Constitutionalising copyright:
A principled normative theory for transformative copyright adjudication

by
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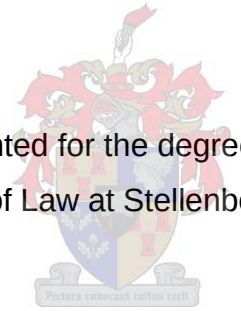

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ABSTRACT

This dissertation investigates South African copyright law from a constitutional vantage point, specifically the role of adjudicators in effecting transformation of this realm of statutory law. Copyright law in South Africa long predates the advent of the Constitution of the Republic of South Africa, 1996, and the Copyright Act 98 of 1978 has seen sparse revision since its initial promulgation. While the constitutional mode of adjudication requires substantive reasoning and value-based interpretation to facilitate the transformation of all law under the single-system-of-law principle, this modality has yet to permeate the copyright context. The formalistic mode of reasoning employed in copyright adjudication arguably perpetuates an independent normative sphere in which property and trade looms large, accompanied by an array of interpretive canons and conventions that are a product of the erstwhile conservative legal culture that characterised South African legal interpretation prior to the constitutional era.

Ronald Dworkin's theory of Law as Integrity is discussed as a candidate reading strategy for courts engaged in transformative interpretation of South African law. Dworkin's interpretive model of constructive interpretation is found compatible with the constitutional mandate to adopt a value-based strategy intent on "promot[ing] the spirit, purport and object of the Bill of Rights, as section 39(2) instructs. Furthermore, Dworkin's dignity-based theory comports with the South African iterations of the fundamental triumvirate of "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms", entrenched in section 1(a) and reinforced by section 39(1). Likewise, the Constitutional Court jurisprudence on the question of direct horizontal application of the rights in the Bill of Rights could be read to suggest that Dworkin's normative approach may assist in defining the scope and ambit of duties between private parties, notably when the legal relationship is mediated by copyright law.

Dworkin's view of law as fidelity to the mandate of dignity through interpretation is ported to the copyright setting by relying on the taxonomical theory of intellectual property propounded by Robert Merges, comprising the trichotomy of justificatory foundations, midlevel principles, and practical doctrine. These concepts are reformulated to reflect a normatively responsive, principled account of adjudication in the South African situation.

OPSOMMING

Hierdie proefskrif ondersoek Suid-Afrikaanse outeursreg vanuit 'n grondwetlike oogpunt, in die besonder beoordelaars se rol in die transformasie van hierdie gebied van statutêre reg. Outeursregwetgewing in Suid-Afrika dateer terug na lank voor die koms van die Grondwet van die Republiek van Suid-Afrika, 1996, en die Wet of Outeursreg 98 van 1978 is yl hersien sedert die aanvanklike promulgering daarvan. Terwyl die grondwetlike wyse van beoordeling substantiewe redenering en waardegebaseerde interpretasie vereis om die transformasie van alle wette onder die enkeleregstelsel-beginsel te fasiliteer, moet hierdie modaliteit nog die outeursregkonteks deurdring. Die formalistiese manier van redeneer wat in outeursregberegting aanwending vind hou 'n onafhanklike normatiewe sfeer voor waarin eiendom en handel groots voorkom, gepaardgaande met 'n verskeidenheid interpretatiewe kanons en konvensies wat 'n produk is van die destydse konserwatiewe regskultuur wat Suid-Afrikaanse regsinterpretasie gekenmerk het voor die grondwetlike era.

Ronald Dworkin se teorie van “Law as Integrity” word bespreek as 'n kandidaat-leesstrategie vir howe wat betrokke is by transformatiewe interpretasie van die Suid-Afrikaanse reg. Dworkin se interpretatiewe model van konstruktiewe interpretasie word versoenbaar gevind met die grondwetlike mandaat om 'n waarde-gebaseerde strategie aan te neem wat bedoel is om die gees, strekking en doel van die Handves van Regte te bevorder, soos artikel 39(2) voorskryf. Verder stem Dworkin se menswaardigheids-gebaseerde teorie ooreen met die Suid-Afrikaanse iterasies van die fundamentele driemanskap van “menswaardigheid, die bereiking van gelykheid en die uitbou van menseregte en vryhede”, verskans in artikel 1(a) en versterk deur artikel 39(1). Net so kan die Konstitusionele Hof-regspraak oor die kwessie van direkte horisontale toepassing van die regte in die Handves van Regte gelees word om te suggereer dat Dworkin se normatiewe benadering kan help om die bestek en omvang van pligte tussen private partye te definieer, veral wanneer die regsverhouding deur outeursregwetgewing bemiddel word.

Dworkin se siening van die reg as getrouheid aan die mandaat van waardigheid deur interpretasie word na die outeursregomgewing oorgedra deur te steun op die taksonomiese teorie van intellektuele eiendom wat deur Robert Merges voorgehou word, bestaande uit die drie elemente van regverdigende grondslae, middelvlakbeginsels en praktiese leerstelling. Hierdie konsepte word geherformuleer om 'n normatief responsiewe, beginselgedrewe weergawe van beregting in Suid-Afrika te weerspieël.

ACKNOWLEDGEMENTS

ABBREVIATIONS

CAB	Copyright Amendment Bill [B13-D 2017]
ECTA	Electronic Communications and Transactions Act 25 of 2002
ESTA	Extension of Security of Tenure Act 62 of 1997
IP	Intellectual Property
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
TPM	Technological Protection Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property
UN	United Nations
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

CHAPTER 1: INTRODUCTION

1.1 Introduction

The Constitution of the Republic of South Africa, 1996, has been a guiding force in South African law for around a quarter century. During this time, courts have grappled with questions regarding the substantive transformation that the Bill of Rights seeks to effect, specifically how this transformation is meant to be enacted in respect of non-constitutional realms of law. In this regard, transformative constitutionalism provides a thematic umbrella for engagement with all aspects of law and legal culture.[1] This scholarly and judicial movement provides crucial context to the project of the transformation of society and impresses the importance of substantive reformation of the normative value system upon which the legal system is founded.

To date, there has been limited engagement with the normative underpinnings of intellectual property laws, with the result that the substantive transformation of these enclaves of law is long outstanding. This is irreconcilable with the Constitutional Court's pronouncements on the objective normative value system underlying the single-system-of-law imposed by the Constitution, which demands more than paying lip service to the project of transformation that it instantiates.[2] Although intellectual property interests have featured in Constitutional Court jurisprudence to varying degrees,[3] copyright law has only very recently been brought before the bench in a constitutional challenge on the basis of unfair discrimination.[4] Accordingly, there has not been much guidance from the highest

[1] For an introduction to transformative constitutionalism see KE Klare "Legal culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146-188; D Moseneke "Transformative adjudication" (2002) 18 *SAJHR* 309-319; P Langa "Transformative constitutionalism" (2006) 17 *Stellenbosch LR* 351-360; D Moseneke "Transformative adjudication in post-apartheid South Africa – taking stock after a decade" (2007) 21 *Speculum Juris* 2-12.

[2] For a clear exposition of the single-system-of-law principle, see *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC). For an elucidation of the objective normative value system underpinning the South African legal order, see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

[3] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC) (trade marks); *Phumelela Gaming and Leisure Ltd v Grundling* 2006 (8) BCLR 883 (CC) (goodwill); *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation* 2020 (1) SA 327 (CC) (patents). See generally M du Bois & RM Shay "Regulation at the edge of the property concept: Judicial treatment of intangible interests" in Muller G *et al* (eds) *Transformative Property Law: Festschrift in honour of AJ van der Walt* (2018) 419-446.

[4] *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33.

court in how copyright law should be reconciled with constitutional imperatives, nor to what extent the two may be out of step. This provides fertile ground for scholarly research, which is the starting point from which this dissertation departs.

1.2 Background

1.2.1) Copyright law and constitutional rights

Since the late nineteenth century, copyright law in South Africa has been governed by statute.The English model of copyright law was imported into South Africa, when the Copyright Act 2 of 1873 was made applicable to the Cape Colony and shortly thereafter to the other three colonies.[5] After the formation of the Union of South Africa, another British law, the Imperial Copyright Act of 1911, was adopted wholesale by section 143 of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916 and made applicable to all creative works produced in the country.[6] This Act was later partially amended by Act 19 of 1947, and then replaced by the Copyright Amendment Act 63 of 1965 after the formation of the Republic of South Africa a few years prior. The 1965 Act was replaced by the Copyright Act 98 of 1978, which is still in force, subject to certain amendments. Both the 1965 and 1978 Acts have been described as "very similar to the British legislation".[7]

Although the Copyright Act of 1978 "attempted to be kinder to authors" than its predecessors,[8] which operated on the ownership paradigm that still permeates the

[5] See NP Sindane *The Call to Decolonise Higher Education: Copyright law through an African lens* (unpublished LLM dissertation UNISA 2020) 34-35. Prior to this, Roman-Dutch common law copyright existed as a natural right of authors: OH Dean & S Karjiker *Handbook on South African Copyright Law* (RS 15 2015) 1-4.

[6] DR Nicholson "The South African Copyright Law: a historical overview and challenges to address access to knowledge issues in a country in transformation" (2015) Paper presented at *IFLA WLIC 2015* 1-13 at 3.

[7] A Rens *et al Report on South African Open Copyright Review* (2008) 8. As Dean & Karjiker *Handbook* 1-4 state, "[a]lthough the Act of 1978 shows a degree of similarity to the British Copyright Act of 1956, it departed from the British Act in several material respects and it really amounts to our legislature departing on an independent course in the field of copyright law, as compared with its predecessor." However, the 1978 Act still overwhelmingly resembles the English approach and undoubtedly adopts its modus operandi over the continental European alternative.

[8] *Biotech Laboratories (Pty) Ltd v Beecham Group PLC and Another* [2002] 3 All SA 652 (SCA) para 12 per Harms JA. The court here was referring to fact that the first ownership rules contained in section 21, which

wording and logic of the Act, the property-centric approach continued to enable the commercial exploitation of copyright works as objects of property. This approach can be contrasted to the continental European approach, which is notoriously author-centric.[9] Although the continental model of copyright would have provided a good theoretical model to work with for present purposes, South African law clung to the English template. As the Supreme Court of Appeal observed of the legislative trajectory of the law following the promulgation of the 1978 Act, "[t]he good intentions did not last and hardly a year had passed when the Legislature […] reverted, as far as ownership was concerned, to the Anglo-American model where commercial rights tend to reign supreme".[10] In this respect, "[t]he law of copyright has followed this pattern of colonial domination […] [and] [c]ontemporary case law indicates that the legal system continues to rely on Commonwealth precedent when interpreting domestic legislation".[11] For this reason it is fair to say that South African copyright law still reflects its English heritage, as only relatively minor revisions have been effected since the promulgation of the 1978 Act, none of which alter the fundamental nature or structure of the Act.[12] This raises the questions whether and to what extent the Act gives adequate protection to a range of constitutional rights within the copyright context.

Although copyright law is governed mostly by statute, chiefly the Copyright Act, there are intersections with other sources of law that need to be considered. First, there may be instances where other legislation interacts with the subject matter of copyright law, such as in respect of technological protection measures used to control access and reproduction of copyright works, which are regulated by section 86 of the Electronic

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award ownership of copyright to persons other than their author in various circumstances, were initially absent from the Act, only being introduced by section 9 of the Copyright Amendment Act 56 of 1980.

[9] JC Ginsburg "A tale of two copyrights: Literary property in revolutionary France and America" (1990) 64 *Tulane Law Review* 991-1031.

[10] *Biotech Laboratories (Pty) Ltd v Beecham Group PLC and Another* [2002] 3 All SA 652 (SCA) para 12.

[11] NP Sindane *The Call to Decolonise Higher Education: Copyright law through an African lens* (unpublished LLM dissertation UNISA 2020) 35 (citations omitted).

[12] These revisions were brought about by the Copyright Amendment Acts 56 of 1980, 66 of 1983, 52 of 1984, 39 of 1986, 13 of 1988, 61 of 1989, 125 of 1992, 38 of 1997 and 9 of 2002, and the Intellectual Property Laws Amendment Act 38 of 1997.

Communications and Transactions Act 25 of 2002.[13] Furthermore, there may be specialised constitutional legislation that explicitly takes precedence over conflicting legislation in matters of overlap, for instance the Promotion of Equality and Prevention of Unlawful Discrimination Act 4 of 2000.[14] In cases of alleged unfair discrimination, this Act may override the provisions of the Copyright Act or provide courts with robust powers to effect immediate remediation of the discrimination.

Secondly, the Copyright Act sometimes intersects with common law. Common law may be used to fill gaps left by the governing statutes and to supplement the provisions of the relevant legislation where the latter refers to concepts or standards derived from common law. For example, section 22(3) of the Act stipulates that an assignment must be made in writing. This implicates the rules of contract law, which is comprised primarily of Roman-Dutch common law doctrine. The doctrine of propriety provides a second example. According to this doctrine, a work will only attract copyright protection on condition that it does not offend the public *boni mores*.[15] Some commentators have argued that the proper construction of this doctrine is that copyright subsists in such works, but courts have a common law discretion to refuse the enforcement of the owner's rights on grounds of impropriety.[16] On either construction, courts must apply an open-ended standard, which derives from the common law. Furthermore, common law may play a more opaque role in copyright adjudication by supplying normative and conceptual content to terms that copyright law takes for granted. Terms like ownership are used throughout the Act, which comes with pre-existing connotations of the presumptive power (and structure) of property rights and their relation to other rights. Indeed, South African courts have described copyright as a bundle of rights,[17] denoting the common law understanding of property

[13] This provision of the Act will be superseded by sections 28O-28P of the Copyright Amendment Bill, once enacted.
[14] Section 5(2).
[15] This doctrine can be traced back to *Goeie Hoop Uitgewers (Eiendoms) Bpk v Central News Agency* 1953 (2) SA 843 (W). See further S Karjiker "The case for the recognition of a public-interest defence in copyright law" 2017 3 *TSAR* 451-469 at 456 and the sources cited there, especially at n 55.
[16] Karjiker "Public-interest defence" 456-457; OH Dean & S Karjiker *Handbook of South African Copyright Law* (RS 15 2015) 1-27.
[17] *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd v Shelburne Associates & Others; Video Parktown North (Pty) Ltd v Century Associates & Others* 1986 (2) SA 623 (T) at 632C.

rights that constitute ownership, which has also featured in copyright scholarship.[18] These common law understandings of the legal concepts at play make up the "background rules" that inform the interpretation and application of the statutory terms and conceptual frameworks.[19] Without interrogating and reworking these background rules and concepts, copyright law will remain transfixed by the inherited conceptualism that lays hidden beneath the surface of judicial reasoning.[20]

It is trite that constitutional morality has not permeated the statutory realm of copyright prior to the promulgation of the Amendment Bill. The latest revision of the Act (the Copyright Amendment Bill B13D – 2017) is presently before Parliament, having been referred back by the President citing fears of unconstitutionality.[21] This amendment bill has been winding its way back and forth through the legislative corridors since the first draft was published for comment in 2015[22] and there is no foreseeable end to this revision process. The amendments span issues such as resale royalty rights,[23] educational and academic uses,[24] accessible format copies,[25] translations,[26] and exceptions for libraries and archives,[27] among others. Even after the eventual adoption of the amendments the

[18] Dean & Karjiker *Handbook* 1-141. This common law understanding of ownership has "entrenched legal formalism as the predominant theoretical approach to adjudication": E van der Sijde *Property Regulation: An integrated approach under the Constitution* (2022) 28.
[19] DM Davis & KE Klare "Transformative constitutionalism and the common and customary law" (2010) 26 *SAJHR* 403-509 at 426, 433-435, 449.
[20] The institution of private property is implicitly based on possessive individualism, which supplies the operative values and assumptions that underlie the copyright regime. As A Roy "Copyright: A colonial doctrine in a postcolonial age" (2008) 26 *Copyright Reporter* 112-134 at 112 observes, "the concept of copyright has been infused with the ideals of the liberal legal tradition, and these ideals – such as 'private property', 'authorship' and 'possessive individualism' – are not universal principles of property law, but instead are *Western* ones." (emphasis in original). Van der Sijde *Property Regulation* 42 makes a similar point in the context of South African property law: "There is a clear prioritisation of the individual in western property theory."
[21] See generally KD Beiter *et al* "Copyright Reform in South Africa: Two Joint Academic Opinions on the Copyright Amendment Bill [B13B- 2017]" (2022) 25 *PER / PELJ* 1-45.
[22] Copyright Amendment Bill (GN 646 published in GG 39028 (2015-07-27). However, KD Beiter *et al* "Copyright reform in South Africa: Two joint academic opinions on the Copyright Amendment Bill [B13B-2017]" (2022) 25 *PER / PELJ* 1-45 at 3 trace the origins of the amendment process back to 2009, when the (then) Department of Trade and Industry first commissioned studies into copyright law reform which ultimately served as impetus for the legislative revision.
[23] Sections 6A, 7A-7F, 8A & 9A.
[24] Section 12D.
[25] Section 19D.
[26] Schedule 2.
[27] Section 19C.

law will not necessarily be entirely convergent with the rights and objectives of the Bill of Rights. There will likely still be aspects of constitutional discord within the Act, and such elements need to be addressed without waiting for the next round of legislative amendments. Furthermore, any of the above-mentioned provisions – such as those concerning academic and educational activities – may be brought before a court to be tested for constitutional validity in terms of the section 25(1) constitutional property rights that grant copyright owners protection against arbitrary deprivation. Moreover, even if the envisioned amendments constituted a near-complete overhaul of existing law to reflect constitutional norms, the adjudication of the statutory provisions will still require that courts interpret and apply the text, both in cases of vertical challenge to the constitutionality of the Act or in horizontal disputes regulated by its terms.

While the legislative revision of copyright law is undoubtedly needed to remedy the various constitutional infirmities it addresses, it can arguably never encompass the full scope of transformative imperatives that the Constitution engenders. Rather, courts are positioned to effect transformation to constitutionally deficient law when such law is challenged, either through an appropriate reading of the provisions of the Act or the declaration of their invalidity. In both cases, courts will require a reading strategy to engage with the substance of the provisions, which strategy must give effect to the normative obligations that inhere throughout the Bill of Rights.

Of course, legislative reform remains on the table as a viable option for transforming copyright law to reflect constitutional norms and precepts, and the model proposed here would latch onto such reform and amplify its effect. That would be the case regardless of whether it is deployed in judicial analysis of the constitutionality of an amending provision (presumably as a constitutional property matter) or in the interpretation of a statutory rule or exception in horizontal cases (and determining the normative legitimacy of any duties placed on or adverse effects to the interests of copyright authors, owners or users).

The Constitutional Court[28] and academic community[29] have all but unanimously accepted that intellectual property qualifies as property for constitutional purposes, but the impact of this acceptance remains unconsidered. Property, as a legal institution, serves prevailing social needs by assuming various socio-economic roles and functions. Yet in relation to intellectual property systems these roles and functions have not been realigned since the advent of constitutional democracy. While legislative attempts at normative reinvigoration have yet to be enacted, the Copyright Act continues to regulate matters falling under the domain of copyright with the same legal rules and standards that were enacted in 1978 with scant revision. These provisions are arguably out of step with the normative imperatives of South African constitutional democracy. Moreover, no discernible methodological or structural model of infusing constitutional morality into copyright law has emerged from the judiciary, nor has any been proposed in scholarship. Even the most progressive legislation can be stymied by the adoption of a regressive reading strategy, and, equally, pre-constitutional law can be infused with constitutional meaning by leveraging constitutional values and directives to produce a different reading of existing statutory provisions. Accordingly, both legislative reform and transformative adjudication are necessary to the substantive transformation of South African copyright law, and this project proposes a viable model for the latter.

Copyright law can affect the constitutional rights to freedom of speech (section 16), human dignity (section 10), equality (section 9), privacy (section 14), education (section 29), access to information (section 32), freedom of trade and occupation (section 22), the right to language and culture (section 30 read with section 6(2)), and the right to cultural self-determination (section 31).[30] This plethora of rights are all limited by copyright in some way, yet none of these rights has been given statutory embodiment in the copyright

[28] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA 1996* 1996 (10) BCLR 1253 (CC); *Laugh It Off*; *Ascendis Animal Health*.
[29] M du Bois "Intellectual property as a constitutional property right: The South African approach" (2012) 24 *SAMLJ* 177-193; AJ van der Walt *Constitutional Property Law* (3rd ed 2011) 143-145; M Kellerman *The Constitutional Property Clause and Immaterial Property Interests* (unpublished LLD thesis Stellenbosch University 2010); OH Dean "Trade mark dilution laughed off" (2005) Oct *De Rebus* 18-22.
[30] Although these rights may feature to illustrate a particular argument, no specific constitutional rights will be investigated in the theoretical context in which this research proceeds.

context. Accordingly, the pre-constitutional Copyright Act is potentially a source of significant limitation of constitutional rights.[31] These human rights elements feature in prominent international treaties as a diverse collection of interests, from recognition of authorship reflecting overtones of authorial dignity to education and the guarantee of civic rights like freedom of expression and participation in the culture of one's choice to the international protection of property systems and trade relations.[32] Indeed, property rights protections are contained in multiple agreements emanating from various international fora,[33] and the tension that results from ostensibly competing commitments has received significant scholarly attention.[34]

Often this constitutional conflict is approached from the perspective of the international law treaties that regulate the subject, which also situates copyright in the human rights framework.[35] The conventional constitutional analysis starts by positing copyright as property for constitutional purposes and applies the section 25 methodology to determine whether the regulation of the property right is substantively or procedurally arbitrary.[36]

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[31] Admittedly, a human rights argument can also be invoked to fortify claims for strong intellectual property protection. Such an argument could for instance rely on section 27(2) of the Universal Declaration of Human Rights (adopted 10 December 1948) GA Res 217A (III), UN Doc A/810, which recognises "the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production". In terms of this argument, limitations on copyright would negate this right and endanger creative industries and the innovation sector. However, this argument ignores the immediately preceding clause, which reads: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

[32] These treaties are implicated in adjudication by ss 39(1) and 233.

