues that instead of mere tolerance we should fully embrace and respect otherness. That way we can learn from otherness rather than merely accommodating it. The liberal culture of tolerance is pernicious because it allows for the tolerance of otherness that is sometimes harmful to selves. Lipkin uses the example of hate speech to illustrate this point.¹⁰³ According to the liberal culture of tolerance, borderline hate speech must be allowed in certain circumstances to accommodate freedom of speech, yet the autonomy of those who are the victims of the hate speech suffers. On the other hand, if hate speech is disallowed the autonomy of the hate speakers suffers.

⁹⁸ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 314.

⁹⁹ See 2 and 2.1 above.

¹⁰⁰ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 314.

¹⁰¹ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 331.

¹⁰² Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 331.

¹⁰³ Lipkin “In Defence of Outlaws: Liberalism and the Role of Reasonableness, Public Reason and Tolerance in Multicultural Constitutionalism” (1996) 45 *DePaul LR* 263 at 331.

The third theme of criticism leveled against the liberal conception of rights is the critique that rights are ineffective as facilitators of social transformation.¹⁰⁴ The main concern here is the so-called strategic concessions of rights. The argument goes that those in power often grant strategic rights to those opposing the established hierarchy. The protesters are pulled into the power structures and the hierarchy of power is maintained. Instead of wholesale change, change to the present structures of power is limited and because of the indeterminacy of rights, it is ultimately neutralized. It is this limiting role that rights often play that makes them suspect as facilitators of change.

After examination of the above criticisms two points should be highlighted. The first point is that liberalism is not an explanation of a factual situation that exists “out there”. Liberalism is a constructive exercise. It presupposes a certain view of humanity, and importantly for this study, autonomy. Persons are not naturally autonomous. It is simply a choice between various possible interpretations of human nature. The second point flows from the first. Liberalism is not the only road to social change. The CLS thinkers and others showed that the liberal conception of rights and its overemphasis on individuality might in fact hamper change, rather than promoting it. While wholesale abandonment of individual rights might not be the way forward, individual rights and autonomy are not simply the products of an objective examination of the way things are.

Together with the criticism of liberalism as a description of the self comes a criticism against liberal interpretive methods. Because the self is essentially a creation (an interpretation), he cannot serve as a basis or originator of meaning. Meaning depends just as much on the influence of the interpreter, context and inherent linguistic meaning possibilities as on the influence of the author. When feasibility of autonomy as a basis of “the good life” is criticized, the role of the author and interpreter in the interpretation process is also subject to the same critical scrutiny.

¹⁰⁴ Fisher “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey & Haakonssen (eds) *A Culture of Rights* (1992) at 294; Tushnet “An Essay on Rights” (1984) 62 *Texas LR* at 1392.

3. Communitarian theory of law and society

3.1 Introduction

The aim of this section on communitarianism is not to describe communitarianism as an alternative meta-theory of law and society (or description of individual life). If communitarianism is elevated to a meta-theory, it will in principle be subject to the same criticisms as the liberal theory. The idea is rather to examine and evaluate the insights as an alternative construction of being, provided by the communitarian view of the self.

Communitarianism and liberalism are two fundamentally opposed points of view regarding the nature and the place of the individual.¹⁰⁵ The liberal conception of the self is that of an individual whose rights derive from her status as a pre-social human being.¹⁰⁶ By contrast, communitarians regard the self as fundamentally constituted by a variety of social settings and communal relations.¹⁰⁷ They argue that human good must be evaluated and defined in terms of communal life.¹⁰⁸ For communitarian theorists the “good life” consists of public participation and state intervention is therefore accepted on a much larger scale than envisaged by liberals.¹⁰⁹

Communitarianism is said to be a product of postmodernism and antimodernism. The postmodern view of individual autonomy consists mainly of a denial of the universality of individual autonomy. Postmodern theorists argue that individual autonomy is not the product of human nature or evolution, but is rather culturally and socially constituted.¹¹⁰ The individual is a construction of society and not the product

¹⁰⁵ Buchanan “Assessing the Communitarian Critique of Liberalism” (1989) 99 *Ethics* 852 at 852; Van Blerk *Jurisprudence: An Introduction* (1998) at 193; Crawford “The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda” (1996) 23 *Journal of Law and Society* 247 at 247.

¹⁰⁶ See section 2.1 above. See also Van Blerk *Jurisprudence: An Introduction* (1998) at 193.

¹⁰⁷ Sandel *Liberalism and Its Critics* (1984) at 6; Van Blerk *Jurisprudence: An Introduction* (1998) at 193.

¹⁰⁸ Dyzenhaus “Liberalism, Autonomy and Neutrality” (1992) 42 *University of Toronto LJ* 354 at 356. Dyzenhaus argues that communitarianism is an attempt to justify the view that a society must be governed by the moral views of the majority of its members.

¹⁰⁹ Buchanan “Assessing the Communitarian Critique of Liberalism” (1989) 99 *Ethics* 852 at 852; Van Blerk *Jurisprudence: An Introduction* (1998) at 193-194.

¹¹⁰ Buchanan “Assessing the Communitarian Critique of Liberalism” (1989) 99 *Ethics* 852 at 852; Gardbaum “Law, Politics and the Claims of Community” (1992) 90 *Michigan LR* 685 at 757; Van Blerk *Jurisprudence: An Introduction* (1998) at 194; Kube “The Legitimacy of the Communitarian Critique— or: Can a Liberal Theory of Social Justice Accommodate the Public Trust Doctrine? (1997) 83 *ARSP* 67 at 69; Crawford “The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda” (1996) 23 *Journal of Law and Society* 247 at 248

of the natural attributes of human nature. Human nature itself is regarded as a social construct. The postmodern communitarian stance does not advocate the wholesale abandonment of all liberal structures.¹¹¹ What the postmodern communitarian stance urges is a re-evaluation of the central liberal claim that the aim of social life is the extension of individual autonomy. The antimodern communitarian stance is a much stronger denial of liberalism. Antimodern communitarianism has often been called “strong” communitarianism. This stance envisages communitarianism as an alternative to liberalism.¹¹² Strong communitarianism involves the rejection of the whole liberal structure and replacement thereof by communitarian structures.¹¹³

Within these two movements three debates appear.¹¹⁴ The first so-called agency debate about the nature of the human agent is discussed more comprehensively in the section on the communitarian conception of the self. The second so-called meta-ethical debate,¹¹⁵ centers on the understanding of values. Communitarian theorists reject the liberal universal understanding of normative values (that values are common to all humans because of their human nature). In liberal theory, these values are building blocks for a social order.¹¹⁶ The communitarian argument is that values are intrinsic to political entities, contexts and traditions situated in community.¹¹⁷ Christodoulidis argues that even the evaluation of a value is impossible outside of community. He states that the shift from the plain-fact view to the interpretive view brought the community directly to bear on the possibility of meaning.¹¹⁸ Values (in the communitarian scheme) are not universal but rather contingent upon communal

¹¹¹ Van Blerk *Jurisprudence: An Introduction* (1998) at 194; Kube “The Legitimacy of the Communitarian Critique— or: Can a Liberal Theory of Social Justice Accommodate the Public Trust Doctrine?” (1997) 83 *ARSP* 67 at 69.

¹¹² Buchanan “Assessing the Communitarian Critique of Liberalism” (1989) 99 *Ethics* 852 at 852; Van Blerk *Jurisprudence: An Introduction* (1998) at 194.

¹¹³ Buchanan “Assessing the Communitarian Critique of Liberalism” (1989) 99 *Ethics* 852 at 852; Kube “The Legitimacy of the Communitarian Critique— or: Can a Liberal Theory of Social Justice Accommodate the Public Trust Doctrine?” (1997) 83 *ARSP* 67 at 69.

¹¹⁴ Gardbaum “Law, Politics and the Claims of Community” (1992) 90 *Michigan LR* 685 at 757; Van Blerk *Jurisprudence: An Introduction* (1998) at 194-196.

¹¹⁵ Gardbaum “Law, Politics and the Claims of Community” (1992) 90 *Michigan LR* 685 at 757; Van Blerk *Jurisprudence: An Introduction* (1998) at 195.

¹¹⁶ Michelman “The Subject of Liberalism” (1994) 46 *Stanford LR* 1807 at 1812. Michelman argues that any liberal theory is dependent upon persons having specific “makeup” or composition. The values mentioned in section 2.1 above are regarded as a prerequisite for a liberal society. Yet it is never mentioned that these values might not in fact be universal.

¹¹⁷ Christodoulidis “The Suspect Intimacy Between Law and Political Community” (1994) 80 *ARSP* 1 at 2; Van Blerk *Jurisprudence: An Introduction* (1998) at 195.

¹¹⁸ Christodoulidis “The Suspect Intimacy Between Law and Political Community” (1994) 80 *ARSP* 1 at 2.

settings that constitute a society. Theorists like Ronald Dworkin and Owen Fiss argue that this community can be used as a value on which to build society.¹¹⁹ The third debate is the so-called political debate.¹²⁰ The contention advanced by the communitarian theorists is that endorsement of communal life and values is preferable to the liberal conception of life.¹²¹ This contention is usually linked to the strong or antimodernist communitarian stance and includes the wholesale rejection of liberalism and its institutions. I now turn to the contentions that most communitarians share.

Communitarians focus on the relations between selves rather than how the selves relate. It is the relation rather than the related that interests them.¹²² They argue that intersubjective experiences contain rich and valuable possibilities. Understanding intersubjectivity will lead to acceptance of the vulnerability and dependence of selves upon others.¹²³ Community of shared context is a necessary pre-condition for meaningful interaction between the members of such a community.¹²⁴ These contexts are sometimes in conflict. This does not pose a problem for communitarians, who argue that communal identities are defined in contradiction to each other.¹²⁵ Because of the importance of conflict in the communitarian scheme, persons must be encouraged to participate in politics. For communitarians, politics is not legitimated by principle (such as the liberal justification of politics, namely that it maximizes individual autonomy) but by participation.¹²⁶ Since it is argued that there are no such things as universal principles, imposition of such principles would disenfranchise those with contrary beliefs. Because identity is historically contingent and can change, communitarians argue that it is best that persons participate in its constitution.¹²⁷

¹¹⁹ See for example Fiss “Objectivity and Interpretation” (1982) 34 *Stanford LR* 739; Dworkin “Law as Interpretation” (1982) 60 *Texas LR* 527.

¹²⁰ Gardbaum “Law, Politics and the Claims of Community” (1992) 90 *Michigan LR* 685 at 693; Van Blerk *Jurisprudence: An Introduction* (1998) at 195.

¹²¹ Gardbaum “Law, Politics and the Claims of Community” (1992) 90 *Michigan LR* 685 at 757; Van Blerk *Jurisprudence: An Introduction* (1998) at 195.

¹²² Hutchinson “Indiana Dworkin and Law’s Empire” (1987) 96 *Yale LJ* 637 at 652.

¹²³ Hutchinson “Indiana Dworkin and Law’s Empire” (1987) 96 *Yale LJ* 637 at 652; Christodoulidis “The Suspect Intimacy Between Law and Political Community” (1994) 80 *ARSP* 1 at 3.

¹²⁴ Christodoulidis “The Suspect Intimacy Between Law and Political Community” (1994) 80 *ARSP* 1 at 3.

¹²⁵ Christodoulidis “The Suspect Intimacy Between Law and Political Community” (1994) 80 *ARSP* 1 at 17.

¹²⁶ Hutchinson “Indiana Dworkin and Law’s Empire” (1987) 96 *Yale LJ* 637 at 655.

¹²⁷ Kube “The Legitimacy of the Communitarian Critique— or: Can a Liberal Theory of Social Justice Accommodate the Public Trust Doctrine? (1997) 83 *ARSP* 67 at 67.

The second shared contention from the first. Communitarians argue that the excessive liberal emphasis on individual autonomy and the marketization of everyday life leads to a severe deficiency with regard to public responsibility and civic duty.¹²⁸ The space of ethics and morality is taken up by notions of public good that are little more than individual market-driven decisions motivated by efficiency, effectiveness and economy.¹²⁹ Communitarianism is an attempt to fill this void with an appeal to strengthen moral voices.¹³⁰ The family is seen as the nucleus of the communitarian claim and it is here that the moral shoring-up should take place.¹³¹ Many communitarian theorists argue that the lack of parenting is a direct cause for the present collapse of moral and ethical life.¹³² They require parents to show greater commitment to their parenting roles.

Communitarians have a particular way of looking at the law. For the most part they argue that the law is interpretive in nature.¹³³ They argue that the law is obeyed because of the cognitive processes of internalization and imagination.¹³⁴ Internalization relates to the (already in place) behavioral patterns that persons observe in everyday life. Winter illustrates the point by using the example of a traffic light.¹³⁵ Persons who stop at a traffic light do so because they already have a habit of conformity to legal rules. It is further apparent that any rule will only work when there already is a culture of obedience and a culture of imagination. Internalization is supplemented by imagination. Where no culture of obedience exists, rules are still

¹²⁸ Crawford “The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda” (1996) 23 *Journal of Law and Society* 247 at 249.

¹²⁹ Crawford “The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda” (1996) 23 *Journal of Law and Society* 247 at 249. This is blatantly demonstrated by *Soobramany v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC). See also the *Brisley v Drotosky* 2002 (4) SA 1 (SCA).

¹³⁰ Crawford “The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda” (1996) 23 *Journal of Law and Society* 247 at 250.

¹³¹ Crawford “The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda” (1996) 23 *Journal of Law and Society* 247 at 250.

¹³² Crawford “The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda” (1996) 23 *Journal of Law and Society* 247 at 250.

¹³³ Winter “Contingency and Community in Normative Practice” (1991) 139 *University of Pennsylvania LR* 963 at 966; Christodoulidis “The Suspect Intimacy Between Law and Political Community” (1994) 80 *ARSP* 1 at 2. The idea is basically that we do not observe meaning, but rather create meaning.

¹³⁴ Winter “Contingency and Community in Normative Practice” (1991) 139 *University of Pennsylvania LR* 963 at 967.

¹³⁵ Winter “Contingency and Community in Normative Practice” ” (1991) 139 *University of Pennsylvania LR* 963 at 967.

observed because of the imagination of possible detection and adverse consequences that could follow.¹³⁶ Communal and contextual influences are seen as the origins of internalization and imagination.¹³⁷ Because of the important role that community plays in interpretive practice closer attention must be given to the concept.

In order to understand the communitarian concept of community, one must first understand what it is a reaction against. The liberal conception of community is one of choice of roles. Because the self is seen as an atomistic and self-constituting individual, the self is capable of choosing the roles or communities she wants to join. Her communities can define the self, but only the communities she chooses have this possibility. Communities therefore are constituted by more or less free association. The self can be a father and a civil servant because he chose to become so. The communitarians disagree with this conception of community. A communitarian conception of community is one where the members share a particular way of understanding and living in the social world and constitute a community because of this shared understanding.¹³⁸ Unlike the liberal autonomous self who chooses roles, the communitarian self is constituted by the roles he embodies.¹³⁹ The self cannot be separated from his roles. The self is a father and a civil servant because he is a father and a civil servant and because society recognizes that there can be such a thing as a father and a civil servant. The community in the larger sense of the word is therefore nothing more than the social space marked out by the relations between recognized communities in the restricted sense of the word.¹⁴⁰

The second characteristic of the communitarian community is that of continuity. Unlike the liberal community where the community is as much a product of history as

¹³⁶ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 968.

¹³⁷ See Chapter 2, section 5 and 6.

¹³⁸ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 978; Christodoulidis "The Suspect Intimacy Between Law and Political Community" (1994) 80 *ARSP* 1 at 12.

¹³⁹ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 983.

¹⁴⁰ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 985. I use the word "recognized" because the communities themselves are contingent upon a possible interpretation of that community as a community. It is quite possible that our interpretation of community might change in the future. Our conception of families at present might change drastically if, for example, homosexual marriages are allowed or because of the effect of the Aids pandemic on families and the resultant child headed homes. See also Christodoulidis "The Suspect Intimacy Between Law and Political Community" (1994) 80 *ARSP* 1 at 12.

of the autonomous self, the communitarian community is a product of continuous community. What is now is a product of what was yesterday.¹⁴¹ Community is an end product of common ways of understanding and living in the world.¹⁴² However, the community is not something “out there” that we can latch on to give us value, because there will always be a degree of slippage.¹⁴³ Winter identifies three forms of slippage.¹⁴⁴ Firstly, it is unlikely that humans in different generations will have the same characteristics of the previous generations because of genetic difference. People simply do not have the same talents or intelligence. The second form of slippage is the result of differing circumstances. People are constantly confronted by differing circumstances that require innovation. This results in modification of their interpretation of the world. The third form of slippage results because there is no determinate regularity by which others in community internalize interpretations. The internalized interpretation is not an exact replica of the original, but rather a unique interpretation. Because of slippage, the successor can always potentially differ from the original.¹⁴⁵

The third characteristic of the communitarian community is that it is a necessary precondition for the self. The self is regarded as a product of community, but the community is also a product of the self. These two cannot be understood apart from each other.¹⁴⁶ The communitarian argument is that interpretation is contingent upon the existence of a community understood as a shared way of living and understanding

¹⁴¹ Winter “Contingency and Community in Normative Practice” (1991) 139 *University of Pennsylvania LR* 963 at 966.

¹⁴² Winter “Contingency and Community in Normative Practice” (1991) 139 *University of Pennsylvania LR* 963 at 966.

¹⁴³ Van Blerk *Jurisprudence: An Introduction* (1998) at 202; Winter “Contingency and Community in Normative Practice” (1991) 139 *University of Pennsylvania LR* 963 at 996. Slippage is the loss or gain of interpretations in a continuous process characterized by a plurality of views, circumstances and communities.

¹⁴⁴ Winter “Contingency and Community in Normative Practice” (1991) 139 *University of Pennsylvania LR* 963 at 996.

¹⁴⁵ Winter “Contingency and Community in Normative Practice” (1991) 139 *University of Pennsylvania LR* 963 at 1002. I would like to add that slippage is not only responsible for lack of contingency. I believe that slippage is in fact crucial for contingency. Firstly, slippage is usually the result of change in changing environments. This ensures that interpretations stay relevant. Without slippage of outdated and impractical interpretations, culture etc would be weighed down to the point of irrelevance. Secondly, slippage results from changing selves. Without this reflective side communal interpretive practice would fall into the modernist trap of forced conformity.

¹⁴⁶ Winter “Contingency and Community in Normative Practice” (1991) 139 *University of Pennsylvania LR* 963 at 1001; Van Blerk *Jurisprudence: An Introduction* (1998) at 197; Christodoulidis “The Suspect Intimacy Between Law and Political Community” (1994) 80 *ARSP* 1 at 12.

in the world.¹⁴⁷ Fragmentation of this common community of life will not lead to perfect autonomy (as liberals often claim), but to irreparable alienation.

3.2 The communitarian conception of the self

The communitarian debate on the conception of the self is also known as the agency debate.¹⁴⁸ The communitarian conception of the self has its roots in the rejection of the liberal conception of the self.¹⁴⁹ The communitarian view is that our identity is the product of the particular community that we belong to.¹⁵⁰ We are who we are because of where we are.¹⁵¹ We cannot define ourselves without reference to our role in life, our social situatedness.

Adam Crawford divides the communitarian conception of the self into two parts.¹⁵² The first is so-called situatedness and embodiment.¹⁵³ Communitarians begin by arguing that individuals are constitutive of each other. Identity (in the communitarian scheme) is deeply embedded in the community of which the individual is part.¹⁵⁴ Winter asserts that the individual is not a pre-role entity.¹⁵⁵ The individual is not a person who takes on roles in life, but rather a combination of roles. Susan is not a mother and an accountant because she is Susan, but rather Susan is Susan because she is a mother and an accountant. Susan did not become Susan by assuming the roles but rather became Susan because of the roles. The roles cannot be detached from the individual, because the self is defining the role just as the role is defining the self.

¹⁴⁷ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 1002.

¹⁴⁸ Sandel *Liberalism and Its Critics* (1984) at 6; Van Blerk *Jurisprudence: An Introduction* (1998) at 197.

¹⁴⁹ Crawford "The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda" (1996) 23 *Journal of Law and Society* 247 at 248; Van Blerk *Jurisprudence: An Introduction* (1998) at 197.

¹⁵⁰ Sandel *Liberalism and Its Critics* (1984) at 6; Van Blerk *Jurisprudence: An Introduction* (1998) at 197.

¹⁵¹ I do not mean a place in the physical sense when I use the word "where". With "where" I mean the community and context in which we find ourselves everyday. I find myself today as a white male junior at a university, about to embark on my summer break. My physical location is only one of the factors that define me as a person.

¹⁵² Crawford "The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda" (1996) 23 *Journal of Law and Society* 247 at 248.

¹⁵³ Crawford "The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda" (1996) 23 *Journal of Law and Society* 247 at 248; Van Blerk *Jurisprudence: An Introduction* (1998) at 197.

¹⁵⁴ Sandel *Liberalism and Its Critics* (1984) at 6; Van Blerk *Jurisprudence: An Introduction* (1998) at 197.

¹⁵⁵ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 987.

These roles are themselves contingent upon the communal understanding thereof, which in turn defines the individual participant's understanding of the role.¹⁵⁶

By defining individuals in this way, communitarians criticize the liberal conception of the self in an important way. The liberal conception of the autonomous self cannot account for the moment of autonomy. When can a person be regarded as autonomous? The communitarian scholars show that the self can never escape the communal since even a liberal conception of self is contingent upon some kind of understanding of autonomy, which is in turn dependent upon the recognition of that understanding by the other. That shared understanding is contingent upon a pre-understanding formed as an infant under the influence of its parents.¹⁵⁷ Even action contrary to that pre-understanding is a reaction from within the pre-understanding and an acceptance of a mode of action that is perceived to be open to the self.¹⁵⁸ To sum up the first part, "... the self is a thickly textured complex of learned modes of interaction with the physical and social world; both the 'self' and its 'roles' are largely matters of what in psychology is called 'internalization'..."¹⁵⁹

The second part of Crawford's explanation of the self is contingent upon the first.¹⁶⁰ Because the communitarian self is constituted by a person's community, her conception of the good is situated in (and formed by) that community.¹⁶¹ In other words, the self can only live a fulfilling life in community.¹⁶² The roles by which the

¹⁵⁶ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 987. Our understanding of who we are is continuously being reshaped. A person who is recognized as a doctor in medieval times will definitely not be regarded as one today. Likewise, our idea of a doctor today might be regarded as absurd in a 1000 years time.

¹⁵⁷ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 987.

¹⁵⁸ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 988.

¹⁵⁹ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 989.

¹⁶⁰ Crawford "The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda" (1996) 23 *Journal of Law and Society* 247 at 248.

¹⁶¹ Crawford "The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda" (1996) 23 *Journal of Law and Society* 247 at 249.

¹⁶² Crawford "The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda" (1996) 23 *Journal of Law and Society* 247 at 249; Kube "The Legitimacy of the Communitarian Critique— or: Can a Liberal Theory of Social Justice Accommodate the Public Trust Doctrine? (1997) 83 *ARSP* 67 at 69.

self is constituted can only be understood in the communal setting.¹⁶³ This implies that the only good that can be pursued is the good defined as a possibility by the process of understanding in the communal setting. The self must fully engage with the community if it wants to live a fulfilled life. The self shapes the community and the community shapes the self, so if the self wants to change the community, he must do so in community with others. Unlike the liberal autonomous self, the self will not only change that which he sets out to change, but will also be changed in the process. Christodoulidis articulates the situated self thus: "... I understand my politics and I understand my identity because I understand the Other ... Communities, and especially communities that generate identity, are based on the sharing of a normative universe that commands commitment, makes difference visible and in the process makes identity visible too, provides reasons to argue and engage in justification for practices...".¹⁶⁴

Winter explains the origin of morality as resulting from the communal being.¹⁶⁵ Communitarians argue that the self is situated and constituted by communal interaction. Winter shows that a change in circumstance combines with existing "knowledge" to form seemingly new moral theories. He argues that morality is embedded in practice. Morality can only be understood in conjunction with the practices that the moral voice seeks to address. The different positions regarding the legality of the death penalty, for example, can only be imagined if the punishment itself can be imagined.¹⁶⁶ Moral voices are thus historically contingent. This has a profound influence upon the conception of the individual. The individual cannot have a moral existence outside of the communal. Moral plurality, for communitarians, is not the product of individual choice but of circumstances.

The communitarian conception of the self can be summed up as inescapable situatedness. The self constitutes the community, but is in turn constituted by that

¹⁶³ Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 995.

¹⁶⁴ Christodoulidis "The Suspect Intimacy Between Law and Political Community" (1994) 80 *ARSP* 1 at 12.

¹⁶⁵ Winter "Human Values in a Postmodern World" (1994) 6 *Yale Journal of Law & the Humanities* 233 at 238-239.

¹⁶⁶ Winter "Human Values in a Postmodern World" (1994) 6 *Yale Journal of Law & the Humanities* 233 at 239.

community.¹⁶⁷ As with liberalism, acceptance of communitarianism involves beliefs about the nature of the author and interpreter. Communitarianism affords much less control over the eventual meaning of the text to the author than liberalism. Communitarians contend that the meaning of a text is not the result of the intention of the author (or the will of the interpreter for that matter) but rather of the context and the interpretive communities in which the interpreter finds herself. Communitarians argue that authors and interpreters are completely interchangeable without affecting the meaning of the text, provided the context and interpretive communities are constant.¹⁶⁸

3.3 Critique against communitarianism

While communitarians expose some fundamental flaws in liberal philosophy, communitarian theory is not above reproach. The first and foremost criticism levelled against communitarianism is the threat of over-socialization.¹⁶⁹ In the eyes of communitarians, the main flaw in the liberal agenda is the overemphasis on the individual and the lack of recognition of social situatedness. It is argued that the liberal conception of individual autonomy does not take account of the social composition of the self. Yet, when communitarianism is elevated to a meta-theory exactly the opposite happens. Communitarians tend to over-socialize the self and the self disappears into the fog of community. While it is true that the self is socially situated and this largely defines the life that the self would lead, this social situatedness causes the self to be an individual. Slippage and imagination are just two of the elements that create possibilities beyond the present for the individual that cannot be adequately accounted for by looking only at the communal.¹⁷⁰ Because circumstances and people themselves are constantly changing, our customs and communities are constantly changing. Therefore, meaning is constantly being lost and created by us living both as individuals and as communal beings. Just like autonomy language cannot adequately describe life in all its fullness, purely communitarian discourse will also fail, because it does not recognize the unique, albeit socially

¹⁶⁷ Winter "Human Values in a Postmodern World" (1994) 6 *Yale Journal of Law & the Humanities* 233 at 244.

¹⁶⁸ See chapter 2 section 5 for elaboration on this theme.

¹⁶⁹ Hutchinson "Indiana Dworkin and Law's Empire" (1987) 96 *Yale LJ* 637 at 653.

¹⁷⁰ See Winter "Contingency and Community in Normative Practice" (1991) 139 *University of Pennsylvania LR* 963 at 963 for a discussion of slippage and imagination as factors that influence meaning and continuity.

situated, self. Just like the self cannot be described without reference to community, community cannot be described without reference to the self. Hutchinson urges us to embrace intersubjectivity as a source both of self and community.¹⁷¹ He argues that an acceptance of intersubjectivity can lead to better understanding of both autonomy of the self and commitment and dependence on others.

Furthermore, the communitarian solution of a return to the family as a building block of the better social life is not reflective enough. While the communitarian claim resounds in strong and searching criticism regarding the liberal claim of individual autonomy, the same in-depth examination of the communal structures is not undertaken.¹⁷² The proposed communitarian structures like the family and political community are assumed rather than proven to be preferable to liberal structures. Yet, contemporary literature is filled with studies that show the negative impact that can result from structures like the family.¹⁷³ The family is the place where the child's perceptions regarding race, gender and violence etc is formed. It is also the site of widespread abuse and violence towards women and children and men. An unhappy family life will become an inescapable fate if there is no individual or communal recourse open to the abused. Political communities can also be instruments of wholesale indoctrination, and of disastrous "communal political life" patterns.¹⁷⁴ While communal life might be a more accurate description of the human condition, it is not by implication less brutal.

There also exists a certain amount of conceptual confusion regarding the precise nature of the communitarian community.¹⁷⁵ Communitarians can only account for individual differences by claiming that the individual self is part to many overlapping

¹⁷¹ Hutchinson "Indiana Dworkin and Law's Empire" (1987) 96 *Yale LJ* 637 at 652.

¹⁷² Crawford "The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda" (1996) 23 *Journal of Law and Society* 247 at 251.

¹⁷³ Crawford "The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda" (1996) 23 *Journal of Law and Society* 247 at 251; <http://www.familydomesticviolence.org/>; <http://www.relationships.com.au/services/violence.asp>; "... We accept our responsibility to challenge the social structures, which permit and encourage violence, and to confront the effects of our patriarchal heritage, which still supports inequality between the sexes, and between generations..."

¹⁷⁴ One might simply ask an inmate of the Stalinist Gulags or the Nazi interment camps whether unreflective communal life is good. See <http://www.loc.gov/exhibits/archives/gula.html>; <http://www.scrapbookpages.com/Buchenwald/SpecialCamp.html>; <http://uncommonlives.naa.gov.au/klaphake/contentse8f5.html>.

¹⁷⁵ Crawford "The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda" (1996) 23 *Journal of Law and Society* 247 at 252.

communities. This might be correct in itself, but it has important implications for the communitarian theory. The community as a restraint must have the ability to force or at least convince its members into one course of action or another. In the system of overlapping communities the individual will tend towards the most persuasive community when there is conflict. Because individual selves have different attributes, different communities will hold different degrees of power over different members. This brings the regulative possibilities inherent in communal life into question. The question is not really whether it is the community or the individual who chooses, but what the relationship is between the different influences on choice.

Crawford identifies four problems emerging from the gap between what community is and what community ought to be. Firstly, membership of community is neither voluntary nor natural.¹⁷⁶ There are entrenched power relationships in most dominant communities that govern entrance to that community. In many cases an “us against them” relationship exists. The result is social alienation rather than unity. Communal dialogue becomes increasingly unlikely in an environment of inclusion and exclusion. Secondly, communal solutions tend to be community specific without regard for the larger ramifications of the solution. Crawford illustrates this problem by referring to community policing in the United Kingdom.¹⁷⁷ The community formed local pickets to “discourage” prostitutes and the associated problems from operating out of their neighborhoods. As a result the problem moved to the poorer, less organized neighborhoods. The already deep divide between poor and wealthy was deepened. Powerful communities end up dominating less powerful ones. Instead of diversity, hierarchical relationships emerge. Thirdly, communities do not consist of equals. Every community is characterized by hierarchical relationships formed along the lines of gender, class, race and age among others.¹⁷⁸ The voice of the community is often simply the voice of the dominant figures in the community. Communal discourse does not guarantee that all will be heard. The fourth problem is the relationship between communities. For the communitarian model to work, communities must have dialogue with other communities. This includes both the communities that overlap within a

¹⁷⁶ Crawford “The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda” (1996) 23 *Journal of Law and Society* 247 at 253.

¹⁷⁷ Crawford “The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda” (1996) 23 *Journal of Law and Society* 247 at 253.

¹⁷⁸ Crawford “The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda” (1996) 23 *Journal of Law and Society* 247 at 255.

certain sphere (for example in the area of welfare like schools and churches) as well as other communities in the bigger community (for example schools with the national government and the provincial government). This implies both a vertical and a horizontal dialogue. However, the reality is very different. Different communities do not necessarily live in happy equilibrium with each other. They compete for space, resources, interest and identity. The larger community competes with smaller communities within itself and the larger community competes with other large communities and other small communities.¹⁷⁹ Communities tend to divide just as often as they unite.

Various preliminary conclusions emerge from the discussion of the communitarian theory of the self. The first is that life exists apart from the autonomous self. The very existence of the self seems to be connected to the existence of a communal space. The self emerges from complex interaction in communal life. The second conclusion is that maximum social benefit does not necessarily flow out of the promotion of individual autonomy. The promotion of individual autonomy can in fact lead to the maximization of good for some while totally disenfranchising others.¹⁸⁰ Being allowed to do something is not the same as being able to do something. The concerns of the community are at least as important as those of the individual and are as relevant to the debate regarding the allocation of resources. The third conclusion is that communitarian discourse provides insightful perspective on the life of the self, but is not in itself capable of sustaining the burden of providing rules for the good life. As soon as communitarian discourse is elevated to a meta-theory, it loses much of its appeal because of the threat of authoritarianism. The community can oppress just as much as the individual. The community can also become the weapon of oppression of difference against the marginalized and weak who do not conform to the idea of communal good. Unreflective community can become the breeding ground for religious fanaticism, patriarchy and hierarchical society. While the unbridled self-seeking individualist good is not desirable, unchecked overarching communal conceptions of good can be just as (or even more?) dangerous.

¹⁷⁹ In the modern world for example, the state typically competes with big business and for big business. The provinces compete for business with each other and with other countries. Cities compete with each other and with the province.

¹⁸⁰ The influences of privatisation of certain public services provide ample evidence of this.

When dealing with interpretation, unreflective communitarianism leads to meaning majoritarianism. In other words, dominant interpretive communities will always decide the outcome of the interpretive process. The strong will always win. Such an interpretive dispensation is neither just nor justifiable.¹⁸¹

4. Self as I or Self as Us (or neither)

The preceding arguments make it clear that neither simple individualist theories nor the call to unqualified communal life can provide the answer to the burning question of identity, agency and its implications for interpretation. The question itself can be the subject of an independent study and thus the following comments should be seen only as starting points rather than concrete answers.

We have seen that the individual is socially situated and that individuals constitute the community. Gazra argues that this tension must be maintained for meaningful existence.¹⁸² He states that the ability of the individual to critically evaluate her social, legal and political circumstance must be maintained. Since meaning is contingent upon community, there must be some or other communal commitment to this goal. It should also be kept in mind that community is not a homogenous entity but rather a space that includes many communities who are in constant conflict with each other. The different communities identify each other and give rise to individual identity through contradiction.¹⁸³ Communities identify each other by the differences between them and by implication identify the members of the various communities by their association to those communities. Identity is therefore intertwined in this conflict. This conflict does not transcend the subjects but involves them and shapes them. What we are is as much a product of what we are not as what we are. This conflict also seems to be the building blocks and standard against which we confront and criticize each other. The dynamic tension between where we are and where we want to be comes into existence in this conflict. We cannot escape who we are and what communities we come from. Likewise the community cannot escape the subjects that constantly form them. Hutchinson argues that by recognizing and embracing

¹⁸¹ See Coombe "Same As It Ever Was: Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603; chapter 2 section 6.2.

¹⁸² Gazra "Hegel's Critique of Liberalism and Natural Law: Reconstructing Ethical Life" (1991) 9 *Law and Philosophy* 371 at 373.

¹⁸³ Christodoulidis "The Suspect Intimacy Between Law and Political Community" (1994) 80 *ARSP* 1 at 17.

intersubjectivity we can come to terms with our vulnerability and dependence but also commitment and responsibility to others.¹⁸⁴

5. The critical self and freedom

In *Rights and Democracy in a Transformative Constitution*¹⁸⁵ various critical scholars examine the legal subject and its relation to self-government (as including both self rule and law rule).¹⁸⁶ In classical liberalism there is a strong commitment to the paradoxical values of democracy and rights.¹⁸⁷ This commitment is built around conceptions of the self as self-sufficient and community as a collection of selves. Michelman takes this description of the self to task. To begin with, Michelman shares the liberal view that the individual's life should be the focus of moral concern. However, he does not share the belief that the self is unencumbered or self-sufficient, but rather that thinks the self is socially constituted and enmeshed in various social connections (relationships, communities and power relations). However, he does not agree that the interests of the self are subordinate to those of the collective either, in fact, he proposes that there can be no rigid divide between the self and the collective.¹⁸⁸ In this theoretical framework, rights are conceived not as trumps, but rather as "... 'a relationship and a social practice'; 'a form of social cooperation'; 'an expression of connectedness'...".¹⁸⁹ Michelman accedes to the point made by Kennedy that the presence of others is always both a threat and a pre-condition to

¹⁸⁴ Hutchinson "Indiana Dworkin and Law's Empire" (1987) 96 *Yale LJ* 637 at 653.

¹⁸⁵ Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003).

¹⁸⁶ See for example Boshoff "Law as Dialogical Politics" at 1-12; Botha "Rights, Limitations and the (Im)Possibility of Self-Government" at 13-32; Kroeze "God's Kingdom in Law's Republic: Religious Freedom in South African Constitutional Jurisprudence" at 117-130; Van Marle "Love, Law and South African Community: Critical Reflections on 'Suspect Intimacies' and 'Immanent Subjectivity'" at 231-247; all contributions in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003). See also Du Toit "Book review of Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003)" in (2005) 16 *Stell LR* (forthcoming). The book is a tribute to Frank Michelman and develops some of his theories on the legal subject. It is very relevant for this study because Michelman can be placed between communitarianism and liberalism. He provides a theory that can be described as a critical and reflective theory of the self.

¹⁸⁷ Botha "Rights, Limitations and the (Im)Possibility of Self-Government" in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 15.

¹⁸⁸ Michelman "Constitutional Conversation with Professor Frank Michelman" (1995) 11 *SAJHR* 477 at 481; Du Plessis 'some of Frank Michelman's Prospects for Constitutional Interpretation in South Africa- In Retrospect' in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 69.

¹⁸⁹ Botha "Rights, Limitations and the (Im)Possibility of Self-Government" in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 16

individual autonomy, and consequently, legal relations reflect this contradiction.¹⁹⁰ A judge is never free simply to choose *the* applicable legal principle in the case, because for every principle there is an equally applicable counter-principle. A text cannot have a single message and there will always be meanings other than the intended ones.

On the other hand, Michelman is not a communitarian either. Communitarianism is based on the belief that we are “trapped” (communitarians will probably use the word “situated”) in our communal consciousness and it leaves no real space for critical re-assessment of our situation outside of this consciousness. Michelman believes that we are indeed capable of transcending the competitive pursuit of communal interest that so often characterizes politics, and in doing so to revise our own beliefs and perceptions.¹⁹¹ Du Plessis describes this conception of the self as a *zoon politikon* or the belief that a person can only achieve self-realization through active participation in the political life of his social setting.¹⁹² The operative word here is *active*. Unlike the communitarian citizen who is bound to collective ideas about the nature of being a citizen, the Michelmanian one has the capability (the option) to change what it means to be a citizen through her interaction with the other. Where the communitarian citizen always lives both from and towards the (abstract) ideals of the collective, the individual Michelman describes is continuously (re-) formulating the terms of her existence albeit in a social context.

¹⁹⁰ Kennedy ‘structure of Blackstone’s Commentaries’ (1979) 28 *Buffalo LR* 205 at 213; Van der Walt “Frankly Befriending the Fundamental Contradiction: Frank Michelman and Critical Legal Thought” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 223.

¹⁹¹ Michelman “Foreword: Traces of Self-Government” (1986) 100 *Harvard LR* at 22; Botha “Rights, Limitations and the (Im)Possibility of Self-Government” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 17; Kroeze “God’s Kingdom in Law’s Republic: Religious Freedom in South African Constitutional Jurisprudence” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 120; Van Marle “Love, Law and South African Community: Critical Reflections on ‘Suspect Intimacies’ and ‘Immanent Subjectivity’” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 147.

¹⁹² Du Plessis “Some of Frank Michelman’s Prospects for Constitutional Interpretation in South Africa— In Retrospect” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 69-72. Du Plessis describes this *zoon politikon* as a civic citizen capable of displaying civic virtues and with that, a willingness to subordinate private interests to the general good. This image is central to civic republicanism, in which it is impossible for a person to visualize her personhood without reference to her role as citizen. The citizen’s conception of good is a common perception that flows out of the response of the citizen to otherness. The crucial factor is the active participation of the citizen in the formulation of the common good. This involves both a commitment to change and a willingness to participate and be heard.

In order to be “free” or “autonomous” two kinds of (often contradictory) types of liberty are needed. The first is self-rule. This means that individuals should be free to decide the terms of their lives. Mr Prince must be free to smoke his *cannabis* if he so pleases. The second type of liberty is law-rule or political freedom. This type of freedom entails the freedom of the political process from governmental interference or arbitrary use of government power. Mr Prince can only be denied his choice of religious practice by a law of general application and not by some whim of the regent. The individual must therefore, at the same time, be free to decide how he wants to live, and to be governed by rules and not man.¹⁹³ It is easy to see that these two types or sides of autonomy can (and will) frequently be in conflict. The resolution of this conflict is often merely a case of pluralist, market-like balancing of competing interests in order to maximize as many individual freedoms as is possible.¹⁹⁴ Michelman rejects this type of reasoning and proposes that we embrace a concept of “dialogic” self-rule in its place. This type of freedom involves a reasoned and constant re-determination of the terms under which we live. Michelman rejects the idea that the parameters of life are predefined and argues that constant critical evaluation of our situation is necessary. In this vein, the conflict between self-rule and law-rule becomes less problematic, because law-rule becomes a type of dialogic self-rule.¹⁹⁵ The application or not of laws are no longer simply determined by formalistic considerations, and the actual circumstances of each case will always play a role in the determination of the meaning of law in that circumstance. On the other hand, unlimited self-rule is then limited by the possibility that the citizen will have to change her choices in the face of reasoned and critical assessment of her life (she must be open to considerations that might be contrary to her own, but always with the knowledge that she will also be heard).

¹⁹³ Kroeze “God’s Kingdom in Law’s Republic: Religious Freedom in South African Constitutional Jurisprudence” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 117 referring to *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC).

¹⁹⁴ Van Marle “Love, Law and South African Community: Critical Reflections on ‘Suspect Intimacies’ and ‘Immanent Subjectivity’” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 234.

¹⁹⁵ For telling criticism of this thesis see Van Marle “Love, Law and South African Community: Critical Reflections on ‘Suspect Intimacies’ and ‘Immanent Subjectivity’” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) at 237-239. For civic republicanism to succeed all voices in society must have an equal opportunity to be heard and these voices must be heard before they are distorted or transformed. However, law tends to transform the specific into general and by expressing the particular in general terms. Consequently the voices of minorities tend to get lost in the majority and the particularity of different discourses is reduced to legal discourse. Van Marle urges us to resist this phenomenon, which she calls “legal imperialism”.

6. Implications for the interpretation of contracts

The critical self is more of a description of what the ideal self would look like than a depiction of the present situation of the self in society. Unlike the liberal conception of the self that requires both a public sphere (for the common good) and a private sphere (for individual realization of freedom), or the communitarian position which calls for (or describes as inevitable) a purely public sphere, the critical self is located in a sphere that encompasses both the traditional private sphere and the public sphere. The critical self is never only in the private sphere, since her life is always subject to critical reflection, but neither is she simply situated in the public sphere since the critical self is always involved in the realization of her life (she will always be heard). The critical self is situated but she also situates. She is defined but she also defines. The critical self is not wholly responsible for her situation, but she is not without responsibility either. She is responsible not only for her own life but also for that of her companions. This model is not a modernist one, as the self is reflective and reflexive because the society she inhabits is moving along at a rapid pace and the context of her being is in constant flux. It is in this radically unstable environment that the interpretation of contracts must be re-evaluated.

In the liberal model, contracts are private transactions between autonomous beings and the extensions of those beings (like corporations and companies). Contracts are tools to exchange and maximize wealth and personal freedom. The interpretation of contracts is an exercise of deciding the nature and extent of the undertakings by each party and only that. Since contracts are simply private tools for private benefit, governments and legislatures can only regulate this practice in so far as it will maximize individual freedom in society. The legislature may for example require that some formalities be complied with when we trade in fixed property, because property is seen as one of the foundations of individual autonomy and the regulation would result in better use of property and, consequently, a freer society. Law and Economics scholars argue that regulation is sometimes necessary in order to maximize the economic benefits that can flow from contracts.¹⁹⁶ The interpretation of contracts is thus an exercise in risk allocation and the maximization of wealth. The liberal model

¹⁹⁶ See for a recent example Schwartz & Scott “Contract Theory and the Limits of Contract Law” (2003) 113 *Yale LJ* 541-620.

regards the parties to the contract as free individuals acting in their own interest. The interpretation of the contract must therefore give effect to their wishes as far this is as possible and legally viable.

In most communitarian models, the aim of contracts is to maximize collective interest and to promote social good. Because the self in this model is a manifestation of his social circumstances and situatedness, any interaction between selves necessarily implies that the community will be affected in some way or another by the contractual relationship. Consequently, the interpretation of contracts is first and foremost a tool to ensure the continuation and advancement of the communal good and good social practices. In communitarian theory, there is no private space (private space is seen as a manifestation of social relations which is in turn a communal space) and therefore no need to cater for the individual needs of the parties in the liberal sense. The interpretation of the contract cannot be a method of giving effect to the intentions of the parties because those intentions are already effects (of social consciousness and situatedness) rather than pure meanings. A wholly communitarian interpretation of contracts would be one that is conscious of the social situatedness of the contract and that would involve an investigation regarding the best possible way (in a communal sense) of enforcement. In a similar vein, communitarianism would require a justification for the meanings that result from the construction because the theory takes cognizance of the contingency of meaning. This is in contrast to the liberal belief that contractual meaning is to be “found” and not created.

The critical self can have contractual relations in the liberal sense as one individual with another, but like the communitarian self, he would constantly be aware of the wider implications of his actions and his dependence upon the broader society for enforcement of the contract. The description of the critical self is not a mere dream, but something concrete that courts can work with. By embracing the ideals of dialogic self-rule courts can facilitate the interpretation of contracts as dialogues to construct a just outcome in each individual circumstance.¹⁹⁷ The court will, by embracing dialogic self-rule as a point of departure, compel individuals to begin to reformulate

¹⁹⁷ Each circumstance brings with it its own considerations and problems and by treating the interpretation of the contract as a dialogue, the courts will be able to weigh up relevant factors in each case.

their goals and ambitions in the light of a dispensation that has respect both for individual concerns and for social needs and responsibilities. In order to facilitate just contracts, the courts need to create the circumstances in which critical self reflection (and all that it entails) will flourish. The nature of preferred contractual outcomes is a political issue that should not be answered by the courts,¹⁹⁸ but the ideal contracting party (the type of persons that we will help in the courts) will depend upon the court's depiction of the contractual party.¹⁹⁹ If persons are likely to be forced to accept a negotiated outcome reached by a court (which they feel would have been the result of reflective deliberation), they will be much more likely to already have negotiated themselves before the proceedings and in that way save the legal cost.²⁰⁰

7. Conclusion

In this chapter three theoretical positions on individual autonomy were considered, namely liberalism, communitarianism and a critical theory of the self. In liberalism individual autonomy is valued both as a foundational principle and as an ideal. The theory relates a narrative of being in which the self is best served by extending autonomy while the state is relegated to the role of guardian of individual autonomy. In liberalism the role of the state is to facilitate autonomy by regulating the actions of autonomous actors in such a way that they can be as free as possible while not infringing on the freedom of others. The constitution and the rights it contains are postulated as boundaries between the selves, and the self is guaranteed a minimum freedom by these rights. Rights are minimum freedoms into which the self can retreat

¹⁹⁸ The embracing of the critical self does not entail the reception of a certain political theory like redistribution of wealth or socialism. The type of society that we want to further must be the product of the political process. If the political process yields a vision of society that embraces capitalism and emphasizes individual freedom, then the courts must accept these ideals and construct contracts in a way that reflects this policy. The difference is that each contract will be looked at with its own set of circumstances and context and the court will be frank and honest about the reasons for finding for one version of the contract and not another. Courts will respect the input of the parties to the contract, but they will also take into account the social responsibility of themselves and the parties. The contract becomes the effect of the interpretation and not the object of it.