[33] These include the Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886 (adopted 9 September 1886, revised 14 July 1967 & 24 July 1971) 1161 UNTS 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force January 1995) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 3; Universal Copyright Convention (adopted 6-9-1952, revised on 24 July 1971) UNTS 13444; Universal Declaration of Human Rights.

[34] RK Okediji "Does intellectual property need human rights?" (2018) 51 *NYUJILP* 1-68; PK Yu "Intellectual property and human rights 2.0" (2019) 53 *U Rich LR* 1375-1454; LR Helfer & GW Austin *Human Rights and Intellectual Property: Mapping the Global Interface* (2011); LR Helfer "Toward a human rights framework for intellectual property" (2007) 40 *UC Davis LR* 971-1020.

[35] See eg LA Tong "The status of intellectual property rights" in A van der Merwe (ed) *Law of Intellectual Property in South Africa* (2nd ed 2016) 1-9.

[36] AJ van der Walt & RM Shay "Constitutional analysis of intellectual property" (2014) 17 *PER/PELJ* 52-85; M du Bois "Intellectual property as a constitutional property right: The South African approach" (2012) 24 *SAMLJ* 177-193.

This occurs due to an interference with the copyright owner's rights by the state, either by means of legislative amendment or in terms of existing (pre-constitutional) law. However, it may also be analytically valuable to consider the conflict from the other end. When copyright limits constitutional rights other than property, the property right is balanced against countervailing constitutional rights in terms of section 36 (the general limitations clause in the Bill of Rights), and the justificatory burden is placed upon the party to the dispute that defends the constitutionality of the limitation.

The work of Klaus Beiter is instructive on this point.[37] Beiter posits the international human right to education as a necessary limitation on copyright, which must have domestic effect in terms of South Africa's international obligations. The author takes a human rights approach to copyright and uses it to dissect doctrinal issues. This differs from the conventional approach to the extent that it does not centre the analysis on the property right, but considers the fundamental human right to education as the focal point. Other scholars have similarly embarked on fruitful analyses of South Africa's international copyright law obligations and the domestic constitutional framework for compliance with these duties.[38] These contributions point to the importance of courts being primed to the multitude of human rights obligations that pertain to copyright.

Recently, the Constitutional Court handed down judgment in *Blind SA v Minister of Trade, Industry and Competition and Others*,[39] where the pre-constitutional provisions of the Copyright Act were challenged for causing an unjustified limitation to the constitutional rights of persons with visual disabilities. The Court found section 6 of the Act to be overbroad in its application, causing an unjustified limitation to the rights of the applicants.

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[37] KD Beiter "Is the age of human rights really over? The right to education in Africa—Domesticization, human rights-based development, and extraterritorial state obligations" (2018) 49 *Georgetown Journal of International Law* 9-88; KD Beiter "Extraterritorial human rights obligations to 'civilize' intellectual property law: Access to textbooks in Africa, copyright, and the right to education" (2020) 23 *JWIP* 232-266; KD Beiter "Not the African copyright pirate is perverse, but the situation in which (s)he lives- Textbooks for education, extraterritorial human rights obligations, and constitutionalization 'from below' in IP law" (2021) *PIJIP Research Paper No 65* 1-69.

[38] S Samtani "The domestic effect of South Africa's treaty obligations: The right to education and the Copyright Amendment Bill" (2020) *PIJIP Research Paper No 61* 1-53; LA Tong "Intellectual property rights and the attainment of human rights" in A van der Merwe (ed) *Law of Intellectual Property in South Africa* (2nd ed 2016) 11-29 at 20-25.

[39] [2022] ZACC 33.

The Court held that copyright owners' reproduction and adaptation rights prevented the format-shifting necessary for persons with disabilities to enjoy access to literary and artistic works, and that this limitation amounted to unfair discrimination against such persons contrary to section 9(3) of the Bill of Rights.[40] The Court also found that the human dignity of persons with disabilities was subjected to unjustifiable limitation, as was the right to freedom of expression, language and culture, and education, respectively.[41] After considering international law on the issue of access to works for people with disabilities, the Court ordered Parliament to cure the constitutional infirmity by amending the Copyright Act, but saw fit to "read-in" an exception (and corresponding definitional clauses) for the intervening period to provide immediate relief to the applicants.[42]

The decision in *Blind SA* illustrates how constitutional rights and norms may conflict with copyright law and shows that the blanket application of copyright has denied a certain class of persons the rights to equality, human dignity, education, and language and culture. It further demonstrates the transformative potential of judicial orders declaring legislation invalid. However, legislative amendments and judicial declarations of invalidity are not the only means through which copyright law can be transformed. Courts are also enjoined to interpret legislation and develop the common law in line with constitutional values. The transformation of copyright law therefore depends not only on policing the outer limits of what is constitutionally permissible through the invalidation of legislative provisions, but also on using the Constitution's interpretation and application provisions to infuse the normative spirit of constitutional rights and values into copyright doctrine through interpretation and development.

So far, the Constitutional Court's call in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* (*Laugh It Off*)[43] for the infusion of constitutional rights and values into intellectual property law has not been heeded in respect of copyright. Constitutional rights and values are often donned

[40] Paras 66, 70, 89-90.
[41] Paras 71-74.
[42] Paras 95-97, 105, 112.
[43] 2006 (1) SA 144 (CC).

as an afterthought in copyright cases or rendered extrinsic to the legal issue, thereby marginalising the constitutional entitlement. For example, the court in *Moneyweb (Pty) Ltd v Media 24 Ltd and Another*[44] found that the section 12(1)(c) fair dealing exception embodies the constitutional right to freedom of expression of section 16(1)(b)-(c) and concluded that the statutory provision does not require transformation. It reached that conclusion without even construing section 16 of the Constitution.

This is a manifestation of conservative legal culture,[45] which views certain discrete areas of private and mercantile law, like copyright, to be either immune to or already compliant with the commandment of a single system of law.[46] Even when courts aver sensitivity to the influence of the Constitution on the interpretation and application of intellectual property legislation, conservative legal culture often runs roughshod over transformative imperatives. The Constitutional Court made it clear in *Laugh It Off* that, from the outset, intellectual property legislation that implicates constitutional rights and values must be interpreted through a constitutional lens. In that case, the Court rejected the approach of the Supreme Court of Appeal,[47] which first asked whether the expressive conduct complained of was harmful to the trade mark interests, and only thereafter enquired whether the infringement of the trade mark was justified on the basis of freedom of expression. That approach failed to come to terms with the Constitution's supreme status, and effectively prioritised the normative content of the statute over that of relevant constitutional norms. Put simply, it made constitutional rights fit an IP framework rather than the other way around. Similarly, cases involving copyright have tended to ignore the instruction to place constitutional rights and values at the centre of the inquiry and courts

[44] 2016 (4) SA 591 (GJ).
[45] The term legal culture is defined by Klare "Legal culture" 166-167 as referring to the "professional sensibilities, habits of mind, and intellectual reflexes" of lawyers and judges working in a particular jurisdiction, including the "characteristic rhetorical strategies deployed" and the "repertoire of recurring argumentative moves" that they deem persuasive.
[46] The unquestioned fallacy is that capitalist ethos and ethics can operate freely in the commercial sector because there is no public law relationship involved in horizontal commerce like implicated in intellectual property law, and all terms of "doing business" are dictated by the ethical realities of the corporate realm, which are directed by the singular, flat motive of profit.
[47] *Laugh It Off Promotions CC v South African Breweries International* [2004] 4 All SA 151 (SCA).

have continued with a business-as-usual approach.[48] As such, courts invariably start the judicial inquiry with copyright rather than its constitutional counterpart, contrary to the instructions in *Laugh It Off*.

Judicial interpretation and application of copyright law involve bestowing meaning on statutory provisions. Giving statutory provisions practical meaning requires construing legal rules in line with certain normative concepts like legal standards and values. In this regard, the interpretation and application provisions, sections 39 and 8 respectively, must be analysed for their role in transformative jurisprudence. Regrettably, the former provision has been raised only discursively in copyright adjudication without any real impact on the interpretative strategy employed, while the latter has never featured in a copyright case (although its effect was certainly felt in *Blind SA*). This points to the glaring need for a transformative theory that operationalises both provisions for deployment in the copyright context.

This can be seen in the decision in *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC*[49] that viewed the constitutional argument raised by the respondent as being made in bad faith, at least partly because the respondent did not make out an argument on the basis of the provisions of the Copyright Act and instead sought to have meaning "read in", a constitutional remedy that is not known to copyright law. This case warrants brief elaboration to illustrate the nature and extent of the problem in judicial reasoning that this research addresses.

The applicant in this case commissioned the respondent to produce a documentary film about apartheid-era bailouts that were given to banks by the former government. The parties signed an agreement in terms of which the respondent produced two episodes, exposing former and sitting government officials in a corrupt scheme in which billions of rand were stolen. The SABC – which is the state broadcaster – refused to air the second episode, citing editorial concerns over broadcasting standards, and further refused to

[48] In the copyright cases of *Moneyweb*, *Vollenhoven*, and *National Soccer League T/A Premier Soccer League v Gidani (Pty) Ltd* [2014] 2 All SA 461 (GJ), the South Gauteng High Court on each occasion neglected the Constitutional Court's clear instruction to centre the inquiry on the constitutional rights involved.

[49] 2016 4 All SA 623 (GJ).

renegotiate the rights over the work, for which it had paid a commissioning fee to the respondent.

The applicant claimed authorship and ownership of the work and sought to prevent the respondent from screening or distributing the work or any raw material produced or procured for the purposes of making the film, indicating that it had no intention of selling the rights back to the producer. The respondent claimed that she was willing to collaborate with the applicant to jointly modify the work to bring it up to the required standard, but the applicant initially ignored the request for months and then informed the respondent that it was not willing to sell the work, despite having no intention of broadcasting it, altering it or exploiting it in any way. In other words, the South African public would never be able to see the film because the applicant had decided to exercise its copyright in a censorial manner.

The respondent argued that the purpose of the Copyright Act was to serve the public good by, inter alia, protecting an author's personality rights in a work, promoting the prolific exposure of art and culture, as well as ideas and information, and ensuring that the acquisition and exploitation of copyright in such works is fair and equitable.[50] Accordingly, the respondent asked the court to read in an exploitation exception into section 24 of the Act to the effect that "any person attempting to enforce a copyright must establish that it intends to exploit the work", or, alternatively, that the author was entitled to keep a single copy of the film as part of their fair dealing entitlements.[51] The court not only shot down both arguments, but found that the applicant and not the respondent was the author of the work as well as its owner.[52] This meant that the respondent could also not rely on her moral rights to be recognised as the author of the work or to object to the derogatory treatment of the work in terms of section 20 of the Act. The court rejected the argument that section 24 of the Act was unconstitutional for violating the section 16 right

[50] Para 25.
[51] Para 25.
[52] Para 37.

to freedom of expression, specifically freedom of artistic creativity (section 16(1)(c)) and the freedom to receive or impart ideas (section 16(1)(b)).[53]

The court found that the remedial reading that the respondent sought would contravene the statutory definition of author in section 1(1) of the Act,[54] and that the section 16 argument "ignore[d] the very basic constitutional right which underpins the Act which is the right of property in s[ection] 25 of the Constitution".[55] The court even found that the attempt to negate the contract on constitutional grounds was an argument in bad faith as it contravened the *pacta servanda sunt* principle of contracts.[56] Furthermore, despite the pre-constitutional origins of the Copyright Act and the infrequent revision it has seen since the dawn of constitutional democracy, the court, as in *Moneyweb*, did not construe the constitutional rights pleaded, but nevertheless found that "the Act undoubtedly balances freedom of expression under section 16 with proprietary rights under s[ection] 25 of the Constitution [which] […] strikes an appropriate balance and is justifiable as a law of general application as contemplated under s[ection] 36 of the Constitution".[57]

This case aptly demonstrates how the Copyright Act routinely intersects with common law concepts and constitutional rights, and how a reading strategy is necessary to align all sources of law with one another. Although the court did not specify the reading strategy that it elected to follow, it can be described as an unduly formalistic approach that failed to properly account for the role of the Constitution in the interpretation of the Copyright Act and the development of the common law.[58] Neither this case nor any other copyright decision has considered what the section 39(2) instruction means for the interpretation of

[53] Paras 42-43.
[54] Para 40.
[55] Para 41.
[56] Para 42.
[57] Para 43.
[58] Indeed, as S Karjiker "The case for the recognition of a public-interest defence in copyright law" 2017 3 *TSAR* 451-469 at 468 contends:

> "[The court] missed [the] opportunity to consider properly the approach that should be taken in the face of competing constitutionally enshrined rights; a court now needs to satisfy itself that its application of the law considers the wider implications of a particular legal position. Such considerations are required in our new constitutional framework".

the Copyright Act, nor the effect of the horizontality clause on copyright interests that intersect with constitutional rights. This is also largely the case for copyright scholarship.[59]

While there have been some suggestions to balance constitutional rights against copyright, no systematic doctrinal development has been proposed in scholarship and no adjudicative approach has been developed to do so. The literature has proceeded on the basis that courts must invalidate legislation that does not conform to the demands of human rights, referring it back to Parliament for remedial amendment. There has been no engagement with the possibility of adopting a transformative interpretation towards copyright informed by constitutional precepts, nor any proposals to effect transformation of copyright law while working within the existing statutory framework. The transformative model of interpretation developed here is not intended to divest the legislature of its constitutional powers to bring about change in the existing statutory regime. Rather, it provides the judiciary a method of systematically bringing constitutional morality to bear on the law, whether in its present form or once amended, and integrates the numerous sources of legal rules that are relevant to a copyright dispute into a model that produces transformative outcomes.

This dissertation argues that courts have much more power to effect transformation than merely issuing orders of invalidity accompanied by instructions to Parliament, as was the case in *Blind SA* (where the interim "reading-in" protected against the continued violation of rights). It develops a principled normative model that operationalises courts' constitutional powers by invoking a theory of law as interpretation that deploys constructive reading strategies to amplify copyright's normative resonance with the constitutional system of law. The facts in *Vollenhoven* provide a practical articulation of contentious issues that can be useful for considering the account of transformative interpretation developed over the chapters that follow.

1.2.2) Transforming the legal pluriverse: the shift towards progressive legal culture

[59] This is with the notable exception of S Samtani "The domestic effect of South Africa's treaty obligations: The right to education and the Copyright Amendment Bill" (2020) *PIJIP Research Paper No 61* 1-53, who analyses these provisions from the perspective of South Africa's compliance with international law.

Transformative constitutionalism provides a thematic umbrella for engagement with all aspects of South African law and legal culture. The movement originated in the context of the fundamental shift from a legal order premised on parliamentary sovereignty with its attendant culture of authority to a political-legal undertaking to abide by a culture of justification. This culture of justification ensures that every exercise of public power is subject to an objective normative metric enshrined against an understanding of historic injustice and transformative ambition. In a hugely influential article, Etienne Mureinik takes up the metaphor of the Interim Constitution proclaiming itself to be:

> "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".[60]

This bridge, Mureinik observes, must be between two notional spaces, which he interprets as being away from a culture of authority (characterised by the rule of parliamentary sovereignty, at a time when Parliament was elected by a minority)[61] to a culture of justification: "a culture in which every exercise of power is expected to be justified […] [a culture] built on persuasion, not coercion".[62] This shift in the basic approach to law and adjudication requires that courts be attentive to the substance of the legal rule being applied rather than focusing solely on its form and pedigree to determine applicability;

[60] E Mureinik "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *SAJHR* 31-48 at 31. See further A Chaskalson "From wickedness to equality: The moral transformation of South African law" (2003) 1 *IJCL* 590-609 at 599-600.

[61] This formal model of legalism held law to be valid if it abided by the formal conditions for validity without any appraisal against moral standards; ultimately, "legalism was central to the ways in which white rule defined itself as superior to indigenous systems of governance": S Hassim "Decolonising equality: The radical roots of the gender equality clause in the South African constitution" (2018) 34 *SAJHR* 342-358 at 344. See also T Roux *The Politics of Principle: The first South African Constitutional Court, 1995-2005* (2013) 203-204, 207-209.

[62] Mureinik "A bridge to where?" 32. This metaphor has survived the transition to the Final Constitution of the Republic of South Africa, 1996, and has been repeated in innumerable judgments since its advent. For critical deconstructions of the aptness and desirability of this metaphor, see AJ van der Walt "Dancing with codes: Protecting, developing and deconstructing property rights in a constitutional state" (2001) 118 *SALJ* 258-311; K van Marle "Transformative constitutionalism as/and critique" (2009) 20 *Stell LR* 286-301; JM Modiri "The colour of law, power and knowledge: Introducing critical race theory in (post-) apartheid South Africa" (2012) 28 *SAJHR* 405-436.

additionally, it must be tested against the normative standards instantiated by the Bill of Rights.[63]

The envisioned culture of justification is to be borne out by the Bill of Rights, which Mureinik describes as "a compendium of values empowering citizens affected by laws or decisions to demand justification".[64] It is this value-based nature of constitutional adjudication that leads Alfred Cockrell to extend the bridge metaphor to legal reasoning, showing that the societal transformation that the Constitution envisages requires a shift from a formal vision of law to a substantive vision that takes account of the normative dimensions of legal rules and the outcomes of their application.[65] These values underlie the constitutional society and are written into the fabric of the constitutional text. Cockrell argues that courts should resort to the values explicitly identified in the Bill of Rights to motivate their reasoning.[66] This approach focuses on whether the reasons for the respective legal rules can be countenanced in South African democratic society.[67] This

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[63] Langa "Transformative constitutionalism" 353 explains:

> "The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. […] Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values."

H Botha "Metaphoric reasoning and transformative constitutionalism (part 2)" 2003 *TSAR* 20-36 at 26 points out that this move towards justification necessarily renders the limitations approach dialogic (rather than binary or formulaic) and requires courts to explain rather than merely declare.

[64] Mureinik "A bridge to where?" 32. H Botha "The values and principles underlying the 1993 Constitution" (1996) 9 *SAPL* 233-244 at 235 describes the legal value of legitimacy as overarching framework (a kind of meta-norm) that defined the new constitutional dispensation under the Interim Constitution, in the sense that it "accords a vital role to the *values* underpinning legal rules", thereby placing the normative content of the legal system at the front and centre of juridical analysis (emphasis in original.)

[65] A Cockrell "Rainbow jurisprudence" (1996) 12 *SAJHR* 1-38. Botha "Values and principles" 240 reinforces this point.

[66] Cockrell "Rainbow jurisprudence" 30-35 argues that "soft positivism" is entirely compatible with constitutional transformation when the dichotomous divide between rules and values is demolished, as in many instances of the constitutional text, and is an appropriate approach to achieve the constitutional objectives. T Roux "Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?" (2009) 20 *Stell LR* 258-285 makes a similar argument. See also Roux *Politics* 197-201. O'Regan suggests that this "richer" tradition of positivism, characterised by the work of Dworkin and Hart, does indeed incorporate explicit legal values (like those identified in the Constitution): C O'Regan "From form to substance: The constitutional jurisprudence of Laurie Ackermann" 2008 *Acta Juridica* 1-17 at 8.

[67] The types of substantive reasons that promote a substantive vision of law, which Cockrell borrows from PS Atiyah & RS Summers *Form and Substance in Anglo-American Law: A comparative study of legal reasoning, legal theory, and legal institutions* (1987), include "rightness" reasons (akin to deontological reasons) and goal reasons (on a consequentialist basis), each of which independently may provide

presents a paradigm shift in the culture of legal reasoning that must be felt in every case argued before a court.