¹⁹⁹ Lawyers tend to learn quickly which type of person the court is likely to help. By forcing parties to act in a certain manner, ie partaking in reflective dialogue, courts will send a clear message to lawyer and non-lawyers alike about the values and beliefs that the courts embrace.

²⁰⁰ It is very interesting to note that contracts that do not go to court and are successfully discharged mostly involve some kind of compromise at one stage or another. See for example Lloyd "Making Contract Relevant: Thirteen Lessons for the First-Year Contracts Course" (2004) 36 *Arizona State LJ* 257 at 263-267. He remarks in lesson three that "...[b]usiness people won't pay attention to the contract...[t]he ...likely scenario is that the contract will be stuffed in a drawer and pulled out only when there is a dispute. Even then the parties are likely to consult the contract only when they've tried to resolve the dispute amicably and are threatening litigation...".

when threatened by either the state or other selves. The role of the state is to regulate the public sphere in order to create a private sphere conducive to individual autonomy. The liberal self is an atomistic being who can choose between the roles available to her in society, and collections of these atomistic individuals make up the community. The self is privileged over the community and the community is a result of the self. In liberal theory, property plays a defining role. Property serves as a medium through which the self can express his autonomy and, consequently, property rights are to be as free from regulation as is possible and protected. Property rights serve as barriers against expropriation and re-division of property. In the liberal model contracts are instruments of exchange. Contracts are ways in which autonomous individuals can express themselves and, provided the contracts do not infringe on the autonomy of others, contracts are construed (in the liberal sense) to have the consequences intended by the parties to the contract. An autonomous self can have an autonomous intention and has the capacity to act according to that intention. When interpreting a contract (and assuming that the contracting parties are autonomous in the liberal sense) the liberal interpreter must interpret the contract in such a way that the wishes (intentions) of the contracting parties are respected and autonomy (as the main aim of liberalism) is maximized.

The main criticism against liberalism is that a liberal dispensation does not necessarily attain the goals it sets for itself. In fact, rights are often stumbling blocks in the way of freedom and the extension of freedom to all sectors of society. History has shown that liberal societies are often characterized by great differences in material wealth, and that the liberal state often falters before the powerful and the rich. Privatization and state minimalism often result in a lack of basic amenities for the poor in society and, while the availability of things like water and electricity is improving, these services become unaffordable (as a direct result of privatization) for those in desperate need. Without these basic services, the poor cannot become autonomous, and the ideals of liberalism are undermined. These practical criticisms aside, liberalism is also faced with substantial theoretical criticism. The CLS highlighted the indeterminacy, instability and reification of rights and their theoretical incompatibility with transformative policies. Duncan Kennedy in particular argued that persons are always caught up in a fundamental contradiction in the sense that we both need others to be free, but that others are at the same time a threat to our freedom. The communitarian

critics aim their criticism at the liberal depiction of the self, arguing that the self does not predate the community and that individual consciousness is always the result of social situatedness and not the other way round.

Communitarianism is in many ways a reaction to the failure of liberalism. This theory of the self flows out of beliefs placing the origin of consciousness in communal life and not in some inherent human capacity. Communitarians argue that the self or individual is nothing more than the product of social relations and influences. In this theory, interaction in the community is emphasized, and unlike the liberal ideal of emerging autonomy, value is placed on the recognition of dependence upon the community. Like liberalism, communitarianism is also characterized by internal divisions and different theoretical positions within the larger theory. Strong communitarianism is an antimodern movement that advocates the replacement of the present legal dispensation with a communitarian one. On the other hand, the postmodern strand of communitarianism emphasizes the critical aspects of communitarianism as a critique against the perceived universality of liberal values. Postmodern communitarians argue that the value of communitarianism lies in its rebuttal of the liberal claim that the maximization (or emergence) of autonomy is the only logical way to achieve the “good life”. Between these theoretical positions, three distinct claims emerge. The first claim is the social composition of the self. Communitarians claim that the self cannot be understood without reference to the social situatedness of the self and that the self often consists of not so much what the self is, but where the self is. The second claim, or meta-ethical claim, is that values are not universal but particular to the societies in which they occur. Freedom and autonomy are not necessarily ideas shared by humanity simply because we are human, but particular societies rather instill values by social interaction. Thirdly, communitarians argue that embracing of communal values and consciousness is preferable (or at least worth consideration) to life in a liberal society.

Communitarians approach contracts from their communal nature and therefore argue that contracts are not to be interpreted simply as individual means of exchange, but rather as legal actions with effects beyond the parties involved. Communitarians see contracts as relation- rather than exchange-orientated, and issues like good faith and contractual equity are strongly emphasized. The aim of communitarian contract

construction is to give the contract a meaning that will have the widest possible benefit, not only for the parties but also for the community at large. The communitarian contractual party is therefore not an atomistic, self-interested being, but rather a manifestation of a communal interest in contact with another such interest. The idea is to interpret this meeting (signified by the contractual text) in the way that leaves the largest net benefit.

Various objections have been raised against the communitarian vision of society, largely centering on the lack of accountability in the communitarian model. The accountability critique has various facets, beginning with the concept of community itself. Critics claim that the ideal communitarian community does not exist and that there is a lack of reflection on the precise nature of the proposed social existence. While liberal theories of the self are depicted by communitarians as overly individualistic, communitarians in turn fail to analyze their own solution, namely communal existence, critically. Critics point out that some of the worst social deviance take place in the communal setting, most prominently the family. They point out that Stalinist gulags and Nazi death camps also advanced steps to make society stronger. Furthermore, communitarianism does not solve the problems of poverty and need because there is no recourse to a standard outside of the communal and, consequently, the strong will still prevail. There is no structure inherent in the community that can guarantee a restructuring and critical reflection that precedes greater material and social parity.

Any viable theory of the self would have to incorporate both the need for autonomy and the need for social justice. Such a theory must provide space for individual selves to flourish, while at the same time realizing that the self is socially situated and therefore has a social responsibility. Michelman provides a theory (the theory of dialogic self-rule) that incorporates both these elements. This is an ideal description of the self rather than an actual description but, unlike many ideal theories, it can be practically implemented through judicial participation. This depiction of the self requires that the self, when confronted with the other (typically in a dispute, but also in business, relationships), engages in a dialogue aimed at finding the best solution to the common dilemma. This should be a process where both parties have a chance to make themselves heard and both parties must be prepared to change in the face of

convincing criticism. This is the ideal model for a contractual situation because the parties to the contract are forced to reach a negotiated settlement and, where one party is unwilling, the court can enforce the just solution in that context. Unlike the liberal model, this model is not overly individualistic in that the parties must be prepared to change their own positions in the light of convincing critique. Like the liberal model, it allows the court to implement whatever policy (economic and social) the political institutions deem appropriate while still maintaining a capacity for contextually just decisions. This model does not have the overly social nature of a communitarian model and the strong economic benefits of the present contractual dispensation are retained. The theory of the dialogic self also incorporates many of the communitarian insights around the need for reflection on the social impact of legal decisions. It calls for a contractual interpretation practice that takes seriously the individual interests involved and the need for contextually sensitive critical reflection on contractual meaning and its impact.

4

Texts

1. Introduction

The aim of this chapter is to examine the concept of a text. When is something a text? What are the elements of a text? What is the relationship between text and fact (if there is a relation at all)? In legal theory, much is written about the interpretation of texts. Passionate debates take place regarding the nature of interpretation and many theoretical positions are postulated on the subject of interpretation. Yet, despite the centrality of the text to the theory of interpretation, very little is written (at least in legal theory) about texts as such. In liberal theory, texts are regarded as an embodiment of authorial intention, a (unproblematic) constant in the interpretation process which serves as a link between the author and the interpreter. It seems that most theorists assume that the definition of legal texts is straightforward and do not warrant special investigation. This chapter seeks to critique such an assumption.

The definition of texts is closely related to understandings of the nature of personhood and interpretation. Theories of interpretation such as functionalism and objectivism require that the text-creator be understood as an autonomous individual, implying that the text can reflect the intentions of the text creator clearly and unambiguously¹. As the text-creator is understood as autonomous and self activating, the text is also understood as independent, predetermined, (if it is a good text) self-explanatory and authoritative. On the other hand, theories like contextualism and pragmatism require understandings of the self as a communal being whose consciousness is the product of his social relations, implying that texts reflect socially constructed and contextual meanings. According to these theories the key to the meaning of a text lies in understanding its context and relation to the community. One cannot divorce the definition of texts from theories of interpretation or understandings surrounding the nature of legal subjectivity.

¹ See chapter 2 and 3 in this regard.

In liberal theory assumptions about interpretation, legal subjectivity and the definition of texts² are interconnected. To understand the liberal interpretation process (especially liberal contractual interpretation), understandings surrounding texts, legal subjectivity and interpretation theory must be approached as being interdependent and mutually constitutive. The autonomous individual (who dominates liberal thought) must be able to communicate accurately (be understood in the way promoted by objectivism) and authoritatively, which means that the communication (or text) must be individualized (externally manifested), preserved (recorded) and executed. The text must be of her (the speaker's/author's) making, to serve her ends. This view has significant implications for the interpretation of contracts, and therefore the question is: Can texts be defined in as such?

The chapter is divided into two main parts and a conclusion. The first main part, which consists of two subsections, investigates and analyzes the definition of texts. Since the nature of texts is not frequently discussed, most of the definitions of texts must be deduced from the rules of interpretation that deal with texts. Literary theory and historical theory also provide clues regarding the present understanding of texts. First, attention will be paid to the relation between texts and “facts” (or more accurately texts as records of facts). Secondly, the parol-evidence rule, together with its qualifications, will be analyzed as a central indicator of legal assumptions about the nature of texts as records. The second part of this chapter deals specifically with postmodern insights regarding texts. The interdependence of texts on other texts is analyzed. It will become apparent that the definition of texts is much more problematic than at first anticipated, that texts are not merely records of facts and that a particular definition of texts can influence meaning significantly. (In the conclusion of this thesis the parol-evidence rule is revisited and evaluated in the light of new theoretical insights). Finally, the conclusions drawn in the preceding sections will be summarized.

² Which ultimately culminate in intentionalism as we will see in chapter 5.

2. Texts as records

2.1 Introduction

“...The text has well defined features; unity, totality, authorship, self-referentiality. The unity of the book is both material and semantic...”³

The quoted passage illustrates the central features of the definition of texts as entertained by many in the legal fraternity. In short, texts are seen as complete entities that are separate from that which is outside the text.⁴ The text can be identified and fully described. The text has an author and a reader. It has a well-defined beginning and end. The text has its place among other texts. Importantly for lawyers, texts can be owned and alienated.⁵ The essential aspect here is the separateness of texts from other texts and the singularity of the text.⁶ This idea is probably best illustrated by looking at books, because they are seen as the ultimate example of a text. The Oxford Dictionary defines a text as “...**1** the main body of a book...**2** the original words of an author or document as distinct from the...commentary on them...”.⁷ Book is defined as “...**1a** a written or printed work consisting of pages glued or sewn together...and bound in covers...**4** (in *pl.*) a set of records...”.⁸ Books contain texts. Texts contain records. Meanings are captured (recorded) by texts and contained in books. Books are there for all to see. One can find books in the library and read them and find the meanings recorded in the texts. The text begins where the front cover starts and ends with the back cover.⁹

This elaborate description of texts in terms of their separateness and as records serves as an introduction into the present understanding of texts in law. These understandings of the text are the result of a broader understanding of language and the role of the text. The discussion will therefore first focus on the understanding of text as a record, separate from other texts; and then the focus will shift to the parol-

³ Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 45. The authors of this work are postmodernists, but they provide the reader with an excellent analysis of the modernist perceptions of texts.

⁴ Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 45.

⁵ Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 45.

⁶ It is often conceded that texts need supplementation in the Derridian sense, but the second step, namely the realization of interdependence of the supplemented upon the supplement, is rarely taken.

⁷ Allen (ed) *The Concise Oxford Dictionary of Current English* (1992) at 1263.

⁸ Allen (ed) *The Concise Oxford Dictionary of Current English* (1992) at 126.

⁹ Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 45.

evidence rule. The aim is to evaluate the rule against the understanding of text as a record to try and find a correlation. If one can assert that the parol-evidence rule is based on the assumption that text equals record, then we can assert that the criticism of the idea of text as a record is also valid against the parol-evidence rule. The interesting question is to what extent a different text-defining strategy will influence contractual interpretation and liability.

Let us start by looking at texts as records of history. A record is an account of something that happened. The Oxford Dictionary defines a record as ...”the state of being set down or preserved in writing or some other permanent form...”.¹⁰ History is defined as a record of important events.¹¹ It is clear that the text itself is not the important element when texts are described as records (reflection) of history (past events). The text is merely a medium that allows its creator to inscribe or record events that are important. The reader of the text must be able to comprehend what the author wanted to record. The events are the crucial elements that should be reflected by the text.¹² The text is portrayed as a “picture” of a past reality.

Most positivists believe that we can separate fact from fiction.¹³ Texts that are true reflections of reality trump texts that provide a skewed picture of reality. Facts are objectively known elements that form the substance of the narrative of being.¹⁴ These facts form the bedrock of the text.¹⁵ If the text conforms to the facts, the text is a true and an accurate reflection of reality. Truth in this sense is not moral truth but rather compatibility with the constituting (bedrock) facts of the genre.¹⁶ Constituting facts

¹⁰ Allen (ed) *The Concise Oxford Dictionary of Current English* (1992) at 1003.

¹¹ Allen (ed) *The Concise Oxford Dictionary of Current English* (1992) at 559.

¹² Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 92. Green refers to this view of texts as a crude view that seeks to assert the dominance of one text over another. The idea seems to be that if one can show that your text is a “truer” reflection of the “facts” one rises above subjectivity and one’s contentions will be objective and thus “truer”.

¹³ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 93.

¹⁴ History is perceived to be an objectively true story about our lives and the lives that preceded us.

¹⁵ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 92.

¹⁶ For example: Let’s assume Y and X agreed that Y would teach X to farm if X paid Y R50. Text A reflects this, while text B reflects this but also that Y has never been on a farm before and can therefore not teach X to farm. While text B might be morally truer than text A, text A is the better reflection of the contract according to the prevailing theory of contract. The prevailing theory regards a true reflection of the intention of the parties (to contract on certain terms) as truer than an account of the ability of the parties to fulfil their obligations. It is irrelevant (except where the so-called public interest is involved) whether X and Y can in fact do what they promised to do, as long as their intentions are accurately reflected by the text.

are depicted as the facts that are important when one judges whether a certain text is part of a genre.¹⁷ A contractual text, according to this view, is a text that reflects the elements that constitute a contract. Carr remarks that a good historical account is one that takes account of historical facts because "...not all facts about the past are historical facts...".¹⁸ But which facts are considered to be "constituting (bedrock) facts"? Carr identifies a so-called commonsense approach.¹⁹ Firstly, it is the duty of the author of the text to be familiar with the constituting facts in the genre he is writing a text in. A poet should know what constitutes a poem just like a historian should know what constitutes a historical account. This implies that authors must be schooled in the "art" of creating texts. Owen Fiss has similar ideas regarding the nature of legal interpretation.²⁰ Secondly, the author must decide beforehand what he considers to be "constituting" facts in his specific circumstances.²¹ The constituting facts of an historical account will differ from one situation to the next. According to this approach, if the author consistently remains within these parameters, his work will reflect the constituting facts and will therefore be a "true" record of the event.

The mere fact that one text is a truer version of the constituting facts in itself is not the reason for preferring the true version over the distorted version. The reason for preferring the true version over the distorted version lies in the positivist preference for objective facts over subjectivity or, more specifically, history over literature.²² Objective facts are perceived to authorize creativity. History is seen as authorizing literature.²³ Positivists argue that history is linked to the world because of its close reflection of reality. Historians, at least in the formalist tradition, do not have any poetic license. They must stick to the facts and "preserve" the facts. History as a genre is perceived to be closer to reality than literature. Literature builds on the reality that history reflects. Positivists contend that literature is a genre where historical significance is denied in order to give it aesthetic significance.²⁴

¹⁷ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 94; Carr *What is History* (1961) at 10.

¹⁸ Carr *What is History* (1961) at 10.

¹⁹ Carr *What is History* (1961) at 10; see also the discussion by Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 95.

²⁰ Fiss "Objectivity and Interpretation" (1982) 34 *Stanford LR* 739 at 744.

²¹ Carr *What is History* (1961) at 11.

²² Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 96.

²³ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 96.

²⁴ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 96.

A problem emerges when history, like literature, is based on other texts rather than on “facts”.²⁵ The danger is that the distinction between literature and history will collapse since both the historical text and the literary text are based on “second hand” facts (other texts rather than the real objective facts). This problem is partly the result of a lack of access to the “facts” and distance between the reader and the facts. The reader must navigate a text that is based on another text. In the field of history this is an everyday problem,²⁶ and historians developed techniques of getting around it. The first method, presuming that authors share a language with readers, is a linguistic search for intention. If the author expressed himself well and the reader is diligent in her search for the intention or message of the text, the reader can understand what the facts were.²⁷ It is of course assumed that the message (recording) of (in) the text is determinate and that the text, if well written, will only carry (transmit) the intended message.²⁸

The second way of dealing with historical texts based on other texts is called contextual reading. The reader is urged to keep the circumstances in mind that were prevalent when the text was created.²⁹ The reason for this contextualisation of the text is the two possible readings that positivists identify. First there is the present reading. The reader must realize that her interpretation of the text is a “present” interpretation.³⁰ The “present” reading is a reading in the context that the reader finds herself surrounded by in the moment of reading. Secondly, there is a “past” reading.

²⁵ Abrams “The Deconstructive Angel” in Fischer (ed) *Doing Things with Texts* (1991) at 238. Positivists readily recognize this danger. Abrams outlines the response of the traditional historian to this problem (which he incidentally agrees with). Kellner discusses a similar and related problem, namely the existence of gaps in the string or narrative of history. He also proves us with a description of the typical positivist response. Interestingly, it is very similar to the methods discussed by Abrams. See Kellner *Language and Historical Representation* (1989) at 28.

²⁶For example if a historian wants to investigate the everyday life of ancient Egyptians he will be confined to studying texts about this era because there are no longer any of the ancient Egyptians around.

²⁷ Abrams “The Deconstructive Angel” in Fischer (ed) *Doing Things with Texts* (1991) at 238; Kellner *Language and Historical Representation* (1989) at 28. Kellner remarks that this specific response often takes the form of a blatant disregard for the gap. The historical text is presented as complete.

²⁸ Abrams “The Deconstructive Angel” in Fischer (ed) *Doing Things with Texts* (1991) at 238. Abrams readily admits to this.

²⁹ Abrams “The Deconstructive Angel” in Fischer (ed) *Doing Things with Texts* (1991) at 238; Kellner *Language and Historical Representation* (1989) at 28.

³⁰ Abrams “The Deconstructive Angel” in Fischer (ed) *Doing Things with Texts* (1991) at 238; Kellner *Language and Historical Representation* (1989) at 29. Kellner calls this method the fourth method of explaining missing evidence. The historian would often admit that her text is not complete, but she would aver that a specific investigation of the gap shows that it is unimportant.

The author had a certain reading in mind when he created the text. He intended readers to read in a certain way. The reader is urged to move from the present reading to the past (intended) reading.³¹ This will establish a close link to the initial creation of the text and therefore a close proximity to the constituting facts. In other words, the reader will know what the author meant with the text.

The final method of negating the distancing effect of a history based on another text is the search for core meaning.³² The positivist historian presents her work in the hope that her interpretation will correlate with that of the expert reader and therefore confirm the objectivity of the meaning recorded by the text.³³ For the interpretation of the author and the reader to conform, the text must have a core meaning. The author must underscore the core meaning of the text, while the reader must seek out the core meaning of the text. If the core meaning correlates with the constituting facts of history, then the work will be vindicated as an objective account, but if the bulk of the core meaning does not correlate with the constituting facts, the work will be a historical fiction.³⁴ Abrams maintains that any historian must be able to claim that, whatever else the text may signify, he at least asserts the core meaning.³⁵ The core meaning must be sufficiently clear to enable the reader to evaluate the claims made in the core meaning.

The preceding discussion highlights the positivist assumptions about texts as records of meaning. The distinction that these theorists draw between literature (stories) and history (facts) is crucial. Stories may deviate from the facts, but history as a record of the facts may not. This distinction highlights the essential assumption that texts are records of objective truth. The truth must not only be objective, but also discernable

³¹ Abrams "The Deconstructive Angel" in Fischer (ed) *Doing Things with Texts* (1991) at 238; Kellner *Language and Historical Representation* (1989) at 29.

³² Abrams "The Deconstructive Angel" in Fischer (ed) *Doing Things with Texts* (1991) at 238; Abrams "Rationality and Imagination in Cultural History" in Fischer (ed) *Doing Things with Texts* (1991) at 126; Kellner *Language and Historical Representation* (1989) at 29. Kellner shows that (traditional) historians often expressly say that they do not know exactly what happened, but that *at least that which they assert*, did in fact happen. If anything, their version is the truth. They portray their text as a core of necessary facts that are beyond doubt.

³³ Abrams "The Deconstructive Angel" in Fischer (ed) *Doing Things with Texts* (1991) at 238.

³⁴ Abrams "The Deconstructive Angel" in Fischer (ed) *Doing Things with Texts* (1991) at 238. It is interesting to note that texts that do not conform to the expert view are labelled "fictions". Fictions or stories are those accounts that seem to skew and distort reality (or at least those views that seem to be real). This characterization of different accounts as fictions serves to highlight the assumption that there is in fact a reality out there that can be mirrored by texts.

³⁵ Abrams "The Deconstructive Angel" in Fischer (ed) *Doing Things with Texts* (1991) at 239.

as such. Only if we can record objective truth in the text, can the text serve as a record. Hans Kellner wrote that "...to get the story right is the first duty of the historian...".³⁶ He goes on to state that this assumption rests upon the contentions that there is in fact one "story" (reality) and that the industrious and honest historian can in fact get the "story" straight. Whether these assumptions can be upheld or not is another question altogether. When the parol-evidence rule is discussed it will be analyzed in order to ascertain whether the rule is based on the same assumptions.

The second important aspect of texts as records is the perceived separateness of texts. Texts are seen as "monuments" of past reality. Abrams begins by saying history must be something determinate and determinable.³⁷ He argues that a history is a recording of a distinctive event or moment in time. The reader must find the correct (objective) interpretation of the text.³⁸ The argument is that "competent readers" already know the truth and that the reader must test her reading of the text by having it evaluated against that of competent readers.³⁹ The text is comprehended as a completion of facts couched in language that can be decoded by applying the rules of language.⁴⁰ The only link between the text and other texts is the language in which it is put. The text (message or recording) itself is unique. Texts, especially histories, are not there for interpretive creativity; they are there to be understood.⁴¹

Historians do not approve of language play when it comes to their texts. Kellner suggests that "...[h]istorians as a guild feel a corporate anxiety about language and about those who study language...".⁴² This anxiety flows from three beliefs that

³⁶ Kellner *Language and Historical Representation* (1989) at vii. Kellner gives a post-structuralist account of history and historical writing, but also provides a detailed account of current historical writing techniques and assumptions.

³⁷ Abrams "Rationality and Imagination in Cultural History" in Fischer (ed) *Doing Things with Texts* (1991) at 126.

³⁸ Abrams "Rationality and Imagination in Cultural History" in Fischer (ed) *Doing Things with Texts* (1991) at 126.

³⁹ Abrams "Rationality and Imagination in Cultural History" in Fischer (ed) *Doing Things with Texts* (1991) at 126.

⁴⁰ Abrams "Rationality and Imagination in Cultural History" in Fischer (ed) *Doing Things with Texts* (1991) at 126.

⁴¹ Abrams "Rationality and Imagination in Cultural History" in Fischer (ed) *Doing Things with Texts* (1991) at 126. This provides an insight into the positivist historical view of interpretation. The readers are urged to stop playing games with the text (it is after all not a novel) and to start finding what the author deposited in the text. The text is unique and the voice of someone. Historical texts (texts that are supposedly records of events) are most useful when conveying a message.

⁴² Kellner *Language and Historical Representation* (1989) at 12.

positivist historians hold regarding texts. The first is that texts form part of a complete whole (reality) and that the text is best understood when reference is made to the whole.⁴³ The whole is seen as more secure in its meaning than the part. The text refers to the whole for justification of the meanings that it supposedly carries (transmits). While the historian can get her meanings wrong in the text, the whole cannot be wrong. The whole is the bedrock against which the text must be measured. The distinction between the whole and the text highlights the “moment” (separateness) of the text. If the text were the whole, there would not be a need for reference outside of the text; in fact such an “outside” would not exist. However, positivist historians see the need to supplement the text (more specifically the meanings resulting from the text) by referring to the whole as a justification. For the text to allow supplementation, it must be separate from its supplement.⁴⁴ In others words, in the positivist scheme there exists a whole, which provides all historical accounts with justifications and then there is a text that records (emulates) a part of the whole. The text is apart from the whole in order for it to be justified by the whole.⁴⁵

The second anxiety entertained by traditional historians concerns the unity of texts.⁴⁶ The idea is that texts form part of a (perfectly) coherent whole and that it is therefore not necessary to study each text separately. At first glance this anxiety seems to indicate the opposite of the argument made so far, that positivist historians see texts as separate, since it seems to indicate that texts are interdependent. Yet just the opposite is true. Texts are not seen as interconnected as *texts* but connected through their *message*. Texts are perceived to be records of parts of the coherent whole. The value of texts in the positivist scheme is not their interpretability, but rather the message that they carry (transmit).⁴⁷ The anxiety is therefore not recognition of the interconnectedness of texts but a reaction to the potential effect on the unity of the

⁴³ Kellner *Language and Historical Representation* (1989) at 12.

⁴⁴ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2525; Balkin “Deconstructive Practice and Legal Theory” (1987) 96 *Yale LJ* at 747. Both these writers provide a good explanation of the so-called “logic of supplementation”.

⁴⁵ As soon as the logic of supplement is taken to its end, it becomes clear that the text is dependent upon the whole, but the whole is also dependent upon the text. If the whole was really “complete”, nothing could refer to that whole because any reference would have to be complete as well. The whole would be referring to itself. However, most historians do not take this final step.

⁴⁶ Kellner *Language and Historical Representation* (1989) at 13.

⁴⁷ Abrams “Rationality and Imagination in Cultural History” in Fischer (ed) *Doing Things with Texts* (1991) at 126.

message if texts are not read in conformity. This realization or fear (that the message will fragment if coherence is not advocated) flows from the understanding that texts are separate.

Kellner finally identifies anxiety about closure as a fear expressed by historians when confronted by language theorists.⁴⁸ This anxiety is probably the result of post-structuralist and neo-pragmatist scepticism about final closure. Neo-pragmatists argue that finality in any interpretation will have to be the result of a stable and final community of interpreters that cannot exist, while post-structuralists argue that meaning is never final and simply the result of some temporary hierarchy of preference that is subject to continuous reversal. Historians who believe that texts can represent parts of reality distrust this inherently unstable representation of interpretation because it does not allow them to test the text against the reality of the whole. If texts cannot have a core meaning that can be tested, how can we evaluate the ability of the text to replay the events recorded by it? If texts do not have a final interpretation, historians fear that the message of the text (and in the positivist scheme this is after all the utility of texts) will be lost. The singularity of texts will be lost because there is no way to finally decide what the text says. Paul de Man describes this as the demise of the “text as a box” metaphor.⁴⁹ The arrival of the new criticism in language led to the demise of the perception that texts are merely boxes containing meaning that the reader could unpack.⁵⁰ The anxiety confirms the assumption that texts are separate entities, each with a unique but appraisable message.

Before the investigation can shift to the parol-evidence rule, one last argument for texts as separateness must be examined. Ronald Dworkin argues that any theory of interpretation must have some way of distinguishing between interpreting and changing a work.⁵¹ Dworkin requires of the interpreter to limit her interaction with the text to finding the meaning of the text and to refrain from changing the text in her interpretation. Douzinas identifies the assumption that underlies this thinking as the

⁴⁸ Kellner *Language and Historical Representation* (1989) at 13.

⁴⁹ De Man ‘Semiology and Rhetoric’ in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 123.

⁵⁰ De Man ‘Semiology and Rhetoric’ in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 123.

⁵¹ Dworkin *Law as Interpretation* (1983) at 53. See also the discussion by Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 62.

perception that texts are complete before interpretation.⁵² The point of this rule is to delineate the spheres of the author and the interpreter. The reader is cautioned to take account of all the words in the text and not to extend or limit her interpretation so that the text is “changed” in the process. The interpreter should not disregard words in order to find a better interpretation and should not add words to the text that will enhance its worth.⁵³ This perception fits in with the positivist belief in the separateness of a text.

The idea of texts as records and the separateness of texts is based on the functional understanding of language as signs that refer to something in the world.⁵⁴ Functionalists understand language to be connected with the world as a referent and the sign is perceived to have an external relation to something in reality. Texts are collections of signifiers that record the history of the real world and the reader is considered able to reconstruct events by understanding the text as a signifier of a certain reality.⁵⁵ The correlation between the signifier and the signified in the real world is important. Likewise in text as history, correlation between the historical facts and the message that the reader gets out of the text is important. The (traditional) historian does not want his text to be creative in any sense; he simply wants to get the chronicle straight. The functionalist theory of language provides the historian with substantiation for his views on reality and our ability to reflect it. Text as separateness revolves around the supposed ability of language to serve as a monument of events. Language, like the figure or depiction in a monument, must provide the reader with a link (a common denominator) to the unique message of the author. Language, in this understanding of texts, is a route marker to the past experience. The functionalist language theories provide the separateness theorist with a foundation from which to justify texts as carriers of unique messages.

⁵² Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 62.

⁵³ Dworkin *Law as Interpretation* (1983) at 254; Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 62.

⁵⁴ Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 93

⁵⁵ This specific understanding of language correlates very closely with the meta-physical realist understanding. Meta-physical realists argue that all interpreters inherently believe that language is a guide or a representation of a “real world” “out there”. They argue that misunderstandings are the result of misrepresentations of reality. The argument goes that if language reflects the “real” reality, there would be no misunderstandings. See also chapter 2 section 3 and Bix *Law, Language and Legal Determinacy* (1993) at 138 and Radin “Reconsidering the Rule of Law” in Schauer (ed) *Law and Language* (1993) at 302.

To conclude this part, it is useful to also note that the assumptions regarding the nature of texts (that texts are separate from other texts and records of facts) often correlate with similar assumptions about the nature of the self and the nature of interpretation. Where the abovementioned assumptions about texts are prevalent, one will also find a positivist interpretation strategy (interpretation as meaning extraction rather than meaning construction) and a liberal description of the self who is autonomous and separate from other selves. If perceptions about texts, the nature of the self or interpretation changes, it influences assumptions about the other two.

2.2 The parol-evidence rule

As mentioned earlier, in South African law there is no express strategy for the definition of texts. The rules dealing with texts must be analyzed in order to identify the underlying assumptions concerning texts. The primary rule dealing with texts in contractual practice, the parol-evidence rule, deals with the admissibility of so-called extrinsic evidence when a (written) contractual text is interpreted. The rule, as it is applied in South Africa, together with the principal academic observations about the rule, are discussed in the following paragraphs to relate assumptions inherent in the parol-evidence rule to assumptions about texts as records and the separateness of texts.

The parol-evidence rule is often (wrongly) called the integration rule because it applies to situations where “...the contract has been integrated into a single and complete written memorial...”.⁵⁶ Where a contract has been reduced to a written document, disagreements can arise regarding the meaning of the written terms. The parol-evidence rule regulates to what extent external evidence will be allowed as proof of the meaning of the written text.⁵⁷ The rule is applied to limit evidence other than the written document itself because the document is regarded as the exclusive memorial of the transaction, so that no evidence other than the document itself may be produced to prove the meaning of the document.⁵⁸ The theoretical foundation of the rule is the belief that parties can in fact fully record their agreement in a text and that

⁵⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 99. The integration rule is but part of the parol-evidence rule. See discussion below.

⁵⁷ Van der Merwe et al *Contract: General Principles* (2003) at 157.

⁵⁸ *Union Government v Vianini Pipes (Pty) Ltd* 1941 AD 43 at 47; Van der Merwe et al *Contract: General Principles* (2003) at 157; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 99.

in such an instance external or parol evidence will be irrelevant and misleading.⁵⁹ Van der Merwe et al argue that the rule consists of two parts, namely an integration rule and an interpretation rule.⁶⁰ The integration rule, which is regarded as the parol-evidence rule proper, involves an enquiry into the question whether the parties to the contract regarded the written document as an exclusive and final memorial of the contract terms.⁶¹ The interpretation rule regulates the extent and nature of evidence that may be produced in order to interpret the terms of a document that was intended to be a final memorial of the agreement.⁶²

The application of the integration rule precedes that of the interpretation rule. Under the integration rule, a document will be regarded as the exclusive memorial of the agreement of the parties if the parties intended it to be a final and exclusive record of the contract.⁶³ The inquiry whether a document is in fact an exclusive memorial is not subject to the integration rule. In other words, it is only once it is established that the writing was in fact intended to be a record of the contract that it will be subject to the parol-evidence rule.⁶⁴ Where only part of the contract is committed to writing, only the written part will be subject to the parol-evidence rule.⁶⁵ The integration rule is central to the parol-evidence rule. Without the distinction between a recorded contract and a non-recorded one, the parol-evidence rule will have no application. The ratio for the parol-evidence rule is inseparably linked to the assumption that documents have the ability to serve as a record of the agreement.

The inclusion of the interpretation rule in the parol-evidence rule process is an attempt to negate the possible adverse consequences of the application of the parol-evidence rule. If the integration aspect of the parol-evidence rule is applied strictly, no extrinsic

⁵⁹ *Johnston v Leal* 1980 (3) SA 927 (A) at 944; Van der Merwe et al *Contract: General Principles* (2003) at 158.

⁶⁰ Van der Merwe et al *Contract: General Principles* (2003) at 157.

⁶¹ Van der Merwe et al *Contract: General Principles* (2003) at 157.

⁶² Van der Merwe et al *Contract: General Principles* (2003) at 157.

⁶³ Van der Merwe et al *Contract: General Principles* (2003) at 158.

⁶⁴ External evidence will be admitted if it is aimed at disproving that the text is an exclusive record. Even in cases where the document states that the text is an exclusive memorial, extrinsic proof can be presented to prove that the parties had a contrary intention. Printed standard contracts that have not been filled in completely will warrant the introduction of extrinsic evidence regarding the open spaces. See Van der Merwe et al *Contract: General Principles* (2003) at 159.

⁶⁵ Van der Merwe et al *Contract: General Principles* (2003) at 159.

evidence could ever be produced if the text was found to be a full integration.⁶⁶ Terms in the text that were unclear would have to stay unresolved or the court would have to impose an interpretation of the text on the parties. The interpretation rule negates this difficulty by allowing extrinsic evidence insofar it does not contradict the text.⁶⁷ If the court judges that the evidence, although extrinsic, aims to explain the text rather than contradict it, the evidence will be allowed. The distinction between the explanation of a text and the contradiction thereof is not clear.⁶⁸

The discussion of the parol-evidence rule, as applied in South Africa, would not be complete without mentioning the main criticisms against the rule. Two streams of criticism can be identified. The first focuses on the practical difficulties with the application of the parol-evidence rule.⁶⁹ The rule does not allow for a clear distinction between the explanation of words and the contradiction thereof⁷⁰ resulting in confusion about the admissibility of extrinsic evidence. The court is left more or less to its own devices when deciding whether the tendered evidence contradicts or explains the written document and consequently the very ratio of the rule is undermined.⁷¹ The aim of the parol-evidence rule is to provide legal certainty and to protect the integrity of written documents and without a proper distinction between contradiction and explanation, this aim is not met.⁷²

The second and more fundamental problem is the theoretical incompatibility of the parol-evidence rule and the will theory as applied in South Africa.⁷³ It is accepted that

⁶⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 100; Van der Merwe et al *Contract: General Principles* (2003) at 160.

⁶⁷ *Spur Steak Ranch Ltd v Mentz* 2000 (3) SA 755 (C) at 763; Van der Merwe et al *Contract: General Principles* (2003) at 160; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 100.

⁶⁸ Van der Merwe et al *Contract: General Principles* (2003) at 161. In some instances extrinsic evidence has been allowed to show that a person who was ostensibly a party to the contract, had in fact been an agent. (*Ten Brink v Motala* 2001 (1) SA 1011 (D) at 1013). Extrinsic evidence has been allowed to show that an oral agreement existed to the effect that the written contract will not become operational if certain circumstances did not occur (*Philmatt (Pty) Ltd v Mosselbank CC* 1996 (2) SA 15 (A) at 23). It seems that the court will have to make the distinction in every case.

⁶⁹ Van der Merwe et al *Contract: General Principles* (2003) at 161.

⁷⁰ Van der Merwe et al *Contract: General Principles* (2003) at 159-161; *Philmatt (Pty) Ltd v Mosselbank CC* 1996 (2) SA 15 (A) at 23; *Ten Brink v Motala* 2001 (1) SA 1011 (D) at 1013.

⁷¹ This is evident from the widely divergent decisions regarding the admissibility of evidence. See Van der Merwe et al *Contract: General Principles* (2003) at 160-161 and footnotes 158-169.

⁷² Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 109.

⁷³ Van der Merwe et al *Contract: General Principles* (2003) at 161; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 109.

the basic principle that influences contractual liability is the subjective intention of the parties.⁷⁴ The parol-evidence rule restricts investigation into the actual subjective intentions of the parties by confining the investigation to the written contractual text.⁷⁵ Subjective intention is that intention held by the parties, regardless of the expressed intention. The subjective intention will therefore not necessarily coincide with the expressed intention. Under the accepted theory of liability, parties can (in theory) write down X and mean Y, so long as they understand each other. The parol-evidence rule eliminates this possibility.⁷⁶

Although many different ways of dealing with these shortcomings have been put forward, most are variations of two major responses. The first response to the shortcomings of the parol-evidence rule is outright rejection of the rule. Van der Merwe et al argue that "...the technical complexity of the rule undermines the ...certainty it seeks to achieve, and the justification for its continued existence has become doubtful...".⁷⁷ Many academics, especially intentionalists, argue that the impossibility of recourse to the subjective intention under the rule is fatal to its continued utility. The South African Law Commission recommended that the parol-evidence rule be scrapped and that extrinsic evidence be allowed to prove meaning in contracts.⁷⁸ The reason for this response is the perception among theorists that the parol-evidence rule hampers the search for the subjective intention (which is after all the basis of contractual liability) and, at the same time, that the rule does not reach the goals set out for it (in short: legal certainty) because of its technical complexity.⁷⁹ It assists neither a completely subjective intentionalist approach, nor a completely objective one.

⁷⁴ Van der Merwe et al *Contract: General Principles* (2003) at 161.

⁷⁵ Van der Merwe et al *Contract: General Principles* (2003) at 161.

⁷⁶ Remember that the parol-evidence rule is often used in conjunction with the plain-meaning rule. The plain-meaning rule holds that effect should be given to the ordinary meaning of the words in the text. If the ordinary meaning of X=X then the court must find that X=X even though the parties might have intended X=Y. Also keep in mind that the parties before the court would most likely contest the meaning of X and therefore the party asserting that X=X will in all likelihood succeed because of the parol-evidence rule (even though both might have subjectively intended X=Y and evidence of this exists outside of the text).

⁷⁷ Van der Merwe et al *Contract: General Principles* (2003) at 161.

⁷⁸ *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) 1998 at 198 and clause 5 of the draft bill attached to the report; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 109.

⁷⁹ Van der Merwe et al *Contract: General Principles* (2003) at 161.

The second response calls for the so-called liberalization of the rule.⁸⁰ Cornelius argues that South Africa should adopt the liberal American approach⁸¹ according to which, no distinction is made between integrated and unintegrated contracts and extrinsic evidence would always be relevant, provided it does not change the contract and helps with the interpretation thereof.⁸² The crucial question in this approach is whether the text can be reasonably susceptible to the meaning that is suggested by the extrinsic evidence. The question is one of fact. This response to the shortcomings of the parol-evidence rule flows from certain beliefs about the nature of contractual interpretation. Theorists who advocate this response believe that documents (written texts) promote legal certainty and are reliable sources of meaning,⁸³ arguing that documents form the backbone of modern day commerce and that the abandonment of the parol-evidence rule will effectively destroy commerce as we know it.⁸⁴ Many academics who recommend the second response fear that abolition of the rule will lead to a situation where contractual disputes are “your word against mine” affairs.⁸⁵ This, they argue, is exactly what parties sought to avoid in the first place when resorting to written documents. They recognize the need for reliable documentation but, like traditional historians, they claim that the utility of texts lies not in their interpretable nature, but in the reliability of documents as records of transactions.⁸⁶ The liberalization of the parol-evidence rule would (in their view) allow the interpreter to find out exactly what the authors meant with the text. In other words, the relaxation of the parol-evidence rule would lead to a more accurate decoding of the text, while retaining its evidentiary value.

To ascertain whether the parol-evidence rule is based on the same linguistic assumptions that positivist historians make about texts, the rationale of the rule must be analyzed critically. The justification for the parol-evidence rule is that it creates legal certainty because it regulates the extent to which extrinsic evidence is allowed to

⁸⁰ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 109.

⁸¹ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 105.

⁸² Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 102; *Pacific Gas & Electrical Co v GW Thomas Drayage & Rigging Co Inc* 40 ALR 3d 1373 at 1377.

⁸³ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 108.

⁸⁴ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 109.

⁸⁵ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 110.

⁸⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 109.

influence the meaning of the contractual text.⁸⁷ The argument goes that it is economically sound to confine contractual consequences to those stipulated in the written text because it allows the parties and others with access to the text to manage their affairs in the knowledge that the contractual text will define the legal consequences associated with the contract. In this scheme the text can readily reflect the state of affairs regarding the contract. The rule affords evidence outside of the text a mere explanatory role, restricted to cases where such evidence does not change the information in the text. Two elements are crucial to the justification for the rule, namely the certainty of the text and the potential influence of extrinsic evidence.

The certainty of texts is central to the parol-evidence rule. The argument goes that written contractual texts are easier to prove than oral agreements. The written text is seen as tangible evidence of the agreement that warrants special treatment because of the presumed certainty of the message in the text. The written text is perceived to be more reliable than the oral evidence. While persons can go back on their word, it is seemingly not possible with a written and signed text. Had the written text not been more certain or reliable than oral evidence, the parol-evidence rule would have had no utility. The very existence of the parol-evidence rule turns on this distinction between written and unwritten texts.

Extrinsic evidence is defined as evidence from outside the document and also as evidence that do not form part of the written record.⁸⁸ The first part of the definition concerns the physical separateness of the text from the extrinsic evidence. The text of a so-called exclusive memorial is held to be physically complete and the external evidence as physically other than the text. While the text may be a sheaf of papers containing writing and the signatures of both parties, the extrinsic evidence could be something else, for example a recollection of the utterances by the parties during negotiations by a typist who was present during the negotiations. The second part of the definition relates to the meaning separateness of the text and the extrinsic evidence. The (written) text is said to contain a specific message and the extrinsic evidence to contain another message. While the text may reflect X=Y, the extrinsic

⁸⁷ Van der Merwe et al *Contract: General Principles* (2003) at 157; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 109.

⁸⁸ Van der Merwe et al *Contract: General Principles* (2003) at 157; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 99.

evidence could conversely reflect $X=T$. Both parts of the definition of extrinsic evidence are crucial to the justification of the parol-evidence rule. The physical separateness of the written text and the extrinsic evidence makes it possible to identify a textual reality and an external reality. At the same time, the meaning separateness of the text and the extrinsic evidence makes it possible to observe the influence of external evidence on the text. If the text cannot be said to have an independent meaning (that can be influenced), potential changes to that meaning cannot be measured and as a result the parol-evidence rule (that attempts to control this change) would be meaningless.

Now that it has been established that the certainty of texts and the distinction between texts and extrinsic evidence stand central to the parol-evidence rule, the correlation between texts as portrayed under the parol-evidence rule and the definition of texts by conventional historians can be examined. Traditional historians contend that texts are records of parts of larger reality and texts are separate from this larger reality. Good texts are ones that reflect the constituting facts of their genre in their core meanings so that the text can both conform to its genre and be sufficiently distinct to allow the reader to evaluate the truth of the text. A contractual text that conforms to this (historical positivist) description is one that reflects the agreements reached between the parties (reflecting the facts); shows that the agreement conforms to the requirements for a binding contract (corresponding with the constituting facts of the genre); and reflects both these things sufficiently clearly so that the reader can determine the extent of the contract (evaluate the truth of the text). The requirements for an ideal text under the parol-evidence rule conform exactly to this. The type of text that the parol-evidence rule aims to protect is not the unclear text but the unambiguous text that might be complicated by extrinsic evidence.

Once it has been established that the general description of the parol-evidence rule and the subsequent understanding of texts conform to the positivist historical description of texts, it becomes necessary to relate general criticism on the parol-evidence rule to texts as records and separateness. The first criticism raised against the parol-evidence rule is that it is a practical failure.⁸⁹ It is often held that the parol-

⁸⁹ Van der Merwe et al *Contract: General Principles* (2003) at 161.

evidence rule cannot adequately distinguish between actions aimed at changing the text and actions that help with the interpretation of the text.⁹⁰ This involves recognition that texts are not always complete and that information outside of the physical text can have an influence on the meaning of the text. However, this criticism seldom leads to a call for abandonment of the parol-evidence rule, since this line of argumentation is usually the precursor to a call for the liberalization of the parol-evidence rule.⁹¹ Critics agree with the rationale of the rule, but they argue that the rule (as it is presently applied) fails to protect the sanctity of the written document.⁹² It is clear that these critics are not so much concerned with the apparently faulty conception of texts as with the need to establish legal certainty. This type of criticism correlates with the Dworkinian contention that interpreters need to distinguish between the interpretation and altering of a text.⁹³ Finally, this type of criticism only makes sense in a theoretical framework where texts are seen as records that are separate from other texts. If the interpretive turn is embraced, the distinction between changing and interpreting falls away. All meaning becomes interpretive in nature.⁹⁴ This is clearly not the theoretical position of the critics of the practical effect of the parol-evidence rule.

The second criticism of the parol-evidence rule is that the rule is theoretically incompatible with the will theory of contractual liability.⁹⁵ This is an intentionalist criticism. Intentionalists normally believe that the intention of the author of the text as *portrayed by the text* is of paramount importance, but with the parol-evidence rule the problem is that the text is often inadequate. This criticism is based on the belief that

⁹⁰ It is interesting to note that the criticism is called “practical”. The perception seems to be that the problem is associated with specific cases where it is difficult to distinguish between the interpretation and alteration of a meaning rather than problems surrounding the theoretical basis of the rule. Many theorists believe that the problem can be solved, without revising theoretical understanding surrounding texts, by creating a standard that can adequately distinguish interpretation and change. I will argue that the “practical” problems with the rule are not “practical” at all, but the result of theoretical misconceptions surrounding language in general and specifically texts.

⁹¹ Van der Merwe et al *Contract: General Principles* (2003) at 161; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 100-102.

⁹² Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 108.

⁹³ Dworkin *Law as Interpretation* (1983) at 53. See also the discussion by Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 62.

⁹⁴ Schanck “Understanding Postmodern Thought and its Implications for Statutory Interpretation” (1992) 64 *Southern California LR* 2504 at 2570. See chapter 2 sections 6 and 7 for discussions around the nature of language and interpretation.