1.2.3) Moving from a culture of formal obedience to one of substantive appraisal

The culture of justification must permeate adjudication across all legal disciplines, for if this paradigmatic shift is not felt at the level of individual disputes, courts have failed to abide by the Constitution's normative value system.[68] Dikgang Moseneke instructs that *"*courts should search for substantive justice, which is to be inferred from the foundational values of the Constitution".*[69]* Substantive justice can only result from substantive reasoning, which, at its core, "involves deciding matters based on their substance and the principles underpinning them rather than on the basis of superficial form".[70] The justification for a rule matters as much as the validity or formal authority of the rule and only those legal rules that produce justifiable outcomes can be countenanced. It should be clear why legal values matter in the legal system: transformative adjudication is entirely dependent on the utilisation of substantive reasoning based on securing normative priorities to resolve disputes, without which it would be empty as an attempt at meaningful transformation. In this way the culture of justification is embedded in – an implicit foundation of – transformative adjudication and should animate all disputes brought before the courts.[71]

Articulated at the most basic level, a tension results from the transformative ambitions of the Constitution overlayed against a tradition that favours certainty and predictability over

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adequate justification for the outcome of adjudication. Both feature prominently in the justificatory debates surrounding copyright: see Chapter 5 Section 3.

[68] S Liebenberg *Socio-economic Rights: Adjudication under a transformative constitution* (2010) 45; G Quinot "Substantive reasoning and administrative-law adjudication" (2010) 3 *CCR* 111-139 at 112.

[69] Moseneke "Transformative adjudication" 316. Langa "Transformative constitutionalism" 353 echoes this thought: "The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines." See also Quinot "Substantive reasoning" 113; S Cowen "Can 'dignity' guide South Africa's equality jurisprudence?" (2001) 17 *SAJHR* 34-58 at 57.

[70] G Penfold "Substantive reasoning and the concept of 'administrative action'" (2019) 136 *SALJ* 84-111 at 85, repeated at 111.

[71] Quinot "Substantive reasoning" 137.

flexibility and change.[72] The traditional approach of formalistic adherence to the letter of the law, which involves upholding a positivist, allegedly amoral deference to the purported plain meaning of a text or unavoidable outcome of the application of a legal rule, is one manifestation of this formal vision. Johan Froneman posits that the formal vision of law adheres to the notion of "law as law" with the intention of skirting normative and distributive questions.[73] Formalism seduces interpreters into the false sense that the law being interpreted is objectively and mechanistically determinable and conclusory, precluding any recognition of the judicial input or guidance towards one conception of justice over another.[74] Consequently, it denies the role of political ideology in formal concepts like legal values and principles, enquiring into the pedigree of a legal source rather than the social purpose that it serves. The formalist adjudicator accepts the application of a formally valid rule without considering the underlying normative values and principles or how the outcome serves their realisation; they assume that the legal rule reflects the conclusion to a process of substantive reasoning in which public policy goals and *boni mores* considerations have been incorporated.[75]

While formal reasons for the operation of law are often essential to the proper functioning of a legal system, this does not lend support for formalism as a mode of thinking.[76] Formal rules must always be capable of substantive justification, especially in a legal system that proclaims itself transformative where the understanding of the legal values involved in the substantive justification should change.[77] Glenn Penfold notes that formal reasoning is often used to shield from scrutiny decisions that would not meet the expected standards

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[72] AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 85.

[73] JC Froneman "Legal reasoning and legal culture: Our 'vision' of law" (2005) 16 *Stell LR* 3-20 at 4. Later (at 6) Froneman equates the resort to formal reasons as being "primarily concerned with the formal validity of any rule or decision." Roux *Politics* 191 links this formal vision of law to positivism. At 192 Roux describes this as a "crude or 'low' version of positivism, tending towards formalism" (citation omitted).

[74] Froneman "Legal reasoning" 16; Botha "Metaphoric reasoning (part 1)" 618-622. On the difference between a legal concept and a legal conception, see R Dworkin *Law's Empire* (1986) 90-101.

[75] Froneman "Legal reasoning" 6.

[76] Penfold "Substantive reasoning" 90-91. Penfold points out that formal reasons are essential to constitutional jurisprudence, but cautions (at 91 n 41) that "courts may – and, indeed, should – adopt substantive reasoning in applying a formal rule to a particular set of facts."

[77] Penfold "Substantive reasoning" 86. See also Froneman "Legal reasoning" 3-4, 6; Cockrell "Rainbow jurisprudence" 5-8; Quinot "Substantive reasoning" 111-112; Roux *Politics* 64 n 187, 80-81.

of moral, political, or other reasoning.[78] Instead, all legal reasoning must be consistent with the norms and contribute to the objectives of the supreme Constitution, which does not cower from political confrontation in law.[79] Because moral concepts generally and political values specifically are not fixed in meaning, much less self-evident, it is apposite to habitually re-evaluate political values like equality and human dignity in their many permutations throughout the law. Only through continuously re-appraising the doctrinal articulations of these values wherever they are instantiated can the body of South African law be normatively reconstituted to better reflect the constitutional vision. In this endeavour, the need to realign legal thinking to produce transformative outcomes cannot be overstated.[80]

The intervention of a transformative constitution resulted in divergent approaches towards the development of law, which is embodied in the scholarly and judicial attitudes surrounding interpretation and application of law in conformity with the Bill of Rights. This was the fulcrum of significant judicial factional warfare, with the central skirmish revolving around judicial activism and the role of the judiciary vis-à-vis the legislative and executive branches of government.[81] At the heart of this tension lies the opposition between stability and accelerated progress; a binary choice between retaining the integrity of the common law or statutory regime as a holistic system and bringing a measure of social justice to bear. Dennis Davis explains the two traditions most starkly:

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[78] Penfold "Substantive reasoning" 85-86. See further Froneman "Legal reasoning" 10; Moseneke "Transformative adjudication" 317-318; H Botha "Freedom and constraint in constitutional adjudication" (2004) 20 *SAJHR* 249-283 at 275-282. For more on the role of formal reasoning in pre-constitutional adjudication, see generally K van Marle "Revisiting the politics of post-apartheid constitutional interpretation" 2003 3 *TSAR* 549-557; H Botha "Equality, dignity, and the politics of interpretation" (2004) 19 *SAPL* 724-751; E Zitzke "The history and politics of contemporary common-law purism" (2017) 23 *Fundamina* 185-230; AJ van der Walt "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) *SAJHR* 169-204

[79] Penfold "Substantive reasoning" 87.

[80] Van Marle "Transformative constitutionalism" 300. See also G Quinot "Transformative legal education" (2012) 129 *SALJ* 411-433.

[81] For an overview of the tumultuous history of factional politics (divided by English and Dutch lines initially, followed by an English-Afrikaans division, which often played out between positivist and non-positivist/human rights camps) on the bench, with an enduring colonial distinction between white and black, see Roux *Politics* 192-201. See also the insightful account of Zitzke "History and politics", who compares the judicial traditions of conservative and liberal judges, in this instance also representing the English-Afrikaans fault line.

> *"*Common law development traditionally requires gradual, cautious alteration of concepts on an incremental case-by-case basis. By contrast, the transformative character of the Constitution envisages substantial, almost immediate change in the socio-economic structure of society."[82]
>
> The traditional approach favours the certainty that allegedly can be gained from a plain-fact view of law and denies that judges have any role in shaping policy decisions or law itself, other than coherent development of common law doctrine when absolutely necessary. This formalism is very much alive and well in South African legal culture and must be brought into the open, exposing the meta-patterns of reasoning and intellectual habits and reflexes that underlie adjudication.[83] Moreover, as Henk Botha contends, this excavation of underlying norms and patterns of judicial reasoning should encompass the basic concepts and elementary dichotomies that lawyers tend to take as given.[84]

When a particular legal regime (like copyright law) posits its own set of normative rules or baseline values and implied objectives,[85] the legislative scheme may seduce interpreters into following the conceptualist logic of that paradigm, which is one type of formalism. Various interpretive canons also offer adjudicators the allure of certainty at the expense of justice, which they may pursue on the misunderstanding that this is their task and function.[86] But ardent adherence to such conceptualism and literalism betrays the promise of substantive reasoning. In contrast, substantive reasoning does not deny the fact that moral and political considerations are often at the heart of adjudication; instead, it tries to harness and direct such considerations towards constitutionally desirable

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[82] Davis "Private law after 1994" 319. This character has also been recognised by the Constitutional Court: see *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) paras 29 & 78. See further DM Davis "The importance of reading – A rebutter to the jurisprudence of Anton Fagan" (2013) 130 *SALJ* 52-59.

[83] DM Davis "Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience" (2003) 1 *IJCL* 181-195 at 192; JC Froneman "Legal reasoning" 5. See also DM Davis "Legal transformation and legal education: Congruence or conflict?" 2015 *Acta Juridica* 172-188; Botha "Freedom and constraint" 267-275; Van Marle "Revisiting" 552-555; K van Marle & D Brand "Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in *Jooste v Botha*" (2001) 12 *Stell LR* 408-420 at 410-412; AJ van der Walt "Legal history, legal culture and transformation in a constitutional democracy" (2006) 12 *Fundamina* 1-47; Van der Walt "Tradition on trial".

[84] Botha "Metaphoric reasoning (part 2)" 20. See further H Botha "Albie Sachs and the politics of interpretation" (2010) 25 *SAPL* 39-56.

[85] See Chapter 5 3 for a discussion of copyright's normative underpinnings.

[86] One such interpretive canon is the injunction *iudicis est ius dicere non dare*, meaning that it is the task of judges to interpret the law and not to make it. Aside from being blind to the interpretive turn, this maxim was frequently invoked under the apartheid era to advance the appearance of judicial helplessness in the face of racist laws and resulted in the courts applying unconscionable laws without any attempt at re-interpreting the given rule in a way that mitigates the effects: see L Du Plessis *Re-interpretation of Statutes* (2002) 255-257.

outcomes.[87] Substantive reasoning requires the interpreter to take account of a much greater array of values than those obviously engaged in a legal dispute; particularly, it must take account of the host of political and socio-economic constitutional values (sometimes expressed as principles)[88] that inhere in the egalitarian society outlined in the Constitution, including institutional values (separation of powers, transparency) and political norms (equality, human dignity).[89]

Geo Quinot warns that the call to transformative adjudication is "not a simple matter of preferring substance over form, since baseless and one-sided substantive reasoning is as devoid of justification as sterile formalism".[90] Substantive reasoning requires a deeper inquiry into the normative validity of the provision or principle and does not permit the flaunting of ostensibly valid considerations to justify an otherwise arbitrary outcome. Importantly, it means investigating all normative touchpoints that are embodied in formal legal rules. The point is to secure the entitlements that the Bill of Rights guarantees and progress towards the goals set by the constitutional objectives, which agenda requires the value-based adjudicative transformation of all non-constitutional sources of law. Penfold explains that "the virtue of substantive reasoning is that it facilitates the interpretation and application of formal legal rules […] in a manner that is consistent with the normative value system of the Constitution", which clearly entails political mandates.[91] Nonetheless, legal rules and judicial outcomes should always be questioned for compliance with the substantive vision of law that the Constitution poses.[92] Contestation of legal meaning along normative lines is a central feature of this process and should not be negated by resort to precedential authority in the apparent interests of legal certainty.[93]

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[87] Penfold "Substantive reasoning" 90; Langa "Transformative constitutionalism" 353.
[88] J Raz *Ethics in the Public Domain: Essays in the morality of law and politics* (1994) 358. See also Roux *Politics* 56.
[89] Penfold "Substantive reasoning" 92.
[90] Quinot "Substantive reasoning" 139.
[91] Penfold "Substantive reasoning" 97.
[92] Quinot "Substantive reasoning" 116.
[93] JW Singer & M Minow "In favour of foxes: Pluralism as fact and aid to the pursuit of justice" (2010) *Boston University LR* 903-920 similarly argue that we should not permit legal reasoning to delegitimise one side of a valid contestation of legal values to pretend that there is no real conflict and that the prevailing party was the only one that could lay claim to a valid legal interest.

Following Mureinik and Cockrell, Karl Klare proposed the term "transformative constitutionalism" to describe:

> "[A] long-term project of constitutional enactment, interpretation, and enforcement committed […] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction […] [by] inducing large-scale social change through nonviolent political processes grounded in law."[94]

The transformative spirit of the Constitution has been recognised by the Constitutional Court on numerous occasions.[95] Klare argues that the transformation of the law necessitates the transformation of the prevailing legal culture in South African scholarship and adjudication, else the project of transformation would be a non-starter. The transformation envisioned by the Constitution, Klare argues, should start by asking whether the lawyers tasked with the project (academics, practitioners, judges) are capable of conceiving of the necessary outcomes to this mission, given that they are constrained by the professional sensibilities, habits of mind, and intellectual reflexes that formal legal training produces. Klare's description of South African legal culture clearly classifies the dominant thinking as formalistic.[96] He observes that lawyers are normalised to certain types of reasoning and rhetoric, and that they are oblivious to the status of these conventions as contingent cultural artefacts that are learned and developed.[97] This means that legal actors are largely unaware of the cultural code in which they participate, which code creates meaning and directs thought towards certain pre-determined outcomes.[98] Klare contends that this ignorance of the cultural code in which legal actors operate often affects the substantive development of law due to the inevitable influence

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[94] Klare "Legal culture" 150.

[95] See the respective decisions in the early case of *S v Makwanyane 1*995 (3) SA 391 (CC): Mahomed J at para 262, Ackermann J at paras 155-1156, and O'Regan J at paras 322-323. See further *In re Certification of the Constitution* para 10; *Shabalala v Attorney-General of the Transvaal* 1995 (12) BCLR 1593 (CC) paras 25-28; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) paras 8-9. See also A Chaskalson "Human dignity as a foundational value of our constitutional order" (2000) 16 *SAJHR* 193-205 at 199. For more decisions to this effect from the early Constitutional Court, see the cases cited by P de Vos "A bridge too far? History as context in the interpretation of the South African Constitution" (2001) 17 *SAJHR* 1-33 at 10 n 30.

[96] Roux "Transformative constitutionalism" 270 shares this reading with Klare.

[97] For this reason, "participants in a legal culture are often unaware or only partially attentive to its power to shape their ideas and reactions to legal problems": Klare "Legal culture" 167. See further Botha "Freedom and constraint" 283.

[98] For an exploration of the idea of operating and communicating according to different codes which instantiate different sets of rules and logic, see Van der Walt "Dancing with codes".

that legal culture has on interpretive practices.[99] As Klare puts it, the challenge of transformative adjudication in South African legal culture centres on interpreting law in ways that "acknowledge and fulfil the duty of interpretive fidelity and yet that are engaged with and committed to [the constitutional vision]", which runs counter to the modes of thinking that defined pre-democratic law.[100] Accordingly, he posits that self-reflection and critical examination of legal culture is a constitutional imperative as a component of the culture of justification and substantive reasoning.

In addition to the transformation of the legal culture, transformative constitutionalism comprises a second element entailing "the establishment of a truly equal society and the provision of basic socio-economic rights to all [which] are a necessary part of transformation".[101] Both of these dimensions must be actualised and all provisions of the Bill of Rights – and the Constitution more broadly – must operate in a systematic manner to eradicate the manifold legacies of injustice that the constitutional break sought to start undoing before any progress in respect of substantive transformation can be claimed. It is from these two dimensions of transformative constitutionalism that this research takes its cue.

1.3 Research problem: judicially transforming copyright

This research focuses on the place of intellectual property rights, specifically copyright, within the South African constitutional system of law. The primary aim is to investigate the implications of the rights and values enshrined in South Africa's transformative Constitution for copyright law, read against the objective normative value system that the constitutional text instantiates and the culture of justification that accompanies it. This line of inquiry has several components, ranging from a theoretical study of the nature of legal concepts to a reflective interrogation of the value-laden approach to interpretation and

[99] Langa "Transformative constitutionalism" 353 echoes this thought.
[100] Klare "Legal culture" 150. H Botha "Democracy and rights: Constitutional interpretation in a postrealist world" (2000) 63 *THRHR* 561-581 at 575 agrees with Klare that judges are "constitutionally required to shape law in accordance with constitutional values".
[101] Langa "Transformative constitutionalism" 353.

application of law evident from constitutional case law. The kernel insights that can be distilled from constitutional case law point to a holistic and integrative approach to construing law under the supreme Constitution that has not found traction in intellectual property law.

The research explores the implications of the Constitution as an overarching value system for cases that involve the interpretation and application of rights in copyright. One of the most fundamental questions to arise is whether a theory of South African copyright adjudication should be driven by internal (copyright) values in the exposition and development of copyright doctrine, or whether it should attempt to construe this regime as an integral part of the normative legal system by resorting to seemingly extrinsic values and normative meaning. It seems clear that the development of copyright's rules through the indirect application of (external) constitutional normativity is capable of far more integration than has been witnessed over the last quarter century. The study of the roles and functions of values and rights respectively enables an instructive understanding of the constitutional environment in which copyright law is situated. This normative environment is constituted by the value-laden precepts and dictates of the Bill of Rights, known as the objective normative value system, that instruct the development of all South African law.[102]

A transformative interpretive strategy comprising both substantive and methodological guidance can aid in bringing about the aspirational vision that the constitutional text adumbrates. This adjudicative framework must reflect the Constitution's normative mandates, based upon a holistic reading of the constitutional text rendered in its proper historical context and in view of its explicitly transformative purpose. Furthermore, it must reflect the methodological principles of subsidiarity that have been formulated to give practical effect to the single-system-of-law ideal. Ultimately, this research addresses the issue of how to systematically integrate copyright law into the normative and methodological setting of constitutional interpretation. This enables a constitutionally

[102] *Carmichele*. See also F Moosa "Understanding the 'spirit, purport and objects' of South Africa's Bill of Rights" (2018) 4 *Journal of Forensic Legal & Investigative Sciences* 1-12; DM Davis "Private law after 1994: Progressive development of schizoid confusion?" (2008) 24 *SAJHR* 318-329.

inspired normative approach to determining the role of copyright in South African society, and consequently its level of integration into the single system of law under the supreme Constitution. This pertains to both horizontal disputes between private parties (typically involving claims of infringement) and the adjudication of disputes relating to the interpretation or constitutionality of copyright legislation. Ultimately, this research aims to provide an adjudicative model that can be employed to guide the judicial application of statutory provisions that comprise copyright law towards constitutional ends.

1.4 Overview of argument

The narrative of this research goes from the general and abstract to the specific and concrete. It starts with the general context of South African law and abstract discussions around legal culture and transformative practices of adjudication, as well as the theoretical underpinnings of the progressive liberal understanding of the rule of law and legal interpretation that Dworkin proffers. It then moves to the general and concrete (how the abstract theorization is taken up in the constitutional text and has played out in constitutional jurisprudence) to the specific and abstract (a taxonomy of copyright and its plural theoretical justifications) and finally to the specific and concrete (developing a theory of transformative adjudication of copyright in South African law).

The first chapter (**Chapter 1**) serves as the introduction to the study and sets out the research questions and outline of the argument developed to answer these questions. It then introduces the concepts employed in this dissertation and explains the flow of the argument that follows. From there it introduces the theme of South Africa's transition from the pre-democratic dispensation by consulting literature on the complementary subjects of transformative constitutionalism and formal and substantive reasoning to provide a solid basis for investigating the role of the interpretation and application clauses in cases of conflicting constitutional commitments in the chapters that follow. This movement provides the impetus for continuously reimagining law as a matter of substantive legal revolution to better approximate the vision of a transformed society. It further sets out the scope and limitations of the study.

Chapter 2 examines prominent adjudicative conventions of different schools within liberal rights theory and specifies the implications of each for constitutional rights and copyright law. Ronald Dworkin's early work is introduced to explain the structure and role of rights, principles, policies, and values, providing a rough taxonomy of the constituent legal concepts involved in adjudication. A brief analysis of rights theory reveals how rights as legal constructs reflect the values on which they are based, which in turn reflect the fundamental political ideals of the legal system. This understanding prefaces and informs the investigation of the operation of rights in the South African constitutional context.

The chapter then turns to Dworkin's explanation of law as an interpretive endeavour, meaning that all law depends on interpretive conventions to ascribe meaning to legal concepts like rights, values, and principles, and that legal rules are ultimately a product of the conventions of interpretation that the adjudicator employs. Dworkin describes two schools of legal interpretation, namely conventionalism and pragmatism, and characterises each according to the interpretive techniques and conventions that they follow. Hereafter constitutional interpretation is introduced, as well as the contextual and purposive techniques that courts are most familiar with as canons of construction. The constitutional approach to statutory interpretation is explained as purposive, teleological and holistic, which ties in with Dworkin's theory of constructive interpretation, discussed in the opening section of the next chapter, Chapter 3. This will lay the groundwork for the subsequent chapters by identifying how rights incorporate values, many of which are overlooked, and how they can accommodate the wider array of interests that are prevalent in modern South African society. The theoretical framework described here will inform the rest of the project, directing it to take account of the nature and function of rights when analysing how they operate in South African law.

The second substantive chapter (**Chapter 3**) delves into the constitutional mode of interpretation specified by section 39(2), which instructs adjudicators to engage in value-laden interpretations that give effect to the "spirit, purport and object" of the Bill of Rights. This instruction directs judges towards the normative context provided by the Bill of Rights to understand the constitutional imperatives for transformation of all law. The role and content of the objective normative value system underlying the Bill of Rights is

investigated and the primary normative commitments are elucidated. The section 1(a) triumvirate of values is introduced as constituting the normative core and comprising the paramount concerns of the Bill of Rights. Some of the most prominent decisions from the Constitutional Court are consulted to elaborate on the section 39(2) instruction and value-based interpretation of law specifically. The constitutional modes of interpretation that avail create sufficient space for Dworkin's model to be employed in South African law as a fruitful reading strategy that could provide the structure for interpretation of legal texts to enable transformative yet sound, predictable and normatively accountable outcomes.

Dworkin provides an influential variant of contemporary liberal rights theory called "Law as Integrity", which he juxtaposes against the conventionalist and pragmatic approaches to adjudication discussed in the previous chapter. Dworkin shows how each camp relies on interpretive conventions to produce meaning and that adjudication (and thus law in its practical form) is ultimately an exercise in interpretation. He proposes his model of constructive interpretation, which posits the requirements of fit and political integrity, respectively. After consulting Constitutional Court jurisprudence on value-laden interpretation, the chapter argues that Dworkin's influential model of "Law as Integrity" is not only compatible with the transformative imperative, but that the latter requires courts to adopt it or something very similar.

This dignity-based account is married to Dworkin's model of constructive interpretation in service of his theory of law as integrity, which is presented as fidelity to the two principles of dignity that he identifies (self-respect and authenticity). Such integrity pertains to the principles and precepts that are inherent to the whole legal system, that derive from the field of law governing the conduct under adjudication, and that emanate from the transformative constitutional vision. Principled, constitution-based reasoning is called for over formalistic or simplistic policy-based reasoning; indeed, Dworkin argues that judicial decisions should be based on principle rather than policy because this allows judges to achieve congruence with the political and moral theories that justify the law in question, making it inherently contextual rather than formalistic.[103] His model insists that the most

[103] R Dworkin *Taking Rights Seriously* (1977) 84, 300.

correct and therefore best outcome to a dispute is determined with reference to the surrounding legal normative context and cannot be extrapolated in the linear and deductive style of reasoning that once characterised South African legal culture. Notably, both Dworkin's model of law as integrity and the objective normative value system underlying the Constitution are premised on human dignity as the foundational norm, rendered in conjunction with the mutually reinforcing values of equality and freedom.

Chapter 4 addresses the correlate of constitutional interpretation: application. Section 8 of the Constitution specifies the manner and scope of the application of the Bill of Rights, which provides the textual basis for effecting the substantive transformation of non-constitutional sources of law in line with the normative dictates of the Constitution. The difference between so-called direct and indirect application of the provisions of the Bill of Rights is examined by means of case law analysis and literature review and tied to the principles of subsidiarity introduced in Chapter 2. Furthermore, the horizontal application of the Bill of Rights between private parties is considered in light of recent developments in the Constitutional Court's jurisprudence. After a somewhat conservative stance emerging from the first body of case law to address the issue of horizontal application, a recent spate of decisions has reignited the transformative potential of horizontal application that all but lay dormant for close to a decade and reintroduced the questions surrounding the substantive transformation of non-constitutional sources of law that regulate private and mercantile law interactions. Seven decisions from the past five years are analysed for clarification on these issues of methodical transformation of extant private law, which situates the discussion squarely within the realm of judicial interpretation and application of law under the supreme Constitution and culminates in a model that is directed at South African copyright law.

Chapter 5 then undertakes the specification of the foregoing account of constitutional interpretation and application to copyright law. Robert Merges's taxonomical theory of intellectual property is introduced to orient the reader in how to approach copyright law as a value-laden and -responsive enterprise. This involves distinguishing three separate layers in copyright law: theoretical foundations, midlevel principles, and practical doctrine. The chapter ports Merges's justificatory theory of intellectual property law to copyright

specifically and uses it as a descriptive model to uncover the plural values that lie at the foundation of copyright law. By linking both Dworkin's taxonomy of concepts and its normative underpinning to Merges's three-layer model of IP law and specifying the application of the latter to copyright law, any transplant shock that the proposal to use Merges's work in South African law may cause is mitigated.

The chapter starts by investigating the theoretical underpinnings of copyright law and excavating the normative values and instrumentalist rationales that animate this statutory regime. This reveals that property reasoning dominates conceptualisations of copyright law. Property rights are the chief legal mechanism for incentivising creative behaviour and regulating conduct in respect of the cultural artefacts that are produced. The nature of property rights is investigated to understand the many ways in which they function and to explain their various purposes, which allows a purposive understanding of copyright to emerge in respect of the private property rights that are granted. This analysis of copyright theory informs the purposive model being developed by providing the necessary understanding of the various values, principles, and objectives that copyright law is designed to realise and accommodate. The divergent approaches to regulating property relations are categorised as following either an information theory approach or a progressive property approach, which are explained by reference to their primary normative focus and preferred methods of dispute resolution.

Next, Merges's four midlevel principles of intellectual property are introduced and a few alternative suggestions that have been made by other scholars are considered. This discussion emphasises the pluralistic aspect of South African copyright law and explores the embodiment of midlevel principles as legal concepts. A different set of midlevel principles is then proposed for South African copyright law, namely property, trade, dignity, and public interest, each comprising a multitude of subprinciples that explain and ground the operation of copyright doctrine. The four suggested midlevel principles are indispensable to the transformative theory that has been developed and each adds a prescriptive element to the model akin to Dworkin's criterion of political integrity. They reflect extant normative doctrine while infusing constitutional meaning into these existing statutory concepts as well as positing the public interest component that is arguably

lacking from judicial dealings with copyright law. With a reconfigured midlevel, this model holds significant potential for transforming South African copyright law.

The concluding chapter (**Chapter 6**) brings together the numerous strands of argument that are developed over the course of the narrative and points to the outlines of a viable theory of transformative adjudication of copyright law in the South African constitutional legal system. The values that animate copyright legislation, and the role of constitutional values in the interpretation of statutory law in the constitutional context, are brought together to suggest a way of unifying the seemingly disparate regimes. Chapter 6 addresses the practical level of doctrine by suggesting how the midlevel principles that have been proposed could interact in numerous decided cases. This gives some insight into how the transformative model is intended to work by considering which midlevel principles find application in which cases and their role in the demarcation and balancing of conflicting commitments.

1.5 Scope and limitations of the study

This research attempts to situate copyright as instrumental to the constitutional system of democratic objectives by combining an array of theoretical accounts. However, it only addresses copyright law and does not cover neighbouring fields of intellectual property law, although it may be instructive to future researchers who wish to build a transformative model to apply to those regimes. Furthermore, while it may be useful to legislators and policy makers looking to develop the statutory framework in a coherent and normatively responsible manner, this project is only aimed at assisting adjudicators in their task of transforming South African law in line with the interpretation and application clauses and the associated normative agenda. Moreover, while international treaties are considered at times, the focus of the study is not on international law; accordingly, neither international law conventions relating to copyright nor human rights conventions that may have a bearing on copyright law are considered in any detail.

Although the original intention was to limit the study to South African law as it was on 31 August 2022, a few weeks later the Constitutional Court handed down decisions in two

cases[104] that pertain to the research questions under discussion. These two decisions have been taken into account, although time and space constraints prevent a detailed exposition of either. Nonetheless, both decisions have been considered and the implications of each are addressed in the appropriate places. Accordingly, the study reflects the law as it was on 30 September 2022.

[104] *Grobler v Phillips* [2022] ZACC 32 and *Blind SA*.

CHAPTER 2: SOUTH AFRICAN LAW AND TRANSFORMATION

2.1 Introduction

This chapter sets the scene for understanding how to fit the private property system comprised by copyright law into the greater constitutional environment. It sketches the constitutional setting in which rights exist and operate in South African law, which distinguishes itself from the conservative legal culture discussed in the introductory chapter. The first chapter investigated the scholarly and judicial writings surrounding the constitutional transition to democracy. This discussion illustrates the juxtaposition between two distinct approaches. First, there is the traditional legal culture and its attendant culture of authority, which relies on formal reasoning to achieve its ultimate ends of predictability and consequent stability of law. Opposed to this is the constitutional culture of justification, requiring exactly the opposite: a progressive legal culture that is willing to step out of its interpretive and normative traditions to pursue transformative ambitions. This latter tradition requires substantive rather than formal reasoning, which is necessary to enable value-based interpretation and application of sources of law. Therefore, research into constitutional law and culture is necessary to enable a holistic understanding of the context in which South African copyright law exists. This chapter provides crucial instruction on the legal culture that must initiate critical engagement with law under a transformative constitution and how traditional areas of private and mercantile law fit into the constitutional vision. After setting this scene, the chapter investigates constitutional interpretation and how the Bill of Rights is rendered applicable to all law by the single-system-of-law principle.

This chapter discusses interpretation as an act of attributing meaning to written legal instruments and provides a brief overview of the dominant theories and approaches to statutory and constitutional interpretation. It proceeds in three parts. The first section describes the place of adjudication in the project of substantive transformation of law, which creates crucial context for the interpretive theory of law that follows. Having established the need for transformation and elucidating the chief dictates of transformative constitutionalism in the opening chapter, the second section of this chapter moves on to the methodological imperatives for law under the Constitution. This part seeks to explain the means for dealing with disparate sources of law that arise from constitutional jurisprudence, giving prime effect to the supremacy and

transformative objectives of the Bill of Rights while retaining an orderly and stable engagement with the plural sources of South African law. Ronald Dworkin's seminal analysis of the different forms that sources of binding legal authority can take – including rights, principles, policies, and values – is outlined to provide a working model of legal concepts and definitions that can be utilised in developing the theory of adjudication over the chapters that follow.

Related to the different forms that legal interests can take is the question of the relationship between them and which should prevail in the event of conflict. This question requires interrogation of the adjudicative conventions of the dominant legal culture, especially in respect of the formal authority of the composite legal rights and principles involved in a dispute. In this regard, the certitude – positiveness[105] – of law was a point of juridical contention throughout the 20th century, with the American Legal Realists (ALR) and Critical Legal Scholars (CLS) problematising the idea of legal certitude in international jurisprudence and scholarship.[106] The role of interpretation in the process of law-making is one crux of the debate: does (and ought) interpretation merely discover a formalistically pre-determined meaning, or is interpretation itself a constitutive act of law-making? The answer to this question, it will be shown, depends on where the interpreter stands on the question of linguistic pliability in conjunction with their view on the proper role of the interpreter in the larger enterprise of law.[107] Textualism conventionally confines all interpretive activity to the specific textual provision being interpreted, devoid of broader social and normative context. By contrast, contextualism under the Roman-Dutch canon generally holds that "meaning depends on the total structure of the language used as well as the context in which it is being used".[108] These conventionalist reading strategies are ill-suited to South African law because the culture of substantive justification requires moral reasoning

[105] DC du Toit "The problem of the 'correct interpretation' in law: Freedom and humanism in interpretation" 1992 2 *TSAR* 15-28 at 24 argues that the law's only positiveness is in the result of judicial activity and does not exist prior thereto.

[106] See G Minda *Postmodern Legal Movements: Law and jurisprudence at century's end* (1995) 25-33, 106-127.

[107] On this question, R Dworkin *Law's Empire* (1986) 87-88 writes:

> "Each judge's interpretive theories are grounded in his own convictions about the 'point' – the justifying purpose or goal or principle – of legal practice as a whole, and these convictions will inevitably be different, at least in detail, from those of other judges."

[108] Du Toit "Correct interpretation" 17.

to permeate all legal argument and displace the purportedly amoral obedience to formal rules and institutional structures.[109]

The third and final section of the chapter shows that the shift to constitutional interpretation under a culture of substantive reasoning involves a de-emphasis of strict textual interpretation in favour of a robust contextual interpretation of the purpose and objects of the Bill of Rights, informed by its wording, structure and normative commitments.[110] While the Roman-Dutch variant of contextualism approaches something like substantive reasoning, it not only stops short of the kind of holism and teleological purposivism that constitutional culture enshrines but further neglects the element of moral reasoning that inheres in the latter.[111] In the constitutional setting, moral-legal considerations are drawn from the objective normative value system comprised by the Bill of Rights and brought into the interpretive fold through a more holistic rendering of the operative law. Constitutional interpretation recognises the systemic location of the rule or principle under discussion and how it relates to those around it and the constitutional value system in which it operates. This mode of interpretation must be brought to bear on every corner of law, including the comparatively mercantile domain of copyright law. This research seeks to work out the implications of this moral, cognitive and methodological transition from a culture of authority to a culture of justification, starting in this chapter with the pivotal issue of judicial interpretation.

2.2 Adjudication as site of societal transformation

The project of transformative adjudication features prominently in this research, specifically the question how the practice of interpretation fits into the constitutional scheme. The aims of such adjudication are not modest, seeing that it envisions the "complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines."[112] That transformative adjudication requires a

[109] K Möller "Justifying the culture of justification" (2019) 17 *IJCL* 1078-1097 at 1081. Such rules and structures include notions like rights as trumps over non-rights and a hierarchical ranking of rights and interests that negate engagement with the attendant moral reasoning. See further T Roux *Politics* 50-62.
[110] See in this regard Moosa "Understanding the spirit" 2, 4; Bishop & Brickhill "In the beginning" 685.
[111] See generally Zitzke "History and politics".
[112] C Albertyn & B Goldblatt "Facing the challenge of transformation: Difficulties in the development of an indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248-276 at *249*. The authors (at 272) place

different *modus operandi* to interpretation than traditional approaches should be obvious,[113] as the former "invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals".[114] As argued in the introduction to this dissertation, no transformative theory of interpretation has yet emerged within South African copyright law that adjudicators can adopt to achieve transformative outcomes.

Transformative constitutionalism views adjudication as an inherently political act and posits judges as political actors who are bound up by ideological commitments, both conscious and covert, and are always engaged in political acts of law-making along their own conservative or progressive normative agendas. Often the traditional legal culture is perpetuated without being aware of the cognitive allure of the prevailing paradigm, due to the firm hold that certain patterns of thinking and modes of reasoning have gained over legal heuristics.[115] The professional attitudes and embedded assumptions that steer legal thinking gravitate towards the culture of authority that cares more for finding the correct source of law than it does for any overt conception of social justice.[116] In this regard, the importance of substantive reasoning is difficult to overstate. It signifies a deliberate banishment of the type of reasoning that shielded apartheid ideology from critical questioning while simultaneously directing the development of all law (common and statutory law) towards the constitutional vision. This vision is characterised not only by the fundamental values stated in section 1, but all values that inhere in the constitutional framework.[117] Substantive reasoning is the currency on which the transformative adjudicative culture operates and with which it

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the transformative potential squarely on the process of interpretation, arguing that "a proper interpretation of transformation entails a total reconstitution of the power relations in society with the consequence that human development is maximised and material imbalances are redressed". D Moseneke "Transformative constitutionalism: Its implications for the law of contract" (2009) 20 *Stell LR* 3-13 at 13 amplifies this point.

[113] Moseneke "Transformative adjudication" 315 notes that "[l]iberal legalism balks at the idea of transformative adjudication". See also Roux *Politics* 64.

[114] Klare "Legal culture" 156. It is important to note that the judiciary's function and power is not a common law power but stems directly from the Constitution, which reflects the considered choice of instructing and empowering courts to undertake the project of transformation in lieu of maintaining certainty and stability, which are classical liberal commitments: *see* Moseneke "Transformative adjudication in post-apartheid South Africa" 6-8.

[115] See on this Van der Walt "Tradition on trial"; AJ van der Walt "Un-doing things with words: The colonisation of the public sphere by private-property discourse" (1998) 1998 *Acta Juridica* 235; Botha "Metaphoric reasoning (part 1)"; Botha "Metaphoric reasoning (part 2)".

[116] See Botha "Democracy and rights" 572-574; SM Mbenenge "Transformative constitutionalism: A judicial perspective from the Eastern Cape" (2018) 32 *Speculum Juris* 1-7 at 3-4.

[117] Penfold "Substantive reasoning" 94.

trades one (pre-democratic) construction of law for another (constitutional); it enables the robust contestation of different visions of the promised constitutional reality. Kate O'Regan posits that a constitutional democracy requires reasoning from first principles, which should direct the course of the law rather than adhere too strictly to precedential reasoning.[118] This call for a strongly principled mode of adjudication has yet to see fruition in various corners of the law, especially mercantile areas like intellectual property law.

Klare describes mainstream legal theory as being overly attentive to the norm of interpretive fidelity that requires a distinctly categorised (and quarantined) space for extra-legal personal or political values. He explains of these traditional approaches:

> "The goal is to maintain the law/politics boundary by describing rational decision-procedures (deduction, balancing, purposive reasoning, etc.) with which to arrive at determinate legal outcomes from neutral, consensus-based general principles expressed or immanent within a legal order."[119]

By contrast, the transformative constitutional mission presupposes the existence of a working theory of legal-political values that can be utilised to shape the course of legal reformation and development in a theoretically coherent manner. While Klare does not offer many thoughts on the best theory for consideration, merely suggesting that a postliberal reading strategy may be appropriate,[120] Roux points to Dworkin's early work as evincing exactly this insight: the theory of constructive interpretation is premised on an awareness and articulation of the "political theory that justifies the Constitution as a whole".[121] Dworkin argues that at every stage of the analysis, the identification and application of relevant content is an interpretive choice that must be exercised with responsibility.[122] Dworkin's theory assumes that an ideologically optimal resolution to a dispute can be identified from the constitutional structure and normative precepts, and that the proposed way of engaging with law (through

[118] O'Regan "From form to substance" 16.
[119] Klare "Legal culture" 158. See also Moosa "Understanding the spirit" 2.
[120] Klare "Legal culture" 150-156. However, it is notable that Klare (at 152) does use the descriptor "best" to label the postliberal reading strategy, indicating a convergence in his and Dworkin's thinking on the point of whether it is feasible to talk about a best or most appropriate strategy at all.
[121] R Dworkin *Taking Rights Seriously* (1977) 106, quoted in Roux "Transformative constitutionalism" 268.
[122] Dworkin *Justice in Robes* 22-25. This has obvious parallels to the argument made by Klare "Legal culture" 181 that the Constitutional Court's early jurisprudence on the Interim Constitution's direct-vertical-plus-indirect-horizontal application was not required by the legal material, but was a choice – perhaps not deliberate, but one produced by the dominant legal culture, which in turn reinforces rather than transforms the prevailing law and legal culture.

constructive interpretation) contributes to this outcome.[123] Understanding this point is crucial to appreciating the nuanced application of legal rules from an array of possible legal sources, whether disparate statutes, common law doctrine, or constitutional provisions.

Dworkin's approach to interpretation pays close attention to the underlying political theory by focusing on the ideological values; this represents a systemic approach concerned with the fealty of the outcome of each case to the underlying political theory (i.e. which values are held paramount in the legal system).[124] He professes that "[a] proposition of law is true […] if it flows from principles of personal and political morality that provide the best interpretation of the other propositions of law generally and treated as true in contemporary legal practice."[125] This approach renders the validity of all law contingent on the interpretation given by the adjudicator. On this view, each constituent component of the legal system depends on its systemic position and purpose for its meaning, which are heavily reliant on the meaning given to the normative values and principles that underlie that rule or doctrine and the law more generally.

Dworkin's model asks whether state or private action can be substantively justified on the normative values posed by the political ideals at the pinnacle of the legal system, which are informed by political traditions and theories relevant to the particular jurisdiction.[126] Clearly the element of substantive, normative justifiability looms large in Dworkin's account, as in the South African constitutional culture of justification. To this extent it seems to be perfectly compatible with Klare's critical insights; while not postliberal in any meaningful sense, Dworkin's theory does not display any of the

[123] See the comprehensive discussion of Dworkin's theory of constructive interpretation in Chapter 3 Section 2.4.
[124] Roux *Politics* 61.
[125] Dworkin *Justice in Robes* 14.
[126] Although Dworkin mostly wrote about American law, his work has been used by South Africa courts and academics since before the democratic revolution (see eg the sources cited at Dyzenhaus "Law as justification" 13-22; for a brief history of how Dworkin's work served as the bedrock for much of the scholarship arguing for human rights on a natural law basis during the second half of the twentieth century, see Roux *Politics* 197-201) and has redoubled in prominence since the constitutional transition: see the essays collected in F du Bois (ed) *The Practice of Integrity: Reflections on Ronald Dworkin and South African law* (2004); P Lenta "Democracy, rights disagreements and judicial review" (2004) 20 *SAJHR* 1-31; M Wesson & M du Plessis "Hart, Dworkin and the nature of (South African) legal theory" (2006) 123 *SALJ* 700-729; Roux "Transformative constitutionalism?"; A Fagan "The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development" (2010) 127 *SALJ* 611-627; D Cornell & N Friedman "The significance of Dworkin's non-positivist jurisprudence for law in the post-colony" (2010) 4 *Malawi LJ* 1-94.

classical liberal hallmarks that Klare cautions against and can arguably accommodate the so-called postliberal rights contained in the Bill of Rights. Dworkin's approach is primarily concerned with producing systemic integrity by consistently applying the principles that contribute to the realisation of the political values and ideals that underwrite the legal system as a whole. This reasoning presents a form of instrumentalism, where the desired political outcome is the objective and the elected theory of interpretation is the instrument that assists in the realisation of the moral objective.[127] Systemic normative unity is a prominent aim and feature of Dworkin's model of law as adjudication which enhances legal certainty in the community and ties in with the methodological dictates of the principles of subsidiarity. Ultimately, the aim is to produce coherent practical manifestations of the political values that the theory of law embodies, which values could themselves be either deontological (Kantian dignity) or instrumentalist (maximisation of utility), or both.