⁹⁵ Van der Merwe et al *Contract: General Principles* (2003) at 161; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 100.

texts are records (otherwise the link between the intention of the author and the text cannot exist), but that extrinsic evidence is sometimes required to prove the intention of the author. Most argue that the problem is not that the text does not reflect the intention of the authors, only that the parol-evidence rule restricts access to evidence that might prove a meaning in the text as an intended one.⁹⁶ Put differently, because of the operation of the parol-evidence rule it is difficult to prove which of the meanings reflected by the text were intended and which ones not. In this sense, intentionalist criticism against the parol-evidence rule is also “practical” criticism. Cornelius, for example, argues that the relaxation (liberalization) of the parol-evidence rule will preserve the high evidentiary value of the written text, while also allowing for an investigation into the actual subjective intention of the parties.⁹⁷ However, even this limited relaxation of the parol-evidence rule begins to undermine the idea of texts as records and separateness. The moment extrinsic evidence is allowed in the interpretation process of a written text, the interpreter is in fact acknowledging that the text is not a complete record of meanings and that the text is not completely separate from other texts.

The liberalization of the parol-evidence rule calls for the rejection of the integration/non-integration distinction in favour of a casuistic evaluation of the effect of extrinsic evidence. As was mentioned in the previous paragraph, relaxation of the parol-evidence rule is a de facto acknowledgement of the failure of the written text to record and set apart the intention of the author. Like the historian’s difficulty in having her text reflect reality when she only has access to second hand facts, the intentionalist is left with a text that is a representation of the subjective intention of the parties rather than the subjective intention itself. This intentionalist response (liberalization of the parol-evidence rule) corresponds with the second response by historians when faced with a similar dilemma: Demanding access to extrinsic evidence that is perceived to be closer to reality than the text; calling for a contextual reading of the text. The extrinsic evidence provides the context and it is argued that its inclusion will connect the text with the meanings intended by the authors.⁹⁸

⁹⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 103 and also footnotes 50-58.

⁹⁷ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 103.

⁹⁸ Remember that liberalization theorists are anxious about the retention of documents as reliable evidence and as a result they are careful to formulate their response as such. They argue that the plain

There is also a correlation between the search for core meaning in historical practice and the liberalization critique of the parol-evidence rule. Traditional historians argue that whatever the linguistic (meaning) possibilities a text may have, its core meaning must correlate with the facts as put forward by expert readers.⁹⁹ South African pro-liberalization theorists claim that the core of any contract is the subjective intention of the parties and that this core must be sought out above all else.¹⁰⁰ They maintain that resorting to extrinsic evidence is justified by the centrality of subjective intention to the formulation of the performance due by each party, and that the text does not always reflect this subjective intention. The theoretical ramifications for the definition of texts are immense. The text is perceived to hold not only the recorded (and desired) meaning, but also undesirable possibilities that can potentially increase the involvement of the interpreter in the definition of texts. The interpreter is asked to judge which meanings are the intended ones and which not. Because of this choice, the text is no longer something that exists prior to interpretation. If the text does not exist prior to the interpretation, the text cannot be a record because the contents are only decided during interpretation.

Finally, before introducing the criticism against texts as records and separateness, the theoretical understanding regarding text that underpins proposed abolition of the parol-evidence rule must be discussed. The proposal to abolish the rule is based on the two general criticisms of the parol-evidence rule namely theoretical incompatibility of the rule and the will theory, and practical difficulties surrounding the application of the rule.¹⁰¹ Proponents of abolition of the rule remind policy makers (legislatures, courts) that the rule places a normative restriction on certain types of contract and that this seems to infringe on the basis of South African contractual liability.¹⁰² This

meanings (see chapter 2 section 3) fortify the meaning of texts, and that the evidentiary burden on parties claiming meanings other than the plain ones is daunting. See Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 103.

⁹⁹ Abrams "The Deconstructive Angel" in Fischer (ed) *Doing Things with Texts* (1991) at 238; Abrams "Rationality and Imagination in Cultural History" in Fischer (ed) *Doing Things with Texts* (1991) at 126; Kellner *Language and Historical Representation* (1989) at 29.

¹⁰⁰ The South African situation must be distinguished from the American one because the American law of contract is based on consideration while South African contracts are based on subjective intention.

¹⁰¹ Van der Merwe et al *Contract: General Principles* (2003) at 161; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 109-110.

¹⁰² Van der Merwe et al *Contract: General Principles* (2003) at 161.

theoretical insight, together with the practical difficulties experienced in implementing the rule, are advanced as reason enough for discontinuing the parol-evidence rule. Important for the definition of texts, while the division between written texts and other texts is maintained, contracts are depicted as uniformly dependent upon texts.¹⁰³ In other words, all contracts are texts.

The traditional historical understanding of texts, as held by proponents of the parol-evidence rule as it stands, together with the major criticisms, on the rule are essentially modernist. The rule is aimed at providing a catch-all regulation of the interpretation of written contracts to provide legal certainty, while the criticism against it is aimed at its lack of practical utility and theoretical incompatibility with the will theory. The belief that one can in fact have legal certainty also rests upon the assumptions that individuals are autonomous and thus best served by a society where legal certainty makes choice and consequence predictable and that interpretation involves meaning extraction (texts are presumed to always yield the same meaning, at least on a basic level).

The postmodern understanding of texts goes against all the assumptions made so far. Texts are depicted as interpretable in the strong sense rather than records and texts are described as interdependent (as texts not just messages) rather than apart.

3. Postmodern texts (or definition of texts)

3.1 Introduction

This part of the chapter starts out with an (essentially modernist) Marxist description of texts, which is useful as a link between the traditional historical definition and postmodern understandings of texts. The Marxist definition is radically different from the traditional historical understanding of texts, in that the latter is based on a presumed common knowledge of texts while the former looks for social facts as a

¹⁰³ The argument that the parol-evidence rule is a unjustified normative restriction on certain types of contract is based on the belief that on a general level and as a point of departure, all contracts are the same and should be treated the same. This the first step in the direction of a recognition that all texts are in fact similar and as far as their interpretability is concerned, all texts, written or otherwise, are subject to the same conditions.

basis for definition of texts.¹⁰⁴ Marxism serves as a good point of departure as it provides links with later postmodern thought. After the Marxist definition has been discussed the focus will shift to the postmodern understandings of textual interconnection and the interpretability of textual meanings. These concepts are in direct conflict with the traditional historical definition of texts. The relationship between oral and written texts, which is central to the parol-evidence rule, is also analysed. The aim of this section is to give an overview of developments regarding the definition of texts and the possible implications for contractual interpretation.

Marxist literary criticism is one of the most coherent and substantial developments of the twentieth century literary genre.¹⁰⁵ While early Marxism advanced preordained economic class division as the driving force behind the definition of texts, later developments take into account more diverse political influences originating from the economic divisions in society.¹⁰⁶ According to the Marxist understanding, history is defined by political and institutional contexts that are themselves defined by the economic foundation of society.¹⁰⁷ In other words, what we see as a text will largely depend upon our station in life and, according to this theory, there will be a correlation between the economic power inherent in an institution and its influence on the definition of texts.¹⁰⁸ Marxists regard terms like “literature” and “aesthetics” with distrust and treat these as products of existing economic power relations.¹⁰⁹ This line of thinking challenges the divide between “literature” and “history” and also between “creativity” and “fact”. Marxist theory questions whether interpreters can distinguish, in the metaphysical way claimed by traditional historians, between a story and a history. It is argued that the distinction is not natural at all, but subject to the

¹⁰⁴ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 124. I will not make an attempt to comprehensively discuss Marxism but will merely briefly describe what is commonly viewed underlying ideas of the Marxist literary theory.

¹⁰⁵ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 124.

¹⁰⁶ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 124.

¹⁰⁷ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 124.

¹⁰⁸ A court, for example, is subject to the economic realities in the society over which it presides. The meanings emanating from the court will, in the Marxist frame of thinking, show a close relation with the economic possibilities open to the court. Courts will, for example, be more likely to give a heavy monetary penalty against a big company in a first world country where the effect of the judgement will have less economic impact, than in a third world country where the economic impact, on employment for example, will be substantial.

¹⁰⁹ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 125.

economic ideology of the ruling class.¹¹⁰ Accordingly, legal texts will be the texts that seem legal because of the existing economic hierarchy.

Marxist theory introduces a role for the other in the definition of texts.¹¹¹ Texts are by definition created in relationship with something other than the text. Marxists argue that the text is the product of an ideology.¹¹² The text is portrayed as a lack of meanings rather than a compilation of meanings.¹¹³ In the Marxist context, a text will not only be a reflection of the prevailing material dispensation, but also a lack of reflection of the non-dominant ideology. In a system where X is economically dominant and Y is not, the text will reflect not only the ideology of X but also not reflect the ideology of Y. Y would be conspicuous in its absence. This view of text is contrasted with the traditional historical view, since text does not have a purely referential value, but includes, by definition, something other than the signified. It includes the non-signified, and by implication the functionalist view of language becomes increasingly difficult to justify.

Ideology is defined as “...something subjective that slips into discourse and pretends to describe reality...”.¹¹⁴ Marxists often use the concept of ideology in opposition to science.¹¹⁵ Ideology is different from science in the sense that ideology is a perception of reality, while science claims access to reality itself. History based on ideology is exactly what traditional historians want to avoid when they justify their histories as objectively true. Yet, Marxists claim that we cannot escape ideology. The economic reality of our being forces ideology upon us, and even claims to objectivity by traditional historians are based on ideology, namely belief about the desirability of objectively certifiable truth (in the Marxist scheme this is an effect of the material dispensation and this dispensation reproduces itself through ideology).

While Marxism provides us with interesting insights into the definition of texts, it is still not a postmodern theory of texts, but rather an example of very advanced

¹¹⁰ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 125 and 127.

¹¹¹ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 131; Macherey *A Theory of Literary Production* (1978) at 154-155.

¹¹² Macherey *A Theory of Literary Production* (1978) at 154-15.

¹¹³ Macherey *A Theory of Literary Production* (1978) at 154-15.

¹¹⁴ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 132.

¹¹⁵ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 132.

modernist analysis of texts. The aim of the Marxist analysis, like the positivist theories, is to provide a complete and coherent theory of texts. Marxist literary theory is similar to structuralism (the precursor to post-structuralism, a postmodern language theory),¹¹⁶ while postmodernism is a reaction against ideas like objective perception (Archimedes points) and the possibility of complete knowledge. In this respect, the following analysis will deviate from the modernist scheme. The following analysis will not seek to privilege one description of text but aims to give a glimpse into the complexity of definition of texts.

Postmodern historians are often called “new historians”.¹¹⁷ New historians do not view historical texts as the episodes of a homogeneous whole history, but deny the existence of objective truth, coherence and unity between the meanings of texts.¹¹⁸ In its place they propose that history is contingent, unstable and interpretable. Postmodernists argue that history and literature are not really in binary opposition to each other and that both are subject to the same linguistic conditions. Two postmodern claims are of special importance: The interpretability of texts and the interconnectedness of texts. The ideas are related, but will be discussed separately. Before these ideas are discussed, new historicism will be examined briefly.

Michel Foucault sees history as a power struggle that binds the disparate forces of society together.¹¹⁹ Because history is about perspective, and dominant history is often about dominant perspective, many contrasting views meet in history.¹²⁰ While the dominant view might prevail for a time, other views are constantly competing with it. Traditional historians, for example, try to erase any link between their preferences and a certain time and hegemony¹²¹ because histories are seen as records of reality and objectivity is perceived to be obtainable. On the other hand, postmodern historians often expressly state their theoretical grounding and beliefs. History is the place where the positivist meets the postmodernist. The important implication of this insight is that definition of texts is relatively arbitrary. The definition of a historical

¹¹⁶ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 131.

¹¹⁷ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 112.

¹¹⁸ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 112.

¹¹⁹ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 117.

¹²⁰ Rainbow *Foucault: The Foucault Reader* (1986) at 90.

¹²¹ Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 117; Rainbow *Foucault: The Foucault Reader* (1986) at 90.

text will depend on the dominant hegemony in society and, importantly, this characterization of a text is not stable.¹²² As soon as power relations shift, the definition of texts will shift with it.

For Foucault, history is without constants.¹²³ He argues that nothing can provide human beings with a stable platform from which the self and the other can be recognized and fully understood.¹²⁴ There is no way of discovering (or in fact rediscovering) the past in an objective way.¹²⁵ Foucault asks that we discard the perception that the past is a patient and continuous development.¹²⁶ In its place he proposes a history that is fragmented and continually reassessed in the light of itself. History is something that challenges — not represents — meaning. Foucault proclaimed that “...knowledge is not made for understanding: it is made for cutting...”.¹²⁷ Historical perspective is therefore at the same time interpretive and changing. With these Foucauldian insights regarding history in mind, the focus can shift to the discussion of the interpretability of the message and the interconnectedness of texts.

Roland Barthes separates texts from works.¹²⁸ For Barthes, this separation is the result of late modern and postmodern thought,¹²⁹ where focus shifted from author-, reader- and critic-defined works to interpretation-bound texts. The first insight is that works are not physically separate from the texts, but rather while the work is something

¹²² Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 106.

¹²³ Rainbow *Foucault: The Foucault Reader* (1986) at 87-88; Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 118.

¹²⁴ Rainbow *Foucault: The Foucault Reader* (1986) at 87-88; Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 118. Foucault’s historical theory links up strongly with his theories on individuality. Many of the insights around the contingency of history flow out of a understanding of the self as a fragmented and infinitely complex structure.

¹²⁵ The traditional ratio of the parol-evidence is that it protects the text, as a path to the discovery of the facts of the contract. It is understood that the interpretation of the text is a rediscovery of the meanings (facts) that existed at the conclusion of the contract. Foucault challenges this understanding of texts and proposes that texts serve a radically different purpose.

¹²⁶ Rainbow *Foucault: The Foucault Reader* (1986) at 87-88; Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 118; Douzinas et al *Post-Modern Jurisprudence. The Law of Text and the Texts of Law* (1993) at 106.

¹²⁷ Rainbow *Foucault: The Foucault Reader* (1986) at 88.

¹²⁸ Barthes “From Work to Text” in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 74.

¹²⁹ Barthes “From Work to Text” in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 74.

concrete (occupying book space for example), the text is a methodological field.¹³⁰ While the work can be held in hand, the text only exists in discourse. The implication of this separation is that the work stops where the book covers stop, but the text is never completely defined.¹³¹ There will always be meanings (definitions) outside of the present meaning of the text. Horizons rather than boundaries characterize the text.¹³² Accordingly, the end of one meaning is the start of another. The work, on the other hand, has boundaries. It has a start and a well-defined end. In this sense, a contractual script under the parol-evidence rule is a work rather than a text.¹³³

The second point made by Barthes is that the relationship between the work and the sign is different from the one between the text and the sign.¹³⁴ The relationship between the work and the sign depends upon two contingencies. If the signified is obvious, the work becomes a scientific experience.¹³⁵ In this case the work is said to reflect its message.¹³⁶ In the second scenario, the signified is secret or unknown. In this case the work is subject to an interpretive process.¹³⁷ The idea is that the signified can eventually be identified or found. Conversely, the text practices infinite deferral of the signified.¹³⁸ Barthes notes that the signifier in a text is not the first step toward

¹³⁰ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 74

¹³¹ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 75.

¹³² Horizons might seem like boundaries, but they connect the end of vision with what is beyond. Likewise, an interpretation of a text does not end the utility of the text, but rather provides a connection with what is not yet said. As Foucault puts it "...Effective history... will not allow itself to be transported by a voiceless obstinacy toward a millennial ending. It will uproot its traditional foundations and relentlessly disrupt its pretended continuity...". See *Rainbow Foucault: The Foucault Reader* (1986) at 88; Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 118

¹³³ The parol-evidence rule aims to protect the written document as a memorial of the contract because of its supposed certainty. This ratio is compatible with the description of a work but not with that of the text. An interpretable and contingent instrument is not what the rule aims to protect. See Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 108.

¹³⁴ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 74.

¹³⁵ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 75.

¹³⁶ This is the ideal written record and the type of work the parol-evidence rule aims to protect.

¹³⁷ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 75-76. Marxist theories of literature are an example of a theory that describes documents in this way. While Marxists reject the contention that works merely reflect a objective reality, they contend that the meanings of documents reflect of ideological hierarchies. If the correct (just) ideology can be found, documents could reflect correct (just) meanings.

¹³⁸ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 76.

a meaning (as is the case with a work), but rather the result (aftermath) of meaning.¹³⁹ The signifiers in a text refer to an infinite amount of possible meanings. The text is part of language and, like language, without closure.¹⁴⁰ While the work is symbolic of something (after the connection is made, the symbolism ceases), the text is symbolic of symbolism.¹⁴¹ The contractual document or record necessitating the parol-evidence rule is one that seems to provide closure in the inquiry regarding the contents of the contract.¹⁴² In this sense the parol-evidence rule aims to protect a work rather than a text.

Finally, Barthes distinguishes work and text on account of the role of description.¹⁴³ The work is caught up in a process of filiation.¹⁴⁴ The work consists and develops out of a determination by the outside world,¹⁴⁵ the fitting in of the work among other works¹⁴⁶ and finally the allocation of the work to its author.¹⁴⁷ The whole process is aimed at delineating the work and finding its place among other works.¹⁴⁸ On the other hand, a textual meaning is a combinatorial effect.¹⁴⁹ The author of the text is

¹³⁹ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 76.

¹⁴⁰ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 76.

¹⁴¹ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 76. This is a very interesting and powerful metaphor. The work is like a route-marker that loses its utility as soon as the traveller reaches her destination. The text, on the other hand, is more like a photograph of a route-marker. Its utility lies in not in the representation of a scene, but rather in the signification of memories. It starts a train of thought or reminisce. The depiction in the photo is the catalyst of memories, but not memories itself. Barthes says "...The Text is plural. It does not mean just that i(t) (sic) has several meanings, but rather that it achieves plurality of meaning, an irreducible plurality...".

¹⁴² The ratio of the rule is that it protects the determinate meanings in the document, as by so doing, speeds up the investigation. The rule is not aimed at protecting documents that do not provide final closure. See Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 108

¹⁴³ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 78.

¹⁴⁴ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 78. Filiation is described in the Oxford dictionary as the act of being parented. See Allen (ed) *The Concise Oxford Dictionary of Current English* (1992) at 436. The author, reader and critic make the work.

¹⁴⁵ Under the parol-evidence rule this would be done with the integration rule. The crucial question would be is the text was meant to be a representation of the agreement.

¹⁴⁶ This would also be done with the integration rule, but the question would now be if the text were meant to be a *complete* representation of the agreement.

¹⁴⁷ The interpretation rule would facilitate this part of the filiation. The question is what exactly the authors intended with the work.

¹⁴⁸ See the comments about the unity of texts in Kellner *Language and Historical Representation* (1989) at 13.

¹⁴⁹ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 78. The "combinatorial" is a mathematical term depicting the relation of an answer

irreversibly alienated from the text and can only return as a guest.¹⁵⁰ The text is no longer demarcated by its author, its place among other texts, or by its critics. The text, in a paradoxical way, resists demarcation because of the attempted demarcations.¹⁵¹ The relation between the reader and the text, for example, ensures that the demarcation by the reader is never final. There can always be another reader and a different reading.¹⁵² The application of the parol-evidence rule depends upon a demarcation of the contract. Again, the parol-evidence rule reflects contracts as works rather than texts.

The question now arises if language use can result in works. Can works exist? This question is central to the positivist line of reasoning that texts can be records. If language can be used in works, the positivist claim can survive. Jacques Derrida defines language as a metaphorical identification of the non-identical.¹⁵³ Language relies on the repeated use of signs that are not the signified, but call into the imagination the signified. Language is not the subject but a representation of the subject. It identifies the subject as something other than the sign but at the same time represented (in the sense of a *re* presentation, an imitation of the original) by it. Like a metaphor, language is used to call into the imagination a subject that is similar to the image of the metaphor but separate from it. Effective communication depends upon the successful connection of language with the intended message. This in itself is not problematic to the theory of texts as records, if it can still be proven that thought and language are separate.¹⁵⁴ Even if language were a metaphor, it would only be a

to combinations of other items. See Allen (ed) *The Concise Oxford Dictionary of Current English* (1992) at 224.

¹⁵⁰ Barthes "From Work to Text" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 78. The relation of the author and text will be discussed in more detail in the chapter 5.

¹⁵¹ The text will only be finally demarcated once the author stops writing, the reader stops reading and the critic stops criticising. The text can only be finally demarcated once it is totally ignored.

¹⁵² The courts of 1968 regarded the Group Areas Act 36 of 1966 as valid legislation, but presently, under the Constitution Act 108 of 1996, a similar act will not be valid legislation. The Group Areas Act 36 of 1966 is now regarded as an example of Apartheid legislation. In future different periods within Apartheid might be identified, which will change the classification of the Act once again.

¹⁵³ Derrida "The Supplement of Copula: Philosophy before Linguistics" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 83. He remarks "...Language has within it, however, an illogical element, the metaphor. Its principal force brings about an identification of the nonidentical (sic); it is thus an operation of the imagination. It is on this that the existence of concepts, forms, etc., rests...".

¹⁵⁴ It does however complicate the interpretation process. The language is no longer, strictly speaking, a reflection of the intended message. The interpreter is required to be familiar with the code of the metaphor. She must be able to decipher the metaphor.

connection between thoughts. The author would think, express that thought in language (the metaphor) and the reader would read the language (the metaphor), translate the language into thought and consequently, the language served as a record. It served as a container for the thoughts of the author.

However, Derrida, investigates the nature of this distinction between thought and language,¹⁵⁵ and convincingly argues that language can never be a container for thought and thought can never be outside of language.¹⁵⁶ In order to fashion categories like thought and language, one has to step outside of thought and language.¹⁵⁷ A transcending perspective is necessary, but Derrida reminds us that the categories (language and thought) that we draw always involve both language and thought, and the distinction between language and thought depends upon the relation between the two entities.¹⁵⁸ Language and thought, on which the idea of a work (in the sense used by Barthes) hinges, have a complex relationship of supplement. While the two entities are discernible, there is a strong referential relationship between language and thought. Thought is part of language and language is part of thought, since we speak thoughts and we think in language. It is not possible to classify thought and language without using both concepts. When classifying language or thought, one either thinks of language or speaks (writes) of thought. The distinction is not transcendental, but practical. The distance between the work and the thought disappears as the thought is necessary to produce the language (text) and, at the same time, language is necessary to produce a thought. Texts cannot be records because thought cannot be separated from language and vice versa.

Further problems with the idea of texts as records are encountered when the reader is expected to extract the recorded message from the text or work. This, like all meaning

¹⁵⁵ Derrida "The Supplement of Copula: Philosophy before Linguistics" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 88-91.

¹⁵⁶ Derrida "The Supplement of Copula: Philosophy before Linguistics" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 88.

¹⁵⁷ Derrida "The Supplement of Copula: Philosophy before Linguistics" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 91-92.

¹⁵⁸ Derrida "The Supplement of Copula: Philosophy before Linguistics" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 91.

problems, is an interpretation problem.¹⁵⁹ The aim of any interpretation is to achieve coherent meaning. Any interpreter is always situated within an interpretive community that shapes his or her beliefs and prejudices.¹⁶⁰ Interpretation takes place within these beliefs and prejudices. This realization in itself is fatal to the idea of texts as records, because the meaning of the text will not be determined solely by the text. The meaning of the record is no longer a reflection, but a construction. However, even more important for the process of definition of texts, interpretation involves the renunciation and disregarding of meanings. The record (or the code of the record) is so complex in its possibilities that it can never be completely settled.¹⁶¹ The possible meanings in a text can never be exhausted. Any coherent meaning involves the rejection of other possible meanings. This rejection takes place according to the norms of the interpretive community that the interpreter belongs to. Consequently, the demarcation of the text (and of course the meanings) is up to the interpreter and not the author.

While the abovementioned is a criticism of texts as records, it is also a criticism of texts as separateness. The interpretability of language poses an insurmountable obstacle to the idea of texts as separateness. Paul de Man examined the relationship between a sign and a signified and he recognizes that the sign and its relation to the signified rely upon a third element, namely an interpreter.¹⁶² The relationship between the signified and the sign is not strictly referential; rather, meaning is derived from the sign by a process of interpretation. The meaning itself is not a decoding of the sign, but further signs ad infinitum.¹⁶³ The text by itself cannot signify anything. What sets one text apart from another is not *the* interpretation (in the sense of a decoding), nor its composition, but *an* interpretation. While the traditional perception is that the message of texts is unique and language is the sole common denominator between

¹⁵⁹ This chapter will not contain a comprehensive discussion on interpretation, because although crucial to the argument made so far, the major theoretical positions on interpretation has already been set out in the chapter 2.

¹⁶⁰ Fish "Is There a Text in This Class" in *Fish Is There a Text in This Class: The Authority of Interpretive Communities* (1980) at 318; Fish "Fish vs Fiss" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 126.

¹⁶¹ See the discussion on the nature of language in part 6 in the Chapter on meaning in legal interpretation. See also De Man "Semiology and Rhetoric" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 122.

¹⁶² De Man "Semiology and Rhetoric" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 126.

¹⁶³ De Man "Semiology and Rhetoric" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 127.

texts,¹⁶⁴ new insights lead us to believe that texts are not separate per se, but simply read that way. One might think that the parol-evidence rule protects the sanctity of written documents, but in fact the text does not exist before it is “protected”.¹⁶⁵ The process of applying the parol-evidence rule defines the text.¹⁶⁶

From the preceding the following can be gleaned: Contracts are texts rather than works because (1) thought cannot be adequately separated from language; (2) interpreters create meaning by “cutting”; and (3) the extent of contracts is determined after interpretation (by the meaning, not the contractual text). Consequently, contractual texts are never completely defined; that which is signified by the text is infinitely deferred and textual meaning is combinatorial in nature. What remains to be seen is what the implications of this analysis are for the parol-evidence rule.

3.2 From parol evidence to just definition

After the traditional and the postmodern theories of text have been discussed, the question arises what the ideal definition of contractual texts will look like and what the implications will be for the interpretation of contracts. Despite the theoretical criticism against the positivist description of texts, it still appears to provide at least a semblance of certainty. Parties believe that interpreters will furnish the contract with the consequences that they intended the contract to have, and they believe that written documents can reflect these intended consequences. Most people see texts as records and as separateness. Any new notion of texts must be workable in practice and it must preserve contracts as an instrument of exchange.

Postmodern theory shows that any total description of texts will inevitably become a new hierarchy that is vulnerable to the same exceptions raised against the positivist model. Any theory of texts must therefore be sufficiently flexible to entertain texts

¹⁶⁴ Abrams “Rationality and Imagination in Cultural History” in Fischer (ed) *Doing Things with Texts* (1991) at 126.

¹⁶⁵ Fish “The Law Wishes to Have a Formal Existence” in Norrie (ed) *Closure or Critique: New Directions in Legal Theory* (1993) at 163. Fish shows that the distinction between the interpretation and contradiction of a text can only exist if the text had meaning before the influence of the external evidence came to bear. If this were the case, the parol-evidence rule would not be necessary because the meaning of the contract will be self-evident, and external evidence could be measured against this textual meaning. The parol-evidence rule only makes sense where the distinction between contradiction and interpretation is not clear.

¹⁶⁶ Fish “The Law Wishes to Have a Formal Existence” in Norrie (ed) *Closure or Critique: New Directions in Legal Theory* (1993) at 163.

that do not exactly fit the description provided by the descriptive model. Finally, as Paul Cilliers reminds us, any description must be responsible,¹⁶⁷ the best we can do. The following is an attempt at a practically workable but theoretically correct method of definition of texts. It is short and incomplete since a comprehensive model of definition of texts is beyond the scope of this study.

In his groundbreaking essay “Force of Law: The ‘Mystical Foundation of Authority’”, Derrida examined the relationship between law and justice.¹⁶⁸ In the course of his argument, Derrida described the law as general and justice as particular.¹⁶⁹ A completely just interpretation is one that recognizes the unique in the text as unique.¹⁷⁰ The law, on the other hand, constantly relates the text to other texts, inquiring what is shared with others. It imposes a reading on the text. Both these tendencies are present when a contract is interpreted.¹⁷¹ When one looks at these two tendencies, an irreconcilable tension is apparent between the unique in the text as a created text and universality of the enforceability of the text as a law text.¹⁷² We want to hear exactly what the parties wanted to say, but at the same time we want to know what can be enforced. The definition of the text as a contractual text severs some of the unique in the text from the contractual text, because not all meanings are contractually relevant. The definition of a contractual text, therefore, happens at the moment when the interpreter interprets the contract as such. The interpretation is both a constituting and a demarcating act. There is no guarantee that the intended consequences will be attached to the contract.¹⁷³

¹⁶⁷ Cilliers “Do Modest Positions have to be Weak? A View from Complexity” (2004) at 8.

¹⁶⁸ Derrida “Force of Law: The Mystical Foundation of Authority” in Cornell, Rosenfeld & Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992).

¹⁶⁹ Derrida “Force of Law: The Mystical Foundation of Authority” in Cornell, Rosenfeld & Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) at 17.

¹⁷⁰ Derrida “Force of Law: The Mystical Foundation of Authority” in Cornell, Rosenfeld & Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) at 20.

¹⁷¹ Two obvious examples can be found by looking at the so-called “golden rule” of interpretation, which seeks the unique, the intention that makes the text a contract, while the plain-meaning rule relates the words with the generally accepted meaning.

¹⁷² No text is ever completely new. All texts are based on other texts, which are in turn based on preceding texts. Also, no text is completely defined. There is always something that escapes the definition. The text before the court is in essence a language act that is both new, chronologically speaking, but also firmly rooted in what has already been said. When I describe a text as “newly created”, I do not mean that it is completely new. The text is something that the authors fashion out of language, to contain linguistic combinations, according to which they intend to define their relationship.

¹⁷³ In fact, there are serious questions whether it is ever found. See chapter 5 for a broad description of intention and its influence on the outcome of interpretation.

This insight leaves courts with an opportunity to “find” the most just contract that they can. The definition of the contract is up to them, and there is no escape from the responsibility that this implies.¹⁷⁴ No person can ever be said to be responsible simply because he agreed to the terms of a contract, since the contractual text is made when it is read, not when it is written. It is the responsibility of the contractual interpreter to keep the consequences of his reading in mind. He must read the text in a way that will be just and a way that is legally enforceable. He must do the impossible.

4. Conclusion

This chapter started out with a discussion of the present, essentially positivist, understandings of the nature of texts. Texts are regarded as records that are separate from other texts. Legal texts are classified as historical texts and distinguished from fictional texts. Consequently, the aim of defining texts is to ascertain exactly what history a text purports to record. Maintaining a distinction between fact and fiction requires a system where reality can serve as an objective standard against which the accuracy of the text can be measured. In such a system, reality must be singular and objectively ascertainable. In positivist historical theory, reality is represented by the constituting facts of every genre. These facts are taken to be neutral, objective and “true”. For a text to fit into the genre (such as being a historical text), it must reflect these facts. The text serves as a medium through which these facts are communicated and, as a result, the text loses its utility (other than a preserving function) once it is read. Where the text is not sufficiently clear, the interpreter is authorized to resort to intentionalism (what did the author want to say?), contextualism (in what context was the text created?) and finding the core meaning of the text (an objective appraisal of the meaning of the text). In short, meaning (or the “facts”) exists before the text and the text is a record of (the) meaning.

Texts are also portrayed as separate from other texts. Because texts are regarded as records of facts, they are seen to represent a “moment” or “incident” in time. Texts are portrayed as a monument to a factual situation. Positivists see texts as separate entities, connected only by their reference to reality. *The* reality serves as a

¹⁷⁴ This is obviously not a final definition, but is often the end of the road for the parties. The legal decision signals the end of the discussion for them and the start of “payment”.

justification for texts since the reader can verify the truth of the text by examining its correlation with (*the*) reality. Also, although texts are connected through their messages, the texts themselves are distinguished from each other because (in positivist history) reading of texts must highlight the unique message of each text.

The prevailing view in the law of contract is that texts are essentially records of the intention of the author and that the interpreter should not tamper with the text but simply extract the message deposited by the author of the text. The parol-evidence rule as it is presently applied strengthens this theory of texts and the influence of the interpreter on them. The rule is divided into two parts: 1) The integration rule, aimed at establishing the extent to which the contract was integrated into the written document, and 2) the interpretation rule, aimed at ascertaining the message of the text as demarcated by the integration rule. Two main criticisms are leveled against the rule, namely that it is theoretically incompatible with the subjective intentionalist will theory of contractual liability and that it is a practical failure. These criticisms are not aimed at undermining present understandings of texts, but rather at negotiating the problems that arise surrounding the application of the parol-evidence rule. Analysis of these criticisms shows that they in fact acknowledge the failure of the view of texts as records. The proposed remedies (such as liberalization of the rule or scrapping it altogether) are also motivated by the belief that the present interpretive dispensation (subjective intentionalism) will benefit from such remedies, rather than a reaction to the failure of the existing process for defining texts.

In the second part of the chapter, the definition of texts in the Marxist tradition is examined. This shows the relatively arbitrary nature of definition of texts and the importance of social situatedness in the perception of texts. Marxists argue that the definition of texts depends not on the content of the text, but rather on the dominant ideology in the interpretive community. Terms like “aesthetics” and “literature” are not objective characterizations of texts but represent the dominant view in society, based on economic power relations. Marxists also introduced concepts like the “other” and “definition by absence” to the theory of defining texts. They show that what is absent from a text is often just as indicative of the process of defining texts as the actual content of the text.

The focus then shifted to the post-structuralist definition of texts with special emphasis on the Barthesian distinction between a work and a text and the metaphoric nature of language as analyzed by Derrida. Barthes shows that texts differ from works because 1) works are not physically separate from the texts, but rather while the work is something concrete (occupying book space for example), the text is a methodological field; 2) the relationship between the work and the sign is different from the one between the text and the sign and finally; 3) Barthes distinguishes work and text on account of the role of description. Derrida shows that language does not have a functional nature but a metaphoric one. This means that language deals with the identification of the non-identical, an exercise in imagination. Understanding is premised on the possibility of misunderstanding. Together with this insight, Derrida shows that language can never be separated from thought and vice versa. The positivist theory of defining texts (as separate and a record) hinges on the possibility that a work can exist. Derrida shows that it cannot.

In the penultimate section the interpreter is reminded of his important role in definition of texts and interpreters are urged to take seriously the responsibility that goes with that. The act of defining a text (especially a legal text) always involves two urges, specifically the urge to find the unique in the text and the urge to find how the text fits in with other texts. The interpreter must take these urges seriously. He must pay close attention to what the parties seemed to intend, while at the same time keeping the needs of the particular situation in mind. He must find a text that is both just (in the circumstances) and one that can be justified (in the community in which the interpreter finds himself). No text is already defined (before interpretation); it is always waiting to be constructed.

If interpretation is not essentially predetermined, if there is more to the nature of subjectivity than liberal theory admits and the definition of texts is essentially an interpretative exercise, can we still maintain a liberal theory of contractual interpretation?

5

Intentionalism, intention discovery and intention creation

1. Introduction

In contractual interpretation theory, assumptions about the nature of interpretation, the autonomy of the contractual party and the function of the contractual text have a lot of bearing on beliefs about the role of intention. The crucial connection between the contractual party, the interpreter and the contractual text is the quest for the intention of the former. Assumptions about the nature of interpretation, the individual and texts culminate to make intentionalism feasible. No understanding of our contractual interpretation process would be complete without a critical assessment of intentionalism and its influence on the interpretation of contracts.

In the recent past (and the not so recent past), much has been written on the possibility of intention discovery, the politics of intentionalism and the role of the author in legal interpretation.¹ In classical liberal thought, the idea of intention of the author was referred to in an effort to restrain interpretations of activist judges.² The intention of the author is also regularly used as a justification for a certain interpretation.³ The aim

¹ See for example Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141-160; Dworkin "Law as Interpretation" (1982) 60 *Texas LR* 527-550; Tushnet "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 *Harvard LR* 781-827; Peller "The Metaphysics of American Law" (1985) 73 *California LR* 1151-1290; Fish "Working on the Chain Gang: Interpretation in Law and Literature" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 87-102; Lewis "The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?" (1990) 107 *SALJ* 26-44; Hutchinson "Identity Crisis: The Politics of Interpretation" (1992) 26 *New England LR* 1173-1219; Lyons "Constitutional Interpretation and Original Meaning" in Schauer (ed) *Law and Language* (1993) 213-239; Mootz "The New Legal Hermeneutics" (1994) 47 *Vanderbilt LR* 115-143; De Ville "Legislative History and Constitutional Interpretation" (1999) *TSAR* 211-223; De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373-389; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002); Du Plessis *Re-Interpretation of Statutes* (2002).

² Tushnet "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 *Harvard LR* 781 at 784. In the classical liberal model the sovereign (government) and the citizen are placed under the rule of law. Laws are passed by the citizens (or their representatives) in the legislature and the executive and judicial branches of government should adhere to those laws. This is achieved with recourse to the intention of the legislature. The theory goes that judges will be less tempted (or in actual fact likely) to make use of free reading if they are constrained by the intention of the legislature (if intentionalism is a requirement for justifiability). In the law of contract, persons are similarly held liable to their intentional conduct because of the belief that persons should be free to go about life in a way they see fit. See Van der Merwe et al *Contract: General Principles* (2003) at 1-15; Chapter 3 section 2.1-2.3.

³ De Ville "Legislative History and Constitutional Interpretation" (1999) *TSAR* 211 at 211.

of this type of justification is to distance the interpreter from the meaning product by ascribing meaning to an external influence like the author of the text.⁴ Others, like members of the Critical Legal Studies movement, advocated judicial activism to escape the restricting influence of intentionalism.⁵ Many jurists argue that authorial intent has no special privilege in textual interpretation.⁶ Whichever way intentionalism is approached, questions surrounding the role of authors and their intentions in legal interpretation are thoroughly political.⁷ The question to be answered in this chapter is to what extent the intention of authors binds us and whether we can really be free of intentionalism. Can there be a happy medium? The implications for the law of contract are immense.

Liberal beliefs about the nature of interpretation, individual autonomy and the definition of texts are tied together by the doctrine of intentionalism. If an interpreter is true to the values of liberalism, she must interpret texts (as records of facts) in an intentionalist way, so that the actions (text creation) of the autonomous and self-regulating author will have the effects that he (the text creator) intended. The inverse is also true, as intentionalism depends on general liberal beliefs about the nature of interpretation as a recovery (or at most recreation) of meaning, the legal subject as an autonomous self-regulating being and texts as records of facts. It is clear that the way intention is approached will depend upon beliefs regarding the nature of interpretation, subjectivity and the definition of texts. Therefore, in a broader sense,

⁴ Peller “The Metaphysics of American Law” (1985) 73 *California LR* 1151 at 1171. This interpretive justification is used to relieve the interpreter of responsibility for the meaning resulting from the interpretation and aim to cancel out the influence of the interpreter and her own prejudices and social situatedness on meaning.

⁵ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1181.

⁶ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1179.

⁷ Mootz “The New Legal Hermeneutics” (1994) 47 *Vanderbilt LR* 115 at 130. In the United States this is especially apparent. Here the debate centres largely on constitutional interpretation, and conservative politics often involves an embrace of intentionalism (in the originalist mode) while more liberal politics often includes a rejection of the authority of original intention in favour of contemporary interpretations. In South Africa, intentionalism is more prevalent in private law, and the debate is not so much whether intentionalism is tenable or not, but whether one should embrace a subjective intentionalism or a more objective one. The so-called private nature of private law often disguises and distorts the political choices underlying this branch of the law. See also Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1179 where he argues that “...questions of interpretive authority and validity can have direct and devastating consequences for individuals and society generally...”.

the aim of this chapter is also to analyze the role of intention in postmodern interpretation theory.⁸

This chapter is divided into eight parts, starting with a discussion on intentionalism and original meaning. In this section, theories about subjective intention discovery and the search for original intention are analyzed. The focus then shifts to the belief that intention is to be deduced from or discovered in a text. These theories are often called objective intention theories. In the following section, theories critical of intentionalism (as presently applied) are discussed, starting with theories of free reading (section four) and then shifting to neo-pragmatist (section 5) and post-structuralist understandings of the role of the author (section 6). Then the new theories of intention discovery and the role of the author in the interpretation process and their relevance for the interpretation of contracts are discussed. In the final section, the conclusions of the chapter are drawn.

2. Intentionalism and original meaning

“...The coming into being of the notion of ‘author’ constitutes the privileged moment of *individualization* (sic) in the history of ideas...”⁹

Strict or subjective intentionalism proposes a strong relationship between the text and the author, more particularly between the text and its relation to the authorial figure who seems to be outside it and who precedes it.¹⁰ Subjective intentionalism is the search for the intention of the author at the time when the contract was concluded. This theory is based on liberal beliefs regarding individual autonomy and a traditional historical understanding of texts as records.¹¹ Traditional subjective intentionalism is based on the premise that authorship is a communicative act through which an author

⁸ It remains to be seen how the critique of the objectivist interpretation, liberal self and texts as records (in Chapters 2-4) will impact on the way an intention is portrayed.

⁹ Foucault “What Is an Author?” in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 141.

¹⁰ Foucault “What Is an Author?” in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 141; De Ville *Constitutional and Statutory Interpretation* (2000) at 9-11.

¹¹ Individual autonomy is the belief that individuals choose, in a relatively free way, which type of life they want to lead. The argument goes that individuals have the ability to choose which message they intend to convey in the text and that the texts in turn have the ability to accurately reflect this intention. For a discussion of individual autonomy see Chapter 3 (especially sections 2.1 and 2.2) and for a further discussion of the nature of texts see Chapter 4.

projects her consciousness by means of a text.¹² Importantly, readers are urged to find the true intention of the author even if it means going behind the text.¹³

The subjective theory of interpretation has been widely recognized and accepted by the South African courts when it comes to contractual interpretation.¹⁴ In its purest form, this theory requires that the intention of the author of the text be ascertained from the text and surrounding circumstances.¹⁵ Furthermore, a distinction is drawn between the meaning reflected by the text and the meaning intended by the author.¹⁶ Subjective intentionalists argue that liability should follow the latter. For them, contracts consist only of the actual intended consequences, not all the possible consequences that the text seems to allow. In this scheme, texts are reflections of intention and should be the starting point in the search for intention, but texts should never be privileged over intention.¹⁷ Once the intention of the parties has been ascertained, the text loses all relevance except as a reference to (and as evidence of) the intention of the author.

¹² Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1179. Hutchinson describes this theory as an attempt to “...open a channel to the mind of the author...”. See also De Ville *Constitutional and Statutory Interpretation* (2000) at 9-11.

¹³ Going behind the text involves looking at evidence of the drafting process and other evidence parallel to the text. In the case of contracts this process is governed by the parol-evidence rule. See Chapter 4 section 3.

¹⁴ See for example *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 326; *Cinema City v Morgenstern Family Estates and others* 1980 (1) SA 796 (A) at 803; *Woolworths (Pty) Ltd v Escom Pension and Provision Fund* 1987 (2) SA 580 (A) at 584; *Sonap Petroleum (SA) Pty Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239-240; *MV Navigator (No 1): Wellness International Network Ltd v MV Navigator and Another* 2004 (5) SA 10 (C) at 23-24. See also Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 28 footnote 34.

¹⁵ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 28; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479; *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 387; *Sonap Petroleum (SA) Pty Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239; *Bierman v Mutual & Federal Versekeringsmaatskappy Bpk* 2004 (1) SA 205 (O) at 211. In South Africa subjective intentionalism is supplemented and restricted by the parol-evidence rule and the rule for clear and unambiguous meaning. Both rules aim to regulate the admissibility of evidence outside the text. See Chapter 4 section 3 for a discussion of the working of the parol-evidence rule.

¹⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 28; *Sonap Petroleum (SA) Pty Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239.

¹⁷ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 28 suggests that “...[o]nce the original intention of the parties has been ascertained, effect should be given thereto, since the intention of an author is more important than his or her words...”.

Subjective intentionalism receives considerable tacit support in legal practice.¹⁸ The support for this theory can also be gleaned from the criticism against subjective theory of interpretation as applied in South Africa. The first criticism against the South African practice is that the South African courts apply a literalist theory under the guise of intentionalism,¹⁹ because they supposedly determine intention *ex post facto* objectively by looking at the literal meaning of the contractual text at the expense of the actual intention of the parties.²⁰ On this basis it is said that adherents of the subjective-cum-literalist interpretation theory equate the text with the contract, while in actual fact it is merely a representation of the contract and not the contract itself.²¹ As a result, extra-textual factors that might influence meaning are ignored in favour of the literal meaning of the contractual text.²²

The main consequence of acceptance of the subjective-cum-literal theory of interpretation is that intention is relegated to an aid in the interpretation process rather than the object of interpretation.²³ Cornelius and others ask interpreters to take the subjective or actual intention of the parties seriously, arguing that a true subjective intentionalism is necessary if application of the will theory were to be possible.²⁴

¹⁸ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1178. See also the example provided by Hutchinson. See also Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 786. Tushnet is a critical legal scholar and his discussion of intentionalism is aimed at debunking it.

¹⁹ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 29; Du Plessis *Re-Interpretation of Statutes* (2002) at 100.

²⁰ In short, this theory holds that language (at least on a general level) has objective meaning and that a diligent interpreter can know what a competent author meant with a certain text. For further discussion of the literalist and objective theories of interpretation see chapter 2 section 3.1. See Lewis “The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?” (1990) 107 *SALJ* 26 at 44.

²¹ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 30.

²² Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 31. Cornelius states that “...[t]his theory creates the possibility that the interpreter may substitute the intention of the parties with his or her own supposed intention, which may substantially differ from that which the parties may actually have had in mind...the subjective theory might cause an interpreter to arrive at an interpretation that neither of the parties may have actually intended...”. See also Lewis “The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?” (1990) 107 *SALJ* 26 at 44.

²³ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 31. He shows that interpreters often use intention as a justification for deviating from the ordinary meaning of the text. Also, strict application of the subjective-cum-literalist prohibits direct evidence of intention and as a result the aim of strict subjective intentionalists are frustrated.

²⁴ Lewis “The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?” (1990) 107 *SALJ* 26 at 43.

Subjective intentionalists remind interpreters that the written or oral text is merely an outward and visible sign of the contract.²⁵ In this scheme, contracts are constituted by the thoughts behind the text, which are the thoughts that make up the psychological or mental agreement between the parties. Subjective intentionalists proclaim that even language itself merely surrounds the thoughts that represent the contract. Language is seen as a medium through which thought is communicated.²⁶ Thought is before language and outside of it and thought (and thus the contract) can never be identified by scrutinizing only the language.²⁷ The first step in the direction of true subjective intentionalism is the realization that the interpretation of a contract is not the reading of the contractual text, but a search for what the text signifies. Once the signifieds and not the signifiers are examined, the distinction between written and oral texts disappears.²⁸ All texts are first pointers toward the reality signified by the text and it does not matter that one text is spoken while the other is written. Finally, interpreters are urged not to confine their interpretations to the linguistic aspects, but to also include non-linguistic considerations when determining the intention of the author.

In the United States constitutional originalism (as the most prominent intentionalist theory) has been the subject of various critical analyses that are important to this study. However, before the underlying assumptions are examined it is useful to relate constitutional originalism to subjective intentionalism. American constitutional originalism has at its core a purpose very different from that of South African

²⁵ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 33; Kerr *The Principles of the Law of Contract* (2002) at 124; De Ville *Constitutional and Statutory Interpretation* (2000) at 9.

²⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 33; Lewis “The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?” (1990) 107 *SALJ* 26 at 43

²⁷ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 33. This is a startling statement that reminds strongly of Moorish metaphysical realism. The idea behind metaphysical realism is that language is always a representation of a reality beyond itself. For further discussion see chapter 2 section 3.5 and also De Ville *Constitutional and Statutory Interpretation* (2000) at 9.