2.3 Methodological imperatives

2.3.1) Conventional concepts in liberal legal interpretation

South African law has maintained a rights-based model of law after attaining democratic status which impresses the need to transform the substance and expand the breadth of enjoyment of such rights. Dworkin's model of rights as trumps and his right answer thesis have become cornerstone accounts of how law operates and judges' role in the legal system. By considering how his theory of law as interpretation has evolved over the course of close to four decades and the normative character that it has accrued, Dworkin's theories pertaining to the formal taxonomy of legal concepts and the application of law's substantive content in light of legal-political principles permit a deeper understanding of the operation of South African law.

Dworkin's model of rights distinguishes between different classes of rights. Rights (both abstract and concrete) are invariably based on interests and values and informed by principles, which require further examination. An abstract right is a general political objective that does not stipulate how it is to be achieved – no particular iterations (in the common law or legislative meaning) are explicated.[128] An abstract right does not

[127] J Weinrib *Dimensions of Dignity: The theory and practice of modern constitutional law* (2016) 168.
[128] Dworkin *Taking Rights Seriously* 93.

determine how this right should be treated after formal embodiment in the face of conflict with other rights. Concrete rights are derived from these abstract rights, which usually have more in the way of content and how the particular political aim is to be achieved – how it is to be applied, when it can be suspended, who has the duty to observe this right, and so on.[129] Concrete rights are embodied in legal rules and are capable of producing remedies. Core rights and derivative rights are both instances of concrete rights rather than abstract rights. Court cases are typically decided by confirming or denying concrete rights, not abstract or background rights;[130] concrete rights are legal, institutional rights with institutional remedies captured in a legally binding form. Dworkin's view of rights attempts to safeguard individual interests against being unceremoniously overridden by the pursuit of collective goals and general considerations of social welfare.[131] Rights are therefore guaranteed a certain type of treatment merely by their status as rights, but this does not warrant the triumph of these interests over all others in all cases.

When legal rules provide no clear answers to a conflict of interests, judges must look for other authoritative sources of law to resolve the dispute. Two potential sources of guidance are legal principles and social or economic policies. Both of these concepts are non-rule standards which shape the law as applied by the judiciary and can be invoked to inform adjudication. Policies and principles inform the law when legal rules are found inadequate,[132] and judges can distil a possible resolution to the dispute from these non-rule standards.[133] On Dworkin's account, the right answer to any legal dispute will be the one that fits most aptly in the institutional setting of the legal system.[134] This fit can be evaluated on the basis of whether it comports with the

[129] Dworkin *Taking Rights Seriously* 93.
[130] Dworkin *Taking Rights Seriously* 101. According to Dworkin, only when a court faces a conflict between positive law and constitutional principles will it veer on the side of principle.
[131] Dworkin *Taking Rights Seriously* xi, 91; P Pettit "Rights, constraints and trumps" (1987) 47 *Analysis* 8-14 at 9.
[132] Either the legal rule could, on its face, yield conflicting or (facially) equally valid commands, or the result is arguably in conflict with the superior norms and dictates of the Constitution, making principles and policies ideal legal devices to produce a more suitable – and, ultimately, precise and secure – outcome.
[133] In his earlier work, notably *Taking Rights Seriously*, Dworkin advanced the thesis that there is always a right answer to a legal dispute, one that a hypothetical judge of exceptional mind and training would be able to divine from the available legal sources. This led many interlocutors to label Dworkin's jurisprudence as positivist, but his later work reveals significant non-positivist dimensions: see Cornell & Friedman "Significance"; Wesson & du Plessis "Hart, Dworkin".
[134] R Wacks *Understanding Jurisprudence: An introduction to legal theory* (3rd ed 2012) 120; Michigan Law Review "Dworkin's 'Rights Thesis'" (1976) 74 *Michigan LR* 1167-1199 at 1184.

established political philosophy and the weight or importance accorded to non-rule standards in the legal system.[135]

Principles describe and explain the rights that they generate, while policies are statements of collective goals that are to be pursued through legislative instruments granting rights. Dworkin distinguishes rights by their weight or strength in cases of conflict.[136] Rights have a certain threshold weight which collective policies and competing interests must overcome in order to prevail against them.[137] Without this threshold weight, rights would be relegated to the status of persuasive rather than authoritative and it is this threshold weight that compels Dworkin to view rights as presumptive trumps over competing considerations.[138]

Rights operate as trumps in a number of ways apart from enjoying precedence in cases of conflict. Constitutional rights preclude the exercise of the state's powers in an unrestrained fashion.[139] All such powers must be exercised with due deference to individual and collective constitutional rights, which gives a greater degree of stability to right holders than is the case with rights that are granted by legislation but have no constitutional basis or fortification. Dworkin's conception of rights as trumps holds that the interests underpinning the particular right should not be defeated by certain political goals, and the reasons advanced for the goals should be excluded from the court's adjudication. This imagery extends no further than preventing the political will of government from disregarding individual interests that are protected as rights, thereby insulating the protected interest from being liable to certain reasons for political action.[140] It does not prevent a given conception of the common good or collective

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[135] Wacks *Understanding Jurisprudence* 121.
[136] For a critical analysis of the implications of this view, see J Raz "A critical review of 'Taking Rights Seriously'" (1977) 6 *Bulletin of the Australian Society of Legal Philosophy* 1-31 at 7-9.
[137] Wacks *Understanding Jurisprudence* 122, 237-238; LS Underkuffler *The Idea of Property: Its meaning and power* (2003) 68; JW Harris *Legal Philosophies* (2nd ed 1997) 201. See to the contrary RH Pildes "Why rights are not trumps: Social meanings, expressive harms, and constitutionalism" (1998) 27 *Journal of Legal Studies* 725-763.
[138] At most, this legal status should protect the interests embodied as rights against certain kinds of reasons for interference, but the formal status of rights does not summarily trump all competing non-right interests, as is often erroneously thought. For more on this distinction, see Pildes "Why rights are not trumps" 725-763; J Waldron "Pildes on Dworkin's theory of rights" (2000) 29 *Journal of Legal Studies* 301-307; RH Pildes "Dworkin's two conceptions of rights" (2000) 29 *Journal of Legal Studies* 309-315.
[139] D Meyerson "Does the Constitutional Court of South Africa take rights seriously? The case of *S v Jordan*" in F du Bois (ed) *The Practice of Integrity: Reflections on Ronald Dworkin and South African law* (2004) 139. Similarly, the property clause does not prevent all kinds of regulation, merely of a certain kind, and limits expropriation of property to occurring only under certain conditions.
[140] Waldron "Pildes on Dworkin" 304-305. This view accords generally with the property clause, which protects individuals from arbitrary state regulation and expropriation without just and equitable

welfare from entering into the equation and demanding that rights submit to other interests.[141] Rights are therefore still expressions of individual interests, but are intended to preclude the trampling of these interests only for certain specific reasons.[142] The status of right therefore does no more than render a particular interest immune from interference on certain grounds, bestowing on it a formal validity and presumptive importance.[143]

However, this formalistic assignation of power to interests that are claimed as rights can be counter-productive in many concrete cases, especially when rights are challenged by collective public interests. Awarding formal title can therefore have the unintended and undesired effect of obscuring how a particular dispute should be resolved according to the underlying values, with the judicial focus directed at the intermediate expression of the interest rather than its founding premise or ultimate purpose.[144] This state of affairs is untenable in the South African context, considering the alliance of pluralistic values and interests enshrined in the Bill of Rights that seeks to transform the existing pattern of legal relations constituted by legal rights.

Dworkin draws a distinction in legal reasoning "between arguments of political principle that appeal to the political rights of individual citizens, and arguments of political policy that claim that a particular decision will work to promote some conception of the general welfare or public interest."[145] Arguments of principle tend to focus on the individual right of the claimant, while arguments of policy are usually directed at achieving a broader collective goal.[146] Arguments of principle are statements of political morality that explain the existence of rights, which can be compared to Joseph Raz's view on rights and their relation to principles.[147] A policy sets out general political

compensation, as well as the general limitations clause that contains similar conditions. Section 36 states that any right in the Bill of Rights may be limited if such limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

[141] Waldron "Pildes on Dworkin" 303.

[142] Pildes "Dworkin's two conceptions" 312.

[143] Waldron "Pildes on Dworkin" 305.

[144] See in this regard JW Singer *Entitlement: The paradoxes of property* (2000) 107-117. For example, in the property context the judicial focus shifts from the reasons for granting the property right or what values or human interests the property is intended to foster or serve; the only relevant questions pertain to the formal validity of the property right and the existence of any formally recognised defence to that claim.

[145] R Dworkin *A Matter of Principle* (1986) 11.

[146] Dworkin *Taking Rights Seriously* 90.

[147] Harris *Legal Philosophies* 189. R Dworkin *Justice for Hedgehogs* (2011) 5 addresses the place of political morality in law:

goals, either broadly or narrowly defined, which typically advance the social, economic or political position of a community as a whole.[148] Principles are especially useful in controversial cases where there is no clear rule to be applied, or the rule offends the judge's conception of fairness.[149] Dworkin's view holds that there is a right answer to legal disputes based on political theory and arguments of principles from this basis, as well as right answers to policy questions.[150] Judicial discretion is then to be exercised in the determination of the matter, but this discretion is not a pass to apply the law as the individual adjudicator thinks it should be – it merely allows the judge to resort to principle to resolve the discrepancy in positive law.[151] An argument of principle, Dworkin contends, establishes an individual interest of such importance that it renders the opposing policy arguments irrelevant, indicating that individual rights are again upheld over collective goals. Moreover, an argument of principle may be defeated by opposing considerations, but this does not disregard the principle as inapplicable to the matter; it recognises the validity of said principle, but also recognises that there are reasons not to apply it to its full extent in the specific case.[152]

The unspecific nature of principles renders them amenable to incorporating general values and considerations into a legal system.[153] This is because principles are typically based on normative considerations or outcomes such as fairness or reasonableness, which can also be articulated as a standard to which behaviour must conform, while rights are typically founded on individual interests narrowly construed and protected by rules. In Dworkin's account, principles are concerned with rights, and policies with goals, though both ultimately reflect human interests.[154] Furthermore, rights are typically distributed equally, and principles must have consistent application

"It is also necessary to understand morality in general as having a tree structure: law is a branch of political morality, which is itself a branch of a more general personal morality, which is in turn a branch of a yet more general theory of what it is to live well."

[148] Dworkin *Taking Rights Seriously* 22.

[149] Arguments of principle feature frequently in South African case law, usually to support one available interpretation above others. For example, courts – even the Constitutional Court – are adept at routing pre-constitutional principles (like *pacta sunt servanda*) in constitutional rights and values, using this principle to direct legal dispute towards an outcome that gives effect to this common law staple rather over countervailing considerations: see *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC); *Barkhuizen v Napier* 2007 (5) SA 323 (CC.

[150] DH Regan "Glosses on Dworkin: Rights, principles, and policies" (1978) 76 *Michigan LR* 1213-1264 at 1250.

[151] Harris *Legal Philosophies* 188-189.

[152] Harris *Legal Philosophies* 189.

[153] J Raz "Legal principles and the limits of law" (1972) 81 *Yale LJ* 823-854 at 841.

[154] Harris *Legal Philosophies* 201.

and scope.[155] Policies, by contrast, can employ the unequal distribution of benefits as a means to the goal.[156] Principles precede policies as persuasive authority, and policy considerations will generally not be sufficient to deny giving effect to established principles.[157] Ideally, policy should stem from principle to prevent this from happening.[158] Further, Dworkin advocates for a principled construction of law based on the underlying legal-political theory of law that explains how the different judicial decisions cohere.

Raz identifies five functions that principles could serve in any given legal system. The first and most self-evident role is that principles are grounds for interpreting rules.[159] This ensures that a coherent purpose can be observed in law by reconciling different normative constraints.[160] This role of principles is explicit in South African constitutional case law, but the various methods of interpreting rules will stand over until Chapter 3. The second role of principles, integral to the interpretive function they serve, is that principles can serve as a basis for changing the prevailing law as applied in precedent or even invalidating extant legal rules.[161] One important incarnation of this is the operation of constitutional principles in South African legal culture, where oppressive or otherwise antiquated and untenable legislation is refined or invalidated on the basis of these principles. In fact, Raz admits that constitutional principles play a greater role in annulling incompatible legislation than common law principles or other principles, which is arguably aligned with Dworkin's account.[162]

Related to this is the third role that he identifies, being that principles can provide the basis for exceptions to the general application of rules.[163] Importantly, the law is not modified in this case, as it remains intact but is deemed inapplicable to the particular case before the court. Raz further argues that principles can be grounds for making

[155] Rights are equally distributed in the formal sense that their vesting and acquisition is open to all alike, but this obviously does not entail equal distribution of the goods and services that may feature as the objects of rights that are acquired unequally.
[156] Harris *Legal Philosophies* 201.
[157] Harris *Legal Philosophies* 202.
[158] This is consistent with the South African position, where the Constitution overrides any policy that offends its provisions, principles or precepts.
[159] Raz "Legal principles" 839.
[160] Raz "Legal principles" 840.
[161] Raz "Legal principles" 840.
[162] Raz "Legal principles" 840. This observation is particularly apt in South African law, where the Constitution proclaims itself supreme (s 2) to legislation and common law, and common law is typically subordinate to legislation that has been promulgated on the same matter. Accordingly, common law principles are not conventionally wielded to invalidate legislation.
[163] Raz "Legal principles" 840.

new rules, which is an integral part of the common law tradition.[164] Finally, principles can be the sole ground for action in some cases. The direct application of principles can guide courts in deciding what needs to be done in a particular case, especially when there are no rules that apply to the case at hand or when extant rules do not produce just outcomes.[165] Therefore, discretion usually indicates the absence of specific rules that are to be followed in favour of a principle or normative standard. Chapter 5 argues that South African courts should invoke principles to direct the construction and, if necessary, reconstruction of South African copyright law towards constitutional ends.

I submit that courts should consider rights in the context that they avail against government goals and interests, informed by legal principles, and the imagery of rights as trumps should be restricted to a presumptive tool of normative weight allocation that invites closer scrutiny. It would be untenable to allow rights to automatically invalidate countervailing government purposes, because this would divest the state of its various constitutional powers at the behest of an inherited power structure.[166] Nonetheless, this does not mitigate the character of rights as mechanisms of resistance to government powers, especially when these powers are exercised excessively or arbitrarily.[167] This nuanced approach has obvious benefit over the cruder view that sees certain interests as beyond reproach on any basis. On this account, the purpose of a right is to identify the kinds of reasons that cannot be used to limit the ambit of recognition afforded to an interest.[168] The formal recognition of interests as rights indicates which normative or political reasons can be taken into account to limit the application of the right – i.e., reasons of principle, not policy.

2.3.2) Unifying disparate sources of law into a single system

The single-system-of-law principle was authoritatively expounded in Chaskalson P's decision in *Pharmaceutical Manufacturers Association of SA In re ex parte President of the RSA*,[169] which concerned the validity of an exercise of the presidential power to

[164] Raz "Legal principles" 841.
[165] Dworkin *Taking Rights Seriously* 22-45.
[166] DT Coenen "Rights as trumps" (1993) 27 *Georgia LR* 463-472 at 468.
[167] Coenen "Rights as trumps" 468.
[168] Pildes "Dworkin's two conceptions" 312.
[169] 2000 (2) SA 674 (CC).

bring legislation into effect. In finding the power to be unjustifiably exercised *in casu*, the unanimous judgment held that it would be counterproductive to the project of transformation to allow the development of two (or more) distinct systems of law, which would be the effective result if public constitutional law could not direct the development of the common law as it regulates private law interactions.[170] In one of the most oft-quoted paragraphs of South African constitutional jurisprudence to date, Chaskalson P states:

> "There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."[171]

This passage and the surrounding argument have given rise to the single-system-of-law principle, which is instantiated by the preamble and sections 1(c),[172] 2,[173] 7(2),[174] 8(1)[175] and 39(2).[176] Evidently Chaskalson's formulation of this constitutional axiom requires courts to adjust the way that private law disputes are resolved, not to merely pay lip service by reciting the truisms of constitutional supremacy and resulting invalidity of all conflicting law.[177] The danger of allowing the development of two parallel systems of law is that this approach could create a neo-apartheid legal order that preserves legal relations in the private sphere as notionally distinct from the influence of public law.[178] Failing to adequately grapple with the impact of the

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[170] While the common law rules and principles that were the subject of judicial attention in this case regulated the exercise of public power, private law relations are equally subject to the principles set out in this decision, especially in respect of not permitting two forms of reasoning to operate, formal reasoning for private disputes and substantive reasoning for public power. See Roux *Politics* 208.

[171] *Pharmaceutical Manufacturers* para 44. Chaskalson P observed (para 45) that "there is no bright line between public and private law" and that "the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."

[172] "The Republic of South Africa is one, sovereign, democratic state founded on the following values: […] Supremacy of the constitution and the rule of law."

[173] "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[174] "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[175] "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[176] "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[177] MH Cheadle & DM Davis "Structure of the Bill of Rights" in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (SI 26 2019) 1-4(1).

[178] Davis "Positivist legal philosophers" 69 n 25. For a compelling argument that neo-apartheid has resulted from the introduction of the Bill of Rights, rather than despite it, see T Madlingozi "Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution" (2017) 1 *Stell LR* 123-147.

Constitution on the common law or meaning and validity of statutory law (especially in the precedential sense) amounts to a failure to discharge the functionary's constitutional duties (according to Klare)[179] and perpetuates the *status quo ante*.[180] To give practical effect to the single-system-of-law mandate, the Court subsequently formulated a systematic approach guiding adjudicators in unifying all sources of law under the constitutional project of transformation, known as the principles of subsidiarity.[181] This approach requires *ad hoc*, case-by-case investigation into how the two systems interact in every concrete case to arise in court, undertaken in a holistic manner that takes account of the potential influence of such statutory interpretation or common law development with due regard for the history in which the law and the facts are steeped.

This has direct implications for the model of property relations that is conceptualised and perpetuated and how it contributes to systemic constitutional objectives. It is neither feasible nor desirable to continue to operate any branch of law, whether traditionally treated as private or commercial, in isolation from the overarching constitutional vision of social justice.[182] No system of property law is value-neutral and because the state has a hand in the configuration and enforcement of the property relations that exist in society,[183] it lends it the full force of public power, thereby implicating the culture of substantive justification.[184] For the same reason, the

[179] Klare "Legal culture" 165 reads section 41(1)(c) of the Constitution as imposing a duty of "political self-reflection and candour" on the courts, requiring that "[a]ll spheres of government and all organs of state within each sphere must […] provide effective, transparent, accountable and coherent government".

[180] Davis "Positivist legal philosophers" 69 n 25 describes the import of the Constitutional Court's instruction as having "warned against a legal apartheid where two systems of law operated, being the Constitution and a common law which was incongruent with the norms of the Constitution".

[181] The subsidiarity principles were articulated in *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52. See also *Chirwa v Transnet Ltd* 2008 2 SA 24 (CC) para 59; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 39-40. See further AJ van der Walt *Property and Constitution* (2012) 35-91.

[182] *Pharmaceutical Manufacturers* para 44.

[183] See on this Davis "Private law after 1994" 324-325 where the author deals with the Realist perspective of contract (and by extension, delict and property) law that sees the entire system of entitlements distributed according to the underlying principles as an overtly political act that constitutes allocation. In the context of property regimes, see LS Underkuffler "The politics of property and need" (2010) 20 *Cornell JL & Public Policy* 363-376 at 370; TM Mulvaney "Property-as-society" (2018) 2018 *Wisconsin LR* 911-970 at 925-927.

[184] Dyzenhaus "Law as justification" 33. See also Van der Walt "Normative pluralism" 87-90; S Woolman "Application" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd ed RS 5 2013) at 31-32 – 31-33, especially at 31-33 n 1.

intellectual property systems that are held distinct from public law should be seen as integral to constitutional society's single-system-of-law.