²⁸ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 34-35 claims that he comes to this insight through the influence of deconstruction. While deconstruction has a considerable value in the examination of the role of the author in interpretation, as I will try to show in section 5, I seriously doubt whether it can be used to justify some kind of subjective intentionalism. Cornelius offers a glimpse of his theoretical understanding (misunderstanding?) in the sentence that follows his deconstructive excursion “...[w]hat this implies, then, is that the language of the instrument refers to a reality beyond the text...”. See Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 35. Deconstructionists do not claim that all texts are the same (have the same failings) and can therefore never truly represent reality (as Cornelius seems to suggest), but rather that all reality is a text to be interpreted. We are caught up in a textual and linguistic reality that we cannot escape. There is no way of knowing reality outside of texts because we can never transcend language.

subjective intentionalism. While subjective intentionalism is aimed at retrieving the intention of the author of the text, originalism is aimed at restraining interpreters.²⁹ Originalists argue that the authors of a text intend to fix the meaning of the document and that the interpretation of the text must reflect this intention. Interpretation of the constitution must reflect the intention of the original framers or at least be in line with meanings that they would have accepted.³⁰ In addition, while subjective intentionalism is mostly concerned with interpretation, originalism also involves a theory of adjudication that recommends to the courts how the interpreted constitution must be applied.³¹

David Lyons identifies three justifications for intentionalist interpretation.³² The first is that interpretation in general should be governed by the intention of the author of the text.³³ This is especially true in a liberal contractual dispensation where the idea is that individual subjects should be free to govern their own affairs as they see fit. The second justification is that intentionalism is in line with general legal interpretative canons and inherently justifiable.³⁴ In other words, intentionalism is justified because

²⁹ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 213 states “...[t]he Constitution was written down to fix its content, and its rules remain unchanged until it is amended. Courts have not been authorized to change the rules. So courts deciding cases under the Constitution should follow the rules laid down. By what right would courts decide constitutional matters on any other grounds...”. The idea that the intention of authors who might have been dead for hundreds of years binds interpreters raised much criticism in the progressive legal fraternity. The idea was that it was improper for courts to be bound by intentions formed when society was very different from the present. Originalists responded that it was better to be bound by the “dead hand” of the past than being subject to the whims of wilful judges. See Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 787; Mootz “The New Legal Hermeneutics” (1994) 47 *Vanderbilt LR* 115 at 131.

³⁰ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 215. It is interesting to note that considerable disagreement exists regarding the precise intentions that “count”. Some argue that the framers’ intention counts while others argue that the persons who voted for the text count.

³¹ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 214. Fish and fellow neo-pragmatists will of course argue that there is no distinction between interpretation and application. More about that in section 5.

³² Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 217-220.

³³ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 217. Lyons remarks that this justification is especially plausible in the case of wills and contracts.

³⁴ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 218. It should be remarked that this justification only makes sense in a liberal state with all the theoretical underpinnings of individual autonomy. In South Africa, legal arguments (especially in private law) are often settled in a similar way. The theorist who prevails often succeeds because she can show that the version of the law that her argument proposes is more closely related (more “pure”) to the Roman Dutch Law than the counter argument. Why is it relevant that the one argument is more Roman Dutch than the other? Does this make the argument inherently just?

all lawyers do it, have always done it and will continue doing it when they interpret texts. They will always ask, “Who authorized it?” The final argument in favour of intentionalism is that it is justified by the accepted theories of political morality.³⁵ Two political theories are characteristically used to justify intentionalism. The first is the idea that society is based on a social contract.³⁶ The second theory developed out of the first, and adherents hold that both the government (representative of the “people”) and its citizens (the “people”) are bound to live according to the constitution which both tacitly accepted as binding.³⁷ In short, intentionalism is justified because a) it is the way one should interpret texts; b) all lawyers interpret texts this way; and c) it is the only way to ensure that courts stay honest and do not cheat the government or the people.

The question arises whether subjective intentionalism is similarly justified in the law of contract since the scopes of the two branches of subjective intentionalism differ. As was pointed out earlier, originalism is a much more comprehensive and overtly political theory of interpretation than contractual subjective intentionalism. However, the justifications for originalism also hold true for contractual subjective intentionalism. Firstly, subjective intentionalists argue that contracts are texts that intend to convey a consensus held by authors apart from and prior to the text.³⁸ They could thus argue that intentionalism is the way texts should be interpreted in general. Secondly, contracts are said to form part of deliberate human conduct with the intention of forming legal relations. These acts are called juristic acts and include, apart from contracts, marriage, making of a will and abandonment (negligence) of

³⁵ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 219.

³⁶ The basic idea is that the citizen and the government have a contract that provides how the government might act in order to be able to legally require its subjects (collection of citizens) to adhere to its laws. The contract is said to be based on the constitution. Thus, as long as the government stays within the bounds of the constitution, it can rule as it pleases. In this model it is necessary for the government to be held to what was originally agreed under the contract for the system to make any sense. Courts, the guardians of the constitution, must therefore be restrained from stretching or restricting the constitution. See Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 218-219.

³⁷ The difference is that the constitution is no longer simply a restraint on the government, but also on the citizen. Both have to act in accordance with the constitution. The intention of the authors is important because neither the citizen nor the government has the right to impose its reading of the text on the other. The meaning of the text must be objectively knowable. See Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 219-220

³⁸ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 33; Lewis “The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?” (1990) 107 *SALJ* 26 at 43

ownership.³⁹ The interpretation of juristic acts is also intentionalist in nature; with willed (intentional) acts it seems logical to use an intentionalist interpretation strategy. Thirdly, subjective intentionalism, although not primarily aimed at constraining interpreters, can be held to constrain interpreters to respect intentional conduct.⁴⁰ The need for this kind of respect flows out of a larger socio-political theory of classical liberalism in which individual autonomy is a cherished value. Subjective intentionalism therefore shares its justifications with originalism.

The main criticism against subjective intentionalism is that subjective intentionalists have an overly simplistic idea of what an intention is.⁴¹ For subjective intentionalism to make any sense, it must be possible to identify a moment of intention. That moment is the thought behind the contract, the catalyst of the record and the means of the text. In other words, the text has a reflection function; it communicates this significant moment to the audience, the interpreter. Yet, as Dworkin pointed out, there are at least two subjective intentions in relation to any work.⁴² There are intentions for a work and beliefs about it. The authors of a contract have both intentions regarding the contract that they intend to create, and beliefs about the possibilities that exist under contract.⁴³ The problem facing the interpreter is one of proof. The interpreter will never have complete access to the mental state of the author and as a result there is always the possibility, even where the parties to the contract are absolutely frank and truthful about their intentions in their evidence, that the author's intention evolved after the contract was concluded.⁴⁴

³⁹ Van der Merwe et al *Contract: General Principles* (2003) at 5; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 7-24.

⁴⁰ The nature of the respect will probably include refraining from giving effect to unwilled consequences and so on. The interpreter will only burden the authors with legal obligations he (the author) intentionally took on himself.

⁴¹ Dworkin "Law as Interpretation" (1982) 60 *Texas LR* 527 at 536-540. Although Dworkin is not a critical theorist, his exposition of the complexities of determining subjective intention is well worth looking at.

⁴² Dworkin "Law as Interpretation" (1982) 60 *Texas LR* 527 at 538.

⁴³ Say, for example, X intends to buy a car from Y and the parties agree that X will pay R 20000 for the car on the 22 September 2004 and X will receive the car on the same day. They reduce the contract to writing. The contract reads that X will buy car A from Y for R20000 and that performance is due on 22 September 2004. Afterwards X realizes that he likes the radio in the car, which incidentally can be very easily removed, and decides that he will demand that Y leave the radio in the car. X had the intention to buy the car. He has the belief that the contract now allows him to demand that the radio be left in the car. It will make a big difference which intention is regarded as his contractual intention.

⁴⁴ Dworkin explains that this happens when the author is confronted with his own work. In our example X is confronted with possibilities that he did not previously envisage. It is not necessarily a new

Any discovery of the actual intention of the author relies upon the possibility of historical discovery.⁴⁵ Contemporary hermeneutics takes issue with the contention that history is simply there to be discovered⁴⁶ and postmodernists argue that history is subject to continuous reinterpretation and reformulation.⁴⁷ Therefore, any intention is subject to the same continuous reinterpretation and reformulation because it is (at the insistence of subjective intentionalists) a historical “fact”. Furthermore, as Mark Tushnet points out, lawyers are notoriously bad historians.⁴⁸ Because lawyers are used to operating in an adversarial legal system, the history that they formulate will always be aimed at strengthening their case. This will often be done by overemphasizing fragmentary evidence and minimizing conflicting evidence.⁴⁹ Also, any evidence regarding the intention of the author must be interpreted and there is just as big a chance that this will be interpreted wrongly as there was with the original text. Going behind the text does not guarantee that the actual intention will be found.

Finally, subjective intentionalism must fail because the theory detaches individual intention from the historical and social context in which it was formulated.⁵⁰ Since subjective intentionalism is part of a larger liberal political theory, subjective intentionalists understand history as the sum of individual experiences. In other words, what we understand as a social or historical scenario is the sum of the

intention, just a more detailed one. See Dworkin “Law as Interpretation” (1982) 60 *Texas LR* 527 at 539-540.

⁴⁵ Mark Tushnet identifies three steps that undercut the logic of subjective intentionalism. The first is that the author formed her intention in circumstances that differ from the present. Secondly, to understand this intention, the interpreter is required to transport himself into imaginative circumstances similar to those prevalent when the intention was formed. The third step is a realization that the imaginative transposition of the interpreter opens up the interpretation to exactly those elements that the subjective intentionalists wish to avoid, namely interpretive subjectivity. The interpreter is bound to find a history as he sees it. His perspective will define his history. The point is that the search for intention leads to the introduction of factors that will differ from person to person. See Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 793.

⁴⁶ Mootz “The New Legal Hermeneutics” (1994) 47 *Vanderbilt LR* 115 at 132-133.

⁴⁷ See Chapter 4, especially section 4 and the discussion of Foucault’s description of history.

⁴⁸ Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 793.

⁴⁹ Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 793 remarks “[w]here the interpretivist seeks clarity and definiteness, the historians seeks ambiguity...”.

⁵⁰ Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 796.

individual perspectives that exist.⁵¹ In this vein, if one envisages a contract, it is seen as a collection of the perspectives held by each party, which happen to coincide. However, postmodern theory reveals that social contexts are not the aggregate of individual preferences but the other way round. Individual consciousness is the result of multiple social influences and contexts. Social consciousness cannot be abstracted into summaries of individual experiences because there is a dramatic interaction between the person and her context.⁵² Any emotion or experience by a person is the result of numerous economic, intellectual and social influences, interactions and contexts. When a person forms an intention, that intention is part of the larger social meanings accessible to and realities of that person, and to abstract that intention is to deny its contingency upon the social reality that is ever changing.⁵³ The intention itself stands in relation to the specific contexts that give rise to it in the first place. To find true subjective intention, the interpreter would have to reconstruct the entire reality surrounding the intention creation, which is of course not possible.

3. Intention deduction and intention discovery

“...The words are the primary and main source of information from which the intention of the parties should be ascertained and an interpreter may not venture beyond the words of the text to determine the meaning thereof. This is known as the golden rule of interpretation...”⁵⁴

⁵¹ Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 796.

⁵² JWG van der Walt “The Future and Futurity of the Public-Private Distinction in the View of the Horizontal Application of Fundamental Rights” (2000) at 128-129. Delivered at Rand Afrikaans University at 21 June 2000 as his inaugural lecture as Professor of Law (published in *TSAR* as JWG van der Walt “Die toekoms van die onderskeid tussen die publiekreg en die privaatreë in die lig van die horisontale werking van die grondwet” 2000 *TSAR* 416-427, 605-618).

⁵³ Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 797. Tushnet proclaims (while discussing the work of Leon Litwack on slavery) “...[t]he ambiguity and contradiction Litwack discloses in individual responses to emancipation demonstrate the impossibility of singling out specific past intentions or beliefs without denying the shifting, complex circumstances that led each person to develop such ambiguous and contradictory understandings of his or her world...”.

⁵⁴ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 29. Where contracts are governed by legislation, objective intentionalism is also often favoured. See for example *S v Zuma and Others* 1995 (1) SACR 568 (CC) at 578; *S v Makwanyane and Another* 1995 (2) SACR 1 (CC) at 13; *S v Boesak* 2001 (1) SACR 1 (CC) at 2; *S v Mhlungu and Others* 1995 (2) SACR 227 (CC); *MEC for Local Government and Development Planning, Western Cape v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm* 2002 (3) SA 1 (CC) at 24; *Kalil v Standard Bank of SA Ltd* 1967 (4) SA 550 (A) at 556; *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202; *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768; *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*, 2004 (3) SA 160 (SCA) at 166

Objective intentionalists recognize the difficulty of finding the actual intention of the parties. They realize that the actual intention of the parties will always remain veiled by words and that language will perpetually hide the actual intention from view, yet they also recognize the need for certainty when interpreting texts. These intentionalists feel uncomfortable with the notion that judges can find any meaning they like in the text and they feel that the parties to the contract need protection and that their expressed wishes must be adhered to where possible. In short, they believe that interpretation is either completely constrained or completely open. It is the latter objective intentionalists seek to avoid. Objective intentionalism is based on the belief that the words of the contract are certain enough to provide us with the intention of the parties. The contractual text is perceived to be a language act which the parties intend to give legal effect.

In statutory interpretation, the intention of the legislature has long been the main justification for judicial interpretations. After the advent of constitutionalism in South Africa, much of the focus shifted from intentionalism to the so-called purposive approach to interpretation.⁵⁵ In this strategy the focal point shifts from the subjective intention of the legislature to the object or purpose of the legal text.⁵⁶ The interpreter is urged to find the reason for promulgation of the statute and to interpret the statute in the light of this purpose. In line with this theory, courts are allowed to modify the plain meaning of a text to bring it in line with the purpose of the text.⁵⁷ Adherents of

⁵⁵ See for example *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) at 159-160; *McLean v SASOL Mine (Pty) Ltd Secunda Collieries*; *McLean v SASOL Pension Fund* 2003 (6) SA 254 (W) at 268-269; *Nkosi and another v Bührman* 2002 (1) SA 372 (SCA) at 388; *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) at 739. This is of course not always the case. See for example *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA) at 429. However, broadly speaking, purposive interpretation has gained remarkable popularity in recent years.

⁵⁶ Du Plessis *Re-Interpretation of Statutes* (2002) at 96; De Ville *Constitutional and Statutory Interpretation* (2000) at 141; De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373 at 376. De Ville is critical of this strategy. See further Botha *Statutory Interpretation: An Introduction for Students* (1998) at 31; *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) at 159-160; *McLean v SASOL Mine (Pty) Ltd Secunda Collieries*; *McLean v SASOL Pension Fund* 2003 (6) SA 254 (W) at 268-269; *Nkosi and another v Bührman* 2002 (1) SA 372 (SCA) at 388; *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) at 739.

⁵⁷ Du Plessis *Re-Interpretation of Statutes* (2002) at 97; De Ville *Constitutional and Statutory Interpretation* (2000) at 142-143; De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373 at 377; Botha *Statutory Interpretation: An Introduction for Students* (1998) at 31. This brings a subjective element into the equation because the interpretation of the purpose of the statute is left up to the interpreter. In *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA) at 429 Lewis JA remarks that this may only happen if the meaning of the text is not clear.

this theory argue that the court has an inherent applicatory function, which entails the application of texts to specific contexts.⁵⁸

The purposive theory of interpretation is a reaction on three specific criticisms against the literalist-cum-intentionalist strategy of statutory interpretation. The first criticism is that context only becomes relevant once a text is ambiguous.⁵⁹ This is absurd because the context of the text becomes retrospectively important once it has been established that the text is unclear.⁶⁰ Secondly, decisions whether a text is ambiguous or not are subjective, and decisions regarding the relevance of contextual factors are therefore relatively arbitrary.⁶¹ Finally, purposivists argue that courts have a lawmaking function through interpreting and that the literalist-cum-intentionalist approach disguises this fact.⁶²

Despite criticism in the field of statutory interpretation, courts have accepted that the purpose of contractual interpretation is to ascertain the intention of the parties to the contract by means of a literal interpretation of the contractual text.⁶³ The theory is commonly known as the literalist-cum-intentionalist theory of interpretation. The theory holds that, provided that the document is clear and unambiguous, no evidence outside of the document may be presented to contradict the intentions of the parties as reflected by the text, even if extrinsic evidence might lead the court to a different

⁵⁸De Ville *Constitutional and Statutory Interpretation* (2000) at 144-145; De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373 at 377; Botha *Statutory Interpretation: An Introduction for Students* (1998) at 31; *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) at 406.

⁵⁹ De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373 at 377.

⁶⁰ De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373 at 377; Botha *Statutory Interpretation: An Introduction for Students* (1998) at 30. In other words, the meaning of an unambiguous text is determined by the text itself while the meaning of an ambiguous text is determined by the surrounding circumstances and evidence of the actual intention of the authors. The author is better of the text is ambiguous, because his opinions about the text will come into play.

⁶¹ De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373 at 377; Botha *Statutory Interpretation: An Introduction for Students* (1998) at 30.

⁶² De Ville *Constitutional and Statutory Interpretation* (2000) at 183; De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373 at 377; Botha *Statutory Interpretation: An Introduction for Students* (1998) at 30. By referring to meaning as either intention or plain meaning, literalist-cum-intentionalists disguise their necessary input and involvement in the creation of that meaning.

⁶³ Lewis "The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?" (1990) 107 *SALJ* 26 at 35; *Richter v Bloemfontein Town Council* 1922 AD 57 at 69-70; *Worman v Hughes & Others* 1948 (3) SA 495 (A) at 505; *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454-5; *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA) at 429. Incidentally, the last-mentioned judgement was handed down by Carole Lewis, who earlier criticized this type of reasoning.

understanding of the meaning of the text.⁶⁴ However, if the text is ambiguous and recourse to such evidence might clear up the uncertainty, the court may for example examine evidence of the negotiations before the contract was concluded.⁶⁵ The interpreter is not allowed to look at words in isolation, and all the words must be read in relation to the contract as a whole.⁶⁶

Objective intentionalism has been accepted in South Africa because of the certainty that it supposedly provides.⁶⁷ The argument goes that the text of the contract is there for anybody to see, and as a result it is possible to arrange one's affairs accordingly.⁶⁸ Parties would not have to conduct extensive and expensive investigations into the actual intention of a party, but could rely on the text of the contract.⁶⁹ It is also argued that an objective theory of interpretation makes it unnecessary for the courts to answer factual questions that are impossible to prove; allows the parties to obtain a decision on linguistic grounds without resort to extrinsic evidence; and allows for policy

⁶⁴ Lewis "The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?" (1990) 107 SALJ 26 at 36. Interestingly, Justice Lewis states "...evidence may not be led as to any factor that sheds light upon the *real* (my italics) meaning of the words in the document...". Lewis AJ is making a claim about the nature of language here. She is arguing that the purpose of language is to convey the intention of the parties and that outside evidence might lead us to this "real" meaning of the text. This identifies her firmly as a subjective intentionalist. Yet, in *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA) at 429, she handed down a judgement that departs from true subjective intentionalism to something that looks a lot like objectivism or even objective intentionalism. At 429 she remarks "...[t]here is no need to resort to an interpretation of a section, generous, purposive or otherwise, where there is no uncertainty as to its meaning...". One can only speculate whether this is a statement supportive of apparent consensus over real consensus in contractual practice (the case dealt with the interpretation of a statute).

⁶⁵ Schreiner JA in *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455; *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 624; *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768; Lewis "The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?" (1990) 107 SALJ 26 at 37.

⁶⁶ Lewis "The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?" (1990) 107 SALJ 26 at 37; *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768; *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (A) at 303; *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd and Others* 1994 (2) SA 172 (C) at 180.

⁶⁷ *Johnston v Leal* 1980 (3) SA 927 (A) at 944; Van der Merwe et al *Contract: General Principles* (2003) at 158; Lewis "The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?" (1990) 107 SALJ 26 at 37. Constitutional originalism found acceptance in America for the same reason.

⁶⁸ For example, where X buys the car from Y, X can now go and obtain a taxi licence because he can rely on the promises made by Y as reflected by the contractual text that he will receive a car against payment. He can assume that the contract will be executed as the text reflects it would. If he incurs costs because of some or other non-compliance by Y, he can on the strength of the text, argue that Y intended to sell him the vehicle as set out in the text, even though Y might subjectively not have intended to sell X the car.

⁶⁹ Lewis "The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?" (1990) 107 SALJ 26 at 37; *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA) at 429.

considerations to come into play.⁷⁰ Du Plessis concludes that this literalist-cum-intentionalist theory of interpretation is based on two linguistic suppositions, namely that language does in fact have a grammatical structure that allows for an “ordinary meaning” to be found; and that reasoned and competent use of language will allow the interpreter and the author to be of one mind with regard to the meaning of the text.⁷¹

Apart from the branch of American originalism already discussed, there is also a textualist branch.⁷² Textualism is again divided into two strands, namely strict textualism and moderate textualism.⁷³ Strict textualists argue that the text must be understood in the context that it was produced.⁷⁴ They argue that the intention of the author will become clear once the text is read as it was created. The moderate strand of textualism involves recognition of the so-called “open-texture” of language.⁷⁵ Open-textured language is held to have a core of determinate meaning when applied to situations where the specific type of language is normally used.⁷⁶ Moderate textualists hold that indeterminacy only comes to the fore when the language is used in a way that is not clearly correct or wrong.

⁷⁰ Lubbe & Murray *Farlam and Hathaway Contract: Cases Materials and Commentary* (3 ed 1988) at 463 note 35; Lewis “The Demise of the *Exceptio Doli*: Is there Another Route to Contractual Equity?” (1990) 107 *SALJ* 26 at 37-38.

⁷¹ Du Plessis *Re-Interpretation of Statutes* (2002) at 107. Du Plessis states that the “...court actually submits that the intention of the legislature, packaged in language as it were, is knowable because the linguistic form also offers the means to unpack this intention...”.

⁷² Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 221. Textualism is the study of the text in the belief that it will yield the intention of the author. It is a type of intention discovery theory or objective intentionalism.

⁷³ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 221.

⁷⁴ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 221. This approach is subject to the same criticisms raised against subjective intentionalism with regards to the nature of historical facts. Like the intention (as held by the author at the creation of the text) is subject to and dependent upon various contextual factors, any contextual reading is subject to the same conditions. A context is subject to innumerable economic, social and intellectual conditions, which are uniquely interactive at any one time. A context cannot be abstracted. If anything, the reader who tries a contextual reading alone is worse off, because he can only look at the text while the subjective intentionalist is allowed to look at all available evidence regarding the intention.

⁷⁵ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 221; Hart *The Concept of Law* (1961) at 121-132.

⁷⁶ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 221. Lyons explains “...[a]n open-textured” word has a core of determinate meaning, encompassing fact situations to which it uncontroversially applies...”.

For moderate textualists, constitutional language is inherently open-textured.⁷⁷ Therefore, while they disapprove of constitutional interpretations that “create” new applications or meanings for the constitutional text, they do agree that there is some scope for applicatory creativity.⁷⁸ In other words, while interpreters are prohibited from changing the text, they are allowed to apply it to new situations that were not envisaged during the creation of the text. Moderate textualists often justify this type of “nonoriginalism” by reasoning that the vague clauses of the text incorporate disputed concepts.⁷⁹ The argument goes that the vague clauses are purposely written in that way in order to require the court to interpret the clauses in each case. In such a way, the court will not permanently settle the meaning of the clause, but keep it dynamic so that it can negotiate the difficulties that gave rise to the dispute in the first place.

Ronald Dworkin proposes that texts be interpreted to maximize their value as legal text.⁸⁰ He urges interpreters to put the text in its best possible light. To achieve this, a distinction must be made between interpretation of a text and changing a text.⁸¹ Dworkin proposes that we do this by taking account of all the words of the text and by devising a theory of identity.⁸² In so doing, he puts forward a theory of interpretation that relies heavily on the impression created by the text on the interpreter. The emphasis on the difference between interpreting and changing hinges on the assumption that the author places a restriction on the amount of information (meaning) that a text can yield by the language she (the author) uses. Accordingly, the

⁷⁷ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 222.

⁷⁸ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 222. Lyons correctly argues that this type of textualism tends to collapse into nonoriginalism when the theory is taken to its limits. Extending the application of constitutional provisions to situations not envisaged by the framers is changing the meaning of the text, strictly speaking. Strict textualists will condemn any such actions because they argue that the courts have no authority to change the constitution.

⁷⁹ Lyons “Constitutional Interpretation and Original Meaning” in Schauer (ed) *Law and Language* (1993) 213 at 223; Dworkin *Taking Rights Seriously* (1977) at 132-137.

⁸⁰ Dworkin “Law as Interpretation” (1982) 60 *Texas LR* 527 at 531. While Dworkin opposes subjective intentionalism, his “best art” theory seems to be a development of objective intentionalism, as I will try to show.

⁸¹ Dworkin “Law as Interpretation” (1982) 60 *Texas LR* 527 at 531.

⁸² Dworkin “Law as Interpretation” (1982) 60 *Texas LR* 527 at 531-532. While Dworkin seems to focus on the work, he is actually focusing on the identification of a work as prior to the interpretation thereof. Consequently, Dworkin is always referring back to the author of a text as the source of identification. What ever follows is premised on the assumption that all the possibilities revealed by the text has its source in the text provided by the author. “Perhaps Shakespeare could have written a better play than he did...This interpretation fails, not only because an Agatha Christie novel, taken to be treatise on death, is a poor treatise less valuable than a good mystery, but because the interpretation is a shambles”.

true nature of meaning possibility in the Dworkinian model rests neither in the language of the text nor in the readings of the interpreter, but in the creation act of the author.⁸³ If this theory is followed, it will mean that the author of the text can, provided she is a careful and diligent drafter, restrict the possibilities open to the interpreters by utilizing supposedly restrictive or narrow language. This theory is based on the assumption that language can be used in this way and that interpretation is largely dependent upon the possibilities of meaning inherent in a certain text.

With his idea of a chain novel Dworkin reveals some of his assumptions about the nature of the restrictions that an author can place on an interpreter. In short, he argues that for the novel to make any sense as a novel, the writers later on in the chain must stick to the characterization of the previous authors.⁸⁴ In other words, the characters must continue to have the same description throughout. Mary must stay Mary and John must stay John. This implies that the description of Mary and John in the text has meaning prior to the interpretation by the next author.⁸⁵ An author can therefore largely fix the descriptions in his text if he uses language correctly. While Dworkin argues that the subjective intentions of the authors is created and not found, his own theory shares assumptions with objective intentionalism.

Dworkin also discusses the possibility that objective intentionalism is simply a way of justifying interpretations.⁸⁶ He recognizes that the authors of a text often had no intention regarding an eventuality simply because they did not foresee it. Contractual disputes often arise because the parties to the contract are faced with a situation that they did not foresee at the outset.⁸⁷ Since contracts in our law are expressly based on

⁸³ Dworkin concedes that the intention of the author is sometimes at the heart of the matter but then distinguishes these instances from cases when it will not really affect the meaning of the text. However, the type of intention Dworkin mentions here is the subjective intention of the author, for example she actually thought of an element in the book (the meaning of a word etc.). The rest of his theory rests upon the assumption that the author objectively demarcates the possibilities inherent in the text by the language she used. See Dworkin "Law as Interpretation" (1982) 60 *Texas LR* 527 at 537.

⁸⁴ Dworkin "Law as Interpretation" (1982) 60 *Texas LR* 527 at 542.

⁸⁵ Dworkin makes it seem that the reader (next author in the chain novel) *finds* the characters in a certain way. This implies that language has at least some fixed content.

⁸⁶ Dworkin "Law as Interpretation" (1982) 60 *Texas LR* 527 at 529.

⁸⁷ In *Bank of Lisbon v De Ornelas* 1988 (3) SA 580 (A), the parties to the contract were confronted with a situation where the applicability or not of a contract of surety was concerned. Neither of the two parties had foreseen that specific situation occurring (see 608 of Joubert JA's judgement), and the question confronting the court was whether the surety could escape liability on grounds of good faith. The court decides that the surety could not escape and justified their decision by arguing that the wording "clearly" reflects an intention to cover the unforeseen situation. Joubert AJ proclaims at 609

intention courts are faced with a dilemma. This difficulty is often solved by referring to the meaning created by the court as the intention of the parties or as an objectively demonstrated intention.⁸⁸ This justification distances the court from the interpretation and shifts the responsibility of the outcome of the interpretation process to the authors of the text.

The basic claim of intentionalists, be it subjectivists or objectivists, is that judicial interpretation can only be legitimate if it gives effect to the intention of the authors of legal texts.⁸⁹ The proposal is that the ideals of democracy and individual autonomy are best served if, when it comes to statutes, the trias politica is preserved and legislating is left to the legislature and, when it comes to contracts, the private nature of the text is kept private and judicial influence is kept out (or to a minimum). By way of a response, Hutchinson points out that it is by no means certain or self-evident that an intentionalist theory of interpretation will best serve democracy, especially as far as the desirability of being bound to the intentions of collective authors (legislatures) and past authors (long term contracts and constitutions) go.⁹⁰ Furthermore, on a normative level, intentionalism is fraught with theoretical contradictions and linguistic problems.

The critical insight that ultimately overwhelms the objectivist theories of intentionalism is the very insight that caused the emergence of these theories, namely the distancing effect of language. Subjective intentionalism is subject to practical criticism because it is difficult to prove a state of mind; and it is subject to theoretical

“In my opinion it appears from reading the deeds of suretyship and the mortgage bonds as a whole that the above-cited passages are clear and unambiguous. On the proper construction of these passages in their contextual settings I am satisfied that *they were intended* (my emphasis) to cover any transaction which might arise out of the customer/banker relationship between the company and the Bank. The contract for the forward purchase of dollars indisputably qualifies as such a transaction”.

⁸⁸ Dworkin “Law as Interpretation” (1982) 60 *Texas LR* 527 at 529 Dworkin reflects that “...whenever judges pretend that they are discovering the intention behind (a text)...this is simply a smokescreen behind which the judges impose their own view of what the statute should have been”.

⁸⁹ De Ville *Constitutional and Statutory Interpretation* (2000) at 9; Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1179.

⁹⁰ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1180. Collective authors like the legislature often embody many divergent views on the text and the text is often the result of bargaining and legislative “horse trading”. Likewise different persons tend to hold very different purposes for statutes and the idea that one must interpret a statute or contract according to its purpose is fraught with difficulty. Past authors often lived in societies that differ radically from ours as far as equality of woman and persons of colour go, and the aims and aspirations of those authors often represent views that we now find repugnant. See also De Ville *Constitutional and Statutory Interpretation* (2000) at 9-11.

criticism because the intention of the author is always communicated through language and this in itself perpetually distances the intention from the interpreter.⁹¹ These criticisms inspired the objective theories of intentionalism that are aimed at remedying the shortcomings of subjective intentionalism. Objective intentionalists argue that they overcome the practical problems with subjective intentionalism because they focus only on the text and the need for all kinds of external evidence no longer exists.⁹² Furthermore, the theoretical problems are overcome since interpreters no longer need to surmount the distancing effect of language because they only seek a linguistic manifestation of intention and not intention itself. While objective intentionalism seems to overcome the problems of subjective intentionalism, a linguistic door has been opened that ultimately lets in an understanding that renders objective intentionalism powerless, namely that the author's intention is already an effect rather than a pure source of meaning.⁹³

All texts are linguistic in nature, and because of this, all texts depend upon shared understanding and relation.⁹⁴ Meaning is the result of endless possible relations between words. The meaning of any text is never completely or permanently fixed and there are always meanings outside of the defined meaning of a text. This is a feature of language as such and not something that an author or reader has control over. Whenever language is used, this feature of language comes to the fore and consequently unintended meanings always slip into the text. The preference of one meaning over another is always relatively arbitrary and the interpreter does not have any privileged or objective way of interpreting a text.

⁹¹ The idea is that any evidence of intention is either directly linguistic in nature or there is a need to explain the intention orally or in writing. Language is always subject to interpretation and consequently the intention of the author is always subject to interpretation. See De Ville *Constitutional and Statutory Interpretation* (2000) at 10.

⁹² De Ville *Constitutional and Statutory Interpretation* (2000) at 9.

⁹³ Peller "The Metaphysics of American Law" (1985) 73 *California LR* 1151 at 1171.

⁹⁴ Peller "The Metaphysics of American Law" (1985) 73 *California LR* 1151 at 1173. In short this means that language is relational and not simply composed of signifiers. Language has more than a simple pointing out function and meaning is the result of interactions between words and contexts over which the author does not have control. There are always also other meanings possible in a text than the ones intended by the author, and these are inherent in language as such. For a more complete discussion of post-structuralist theory see chapter 2 section 7. See also De Ville *Constitutional and Statutory Interpretation* (2000) at 10.

It is also necessary to look at the practice of writing history.⁹⁵ Any investigation into the intention of the author of a text is necessarily an investigation into history. When interpreting history, the interpreter is always bringing his present situatedness into the interpretation process and as a result his own beliefs and prejudices play a role in his perception of history.⁹⁶ There can be no objective account of history because such an account cannot exist.⁹⁷ As De Ville reminds us, what is perceived as “facts” depends largely upon the questions that are asked and the interpretation method that is used.⁹⁸ The weight that will be attached to these “facts” will differ from historian to historian and from context to context.⁹⁹ Interpreters are also subject to various personal and shared contextual influences and pressures that have the effect of both diversifying their interpretations, so that it will never be completely objective, and at the same time linking their interpretations with others, making a completely subjective interpretation impossible.¹⁰⁰ As far as the intention itself is concerned, it will never be possible to completely record an intention, even where it is reduced to a text. Time, space, error, and various contextual influences like personal preference and selection exist in any given situation and, combined with the linguistic difficulties, any record of intention is doomed to be partial and incomplete.¹⁰¹ All we have are traces of a past that can only be evoked as a rhetorical device.¹⁰²

In most legal systems jurists realize that intentionalism is not an appropriate and theoretically sound interpretation strategy.¹⁰³ The response to this realization is

⁹⁵ This idea is discussed in detail in the chapter 4.

⁹⁶ De Ville *Constitutional and Statutory Interpretation* (2000) at 7; De Ville “Legislative History and Constitutional Interpretation” (1999) *TSAR* 211 at 212; Jenkins *Re-Thinking History* (1991) at 40. Jenkins states “...to all past events historians bring their own mind-set programmed in the present...”.

⁹⁷ De Ville *Constitutional and Statutory Interpretation* (2000) at 7; De Ville “Legislative History and Constitutional Interpretation” (1999) *TSAR* 211 at 212.

⁹⁸ De Ville “Legislative History and Constitutional Interpretation” (1999) *TSAR* 211 at 212. Suppose X stated that he will pay R120 for Y’s watch and committed that to writing, but in the presence of many witnesses crossed his fingers and burst out laughing. It is conceivable that the “contract” will not be taken to exist if the subjective intentionalist theory was employed, but the subject to the objective theory of intention, X might well be held liable because of the impression that his writing creates.

⁹⁹ De Ville “Legislative History and Constitutional Interpretation” (1999) *TSAR* 211 at 212-213.

¹⁰⁰ De Ville *Constitutional and Statutory Interpretation* (2000) at 7-8; De Ville “Legislative History and Constitutional Interpretation” (1999) *TSAR* 211 at 213.

¹⁰¹ De Ville *Constitutional and Statutory Interpretation* (2000) at 8; De Ville “Legislative History and Constitutional Interpretation” (1999) *TSAR* 211 at 213.

¹⁰² De Ville *Constitutional and Statutory Interpretation* (2000) at 8-11; De Ville “Legislative History and Constitutional Interpretation” (1999) *TSAR* 211 at 213.

¹⁰³ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1180. In South Africa intentionalism, or at least the ghost of intentionalism is alive and well, especially in the fields of contract and wills.

varied. Many (in South Africa read most) theorists still look for an authoritative and legitimate way of justifying interpretations and the standard responses are those of objectivism and rule theories.¹⁰⁴ Most of these theories are aimed at restoring the interpreter to his silent, uninvolved and neutral position that will render law free from politics.

The critical responses vary from free reading theories to critical re-evaluations of the role of the author in legal interpretation. These will be discussed in the following sections. Most of the critics of intentionalism reject the assumptions intentionalists hold regarding language. They reject the notion that the text can somehow (subjectively or objectively) reflect intention and they argue that meaning is always interpretive in nature.

4. Free reading and intention creation

The Critical Legal Studies (CLS) movement, under the influence of the American Realists, rejects intentionalism as a theory of interpretation and proposes radically different strategies of interpretation. They begin by systematically dismantling the theoretical framework of intentionalism by way of a critical analysis. The main project of this group is not to propose a rival strategy of interpretation but to expose the flaws in the present hegemony. However, once their works are closely examined, an alternative strategy becomes apparent. This section focuses on the views of selected CLS scholars like Mark Tushnet and the theory of interpretation that they seem to favor. The focus will then shift to neo-pragmatist interpretation theories and the work of post-structuralists like Michel Foucault.

Mark Tushnet, one of the leaders of the CLS movement,¹⁰⁵ shows the inadequacy of intentionalism by comparing it to hermeneutics.¹⁰⁶ In the hermeneutic tradition,

¹⁰⁴ For a more elaborate discussion see chapter 2.

¹⁰⁵ Van Blerk *Jurisprudence: An Introduction* (1998) at 162.

¹⁰⁶ Tushnet "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 *Harvard LR* 781 at 798. This article by Tushnet is one of very few in which a member of the CLS seems to pose an alternative strategy to the one criticised in the work. As a result, most of the analysis will focus on this article. For more CLS work on this topic see for example Schlag "Le Hors de Texte, C'est Moi" - The Politics of Form and the Domestication of Deconstruction (1990) 11 *Cardozo LR* 1631; Schlag "Normativity and the Politics of Form" (1991) 139 *University of Pennsylvania LR* 801; Gabel and Kennedy "Roll over Beethoven" (1984) 36 *Stanford LR* 1; Tushnet *Red White and Blue: A Critical Analysis of Constitutional Law* (1988) passim; Gabel "Reification in

history is regarded as the interpretive understanding of socially situated texts, while interpretivism is based on the assumption that past beliefs and intentions are determinate and knowable.¹⁰⁷ In the hermeneutic tradition it is argued that in order to fully understand the intention of another, the interpreter must enter the mind of the author and see the world as the author saw it and understand the world in the same way the author understood it.¹⁰⁸ The ways in which persons perceive the world around them informs the way in which they speak and the way they understand the words that they use.¹⁰⁹ Only once the interpreter shares this understanding and worldview with the author can she claim to know the intention of the author when she uses certain language. The problem with intentionalism is that its historical method does not allow for the discovery of these comprehensive worldviews. In fact, no interpretation strategy can achieve this.¹¹⁰ For intentionalism to effectively constrain interpreters, it must be able to provide something inherent in the text, a determinate meaning against which the validity of the interpretation can be evaluated. However, the hermeneutic project shows that when we enter the imaginative past we do not only reconstruct past events, we in fact actively construct them.¹¹¹ This necessarily involves the interpreter and her perspectives and as a result any reconstruction of a history involves some indeterminacy. This indeterminacy overwhelms intentionalism

Legal Reasoning” in Boyle (ed) *International Library of Essays in Law and Legal Theory (Schools 4) Critical Legal Studies* (1992) at 1. For criticism see Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019.

¹⁰⁷ Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1029; Schlag “Le Hors de Texte, C'est Moi” - The Politics of Form and the Domestication of Deconstruction (1990) 11 *Cardozo LR* 1631 at 1636-37; Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 798. Tushnet defines the hermeneutic perspectives as “...the interpretive understanding that actors give their actions...”.

¹⁰⁸ Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 798.

¹⁰⁹ Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1019; Schlag “Normativity and the Politics of Form” (1991) 139 *University of Pennsylvania LR* 801 at 822-824; Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 799. Tushnet puts it this way “...the ways in which people understand the world give meaning to the words that they use, and only by recreating such global understandings can we interpret the document the framers wrote...”.

¹¹⁰ Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 799-800; Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1029; Schlag “Le Hors de Texte, C'est Moi” - The Politics of Form and the Domestication of Deconstruction (1990) 11 *Cardozo LR* 1631 at 1637.

¹¹¹ Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1019; Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 800; Schlag “Le Hors de Texte, C'est Moi” - The Politics of Form and the Domestication of Deconstruction (1990) 11 *Cardozo LR* 1631 The differences between the past and the present necessitate such creativity in order to negotiate the gaps between normative realities.

because it is the search for intention that ultimately introduces indeterminacy into the interpretation process. The touchstone turns out to be a quagmire.

The same problem, namely the need for an imaginative bridge over a normative divide, introduces a further stumbling block to intentionalism. Even where the reconstructive imagination allows the interpreter to enter the world (and the mind) of the author, it highlights not the singularity of the author's perspective but the many perspectives open to him.¹¹² Added to this is the fact that our reconstructions of the past are shaped by our own situatedness, which means that any reconstruction is simply one of many possibilities.¹¹³

A hermeneutic strategy of interpretation forces the interpreter to take note of the resemblances and dissimilarities of our social contexts and that of the author.¹¹⁴ This forces the interpreter to take seriously both his own assumptions and beliefs and those of the author whose work he is interpreting. Tushnet argues that this should not lead to despair over the divide between the author and the reader, but should spur on the reader to find "creative" links between the ideals of the author and that of the reader.¹¹⁵ The interpreter is urged to recognize the creative component of his interpretation and its implications.¹¹⁶ While avoiding attempts at creating the past as it

¹¹² Tushnet "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 *Harvard LR* 781 at 802. The author inhabits a world, which, like our own, is shaped by multiple choices and influences rather than one concrete determinate progress. The significance of each influence is in turn determined by a multiplicity of factors not necessarily related to, or under the control of the author. See also Tushnet "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 *Harvard LR* 781 at note 59; Michelman & Radin "Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1022-1023.

¹¹³ Tushnet "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 *Harvard LR* 781 at 802; Schlag "Normativity and the Politics of Form" (1991) 139 *University of Pennsylvania LR* 801 at 822-824; Michelman & Radin "Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1023. Michelman & Radin remarks that a unitary legal vision is not the result of a unitary meaning, but rather "...that all legal thought feels the cultural pressure to measure its adequacy, as legal thought, against the norm of the grand theory...".

¹¹⁴ Tushnet "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 *Harvard LR* 781 at 803.

¹¹⁵ Tushnet "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96 *Harvard LR* 781 at 803. See also Schlag "Cannibal Moves: The Metamorphoses of the Legal Distinction" (1988) 40 *Stanford LR* 929 at 961; Schlag "Le Hors de Texte, C'est Moi" - The Politics of Form and the Domestication of Deconstruction (1990) 11 *Cardozo LR* 1631 at 1626-1637. Schlag warns that any institutionalisation of critical method would undermine the effectiveness of such methods. The "creative link" Tushnet speaks of can therefore never be an institutionalized one; it must always be situated and context sensitive.

¹¹⁶ Michelman & Radin "Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1039; Schlag "Normative and Nowhere to Go" (1990) 43 *Stanford LR* 167 at

was (which is after all not possible), the reader is advised to work with the commonalities between the present and the past. Tushnet argues that this will bring the interpreter face to face with the development of our society and will leave him with questions about the way society is changing and where we want to take it.¹¹⁷

Hutchinson analyses and comments on the interpretation methods of the CLS.¹¹⁸ He begins by highlighting the criticism of the CLS against supposed ideological neutrality¹¹⁹ and the legal positivist project of grounding interpretation in some objective practice or entity. The CLS showed that there is no such thing as a neutral legal strategy and any interpretation is either aimed at preserving a certain hierarchy or destroying it. They showed that the seemingly neutral principles of property and legal education are actually aimed at the preservation of the existing property dispensation and the existing hegemony of legal education.¹²⁰ The movement embraced the so-called “death of the author” and explores the impact of this theoretical shift to the fullest. The CLS aimed to show that even seemingly restrictive texts like the US constitution could have transformative and expansive interpretations.¹²¹ With an enlightened reader any text can be utilized for social change. Finally, the CLS aimed to liberate texts from reactionary authors and to use

185; Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 803-804. Tushnet argues “...in recognizing the magnitude of the creative component, we inevitably lose faith in the ability of interpretivism to provide the constraints on judges that liberal constitutional theory demands...”.

¹¹⁷ Tushnet “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles” (1983) 96 *Harvard LR* 781 at 804. This is the crucial part of the theory. While this may look like a kind of subjective intentionalism, it is not. It is a theory that requires of the reader to fashion meaning that is transformative. It is essentially a reader-based theory, rather than an author-based or text-based theory. The theory calls for social awareness from the reader and begins to formulate a sort of transformative reading that is aimed at influencing the development of law as such. The goal is to change the way we think about law and the application of law. It asks not what the text says, but what it should say. See also Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1029; Schlag “Le Hors de Texte, C'est Moi” - The Politics of Form and the Domestication of Deconstruction (1990) 11 *Cardozo LR* 1631 at 1636-1637.

¹¹⁸ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1181-1183. Hutchinson is an adherent of CLS, but he can be described as a critical scholar.

¹¹⁹ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1181.

¹²⁰ See for example writings by Duncan Kennedy on property (Kennedy “Form and Substance in Private Law Adjudication” (1976) 89 *Harvard LR* 1685; Kennedy “Distributive and Paternalist Motives in Contract and Tort Law” (1984) 41 *Maryland LR* 563) and on Law Schools (Kennedy “How the Law Schools Fail’ A Polemic” (1970) 1 *Yale Review of Law and Social Action* 71; Kennedy “The Political Significance of the Structure of the Law School Curriculum” (1983) 14 *Seton Hall LR* 1).

¹²¹ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1181.

these texts for progressive ends. These CLS insights have influenced and still influence critical legal thinkers. Although many of the theoretical principles (such as deconstruction) on which its members based their critical analyses have been around for some time (especially in the field of literature), the CLS application of these principles enjoyed theoretical endorsement last witnessed when the realist movement was at its zenith. Interdisciplinary research is also approached in a new light since the CLS made this kind of analysis more common.

With all this said, the CLS movement became the victims of their own success.¹²² As Hutchinson puts it, the rebuttal of mainstream legal beliefs came at the expense of reader anarchy.¹²³ Because of the radical indeterminacy of meaning of texts as demonstrated by CLS, texts can now mean anything, and they therefore mean nothing.¹²⁴ The validity of an interpretation cannot be tested and any interpretation goes. The only constraints on meaning are imaginative ingenuity and political cunning.¹²⁵ Herzog argues that this line of reasoning will lead to the situation where all texts are superfluous and all an interpreter would need is a folio with the word “text” written in bold.¹²⁶ The reader can then proceed to read whatever he wants on the page, be it Shakespeare or Henry James.

With the practical criticism of CLS free reader theories comes a fundamental political criticism. Although they are themselves transformation minded, the theoretical success of the CLS analysis meant that they cut the ground from under their own

¹²² Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1022; Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1182.

¹²³ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1181-1182. Hutchinson states that “[a]t bottom, the spirited rebuttal to critical attempts to sabotage the mainstream hermeneutical project rests upon the argument that the defeat of authorial tyranny and political inconvenience of textual certainty has been bought at the bankrupting price of reader anarchy”.

¹²⁴ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1182; Michelman & Radin “Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1033.

¹²⁵ Hutchinson “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1182. Hutchinson proclaims “...the text becomes a blank cheque that can be written in the reader’s preferred political currency...” See also Coombe “Same As It Ever Was: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603 at 630.

¹²⁶ Herzog “As Many as Six Impossible Things Before Breakfast” (1987) 75 *California LR* 609 at 629. See also Hutchinson’s discussion of the article: “Identity Crisis: The Politics of Interpretation” (1992) 26 *New England LR* 1173 at 1182.

feet.¹²⁷ By denying the existence of any objective foundation to their opponents, the movement managed to show that any interpretation strategy, even their own based on need, is historically contingent, subjective and unverifiable. Any political initiative aimed at social change is therefore doomed from the outset. This has enormous implications, especially in rights theory, where previously disadvantaged persons who finally began to make headway had the status of their newly acquired rights undermined.¹²⁸ The threat is that the very weapons formed to free the enslaved will be used to re-enslave them. The ability to politicize an interpretation means nothing if one does not have the power to apply the interpretation. Furthermore, if deconstruction alone is such a powerful weapon for transformation, deconstructive readings of texts should suffice as transformative strategy and the diversification of the author base to include more works by marginalized authors would not be warranted.¹²⁹ While it is not desirable or theoretically defensible to argue that authors wholly determine the meanings of the texts they create, it is not politically justifiable to argue for absolute reader anarchy either.