2.3.3) The subsidiarity principles

The first question that arises in respect of the single-system principle is: when does the Constitution apply to legal disputes? The answer, briefly stated, is always when necessary, but never when non-constitutional sources suffice (in the sense that they are both sufficiently comprehensive to address the dispute and normatively representative of constitutional standards and provisions).[185] The principles of subsidiarity give structure to the single-system edict, providing clarity on the interaction between various sources of law and indicating the correct junction for declaring law invalid.[186]

This requires the various sources of law in a mixed legal system to be synthesised into a systematic approach. The methodology for determining the applicable law(s) takes the form of the subsidiarity principles, while other principles (e.g., of interpretation and constitutional validity) determine the outcome of a constitutional challenge to a legal rule and the applicable remedy. This methodological synthesis provides an orderly arrangement of legal sources, preventing the fragmentation of the constitutional vision of justice through the counter-transformative reliance on one (preservative) source of law over another (potentially more transformative).[187] On the matter of methodology, Lourens du Plessis cautions:

> "[S]ubsidiarity is not to be confused with avoidance. For when one relies on nonconstitutional law as the source of relief, one still invites constitutional interpretation. That invitation extends primarily to recasting — where necessary — nonconstitutional forms of law in light of constitutional desiderata. Subsidiarity — so understood — draws simultaneously upon the richness and depth of existing bodies of law while recognizing that our basic law — the Final Constitution — is the 'text' from which all other law derives its power."[188]

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[185] See AJ van der Walt *Property and Constitution* (2012) 19-24 and the sources cited there.
[186] L du Plessis *Re-interpretation of Statutes* (2002) 30.
[187] See KE Klare "Legal subsidiarity and constitutional rights: A reply to AJ van der Walt" (2008) 1 *CCR* 129-154 at 134, where the author describes the dangers of proliferating separate systems of law. See also Davis "Legal transformation" 181 for the fundamental difference between a transformative and preservative constitution.
[188] L du Plessis "Interpretation of the Bill of Rights" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd ed RS 5 2013) 32-21.

Since *Pharmaceutical Manufacturers*, academic and judicial efforts to clarify the notion of subsidiarity have focused primarily on the proper interaction between different sources of law to different factual scenarios and the distinction between jurisdictional and adjudicative subsidiarity has largely faded away in the wake of the dissolution of the substantive constitutional threshold for hearing appeals that had previously been observed.[189] References to subsidiarity are thus references to the methodological approach that guides courts in determining the appropriate source of law to apply to the matter at hand; a "constitutional vision of sources".[190]

The basic premise of subsidiarity is that "[t]he higher authority of the Constitution is not to be overused to decide issues that can be disposed of with reliance on particular, subordinate and non-constitutional precepts of law."[191] Nonetheless, the Constitution must undoubtedly guide the utilisation of all other sources of law according to the principle of constitutional supremacy.[192] Naturally, however, the identification of the legal rule must logically precede the evaluation of its constitutionality. Given that the Constitution must provide justiciable remedies for rights to be effective, the question is whether these rights and remedies are captured in existing law.

The starting point for invoking a constitutional right is to establish whether the issue at hand is governed by legislation. If so, this legislation is determinative of the outcome in so far as it is comprehensive (does not leave gaps pertinent to the legal question and gives effect to the constitutional right) and constitutionally compliant (offends neither a substantive provision nor the spirit of the Bill of Rights). The interpretive techniques of reading the statutory provision up or down are appropriate to bridge any gaps created by the elected interpretation. Should these techniques prove insufficient to achieve constitutionally compliant meaning from the statute, remedies like invalidation, severance and reading-in avail to cure the constitutional defect. If the

[189] See the academic discussions of the principles of subsidiarity in AJ van der Walt "Property law in the constitutional democracy" (2017) 1 *Stell LR* 8-25 at 9-11; Van der Walt *Property and Constitution* 24; Van der Walt "Normative pluralism"; Klare "Legal subsidiarity"; EJ Marais & G Muller "The right of an ESTA occupier to make improvements without an owner's permission after *Daniels*: Quo vadis statutory interpretation and development of the common law?" (2018) 4 *SALJ* 766-798 at 770-774; Du Plessis "Interpretation" in *CLOSA* 32-142 – 32-158.

[190] Van der Walt *Property and Constitution* 24. For an overview of the hierarchical status of superordinate and subordinate legislation, see Du Plessis *Re-interpretation* 32-41.

[191] Du Plessis *Re-interpretation* 30.

[192] K O'Regan "Tradition and modernity: Adjudicating a constitutional paradox" (2013) 6 *CCR* 105-126 at 121.

legislation is not comprehensive and dispositive to the issue at hand, the inquiry moves on to whether there is common law to fill the gap.[193]

If there is no legislation or if the legislation is not comprehensive, the inquiry turns to the applicable common or customary law and asks the same questions: is the common law comprehensive in its applicability to the matter at hand, and is it substantively compliant with the Bill of Rights or does it need developing? The common law may need to be developed to accommodate the constitutional imperatives, else direct reliance on the constitutional provision is appropriate. When the applicable law is alleged to be unconstitutional for violating a provision of the Bill of Rights, the legislation is tested against the substantive constitutional provision.[194] A direct appeal to a constitutional right is allowed only when there is no subsidiary law. Subsidiarity reasoning also holds for legal norms, indicating that norms of specific applicability are to be preferred above norms of general relevance.[195] The most challenging cases in respect of subsidiarity are when legislation has been enacted to give effect to a constitutional right but does so only partially.[196]

This staggered methodological approach has numerous benefits: it directs the orderly development of a single system of law instead of allowing the parallel or whimsical invocation of one source of law over another; it ensures that all law is be applied in a manner that is consistent with the substantive provisions and ethos of the Bill of Rights; and it conducts the systematic application and development of rights in a manner that allows for "quality checking" at every step of the way, ensuring that the law that is being applied is constitutionally compliant.[197]

For intellectual property law, subsidiarity means that litigants must argue in terms of the legislation that applies to the specific field of conduct rather than directly resorting to a constitutional right to make out an argument. If the legislation does not adequately reflect the constitutional right, courts may interpret it in a manner to save it from

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[193] Van der Walt *Property and Constitution* 40-60.
[194] Van der Walt *Property and Constitution* 81-91. See the discussion of direct application of the Bill of Rights in Chapter 4 below.
[195] I Currie & J de Waal *The Bill of Rights Handbook* (6th ed 2017) 253. The authors point to *Nokotyana v Ekhuruleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) para 50 as an instance where concrete iterations of human dignity find application over the general norms of dignity.
[196] See the discussion of such a case in the context of housing and tenure security by Marais & Muller "ESTA occupier"; DM Davis "The right of an ESTA occupier to make improvements without an owner's permission after *Daniels*: A different perspective" (2019) 136 *SALJ* 420-432.
[197] See generally Van der Walt "Normative pluralism".

invalidity. If a particular provision is found to be invalid for unconstitutionality by reason of incompatibility with one or more constitutional rights, the court may use remedies like reading words into or out of the statute to bring it into conformity with the constitutional mandate. A party wishing to rely on a constitutional right directly must, therefore, argue that the legislation in question is either in conflict with a right in the Bill of Rights and accordingly the text must be remedied or invalidated, or that the legislation does not give adequate expression to the constitutional right and the provision must be invoked directly.[198]

2.4 Transformation through interpretation and law as integrity

2.4.1) Law as interpretation: transformative adjudication in the single system of law

> "Law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is. General theories of law, for us, are general interpretations of our own judicial practice."[199]

The interpretive role and power of judges in the law-making process has long been recognised in South African law and is not a unique feature of constitutional adjudication.[200] However, since the recognition of the role that legal culture plays in determining how lawyers (including judges) conceive of and implement transformation, the role of judges in the law-making-and-applying process has been re-examined. Annie Singh and Zaryl Bhero describe adjudicative interpretation as "the final stage in the legislative process" because it involves "a harmonisation of the abstract legislative text with the facts of the case through interpretational methods, within the framework of the Constitution or relevant law".[201] On this view the judiciary enjoys a partial law-making function that ensues as an inevitable occurrence following the legislative process. Accordingly, the meaning of law is only determined upon

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[198] On the difference between an unmet constitutional obligation and the invalidation of unconstitutional legislation, see *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC). As explained below, section 39(2) features during the interpretation stage and may have an influence on the outcome because the law in question must be interpreted or developed according to the constitutional values, which is different to direct application. For a mildly critical take on the prescriptive transformative potential of subsidiarity, see DM Davis "Interpretation of the Bill of Rights" in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (SI 26 2019) 33-18 – 33-19. See further Klare "Legal subsidiarity".

[199] Dworkin *Law's Empire* 410.

[200] See for example *Corocraft Ltd v Pan American Airways* 1973 3 (WLR) 714 732 (cited in A Singh & MZ Bhero "Judicial law-making: Unlocking the creative powers of judges in terms of section 39(2) of the Constitution" (2016) 19 *PER/PELJ* 1-22 at 4).

[201] Singh & Bhero "Judicial law-making" 3.

adjudication, which diminishes whatever purchase positivism found in conservative legal culture.[202]

This view of adjudication is fully congruent with Dworkin's theory of constructive interpretation, which he postulates as a way of construing law with holistic integrity.[203] For Dworkin, law is entirely interpretive: there is no meaning prior to an interpreter's engagement with the source of law.[204] He is concerned with the appropriate political role of judges in the legal system and the legitimate way of exercising discretion when called to do so. To understand this position, a few features of Dworkin's description of rights and values as embodied in rules and principles may be worth restating. Principles can be either substantive moral principles of law with normative content, or interpretive principles, which are usually more methodological than substantive but still have implications for the normative outcome reached.[205] Rules are structured as statements of law contingent on conditional statements of fact (if X then Y applies, else Y does not apply), whereas principles do not operate in such syllogistic structures.[206] This model of rights holds that rules and principles are different both in manner and range of application: "[r]ules are applicable in an all-or-nothing fashion",[207] while principles can contribute to the outcome of a dispute in a less binary way.

Yet, judges and legal subjects are not always bound to do as an isolated legal rule instructs, given the concurrence of competing legal rules and the array of deontological values and teleological objectives that apply to any given scenario. It is important to unpack this perspective as it disarms many of the formalist aversions regarding the role of judges as mechanistic functionaries. Determining the applicability of a rule to a given case by means of interpretive conventions may be the first step in defining the relative legal positions of the parties to litigation, but this is not determinative of the

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[202] Although some strains of positivism hold that judges are mechanistic functionaries that exercise no normative discretion in the proper discharge of their duties, which would be less affected by the claim of inevitable judicial involvement, any positivist that proclaims the court's place as strictly spectatorial rather than constructionist would be hard pressed to find constitutional support for their claim in South African law.
[203] Dyzenhaus "Law as justification" 15.
[204] Barak *Purposive Interpretation* 291 recounts "Dworkin's own view that law itself is the result of an interpretive process". This thesis is developed chiefly in *Law's Empire*. See Cornell & Friedman "Significance" 5-19 for a lucid summary of this work. The authors explain (at 50) the nature of law being irreducibly interpretive because "an integrity-based interpretation means that questions concerning the truth of a legal proposition are questions about its interpretation", quoting Dworkin *Justice in Robes* 13.
[205] See Gaffney *Dworkin on Law* 50-51, where the author notes that both moral and methodological principles are aimed at persuading adjudicators rather than private actors.
[206] See Gaffney *Dworkin on Law* 48-50.
[207] Dworkin *Taking Rights Seriously* 24.

matter. Even when the applicable legal rule is correctly identified, the precise content of its instruction is subject to divergent meanings, especially when the rule incorporates principles, values or standards that require further elucidation. When statutory or constitutional language is deliberately open-ended or common law doctrine is based on principles or standards,[208] these all require an overtly normative reading for which orthodox approaches to interpretation may be ill-suited in the constitutional setting.[209] Principles may mitigate the effect of a rule, as may exceptions to the given rule that are derived from different sources of law, meaning that the remedy that the rule generates is not automatically and formulaically determinative.[210] Clearly non-rule standards like principles and values can (and frequently do) have binding force on judges: "as both standards have the force of law, a judge is obligated by both in his or her role as adjudicator".[211] Accordingly, the hard distinction between rule statements and non-rule standards is of limited utility in Dworkin's approach to law as interpretation.[212]

For these reasons, courts must be keenly aware of the stratagems they wield, whether consciously or unconsciously, when deciding cases. The choice of reading strategy becomes a matter of substantive import when it determines the outcome, and an array of approaches that have been adopted by courts in the past may no longer be viable. It is therefore apposite to consider the styles and strategies of interpretation that are

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[208] IM Rautenbach "Constitution and contract: Indirect and direct application of the Bill of Rights on the same day and the meaning of 'in terms of law'" 2021 2 *TSAR* 379-395 at 385-386 helpfully specifies:

> "Open-ended legal concepts appear in numerous statutory and common-law legal rules and constitutional provisions. (Examples of constitutional provisions are reasonable in s 24(b), 26(2), 27(2) 32(2), 33(1), 35(1)(f) and 36, fair/unfair in s 9(3), 23(1), 34 and 35(3), arbitrary/ arbitrarily in s 12(1), 25(1) and 26(3), and equitable in s 25(3) and 25(7); a common law example is that the constitutional court now defines delictual unlawfulness as the reasonableness of imposing liability as determined by public and legal policy in accordance with constitutional values (*Le Roux v Dey* 2011 6 BCLR 577 (CC), 2011 3 SA 274 (CC) par 122; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 12 BCLR 1397 (CC), 2015 1 SA 1 (CC) par 20.)".

[209] Du Plessis *Re-interpretation* ix describes the open-ended nature of constitutional provisions as "a challenge rather than a threat to the legal interpreter", with which one is not always assisted by conventional, common law interpretive strategies.

[210] Dyzenhaus "Law as justification" 25 explains Dworkin's utilisation of legal rules and principles:

> "The division of labour Dworkin envisages is one between the legislature, which enacts policy into law, and the judiciary, which tests that policy against principle."

[211] Gaffney *Dworkin on Law* 43-44.

[212] This is not to say that the distinction should not be observed when appropriate, but simply applying a rule in an all-or-nothing fashion because of its status as a rule vis-à-vis non-rule standards, as a superficial reading of Dworkin's model may require, posits a formalistic and outdated structure to adjudication.

appropriate and then determine whether Dworkin's theory can positively contribute to the (re)construction of South African law.

2.4.2) The role of interpretation and interpretive strategies

Interpretation of law is not a neutral or value-free activity that adjudicators can execute formulaically, expecting to produce a mechanistic outcome from the basic premises supplied by the facts. Since the interpretive turn (sometimes called the linguistic turn),[213] it is generally recognised that interpreters do not derive meaning from a text's plain or "ordinary grammatical meaning"[214] as much as imbue the text with meaning in the particular (factual, textual and normative) context of its occurrence; this is no more than the inevitable result of pre-understandings and interpretive biases that play on the interpreter's endeavours.[215]

When undertaking the interpretation of a legal text, adjudicators adopt one or more interpretive theories guided and informed by interpretive canons to produce the preferred (sometimes thought of as the correct) meaning of a legal text.[216] These theories of interpretation are part of the South African common law approach to adjudication and include reading strategies like literalism, intentionalism, objectivism, contextualism, and purposivism, with pre-democratic South African courts predominantly adopting a literalist-cum-intentionalist approach to establishing the meaning of a text.[217] These interpretive strategies are not unique to South African

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[213] G Minda *Postmodern Legal Movements: Law and jurisprudence at century's end* (1995) 79-80. On the implications of the linguistic turn for law in South Africa, see Du Plessis "Interpretation" in *CLOSA* 32-44 – 32-45. See further Du Plessis *Re-interpretation* xv, 7-9, 99-100. The author notes (at 99) that the linguistic turn has had relatively little influence in South Africa. See also Van Marle "Revisiting" 551.

[214] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 25, where Wallis JA explains the historical progression of the judicial attitude towards the "ordinary grammatical meaning" of textual provisions.

[215] Botha "Freedom and constraint" 251:

> "[L]egal materials do not apply themselves, but are constructed by human beings. Their meaning depends as much on the interpretive habits and reflexes of the interpreter as on the materials themselves."

See also Botha "Democracy and rights" 564; Botha "Albie Sachs" 41.

[216] Meaning is always constructed from a text and its surrounding context, never merely found in a text. This is one of the key insights to arise from the interpretive turn and plays a major role in contemporary understanding of an interpreter's duty of fidelity.

[217] See Du Plessis *Re-interpretation* 92-100 for an overview of common theories of interpretation and 100-119 for a discussion of the South African judiciary's approach, which the author characterises as interpretive formalism (100-111), contextualism (111-115) and purposivism (115-119) respectively; see also Du Plessis "Interpretation" in *CLOSA* 32-29 – 32-40. DM Davis "Of closure, the death of ideology and academic sandcastles – A reply to Dr Fagan" (1997) 13 *SAJHR* 178-181 at 180 points out that

law,[218] and indeed find a parallel in the descriptive account that Dworkin uses to diagnose the deficiencies in traditional legal thinking in American law.[219] The conventional interpretive strategies that follow from conventional theories of interpretation as well as constitutional modes of interpretation are discussed below, while Chapter 3 introduces the techniques associated with Dworkin's theory of constructive interpretation and marries them to the constitutional strategy implied by section 39(2).

2.5 Constitutionalism and transformative reading strategies

2.5.1) Pre-constitutional hermeneutics: conventionalism and pragmatism

Whenever courts interpret a source of law, they are necessarily employing a reading strategy to establish the source's meaning and consequent instruction in the contextual setting provided by the facts of the case. These reading strategies and techniques are often determined by the interpreter's conception of law, irrespective of whether they acknowledge working with one. Dworkin distinguishes his model of law as interpretation from the two dominant conceptions of law, namely conventionalism and pragmatism.[220]

Conventionalism broadly corresponds with the politics of positivism "which insists that law and morals are made wholly distinct by semantic rules everyone accepts for using 'law'".[221] It is also sometimes identified with the position of foundationalists.[222] Foundationalists argue that "the moves and manoeuvres in law are so determinate that one can distinguish between right and wrong ways of doing law" and "agree that law and adjudication deal with political questions and have political elements, [but]

"literalism is an attempt at jurisprudential closure when contestation lies at the heart of constitutionalism".

[218] See K Perumalsamy "The life and times of textualism in South Africa" (2019) 22 *PER/PELJ* 1-28 at 4-14 for a succinct history of the two interpretive traditions that vied for judicial attention during the twentieth century: the English textualist approach and the Roman-Dutch preference for contextualism.

[219] Du Toit "Correct interpretation" 17.

[220] Dworkin *Law's Empire* 94. See further Dworkin *Justice in Robes* 36-48 for a more recent summary of his case against pragmatism. See also Cornell & Friedman "Significance" at 13-19.

[221] Dworkin *Law's Empire* 98. See also Gaffney *Dworkin on Law* 40. In the South African context, given that "[t]he new South African Constitution is a moral document" (Chaskalson "From wickedness to equality" 599) and requires a moral reading, and considering the abundance of non-right interests and principles embodied in its text, any variant of positivism that excludes "extra-legal", moral considerations from relevance can be disregarded *ex ante*. This comports with Dworkin's model, which is quite explicit about the need for reliance on moral values in legal reasoning.

[222] IJ Kroeze "When worlds collide: An essay on morality" (2007) 22 *SAPL* 323-335 at 324.

deny that law can be reduced to politics".[223] Foundationalists have become associated with "the traditional textualism or literalism of the apartheid years" that was often used to uphold abhorrently unjust laws.[224] They did this by holding out positivist tropes like value-neutrality or judicial deference to the legislature to disclaim any involvement in the injustices that their orders inflicted. Such a purely textual or literal approach succumbs to the fallacy that the correct resolution to a dispute can only be found by relying on the clear meaning of a text and that all social, economic, political, and moral considerations should be held at bay.

The formalism that accompanied such positivism manifested in adjudication as an adherence to textual fidelity above any real theory of or concern for substantive justice.[225] In terms of a preferred reading strategy, conventionalists (and their South African iteration, foundationalists) typically favour textualist techniques (like intentionalism, originalism, and plain meaning construction)[226] as interpretive devices and adhere to orthodox conventions and canons of interpretation.[227] One such strategy that is prominent in South African adjudication is literal interpretation, which construes words as acontextual and as if they have self-contained meaning: that is, words have the same meaning divorced from legislative context as within it, almost "[as] if we had no special information about the context of their use or the intentions of their author."[228] The underlying argument is that construing words devoid of contextual considerations will yield more determinate outcomes, as the context adds additional dimensions of meaning that confuse the plain grammatical meaning.[229] Yet, even on the literalist interpretive approach, where context is rendered secondary, "one could

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[223] IJ Kroeze "Power play: A playful theory of interpretation" 2007 1 *TSAR* 19-34 at 20 (citations omitted).
[224] Bishop & Brickhill "In the beginning" 698, citing the seminal work of A Hutchinson *It's All in the Game: A nonfoundationalist account of law and adjudication* (2000).
[225] Singh & Bhero "Judicial law-making" 5. Dworkin *Law's Empire* 7 asserts that certain conservative methodologies – arguably including the conservative legal culture under pre-democratic South African law – are "more concerned with fidelity to law than with what law is".
[226] See Perumalsamy "The life and times" 2 for a description of the methodology of textualism.
[227] Dworkin refers to conventionalism as the "rulebook" understanding of the political community because of its tendency to reduce the function of contestation to determining what the agreed-upon rule statements mean that exhaust legal rights and obligations in society: Dworkin *Law's Empire* 209-210. Later at 345-346, Dworkin contrasts the rulebook conception against his preferred model of integrity that is devoted instead to giving expression to fundamental political principles.
[228] Dworkin *Law's Empire* 17. The author refers to the literal meaning approach as an acontextual approach, contrasting it against contextualism. See also Gaffney *Dworkin on Law* 19-22.
[229] Literalism is the interpretive technique favoured by formalistic adjudicators towards intellectual property matters, including copyright disputes, which ignores the political nature of such laws and see these realms of law (which they deny are distillations of political ideals into legislative regimes) as involving mechanical interpretation and application of the relevant textual authority.

find cases where two judges adopted the plain meaning approach, but contradicted one another on what that plain meaning was".[230]

Textualism allows courts to determine the literal meaning of words and apply that meaning, unless the result is vague or absurd, in which case the legislature's intention is to be preferred.[231] This invocation of the intention of the author of the statute is an attempt at upholding the law "as it stands" – that is, without changing its allegedly self-contained meaning or reading moral requirements into the law.[232] This intention can be ascertained from the limited context of the rest of the statutory text, resorting to tertiary aids like common law presumptions only if the language of the text was unclear or ambiguous.[233] This is where the court's powers of interpretation end on the literalist-cum-intentionalist view that is known as textualism in South African law. Kessler Perumalsamy traces the history of "[f]idelity to the text over its context in South Africa" to the 1875 decision in *De Villiers v The Cape, Divisional Council*,[234] where the English law rules of interpretation were employed above the Roman-Dutch counterparts. On the author's telling, a spate of successive decisions following *De Villiers* resulted in textualism gaining a firm hold on the South African judiciary, including on the Afrikaners on the bench who were known to prefer Roman-Dutch law above English.[235]

While it is arguable that every meaning-giving act of interpretation of a text necessarily requires the identification of an intention,[236] this alone does not require preference for legislative intention above, for example, an intent posited from constitutional purpose.