5. Neo-pragmatism and the author

Neo-pragmatism is a theory about the influence of an interpreter's social situatedness and the influence of her interpretive community on the meanings that result from the interpretive process. Stanley Fish is one of the leading neo-pragmatists who work in both law and literature.¹³⁰ In "Working on the Chain Gang" he aims specifically to rebut Dworkinian objective intentionalism as raised in "Law as Interpretation".¹³¹ The

¹²⁷ Hutchinson "Identity Crisis: The Politics of Interpretation" (1992) 26 *New England LR* 1173 at 1182-83; Michelman & Radin "Pragmatist and Post-structuralist Legal Practice (1993) 39 *University of Pennsylvania LR* 1019 at 1033.

¹²⁸ Williams "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 *Harvard Civil Rights- Civil Liberties LR* 401 at 413 proclaims "[f]or blacks, therefore, the battle is not deconstructing rights, in a world of no rights: nor of constructing statements of need, in a world of abundantly apparent need. Rather, the goal is to find a political mechanism that can confront the *denial of need*".

¹²⁹ Hutchinson "Identity Crisis: The Politics of Interpretation" (1992) 26 *New England LR* 1173 at 1183. Hutchinson argues "...moreover, the introduction of woman authored texts will be of no consequence because, as the critics themselves amply demonstrated, the authors of texts have no influence over the meaning that can be attributed to their texts; the text and its meaning will be interpreted as its readers decree...".

¹³⁰ Fish "Working on the Chain Gang: Interpretation in Law and Literature" in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 87-102. For a more detailed discussion of the work by Fish and other neo-pragmatists see section 6 in the Chapter 2. In this section I will work mainly with the first mentioned article since it is specifically on intentionalism and its influence in legal interpretation.

¹³¹ The article by Dworkin is discussed in section 3 of this chapter.

first theoretical assumption that Fish wishes to rebut is the assumption that a written text constrains both readers and the possible meanings that can be given to the text.¹³² Underlying this assumption is the belief that there is something in the text, some foundational meaning, which will always be attributed to the text.¹³³ The same idea underlies any objective intentionalist account of meaning since an intention can only be found if it existed in the area of investigation prior to the search. Fish argues that subsequent authors are not necessarily more constrained than the first but that both are equally free and constrained. The first author is constrained because he intends to write a novel (or a contract or a will or a statute).¹³⁴ When this author starts his endeavor he is already constrained in the sense that he must create a text that will qualify as a novel in relation to his own understandings of a novel, which were formed by his interaction with various interpretive communities in which he finds himself. One cannot envisage a project in textual creation without thinking within a set of practices or understandings surrounding the intended project.¹³⁵ The text creator is therefore constrained by “text creating” choices and is not free to do as he pleases.¹³⁶ In fact, there is no doing as he pleases because his preferences will be determined in the same way. This does not mean that the author is completely constrained either. The author still has a choice whether he would like to follow what he perceives to be the conventions for writing a novel (or contract or will) or not. As Fish puts it “...he is neither free nor constrained (if those words are understood as referring to absolute states), but free and constrained...”.¹³⁷ Neo-pragmatists reject

¹³² Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 88. Dworkin contended that the first author in a chain enterprise is the least constrained while the subsequent authors are progressively more constrained. See Dworkin “Law as Interpretation” (1982) 60 *Texas LR* 527 at 542.

¹³³ The same idea is reflected by Hart *The Concept of Law* (1961) at 121-132 who claims that some texts are inherently open textured but contains a core of determinate meanings.

¹³⁴ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 89.

¹³⁵ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 89. Fish explains that “[o]ne cannot think of beginning a novel without thinking within, as opposed to thinking ‘of’, these established practices, and even if one ‘decides’ to ‘ignore’ them or ‘violate’ them or ‘set them aside’, the actions of ignoring and violating and setting aside will themselves have a shape that is constrained the pre-existing shape of those practices”.

¹³⁶ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 89.

¹³⁷ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 89. He continues, “[h]e is free to begin any kind of novel he decides to write, but he is constrained by the finite

both absolute meaning determinacy and relativism. They argue instead that (relative) meaning determinacy is possible.

The writers (interpreters) following the initial writer are equally free and constrained. They are free to follow any path of textual creation that they please, but they must do so within that which they perceive to be “ways of continuing a chain novel”.¹³⁸ The writer must have some understanding of what the previous writer wrote and this interpretation is subject to the constraints that interpreter perceives from the various interpretive communities he is part of. The important theoretical insight is that the initial writer and all subsequent writers are in exactly the same position. They must interpret the task before them and they must proceed in one of the ways they perceive open to them.¹³⁹ Any meaning is subject to an interpretive act and the moment that the interpretation is noted is always after interpretation has taken place.¹⁴⁰ Fish shows that it is not something determinate in the text (like a core meaning or objective intention) that constrains the interpreter. The text will appear differently in the light of different assumptions concerning it.¹⁴¹

Fish also shows how the assumption that the text is the only fact that can constrain the interpreter is false. Objective intentionalists are apprehensive about judicial activism, especially with relation to contracts and wills. Because of the liberal supposition that individuals should be free to organize their own affairs as they see fit within the law, objective intentionalists feel that interpreters of contracts and wills should be constrained to only give effect to the contract or will as intended by the parties who created those texts.¹⁴² The idea is that something in the text will check the judge who

(although not unchanging) possibilities that are subsumed in the notions ‘kind of novel’ and ‘beginning a novel’”.

¹³⁸ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 89.

¹³⁹ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 90.

¹⁴⁰ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 90. Fish concludes “...No matter how much or little you have, it cannot be a check against interpretation because even when you first ‘see’ it, interpretation has already done its work...”.

¹⁴¹ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 90.

¹⁴² Many people feel that an intentionalist theory of interpretation is non-negotiable in private matters such as contracts and wills. While “public law” intentionalism is not absolutely necessary for the justification of a liberal democratic theory of rights, “private law” intentionalism is crucial. Without it acknowledgement of public interference in private law and even an abandonment of the distinction

is tempted to strike off in a direction of his own.¹⁴³ Fish begins his rebuttal by arguing that it is hard to imagine such an “own direction”.¹⁴⁴ The reason for this is twofold. If a judge decides a case on reasons that are clearly not legal reasons, his decision would no longer be a legal decision. Conversely, if a judge could give reasons for his decision, the decision would not be absolutely new, but rather a choice of one of the options already open to the judge.¹⁴⁵

It is also important to note that one does not simply find a text. An interpreter looks at materials assuming that they have some or other legal purpose and only then, against these assumptions of legal relevance, does she “find” a text.¹⁴⁶ Not every interpreter would find the same text since not every interpreter will be proceeding from the same assumptions of legal relevance.¹⁴⁷ Fish shares the belief of post-structuralists that history or law can only be adhered to by revising it to accommodate the issues raised by the present.¹⁴⁸ In other words, law remains law by re-applying it to new situations. This is often the issue in contractual disputes, for example regarding the applicability of the contract to a situation not envisaged when the contract was concluded. The court “breaks” the contract (in the sense that the court removes the contract from the context envisaged at the conclusion of the agreement) in order to test its applicability in this new situation. Depending on the assumptions held by the court, the court might either find that the contract can in fact be “extended” to cover the new situation, or that it cannot. The point is that the contract can only be upheld by breaking it

between public and private might be necessary. This will place the entire theory of liberalism and its reliance on individual autonomy in danger. Compare with chapters 2, 3 and 4.

¹⁴³ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 92.

¹⁴⁴ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 93.

¹⁴⁵ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 93. Fish states that the direction would not be new since “...it will have been implicit in the enterprise as a direction one could conceive of and argue for...”.

¹⁴⁶ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 93.

¹⁴⁷ For example, adherents of the will theory of contractual liability and of the declaration theory will regard different materials as contractual texts in the same factual situation. Where there is a written document, the will theorists will most likely see it as a manifestation of a subjective intention and therefore include evidence of the meanings of terms in the written document, as part of the contractual text. Declaration theorists are likely to regard only the written document as legally significant and conclude that it is the full extent of contractual text.

¹⁴⁸ Fish “Working on the Chain Gang: Interpretation in Law and Literature” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 94. See also Derrida “Force of Law: The Mystical Foundation of Authority” in Cornell, Rosenfeld & Gray Carlson (eds.) *Deconstruction and the Possibility of Justice* (1992) at 23.

(removing it from its initial context to test its applicability in the new situation) in the sense just described. Objective intentionalism is no more constraining than subjective intentionalism because the constant in the objectivist equation (the text) turns out to be a variable. The only (relative) constant is one's interpretive context.

The neo-pragmatist position can therefore be summarized as follows: 1) The creators of texts are both free and constrained and they always act within a set of assumptions about their project; 2) texts cannot constrain interpreters because the texts do not exist before interpretation and as a result the text is always the product of the interpretation; and 3) the distinction between finding and creating meaning cannot be upheld since both are always present in the interpretive process.

6. The author and referentiality

Michel Foucault changed the way many critical scholars think about authors.¹⁴⁹ Foucault begins by describing writing as an act whereby the author creates a space into which he constantly disappears.¹⁵⁰ What is described here is the constant alienation of the writer by the text that he creates. The traces of the author disappear among the possible meanings that the text represents. Foucault contrasts this view with the perception of the role of writing in our culture.¹⁵¹ He highlights the assumption that writing immortalizes the message of the author.¹⁵² With this contrast between the disappearance of the author into the text and the immortalization of the message a paradox emerges. The work, aimed at preserving the wishes of the author, becomes the destroyer of those wishes,¹⁵³ the mark of the author is reduced to nothing

¹⁴⁹ See for example Hutchinson "Identity Crisis: The Politics of Interpretation" (1992) 26 *New England LR* 1173 at 1175. Peller also drew from Foucault's work in Peller "The Metaphysics of American Law" (1985) 73 *California LR* 1151 at 1171-1177 where he discusses the relevance of an author from the post-structuralist perspective. Both were strongly influenced by Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141.

¹⁵⁰ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 142. Foucault explains "[i]n writing, the point is not to manifest or exalt the act of writing, nor is it to pin a subject within language; it is rather a question of creating a space into which the writing subject disappears".

¹⁵¹ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 142-143.

¹⁵² Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 142. This assumption is also present in contractual practice and is manifested in rules like the parol-evidence rule, which aims to protect the supposed certainty of written contracts.

¹⁵³ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 142. Foucault states that "the work, which once had the duty of providing immortality, now possess the right to kill, to be its author's murderer".

more than his absence.¹⁵⁴ Foucault then proceeds to discuss various elements of the author/reader/text relationship from this basis, always keeping this difficulty between the preservation of the message and the alienation of the author by the message in mind.

The first element that Foucault analyses is that of the work. he problematizes the association of the definition of a work with the author of the text,¹⁵⁵ arguing that a work cannot be understood apart from its author, but that the relation is not a simple one (of an author and his writings), since that would have made it possible to situate the absent author and to circumvent references to him.¹⁵⁶ The complexity of language and the meaning possibilities that make up a text make this impossible. Foucault is not asking for the reinstatement of the author in his privileged position from where meanings can be cast in a neutral light, but rather to show the relational nature of authorship.¹⁵⁷ Since the demise of the notion of absolute authorial control over textual meanings, the position previously occupied by the author became vacant.¹⁵⁸

Foucault also investigates the complexity inherent in the characterization of a text by an author's name.¹⁵⁹ A name does not only have a pure signification function but also a description function. Calling someone by his name *de facto* entails a description of the person.¹⁶⁰ This is relevant in law because it disrupts the simplistic notion of an

¹⁵⁴ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 143.

¹⁵⁵ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 143. The claim is often that the text can be understood apart from the author or in other cases that the text cannot be understood apart from the author. Foucault argues that there is always a little of both involved. See also chapter 2 section 7, chapter 3 section 5 and chapter 4 section 4.

¹⁵⁶ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 143.

¹⁵⁷ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 144. Foucault describes the unity of a work as similar to the individuality of the author, hence the relational composition of the work. For a discussion of the Foucaultian notion of the individual see Rabinow (ed) *Michel Foucault: Ethics, Subjectivity and Truth* (1997).

¹⁵⁸ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 145. It seems that spaces in this sense means interpretive possibilities and justifications for different meanings, but also that the entity of the author as such can be analysed. Foucault seems to follow the last suggestion, namely an analyses of the authorship role.

¹⁵⁹ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 145.

¹⁶⁰ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 146. This is true even if we do not know the person who is the author. By linking the name to the author we assign various characteristics to the author for example that the person is a human being, a writer and a literate person. None of the terms literate person, human being

author as a creative entity outside of the text. The name of the author becomes a volatile text with unpredictable consequences for the rest of the interpretation. For example, in a contract a description of the parties can influence the intentions that we ascribe to them. If I linked the name Rudi with that of a rich person (also a “Rudi“) which I know, I will understand Rudi’s actions as if Rudi were rich. This happens because I “read” Rudi in a way that describes the author to me. Consequently, I ascribe intentions to Rudi that I would normally ascribe to a rich person (or my perception of a rich person). The names of the contracting parties will therefore influence my interpretation of the contract.

While the name of an author might have an admittedly limited effect on the interpreter, the so-called author-function will have a distinct influence. Foucault identifies the author-functions as the classification of texts by their authors.¹⁶¹ An investigation of the origins of this author-function yielded the conclusion that the author-function is determined by four factors. The first is the juridical and institutional systems that shape the discourse in a particular society. Foucault shows that pre-property oriented societies did not attach the same significance to the author of a text as is presently the case.¹⁶² The second factor is that the types of discourses that a particular society deems author worthy will shift from time to time.¹⁶³ Different genres are more strongly linked to authors in different times. Foucault illustrates that literary texts used to be less linked to authors while scientific texts used to be strongly linked to authors.¹⁶⁴ In modern society, things are the other way around. Thirdly, the author-function is not the result of a spontaneous attribution of a text to its producer

or writer are independent and each term brings to the interpretive act various meaning possibilities. Added to this already complex characterization of the author, the interpreter will often relate the name to that of a person that she already knows and assign similar characteristics to the author. The name of the author is therefore not simply a signifier but a complex description of an entity, the extent of which cannot always be predicted beforehand by the author himself.

¹⁶¹ Foucault “What Is an Author?” in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 147-153.

¹⁶² Foucault “What Is an Author?” in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 148. The author-function is therefore often the effect of a need for ownership to settle somewhere. For a text to be property is must be capable of origin for ownership to settle.

¹⁶³ “Author worthy” describes the judgement whether a text is to be identified with reference to its author or not.

¹⁶⁴ Foucault “What Is an Author?” in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 149 In the Middle Ages scientific texts were not validated by experiments but with reference to their authors. Literary texts on the other hand, were validated by their “...ancientness...” and not by their authors.

but rather the result of a series of complex and specific operations.¹⁶⁵ These operations consist of a process in which we construct a rational being that can be held responsible for various textual phenomena (which are often contradictory).¹⁶⁶ Fourthly, Foucault shows that the author-function is often not associated with a real individual, but with several selves simultaneously. The intention of the contractual author, for example, is the meeting of the minds of more than one individual. The author is the consensus. It is clear that the author-function is not a natural process by which the text is linked to the author; rather, the extent and shape of the author-function will depend upon the particular social situatedness of the text and the interpreter.

In essence, what Foucault tries to do is to find a link between the interpretation of a text, the ascription of the title of author and justice. Derrida provides a vivid account of justice in the post-structuralist mould.¹⁶⁷ Justice lies in the destruction of the previous interpretation by the prospect of the new interpretation. While law is deconstructable, justice is not. Justice cannot be experienced, yet there is always a call for justice. Justice is always singular and particular. Ultimate justice is the ultimate (and impossible) recognition of the other as other. The law, on the other hand, is always general and universal. There is a constant struggle between the universal and the particular, between law and justice. Deconstruction takes place in the space between the deconstructable and the undeconstructable. When legal interpretation takes place, there is tension between the particularity of the text and the generality of the law. The interpreter seeks both what is just in the particular circumstance and what is justifiable under law.

When one applies the work of Foucault to this description of justice, it reveals the importance of the author-function within law (specifically contract law). The author-

¹⁶⁵ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 150.

¹⁶⁶ Foucault "What Is an Author?" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) 141 at 150. Foucault identifies three such operations in modern literary theory, namely: 1) the author provides a basis for explaining the presence of certain events in a text as well as their transformations, distortions and modifications; 2) the author is the principle around which unity of writing is build. All differences can thus be resolved with reference to maturation of the author, the influences he was under and an evolution of his writings; 3) the author is a source of expression that is manifested in various forms like letters, works and sketches and so on.

¹⁶⁷ Derrida "Force of Law: The Mystical Foundation of Authority" in Cornell, Rosenfeld & Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) 1 at 13-24.

function is in essence a study of the particularity of the text, while at the same time trying to discover the reason (justification) for the text. In a contractual situation, one tries to recognize the particular in the text (what did the parties actually intend?), while at the same time linking the text to law (how must the text be effected?). Foucault shows that the author-function is not a “natural” or essential function of interpretation. Like all interpretive applications, the author-function is subject to context, policy and linguistic indeterminacy. The author-function helps us to distinguish contractual texts from other legal texts, but it does not provide those contractual texts with predetermined meaning. It simply provides an avenue for further pursuit of illusive particularity.

The pursuit of particularity will of course always bring with it the need for justification and thus, by implication, generalisation. No text can ever be completely unique and at the same time completely justifiable. As long as contracts belong to the genre “law of contract”, the author-function will have to include the linking of the text with what is justifiable. As long as contracts are in language, they will have to be readable, and thus not completely unique.

7. Are contracts without intention necessarily unintended contracts?

Can we have a theory of contract and contractual interpretation that is not inherently intentionalist? Are contracts not by definition intentionalist? Contractual interpreters (especially judges and arbitrators) face the dilemma that contracts are mostly instruments of exchange and therefore have highly localized effects; to simply proclaim “the author is dead” will leave this important institution vulnerable. The existence of contracts are strongly linked to their effects. The creation of a contractual text is not aimed at creating an interpretable instrument but rather at ensuring certain practical effects. How do we ensure that these effects come into being without resorting to the intention that “created” them in the first place?

Two postmodern answers to this dilemma come to mind. Firstly, the neo-pragmatist answer. Neo-pragmatists reject both absolute meaning determinacy and relativism. They argue instead that (relative) meaning determinacy is possible. Neo-pragmatists contend that interpreters are never free enough to find whatever they please in a

text¹⁶⁸ and, on the other hand, they are never completely constrained by the text.¹⁶⁹ In this model, meaning is the result of the influence of interpretive communities and not of the interpreter, author or text. A contractual interpreter would “find” the “intention” of the “author” because that specific meaning exists as a possibility with relation to the contractual text because of the specific interpretive community in which the interpreter happens to find himself. This does not mean that the interpreter is absolutely constrained by a specific interpretive community in the sense that the meaning he finds is the only meaning open to him, but simply that there is a range of meanings open to him because of his social situatedness. He is not completely free to find (or create) whatever meaning he pleases. When he finds (or creates) a meaning, that meaning already existed as a possibility in the interpretive context of the reading.

The intention of the parties to the contract is therefore a text that existed as a possibility in the legal system before it was created. If the text (intention) were completely unrelated to the legal system in the sense that the text could not possibly be a legally valid intention, the contract would not be a legal contract. Consequently, legal contractual intentions are always halfway towards recognition and are related in some way to interpretations already recognized as legally valid intentions. When the parties formulate their contract, they do so within a set of beliefs and assumptions already in place. As a result, the contract will largely resemble the social and legal understandings of what a contract will look like and other members of society with shared interpretive contexts will reach the same conclusions (meanings) as the parties. When a dispute arises, the options open to the dispute resolver will again be informed by his interpretive assumptions and beliefs. In large interpretive communities like the South African legal community, the “intentions” of the parties and the interpretations of the interpreters of the text are bound to correlate most of the time because the interpreters and text creators share certain assumptions.

¹⁶⁸ Fish “Is There a Text in This Class” in Fish *Is There a Text in This Class: The Authority of Interpretive Communities* (1980) at 306; Levinson “Law as Literature” in Schauer (ed) *Law and Language* (1993) at 351.

¹⁶⁹ Fish “Is There a Text in This Class” in Fish *Is There a Text in This Class: The Authority of Interpretive Communities* (1980) at 307; Fish “Fish vs. Fiss” in Fish *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 126; Levinson “Law as Literature” in Schauer (ed) *Law and Language* (1993) at 351-353.

The neo-pragmatist position can therefore be summed up as follows: 1) Although it is not possible to find an actual intention or an expressed intention because the nature of interpretation prohibits such a finding, it is possible to project (with reasonable accuracy) what the parties wanted to achieve with a certain contractual text. 2) This is possible because the parties to the contract share assumptions that influence interpretation with the interpreters of the text, and as a result a strong possibility exists that the interpreters and the parties will agree on the meaning of the text. “Intentions” can be known because we share assumptions regarding the possible nature of those “intentions”.

The big problem with this type of thinking is that it leaves little room for the creativity and interpretive suppleness often required in the resolution of contractual disputes. Because the interpreter is limited to assumptions already in place, it becomes very difficult to justify deviation from present hegemonies and hierarchal structures of meaning. Any deviation from the “normal” meaning requires justification and proof that the new direction is in fact a “legal” direction. If a judge sought to extend or limit the meaning of a word, that move must be justified in some way as either the manifested or the actual intention of the parties to the contract. Existing hegemonies are protected by the illusion that there is, somehow, a general interpretive consensus.

The post-structuralist response to the dilemma of interpretive justification is to turn the problem on its head. Instead of asking why the judge arrives at a certain meaning, they ask whether it is the best possible way of resolving the dispute. In other words the aim is not to find what the parties intended, but rather to work out the best solution for the problem using the text provided by the parties. In this theory the language of the text is not an instrument for the preservation of a meaning, but rather a means to provide justice in the specific circumstances before the interpreter.¹⁷⁰ Post-

¹⁷⁰ For the post-structuralist definition of justice see Derrida “Force of Law: The Mystical Foundation of Authority” in Cornell, Rosenfeld & Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) 13-24. Justice lies in the destruction of the previous interpretation by the prospect of the new interpretation. While law is deconstructable, justice is not. Justice cannot be experienced, yet there is always a call for justice. Justice is always singular and particular. Ultimate justice is the ultimate (and impossible) recognition of the other as other. The law, on the other hand, is always general and universal. There is a constant struggle between the universal and the particular, between law and justice. Deconstruction takes place in the space between the deconstructable and the undeconstructable. When a legal interpretation takes place, therefore, there is tension between the particularity of the text

structuralists argue that meaning can never be the criterion that settles arguments. Meaning is always contested and the arguments about the meaning of texts are always aimed at the acquisition of the meaning.¹⁷¹ As Hutchinson remarks "...meaning is always to be argued for and never to be argued from".¹⁷²

The identity of the author and his or her experiences regarding the text is neither the sole determinant of value nor immaterial.¹⁷³ While it is theoretically impossible to recapture the experience of the author as the sole determinant of value and politically (and socially) irresponsible to attempt to do so, the interpretation of a text will invariably be influenced by elements such as the identity of the parties to its creation, the circumstances surrounding its initiation and the purpose at the heart of its origin.¹⁷⁴ The reader is no more the originator of meaning than the author, since with all readings there is always the "...inescapable element of the parasitic or the plagiarized".¹⁷⁵ The author and the reader are in a sense products of the text and not the other way round. Texts are interpreted in concrete settings and the influence of the reader and the author is inevitable, but the extent of that influence will depend upon the complex codes of power that are always political.¹⁷⁶ Intention does matter, only not in the way envisaged by intentionalists.

What the interpreter utilizing deconstruction must be aware of is that deconstruction is not a rival interpretive strategy. It can be used with multiple interpretive strategies,

and the generality of the law. The interpreter seeks both what is just in the particular circumstance and what is justifiable under law.

¹⁷¹ Hutchinson "Identity Crisis: The Politics of Interpretation" (1992) 26 *New England LR* 1173 at 1185. He argues "[m]eaning can never be a ground for discourse because discourse itself encloses meaning. Moreover, discourse is itself never grounding for anything; it is only a site or opportunity for interested attempts at hermeneutical acquisition. Reading ends not with a final affixing of meaning, but with temporary undecidability".

¹⁷² Hutchinson "Identity Crisis: The Politics of Interpretation" (1992) 26 *New England LR* 1173 at 1188.

¹⁷³ Hutchinson "Identity Crisis: The Politics of Interpretation" (1992) 26 *New England LR* 1173 at 1176; De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373 at 375.

¹⁷⁴ Hutchinson "Identity Crisis: The Politics of Interpretation" (1992) 26 *New England LR* 1173 at 1176. Hutchinson proclaims "identity is neither entirely dispensable nor completely determinative". See also De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373 at 376.

¹⁷⁵ Hutchinson "Identity Crisis: The Politics of Interpretation" (1992) 26 *New England LR* 1173 at 1187.

¹⁷⁶ Hutchinson "Identity Crisis: The Politics of Interpretation" (1992) 26 *New England LR* 1173 at 1188; De Ville "Meaning and statutory interpretation" (1999) 62 *THRHR* 373 at 376; De Ville "Legislative History and Constitutional Interpretation" (1999) *TSAR* 211 at 222. De Ville remarks here, "...A text acquires meaning within the context that it finds itself. In other words, a text is to be contextualised, but then by means of a context which itself has to be constructed...".

including positivism.¹⁷⁷ Although deconstruction is often utilized as a tool for the destabilization of existing hierarchies of power (which just happen to be positivist in South Africa) and is therefore often associated with leftist politics, it is not essentially a reformist or leftist political tool and the interpreter could use deconstruction to serve various political agendas. The important issue is that the interpreter realizes that he is always serving some political goal, even when expressly refraining from politics.

As far as contractual interpretation is concerned, the post-structuralist response to the problem of interpretive authority would be to replace the notion of intention as justification with the notion of intention as creation. Every contract contains within it the solution of the contractual relationship, the ideal contractual outcome. However, this outcome is not independent of the parties to the contract. In fact, it is inseparably entwined with the parties and it is the role of the interpreter and the author to pronounce this outcome.¹⁷⁸ Language (itself, not its use) does not serve a political agenda, but interpretation always does. The interpretation of the language act that is the contract is an activity caught between the paradox of creation and discovery. It is a forceful acquisition of meaning and the label of truth is hung on to that meaning by the legal process. The intention of the parties does not provide the court with a finished product, but rather with a starting point in the interpretation process. Intention in this regard is not a historical-psychological moment but rather the process of creating a contract. The contract is only concluded once it is interpreted.¹⁷⁹ Therefore un-intentionalist does not necessarily mean unintended.

¹⁷⁷ A good example of this is in the work of Patrick Atiyah in *The Rise and Fall of the Freedom of Contract* (1979). In this book he uses deconstructive strategies to prove that the age of freedom of contract has passed. In its place he proposes an essentially positivist model of reliance liability.

¹⁷⁸ Ian MacNeil developed a modernist contractual theory called the relational theory of contract (see for example articles in "Relational Contract Theory: Unanswered Questions - A Symposium in Honour of Ian MacNeil" in (2000) 84 *North West University LR* 737-852. The entire volume is dedicated to articles flowing out of the symposium. I was first alerted to the set of articles by Schemedemann "Beyond Words: An Empirical Study of the Role of Context in Contract Creation" (2003) 55 *South Carolina LR* 145 at 149). This theory is based on the belief that contracts are not relations between autonomous individuals, but rather the result of complex social relations and connections. MacNeil (and his followers) argue that contracts can only be analysed by identifying the most important social facts that give rise to the contract. When, for example, reading a contract of sale, the interpreter is required to also keep in mind the reasons why the seller wants to sell and why the buyer wants to buy. A detailed analysis of this theory of contract is beyond the scope of this study, but it is very useful as an alternative version of contractual relations and intentionalism. It shows that contracts are not necessarily liberal institutions and the demise of intentionalism need not prove fatal to contracts as we know them.

¹⁷⁹ This is not a once off interpretation but rather the process to make sense of the contract even while it is being formulated. The paradox is that a contract can be concluded even before it is finalized.

8. Conclusion

Intentionalism can be divided into two streams, namely subjective intentionalism, which involves the search for actual historical psychological intention, and objective intentionalism, the belief that any intention can be gleaned from the evidence of the contract like the contractual text. The main criticism against subjective intentionalism is that 1) it portrays intentions in an overly simplistic way; 2) it is based on untenable assumptions about historical discovery; and 3) it necessitates abstraction of the text and the parties from the historical and social circumstances that inform their decisions. Objective intentionalism is criticized for 1) its lack of accountability of interpreters using this type of interpretation and; 2) the linguistic fallibility of intention deduction because intention is always already an interpretation and can therefore never be objective. Responses to the failure of intentionalism vary from a retreat into positivism to the advocacy of free reading theories. The CLS movement advocated a free reading theory based on the social situatedness of the reader and the developments since the inceptions of the text. The reader is urged to take serious notice of the transformative capabilities of the text and to interpret the text in a matter that will adapt the text to serve the needs of the situation. Later critical writers point out that this radical undermining of interpretation nullifies the transformative potential of for example feminism and rights/race theories. The problem with indeterminacy is that it is totally subjected to the power relations in society. Interpretations are indeterminate for everybody, and the prevailing meaning is necessarily that of the powerful.

Neo-pragmatism offers an alternative theory about the nature of interpretation and the origin of meaning. Neo-pragmatists argue that the reader and the author are in the same position in that both are subject to the constraining influence of interpretive communities. They reason that an interpreter is always already constrained in the meaning possibilities open to her, but that she is also free to choose since she is part of various interpretive communities, each with its own constraints and freedoms. Post-structuralists seek to return the original difficulty to the interpretation process. They argue that the relation between author-text-reader is not a simple one and that the extent of the influence of one on the other is not stable but subject to continuous substitution and change. Both the author and the reader play a role in this theory, their

influence determined by the dominant political and social hegemony. In order to come to a just (and justifiable) interpretation, serious attention must be paid to the intention (as a process not a moment), but intention does not and cannot guide interpretation on its own.¹⁸⁰

¹⁸⁰ For a discussion of the distinction between a just and a justifiable interpretation see JWG van der Walt “Frankly Befriending the Fundamental Contradiction: Frank Michelman and Critical Legal Thought” in Botha, AJ van der Walt & JWG van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 213-226 at 218-219.

Reprise

During the first part of this thesis, four themes were discussed: 1) the nature of interpretation; 2) the nature of personhood; 3) the process by which texts are defined, and; 4) the nature of intentionalism.

As far as interpretation is concerned, the main questions were: To what extent is interpretation determinate? How and to what extent can an interpreter be constrained by the language and context of the text and interpretive rules? Most liberal interpretation theories (of which the present contractual interpretation theory is one) teach that the interpreter can be constrained by the objective meaning of the text, by interpreting the text in the context in which it was created and by setting down interpretive rules to facilitate the interpretation process. In this way the interpreter can be absconded from interpretive responsibility, and the consequences of the text can be solely ascribed to the authors thereof. This is especially pertinent in contractual interpretation where the interpretation practice is inherently intentionalist. However, postmodern literary theory, especially with regards to neo-pragmatism and post-structuralism, exploded the notion that the interpreter can escape interpretive responsibility. In the place of this notion, it is proposed that the interpreter is always influential in the interpretation process and that the text will by nature always include meaning other than the ones intended by the authors of the text. Instead of trying to justify their interpretations, interpreters are urged to take responsibility for their interpretations and to try to find the best possible answer to each interpretive dilemma.

The second theme of part I was the nature of personhood. In liberal theory, individuals are regarded as autonomous, self-activating and interest bearing, while society is seen as the sum of individual preferences. Liberal theorists advocate the maximisation of individual autonomy. Contractual parties are regarded as autonomous persons who decide the consequences of their contract and, provided they make their intentions known unambiguously, effect must be given to their wishes. On the other hand, communitarians regard the individual as a product of society. They encourage a return to group values and communal interests in the place of individualistic self-

pursuits. Communitarian contracts are interpreted in a way that serves the collective aims of society rather than the interests of the parties to the agreement. Critical theorists reject both the liberal conception of the self and the communitarian communal interest models. Critical self-rule, an ideal (as supposed to an actual or descriptive) critical theory of personhood, is suggested as an alternative to liberalism and communitarianism. This theory involves an interpretive notion of individuality, where the self engages in constant critical reflection regarding the nature of his existence. In the field of contractual interpretation this involves re-determination of the needs and rights of the parties each time they are confronted by a new (often unforeseen) situation.

The definition of texts, as the third theme of part I, involved an analysis of traditional characterization of texts as records apart from other texts and also of the parol-evidence rule as the premier rule dealing with texts. Both the traditional characterization and the parol-evidence rule (at least as it is presently applied) rest on the assumption that language has a functional nature. Texts are subsequently regarded as records of the intention of the author and moment when the contract is reduced to writing is regarded as the moment when the intention of the author is preserved and set apart from other texts. Post-structuralists criticize the functionalist description of language and in its place propose that language has a metaphoric and normative character. They argue that texts are never “found” but rather created through interpretation. On a practical level, this means that contracts are “created” or “defined” when they are applied in concrete situations. There is no final definition of the contractual text as long as there are potential situations in which the contract might find application.

The final theme of part I was that of intentionalism and the role of the author during interpretation. Contractual interpretation is explicitly based on intentionalism, that is: The aim of interpretation is to ascertain the intentions of the authors of the contract. There are two types of intentionalism namely subjective intentionalism which involves a search for the actual intentions of the authors at the conclusion of the contract, and objective intentionalism, which involves an objective interpretation of the text to ascertain the objectively manifested intentions of the authors. While most contractual theorists agree that ours is a subjective intentionalist interpretation

practice, many of the rules of interpretation have an objective intentionalist working. Various criticisms of intentionalism were discussed including those expressed by the CLS, neo-pragmatists and post-structuralists. Analyses of these criticisms led to the realization that contracts cannot but be interpreted with the parties in mind, but that contractual interpretation need not necessarily be intentionalist. By re-imagining the role of the author as an influence on (but not sole determinant of) meaning, and by approaching intention as an interpretation rather than a restraint, contractual interpretation can be flexible while at the same time retaining protection for the wishes of the parties.

In part II various rules of contractual interpretation are analysed in order to demonstrate both the effect of theoretical assumptions regarding interpretation, legal subjectivity, the definition of texts and intention on the application of the rules and also to show how acceptance of postmodern interpretative theory would potentially impact on the application of these interpretation rules.

6

Theory and the rules of contractual interpretation

1. Introduction

Three central themes, namely the golden rule of interpretation, the parol-evidence rule and good faith (*bona fides*), have been selected for discussion because of their importance for the theoretical understanding of the three main elements of contractual interpretation, namely intention (in a subjective historical sense), text (as a record) and person (as an autonomous subject). The golden rule concerns intention, the parol-evidence rule is relevant for the definition of texts and *bona fides* relates to legal subjectivity. By studying the effect of a theoretical shift regarding interpretation on the application of the three “rules”, one can glimpse the nature of a postmodern contractual interpretation practice.

In the preceding chapters aspects regarding prevailing contractual interpretation practices were evaluated against postmodern insights, the conclusion being that the present practice is based on certain specific theoretical misconceptions. This chapter evaluates the implications of a shift from the present interpretive theory to a more responsive postmodern (specifically post-structuralist and neo-pragmatist) theory of contractual interpretation. This evaluation will focus on various rules of contractual interpretation and explore the likely influence of a post-structuralist approach on the operation of these rules.

Before moving on to the specific rules of interpretation, a short overview of the South African contractual interpretation practice is provided. After this overview, first to be considered is the so-called golden rule of interpretation which is specifically concerned with the intention of the parties to the contract. Analysis of the golden rule yields proposals regarding its operation in an alternative postmodern interpretation theory. The focus then shifts to the parol-evidence rule, which is also discussed in some detail in chapter 4.¹ Here it will be approached from a post-structuralist/neo-pragmatist interpretation perspective in order to determine its continued viability. In

¹ In this chapter the parol-evidence rule was analysed with the purpose of exposing the assumptions about the nature of texts in the present contractual interpretation theory.

the penultimate section, the role of good faith (*bona fides*) as a factor in contractual interpretation is analyzed. Specific attention is paid to the relationship between the notion of dialogic self-rule and a contractual interpretation process based on good faith. In the final section, the conclusions of the chapter are drawn

2. A brief overview of the application of contractual rules of interpretation

In South Africa contracts are said to be based on consensus or a reliance on consensus and the aim of contractual interpretation is to ascertain the content of this consensus in order to give legal effect to the contract.² As previously pointed out, our interpretation practice is of an intentionalist nature: The claim is that intention can be extracted from a contractual text by the application of rules.³

2.1 Classification and systemization

The rules reveal features of both subjective and objective intentionalism.⁴ Most authors agree that the search for actual intention must first be accommodated, but that it would often be necessary, if subjective intentionalist rules fail, to resort to objective intentionalist and finally normative rules to settle the dispute.⁵ Consequently, rules directed at revealing the actual intention are recognised in concert with rules concerned rather with the impression created by the contract (objective intention).⁶ According to Van der Merwe et al, there are three classes of interpretive rules: 1) primary rules; 2) secondary rules; and, 3) tertiary rules.⁷ These “classes” pertain to the order in which the rules are applied, starting with the primary rules and, provided no

² Van der Merwe et al *Contract: General Principles* (2003) at 279.

³ See chapter 2 section 3 and 4; chapter 3 section 2; chapter 5 section 2 and 3; chapter 5 sections 2 and 3.

⁴ See chapter 5 sections 2 and 3.

⁵ See for example Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 4; Kerr *The Principles of the Law of Contract* (2002) at 383; Fouchè *Legal Principles of Contracts and Negotiable Instruments* (2002) at 108; Joubert *The General Principles of the Law of Contract* (1987) at 59.

⁶ See for example *Principles of the Interpretation of Contracts in South Africa* (2002) at 29; chapter 5 section 2 where the criticism on the literalist-cum-intentionalist interpretation practice is discussed.

⁷ Van der Merwe et al *Contract: General Principles* (2003) at 280. Keep in mind that “rules” as used here includes rules and presumptions. Although none of the other authors expressly accept the classification of the interpretive rules as primary, secondary and tertiary, most accept that subjective intentionalist rules (aimed at retrieving the actual intention of the authors) must first be applied, and if the ambiguity persists, then objective intentionalist rules must be applied and in the final instance if all else fails, normative considerations should be applied to bring the matter to a close. See for example Kerr *The Principles of the Law of Contract* (2002) at 383; Fouchè *Legal Principles of Contracts and Negotiable Instruments* (2002) at 108; Joubert *The General Principles of the Law of Contract* (1987) at 59.

clear answer regarding the meaning of the text emerges, moving on to the secondary rules and so on.

The primary rules regulate the search for the actual intention. Should the application to the document of these rules, which include presumptions like the ordinary meaning presumption and the ordinary business meaning presumption, give the court a clear indication of the intention of the parties, no further interpretation is deemed necessary. If the primary rules fail to give a clear indication of the intention of the parties, the secondary rules would be applied. These rules are not aimed at ascertaining the actual intention of the parties, but rather at objectively appraising the meaning of the contract. Secondary rules require, inter alia, that the nature and purpose of the contract be considered, and that written words on a printed contract be given preference. The *eiusdem generis* rule, which states that general meanings are restricted when used in concert with words relating to a specific class and the *expressio unius* rule, which states that special reference to a specific subject excludes subjects that would otherwise have been implied in the circumstances, find application.⁸ Where there are two possible interpretations, one valid and one not, the contract will be interpreted so as to be valid. Penalty clauses are strictly construed to minimise their effect. The *bona fides* interpretation principle⁹ is also relevant here. The principle involves an interpretation of an ambiguous term as if the contractual parties were fair, honest and had an equitable result in mind. This principle is a departure from the assumption that parties to the contract are self-regulating and autonomous beings that make their intentions known unambiguously. As with the primary rules, if the court can resolve any ambiguity using the secondary rules, the process stops here.

If the ambiguity persists after the application of the secondary rules, the court will apply the tertiary rules in respect of the text as identified by the parol-evidence rule. These rules are aimed at bringing the interpretation process to a close rather than finding the intention of the parties.¹⁰ Two rules are relevant here:¹¹ According to the

⁸ Van der Merwe et al *Contract: General Principles* (2003) at 282.

⁹ In *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 340, the court proclaims that it will sometimes follow the most just interpretation of the contract where the parties' intention is not clear. See also Van der Merwe et al *Contract: General Principles* (2003) at 283 and fn 353.

¹⁰ Van der Merwe et al *Contract: General Principles* (2003) at 283.

¹¹ Van der Merwe et al *Contract: General Principles* (2003) at 284-285.

quod minimum rule, words of doubtful meaning must be construed so as to put the least possible burden on the debtor. The *contra proferentem* rule teaches that contracts must be construed against the party on behalf of whom the contract was formulated. These rules are applied as a last resort.

2.2 Text/context

The application of these rules is influenced by the parol-evidence rule which purports to demarcate/identify the text as the subject matter of the interpretative process where there is a written document which is claimed to be a memorial of the contract. On the traditional understanding of the parol-evidence rule, the document is in principle regarded as the exclusive memorial of the transaction and it therefore constitutes the text to which the primary rules/golden rule of interpretation and the secondary rules have to be applied in order to extract the intention of the parties to the contract. The extent to which regard may be had to the factual context of the contract to understand the meaning of words in the document is regulated by the interpretation rule¹² (as a part of the parol-evidence rule). The parol-evidence rule is in a state of flux and the recent developments are considered below.

The rules discussed in this chapter are mostly primary and secondary rules. The golden rule of interpretation is discussed because it is the most important “tool” for the discovery of intention. It is also one of the first rules to be applied to all contracts. The parol-evidence rule is important because it is relevant to all written contracts and plays a crucial role during the process by which the contractual text is defined. The role of *bona fides* during interpretation is discussed because it is the most prominent “principle” dealing with the attributes ascribed to the contractual parties. At present it (*bona fides*) plays only a minor role: Principles of *bona fides* (as corrective interpretive measures) are not regarded as relevant during the application of the primary rules because the default conception of a contractual party is that of a self-regulating and autonomous being that makes her intentions known unambiguously. Only if she fails to make her intentions known unambiguously, may the court (when

¹² This rule regulates the admissibility of external evidence once the document has been found to be an exclusive memorial of the contract.

applying the secondary rules) interpret the contract as if the contractual parties intended a just result.

By analysing and discussing these rules, the reader can evaluate the potential influence of the theories discussed in the preceding chapters for contractual interpretation and specifically the application of contractual rules of interpretation.

3. The golden rule

3.1. How it works

“...The golden rule applicable to the interpretation of all contracts is to ascertain and to follow the intention of the parties; and, if the contract itself, or any evidence admissible under the circumstances, affords a definite indication of the meaning of the contracting parties, then it seems to me that a court should always give effect to that meaning...”¹³

The golden rule entails the following: First, the ordinary meaning of each word of the contract is assessed in the context provided by the contract. This is done by simply reading the contract. Then the relevant provision is interpreted, starting with the individual words, understood in conjunction with surrounding phrases and paragraphs and eventually the full grammatical context provided by the document in order to try and ascertain the meaning of the relevant sections. All the words are constructed separately and jointly because of the presumption that all the words are included in the text for a reason. Therefore all the words are first read in isolation, then in the context of smaller parts (phrases) and then bigger parts (paragraphs, sections).¹⁴ Unless it is clearly not the intention of the parties, the words are also afforded the meaning that they will usually have in the business usage of which the contract forms part.¹⁵ The interpreter then arrives at what can be described as the ordinary meaning

¹³ Innes J in *Joubert v Enslin* 1910 AD 6 at 37. See also *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 324; *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803; *Johnston v Leal* 1980 (3) SA 927 (A) at 940-1; Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 447 and 451; Kerr *The Principles of The Law of Contract* (2002) at 386.

¹⁴ The courts sometimes approach this process inversely, that is first the big parts then the smaller parts and so on. See for example *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A).

¹⁵ See for example *Columbia Nitrogen Corporation v Royster Company* 451 F. 2d 3 (1971) at 7. In this American case the court found that “will deliver 31000 tons of phosphate” actually means “projects to deliver 31000 tons of phosphate if the market forces allow”. See also Fish “The Law Wishes to Have a Formal Existence” in Norrie (ed) *Closure or Critique: New Directions in Legal Theory* (1993) at 165.

of the contract. During this stage a preliminary idea is formed about the meaning of the contract. Finally the preliminary contractual text, together with its ordinary meaning, is tested against all extrinsic evidence that may be admissible about the actual intention of the parties to the contract.¹⁶ During this stage, the parol-evidence rule (the integration rule) will play an important role. The full extent of the contract is also decided during this stage, involving both the ordinary meaning of the text and the so-called intention of the parties as evident from the admissible evidence. During this stage the substantive presumptions will play a role, as the intention of the parties and its enforceability are evaluated.

In South Africa, the interpretation of contracts is based on the so-called historical-psychological intention of the parties to the contract (that is the intention actually held by the parties at the conclusion of the contract).¹⁷ It is therefore not surprising that the primary rule of contractual interpretation is aimed at retrieving this intention.¹⁸ It should be kept in mind that the rule will usually be relevant when the parties do not agree about the meaning of the text, but it can also be relevant when they do agree.¹⁹ The application of the rule involves various presumptions and rules of interpretation, and no understanding of the rule would be complete without a discussion of these “auxiliary” rules. Jansen JA explained the process by which the golden rule of interpretation must be applied in *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd*.²⁰ He stated that the most important part of the interpretation of the contract

The position in South Africa is comparable. In one case the court found that the words “prairie fires” meant “veld fire” in the South African insurance context. See *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 252. See for further examples *Donovan v Turffontein Estate Co I* (1895) 2 OR 298 at 304; *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803; *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 777 and 791-792; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 122.

¹⁶ See section 4 of this chapter for discussion of the parol-evidence rule, which deals primarily with the admissibility of extrinsic evidence.

¹⁷ Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 451; Kerr *The Principles of The Law of Contract* (2002) at 41 and 388. Van der Merwe et al *Contract: General Principles* (2003) at 20 and 279. The party who alleges his interpretation must not only prove that his interpretation of the contract is the correct interpretation, but also that it is the *common* intention of the parties.

¹⁸ Kerr *The Principles of The Law of Contract* (2002) at 386.

¹⁹ Kerr *The Principles of The Law of Contract* (2002) at 387. When the parties do agree, the court will normally give effect to the meaning they commonly hold. See *Breed v Van den Berg and Others* 1932 AD 283 at 292; *Telkom Suid-Afrika Bpk v Richardson* 1995 (4) SA 283 (A) at 193.

²⁰ *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803; Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 446. This approach was indorsed in *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768.

is the straightforward reading of the text,²¹ which must provide the interpreter with a general picture of the contract.²² This first step introduces the first presumption vital to the application of the golden rule, namely that words are taken to bear their ordinary meaning. This presumption is often called the ordinary meaning rule but usually serves as a presumption rather than a rule.²³

The presumption that the words are used in their ordinary sense entails that the interpreter must attach to the words of the contract their ordinary meaning in relation to the way they are used in the contract.²⁴ This presumption is justified by the assumption that the parties have a shared understanding of language and that there exists (on a general level) a degree of consensus about the meaning of words.²⁵ In

²¹ *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803. He stated that "... At the risk of stating the obvious, it must be pointed out that the first step in interpreting a written contract is to read it...". I for one believe that such a statement is not a "stating of the obvious". Lawyers tend to forget (often in the dust of battle) that the contract is more than the clause that is the origin of the dispute. Many disputes can be resolved with reference to the whole, since the whole tends to give a bigger picture of the relationship than a localized focus on the disputed clauses. See also *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A).

²² Jansen JA calls this "...attaching to each word that ordinary meaning (of the several which the word undoubtedly will bear) which the context seems to require and applying the common rules of grammar...". (*Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803.) Kerr reminds us that the contract must reflect that the parties did in fact intend to enter a binding agreement. If the text does not reflect this it cannot be regarded as a contract and the interpretation stops at this stage. It must also be clear that the parties intended to contract with each other. See Kerr *The Principles of The Law of Contract* (2002) at 45, 49 and 51-2.

²³ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 121. A presumption differs from a rule in the sense that presumptions are foundational norms or background norms while rules are generally aimed at regulating a specific situation. Presumptions are those conditions that the courts deem to be the normal conditions under which a text will be created and understood. In other words they embody expectations held by the court regarding the contract (or type of contract). Rules on the other hand are aimed at transforming or regulating behaviour in a very specific manner. A rule that persons must stop at a stop sign regulates behaviour in that most people will be expected to stop at the sign (they can be forced to stop), while a presumption that persons stop at stop signs means that we will act, unless the contrary is proven, as if people stop at stop signs. See also Du Plessis *Re-Interpretation of Statutes* (2002) at 149-154. The utility of presumptions lies in the "background" (default meanings that the parties do not have to prove) that they provide to contractual interpretation. This background makes it possible for the parties to conclude an agreement without having to resort to recording every minute detail. Cornelius states, "...When parties reduce their contract to writing, a great deal inevitably remains unsaid. The purpose of the presumptions is to fill the resultant gaps...". See Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 118.

²⁴ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 121. Many theorists see the potential problems regarding the application of this issue as a rule rather than a presumption. The potential problems that are highlighted relate mostly to the intentionalist dilemma of finding an interpretive system that allows for swift and simple meaning generation while also catering for the need to find exactly what the parties intended. See Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 453; Van der Merwe et al *Contract: General Principles* (2003) at 280.

²⁵ See Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 453. The authors also note that a fair amount of criticism on the ordinary meaning presumption exists and that the courts do not look at the ordinary meaning presumption as an absolute.

other words, it is presumed that the words used in the contract bear the same meaning that they would usually bear in relation to the business area in which the contract was concluded.

The presumption that words were used in their ordinary business sense also allows the court the opportunity to look at the context, purpose and nature of the contract. Words have many ordinary meanings, and it is recognized that the meaning that seems natural or ordinary in a contract will often be a product of the context of the text. The word “shoot” will have two different meanings in the film industry and on a firing range respectively. The ordinary meaning attached to a word will be the meaning that seems natural in the context created by the contract (and of course the context in which the contract was created).²⁶ Because the contract provides the context that will ultimately strongly influence the eventual “ordinary meaning”, courts have used the presumption that a word will be taken to mean what the word ordinarily means in the business or trade in which the contract was concluded.²⁷ This introduces the first departure from the actual intention of the parties during the application of the golden rule. A presumption is the point of departure, and it seems strange that a rule aimed at finding exactly what the parties meant with the contract is realized by means of a presumption informed by general business meanings rather than the intention of

²⁶ *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803. Kerr *The Principles of The Law of Contract* (2002) at 385 uses the striking example of insurance contracts originally drafted in one country and later used in another country where the same concepts bear different names. See for example *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 252; *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A) at 858; *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd And Another* 1996 (4) SA 1167 (A) at 1178; *Van Zyl NO v Kiln Non-Marine Syndicate no 510 of Lloyds of London* 2003 (2) SA 440 (SCA) at 443.

²⁷ *Donovan v Turffontein Estate Co I* (1895) 2 OR 298 at 304; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 252; *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803; *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A) at 777 and 791-792; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 122. This interpretive strategy looks very much like purposive interpretation. The ratio of this type of interpretation is most likely that words commonly used in some or other sphere of business, were used in the contract to attain the type of performance that they typically signify in the ordinary run of that type of business. In *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) at 196 Marais JA remarks “...it is perhaps necessary to emphasise that the task is one of interpretation of the particular clause and that caveats regarding the approach to the task are only points of departure. In the end the answer must be found in the language of the clause read in the context of the agreement as a whole in its commercial setting and against the background of the common law and, now, with due regard to any possible constitutional implication...”.

parties themselves.²⁸ Our courts will often only depart from the ordinary meaning presumption if it will lead to absurdity.²⁹

After the application of the presumption that words bear their ordinary meaning, the interpreter arrives at a prima facie meaning of the contract.³⁰ There might still be discrepancies between the meanings of the words (if taken in isolation) and the combinations of words (phrases and sentences) in the document as a whole. For the purpose of integrating the meanings of the individual words, phrases and sentences, the contractual text (of which the extent has now been decided) is read as a whole, and the meanings of the smaller parts may be modified to relate and integrate the meanings into one coherent whole.³¹ The need for the modification of the meanings of words and phrases that clash with the meaning of the coherent whole lies in the presumption that there are no superfluous words in a contract.³² This presumption simply entails that all the words in the contract must be regarded as being there for a purpose. In normal circumstances, where at least some sensible meaning can be attached to the individual words of the text in relation to the whole, the individual words will have a bearing on the eventual meaning of the contract as a whole. As explained so far, the text embodies a range of possible meanings, and the outcome of

²⁸ It resembles an objective intentionalist presumption, and it is presumably aimed at easing the evidentiary burden on the parties. The onus would be on the party seeking to prove that her version of the contractual meaning (as agreed on by both parties) is one that deviates from the accepted business use of the word. It is interesting to note that the contract is informed by a source external to the negotiations of the parties, namely business practice. The applicable business practice is also a factual question to be answered in the trial, and the type of contract will have a large bearing on the type of business practices that will be deemed applicable.

²⁹ *Kalil v Standard Bank of SA Ltd* 1967 (4) SA 550 (A) at 556; *Racec (Mooifontein) (Pty) Ltd v Devonport Investment Holding Co (Pty) Ltd* 1976 (1) SA 299 (W) at 302. Courts are not allowed to deviate from the ordinary meaning of the words even where adherence will lead to a harsh bargain for one party. See for example *Rapp and Maister v Aronovsky* 1943 WLD 68 at 74; *Rashid v Durban City Council* 1975 (3) SA 920 (D) at 925; *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) at 566; *Smith NO and Another v Van Reenen Steel (Pty) Ltd and Another* 2002 (2) SA 613 (D) at 623; Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 454; Van der Merwe et al *Contract: General Principles* (2003) at 281-282.

³⁰ *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803. Jansen remarks that "...Thus we may arrive at a prima facie meaning of each word, phrase and sentence...". It is conceivable that the meanings of the words as opposed to the phrases and the phrases as opposed to the sentences (which in many contracts can be as long as an entire paragraph) may differ in meaning since meaning is often combinatorial in nature. See also Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 451-3.

³¹ *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803; *Sun Packaging (Pty) Ltd v Vreulink* 1996 4 SA 176 (A) at 184; Van der Merwe et al *Contract: General Principles* (2003) at 281.

³² *Cornelius Principles of the Interpretation of Contracts in South Africa* (2002) at 123; Van der Merwe et al *Contract: General Principles* (2003) at 281.

the interpretation process will depend largely upon the choice of combinations that the interpreter will use. In other words, the contractual text embodies a whole range of linguistic meaning possibilities and the task of the interpreter is to identify the meaning(s) intended by the parties.³³

In the process of applying the golden rule of interpretation, the interpreter is now at the stage where she has formed some idea of what the contract means. In the objective intentionalist theories of interpretation, the process would stop here, since the aim is to arrive at the intention of the parties as it is evident from the contractual text.³⁴ Subjective intentionalists have to search further for *the actual* intention of the parties. As Jansen JA states "... it may be necessary to modify further the meanings thus arrived at so as to conform to the apparent intention of the parties...".³⁵ This remarkable statement shows that the golden rule is more than an instrument to interpret the contractual text. It is in fact an investigation (within the limits of the law of evidence and the parol-evidence rule) into the "text" (or context) surrounding the contractual text (as delineated in the interpretation process). It can include a modification of the meaning of the contractual text (as appears from the first reading) in order to bring the contractual outcomes (which depend upon the interpretation) in line with the perceived intention of the parties.³⁶ In this sense, the golden rule affords the interpreter the chance to modify or even contradict the meanings of the contractual text (as read alone) in favour of a meaning revealed by evidence of the agreement (which might include evidence other than the contractual text). The golden rule of

³³ The process itself begins to resemble more of a cutting process as described by Foucault than an extraction of meaning. See Rainbow *Foucault: The Foucault Reader* (1986) at 88; chapter 4 section 3.

³⁴ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 29. Cornelius states here that "[w]ords are the primary and main source of information from which the intention of the parties should be ascertained and an interpreter may not venture beyond the words of the text to determine the meaning thereof". This is also mostly the case in (originalist and literalist-cum-intentionalist) statutory interpretation, where the meaning of the statute must be ascertained from the statute alone. For the role of historical interpretation see Du Plessis *Re-Interpretation of Statutes* (2002) at 259-270.

³⁵ *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803. The intention the interpreter has in mind here is the intention held by the parties at the moment of conclusion of the agreement. Also, the prevailing theory (subjective intentionalism) is aimed at ascertaining the thoughts behind the words rather than the meaning of the words themselves. Therefore, if the original intention of the parties can be found, effect must be given to that intention rather than the meanings revealed by the words alone. See Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 18.

³⁶ Jansen JA supports this contention with reference to the early decision of *Joubert v Enslin* 1910 AD 37. At 38 Innes J argued that the intention of the parties should be followed if "...the contract itself, or any evidence admissible under the circumstances affords a definite indication of the meaning of the contracting parties (my emphasis)...".

interpretation is therefore not strictly a rule of interpretation (in the sense of meaning finding) but rather a rule of contractual construction (in the strong sense).³⁷

Upon closer scrutiny, the application of the golden rule includes references to the purpose of the contract as well as the wider contractual context.³⁸ Purposive or teleological interpretation is not uncommon in statutory construction, but this strategy is very seldom explicitly used in contractual interpretation.³⁹ The aim of teleological interpretation is to read the text in close relation with the purpose for which the text was created.⁴⁰ As Du Plessis points out, purposive interpretation goes hand in hand with contextual interpretation.⁴¹ Any theory of purpose (of the text) necessarily involves a theory of context. The purpose of a contract is not freestanding, but connected to the parties and the specific context(s) in which they find themselves.⁴² Also, like any other part of the contract, the purpose of the contract is never self-evident, and any ruling as to the purpose of the contract is already an interpretation of the contract.⁴³ Kerr argues that the aim of contractual teleological interpretation is to

³⁷ See chapter 2 sections 3-7 for discussion of the distinction between interpretation and construction as approaches to interpretation.

³⁸ *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202; Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 449-451; Kerr *The Principles of The Law of Contract* (2002) at 388-391.

³⁹ In *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 261 Kotzé remarks that "...It is the duty of the courts to construe language in keeping with the purpose and object which they had in view, and so render that language effectual...". This is one of the few decisions in which the purposive approach seems to be explicitly endorsed. See also *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803-804; *First National Bank of SA Ltd v Rosenblum and Another* 2001 4 SA 9189 (SCA) at 196; Kerr *The Principles of The Law of Contract* (2002) at 387

⁴⁰ Du Plessis *Re-Interpretation of Statutes* (2002) at 247.

⁴¹ Du Plessis *Re-Interpretation of Statutes* (2002) at 247.

⁴² This point is very well illustrated by the facts of *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A). Two brothers concluded a loan agreement with the Bank of Lisbon and in an auxiliary agreement bound themselves as sureties for the loan (which was to their business). The auxiliary agreement stated that the brothers would be bound as sureties for any present or future indebtedness to the bank. They later discharged the original loan, but the bank held them liable for a subsequent debt. The majority of the court dismissed the defense of the brothers De Ornelas that the bank was acting in bad faith and that the brothers were therefore entitled to an *exceptio doli generalis*. When the court interpreted the agreement it held that the agreement was capable of the construction by the bank. However, upon a purposive construction the bank could not hold the brothers liable as sureties because the agreement was clearly aimed at the initial loan agreement. On the other hand, taking into account that the party arguing for a wide construction was a bank and that banks routinely hold sureties liable in similar circumstances, the construction approved by the court can prevail. The point is that purpose and context have a complex interaction, and one without the other can have a definite influence on the eventual interpretive outcome. The meaning is subject to both the wording and the context.

⁴³ For more on the teleological interpretation of contracts see Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 455. Teleological interpretation does not solve the problems of intentionalism because the purpose of a contract is always already an effect rather than a pure source of meaning. The purpose is always already an interpretation, just like findings regarding

place the interpreter as closely as possible to the actual circumstances that existed at the conclusion of the contract and by so doing allowing the court to enter the shoes of the parties in order to ascertain their intentions.⁴⁴ However, in most instances purposive interpretation is regarded as a secondary rule of interpretation, and therefore only becomes relevant when the intention of the parties is not “self-evident”.⁴⁵

3.2 Presumptions and the golden rule

Presumptions can be divided into presumptions of interpretation and presumptions of substantive law. The presumptions of interpretation deal specifically with the interpretation and meaning formation process. They help the interpreter by giving weight (legal enforceability) to what is seen as common sense inferences.⁴⁶ These presumptions are usually triggered by language use, for example when a contract deals with a certain type of business (say the film industry) the “ordinary business meaning” presumption will be triggered. These presumptions are not rules, but rather “anticipated” meanings. They are not aimed at regulating the contract, but rather at speeding up the process of proving the meaning of the contractual text. On the other hand, presumptions of substantive law are common law provisions that are not specifically “triggered” by language use but rather by the classification of a legal action as a contract. These presumptions are the legal rules that govern a contract and parties are assumed to have complied with them simply because they created a contractual relationship. This type of presumption is a good instrument for the implementation of policy.

It is clear that presumptions play an important part in the application of the golden rule of interpretation. The nature of presumptions is such that they are default meanings that will come into operation unless the parties expressly provide

the intention of the parties to the contract. Furthermore, like the intention of the parties to the contract, the purpose of the contract is a concept relating to the mental state of the parties and is therefore always behind a veil of language.

⁴⁴ Kerr *The Principles of The Law of Contract* (2002) at 391.

⁴⁵ *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202; Van der Merwe et al *Contract: General Principles* (2003) at 282.

⁴⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 120. Whether something is common sense or not will of course depend upon the context and the interpretative community in which an interpreter finds herself.

otherwise.⁴⁷ In other words, unless the parties are aware of all the presumptions that might influence the meaning of the contractual text that they created (and kept this in mind while creating the text), the presumptions are a sort of meaning by legal operation and not an intended meaning. Also, various arguments have been made that presumptions should be applied unless there is good reason why they should not be applied, because they form the basis of interpretation.⁴⁸ The parties can therefore be fairly certain that presumptions will play a role if the court has to interpret their contract. The evidentiary burden rests upon the party trying to prove that the presumption must not be applied.⁴⁹ Although presumptions do not stand in the way of intentionalism, the way they are used suggests that the court would rather resort to a so-called objective appreciation of the intention of the parties than an overly party-orientated (and thus subjective) process. As Cornelius remarks "...[t]he presumptions deal with linguistic matters ... they are aids to prevent or eliminate ambiguities or uncertainties...".⁵⁰ While the application of presumptions does not necessarily frustrate the goals of the golden rule, they definitely introduce a parallel agenda or purpose into the process of applying of the rule. The aim is no longer simply to find out what the parties intended, but also to attach meanings (where possible) to words in a way that has been proven to work in the past.

Three substantive presumptions are of special importance during the application of the golden rule of interpretation. These are the presumptions 1) that a person does not write what she does not intend; 2) that a person is familiar with the contents of the documents he signs; and finally 3) that the parties intend to conclude a valid contract. Unlike interpretive presumptions, these (substantive) presumptions will always come into operation once a legal act is classified as a contract. The presumption that a person does not write what she does not intend originates from the Roman-Dutch law according to which a person should not act contrary to her own intentions, and that parties should express themselves truthfully in a document.⁵¹ The centrality of this presumption to the application of the golden rule is obvious. It provides a justification

⁴⁷ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 118-119.

⁴⁸ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 119; Du Plessis *Re-Interpretation of Statutes* (2002) at 149-154. Du Plessis argues for example that "...presumption can thus 'stand in' for the Constitution where the Constitution does not cater for certain values...".

⁴⁹ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 118.

⁵⁰ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 120.

⁵¹ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 124-125.

for any finding of liability on the face of the contractual text because the party to the text is held legally responsible for the text (which in the intentionalist scheme is taken to reflect liability) that she created.⁵² This presumption places the onus on the party who avers that the real intention of the parties is different from the one reflected by the text.

Secondly, a party to a contract who signed the text is presumed to be familiar with the contents of the document. The ratio for this presumption is probably a mixture of commercial concerns and the assumption that a person who signs a document had read it first.⁵³ The presumption is central to the application of the golden rule because, like the presumption that one does not write what one does not intend, it justifies the allocation of liability according to the intentions reflected by the contractual document.⁵⁴

Finally, both parties are presumed to have intended to conclude a legally valid contract. This presumption flows from the principle that all persons are presumed to be law-abiding and innocent of wrongdoing.⁵⁵ Cornelius also remarks that this presumption might be the result of widely held beliefs that contracts freely entered

⁵² *Zandberg v Van Zyl* 1910 AD 302 at 314; *S v Friedman Motors (Pty) Ltd and Another* 1972 (1) SA 76 (T) at 80; *Premier Finance Corporation (Pty) Ltd v Rotainers (Pty) Ltd and Another* 1975 (1) SA 79 (W) at 81; *Kommissaris van Binnelandse Inkomste en 'n Ander v Willers en Andere* 1999 (3) SA 19 (SCA) at 31; *Michau v Maize Board* 2003 (6) SA 459 (SCA) at 464; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 125.

⁵³ The commercial concerns can be formulated as the concern that the need to prove that a party is familiar with the contents of a document (in each case where he signs a document) will place a heavy burden on ordinary business transactions. Also since we are only working with a presumption and not a rule, the opportunity always exists for the aggrieved party to prove that he was in fact not familiar with the contents of the document because of, for example, fraud on the part of the counter party. It should be noted that unilateral mistake does not rebut the presumption. If both parties were mutually mistaking each other's intentions and the intentions were reasonable, the contract will be void for lack of consensus. Where both parties labour under the same mistake, the contract can be rectified, or in certain circumstances, either of the parties may rescind the contract. See Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 126.

⁵⁴ There is a direct correlation between the liberal belief in autonomy and ascribing liability for a signature. This type of liability ascription is only justifiable when it is assumed that individuals are self activating and autonomous. Also, when arguing that the person affixing her signature to a document is familiar with the content of that document, one is making an assumption about the nature of a text. Familiarity with the content of the document implies that the document is a record (in the sense discussed in chapter 4 section 2) and also that interpretation is an objective assessment of the consent of the text (in the sense described in chapter 2 section 3).

⁵⁵ *Lesotho Diamond Works v Lurie* 1975 (2) SA 142 (O) at 146; *Brown v Oosthuizen en 'n Ander* 1980 (2) SA 155 (O) at 162; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 127.

into must be upheld where at all possible.⁵⁶ As far as this presumption goes, three levels of impact are identified.⁵⁷ The first level of impact is on the onus of proof regarding the legality of a contract. Where a contract seems, on face value, to comply with whatever formalities there might be for the specific contract, the contract is presumed to comply. This means that the onus of proof is on the party averring that the contract does not comply with legal formalities. This impacts on the golden rule's application because the text (whether legal or illegal) will be read as the legally valid option wherever practical.⁵⁸ On a second level, where an interpretation yields two possible meanings of the text, one legal and one not, the legal meaning will be presumed to have been the intended one.⁵⁹ The presumption influences the application the golden rule in that legality (and prevalent legal policy) is preferred over illegality (and non-prevalent policy).⁶⁰ On a third level, constructions that render a contract valid and enforceable are preferred over constructions that render the contract inoperative. This has the effect that terms that can be interpreted as either void or operative are interpreted as operative and terms that cannot be interpreted as operative, but can be discarded without making the contract inoperative, will be discarded.⁶¹ This operation of the presumption affects the application of the golden rule in the sense that the interpreter is instructed to make sure that the "bad term" does not frustrate the overall intentions of the parties to the contract.

3.3 Postmodernism, intention and the need for a golden rule

3.3.1 The role of thought and language during intention-formation

⁵⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 127. This belief links with the liberal assumption that persons are autonomous beings largely in charge of their own destiny.

⁵⁷ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 127-8.

⁵⁸ The point is not that illegal intentions will be negated, but rather that contracts that look like contracts belonging to a genre necessitating legal formalities will be interpreted as a contract of that genre whether it was so intended or not. This also brings the presumption into play that the contractual terms used bear the meaning usually employed in that business sphere.

⁵⁹ *Schoultz v Voorsitter, Personeel Advieskomitee van die Munisipale Raad van George* 1983 (4) SA 689 (C) at 706; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 127

⁶⁰ Although this part of the presumption might relate to actual formal legality like criminal sanctions (for example the prohibition on the sale of scheduled medicines without a prescription) and prescribed forms (for example with regard to the sale of fixed property) it will mostly deal with contracts that can be interpreted as either *contra bonos mores* or as in line with the *bona fides*. The interpreter must now follow an interpretation in line with the *bona fides*.

⁶¹ *Kroukamp v Buitendag* 1981 (1) SA 606 (W) at 610; *Moodley v Moodley and Another* 1991 (1) SA 358 (D) at 362; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 128.

The intention of the parties is a product of both thought and language, not just thought or language.⁶² Subjective intentionalists argue that the object of interpretation is to find the thought of the authors, while objective intentionalists look for the meaning of the language they used. Both miss the mark. Subjective intentionalism fails because language contains more than just the thoughts of the authors of the text and objective intentionalism falls short because language is more than an expression of meaning; it is an interpretable medium. Intention consisting of both thought and language is therefore not the type of intention depicted by either subjective or objective intentionalism. Intention is a dynamic meaning, continuously created through communication. The moment of consensus necessary to justify either objective or subjective intentionalism does not (and cannot) exist. If the criticism against the intentionalism raised here and in chapter 5 is accepted, the theoretical basis of the golden rule has to be re-imagined.⁶³

While the courts might have a different view of the golden rule of statutory interpretation (ie that it limits interpretation and provides an objectively certifiable interpretation), the theoretical premise of the rule can provide a basis for a different (postmodern?) understanding of the golden rule of interpretation. The application of the golden rule of statutory interpretation is the inverse of the same rule in contractual interpretation. The statutory golden rule of interpretation is an objective intentionalist (or literalist) rule aimed at preserving the literalist justification for interpretation, namely that the intention of the legislature (creator of the text) must be followed where this intention is plainly evident from the words of the statute.⁶⁴ This rule requires the language of the statute to reasonably permit departure from the literal meaning of the text before such a departure would be authorized. Also, literal reading of the text must result in an absurdity that was clearly not intended by the legislature before departure from the “evident” meaning is permitted.⁶⁵ Where the statutory rule is aimed at retrieving the ordinary meaning of the text (as evidencing the intention of

⁶² See chapter 5 section 6.

⁶³ See chapter 5 sections 2-4.

⁶⁴ Du Plessis *Re-Interpretation of Statutes* (2002) at 103-4. This rule was first formulated in *Venter v R* 1907 TS 910 at 914-5 and had confirmed by the SCA in 1999 in *Manyasha v Minister of Law and Order* 1999 2 SA 179 (SCA) at 185 and was applied as recently as 2003 in *Minister of Justice v Firststrand Bank Ltd and Others* 2003 (6) SA 636 (SCA) at 641.

⁶⁵ Du Plessis *Re-Interpretation of Statutes* (2002) at 104; *Hatch v Koopoomal* 1936 AD 190 at 212; *Shenker v The Master* 1936 AD 136 at 143.

the legislature), the contractual rule is aimed at retrieving the intention of the parties to the text (as evidenced by the plain meaning of the text). In contractual interpretation the text is regarded as *evidence* of the actual intention of the parties,⁶⁶ but in statutory interpretation the text is regarded *as* the actual intention of the legislature.⁶⁷ The statutory golden rule is based on the assumption that the text is a product of the intention of the legislature, and that the intention is reflected through the language used. The text is a declaration of intent.⁶⁸ By contrast, the contractual text is regarded as the result of an intention, a byproduct of the intention. The text is regarded as evidence of the intention.⁶⁹ When one deals with statutes, the aim of the statute is to govern behaviour in a certain way, while contractual texts are the evidence of agreements to act in a certain way. The essential difference is that the necessity of applying (interpreting) the language of the statute in every unique context is recognized under the statutory golden rule, but not under the contractual golden rule. While the former recognizes the necessity of contextualisation (meaning following context), the latter does not. The contractual golden rule calls for a separation of thought and language (we must find what was meant) while the former calls for an implementation of thought through language (we must apply what was meant).

In postmodern theory the connection between thought and language is analyzed and it is said that these two elements are not in conflict with each other, but rather in a mutually constituting relationship.⁷⁰ Thought must always be expressed (and thought) in language and language is always the result of thought. Although thought in a sense always seeks to escape language, to be by itself, the process of expression (of seeking to escape) always drags language back into thought. The expression of thought can

⁶⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 28; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479; *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 387; *Sonap Petroleum (SA) Pty Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239; *Bierman v Mutual & Federal Versekeringsmaatskappy Bpk* 2004 (1) SA 205 (O) at 211.

⁶⁷ See for example Du Plessis *Re-Interpretation of Statutes* (2002) at 103-105.

⁶⁸ See for example Du Plessis *Re-Interpretation of Statutes* (2002) at 103-105.

⁶⁹ See for example Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 28; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479; *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 387; *Sonap Petroleum (SA) Pty Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239; *Bierman v Mutual & Federal Versekeringsmaatskappy Bpk* 2004 (1) SA 205 (O) at 211.

⁷⁰ See for example Derrida "The Supplement of Copula: Philosophy before Linguistics" in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 88-90.

only feature in language. Unlike the need (or urge) to express pure thought (to show the unique in thought), language always captures and delineates thought (to show how it is related to what is already there). Language is used to make thought known, and by so doing expresses (or expends) the totality of the thought. Language fails at this because residues of past thought always loiters in language use. Language is iterable, it can be repeated in many contexts and therefore past uses of language create expectations about the way language can be used and this residue (or expectation) contains thoughts previously expressed. There is a dynamic tension between the uniqueness of thought on the one hand and the iterability (or repeatability) of language on the other.⁷¹ When formulating meaning, some of the uniqueness of thought is lost through its expression in language, but language itself contains a residue of past expression and this residue influences the eventual outcome of the interpretation process.⁷² In other words, some of what is thought is lost in expression, but some of what is said (and unsaid) is gained.⁷³ No rule can predict what will be lost or what will be “unintentionally” found.

When two persons decide to contract with each other by corresponding declarations, they set out to create an “intention”. They communicate their thoughts to each other and, on the basis of those communications, decide what they want to accomplish with their relationship. During this stage, the mitigation (contamination?) of their thoughts by language and the introduction of possibilities of meaning by language use already take place for a *second* time. The first time this mitigating and introduction of possibility take place is when the parties formulate their intentions for themselves. They are never (and can never be) completely certain of what they intend.⁷⁴ When the

⁷¹ Derrida “The Supplement of Copula: Philosophy before Linguistics” in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 91-92.

⁷² See in general Derrida “The Supplement of Copula: Philosophy before Linguistics” in Harari (ed) *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979) at 91-92; Derrida “Force of Law: The Mystical Foundation of Authority” in Cornell, Rosenfeld & Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) 1.

⁷³ This is the process by which the interpretive community of which one is part influences what one hears. This is not only a delineating process, but also an expansion of the possible meanings that the text may have. See for example Fish “What makes an Interpretation Acceptable?” in *Fish Is There a Text in This Class: The Authority of Interpretive Communities* (1980) at 338. Fish remarks that “...[d]isagreements are not settled by the facts, but are the means by which facts are settled...”. What is thought is always already in language. There is no step before language, but there is no language before thought either.

⁷⁴ Let’s say I intend to close the door of my office in the next ten seconds. Will I still do so if my promoter appears in the door? Would I do so if my phone rings? Does closing the door include locking it? Will I get up from my chair to close the door (my chair has wheels)? Yet when I proclaim that I am

parties create the contractual text they are in effect aiming to express their unique thoughts and, at the same time, attempting to delineate these thoughts through language. They want to tell us what they intend *and* what they do not intend.⁷⁵

Because intention is a dynamic meaning created through communication and interpretation, intention cannot be “found”, nor can it be “recreated”. To find something, it must be hidden, not lost. Because intention is dynamic and the result of interaction, once the moment is past the intention is lost, not obscured. Intention is moment specific and not the product of a specific language and thought interaction alone. Intention cannot be recreated because much of the original “components” (context, situatedness of the authors, linguistic conceptions held by the authors etc) of the intention are irretrievably lost. What is left to discuss is whether deconstruction allows for an interpretive approach that reconciles the individual needs for recognition (having our thoughts and intentions heard and considered) and the collective need for practical enforcement (having others understand how our thoughts and intentions will effect them).

3.3.2 Dichotomies and intention

Underlying each text is a complex set of dichotomies that influence the meaning of the text. These dichotomies consist of opposites that are thrust to prominence in relation to the existing hegemonies of power in the interpretive community.⁷⁶ In an interpretive community that values capitalism and individual autonomy, interpretation will reflect the values underlying these concepts, but this does not make interpretation

going to close my door, most persons will have a very good idea of what I “intend” to do. The point is that I am saying something both by expressing my thoughts and by refraining from expressing others and by the listener hearing what I am expressing. The meaning is both the result of my expression and the act of interpretation on the part of the listener. My “intention” is often the result of me not thinking about the intended action too much. As soon as I try to find out exactly what I intend, the intention is swamped by other possibilities.

⁷⁵ Although they cannot do either with 100% accuracy, nor have they conceived either to 100%.

⁷⁶ The concept of property exchange provides a striking example. Property exchange is based on a dichotomy of voluntary and non-voluntary action. When one deals with the sale of land, the general view is that one deals with voluntary property exchange (money for land). When interpreting contracts of sale (or most contracts for that matter) the interpreter would almost automatically afford a meaning to the property exchange that reflects this preference for voluntary property exchange over non-voluntary exchange. Where it seems that one party (illegally) forced the other to sell her property, such a contract would not be enforced. On the other hand, when one deals with the activities of the asset forfeiture unit, the non-voluntary property exchange is the norm. The court would be much less likely to invalidate forced property seizure than was the case in the contractual scenario (The latter situation is not contractual in nature). The point is that the inherent preference of one of the opposing concepts will influence the eventual outcome of the interpretative exercise.

determinate. A society will never have one set of beliefs only, as there will always be a struggle for dominance by ideologies and beliefs other than the preferred ones in the present hegemony.

In a deconstructive interpretive practice the interpreter would analyze the text as thoroughly as possible.⁷⁷ During this process the input of the parties to the contract is crucial. They must form part of the analysis and it should be their responsibility to sketch for the court what they intended with the contract and how they understood the aim of the counter-party and the law should permit them to do so. The difference between this approach and subjective intentionalism is that the court will not base its decision upon the intention of the parties. The input of the parties may not lead the court to their actual intentions, but it does allow the court to contextualize and place the contract. Why the contract was entered into is not important because it represents the intention of the parties then, but rather because it allows the court to ascribe a context sensitive meaning to the text now. It is not objective intentionalism either, since the court will not claim to attach liability to the intention expressed by the text. Instead, the court would base its decision upon an interpretation of the contractual text, influenced by the parties' participation in the process, specifically aimed at providing a just solution in the specific circumstances. The solution will not be based on something in the text that existed prior to interpretation either, but rather on the possibilities inherent in the text. It cannot be a free construction of meaning, because the interpretation must still be justifiable with reference to the textual meaning possibilities.⁷⁸

3.4 Differences between an intentionalist and a postmodern golden rule

Deconstructionists do not claim to know the actual intention of the parties (as subjective intentionalists do), nor do they claim to ascertain the parties' intention by

⁷⁷ It will never be possible to reach the core dichotomy required in structuralist thought. There will always be another level of analysis possible because meaning, being the result of difference, can never be the result of only one concept. Meaning is born out of difference and where there is difference, there are always two concepts that are again the product of two further concepts and so on. See for example Green & LeBihan *Critical Theory and Practice: Coursebook* (1996) at 215; Schanck "Understanding Postmodern Thought and its Implications for Statutory Interpretation" (1992) 64 *Southern California Law Review* 2504 at 2523; Davies "Authority, Meaning, Legitimacy" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 123.

⁷⁸ In this regard, the input of the parties must not be regarded lightly. It is after all they who will have to live with the decision of the court.

an objective appraisal of the text. Instead, deconstructionist interpreters recognize that any meaning (including a finding that a meaning is an “intention”) is a construction.

Deconstructionist interpreters recognize that any interpretation necessarily involves a choice among the contradictory impulses (or dichotomies) that constitute meaning. They are sensitive to those impulses and recognize that a just interpretation is at the same time responsible and context-sensitive. The identification of these impulses requires a deeper analysis of the text than intentionalist interpretive practices allow for. One needs to let the text reveal its possibilities (so to speak).

As far as the golden rule goes, it can no longer be taken to mean that the goal of interpretation of contracts is to ascertain the intention of the parties to the contract.⁷⁹ In postmodern theory intention is described as the situated interplay between thoughts and language as reflected by interpretation. Intention cannot be ascertained and every subsequent interpretation of the contractual text will yield a new intention. An alternative formulation would state that the goal of the interpretation of contracts (by the court) is to justly ascribe liability according to the meaning possibilities inherent in the contractual text.

The so-called ordinary meaning presumption will become superfluous in a postmodern interpretive practice. As Stanley Fish reminds us, we are always already reading the ordinary meaning of a text because of our situatedness in a particular interpretive community.⁸⁰ However, this does not mean that words have a determinate meaning, even on a “plain” or “ordinary” level. There will always be other ordinary meanings that can be as relevant for other interpretive communities, and since no one is part of only one interpretive community, ordinary meanings are not stable enough to provide a basis for interpretation.

⁷⁹ As formulated by Innes J in *Joubert v Enslin* 1910 AD 6 at 37. See also *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 324; *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 803; *Johnston v Leal* 1980 (3) SA 927 (A) at 940-1; Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 447 and 451; Kerr *The Principles of The Law of Contract* (2002) at 386.

⁸⁰ Fish “Is There a Text in This Class” in Fish *Is There a Text in This Class: The Authority of Interpretive Communities* (1980) at 307; Fish “What makes an Interpretation Acceptable?” in Fish *Is There a Text in This Class: The Authority of Interpretive Communities* (1980) at 341.

Interpretive presumptions provide examples of the way legal (and political) policy can influence interpretation. If individual autonomy and responsibility for individual actions are valued, a substantive presumption that one does not write what one does not intend will make sense when dealing with two parties who willingly and knowingly entered an agreement which is marginally detrimental to those close to the parties (but not so much as to bring into play public policy considerations that would override the aforementioned policy). On the other hand, the same presumption will not be compatible with a commitment to family preservation and social-mindedness (as argued by strong communitarians), since the effect on the family unit will weigh more than the commitment to individual self-determination. The point is that these presumptions can play (and I believe do play) an important role in the implementation of policy. However, it is pertinent that courts consider the application of presumptions in each individual case to prevent presumptions from becoming just hollow justifications of meaning. Presumptions as embodiments of vague values and so-called objective standards are not helpful in a deconstructive theory of contractual interpretation, but can be successfully utilized as value statements in a contextual analysis.

In a postmodern practice, substantive presumptions will still fulfill the role of shifting the burden of proof onto the party who argues that the contract should not be valid. They do not expressly state the law, but provide certain procedural conditions that simplify and shorten the court process, while still allowing for judicial consideration when the presumptions cannot stand (for example when the contract would not be legal and therefore operates contrary to the presumption that contracts are legal).

Finally, the rules and presumptions pertaining to the enforcement of the intention of the parties must be re-evaluated in the light of the changed theoretical position on interpretation.⁸¹ Intention in the deconstructionist scheme is neither a linguistic reflection nor a historical psychological moment, but rather the product of the interpretation process.

⁸¹ See chapter 5 section 7.

4. Parol evidence: Letting in the outside (or is it already inside?)

4.1 The parol-evidence rule in current contractual interpretation

“...The law wishes in its distinctness to be perspicuous; that is, it desires that the components of its autonomous existence be self-declaring and not be in need of piecing-out by some supplementary discourse...”⁸²

The parol-evidence rule was already the subject of discussion, so save for a brief restatement of the law as it stands, the aim is not to elaborate on the assumptions and on beliefs upon which the rule is based, but rather to imagine the rule in a new system of postmodern textual definition. The theoretical foundation of the rule is the belief that parties can fully record their agreement in a text and when this is the case, external or parol evidence will be irrelevant and misleading.⁸³ The parol-evidence rule is made up of two supplementary rules, namely the integration rule and the interpretation rule.⁸⁴ The integration rule states that the interpreter must assess to what extent the written document was intended to be an exclusive written memorial of the agreement (to what extent the contract is *integrated* into the written document).⁸⁵ The second rule deals with the admissibility of external evidence once it has been ascertained that the written document was in fact intended to be a full integration of the contractual terms. In terms of this rule, external evidence is allowed to help with the interpretation of the written document so long as it does not contradict the apparent meaning of the document.⁸⁶

⁸² Fish “The Law Wishes to Have a Formal Existence” in Norrie (ed) *Closure or Critique: New Directions in Legal Theory* (1993) at 157.

⁸³ *Venter v Birchholtz* 1972 (1) SA 276 (A) at 282; *Johnston v Leal* 1980 (3) SA 927 (A) at 944; *Standard Bank of SA Ltd v Cohen* 1993 (3) SA 846 (SE) at 849; Kerr *The Principles of The Law of Contract* (2002) at 349; Van der Merwe et al *Contract: General Principles* (2003) at 158.

⁸⁴ Van der Merwe et al *Contract: General Principles* (2003) at 157.

⁸⁵ This rule is often regarded as the parol-evidence rule proper. See for example Kerr *The Principles of The Law of Contract* (2002) at 348.

⁸⁶ Most indications are that the “apparent” meaning of the document would be the ordinary meaning of the terms in the document, but not always so. For some exceptions see Van der Merwe et al *Contract: General Principles* (2003) at 161; *Ten Brink v Motala* 2001 (1) SA 1011 (D) at 1013; *Philmatt (Pty) Ltd v Mosselbank CC* 1996 (2) SA 15 (A) at 23.

The application of the parol-evidence rule is largely based on the judgement of Schreiner JA in *Delmas Milling Co Ltd v Du Plessis*.⁸⁷ Schreiner JA identified three scenarios in which external evidence would be relevant (but not necessarily equally admissible) to prove the meaning of the contractual text. The first arises where the meaning of a written document is unclear, but the uncertainty can be cleared up by “linguistic treatment” of the document.⁸⁸ Linguistic treatment seems to involve seeking the ordinary meaning of the phrase in question, much like the application of the ordinary meaning presumption. Courts seem to accept that linguistic treatment means reading the text. During this initial stage extrinsic evidence is not allowed,⁸⁹ whether relevant or not and if linguistic treatment of the text leaves the court with a “plain meaning” the process stops here.

The second scenario arises when the difficulty cannot be “sufficiently” cleared up with a “linguistic treatment” of the text.⁹⁰ Recourse may then be had to evidence of the surrounding circumstances that might have been in the minds of the parties when they concluded the agreement, but not to the actual negotiations. Instances where extrinsic evidence will be allowed are treated as exceptions rather than the rule, because inferences made from extrinsic evidence are regarded as subjective judicial conclusions, while linguistic inferences are regarded as objective.⁹¹ Schreiner JA remarked that this type of case (when the difficulty cannot be “sufficiently” cleared up with “linguistic treatment”) should be called cases of uncertainty rather than cases of true ambiguity.

⁸⁷ 1955 3 SA 447 (A) at 453. The decision was cited with approval by the SCA as recently as 2004 in *Van Wetten and Another v Bosch and Others* 2004 (1) SA 348 (SCA) at 354. See also Lubbe & Murray *Farlam and Hathaway’s Contract: Cases, Materials and Commentary* (1988) at 456-457.

⁸⁸ See for example *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) at 1258; *Durban Add-Ventures Ltd v Premier, Kwazulu-Natal, and Others* (No 1) 2001 (1) SA 384 (N) at 386; *Marques v Unibank Ltd* 2001 (1) SA 145 (W) at 157; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at 458; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at 835; *Van Zyl NO v Kiln Non-Marine Syndicate no 510 of Lloyds of London* 2003 (2) SA 440 (SCA) at 450; *HNR Properties CC and Another v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) at 478.

⁸⁹ In exceptional circumstances reference to very limited “background evidence” would be allowed. See discussion on new developments supra.

⁹⁰ *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A) at 453; Lubbe & Murray *Farlam and Hathaway’s Contract: Cases, Materials and Commentary* (1988) at 456-457.

⁹¹ In *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A) at 455 Schreiner argues that “...whether there is sufficient certainty in the language of even badly drafted contracts to...make it unnecessary and therefore wrong to draw inferences from surrounding circumstances is a matter of individual judicial opinion in each case...”.

In cases of true ambiguity (the third scenario under the *Delmas* rule) the ambiguity persists even after recourse has been had to extrinsic evidence of the surrounding circumstances as indicated. In such cases the judge may look at evidence of the negotiations between the parties.⁹² The court reminded interpreters that extrinsic evidence should be used sparingly and with due circumspection, but added that recourse to such evidence must be permitted where it allows the court to reach the necessary degree of certainty as to the meaning of the contractual text.⁹³

The *Delmas* rule encapsulates the essence of the parol-evidence rule as applied in South African law. The rule aims to protect the sanctity of written documents as records of contracts, where the parties agreed to reduce their entire contracts to written texts.⁹⁴ Where a contract is made up of different parts, and one part is written and another not, only the written part would be subject to the parol-evidence rule.⁹⁵ Whether a contract was in fact intended to be a written memorial of the agreement is a factual question.⁹⁶

4.2 External evidence: New debates

While the *Delmas* version of the parol-evidence rule has found widespread acceptance,⁹⁷ recently the SCA seems to have revised the position regarding the admissibility of evidence regarding so-called “background circumstances”.⁹⁸ In *Coopers & Lybrand* the court argued that evidence of background circumstances

⁹² *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A) at 455.

⁹³ The reason for a recourse to external evidence was pronounced in *Tesvan CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 274-275 by Farlam AJA “... To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed and so overthrow the basis on which contracts rest in our law: the application of no contractual theory leads to such a result...”. See also *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A) at 455. Confirmed as recently as 2004 in *Van der Vyver v Du Toit* 2004 (4) SA 420 (T) at 423. See also *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 (1) SA 365 (SCA) at 370. Scott AJ discusses the admissibility of different types of extrinsic evidence in the case at 370-372.

⁹⁴ *Union Government v Vianini Pipes (Pty) Ltd* 1941 AD 43 at 47; Van der Merwe et al *Contract: General Principles* (2003) at 157; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 99.

⁹⁵ Van der Merwe et al *Contract: General Principles* (2003) at 159.

⁹⁶ Van der Merwe et al *Contract: General Principles* (2003) at 158; *Tesvan CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 274-275; *Brits v Van Heerden* 2001 (3) SA 257 (K) at 281.

⁹⁷ *Venter v Birchholtz* 1972 (1) SA 276 (A) at 282; *Johnston v Leal* 1980 (3) SA 927 (A) at 944; *Standard Bank of SA Ltd v Cohen* 1993 (3) SA 846 (SE) at 849; Kerr *The Principles of The Law of Contract* (2002) at 349; Van der Merwe et al *Contract: General Principles* (2003) at 158.

⁹⁸ See *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767; *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at 467.

would always be relevant to prove “...the genesis and purpose of the contract, ie matters probably present in the minds of the parties when they contracted...”⁹⁹ In *Sun Packaging* Nestadt JA argued that “...[I]t would seem that...background facts, is (sic) part of the context and as such always admissible...”¹⁰⁰ He distinguishes “background facts” from evidence of the surrounding circumstances, which according to “conventional thinking” is only relevant when there is ambiguity.¹⁰¹ Nestadt JA goes further to say (obiter) that there is evidence of a liberalizing trend according to which ambiguity is no longer regarded as a prerequisite for the admissibility of evidence of the surrounding circumstances.¹⁰² On the face of it this new approach clashes with the *Delmas* approach, which requires that pure linguistic treatment of the contract must first prove to be unsuccessful in eliminating the ambiguity before external evidence can be admitted.

The court is not clear on how this new approach impacts on the *Delmas* approach. I would suggest that there are at least three possible ways in which this new approach to evidence of background facts can be accommodated by the *Delmas* approach. The first is to separate instances where the *Delmas* approach would find application from situations where both parties wish to substantiate their versions of the contract with reference to external evidence. It can be argued that the *Delmas* approach was never meant to cater for the latter and, at least according to the present internationalist approach to interpretation, it would be unjust to prevent parties from adducing evidence that would prove their intentions, provided both parties choose to do so. In other words, *Delmas* was meant to protect a party who relied on the plain meaning of the text from having to prove such a plain meaning. Where the plain meaning is in dispute, and both parties wish to adduce evidence of the background facts to support

⁹⁹ Joubert JA in *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768.

¹⁰⁰ *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 184. See also *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768, where Joubert JA made a similar statement.

¹⁰¹ *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 184.

¹⁰² *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 184. See also *Pangbourne Properties v Gill & Ramsden* 1996 (1) SA 1182 (A) at 1187 where Harms JA remarked in this regard “...[I]t appears to me that the time may be ripe for this Court to reconsider the limitations placed in this statement (made in *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A) at 454) on the use of ‘surrounding circumstances’ in interpreting documents. The present instance does not, however, require it and I shall regard myself bound by the restraints set out...”

their particular “plain meaning”, the parties can be said to waive the first step of the *Delmas* approach.¹⁰³

The second way of reconciling the *Delmas* approach with the more liberal resort to background facts is to incorporate the latter with the first step in the *Delmas* approach.¹⁰⁴ By distinguishing evidence of background facts from other extrinsic evidence,¹⁰⁵ the linguistic treatment of an ambiguous phrase can be said to include reference to background facts as a way of contextualising the phrase in dispute, and, by doing so, simply finding the ordinary meaning of the phrase.¹⁰⁶ In this way the three steps of the *Delmas* approach can be retained.

The final way of accommodating the *Delmas* approach with the more liberal resort to background facts is to conflate the first two steps of the *Delmas* approach, which leaves it up to the parties to decide which evidence they would like to adduce, be it evidence regarding the surrounding circumstances or evidence regarding the ordinary meaning of the text in a linguistic sense or both.¹⁰⁷ It would probably lead to the

¹⁰³ While there is no support for this approach in the cases, in all three of the so-called “background circumstances” cases both parties adduced evidence to support their own version of the plain meaning. See *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767; *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at 467. Added to this, the parol-evidence rule does not seem to cater for situations where both parties adduce evidence regarding the plain meaning of the text. See *Union Government v Vianini Pipes (Pty) Ltd* 1941 AD 43 at 47; Van der Merwe et al *Contract: General Principles* (2003) at 157; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 99.

¹⁰⁴ There is support for the notion that extrinsic evidence of the background circumstances are always relevant during the assessment of the plain meaning of the text. See *Haviland Estates (Pty) Ltd and Another v McMaster* 1969 (2) SA 312 (A) at 336; *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W); Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 110.