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[230] M Wallis "Interpretation before and after *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA)" (2019) 22 *PER/PELJ* 1-29 at 7 (referring to the contradictory judgments of Heher AJA, Lewis and Marais JJA in *Van der Westhuizen v Arnold* 2002 6 SA 453 (SCA), all of whom arrived at different interpretations of the alleged plain meaning of the statutory provision).

[231] Perumalsamy "The life and times" 6.

[232] P Lenta "Constitutional interpretation and the rule of law" (2005) 16 *Stell LR* 272-297 at 273. In respect of legal theories of interpretation, even a theoretical stance that ostensibly defers to legislative intention or the literal textual meaning should not be considered value-neutral as these themselves embody theoretical assumptions that should be examined for political undertones and content: see Du Plessis *Re-interpretation* 90-91. See further generally E Zitzke "History and politics".

[233] See eg *Bok v Allen* [1884] ZATransvSCRpKB 13; (1881-1884) 1 Kotze & Barber 119 (24 March 1884).

[234] Buchanan Reports 1875 50, cited in Perumalsamy "The life and times" 4.

[235] Perumalsamy "The life and times" 4-8.

[236] S Fish "There is no textualist position" (2005) 42 *San Diego LR* 629-648 argues that intention is a precondition for all textual meaning; interpretation is "the task of trying to figure out what some purposive agent intended" (646) and the construction of meaning is merely "choices between alternatively posited intentions" (647) and that "[i]f you are not trying to determine intention, you are not interpreting" (648). Accordingly, searching for the purpose of a legal text is merely one way of trying to ascertain an intention.

Textualist strategies like giving a text its plain and ordinary meaning is proffered as a way of keeping the judiciary out of the politics of law and restraining their activities to establishing the legislatively intended meaning of statutory law. However, such ostensibly neutral approaches are just as normative as any other and are often adopted to validate a desired normative outcome rather than reach it.[237] Accordingly, fidelity to textualist conventions of meaning is an ideological stance that often gives priority to the political virtues that produced the status quo above those required by transformative constitutional justice. The dogmatic positivistic attitude of judicial deference to the legislature and strict disavowal of the role of morality is clearly at odds with the constitutional purpose and the culture of substantive reasoning.[238]

By contrast, the Roman-Dutch approach takes a broader context into account, including the purpose and history of the legislation and the context of the legal system as a whole.[239] This approach is appropriately called contextualism and is concerned with producing coherent meaning that gives effect to the spirit of the law as much as its literal interpretation.[240] However, even under the Roman-Dutch position on contextual interpretation, the intention of the legislature still features at the front and centre of the interpretive methodology and, should there be problems with vagueness, absurdity or incoherence, adjudicators are bound by the meaning that the legislature allegedly intended. Even in matters involving the interpretation of private documents like wills and contracts, the primary injunction is to seek to determine the author's intention from the language used.[241]

The second grouping of legal thinkers that Dworkin identifies, known as pragmatists, display the tendency to decide the case according to whichever outcome the judge believes would most benefit the political community. Dworkin cautions that "[a]ctivism is a virulent form of legal pragmatism", which he condemns.[242] This represents the

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[237] *Endumeni* paras 22-23.
[238] Cockrell "Rainbow jurisprudence" 13; Botha "Democracy and rights" 564; Van Marle & Brand "Enkele opmerkings" 410-412; Van Marle "Revisiting" 552-555. For an overview of the early discourse on constitutional interpretation and what it requires for meaningful transformation, see Du Plessis *Re-interpretation* x-xiv.
[239] Perumalsamy "The life and times" 6.
[240] Perumalsamy "The life and times" 7.
[241] *King v De Jager* [2021] ZACC 4 para 34. At n 66, the court (per Mhlantla J) identifies the "plain meaning rule" as a primary common law canon of interpretation, specifying that "ordinary words must attain their ordinary meaning and technical words their technical meaning". This canon also applies to statutory interpretation.
[242] Dworkin *Law's Empire* 378.

anti-foundationalist school of thought in South African jurisprudence, which is radically opposed to the position on the purported constraints of text that motivate textualist approaches.[243] Pragmatists exhibit a CLS-like commitment to proving the indeterminacy of legal texts, hoping to show that adjudication is no more than unconstrained political activism disguised as interpretation.[244] Accordingly, the text itself poses a much lower degree of constraint on the adjudicator, if any at all. The result of pragmatism is a fractured, piecemeal model of law that devotes itself so entirely to the individual case that it loses sight of the coherent normative vision that the system of law more broadly comprises. Pragmatic solutions dispense situational justice (on the judge's understanding of this ideal) without much regard for the generative normative principles that underpin the conceptual field of law and the legal project as a whole, or the complex relationship between the two. Drucilla Cornell and Nick Friedman describe it as follows:

> "Legal pragmatism, for Dworkin, leaves us with the worst kind of subjectivism in interpretation, as each judge attempts wilfully to impose her best vision of the future."[245]

The question becomes whether either of these approaches to interpretation are able to meet constitutional objectives.[246] While conventionalism is arguably the more common interpretive mode in the South African legal context, both conventionalism and pragmatism differ markedly from constitutional interpretation, which has a charter of rights and values to reference and instantiate without an overriding respect for authorial intent. As is argued below, the normative compliance of all interpretation and application of law is of paramount importance under constitutional interpretation, which will override the intention of the legislature if the two come into conflict. This is a chief difference between textual and contextual interpretation as ingrained in South African legal culture and constitutional interpretation.

This is not to say that the Constitutional Court always treads a middle path between foundationalism and anti-foundationalism. Foundationalist approaches have been

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[243] Bishop & Brickhill "In the beginning" 698.
[244] Lenta "Constitutional interpretation" 291; Roux *Politics* 94.
[245] Cornell & Friedman "Significance" at 18.
[246] Van Marle "Revisiting" 550. O'Regan "From form to substance" 8 also notes that the traditional divide between law and politics or morality is no longer appropriate in light of the objective value system introduced by the Constitution and the role that section 39(2) sketches for it. At 9 the author explains in reference to the Constitutional Court's judgment in *Carmichele* para 54: "[T]he effect of the constitutional project is a new understanding of the relationship between law and morals; an approach, by and large, alien to the mainstream legal tradition in South Africa."

rejected in innumerable Constitutional Court decisions since the advent of constitutional democracy, to such an extent that the Court has been accused of displaying an anti-foundationalist bent.[247] While foundationalism's ardent adherence to the alleged clear meaning of text cannot accommodate the need for transformative politics, anti-foundationalists' disregard for the textual basis of law overemphasises the pliability of meaning at the expense of certainty under the rule of law. Each position leans too hard in one direction, either towards conventional stasis or pragmatic dynamism, with the result that the opposing virtue is unnecessarily compromised. Yet, as Michael Bishop and Jason Brickhill contend, "[t]he need for relative certainty also applies to the interpretation of laws", while the (sometimes countervailing) need for transformation is equally unassailable.[248]

2.5.2) Constitutional interpretation and appropriate reading strategies

Constitutional interpretation means the interpretation of all law (including the Constitution and non-constitutional sources) according to the mandates of the Bill of Rights. The essence of constitutional interpretation in South African law is the holistic, purposive construction of independent sources of law towards the ends adumbrated in the constitutional text. A court's first duty is that of constitutional fidelity: this duty is imposed in sections 1, 2, 7(2), 8(1), 39, 165(2), and 172. In contrast to judicial deference to parliamentary sovereignty, courts are now duty-bound to invalidate any law or conduct that is inconsistent with the Constitution. As Singh and Bhero observe, "a failure by a court to fulfil its mandate of promoting the spirit, purport and objects of the Bill of Rights by deferring to the legislature could potentially leave certain rights unprotected or with little protection".[249]

While some strides have been made in dismantling the various types of formalism – both in reasoning and interpretive practices – that have traditionally characterised the

[247] This is the gist of the criticism levelled by Bishop & Brickhill "In the beginning" against a series of decisions between 2007-2012.
[248] Bishop & Brickhill "In the beginning" 697, 700.
[249] Singh & Bhero "Judicial law-making" 14. The Constitutional Court used almost the same terminology, describing the judiciary's primary responsibility in applying and developing the common law as "true fidelity to the ethos of the transformative constitutional project": *King v De Jager* 2021 (4) SA 1 (CC) para 47 per Mhlantla J.

bench, many incarnations still survive to this day.[250] As a result of the conservative South African legal culture that remains the tacit norm on the bench, constitutional reconfigurations of predetermined meaning are considered only infrequently. This results in the miscarriage of transformative justice where the constitutional word and spirit are left without substance, particularly when a court adopts precedential constructions of legal rules without investigating the normative implications of doing so, often resulting in pre-constitutional or non-constitutional meanings going unchallenged.[251] Strategies and techniques like the literalist-cum-intentionalist interpretative approach that served the judiciary in the past must be discarded in favour of achieving the constitutional vision instead of the legislature's. Dikgang Moseneke puts it plainly:

> "Judicial interpretation under the Constitution has placed different imperatives upon the adjudicator. Austere legalism more suited to interpretation of statutes is not commendable to constitutional interpretation."[252]

Prior to constitutional democracy, courts were split between textualist and contextualist approaches to interpreting law.[253] However, the inaugural series of cases to emanate from the Constitutional Court bench gave a clear indication that purposive constitutional interpretation would not be a continuation of the pre-constitutional approach to interpretation of legal sources.[254] One of the first cases to demonstrate the difference between a traditional statutory interpretive outcome and a constitutional

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[250] *Endumeni* has become the emblematic decision that has provided the seminal position on interpretation of non-statutory legal documents, relying for support on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 90; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 52.

[251] This is on full display in judgments like *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC* [2016] 4 All SA 623 (GJ), where the court takes an overtly textualist approach to the interpretation of the Copyright Act 98 of 1978, resulting in the constitutional rights provisions being given short thrift in the court's reasoning.

[252] Moseneke "Transformative adjudication" 316. See also Du Plessis *Re-interpretation* 139, where the author concludes that the "politicisation" of constitutional interpretation has the same effect on statutory interpretation, considering the validity-testing function of the Constitution that utilises political criteria formulated as rights and values. Later (at 144) the author explains:

> "The decisive question of statutory interpretation is no longer what the legislature intended a statute to mean, but which one of the possible meanings of the text is most compatible with the Constitution. The intention of the legislature plays second fiddle at best."

[253] Du Toit "Correct interpretation" 17.

[254] *S v Zuma* 1995 (2) SA 642 (CC) para 15; *Makwanyane* para 9; *S v Mhlungu* 1995 (3) SA 867 (CC) (CC) para 8. Davis "Of closure" 180 succinctly illustrates the problem with the previous approach of formal reasoning underlying the interpretive approach:

> "The task of a court in interpreting a section of the Constitution is to promote the values which underlie the idea of the Constitution, in our case, dignity, equality and freedom. In this a mechanical approach to language is the very antithesis of a progressive approach to constitutionalism."

interpretive outcome is the early Constitutional Court decision in *S v Mhlungu*.[255] This case concerned the application of the Constitution to presumptions in the law of evidence pertaining to the non-coercion of confessions. The Court handed down four different decisions: Mahomed J wrote for the majority; Kentridge AJ for the dissenting minority; and Sachs J and Kriegler J in separate judgments concurred with the majority judgment but on different grounds.

The differences between these judgments are explicable entirely by recourse to the interpretive approaches adopted in each respective decision, illustrating how the normative components that inspire every interpretive approach determine its bearing and trajectory.[256] Kentridge AJ construed the constitutional right in section 25(3) of the Interim Constitution to apply only to those persons whose criminal proceedings were launched after the date of the commencement of operation of the Bill of Rights. This approach involved construing the plain meaning of the provision and giving effect to the meaning produced.[257] This is representative of the conventionalist approach to interpretation. Mahomed J's majority decision rebuked a literal interpretation of the relevant constitutional provision that would disabuse the right of accused persons to a fair trial based solely on the textual strictures of the constitutional provision.[258] His judgment makes it clear that the spirit and objectives of the constitutional transition should not be rendered subservient to the conventions of legal culture that would denude textual provisions of their substance. This should not be seen as a call for pragmatism or an embrace of anti-foundationalism, but rather serves to illustrate the point that the Bill of Rights demands more than literalist fidelity to a strict interpretation of the text; instead, a value-laden substantive interpretation with the text may deliver a different outcome to the plain and ordinary meaning that may avail.[259] Although a case analysis is beyond the remit of this discussion, the briefest of glances serves to illustrate the point that the outcome of a legal dispute is contingent on the interpretive

[255] 1995 (3) SA 867 (CC).
[256] For extensive discussions of the judgments, see generally A Fagan "In defence of the obvious – Ordinary meaning and the identification of constitutional rules" (1995) 11 *SAJHR* 545-570; DM Davis "The underlying theory that informs the wording of our Bill of Rights" (1996) 113 *SALJ* 385-394; E Fagan "The longest erratum note in history'" (1996) 12 *SAJHR* 79-89; DM Davis "The twist of language and the two Fagans: Please Sir may I have some more literalism!" (1996) 12 *SAJHR* 504-512; E Fagan "The ordinary meaning of language: A response to Professor Davis" (1997) 13 *SAJHR* 174; Davis "Of closure"; J de Ville "Eduard Fagan in context" (1997) 12 *SAPL* 493-513; Van Marle "Revisiting"; Lenta "Constitutional interpretation"; Du Plessis "Interpretation" in *CLOSA* 32-13.
[257] Para 84."
[258] Para 8.
[259] Du Plessis *Re-interpretation* 144.

strategy with which the adjudicator engages the law. Contestation of statutory meaning on political grounds is an expected outcome of a difference in approach to interpretation, which again illustrates the importance of choosing a suitable interpretive theory. The majority judgment in *Mhlungu* uses the text as its starting point but adopts the political content of the Bill of Rights as the normative baseline for its interpretation and ensures that justice is done to the constitutional right rather than the legislative instrument.

The dictates of constitutional interpretation now behove purposive interpretation of all sources of law, not just the Constitution. This is the crucial difference when interpreting legislation under a supreme constitution: formal rules are always beholden to a higher value system than the principle of parliamentary sovereignty. Consequently, formal rules should be divorced from the environment of formalism that reigned supreme in South African legal culture.[260] Singh and Bhero juxtapose literalist loyalty to the plain meaning of a provision against the judicial duty to deliver justice.[261] This is a good bifurcation of two possible allegiances, although some of the judges following the former approach presumably also believe that they are in pursuit of a theory of justice that requires exactly that from adjudicators.[262] Blind allegiance to one variant of justice (fidelity to plain meaning or legislative intention) can come at the expense of concurrent conceptions of justice, especially when the fundamental normative values of the Bill of Rights are brought into the fold. By contrast, constitutional interpretation involves the purposive and value-based construction of sources rather than the textualist fidelity that promises to perpetuate the existing structure and content of law, true to its original design.[263] The importance of the correct interpretive strategy has been assertively formulated in scholarship:

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[260] This formalism is intricately tied to claims of value neutrality and all the other obfuscating frames that contort thinking towards inevitable conclusions on distributive arguments or allocations of entitlements. Formal reasoning is launched from a platform of value-laden assumptions hidden from view or proffered as value-neutral, objective and universal. Klare "Legal culture" 184 exposes the Constitutional Court's neglect of its judicial powers and responsibilities in assuming that court orders are not the products of governmental branches that are answerable to the Bill of Rights, and that "the common law rules that structure social life and distribute power are a kind of neutral background for which government is not responsible." This exposes the a-contextual and formalistic analysis that is a function of the liberal legal culture and treats the question of application as one to be decided within the confines of this legal tradition rather than as a problem about a political tradition.

[261] Singh & Bhero "Judicial law-making" 7, 16.

[262] Dworkin *Law's Empire* 8 makes a similar point: "The bad judge […] is the rigid 'mechanical' judge who enforces the law for its own sake with no care for the misery or injustice or inefficiency that follows. The good judge prefers justice to law."

[263] Cheadle & Davis "Structure" in *SA CL* 1-6 – 1-9.

> "Judicial duty demands the delivery of justice. In the South African context, it is submitted that such justice can be achieved through the correct methodology of interpretation, which has been identified as a value-activating or teleological method of interpretation. This methodology should inform the way we interpret legislation and the Constitution with the values that it epitomises in a constitutional democracy."[264]

Moseneke likewise charges that "courts often acknowledge their duty to develop the law […] in harmony with the Constitution but stop short of embracing the consequences of contextual or purposive adjudication".[265] This could be understood as a remnant of conservative legal culture with its reliance on formal over substantive reasoning, hoping to be seen to avoid engaging in moral reasoning. Despite the clear break in tradition from textualism and the Roman-Dutch version of contextualism caused by constitutional intercession, case law remained dominated by the prevailing attitude of deference to what the legislature could have intended certain wording to mean. This indictment aptly describes courts' engagement with the Constitution in many intellectual property decisions, evincing a conditioned pattern of reasoning that betrays pre-constitutional interpretive methodology.

Courts are no longer expected to be passively obedient to conventional canons of interpretation in their search for textual meaning. Adjudicators are now tasked with finding contextual, teleological meaning that feeds into the holistic constitutional system of law. This constitutional approach, which gives effect to substantive transformative rather than formal justice or preservative priorities,[266] requires keen awareness on the part of the interpreter of the dangers of the regressive legal culture in all matters that involve interpretation of law. The chief lodestar should always be the constitutional vision, not what a legal text purports to mean on its face. In the words of Sachs J, in constitutional interpretation "grammar and dictionary meanings are merely principal (initial) tools rather than determinative tyrants".[267] Without constant vigilance against conventional heuristics, regression to the norm of the conservative legal culture and its formalistic and superficial glean on interpretation is

[264] Singh & Bhero "Judicial law-making" 16.
[265] Moseneke "Transformative constitutionalism". See further Davis "Private law after 1994" 325.
[266] It may be argued that the constitutional property clause is a preservative feature of the Bill of Rights as it shields entrenched patterns of property relations from redistributive policy mechanisms. This would be to misconstrue the opening provisions of the property clause. Rather, the deprivations provision is merely an iteration of the more general constitutional concept of proportionality, which is itself an applied form of the osmotic culture of justification.
[267] *South African Police Service v Public Servants Association* 2007 3 SA 521 (CC) para 17.

likely, with the result that constitutional interpretation is likely to ultimately revert back to traditional conventions serving liberal priorities with added rhetorical subterfuge.