¹⁰⁵ This was done in *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768. While evidence of background facts would place the interpreter in the shoes of the parties to form an objective opinion regarding the meaning of the disputed phrase, extrinsic evidence relates to evidence of the subjective intentions of each party such as previous negotiations and correspondence between the parties (as per Joubert JA in *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768). This distinction would of course be difficult to make in practice. See for example the judgement by Lewis JA in *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at 465-468. Lewis JA has difficulty distinguishing the background facts from extrinsic evidence regarding the actual intentions of the parties and she states that the distinction is “...[p]erhaps...a distinction without a difference...”.

¹⁰⁶ The ordinary meaning presumption forms part of the golden rule of interpretation and Joubert JA explains his resort to background circumstances as an application of the golden rule. It also seems as if he regards evidence of the background circumstances as part of the first step of the *Delmas* approach and he substantiates his resort to such evidence with reference to the *Delmas* case. See *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 110-111.

¹⁰⁷ This was also proposed by the South African Law Commission *Report on Unreasonable Stipulations in Contracts and the Rectification of Contracts* (Project 47) 1998 at clause 5. See also Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 109-111.

resolution of the tension between the *Delmas* approach and the more liberal resort to background facts when the court is faced in future with having to decide a dispute regarding the meaning of a phrase where one party avers an ordinary meaning of the phrase in a linguistic sense while the other relies on an ordinary meaning resulting from the admission of evidence regarding background facts. In such a dispute the court will be forced to deal with the potential conflict between the *Delmas* approach and the recent more liberal approach to surrounding evidence.

The important question for this chapter is how this more liberal resort to background facts impacts on the parol-evidence rule and the resulting assumptions about the nature of the definition of texts. Initially the idea that a text is individualized when it is created is maintained, since there is still a distinction between the text and the background facts. In other words, the text is still regarded as a record of the intentions of the authors and as an abstraction from the context in which it was created. However, the more liberal resort to background evidence involves (admittedly limited) recognition that texts are never “complete”. With the recognition of the need for contextualization of the text, the rationale for the parol-evidence rule is fundamentally compromised. If the text cannot signify its message without reference to evidence outside of the text, it is not of any more evidentiary value than unwritten texts. In short, if the meanings of written contracts are always subject to external proof, such contracts are no easier to prove than any other type of contract, and there is no reason why written contracts should receive special treatment.

4.3 Criticism against the parol-evidence rule

The parol-evidence rule has been criticized on two points. The first is the practical difficulties regarding the application of the rule (and the *Delmas* version in particular) that emerge when the interpreter has to decide whether the contractual document is sufficiently “uncertain”.¹⁰⁸ The courts do not offer any indication as to the standard of uncertainty required before recourse may had to external evidence.¹⁰⁹ This uncertainty

¹⁰⁸ Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 461; Van der Merwe et al *Contract: General Principles* (2003) at 161.

¹⁰⁹ In *Van Rensburg v City Credit (Natal) (Pty) Ltd* 1980 4 SA 500 (N) at 506, Kriek J offers this explanation of the *Delmas* rule: “...In most cases it is unwise, if not impossible, to endeavour to effect a rigid division of the evidence which has a bearing upon the interpretation of the document into the three classes (of the *Delmas* rule (my insert)). The three classes are like the colours of a spectrum with diffused borders between the different colours...”. See also Lubbe & Murray *Farlam and Hathaway's*

undermines the purpose of the parol-evidence rule, which is to restrict the inquiry into contractual meanings to the document where possible. Some academics try to negotiate this difficulty by construing the *Delmas* rule as subsequent steps in the interpretation process rather than three distinct types of situations.¹¹⁰ According to this reasoning, the *Delmas* rule seeks to force the court to first look at the text to see if that does not solve the problem by itself. Only after this has been done and the uncertainty persists may the court look at extrinsic evidence of a restricted scope; if this does not solve the difficulty it may have recourse to evidence of the negotiations between the parties. I would propose that the “threshold uncertainty” is unclear not because the courts do not spell out the requirements for uncertainty clearly, but rather because of the nature of language. Even the most perspicuous text has the potential (linguistically speaking) to have more than one equally relevant “ordinary” meaning.¹¹¹ The “self-evidence” of any meaning is dependent upon the context of the interpretation and the situatedness of the interpreter, rather than on the nature of the text.¹¹²

The second problem with the parol-evidence rule is that it is (according to many) not compatible with a basic principle of South African theory of contract, namely that contractual liability follows the actual intention of the parties to the contract.¹¹³ It has been pointed out that there is some absurdity in defending the notion that liability follows the intention of the parties while at the same time prohibiting evidence relating to this intention.¹¹⁴ As Kerr points out in a similar vein, the parol-evidence rule contradicts the very purpose of its creation.¹¹⁵ It is this problem that evokes the

Contract: Cases, Materials and Commentary (1988) at 461; Van der Merwe et al *Contract: General Principles* (2003) at 159-161; *Philmatt (Pty) Ltd v Mosselbank CC* 1996 (2) SA 15 (A) at 23; *Ten Brink v Motala* 2001 (1) SA 1011 (D) at 1013.

¹¹⁰ Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 461; Kerr *The Principles of The Law of Contract* (2002) at 406-407.

¹¹¹ See chapter 2 sections 6 and 7, especially the discussions around Fish's idea of ordinary meaning in section 6 and the idea of *différance* in section 7.

¹¹² See in this regard chapter 2 section 6.

¹¹³ Van der Merwe et al *Contract: General Principles* (2003) at 161; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 109; Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 461.

¹¹⁴ Lubbe & Murray *Farlam and Hathaway's Contract: Cases, Materials and Commentary* (1988) at 461-3.

¹¹⁵ Kerr *The Principles of The Law of Contract* (2002) at 407. He remarks "...[T]he first step is said to involve "linguistic treatment" that is, "studying the language" without recourse to any extrinsic evidence. It is suggested that this can only be successful [in highlighting the intention of the parties] where the parties have mentioned all the relevant circumstances in their contract...". In other words,

most criticism against the parol-evidence rule; most of the proposed solutions are also aimed at solving this difficulty. The rule was aimed at simplifying the process of contractual interpretation and to provide certainty regarding the possible effects (meanings) interpreters would attach to (or find in) the contractual text. However, the rule creates the situation where the parties have to cater for all eventualities in the contractual text, since failing to do so will render the effects of the contract uncertain by leaving these effects to be decided by the court (who will have to decide whether or not to examine extrinsic evidence).¹¹⁶ This makes the contractual negotiation process cumbersome and it prolongs the period before the contract will come into operation. It must also be kept in mind that in most instances the problem is not whether the contract covers a situation envisaged by the parties, but rather whether it covers some unforeseen circumstance. Parties do not need the court to tell them what they intended, but rather whether it would be just to find liability in a specific (unforeseen) instance.

The prevailing view in the law of contract is that texts are essentially records of the intention of the author and that the interpreter should not tamper with the text but simply extract the message deposited by the author of the text. The parol-evidence rule as it is presently applied strengthens this theory of texts and the influence of the interpreter on them. Two main criticisms are levelled against the rule, namely that it is theoretically incompatible with the subjective intentionalist will theory of contractual liability and that it is a practical failure. These criticisms are not aimed at undermining present understandings of texts, but rather at negotiating the problems that arise with regard to the application of the parol-evidence rule. Analysis of these criticisms shows that they in fact acknowledge the failure of the view of texts as records. The proposed remedies (such as liberalization of the rule or scrapping it altogether) are also motivated by the belief that the present interpretive dispensation (subjective intentionalism) will benefit from such remedies, rather than a reaction to the failure of the existing process for defining texts.¹¹⁷

4.4 The nature of texts and textual definition during contractual interpretation

the contractual text can only be “protected” from the influence of extrinsic evidence if it is already sufficiently certain. In such a case the need for recourse to external evidence is no longer an issue.

¹¹⁶ Postmodernists argue that this is in any event inevitable. See chapter 2 section 8.

¹¹⁷ See chapter 4 section 4.

As pointed out in chapter 4, the parol-evidence rule is based on a set of assumptions about the nature of texts. Good historical texts (at least according to good traditional historians) are ones that reflect the constituting facts of their genre, and likewise good contractual texts are described as ones that reflect the necessary elements for a binding agreement. Texts are seen as mere reflections of “history” or “facts”,¹¹⁸ and therefore the type of text that the parol-evidence rule aims to “protect” is not the unclear text, but the unambiguous text that might be “complicated” by extrinsic evidence.

Du Plessis distinguishes between narrative and normative texts¹¹⁹ and argues that a contract is an example of a hybrid law-text, one that is at the same time narrative and normative.¹²⁰ Narrative texts are (or more accurately profess to be) records or accounts of factual occurrences that influence the working of the law.¹²¹ These texts are usually employed to trump some other account of the “facts” and, by so doing, influence the way in which the law will attach liability in a specific circumstance. Contracts are normally (in the intentionalist scheme) narrative texts. They are construed as accounts of the common intention reached between the parties during negotiations. The evidence in delict cases (such as motor vehicle accidents) is also

¹¹⁸ The relevant facts would of course be the agreement reached between the parties. In a perfect world the text would reflect exactly what the parties intended and how the parties intended the agreement to operate (even in unforeseen circumstances).

¹¹⁹ Du Plessis *Re-Interpretation of Statutes* (2002) at 12-14. He describes law-texts as “...compound linguistic signifiers that, in a complex interplay with one another (and with other signifiers), render “law” intelligible and therefore interpretable...”.

¹²⁰ Du Plessis *Re-Interpretation of Statutes* (2002) at 13. It should be kept in mind that Du Plessis is not an intentionalist and does not share the positivist belief that texts can be a reflection of reality. Indeed at 12 he argues that “...[J]urists engaged in untangling questions of law do not actually work with “concrete facts” or “concrete norms”, but with *linguistic renditions* of what they *understand to be* facts and norms pertaining to “the law”, in other words, (narrative and normative law-)texts that they construct...”.

¹²¹ Du Plessis *Re-Interpretation of Statutes* (2002) at 12. Du Plessis strikingly remarks that “...[N]arrative law-texts profess to be linguistic accounts of (f)actual occurrences pertinent to the functioning of (the) law...”. This remark captures the essence of narrative texts. Firstly, narrative texts profess, they claim to be. Narrative texts cannot exist with other narrative texts about the same circumstances. These texts are always imposed upon, and in the place of another account of the situation. General accounts must always yield to the specific accounts. Secondly, narrative accounts are always represented as the true (or actual) accounts and as objectively (or factually) so. In other words the account is always immanent (the first-hand record) and unassailable (an objective account). For any text to be such, the text creator must be at the same time situated in the circumstance that the text appears to relate (in order to give a first hand, unmitigated account of the event) and, conversely, have a holistic view of the events (in order for the account to be objective). Thirdly, the narrative law-text functions in a system of law where there is just one option open to the interpreter, namely giving effect to the actual truth. The law (in this scheme) is not flexible, but merely a system of rules that will be influenced in one way or another by the facts. In other words the law is the constant in an equation and the facts are differentials.

treated as narrative text, that is, as reports of the facts as they happened. It is important to note that narrative accounts do not invite any interpretive creativity (or even involvement). The interpreter is required to simply read the text in order to comprehend “what actually happened”. This kind of text is created in order to “preserve” the factual reality that they are enlisted to record. They are in a sense monuments to the “facts”, lest distortions should influence the law in an unauthorized manner. The parol-evidence rule is meant to serve such narrative texts by protecting texts as monuments of past reality, because these texts are perceived to reflect the past more accurately than extrinsic evidence can. Paradoxically, the bulk of the criticism against the rule is aimed at its failure to adequately “protect” the intention of the parties. However, the parol-evidence rule fails not because of its operation, but rather because of the nature of language. *The* “message” gets lost, not because the parol-evidence rule fails to operate accurately, or because the rule bars outside evidence, but because there is always already more than one possible “message”.

The second type of law-text, namely a normative law-text, is also aimed at influencing the process by which legal effect is given to a text.¹²² However, unlike narrative law-texts that are aimed at relating a certain set of facts, normative texts verbalise expectations that certain future events or occurrences will be treated in a certain way. A statutory text envisages regulation of conduct across diverse circumstances, establishing a norm and relating certain actions to that norm and facilitating action according to the norm. The important aspect of a normative text is that it is flexible.¹²³ The text itself is an abstraction of the norm (as supposed to the reflection of it), and it is recognized as such. There are two important stages here: 1) the creation of the normative text (the abstract text) and 2) the application (interpretation) of a normative text in a specific context (the interpreted text). A

¹²² Du Plessis *Re-Interpretation of Statutes* (2002) at 12-13. Du Plessis argues that normative law-texts can 1) establish a legal norm, 2) relate a legal action to a legal norm or 3) regulate legal actions according to a certain legal standard. These possible meanings are all related and the application of any of the types of normative texts necessarily involves (to a larger or lesser degree) the application of the other two. No legal norm can ever be completely new, since any law must be justifiable, and legal justification lies in the relation of the new norm to some already existing principle or norm. Likewise, the creation of a new norm always involves the application of another norm. The relation of a legal action to a norm involves the extension of a norm to new circumstances, and by so doing the creation of a new norm. Also the relation of an action to a norm involves the application of the norm to which the action is related. Finally the regulation (or application) of a legal norm involves the establishment of a new norm by removing the norm from abstraction, and the relation of a action (the new circumstance) to the norm.

¹²³ Du Plessis *Re-Interpretation of Statutes* (2002) at 12.

narrative text imposes a reading on the situation, but a normative text removes the norm (abstract text) from abstraction in order to relate the norm to the specific circumstance (to make it an interpreted text). Because this is the case (normative texts must always be reinterpreted in every new context), normative texts are always subject to the influence of the context and the interpreter. A normative text allows for reflection upon the circumstances in which the present interpretation takes place. With a normative text, there is always the expectation that the text will be moulded and modified to ensure that justice and responsibility is accounted for.¹²⁴

Although narrative and normative texts differ, no text can be only narrative or only normative.¹²⁵ Narrative texts need normative aspects in order to have them imposed. A narrative text without any normative aspects becomes a story without any legal significance. A normative text without a narrative aspect becomes a hopeless abstraction, because narrative is necessary to link the norm with past legal practice and also with the birth of legal significance of the text (for example the passing of a bill, drawing up of a will or the formation of a contract). While the account of what the parties agreed to is a narrative law-text, the activation of the contractual legal norms makes the text a normative law-text.

The act of defining a text (especially a legal text) always involves two urges, specifically the urge to find the unique in the text and the urge to find how the text fits in with other texts. The interpreter must take these urges seriously. He must pay close attention to what the parties seemed to intend, while at the same time keeping the needs of the particular situation in mind. He must find a text that is both just (in the circumstances) and one that can be justified (in the community in which the interpreter finds himself). No text is already defined (before interpretation); it is always waiting to be constructed.¹²⁶

4.5 Evaluating the parol-evidence rule: Enter postmodern critique

¹²⁴ Justice demands that the unique circumstance be recognized and catered for, while the law demands that the actions taken be responsible and connected to what is legal. Both the unique and what has (and can) been done must be kept in mind.

¹²⁵ Du Plessis *Re-Interpretation of Statutes* (2002) at 13. He remarks, "...[A] distinctive feature of all kinds of legal texts is that they *can be* and indeed *strive to be of effect*. Any resolution of a legal issue *always* draws on both narrative and normative law-texts...".

¹²⁶ See chapter 4 section 4.

The parol-evidence rule (as it stands, with its present ratio) cannot cater for normative law-texts (or for postmodern narrative texts for that matter). Reading a normative text necessarily involves the application of certain norms to the context or situation. This can only be achieved by relating the present situation to another situation where the norm has previously been applied or considered.¹²⁷ In a contractual relationship this would necessarily involve an investigation into the origin and development of the contract. This would undermine the present ratio of the parol-evidence rule, namely the protection of documentary integration of the agreement and the supposed certainty (to the parties and the wider public) regarding the effects of the contract. The present rule is not of much use with regard to a postmodern narrative text. In postmodern theory narratives are recognized as interpretations driven by the possibilities of meaning inherent in language and the specific interpretative communities in which the interpreter (text creator) finds herself. Consequently, the text cannot be a reflection of reality because in this scheme reality is always a rendition of perspective and language. A postmodern narrative is not a record, but rather a version of reality drawn from an irreducibly plural whole. There can never be only one version of reality. The apparent message or reflection that the parol-evidence rule is aimed at protecting is always just one of many possibilities. In a sense, the gate is closed after the horse had already bolted (or the kraal filled up with all the animals imaginable). The rule protects singularity when plurality is already inescapable.

It is clear that it is not necessarily the working of the rule that we need to amend but rather our theoretical understanding of texts. The problem is not so much that the parol-evidence rule does not work properly, but rather that the targets set for the rule are unattainable. Texts are always defined as much by what is said as by what is omitted.¹²⁸ Even if interpreters were to have recourse to all extrinsic evidence regarding the intentions of the authors, this evidence will still only be text,

¹²⁷ The interpretation of a contract will normally be an issue where the parties disagree about the nature of the contractual consequences (rights and duties). The court must attempt to show that their interpretation is somehow justified by either the text or the subjective intention of the parties to the agreement. Consequently, the court must link their interpretation with one that is manifestly accepted by the parties.

¹²⁸ Fish "Is There a Text in This Class" in *Is There a Text in This Class: The Authority of Interpretive Communities* (1980) at 318; Fish "Fish vs. Fiss" in *Fish Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) at 126. Fish remarks that the facts are not the elements that settle disagreements, but rather that disagreements are the means by which the facts are settled. See also Fish "What makes an Interpretation Acceptable?" in *Fish Is There a Text in This Class: The Authority of Interpretive Communities* (1980) at 338.

characterized by the same conditions as the original text that stands to be supplemented by the extrinsic evidence. In a sense, the outside evidence is already part of the interpretation process because it is omitted. No text can ever be interpreted in isolation and therefore any reading of the text includes a reconstruction of the context that gave birth to it.¹²⁹ The text is already a reconstruction and not a reflection, and the extrinsic evidence likewise is a construction, and not some tool that can make the reflection of the text more accurate. With or without extrinsic evidence, we are in the same position.

The question for this chapter is whether the parol-evidence rule can serve some purpose in a postmodern theory of contractual interpretation. Can the parol-evidence rule serve another purpose if the theoretical understanding of texts were to change? In a new theory, the focus would shift from texts as a preservation of a (singular) meaning to texts as possible meanings. The text becomes an abstraction of many possibilities, out of which the interpreter must fashion meanings that will be just and coherent in the circumstances before the court. There would no longer be a need to protect the sanctity of the textual message because it has been acknowledged that the message is the result of interpretation and not reflected by the text. Interpreters “sever meanings” rather than extracting them.¹³⁰ The question is therefore whether the parol-evidence rule can serve a purpose other than to protect meaning.

4.6 How is the postmodern parol-evidence rule different?

The parol-evidence rule can have a place in contractual interpretation if its theoretical basis shifts from a narrative approach to one combining both normative and narrative elements. As was pointed out above, the narrative approach to texts lies at the heart of

¹²⁹ Fish “The Law Wishes to Have a Formal Existence” in Norrie (ed) *Closure or Critique: New Directions in Legal Theory* (1993) at 162-163. Fish strikingly remarks “...[I]n other words..., an instrument that seems clear and unambiguous on its face seems so because “extrinsic evidence” - information about the condition of its production, including the situation and state of mind of the contracting parties, etc. - is already in place and assumed as a background; that which the parol-evidence rule is designed to exclude is already, and necessarily, invoked the moment that writing becomes intelligible...”. Fish further deconstructs the distinction between contradiction and explanation (which forms part of the rules that make up the parol-evidence rule. Evidence might be produced to explain the text but not vary or contradict it). Fish questions whether it is possible to distinguish the two types of evidence. If a text is self-explanatory, there is no need to produce extrinsic evidence. However if the text is not self-explanatory, the relation of the text to extrinsic evidence can only be judged once the evidence has been submitted. The point is that the relevance of the evidence can only be evaluated once it has been submitted and it is by definition no longer extrinsic.

¹³⁰ Rainbow *Foucault: The Foucault Reader* (1986) at 88.

the parol-evidence rule, because the rule (as it is presently understood and criticised) is mainly aimed at protecting the (textual) record of the facts (since the parties agreed that the text would be the record). If we shift the focus from what was (seemingly) already there (that is the message of the text), to what it can be (the normative possibilities inherent in the text), the parol-evidence rule would make sense. In this scenario, the text is the language act of the parties that governs the relationship between them.

The text is not a fixed meaning, but rather the catalyst or origin of multiple potential solutions to the various contractual disputes that might arise. It is the task of the interpreter to construct a solution out of the variety of textual possibilities. The solution must simultaneously be capable of answering the unique questions before the court, and it must be responsible.¹³¹ The role of the parol-evidence rule is to ensure that the text is taken seriously.

The idea that a contractual text can be both a normative and a narrative text is not new.¹³² The main reason for the rejection of this approach in the past lies with its implications for intentionalism.¹³³ In the light of the developments in this field (namely the theoretical implosion of intentionalism) these objections are no longer valid.¹³⁴

¹³¹ The concept of uniqueness is strongly related to the Derridian sense of justice. See Derrida “Force of Law: The Mystical Foundation of Authority” in Cornell, Rosenfeld & Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) at 17-20. The responsibility concept relates to the need to have the decision related to law and the norms of law. The decision must be a legally defensible one. The decision or contractual meaning must stem from the legal setting and not some whim of the judge and, importantly, it must be seen to do so.

¹³² GF Lubbe and CM Murray noted this possibility as early as 1988 in Lubbe & Murray *Farlam and Hathaway’s Contract: Cases, Materials and Commentary* (1988) at 463-464. They highlighted the possibility that contractual interpretation can bear a normative character and that the parol-evidence rule can in fact facilitate cheaper and more just contractual interpretation by keeping disputes of fact out of the process.

¹³³ It was often (and is often) argued that the normative approach to contractual interpretation substitutes the intention of the parties with the intention of the court. See for example Kerr *The Principles of The Law of Contract* (2002) at 401. Kerr states here that “...A third possible reason may be the adoption by some of the theory that a court is not concerned with the parties’ intention, only with what the words they chose mean to others who did not choose them, and who did not make the contract. This...is the most unacceptable theory of contract...”. In the light of recent developments in the field of linguistics, this objection is first realized and then proven to be beside the point. Yes, judges do substitute (in the sense that they form a new intention) the intention of the parties with their own interpretation of the text when using the normative approach. But the intention of the parties can never (not even in the narrative approach) be a restriction on judges because it is itself already an interpretation.

¹³⁴ See chapter 5 section 2-6.

It should be noted that a normative approach must be linked with a narrative approach to allow optimal party participation. The narrative textual approach allows the parties to submit what they meant with the terms of the contract (much like the interpretation rule of the parol evidence process as presently applied) but, because of the normative aspects of the textual understanding, the narrative approach allows the court to decide to construct an interpretation other than that suggested by the evidence led by the parties. The court will be well and truly confined to the text and any interpretation that they endorse will have to be justifiable in terms of the policy that they seek to implement. The parol-evidence rule will no longer be a way of shifting responsibility for interpretation to the parties, but rather a way of forcing the court to take an active part in the construction of a responsible contractual solution.

There are theoretical and practical consequences to accepting a post modern parol-evidence rule. On a theoretical level, interpreters have to deal with the notion of texts as normative and interpretive as opposed to merely records of intention. We can no longer justify meanings as if these are merely reflected by the text. Rather, meanings must be justified in relation to the situation in which these meanings must be applied. In other words, the way in which the contract is applied must be justified. We no longer ask whether the parties intended a certain result, but rather if the result is justifiable given the specific circumstances and the context of the interpretive question. On a practical level, parties will no longer only supply the court with evidence of their intentions (although such evidence will still be relevant) but also of reasons why the court should interpret the contract in a certain way. Because it is recognized that intention is also an interpretation, the discovery of intention would no longer be the object of the interpretive exercise. The intention of the parties would now be a factor in the determination of the eventual outcome of the process, but it would not be determinative.

5. The dialogic self and good faith in contractual interpretation

5.1 Good faith and the courts

“...Where good faith dictated that the rights of one contracting party had to be extended in order to satisfy Roman society’s precepts of fairness and equity, the judge could employ the expansive working of *bona fides* to effect such an extension...”¹³⁵

What remains for this chapter is to see how a re-evaluation of the nature of legal subjectivity will affect contractual interpretation. In order to do this the contractual interpretation practice must be evaluated to reveal the prevailing assumptions about subjectivity and to re-imagine the practice in the light of a postmodern description of subjectivity. The main contractual principle dealing with subjectivity is that of the *bona fides*. By examining the way in which *bona fides* principles are presently approached and by re-imagining the role of these principles in a hypothetical postmodern interpretation practice, the role of assumptions about legal subjectivity can be evaluated.

It has been said that the South African law of contract is based (among other things) on good faith,¹³⁶ but exactly what this means is unclear. Whenever *bona fides* and its relation to the law of contract are discussed, it is always stressed (by both the proponents of more active enforcement of *bona fides* and their antagonists) that this concept plays an important role in the law of contract, but the description of this role varies substantially.¹³⁷ The recently adopted stance by the SCA is that *bona fides* only plays a background role in contract.¹³⁸ The main objection to affording *bona fides* a more direct role seems to be that values like fairness and equity do not have a definite content and that resort to such values will inevitably lead to legal and commercial

¹³⁵ Du Plessis “Good faith and equity in the law of contract in the civilian tradition” (2002) 65 *THRHR* 397 at 400.

¹³⁶ *Meskin v Anglo-American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W) at 804; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) at 331; *NBS Boland Bank Ltd v One Berg River Drive CC and Others*; *Deeb and Another v ABSA Bank Ltd*; *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at 937; *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (K) at 474; *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at 28; *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 339.

¹³⁷ See for example the divergent opinions expressed in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) at 331 and *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at 28.

¹³⁸ The opinion of the court was enunciated in *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 339 by Brand JA. He stated that “...although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that the court can employ to intervene in contractual relationships...”.

uncertainty.¹³⁹ In recent cases such as *Brisley* and *York Timbers*, the SCA held that the constitutional values of dignity, equality and freedom require that the court enforce contracts wherever possible.¹⁴⁰ It seems that as far as using *bona fides* as a contractual standard is concerned, the required measure of good faith is not considerable. Once a party can show that her version of the contract is not against public policy (if it were the other party would be absolved), the contract is regarded as having satisfied the good faith requirement. The test for public policy is very thick and difficult to satisfy.

The question now arises why we seem to place such a low value on good faith. The answer to this question can be found in the reasoning of the SCA. In *Brisley v Drotsky*, the majority¹⁴¹ explains the weak position of *bona fides* by ranking the requirement of good faith alongside the value of individual autonomy.¹⁴² They approvingly quote Hutchison: "...[good faith] is not, however, the only value or principle that underlies the law of contract; nor, perhaps, even the most important one...".¹⁴³ The court characterizes a decision based on good faith as a value

¹³⁹ *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 339. Brand pronounces "...[A]fter all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder..."

¹⁴⁰ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 28 and *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 339.

¹⁴¹ Consisting of Harms AR, Streicher AR en Brand AR (who also delivered *Afrox Healthcare Beperk v Strydom* 2002 (6) SA 21 (SCA) and *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA)).

¹⁴² *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 15. The learned judges remark that "...[W]at die rol van goeie trou betref, stem ons in wese saam met die siening van prof Hutchison (op 743 - 4) waarvolgens goeie trou nie 'n onafhanklike, oftewel 'n "free-floating", basis vir die tersydestelling of die nie-toepassing van kontraktuele bepalings bied nie. Goeie trou is 'n grondbeginsel wat in die algemeen onderliggend is aan die kontraktereg en wat uiting vind in die besondere reëls en beginsels daarvan. Of, soos hy dit ter aangehaalde plaatsel stel: "What emerges quite clearly from recent academic writing and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contract; nor, perhaps, even the most important one."

'n Ander waarde onderliggend aan die kontraktereg is deur Rabie HR in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) op 893I-894A onderstreep toe hy daarop gewys het dat dit in die openbare belang is dat persone hulle hou aan ooreenkomste wat hulle aangegaan het. In laasgenoemde verband het Steyn HR in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) op 767A, gewag gemaak van – "die elementêre en grondliggende algemene beginsel dat kontrakte wat vrylik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word" ...".

¹⁴³ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 15. See also Dale Hutchison "Good Faith in the South African Law of Contract" SA Law Commission, Draft 199 at 743-744. This part of the quote is interesting because the rest of the quote was sufficient to bring the point the courts seeks to make

judgement and argues that deciding a case on the basis of such values would run counter to the established principle of *pacta sunt servanda*. According to this view the court must be the servant of the contract, not the other way round. The court's view is related in broad terms to the objective intentionalist theories of contractual interpretation and liability, the idea being that parties should be able to ascertain what the contract says in order to act accordingly. The court argues that any good faith remedy would negate the value of the contractual text as evidence of the intention of the parties and would replace this intention with the value judgement of the interpreter.¹⁴⁴ In closing, the court argued that the principle of good faith finds embodiment in public policy and that the court will only declare a contract to be contrary to public policy in exceptional cases.¹⁴⁵

The implications of this judgement are important. Firstly, while contracts are based on good faith, it is just one of the values that influence contractual interpretation. Secondly, when faced with a conflict between freedom of contract and good faith (*bona fides*), the court must usually give preference to freedom of contract. The court may only disregard freedom of contract in cases where the contract is *contra bonos mores*, which leaves a much smaller scope for judicial interference than would a substantive application of the *bona fides*.¹⁴⁶ Thirdly, the court follows (at least according to the public policy inquiry) an all-or-nothing approach to the application of remedies based on *bona fides*: according to the principles of contractual freedom the contract is either void for lack of good faith or it is valid.¹⁴⁷ The court does not envisage any compromise between contractual freedom and principles of good faith.

across. (See full quote in previous note.) The inclusion of the last part seems to emphasize the inferiority of good faith in relation to other values (especially individual autonomy and contractual freedom) in the eyes of the court.

¹⁴⁴ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 16. The judges argue that "...[D]ie gevolg sal immers wees dat die beginsel van *pacta sunt servanda* grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat "n bepaalde Regter in die omstandighede as redelik en billik beskou. Die maatstaf is dan nie meer die reg nie maar die Regter. Vanuit die hoek van die kontrakterende partye gesien, sal hulle nie kan handel op die algemene verwagting dat wanneer daar "n dispuut tussen hulle ontstaan hulle kontrak ooreenkomstig die terme daarvan afdedwing sal word nie. Hulle sal moet wag en sien of die individuele Regter die bepalings as redelik en billik beskou. Dat so "n algemene benadering nie aan die behoeftes van die handelsverkeer sal voldoen nie, spreek eintlik vanself...".

¹⁴⁵ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 18.

¹⁴⁶ Keep in mind that the court may find a "just" interpretation where the intention of the parties is not clear. See *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 340.

¹⁴⁷ Keep in mind that the court has more scope when interpreting an "unclear" contract. The court can also by the way of tacit terms and novel *naturalia* approach contractual parties in a normative way. See previous fn.

The reasoning in *South African Forestry Company Ltd v York Timbers Ltd*¹⁴⁸ reinforces the aforementioned view. In this case, the advocate for the appellant also sought to have the adverse effects of the contract (as interpreted by the court) negated by inferring that the principles of good faith that underlie the contractual relationship necessitated the relief sought by his client (SAFCOL).¹⁴⁹ However, because arguments based on direct inferences from the principles of good faith failed in *Brisley*, the advocate sought to have an implied term recognized to the effect that the parties must not only follow the dictates of the contract, but also do so according to the principles of good faith.¹⁵⁰ By doing so, the advocate sought to not only circumvent the restrictions of *Brisley*, but also to be able to cite *Brisley* as authority for the importation of the implied term.¹⁵¹

The court rejected this approach mainly because of the scope of implied terms in general. Unlike tacit terms that are specific to each individual agreement, implied terms (once recognized) will be part of every subsequent contract of a similar kind.¹⁵² Implied terms become part of the law of contract in general when they deal with contracts generally, and part of the law of specific contracts when it is recognized in relation to a specific type of contract. The court argued that the wide implications of the recognition of an implied term trumps whatever dictates of fairness and good faith might be relevant in specific cases. Freedom of contract (as evidenced by the intention

¹⁴⁸ 2005 (3) SA 323 (SCA).

¹⁴⁹ *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 338-341.

¹⁵⁰ *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 338. Brand formulates the term as the duty to "...not only perform... obligations in compliance with the contract, but they must do so in accordance with the dictates of fairness and good faith...".

¹⁵¹ *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 338-339.

¹⁵² *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 339-340. Brand remarks "...[implied terms] can only be implied when it is considered good law in general. The particular parties and the set of facts can serve only as catalysts in the process of legal development...". It is interesting that the parties specifically are denied recourse to justice because the general practice of law might be harmed in future. The conflict between justice and justification as identified by Derrida is acutely reflected by this statement by Brand JA. See Derrida "Force of Law: The Mystical Foundation of Authority" in Cornell, Rosenfeld & Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) at 22. Derrida argues that justice and justifiability are two contradictory impulses always present in law. There is always the need for specific justice, specific attention to the context. At the same time any finding must be linked in some way to previous judgements, it must be justifiable. See further chapter 5 section 6.

of the parties) is the paramount value in the law of contract.¹⁵³ The court specifically stated that it had “...no power to deviate from the intention of the parties, as determined through the interpretation of the contract, *because it may be regarded as unfair to one of them ...*(my emphasis)”.¹⁵⁴

Brand JA, writing for the court, also disagreed with the contention that *Brisley* necessitated the importation of a tacit term requiring the parties to act in good faith and according to the dictates of fairness.¹⁵⁵ He argued that recognition of the implied term suggested by the respondents would amount to a negation of the previous lines of reasoning followed by the court.¹⁵⁶ The judge (quite correctly) pointed out that the hierarchy recognized by the court consists firstly of recognition and implementation of freedom of contract as evidenced by the agreement, and only if this proves inconclusive (after proper construction of the agreement) or grossly unreasonable (against public policy) may the court import notions of fairness and good faith.¹⁵⁷ While the method of relying on the notions of good faith and fairness may have been different from *Brisley* and *Afrox* (implied good faith vs a direct resort to good faith), the end result (against which the court argued so strongly) would be the same. If an implied term to the effect were recognized, courts would be required to make value judgements about the requirements of good faith in each specific case. Courts do not want to do this because such subjective value judgements go against the (perceived) neutrality of judges who just decide on what the parties put in front of them. Judges would be forced to come to judgments based on their own ideas of fairness and good

¹⁵³ *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 340. This reason will of course no longer be valid if the critique on the present interpretive practice (specifically concerning intentionalism) is accepted. See part 2 of this section.

¹⁵⁴ *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 340. This quote can mean two things. Firstly, it can mean that the court will not infer the *bona fides* because to do so would not be fair to one of the parties. It can also mean that the court will not infer the *bona fides* solely because enforcement of the contract as it stands will be unfair to one of the parties. Both interpretations are the result of a belief that it is better to hold the parties to their agreement, because they agreed in the first place.

¹⁵⁵ *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 340. He argues “...[T]o say that contractual stipulations cannot be avoided on the basis of abstract notions such as fairness and good faith, but that the same result can be attained when a party’s conduct is said to offend these same abstract notions, because they have been imported by means of an implied term, amounts to a distinction without a difference...”.

¹⁵⁶ He was referring to *Brisley v Drotzky* 2002 (4) SA 1 (SCA) (where he formed part of the bench) and *Afrox Healthcare Beperk v Strydom* 2002 (6) SA 21 (SCA) (where he wrote the judgement).

¹⁵⁷ See *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 340.

faith, and in the present scheme this would constitute a betrayal of everything that seems to make contracts worthwhile.¹⁵⁸

It is important to realize that that the rationes of these judgements do not reflect a belief that the requirements of good faith and fairness are unimportant, but rather that the South African law of contract is already based on good faith and fairness. For the court, the principles of freedom of contract and individual contractual autonomy reflect the notions of fairness and good faith of our society. They believe that the best way to give effect to a contract is to do as the parties to the agreement intended.

5.2 The present role of good faith and the contractual party

The line of cases emanating from the SCA on the relevance of good faith and fairness is well argued and theoretically sound, given present beliefs regarding the nature (and role) of contractual parties.¹⁵⁹ At present, a contract is seen as an agreement concluded between two autonomous individuals. The consequences of the contract are said to be the result of the agreement between the parties and therefore no party outside the agreement is allowed to influence the contractual outcome. This line of reasoning is based on beliefs regarding the nature of interpretation, intention, texts and the contracting party. In the present hierarchy the dominant value in contractual theory is that of the self-determination of contractual parties. Only when this self-determination brings the individual's wishes in conflict with the common good (also described as the maximisation of individual freedoms in many liberal dispensations) may the court (as the guardian of the common good) step in and modify the contractual outcomes.

The attitude of the courts towards good faith is the direct result of beliefs about the nature of contractual parties (and legal subjects). Judges are hesitant to interfere in what they see as the actions of autonomous individuals. Autonomous individuals must be afforded the freedom to form associations (such as contracts) and to see out the

¹⁵⁸ The judge does acknowledge that there might be cases where the interpretation of contract require of judges to make such individual judgements based on their personal judgments, but that this will only happen where the contract is ambiguous (which is after all the fault of the parties themselves). See *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 340.

¹⁵⁹ See Michelman "The Subject of Liberalism" (1994) 46 *Stanford LR* 1807 at 1812.

consequences of those associations as intended by them.¹⁶⁰ The role of the court in such a system is that of the guardian of the common good (maximisation of individual freedom). It is not the task of the court to ensure fairness and good faith in contractual dealings, it is the responsibility of the autonomous parties. They are after all free to form the associations that they please and, if they strike a bad bargain, it is their own fault. In short, the present application of good faith reflects the liberal description of a contractual party as an autonomous individual,¹⁶¹ who stands apart from her social relations, with the result that the regulation of those social relations (which includes contracts) is up to the party herself and the courts.

According to Michelman's characterization of the liberal self,¹⁶² the self can be described as an interest bearing, ethically several, self-activating, communicative and reflective autonomous being. If a contractual remedy like the *exceptio doli generalis* or a general "good faith" remedy were recognized, many of these values would automatically be violated. For example, if X concluded a contract with Y within the acceptable parameters of public policy and the court were to set aside this contract on the value judgement of an individual judge, X would no longer be self-activating, or responsible for the consequences of her actions. Self-activation can only take place in a society where individuals can expect certain responses on their actions. In the ideal liberal dispensation, the effects of one's actions must be objectively ascertainable. Any good faith remedy relies heavily on individual judicial discernment and this in itself is distinctly non-liberal.

In the prevailing legal doctrine on good faith in the law of contract, the value of individual autonomy is postulated against intervention on the basis of good faith by the interpreter (mostly the court).¹⁶³ It is also accepted that in most circumstances the

¹⁶⁰ This description of a contractual party and the options open to her is the result of a culmination of beliefs about the nature of interpretation, intention and the will theory of contractual liability. See further chapter 2 section 3 and chapter 5 section 2-3.

¹⁶¹ See chapter 3 section 2.

¹⁶² See chapter 3 section 2.2; Michelman "The Subject of Liberalism" (1994) 46 *Stanford LR* 1807 at 1812.

¹⁶³ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 16. The learned judges argue that "...[D]ie gevolg sal immers wees dat die beginsel van *pacta sunt servanda* grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat "n bepaalde Regter in die omstandighede as redelik en billik beskou. Die maatstaf is dan nie meer die reg nie maar die Regter. Vanuit die hoek van die kontrakterende partye gesien, sal hulle nie kan handel op die algemene verwagting dat wanneer daar 'n dispuut tussen hulle ontstaan hulle kontrak ooreenkomstig die terme

value of individual autonomy will prevail over the inference of an external judgement of good faith into the contract. In short, we would rather have the parties decide what constitutes a fair bargain than leave it to the court. For this characterization to work, the parties have to “exist” prior to the existence of and separate from the agreement. The parties must be individuals in the liberal tradition. They must exist as atomistic, self-contained and self-regulating persons that take on various roles (in this case concluding a contract). The contract is a link between the two parties, but it does not constitute them. It might influence their behaviour, but not their autonomy. In this model of the self, the ideal is to give the self sufficient freedom to enter into whatever relations that he might desire and to influence the direction of his own existence in that way. Consequently, the court is understandably hesitant to interfere with the regulation of the lives of such autonomous beings, and only in exceptional circumstances will the court alter the consequences of agreements freely entered into by the parties.¹⁶⁴

5.3 An alternative theoretical understanding of the contractual party and good faith

The remaining question for this chapter is therefore: How would an alternative theoretical position on the nature of contractual parties influence the role of *bona fides* in contractual practice? Firstly, how would this alternative contractual party look (theoretically speaking)? I would propose that the contractual party should be described in terms of dialogic self-rule.¹⁶⁵ Dialogic self-rule involves a reasoned and

daarvan afgedwing sal word nie. Hulle sal moet wag en sien of die individuele Regter die bepalings as redelik en billik beskou. Dat so ‘n algemene benadering nie aan die behoeftes van die handelsverkeer sal voldoen nie, spreek eintlik vanself...”. ; *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 338-341.

¹⁶⁴ This is the reason given for the decisions in most of the cases on *bona fides* regarding contracts. In *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at 35, Cameron JA remarks “...the constitutional values of dignity and equality and freedom require that the Courts approach their task of striking down contracts or declining to enforce them with perceptive restraint . . . contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity...”. See also *Afrox Healthcare Beperk v Strydom* 2002 (6) SA 21 (SCA) at 38; *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 338-339.

¹⁶⁵ The phrase “dialogic self-rule” can be attributed to Frank Michelman. See Michelman “Law’s Republic” (1988) 97 *Yale LJ* 1493-1537. In “The Supreme Court 1985 Term – Foreword: Traces of Self-Government” (1986) 100 *Harvard LR* 4 at 31-36 Michelman argues that the self is always embedded in social relations, communities etc, but importantly, the self is still capable of self-revision. These contradictory thoughts (embeddedness and the ability to rise above the embeddedness through self-revision) underscore the concept of dialogic self-rule. See also Botha “Rights, Limitations and the (Im)Possibility of Self-Government” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 at 17. See also chapter 3 section 5.

constant re-determination of the terms under which we live. Proponents of dialogic self-rule reject the idea that the parameters of life are predefined and they argue that constant critical evaluation of our situation is necessary.

In terms of the notion of dialogic self-rule, the focus (and therefore moral justification) is still on the individual. However, the individual (in this scheme) is distinctly post-liberal. While liberalism regard individuals as pre-social, dialogic self-rule describes them as socially constituted.¹⁶⁶ In other words, the self can only exist through interaction with others, and therefore the consciousness of the self is strongly related to her social situatedness. In terms of this theory, one cannot argue that the parties to the contract are wholly free to decide how they want to structure their relationship, since the nature of that relationship (and of the parties themselves) are subject to continuous (re-)formation. The parties' decisions to contract do not just represent the mindsets of the parties, but also forms part of the social fabric that continuously (re-)constitutes the self.¹⁶⁷

However, dialogic self-rule is not a purely communitarian phenomenon either. One of the most important distinctions between the communitarian conception of the self and that of dialogic self-rule lies in the latter's emphasis on the human capacity for self-revision. The communitarian self is locked into a social system over which she has no command. She is always subject to communal practices and constraints over which she has no control. In other words, it is not possible for the communitarian self to objectively face up to her own existence in order to radically change that subsistence. The possibilities of change (or lack thereof) will always already be in place. Conversely, the dialogic self is capable of what Michelman terms "self-

¹⁶⁶ Botha "Rights, Limitations and the (Im)Possibility of Self-Government" in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 at 15

¹⁶⁷ Michelman *Brennan and Democracy* (1999) at 133. He explains, "...Individuals are what matter in the end. Individuals are also, however, as a matter of fact, socially constituted, enmeshed in various relationships and communities, thoughtways and cultures, institutions and practices. Out of these multiple, overlapping formative contexts, individuality forms itself. Individuals...depend for their identities and self-understandings on affiliation and commitment...". A contract would be an example of a social relation that forms the individual. My rental agreement, for example, will determine where I will live and as a consequence, have a bearing on how I see myself in relation to others. See also Botha "Rights, Limitations and the (Im)Possibility of Self-Government" in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 at 15.

transcendence”,¹⁶⁸ the ability of the self to confront her own existence. By processes of deliberation, debate and social (and political) arrangements geared towards constant revision of identity, the self is able to reformulate the terms of her existence.¹⁶⁹

Dialogic self-rule also includes a specific view of rights. In a liberal dispensation, rights are trumps or boundaries that protect selves from infringements by other persons. In terms of dialogic self-rule, this description of rights cannot prevail. Instead, rights are recognized as social relations and practices.¹⁷⁰ Because of the association of rights and social relations, rights can no longer be characterized as objective standards, but take on a normative character. The application of rights therefore depends upon an interpretive act that applies an abstract notion to a factual situation, bearing in mind that there are often competing norms that are equally applicable.¹⁷¹ In other words, the relations (rights) among the selves are subject to evaluation and reformation each time they are interpreted. Contracts, like rights, are also social relations between selves. If we see the self (the contractual party) in terms of dialogic self-rule, we can no longer regard contracts as embodiments of contractual “rights” in the liberal sense. Contracts are then social relations between selves and are therefore (like rights) subject to continuous reformulation when interpreted.

This brings us to the second part of the question, namely: How would understanding a contractual party in terms of dialogic self-rule influence the legal position on the role and requirements of *bona fides*? According to the notion of dialogic self-rule, it is recognized that the self is not a pre-interpretation being. The self, according to this theory, exists because of her social relations and interaction. The self is therefore at the same time dependent upon the other for existence and responsible for the

¹⁶⁸ Michelman *Brennan and Democracy* (1999) at 69; Botha “Rights, Limitations and the (Im)Possibility of Self-Government” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 at 16.

¹⁶⁹ Botha rightly remarks that this type of existence is only possible in a political dispensation that values debate, confrontation and deliberation. See Botha “Rights, Limitations and the (Im)Possibility of Self-Government” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 at 16.

¹⁷⁰ Michelman “Justification (and Justifiability) of Law in a Contradictory World” in Pennock & Chapman (eds) *Justification in Law, Ethics and Politics* (1986) at 91; Botha “Rights, Limitations and the (Im)Possibility of Self-Government” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 at 16.

¹⁷¹ See for example Kennedy “The Structure of Blackstone’s Commentaries” (1979) 28 *Buffalo LR* 205 at 211.

existence (and the nature) of the other. In line with the arguments of Duncan Kennedy, the self depends upon others for a free existence and others simultaneously threaten the existence of the self.¹⁷² This insight leads to the realization that our interaction (interpretation and implementation) with the contractual text will have important implications for the existence of the parties to it. These implications do not merely concern the well-being of the contractual parties, but actually influence who these parties turn out to be. In other words, the way that we read the contract will influence the identity of those who entered into the agreement in the first place.

If one accepts dialogic self-rule as the theoretical basis of legal identity, *bona fides* and autonomy can no longer be separate issues. One can no longer claim to balance the interests of the parties to the contract and that of the judge (as representative of society at large) because both these interests are mutually constitutive. The parties become that which they are allowed to become through the contract, and this is determined by the interpretation of the contract. The court, as a major player in the establishment of the *bona fides* as far as contracts are concerned, will have to work out the details of justice in every case. The court must decide how the parties must see out the contract. In doing this, courts are creating the types of self that are valued in contractual practice.¹⁷³

By challenging current beliefs about the nature of legal personality and personhood, one shifts the boundaries of accepted contractual interpretation practices. The court has to take responsibility for the nature of contracting parties, but the parties have to take responsibility for the way in which they conduct themselves in the contractual relationship. The court can only decide on that which is put in front of it, and the

¹⁷² See Kennedy “The Structure of Blackstone’s Commentaries” (1979) 28 *Buffalo LR* 205 at 211-213; Botha “Rights, Limitations and the (Im)Possibility of Self-Government” in Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13 at 16; JWG van der Walt “Frankly Befriending the Fundamental Contradiction: Frank Michelman and Critical Legal Thought” in Botha H, Van der Walt AJ and Van der Walt JWG (eds) *Rights and Democracy in a Transformative Constitution* (2003) 213 at 223. It should of course be noted that the self is also a threat and a precondition to others. The fundamental contradiction is that the preconditions for any legal aim like individual autonomy, also involves the treat to that legal aim. With regards to individual autonomy other persons are always required for individual autonomy, but they are at the same time a threat to individual autonomy.

¹⁷³ The individual that the court “helps” will be the individual that future contractants will emulate. If we want persons to negotiate in good faith and to act fairly, then encourage such behaviour by accentuating those values (which already exist as possibilities in any interpretation) when interpreting contracts before the court. Before long, the general legal practice will strive to show that they acted fairly and in good faith because those are the parties that the court would assist.

parties must provide the court with evidence that will enable the court to make a just decision in each individual case. A change in theoretical understanding of the nature of the self can only influence the court insofar as it forces courts to consider the merits of each case and its relation to relevant considerations of *bona fides*. In other words, *bona fides* will always be relevant, but the precise nature of what is relevant in a particular case will depend on normative policy.¹⁷⁴ In the end, policymakers like the legislature will have to decide what the relevant policy considerations must be in contractual practice.

5.4 Toehold: Tacit terms and normative contractual parties

Normative conceptions of individuality are not completely foreign to South African contract theorists. In fact, other than the *bona fides* interpretation principle,¹⁷⁵ the notion of “ideal contractual parties” is also recognized as part of the tacit term doctrine.

When a contract is interpreted and interpreters encounter a “gap” in the contract, that is to say there is no external manifestation indicating a term but there is evidence that the parties indeed intended such a term, they may in certain circumstances import a tacit term.¹⁷⁶ Tacit terms are described as “...terms which derive (or at least are said to derive) from the common intention of the parties but which are not expressed by them...”.¹⁷⁷ Courts are slow to import a tacit term, probably because of the assumption that the parties to the contract are self-regulating and that they would

¹⁷⁴ It is interesting to note that the SCA has already given the first step in the direction of the recognition of the interpretive nature of individuality. *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 340, the court proclaims that it will sometimes follow the most just interpretation of the contract (where the parties’ intention is not clear). This implies that the court assumes that the parties acted justly when they constructed the contract. The presuppose that the parties had a certain mindset (regardless of their actual mindset). It does not therefore require too big a leap of the imagination to envisage a contractual practice where all contracts (not just the ones where the intentions of the parties are unclear) are treated this way.

¹⁷⁵ See *South African Forestry Company Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 340 and also the discussion above.

¹⁷⁶ Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 153.

¹⁷⁷ Van der Merwe et al *Contract: General Principles* (2003) at 256.

mention a term should they regard it as necessary.¹⁷⁸ The term would be imported if it passes the so-called “innocent bystander” test.¹⁷⁹

While the courts have consistently argued that tacit terms are based on the intention of the parties,¹⁸⁰ various practices give the importation of these terms a normative character. The first of these practices is that a tacit term would sometimes be inferred even where the parties did not in fact think of such a term, as long as it is compatible with the rest of the contract.¹⁸¹ This practice lies in close relation to the imputation of a tacit term to give the contract business efficacy.¹⁸² Both of these involve a judgement by the court regarding the intentions of the parties regardless of their actual intentions. Provided the circumstances allow the importation of such a term, courts act as if the parties contemplated the business efficacy of their contract even if they did not.¹⁸³ This is clearly a normative reading of the contract and also a normative

¹⁷⁸ Van der Merwe et al *Contract: General Principles* (2003) at 257; Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 154; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532; *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 143.

¹⁷⁹ Van der Merwe et al *Contract: General Principles* (2003) at 257; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532-533; *Strydom v Duvenhage NO en 'n Ander* 1998 (4) SA 1037 (SCA) at 1044-1045. The test was formulated in *Reigate v Union Manufacturing Co* 118 LT 479 at 483 as “...You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: ‘What will happen in such a case?’ they would have both replied: ‘Of course, so-and-so. We did not trouble to say that; it is too clear...” and subsequently accepted as part of our law.

¹⁸⁰ See for example *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532; *Strydom v Duvenhage NO en 'n Ander* 1998 (4) SA 1037 (SCA) at 1044; Van der Merwe et al *Contract: General Principles* (2003) at 258.

¹⁸¹ *Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 165; *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd* 2001 (1) SA 313 (C) at 320; Van der Merwe et al *Contract: General Principles* (2003) at 259.

¹⁸² *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 143; Van der Merwe et al *Contract: General Principles* (2003) at 259. Cornelius argues that business efficacy is not a prerequisite for the recognition of a tacit term, but that it would play a role in determining the feasibility of the term. See Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 154; *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N) at 909; *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 236 – 237.

¹⁸³ In *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N) at 909 Hoexter J remarks that “...Although the hallowed ‘business efficacy’ test for reading a tacit term into a contract is capable of statement in simple language, its application in practice is often a matter of difficulty. Before trying to apply it to the facts of the present case two general considerations should, I think, be steadily borne in mind. Both are suggested by the fact that to some extent the test is an objective one. The first is that the test does not necessarily require that the contracting parties should consciously have directed their minds to the incidental contingency which might later supervene, and the need to provide for it. The test does not require that the parties should actually have intended the tacit term... The second consideration requiring brief mention is this. The test imports the standard of a reasonable man. The contracting parties questioned by the officious bystander must, I consider, be taken to be persons endowed with the degree of shrewdness, knowledge and prudence reasonably to be

understanding of the contractual parties and their intentions. Added to considerations regarding the business efficacy of the contract, courts often impute terms on the basis that such a term would have been consented to by reasonable parties (provided it is compatible with the rest of the contract), even if the parties to the agreement were not necessarily reasonable.¹⁸⁴

While typical liberal assumptions about the nature of contractual parties still underlie the interpretation of contracts (courts are after all very slow to import tacit terms), the way in which tacit terms are administered suggests that a normative understanding of individuality is already (albeit to a limited degree) part of contractual interpretation. Extension of a critical normative understanding of contractual parties (such as critical self-rule) to all contractual situations is not impossible and not incompatible with our rules of interpretation.

6. The beginning

“...Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. We ought to stop circumscribing the *Nomos*: we ought to invite new worlds...”¹⁸⁵

The aim of this chapter and this thesis is to show that the present theoretical dispensation is not crucial to the survival of contractual practice in South Africa. In fact, much of the necessary reforms are short-circuited not by the practice itself, but rather by the theoretical understandings that underpin the contractual practice as it stands. The problem is often not the rules, but rather the reasons for the way the rules are used. Rules and practices are fleshed out by presumptions and beliefs, not by some independent content. By changing these assumptions, one can dramatically alter the way contracts are interpreted and realized.

expected of persons *ordinarily* (my emphasis) engaged in the conclusion of the relevant contract...”. See also *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 236 – 237.

¹⁸⁴ Van der Merwe et al *Contract: General Principles* (2003) at 259; *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 141. Cornelius remarks in this regard that the tacit term need not be reasonable, but that the parties will be regarded as intending a reasonable and equitable result and being honest and reasonable themselves. See Cornelius *Principles of the Interpretation of Contracts in South Africa* (2002) at 154. See also quote by Hoexter J in *Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N) at 909 in previous fn.

¹⁸⁵ Cover “Foreword: *Nomos* and *Narrative*” (1983) 97 *Harvard LR* 4 at 68.

Derrida recognizes that just legal action involves two contradictory impulses, justice and justification.¹⁸⁶ Justice involves the (impossible) complete recognition of the other as other. It involves a completely contextualised interpretation of the unique question before the court and requires the court to answer the unique question in a unique way. On the other hand, any legal interpretation must be justifiable and must be connected to previous legal interpretations. In other words, legal interpretation must proceed in accordance with established legal tradition. According to the established legal dispensation, legal rules are primarily aimed (at least according to their present formulation) at regulating behaviour,¹⁸⁷ at providing a justification for an interpretation. What the deconstructive approach shows is that mere application of rules is often not enough. We have to continually reflect on why we apply rules and whether application in the specific case is just. Consequently, what is needed is not merely a re-evaluation of the contractual rules of interpretation in the light of changed theoretical assumptions, but a re-imagination of how we apply rules. We should go further than asking whether an interpretation is justifiable and ask whether it is just. In the present practice, an interpretation is deemed just because it is formally justifiable. If rules are simply used to justify contractual meaning, the process of rule application tends to become a mechanical process. It might seem objective, but as Kennedy explains, there are always equally applicable counter rules, and any interpretation is therefore always relatively arbitrary.¹⁸⁸ It is only once we start to look at our reasons for the application of the rules in *every specific case*, and at the same time do not

¹⁸⁶ Derrida “Force of Law: The Mystical Foundation of Authority” in Cornell, Rosenfeld & Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) 1 at 13-24.

¹⁸⁷ Twining & Miers *How To Do Things With Rules* (1999) at 123. See also *ABSA Bank LTD v Deeb & Others* 1999 (2) SA 656 (N) at 663; *Phone-a-Copy Worldwide (Pty) Ltd v Orkin & Another* (1986) (1) SA 729 (A) at 734; Detmold “Law as the Structure of Meaning” in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 164.

¹⁸⁸ Kennedy “The Structure of Blackstone’s Commentaries” (1979) 28 *Buffalo LR* 205 at 211-213. In Kennedy “Form and Substance in Private Law Adjudication” (1976) 98 *Harvard LR* 1685 at 1685, he states “...substantive and formal conflict in private law cannot be reduced to disagreement about how to apply some neutral calculus that will “maximise the total satisfactions of human wants.” The opposed rhetorical modes lawyers use reflect a deeper level of contradiction. At this deeper level, we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future...”. See on the subject Kennedy *A Critique of Adjudication (fin de siècle)* (1997) at 105-07. For an explanation see Roux “Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court” at 19 presented: the Centre for Applied Legal Studies conference on *Human Rights, Democracy and Social Transformation: When do Rights Work?* (November 2003) and the University of the Witwatersrand Law School conference celebrating *Twenty Years of Human Rights Scholarship and Ten Years of Democracy* (July 2004) (Published as Roux “Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court” (2004) 20 *SAJHR* 511-543.

hesitate to apply the rules when it would be just to do so, that we can break free of a (seemingly) objective method of rule application. In postmodern theory rules resemble normative policy rather than mechanical ways of guiding interpretation. Rules embody policy as an abstract notion, while the interpretation process determines the specific content of the policy in the specific situation facing the interpreter. Rule-guided interpretations must first be just, then justifiable.

The golden rule of interpretation is used to justify the ascription of liability to the “intentional” actions of competent legal subjects. The rule is applied in various stages, comprising an initial evaluation of the so-called plain meaning of the contract (starting with the individual words and then moving to sentences and phrases until the contract as a whole is evaluated), followed by the application of various presumptions (both interpretive and substantive) and the evaluation of the (applicable) evidence outside the text concerning the intention of the parties to the contract. It was shown that the rule itself is the result of a belief in subjective intentionalism as a basis for interpretation (although the application of the rule is often based on objective intentionalism). The rule is aimed at “protecting” the intentions of the parties to the contract and to give effect to those intentions. In theoretical terms, the existence and application of the rule is based on the dual belief that: 1) Persons have intentions apart from the text and these intentions can be recovered or reconstructed; and 2) language has a reflection value, that is, language serves as a records of facts. Consequently, it is believed that language can have objectively certifiable meaning, and that careful users (of language) can create a contract that reflects their intentions accurately. In short, the golden rule and its application are based on the belief that thought and language can be separated.

In postmodern thinking the distinction between thought and language is problematized (although not done away with). Post-structuralists (and to an extent neo-pragmatists) argue that thought and language, although conceptually separate, can never be separated in practice. Thought is always situated in language and language is always an expression of thoughts. With thought, there is the constant urge to express the uniqueness of the idea (thought), while language tends to delineate and show the connection between the idea (thought) and previous ideas. When thoughts (of which intentions are one type) are expressed in language, the thought loses some of its

uniqueness (individuality) because of the delineating effect of language, while language can never completely delineate (capture) thought because language is iterable (it contains traces of previous language use and therefore the possibility of other meanings). The effect of this insight is that intentions can never be captured or reconstructed perfectly. The uniqueness of the intention will always be lost in expression, while other meaning possibilities will emerge because of the traces of past expressions of the same language.

The golden rule of interpretation can be re-imagined with a shift in the understanding of intention. A rule aiming for something that cannot be found should not be maintained. Contracts will always (at least in the foreseeable future) be instruments dealing with relations between legal subjects, and it is for this reason that one cannot simply jettison all ideas regarding intention. We cannot have a theory of contract (or interpretation of contracts) that does not take seriously the wishes of both parties to the agreement. In line with postmodern theories of interpretation, what is proposed is a theory of just interpretation. The aim of such a theory is to involve both parties extensively and to try to ascertain the needs of both parties to the relationship (and the way these needs are understood by the counter party). The interpreter must then enforce the contractual relationship in such a way that the (publicly known) normative policies of contract be served optimally. The new “intention” is a construction (not a reconstruction or a discovery), but it is developed with active participation of the parties to the contract.

The main difference between the present concept of intention and a postmodern conception of intention lies in the normative character of the latter. At present, meanings are being justified by referring to them as the intention of the parties. In postmodern theory, it is recognized that intention (even during the negotiations and just after conclusion) is an abstract notion that only acquires meaning in concrete situations. The contractual text is a manifestation of this abstract intention and the role of the interpreter is to apply the text in the specific situation facing the court. In other words, the “intention of the parties” is only formulated when an interpreter deals with a question regarding the applicability of the contractual text to a specific circumstance. If the contract “covers” the circumstances, it can be found that the parties “intended” the contract to provide for the circumstances. If not, then it is found

that the parties did not intend to cover the circumstance in their agreement. The point is that intention cannot serve as a justification for a contractual meaning (as courts would like us to believe) because intention is reformulated in every new set of circumstances. In postmodern theory intention is a meaning, not a restraint. This does not make intention any less relevant, but it does require the interpreter to find other justifications for her interpretation.

The parol-evidence rule is aimed at “protecting” the sanctity and certainty of written documents. The rule is an attempt at regulating the kinds of evidence that can be presented to explain the contents of a written contractual document. The rule consists of two parts, the integration rule and the interpretation rule. In terms of the former, it is determined whether a written contractual document was intended to serve as the exclusive memorial of the contractual terms. Where it is found that the document is an exclusive memorial, no evidence may be produced to contradict the terms of the contract as evidenced by the document. Where the document serves as a partial integration, the same applies to the integrated part. The interpretation rule is applied to determine the extent to which evidence outside of the document may be scrutinized in order to explain the document. All such (explanatory) evidence will be permissible save evidence that contradicts the written document. The parol-evidence rule is also geared to “protecting” narrative texts as records.

Two main criticisms are raised against the rule; firstly that it is contrary to the accepted theory of contractual liability (subjective intentionalism), and secondly that the rule is difficult to apply. Both these criticisms and the rule itself are based on the assumption that texts serve as records of facts and, consequently, that written texts (which are very good records of facts) deserve special attention. This assumption is based on a functionalist understanding of language and a positivist historical view on the utility of texts. In short, the application process and the working of the rule are aimed at protecting written contracts as records of contractual facts.

In postmodern interpretation theory, the role of interpretation is described as meaning construction rather than meaning reproduction or extraction. Meaning is described as the product of an interpretation process, encompassing irreducibly plural influences ranging from interpretive communities to the meaning possibilities inherent in all

language. Texts cannot be described as “containers” of meaning since no pre-interpretation meaning exists and there are always meanings outside our definition. Contracts are better described as combined normative and narrative law-texts; texts telling a story but having to relate this story in various circumstances. In this light, the text becomes a catalyst of endless possibilities of meaning of which the interpreter must apply what is both just and justifiable in the specific circumstance. The text becomes the beginning of the understanding process and not the element that settles the meaning. The parol-evidence rule can no longer serve as “protection” of that which the text contains, but it can serve as a tool to force the interpreters to take the textual possibilities seriously.

In South African law contracts are based on good faith (*bona fides*), but the Supreme Court of Appeal decided in a line of decisions (*Brisley, Afrox* and *York Timbers*), that we do not have a remedy or implied term to the effect that a contract can be modified to bring it in line with the *bona fides*. The court weighed up the value of contractual freedom and abstract values of fairness, good faith and equity and decided (first in *Brisley* and followed in the subsequent decisions) that, except in extraordinary circumstances, the value of freedom of contract must prevail. The court reasoned that it would be improper for it to infer by way of individual value judgement certain values of good faith to alter the contractual consequences which the parties themselves reached and which is reflected by the contract. The role of the *bona fides* in the law of contract is not indicative of a disregard for such values, but instead reflects a belief that individual autonomy is the quintessence of the *bona fides*. The highest value in a liberal society is that of individual autonomy or freedom to lead a life driven by one’s own decisions.

In the place of the atomistic and autonomous self, postmodern theories of identity recognize the self as at the same time the seat of moral concern and constituted by her social relations and situatedness. The dialogic self is a person continuously reconstituted by her social interactions and situatedness, but also capable of reevaluating her situation through debate and confrontation. In other words, the dialogic self recognizes her dependence upon others, but is not powerless to affect her own destiny. Because of the realization that the self and her consciousness is continuously formed by her situatedness, the contractual relationship should not be

understood as involving an a priori atomistic self taking on a role, but rather as a continuing definition of the contractual relationship through interaction between the self, others and the circumstances in which they find themselves. The self is therefore consciously developing through the contractual relationship and the interpretation of the contract will affect who the parties to the contract will be. The court has an opportunity to create a contractual relationship that is sensitive to the context. Sometimes it will be necessary to have responsive parties who are prepared to compromise, at other times not. By being sensitive to the specific needs of the parties the court can, in line with normative considerations, decide whom they will help and how they will do this. We will no longer be ruled by the appearance of objective rules, but rather by the exigencies of the particular situation.

7

Conclusion

1. Introduction

The present contractual interpretive practice is aimed at justifying interpretation. Four assumptions underlie this practice: 1) Interpretation is regarded as a meaning-extraction exercise. It is assumed that interpreters (should they search for either the intention of the parties or the objective meaning of the text) have a minimal influence on the outcome of the interpretation process. As a result, the emphasis during the interpretative process is not on the eventual meaning, but rather on the “objectivity” of the process. 2) Contractual parties are assumed to be autonomous and self-regulating. It is argued that the parties stand apart from the contractual relationship. Assumptions about legal subjectivity held in the present interpretive practice are reflected by the way in which *bona fides* was applied during contractual interpretation. 3) Texts are assumed to be records of facts. Consequently, the parol-evidence rule is aimed at protecting such “records” against the possible destabilizing influence of external evidence. 4) Finally, intention is regarded as a possible restraint on the interpreter. If the interpreter were to confine himself to finding the intention of the author of the text the interpretation process would be predictable and the influence of the interpreter would be minimal. It is therefore not strange that the principal rule of contractual interpretation, the “golden rule”, is aimed at facilitating the process of finding the intention of the contractual parties. All these assumptions (about interpretation, individuality, texts and intention) combine to release interpreters from responsibility for the meaning of contracts because the meaning of the contractual text is solely attributed to the contractual parties.

On the other hand, postmodernism involves a search for just interpretations. In postmodern literature concepts like interpretation, the nature of subjectivity, the nature of texts and also intention are critically analysed and the results of these analyses have important implications for contractual interpretation because they contradict current assumptions about the nature of interpretation, legal subjectivity, the definition of texts and the possibility of intention discovery in contractual

interpretation. Postmodernists claim that meanings resulting from the interpretation of the text are created during the interpretive process rather than inhering in the text, that legal subjectivity is a construction rather than a metaphysical reality and that texts are “created” through the interpretive process. Consequently interpreters are just as responsible for contractual meanings as the contractual parties.

In Part One, the leading postmodern insights on interpretation, individual autonomy, texts and intentionalism are discussed. The present interpretive practice surrounding contracts is critically analysed to identify the underlying assumptions of the practice. The assumptions identified during the critical analyses are then evaluated against the postmodern insights identified during the discussions on interpretation, texts, intentionalism and individual autonomy. This is done by analysing the present interpretive practice in four chapters.¹ In Part Two, questions about the justifiability of the present interpretive theories are posed.²

2. Part I (chapters 2-5)

2.1 Meaning in legal interpretation

In Chapter 2 the different theoretical positions on interpretation (especially interpretation of legal texts) were discussed together with the main criticism against each theory. The chapter starts out in section 2 with a discussion of the uniqueness of legal interpretation as explained by Robert Cover. Where normal interpretation is characterized by (indeed aimed at creating) a space where inter-personal interaction can be facilitated, legal interpretation is characterized by the lack of a shared experience between the participants because of the violent nature of legal interpretation. Cover’s analysis of the nature of legal interpretation leads us to the important insight that working with (and theorizing about) legal interpretation is a serious business with potentially serious consequences.

In section 3 various objective meaning theories were examined, including Objectivism, Plain Legal Language Theory (PLLM) and Natural Law Theory. All of

¹ For a detailed discussion of the research results of each chapter in Part One, see sections 2.1-2.5 below.

² For a detailed discussion of the research results of each chapter in Part Two, see sections 3.1-3.3 below.

these theories are aimed at eliminating misunderstandings and by so doing, perfecting communication. Objectivists contend that language itself has independent (objectively certifiable) meaning and that careful language use eliminates misunderstandings. The PLLM contend that misunderstandings are the result of special-language (like legal language) use. They hold that standardization of terms and their meanings (correlation between signifiers and that which they signify) will minimize misunderstandings because there will be a correlation between what we say and what we mean. Metaphysical realism (as an example of natural law theory) is based on the contention that language has a pointing out (ostension) function, and perfect understanding is the result of a successful connection of the word (signifier) with that which it represents (signified). Metaphysical realists argue that one must look past the text (and the different meanings inherent in that text) to the actual intended message. The main criticism against all three theories is: The possibility of a correlation between signifiers and what they signify depends upon the possibility that signifiers do not correlate with only one signified. There must be the possibility of metaphoric communication. Linguistically, the possibility of a correlation of signifier and signified and the possibility of non-correlation is very important. Language can only signify because it can also miss-signify. The very element that objectivists want to limit (non-correlation of signifiers and signifieds) provides us with meaning.

In section 4 the influence of rules of interpretation on the elimination of misunderstanding is examined. Many rule-theorists argue that consistent application of rules will lead to a situation where the outcome of the interpretation process is predictable. The main problem with the rule-based approach to interpretation is that rules are also linguistic texts and are therefore subject to the same conditions of interpretation as any other text.

Context and interpretive communities (the subject of section 5) are also used to restrict the possible meanings of legal texts. Many interpretation theorists argue that careful consideration of the legal context in which a text is created eliminates possible meanings other than the contextually correct meaning, while others believe that the interpretive assumptions of the legal community serve as constraints on the legal interpreter. The greatest difficulty facing these theorists (who believe that either context or the interpretive community (or both) can restrict interpretation) is that any

interpreter is always bound to interpret any text from her unique perspective and is bound to be part of many diverse interpretive communities. A context can only constrain an interpretation insofar as that context can be reproduced and, as far as interpretive communities are concerned, any person is at the same time subject to various interpretive communities (and by implication interpretive influences).

Neo-pragmatism (the subject of section 6) is the postmodern equivalent of pragmatism. Like pragmatists, neo-pragmatists reject the notion of objectively certifiable meaning and they believe that meaning (as a product of our interpretive communities, context and historic situatedness) can only exist after interpretation. Neo-pragmatists reject the belief that ultimate knowledge of the way we interpret is possible because of our historic situatedness. The main criticism against neo-pragmatism is that it leaves the “authorization” of meaning in the hands of the powerful (or dominant interpretive community) and marginalizes the meanings of weaker interpretive communities. Neo-pragmatists rejoin by arguing that although interpretive communities are always already in place, the interpreter is free to broaden the influences on interpretation by including the marginalized and weak in the decision-making processes. Neo-pragmatists provide us with an alternative interpretation theory that is more theoretically sound than positivist theories.

Post-structuralism (the subject of section 7) developed out of structuralism. Both theories hold that language predates understanding and that language consists of purely arbitrary relations between signs and what they signify. Meaning is the result of interplay between the signs and not the result of a relationship between the sign and that which it signifies. While structuralists hold that one would ultimately be able to know how language works, post-structuralists contend that this is not possible. In legal interpretation deconstruction (a post-structuralist way of interpreting) highlights the dependency of concepts like individual autonomy upon various preconditions that are often contradictory. Various criticisms have been levelled against post-structuralism, ranging from allegations that post-structuralism is a relativist theory to arguments that post-structuralists are guilty of a performative contradiction. Post-structuralists have been able to successfully defend the theory against all these criticisms and post-structuralism is at present the most promising theory of

interpretation as far as highlighting marginalized and critical meanings go. Post-structuralism is therefore a potential alternative to the present interpretive practice.

This chapter shows that interpretation is not a simple meaning-finding exercise, but rather a process of meaning construction in which neither the author, the reader or language has the conclusive influence. Meaning is the result of interplay between the interpreter, author and language. There are always multiple meanings and the challenge is not to provide the right meaning, but rather to identify the most just meaning. Contracts do not “say” or “reflect” anything; they only provide a starting point in the quest for the best answer in every situation.

2.2 Contemplating individual autonomy

In Chapter 3, three theoretical positions on the self were analysed, namely liberalism, communitarianism and critical theories of the self. In liberalism individual autonomy is valued both as a foundational principle and as an ideal. The theory relates a narrative of being in which the self is best served by extending autonomy and the state is relegated the role of guardian of the emerging autonomy. The self is valued higher than the community and the community is said to be a product of selves coming together. Communal influences are ignored or explained as the culmination of individual preferences. Contracts are ways in which autonomous individuals express themselves and, provided the contracts do not infringe on the autonomy of others, contracts are construed (in the liberal sense) to only have the consequences intended by the parties to the contract. The main criticism against liberalism is that a liberal dispensation does not necessarily attain the goals it sets for itself. In fact, rights in particular are often stumbling blocks in the way of freedom and the extension of freedom to all sectors of society.³

Communitarianism is a reaction to some of the failures of liberalism. Communitarians claim that the self cannot be understood without reference to the social situatedness of the self and that the self often consists of not so much what the self is, but where the self is. It is also claimed that values are not universal but particular to the societies in

³ See for example the “fundamental contradiction” as explained by Kennedy “The Structure of Blackstone’s Commentaries” (1979) 28 *Buffalo LR* at 211-212. In short: While individuals are preconditions to freedom, they are at the same time also threats to freedom.

which they occur. Communitarians approach contracts from a different angle, namely from the communal nature of contracts and specifically contractual enforcement. They argue that contracts are not to be interpreted as individual means of exchange, but rather as legal actions with effects wider than only the parties involved. The aim of communitarian contract construction is to give the contract a meaning that will have the widest possible net benefit, not only for the parties but also for the community at large. Various objections have been raised against the communitarian vision for society, largely centering on the lack of accountability in the communitarian model. There is no structure inherent in the community that can guarantee a restructuring and critical reflection that precedes greater material and social parity. In a purely communitarian model, strong communities will dominate weak ones, leaving members of the weak communities without recourse.

Any viable theory of the self would have to incorporate both the need for autonomy and the need for social justice. Such a theory must provide space for individual selves to flourish, while at the same time realizing that the self is socially situated and therefore has a social responsibility. Dialogic self-rule incorporates both these elements. This depiction of the self requires that the self, when confronted with the other (typically in a dispute, but also in business, relationships etc), engage in a dialogue aimed at finding the best solution to the common dilemma. This is the ideal model for a contractual party because the parties to the contract are forced to reach a negotiated settlement (the parties must engage in dialogue) and where one party is unwilling, the court can enforce the just solution in that context. This model does not have the overly social nature of a communitarian model and the strong economic benefits of the present contractual dispensation are retained. It calls for a contractual interpretation that takes seriously the individual interests involved and the need for contextually sensitive critical reflection on contractual meaning and its impact.

If one accepts dialogic self-rule as the theoretical basis of legal identity, one can no longer claim to balance the interests of the parties to the contract and that of the judge (as representative of society at large) because both these interests are mutually constitutive. The court must decide how the parties must see out the contract by the interpretation of the contract. In doing this, courts are creating the types of self that are valued in contractual practice.

2.3 Texts

Chapter 4 started out with a discussion of the present, essentially positivist, understandings surrounding the nature of texts. Texts are regarded as records that are separate from other texts. Legal texts are classified as historical texts (to be distinguished from fictional texts). Maintaining a distinction between fact and fiction requires a system where reality can serve as an objective standard against which the accuracy of the text can be measured. In such a system, reality must be singular and objectively ascertainable. Texts are also portrayed as separate from other texts. Because texts are regarded as records of facts, they are seen to represent a “moment” or “incident” in time. Positivists see texts as separate entities, connected only by their reference to reality. *The* reality serves as a justification for texts since the reader can verify the truth of the text by examining its correlation with (*the*) reality. Also, although texts are connected through their messages, the texts themselves are distinguished from each other because (in positivist history) texts must highlight the unique message of each text.

The prevailing view in the law of contract is that contractual texts are essentially records of the intention of the author and that the interpreter should not tamper with the text but simply extract the message deposited by the author of the text. This is reflected by the foremost interpretive rule dealing with contractual texts; the parol-evidence rule. The rule is divided into two parts: 1) the integration rule, aimed at establishing the extent to which the contract was integrated into the written document; and 2) the interpretation rule, aimed at ascertaining the message of the text as demarcated by the integration rule. Two main criticisms are levelled against the rule, namely that it is theoretically incompatible with the subjective intentionalist will theory of contractual liability and that it is a practical failure. The proposed remedies (such as liberalization of the rule or scrapping it altogether) are motivated by the belief that the present interpretive dispensation (subjective intentionalism) will benefit from such remedies, rather than reaction to the failure of the existing process for defining texts.

In the second part of the chapter, the definition of texts in the Marxist tradition is considered. This shows the relatively arbitrary nature of the traditional definition of texts and the importance of social situatedness in the perception of texts. Marxists argue that the definition of texts depends not on the content of the text, but rather on the dominant ideology in the interpretive community. Marxists also introduced concepts like the “other” and “definition by absence” to the theories of defining texts. They show that what is absent from a text is often just as indicative of the process of defining texts as the actual content of the text. Marxism represents the first departure from the formalist idea of texts and serves as a suitable introduction to postmodernism.

The focus then shifted to post-structuralist definition of texts with special focus on the Barthesian distinction between a work and a text and the metaphoric nature of language as analyzed by Derrida. Barthes shows that texts differ from works because 1) works are not physically separate from the texts, but rather while the work is something concrete (occupying book space for example), the text is a methodological field; 2) the relationship between the work and the sign is different to the one between the text and the sign; and finally 3) Barthes distinguishes work and text on account of the role of description. Derrida shows that language does not have a functionalist nature, but rather a metaphoric one. This means that language deals with the identification of the non-identical, an exercise in imagination. Understanding is premised on the possibility of misunderstanding. Together with this insight, Derrida shows that language can never be separated from thought. The positivist theory of defining texts (as separate and a record) hinges on the possibility that a work (in the Barthesian sense) can exist. Derrida shows that it cannot.

In the penultimate section it is shown that the interpreter has an important role in definition of texts and interpreters that they should take seriously the responsibility that goes with that. The act of defining a text (especially a legal text) always involves two urges, specifically the urge to find the unique in the text and the urge to find how the text fits in with other texts. The interpreter must take these inclinations seriously. No text is already defined (before interpretation); it is always waiting to be constructed.

As far as contractual interpretation goes, it is clear that contractual texts are not records of meaning. Rather, the interpreter constructs the contractual texts as he interprets it. A text cannot serve as justification for a meaning. The interpreter is not only responsible for meaning, but also for creating a contractual text. This must be done in a responsible and just manner.

2.4 Intending intentionalism, intention discovery and intention creation

Chapter 5 deals with theories about the nature of intention and the possibility of intention discovery (or recovery). Intentionalism (the belief that intention can be recovered or discovered) can be divided into two streams, namely subjective intentionalism, which involves the search for actual historical psychological intention, and objective intentionalism, the belief that any intention can be gleaned from the evidence of the contract like the contractual text. Subjective intentionalists argue that it is possible to ascertain the actual intention of the parties to the text. On the other hand, objective intentionalists argue that the actual intention of the parties (as a mental state) cannot be discovered (or recovered), but that it is possible to objectively ascertain what the intention of the author was by looking at his actions. In other words, the goal is not to find what he intended, but rather to find out what he seemed to intend.

The main criticism against subjective intentionalism is that 1) it portrays intentions in an overly simplistic way; 2) it is based on untenable assumptions about historical discovery; 3) it necessitates abstraction of the text and the parties from the historical and social circumstances that inform their decisions. Objective intentionalism is criticized for 1) its lack of accountability of interpreters using this type of interpretation; 2) the linguistic fallibility of intention deduction because intention is always already an interpretation and can therefore never be objective.

The responses to the failure of intentionalism vary from a retreat into positivism to the advocacy of free reading theories. The CLS movement advocated a free reading theory based on the social situatedness of the reader and the developments since the creation of the text. The reader is urged to take serious notice of the transformative capabilities of the text and to interpret the text in a manner that will adapt the text to serve the needs of the situation. Later critical writers point out that this radical

ungrounding of interpretation nullifies the transformative potential of for example feminism and rights/race theories. The problem with indeterminacy is that it is totally submitted to the power relations in society. Interpretations are indeterminate for everybody, and the prevailing meaning is necessarily that of the powerful.

Neo-pragmatists argue that the reader and the author are in the same position in that both are subject to the constraining influence of interpretive communities. They reason that an interpreter is always already constrained in the meaning possibilities open to her, but that she is also free to choose since she is part of various interpretive communities, each with its own constraints and freedoms. Post-structuralists seek to return the original difficulty to the interpretation process. They argue that the relation between author-text-reader is not a simple one and that the extent of the influence of one on the other is not stable but subject to continuous substitution and change.

2.5 End of Part I

Liberal beliefs about the nature of interpretation, individual autonomy and the definition of texts are tied together by doctrines of intentionalism. If an interpreter is to be true to the values of liberalism, she has no choice but to interpret texts (as records of facts) in an intentionalist way, so that the actions (the act of text creation) of the (autonomous and self-regulating) author will have the effects that he (the text creator) intended. The inverse is also true, as intentionalism depends on general liberal beliefs about the nature of interpretation (as a recovery (or at most recreation) of meaning), the legal subject (as an autonomous self-regulating being) and texts (as records of facts). It is clear (from the critical analysis of intentionalism) that the way intention is presently approached is theoretically flawed. It is also apparent from the critique of liberal beliefs regarding the nature of interpretation, subjectivity and the definition of texts that the theoretical foundations of these beliefs are fundamentally flawed.

A critical re-imagination of contractual interpretation is necessary. The question remains, can postmodern theories provide a point of departure? The first obvious question is whether a postmodern theory of contractual interpretation will require a rejection of the rules of contractual interpretation. This question is addressed in Part Two by analyzing the impact of postmodern theories of intention, texts and

subjectivity on contractual rules of interpretation dealing with intention, texts and subjectivity.

3. Part II (chapter 6)

3.1 On rules and outcomes: What role does theory play in the application of rules of interpretation?

The aim of this chapter (and in fact this thesis) is to show that the present theoretical dispensation is not crucial to the survival of contractual practice in South Africa. In fact, much of the necessary reforms are short-circuited not by the practice itself, but rather by the theoretical understandings that underpin the contractual practice as it stands. The problem is often not the rules, but rather the way the rules are used. Rules and practices are fleshed out by presumptions and beliefs, not by some independent content. By changing these presumptions, one can dramatically alter the way contracts are interpreted and realized. Three “rules” are examined namely 1) the golden rule of interpretation (which deals with intentions discovery); 2) the parol-evidence rule (which deals with textual definition); and 3) the application of *bona fides* (which deals with subjectivity).

The golden rule of interpretation is used to justify the ascription of liability to the “intentional” actions of competent legal subjects. The rule is aimed at “protecting” the intentions of the parties to the contract and to give effect to those intentions. In theoretical terms, the existence and application of the rule is based on the dual belief that 1) persons have intentions apart from the text and these intentions can be recovered/reconstructed; and 2) language has a reflection value, that is, language serves as records of facts. In short, the golden rule and its application are based on the belief that thought and language can be separated.

In postmodern thinking the distinction between thought and language is problematized (although not done away with). Post-structuralists (and to an extent neo-pragmatists) argue that thought and language, although conceptually separate, can never be separated in practice. Thought is always situated in language and language is always an expression of thoughts. The effect of this insight is that intentions can never be captured or reconstructed perfectly. The uniqueness of the intention will always be

lost in expression, while other meaning possibilities will emerge because of the traces of past expressions of the same language.

The golden rule of interpretation must be re-imagined with the shift in perception regarding intention. Contracts will always (at least in the foreseeable future) be instruments dealing with relations between legal subjects, and it is for this reason that one cannot simply jettison all ideas regarding intention. We cannot have a theory of contract (or interpretation of contracts) that does not take seriously the wishes of both parties to the agreement. In line with postmodern theories of interpretation, what is proposed is a theory of just interpretation. The new “intention” is a construction (not a reconstruction or a discovery), but it is assembled with active participation of the parties to the contract.

The chief difference between the present concept of intention and a postmodern conception of intention lies in the normative character of the latter. At present, meanings are being justified by referring to them as the intention of the parties. In postmodern practice, it is recognized that intention (even during the negotiations and just after conclusion) is an abstract notion that only gets meaning in concrete situations. The point is that intention cannot serve as a justification for a contractual meaning (as courts would like us to believe) because intention is reformulated in every new circumstance. In postmodern theory intention is a meaning, not a restraint. This does not make intention any less relevant but it does require of the interpreter to find other justifications for her interpretation.

The parol-evidence rule is aimed at “protecting” the sanctity and certainty of written documents. The rule is an attempt at regulating the types of evidence that can be presented to explain the contents of a written contractual document. The rule is based on the assumption that texts serve as records of facts and, consequently, written texts (which are very good records of facts) deserve special attention. This assumption is based on a functionalist understanding of language and a positivist historical view on the utility of texts. In short, the whole application process and the working of the rule are aimed at protecting written contracts as records of contractual facts.

In postmodern interpretation theory, texts cannot be described as “containers” of meaning since no pre-interpretation meaning exists and there are always meanings outside our definition. Contracts are better described as normative/narrative law-texts; texts telling a story but having to relate this story in various circumstances. In this light, the text becomes a catalyst of endless meaning possibilities of which the interpreter must apply what is both just and justifiable in the specific circumstance. The text becomes the beginning of the interpretation process and not the element that settles the meaning. The parol-evidence rule can no longer serve as “protection” of that which the text contains, but it can serve as a tool to force the interpreters to take the textual possibilities seriously.

In South African Law contracts are based on good faith (*bona fides*). We do not have a substantive remedy or implied term to the effect that the contract can be modified to bring it in line with the *bona fides*. The position taken on the value of the *bona fides* in the law of contract is not indicative of a disregard for values, but rather reflects a belief that individual autonomy is the quintessence of the *bona fides*. The highest value in a liberal society is that of individual autonomy (freedom to lead a life driven by one’s own decisions).

In the place of the atomistic and autonomous self, postmodern theories of identity recognize the self as at the same time the seat of moral concern and constituted by her social relations and situatedness. Because of the realization that the self and her consciousness are continuously formed by her situatedness, the contractual relationship is not a case of an a priori atomistic self taking on a role, but rather a continuing definition of the contractual relationship through interaction between the self, others and the circumstances in which they find themselves. The self is therefore consciously developing through the contractual relationship and the interpretation of the contract will affect who the parties to the contract are. The court has an opportunity to influence a contractual relationship so that it is sensitive to the context. Sometimes it would be necessary to have responsive parties who are prepared to compromise, at other times not. By being sensitive to the specific needs of the parties the court can, in line with normative policy, decide whom they will help and how they will do this.

Derrida recognizes that just legal action involves two contradictory impulses, justice and justification.⁴ Justice involves the (impossible) complete recognition of the other as other. It involves a completely contextualised interpretation of the unique question before the court and requires of the court to answer the unique question in a unique way. On the other hand, any legal interpretation must be justifiable and must be connected to previous legal interpretations. In other words, legal interpretation must take place in accordance with the established legal tradition. According to the established legal dispensation, legal rules are primarily aimed (at least according to their present formulation) at regulating behaviour.⁵ In this sense, rules are aimed at providing a justification for an interpretation. What the deconstructive approach shows is that mere application of rules is often not enough. We have to continually reflect on why we apply rules and whether application in the specific case is just. Consequently, what is needed is not merely a re-evaluation of the contractual rules of interpretation in the light of changed theoretical assumptions, but a re-imagination of how we apply rules. We should go further than asking whether an interpretation is justifiable. We should also ask whether it is just. In the present practice, an interpretation is deemed just because it is justifiable. If rules are simply used to justify contractual meaning, the process of rule application tends to become a mechanical process. It might seem objective, but as Kennedy explains, there are always equally applicable counter rules, and any interpretation is therefore always relatively arbitrary.⁶ It is only once we start to look at our reasons for the application of the rules in *every specific case*, and at the same time do not hesitate to apply the rules when it would be just to do so, that we can break free of a (seemingly) objective method of rule application. In postmodern theory rules are more like normative policy

⁴ Derrida "Force of Law: The Mystical Foundation of Authority" in Cornell, Rosenfeld and Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) 1 at 13-24.

⁵ Twining & Miers *How To Do Things With Rules* (1999) at 123. See also *ABSA Bank LTD v Deeb & Others* 1999 (2) SA 656 (N) at 663; *Phone-a-Copy Worldwide (PTY) LTD v Orkin & Another* (1986) (1) SA 729 (A) at 734; Detmold "Law as the Structure of Meaning" in Goldsworthy & Campbell (eds) *Legal Interpretation in Democratic States* (2002) at 164.

⁶ Kennedy "The Structure of Blackstone's Commentaries" (1979) 28 *Buffalo LR* 205 at 211-213. In Kennedy "Form and Substance in Private Law Adjudication" (1976) 98 *Harvard LR* 1685 at 1685, he states "...substantive and formal conflict in private law cannot be reduced to disagreement about how to apply some neutral calculus that will "maximise the total satisfactions of human wants." The opposed rhetorical modes lawyers use reflect a deeper level of contradiction. At this deeper level, we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future...". See also Kennedy *A Critique of Adjudication (fin de siècle)* (1997) at 105-07. For an explanation see Roux "Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court" (2004) 20 *SAJHR* 511-543.

than mechanical ways of guiding interpretation. In other words, rules are suggestions, not guidelines. Rules embody policy as an abstract notion, while the interpretation process determines the specific content of the policy in the specific situation facing the interpreter. Rule-guided interpretations must first be just, then justifiable.

3.2 End of Part II

It becomes clear that contractual practice does not consist of positivist assumptions; it is merely grounded in them. We can change our assumptions and still have a contractual practice. However, instead of an objective system, postmodernists propose a self-conscious system, struggling with the impulses to be at the same time particular and justifiable. This struggle is not a hindrance, it is a necessity.

It was shown that rules depend not on their content for operation, but rather on the assumptions upon which they are grounded. Rules only make sense once they have been applied. We must think about the way in which we apply rules. Rules can never provide justification for meanings, but they can provide normative guidelines. In short, we do not have to do away with our rules of contractual interpretation, but we have to re-evaluate how we apply those rules.

4. Checking Out... (But not leaving)

“ [a]nd I was thinking to myself
This could be Heaven or this could be Hell ...
Last thing I remember
I was running for the door
I had to find the passage back to the place I was before
Relax said the nightman
We are programmed to receive
You can check out any time you like
But you can never leave”⁷

⁷ Artist: Eagles, Album: Hotel California, Song: Hotel California (1975) *Elektra Records*; see also <http://www.reallyrics.com/Lyrics/E000200010001.asp>.

Like the narrator in “Hotel California”, I find myself confronted by the impulse to “run” (rhetorically speaking).⁸ I feel like a guest who is seriously disillusioned by his lodgings. For someone trained in the general positivist tradition of contract interpretation with pre-determined contractual parties, easily identifiable contractual texts, rules to find actual intentions and, above all, a very simple theory of interpretation, digesting postmodern understandings on these subjects can be traumatic. When considering postmodern theory in general, one is immediately struck by the way in which it radically destabilizes all of the concepts on which contractual interpretation (as presently applied) rests. The central question of this thesis is whether contracts can survive without the stability provided by positivist theory.

The version of contractual interpretation that I propose falls outside of the accepted norms. It is not an application of the present contractual theory (it is not a guest), nor does it involve an analysis of the way things are in order to come to a better understanding of the theory of interpretation of contracts (it is not an employee). It involves a re-imagination of the interpretation of contracts in a postmodern light where there is no general position. There can be no default theory of interpretation, of the nature of a contractual party, texts or intention. It consists only of exceptions.

⁸ Not just leave. Quite literally run away from the task of finishing what I started. As Allen (ed) *The Concise Oxford Dictionary of Current English* (1992) at 1055 explains: “...run;...2 flee, abscond. **3** intr. go or travel hurriedly...”. Like the narrator in “Hotel California”, I come to the conclusion that leaving is not an option. Postmodernism does not leave scope for a retreat into a positivist position (or does it?). The illusion is shattered for ever. The only way back to the illusion is to reconstruct the hotel in the image of the illusion. That cannot be done while one is a guest. A guest is the “prisoner” of the hospitality of the hotel, a perpetuator of the institution. To change the hotel, one must check out, either to become an employee of the hotel or the continual antagonist. Employees can change the institution, but to do so is very hard. Since the institution pays the wages, why risk change (which might result in the demise of the institution and the alienation of the employee if he fails in his attempt to change the institution)? On the other hand, when one is outside of the institution (not a guest or an employee) but at the same time not allowed (or able) to leave, one’s presence can leave a distinct impression on the hotel. As neither a guest nor an employee, the outsider cannot expect hospitality or a wage. However, he can expect attention. He can pester guests, impede employees in the execution of their duties and interfere with the running of the institution because he cannot be forced to leave. (In a sense the outsider can be made to leave by killing him. However, he cannot leave. He is already a ghost.) He can also help guests and employees. The point is that he will always occupy the position of outsider, which makes the running of the institution unpredictable. What will he do next? To eliminate the outsider (the ghost of the other), he must be accommodated in the institution. Make him a guest or employ him. Change the institution so that his otherness will be accommodated. In the same way, the interpretation of contracts cannot be changed if we continue to use it as we always have (being guests) because we will always be playing the game according to the prevailing rules. One can use the prevailing methods of contractual interpretation to achieve different results (becoming employees) but playing by the rules will be much easier, especially if it allows one to make money. Finally, we can become outsiders, using the prevailing methods when it suits the situation or using new methods when it will be just to do so. We cannot expect a wage or hospitality, but we can expect change.

Interpretation must always be particular, contractual parties must be continually re-imagined, texts must be argued for (not from) and intentions are meanings, not constants. To think of interpretation as an unpredictable process of meaning construction, to image contractual parties in terms of dialogic self rule, to think of text creation rather than text discovery and to imagine intention rather than to find it, requires a rejection of our presuppositions about the nature of contracts and interpretation (we have to check out). We have to become the Derridian “Other”, in order to refashion the way we see and think about contracts. Not all contracts are the same, nor should all contracts be approached in the same way. Let interpreters look for particularity before they search for sameness. We must first aim for a just interpretation and only then concern ourselves with justifiability. Also, the answer is yes, contracts will survive without the “stability” provided by positivism. In fact, it will flourish.

“...[t]here is no growth without change;
there is no change without fear or loss;
and there is no loss without pain.

Every change involves a loss of some kind:

You must let go of old ways in order to experience the new...”⁹

⁹ Warren *The Purpose Driven Life* (2002) at 220.

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