As an antidote, the interpreter should always engage in a value-laden construction of the source of law before them. Yet just because the Bill of Rights necessitates a value-heavy reading in respect of the statutory law being interpreted, such value-based interpretation does not permit ascribing to the text a meaning that is foreign to the wording. While the relevant normative content should be sourced in the Bill of Rights rather than the conceptual-ethical paradigm that animates the statute, this should not force a meaning from statutory provisions that simply is not among the possible constructions of the text.[268] The condition that the meaning must be a textually feasible one is captured in case law as the requirement that the given "interpretation can be reasonably ascribed to the section" of the statute.[269] This validity threshold is considered in more detail in the next chapter.[270]

The relation between text and context in adjudication has also changed since constitutional democracy, which has been clarified in case law. Wallis JA, the author of one of the most instructive judgments on interpretation from the past decade, proffers of that decision:

> "[T]he basic point of *Endumeni* [is] that text and context go together in the process of interpretation; that one starts with the language and the rules of grammar and syntax, but always viewed in the light of the context, the apparent purpose of the document and, where there is relevant knowledge, the material known to those responsible for its coming into existence. This is not confined to contracts. Even legislators and the officials who are initially responsible for the drafting of legislation are aware of external facts that lead to legislation being passed."[271]

In *Natal Joint Municipal Pension Fund v Endumeni Municipality* ("*Endumeni*"),[272] the SCA was confronted with the interpretation of pension fund regulations that purportedly allowed the applicant to recover an adjusted contribution. The question arose whether the textualist approach to determining the meaning of regulations is

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[268] Of course, if the statutory provision is incapable of bearing a constitutionally viable meaning, this calls for decisive remedial action in the form of severance or "reading in", but these only occur once the meaning of the provision has already been determined and is found unconstitutional. See Chapter 3 Section 2.6 on interpretive mechanisms available to courts confronted with wording that is incapable of producing a constitutionally compliant meaning.
[269] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O*. 2001 (1) SA 545 (CC) para 23.
[270] See Chapter 3 Section 2.6.
[271] Wallis "Interpretation" 20.
[272] 2012 4 SA 593 (SCA).

appropriate. The court found that there was no reason to follow a textualist approach in these matters, preferring the contextual construction of the relevant text in a manner that serves the purposes of the provision in the broader scheme of the constitutional value system.[273] Many have welcomed this decision, heralding it as "draw[ing] a line under the era dominated by the golden rule of legal interpretation […] to embrace a new era dominated by a modern, globally recognised and fully integrated approach to legal interpretation".[274] The decision has been cited with approval by the Constitutional Court numerous times,[275] and leaves South African adjudicators with no doubt regarding what Wallis JA calls the "proper approach to interpretation".[276]

> "What are the underlying principles that animate the judgment in *Endumeni*? The first is that we need to escape from an approach to interpretation that involves an *a priori* assessment of the meaning of the document in issue and then an endeavour, by invoking whichever canons of interpretation suit, to justify that meaning. […] *Endumeni* demands of judges that they articulate their reasons, both linguistic and contextual, for arriving at their decisions on questions of the construction of documents. As such it should produce greater transparency in regard to judicial decision-making in this sphere. Once judges treat it as second nature to explain the contextual material on which they rely, it will be possible to assess whether that reliance is legitimate or unjustified.
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> The second animating principle is that it is desirable to have a single reasonably clear standard for the interpretation of documents that enables lawyers and courts to go about their business of interpreting documents, without becoming bogged down in the 'how' of interpretation."[277]

Viewed in this light, contextualism is a call for direct normative engagement with legislation in every case that calls for its interpretation, as entrenched and enforced by the norm of public justification of the exercise of public power through law. The unified standard of interpretation also speaks to holism in constitutional interpretation, feeding into the single-system-of-law principle both normatively and

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[273] In *CSARS v Daikin Airconditioning SA (Pty) Ltd* 2018 ZASCA 66 paras 29-31, 33, the dissenting minority decision of Majiedt JA and Davis AJA distinguished the focus of *Endumeni* as being on the interpretation of private legal documents like contracts but not legislation; the traditional literalist-cum-intentionalist approach was preferred above the purposive-cum-contextualist approach that *Endumeni* advocates. However, this minority decision was rejected in *Telkom SA Soc Ltd v CSARS* 2020 4 SA 480 (SCA) and *CSARS v United Manganese of Kalahari (Pty) Ltd* 2020 4 SA 428 (SCA). See further F Moosa "Interpretation of wills – Does the *Endumeni* case apply?" (2021) 24 *PER/PELJ* 1-30 at 3-4.

[274] W le Roux "Legal interpretation after *Endumeni*: Clarification, contestation, application" (2019) 22 *PER/PELJ* 1-9 at 2-3.

[275] Perumalsamy "The life and times" 3 n 4 explains that "[t]he Constitutional Court has relied on *Endumeni* in dozens of cases, but it was first approved in 2013". Le Roux "Legal interpretation" 3 claims that "[i]n less than a decade Endumeni has become one of the most cited authorities in the history of South African law", reporting more than 140 citations by October 2019.

[276] The judge adopts this heading to describe the comparative excurses conducted in paras 17-26.

[277] Wallis "Interpretation" 21-22. The first reason given by the judge enforces the culture of justification by increasing the transparency of judicial decision making.

methodologically. Such value-laden purposivism applies regardless of the date of legislative promulgation or which realm of conduct (public or private) the statute regulates.[278] This comports with the approach towards constitutional interpretation that courts have adopted more generally when interpreting non-constitutional law with clear constitutional intersections.

The judicial approach towards interpretation under the Constitution can be described as purposive and teleological, requiring substantive reasoning and public justification of the outcomes on normative grounds. Purposive interpretation entails construing statutory and common law to contribute to the achievement of the constitutional aims and objectives.[279] Du Plessis issues three caveats on purposive interpretation: that constitutional interpretation cannot be pithily captured in a popular catchphrase like "purposive"; that the relevant purpose will not always require a generous construction of the provision, as it may be better served by a restrictive meaning; and that the purpose of any statutory provision can only be determined through the process of interpretation, not prior to it.[280] This approach requires awareness of the competing and complementary political values inherent in legal doctrine and an overriding commitment to achieving normative comity across the many sources of law they encounter. Sometimes extensive strategies are required;[281] other times restrictive strategies are necessary.[282] It is ultimately a question of which values the interpreter identifies as being served by the purposive construction of the statute.

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[278] Perumalsamy "The life and times" 15 reads the *Endumeni* judgment as establishing that contextualism is the appropriate methodology for the interpretation of all legal documents and should be undertaken on an objective basis rather than a subjective approach, meaning that the intention of the author (whether the legislator or a private legal actor) as dominant interpretive anchor is no longer viable or desirable. At 16 the author explains "[t]he most important contribution of *Endumeni* to statutory interpretation, in my view, is that it sounds the death-knell in our law for the intention of the legislature." Moosa "Interpretation of wills" 10 likewise reads the decision as "authority for the proposition that interpreters of all documents, irrespective of their nature, must from the outset proceed to ascertain the meaning and effect of the document's content read as a whole" (citing *Raubenheimer v Raubenheimer* 2012 5 SA 290 (SCA)).

[279] See on this Moosa "Understanding the spirit" 2.

[280] Du Plessis "Interpretation" in *CLOSA* 32-54 – 32-55. This comports with the Constitutional Court's recent approach to testing the validity of pre-constitutional legislation in *Herbert v Senqu Municipality* 2019 (6) SA 231 (CC), which involves first interpreting the provisions in their historical context and then measuring those provisions against the prevailing constitutional interests or countervailing entitlements.

[281] This was held in the first decision to be delivered by the Constitutional Court in *Zuma*. See also *Goedgelegen* para 53 (per Moseneke J): "We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees." (quoted with approval in *Daniels v Scribante* 2017 (4) SA 341 (CC) para 25).

[282] *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) para 17. See further Cheadle & Davis "Structure" in *SA CL* 1-6.

Of the many different approaches that one can adopt towards interpretation, only some will yield constitutionally compliant outcomes in most cases. The appropriate reading of any source can only be determined by reference to what the Constitution demands – in other words, the constitutional purpose. Yet, the Constitution plausibly supports a variety of reading strategies and interpretive approaches, and too often the choice of strategy becomes determinative of the outcome of the interpretive endeavour. Each reading strategy or interpretive approach allows a different perspective into the history, purpose, original context, ideological commitments, and present utility of the law being interpreted.[283] Du Plessis suggests that each interpretive technique and adjunct canon or rule should be employed with the constitutional dictates in mind and that all such reading strategies could offer a useful insight into the legal problem at hand, with those that are constitutionally fruitful in a specific case being brought to the fore. While not proposing one strategy over another, du Plessis argues that "[i]t is preferable and possible to work towards a meaningful and creative coexistence of various interpretive approaches (*qua* reading strategies) that sustain and enrich one another".[284] However, because these aids and canons of interpretation stem from the pre-democratic common law tradition[285] they must be adapted and reformed to fit the transformative constitutional project and obey constitutional commands.[286]

By employing a combination of reading strategies as may be appropriate to the interpreter's purpose, and by identifying the different vantage points from which to view a matter, adjudicators engage the legal text as an object on which to impose one purpose from the variety that are available. Du Plessis explains that identifying a leitmotif to the constitutional text may aid in extracting cogent meaning that pays heed to the constitutional system as a whole.[287] This provides a more complete picture of the regime that the given rule, exception, principle, or value (whether explicit, implicit or generative) helps to create and sustain, leading to a final pronouncement on its

[283] Moosa "Understanding the spirit" 1.
[284] L du Plessis "Interpretation" in *CLOSA* 32-56.
[285] Although many canons of interpretation hail from the common law, English influence is felt in the form of the Interpretation Act 33 of 1957, which provides a reference framework for terms commonly encountered in the practice of statutory interpretation.
[286] L du Plessis "The (re-)systematization of the canons of and aids to statutory interpretation" (2005) 122 *SALJ* 591-613 at 612.
[287] See L du Plessis "Theoretical (dis-) position and strategic leitmotivs in constitutional interpretation in South Africa" (2005) 18 *PER/PELJ* 1332-1365.

application.[288] But the selection of an appropriate reading strategy can only occur once the constitutional normative landscape has been plotted, as this provides the backdrop for the interpretive mechanisms to orchestrate systemic synthesis. Accordingly, one must discern the constitutional values that are said to comprise the objective normative system and construe all law in conformity with those political ideals (in service of the political integrity of the legal system as a whole). This is preferable to being constrained by the ideological underpinnings of the particular legal institution, such as those that inform copyright law. The latter approach would proliferate the existence of sometimes incongruent normative commitments across the unified body of South African law, thereby fragmenting the unitary vision by allowing different domains of law to serve conflicting normative regimes.

Halton Cheadle and Dennis Davis make the point that adopting an interpretive approach (literalism or originalism or whichever approach is preferred) is not equivalent to adopting a theory of interpretation, but rather an interpretive technique to aid the adjudicator in arriving at a result that their constitutional theory demands.[289] The authors proffer a holistic approach to interpretation that involves Dworkin's constructive interpretation aimed at achieving political integrity by construing each provision of a text according to the overall purpose (ideological commitments or practical objectives), which informs the interpreter of the best reading for each provision to contribute to the holistic coherence.[290] The importance of systemic unity of purpose is a key feature of both constitutional interpretation in South African law and Dworkin's theory of law as integrity. Dworkin's constructive interpretation is "a matter of imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong".[291] Aharon Barak sees Dworkin as proffering a subset of purposive interpretation – in America called "Living Constitutionalism" – which comprises both the framers' intent and "the original

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[288] Du Plessis "(Re-)systematization" 611-612. Dworkin *Justice in Robes* 52 echoes a similar sentiment:

> "A claim of law […] is tantamount to the claim, then, that one principle or another provides a better justification of some part of legal practice. Better in what way? Better interpretively–better, that is, because it fits the legal practice better, and puts it in a better light." (citations omitted).

[289] Cheadle & Davis "Structure" in *SA CL* 1-6(1) – 1-7. At 1-2 the authors make the following statement that is crucial to understanding legal interpretation in South African law:

> "The key interpretative question is less concerned with possible intra-textual conflicts then (*sic*) with a contest between different readings of the text read as whole."

[290] Cheadle & Davis "Structure" in *SA CL* 1-7.

[291] Lenta "Constitutional interpretation" 290, citing Dworkin *Law's Empire* 52.

public understandings" but pays both less attention than "the fundamental purpose underlying the constitution at the time of the interpretation".[292] This is a useful clarification that must be kept in mind when using Dworkin's work in the South African context: the fundamental purposes of the transformative Constitution are of utmost importance in determining the meaning of any legal text and are always superior to legislative purpose.

2.5.3) Contextualism, purposivism and holism in interpretation

The constitutional approach seeks to accommodate the multiple dynamic components of the South African legal system, both relating to facts (like historical injustice and continuing inequality) and the overlapping sources of law. For the adjudicator to deliver a purposive, contextual decision, it is essential to take a holistic stance towards construing all sources of law concurrently and in a mutually supporting fashion. By holistic is meant that "each provision must be interpreted, as far as possible, in harmony with other constitutional provisions, and in the light of the purpose which the particular constitution (and the provision in question) was meant to achieve."[293] This involves determining the meaning of statutory texts by some measure of textual constraint – adjudicators are not tasked with divination, after all – construed against the transformative intent of the Constitution, ultimately aimed at upholding the aspirational vision of the rule of law rather than a positivistic or doctrinal rendering of this ideal.[294] Although the Bill of Rights recognises a large array of values and interests in the formal legal mechanism of rights, the interdependence of all constitutional provisions engenders the need for a holistic approach that derives its context from more than the textual component and preceding authority on how to interpret and apply private law rules.[295] This means an interactive exchange between constitutional provisions in a joint endeavour to deliver on the constitutional promise of a transformed

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[292] A Barak *Human Dignity: The constitutional value and the constitutional right* (2015) 70, citing Dworkin *Justice for Hedgehogs*. See also the author's discussion of his variant of purposive interpretation versus Dworkin's theory of law as integrity: Barak *Purposive Interpretation* 290-297.
[293] N Friedman "The South African common law and the Constitution: Revisiting horizontality" (2014) 30 *SAJHR* 63-88 at 66 (citations omitted).
[294] Lenta "Constitutional interpretation".
[295] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) para 131. See also IM Rautenbach "The limitation of more than one constitutional rights by the same law or action" 2015 (3) *TSAR* 602-611 at 602.

society,[296] not only those that relate to fundamental rights and not only as raised by counsel in a given case. More is required to uphold a right over another interest than the former's mere assertion.

The broader context in which the statutory provision is found will always be as relevant to determining its meaning as the wording itself. Moreover, the wording of the textual source is no longer the only relevant determinant of the law, as it once was. Following the teleological, systematic approach, the following elements and considerations should be construed in the process of determining statutory meaning:

> "[T]he text of a provision and the Constitution as a whole; the values that underlie an open and democratic society based on human dignity, equality and freedom; international law; foreign law; the constitutional principles with which the new Constitution had to comply; background evidence on negotiations; and the history of human rights violations."[297]

The ambit of relevant factors on a contextualist approach remains contested and currently presents the crux of the interpretive question. While many courts consider themselves free from methodological constraints in selecting the relevant factors, some commentators insist that the contextualist adjudicator should be confined to a closed list of factors in construing legal texts.[298] As a start, "'[c]ontext' includes the entire enactment in which the word or words in contention appear […] and in its widest sense would include enactments *in pari materia* and the situation, or 'mischief', sought to be remedied."[299] Sachs J explicitly identified the constitutional normative framework as part of the "contextual scene" that informs all interpretation, including both substantive and structural values.[300] He emphasised the importance of systemic construction whereby each part of the legal system contributes to the greater purposes of constitutionalism, repeatedly stating that the aim of such interpretation is to "harmonise" the various interests at stake.[301]

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[296] I do not mean to suggest that South African legal society will ever be fully transformed, if such a thing were possible, and am aware of the well-argued critical literature warning of the dangers to the project of transformation that attend a static conception of a transformed society. See eg Van der Walt "Dancing with codes"; De Vos "A bridge too far?"; Van Marle "Transformative constitutionalism".

[297] IM Rautenbach *Rautenbach-Malherbe Constitutional Law* (6th ed 2012) 250.

[298] Perumalsamy "The life and times".

[299] *Hoban v Absa Bank Ltd t/a United Bank* 1999 2 SA 1036 (SCA) para 20, quoted in Wallis "Interpretation" 18.

[300] *Public Servants Association* para 19. Sachs J elaborated on what constitutes the constitutional context in paras 21-23.

[301] *Public Servants Association* paras 31, 33 & 34. This is in stark contrast to the conventional approach whereby one party's interests are protected on the basis of formal authority, with the competing interests having to yield the entirety of their demands to the triumphant countervailing assertions of interest.

Every rule must be applied in the context of the statute as a whole, which in turn fits into the applicable area of law, which fits into the greater legal system comprising multiple interlocking and overlapping sources of law, which must ultimately comport with the constitutional vision and the values explicated throughout the text. This type of contextual construction can only be attempted through a holistic reading of the relevant statutory provision and common law doctrine that identifies its proper purpose in the context of constitutional norms and values. As part of this holistic reading strategy, courts are required to construe constitutional values in light of the "structural provisions of the Constitution as a whole", attempting to direct interpretative activity towards systemic comity.[302]

The reason for a holistic approach towards constitutional interpretation is that the Constitution neither ranks protected rights and interests in a mechanistic, formalistic way, nor does it hold them conceptually distinct; rather, it takes proper cognisance of the impact that judicial intervention may have on the attainment of other rights and interests. A theoretical approach that abstractly privileges one right above another regardless of context has been explicitly rejected by the Constitutional Court in numerous cases.[303] The Court has issued a clear call for a holistic approach that takes account of the totality of the impact that the limitation of one right might have.[304]

It becomes clear that the holistic approach is directly opposed to mechanically and hierarchically construing sources of law, as a fact-sensitive, contextual analysis is required in every case. Accordingly, the value of the rights-as-trumps heuristic is severely curtailed. This holistic approach also comports with section 39(2), which commands courts to engage the spirit, purport and objects of the Bill of Rights in all

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[302] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) para 47, quoted in Penfold "Substantive reasoning" 89. See also Bishop & Brickhill "In the beginning" 685.

[303] See eg *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23; *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) para 62; *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) paras 55, 125; *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) para 41.

[304] The Court stated in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) para 34 (per Jafta J and Tshiqi AJ for the minority):

> "Where more than one right is affected […] the promotion of the objects of the Bill of Rights cannot be confined to the impact on one right."

In the earlier case of *Fraser v Absa Bank Ltd* 2007 3 SA 484 (CC); 2007 (3) BCLR 219 (CC) par 47 the Court (per Van der Westhuizen J) advised that the spirit, purport and objects inhere "in the matrix and totality of rights and values embodied in the Bill of Rights [as well as] in the protection of specific rights", thus rendering a holistic reading the only feasible option to comply with the section 39(2) mandate. See also *Mamabolo* para 41. See further IM Rautenbach "Overview of Constitutional Court judgments on the Bill of Rights – 2015" 2016 *TSAR* 294-311 at 295.

legal disputes, even when they are not obviously implicated in the matter or raised in argument by the parties. Davis explains that "[t]he real significance of attempting, by way of a holistic reading of the Bill of Rights, to determine its spirit, purport and objects, is to engage in a process of development of a normative order in terms of which the entire South African legal system can be located."[305] This requires the analytical net to be cast wider than the immediate interests of the parties to the dispute and the values that are typically thought to operate in the particular field of law under discussion; it requires taking account of the systemic consequences for the constitutional order of making any given order.

Clearly the adjudicative protocol has shifted in a teleological direction, away from traditional notions of legal language and legislative intention. This indicates a systemic turn in the style of adjudication (which, it is argued below, is compatible with Dworkin's model of law as interpretation), in terms of which adjudicators take a broader view of their role in the legal system than the mechanistic function of a-contextually decoding and applying legal language.

2.5.4) Purposive interpretation of private law documents

Another site of tension between conservative and progressive theories of law is the differing approaches to how different legal documents are construed.[306] The new purposive contextualism has influenced different domains of legal interpretation under the Constitution, including the interpretation of legal documents in the private commercial sphere where conventionalist strategies still loom large. This is arguably a priority for achieving the broader transformative mission of social justice, which Moseneke identifies as the paramount priority of the interpretive endeavour, especially as it relates to instantiating the foundational values in all spheres of society.[307] Adopting a holistic, teleological and value-laden approach to interpreting documents and texts in private disputes arguably is a precondition to achieving a semblance of

[305] Davis "Positivist legal philosophers" 68. See also Weinrib *Dimensions of Dignity* 121.
[306] Wallis "Interpretation" articulates the history of formal judicial separation between public sources of legal documents like statutes on the one hand and documents emanating from private relationships like contracts and patent specifications on the other. Even once courts started to accept that statutes should be purposively construed and that textualism (literalism-cum-intentionalism) would not deliver a complete picture of the legal provision's application and effect, there still existed some reluctance in applying this insight to other legal documents.
[307] Moseneke "Taking stock" 4.

the constitutional vision in private interactions,[308] where private power can be just as coercive as public.[309]

In his extra-judicial writing, Malcolm Wallis, the author of the *Endumeni* judgment, describes a global convergence on purposive, contextual interpretive approaches towards all types of legal documents, including contracts and patent specifications, that is replacing traditional interpretive strategies.[310] Wallis cites the patent law decision in *Aktiebolaget Hässle v Triomed (Pty) Ltd*[311] as being the case that broke the dam wall on upholding the pretence of plain and ordinary language devoid of context (in respect of a patent specification document) in South African law.[312] This unitary approach towards interpretation in public and private law disputes holds clear benefit from a non-fragmentation point of view and ensures that the normative content of the constitutional system of law is infused along with its methodologies. Artificially restricting the impact of the Constitution to the public sphere would counter the mission of transforming all spheres of society. It is submitted that the recent trend in expanding the conventions of constitutional interpretation to all walks of law is a necessary expression of the mandate of transformative constitutionalism.[313] However, this does

[308] Moosa "Interpretation of wills" 19 describes the import of teleological interpretation for private disputes: "A court must interpret every document through the prism of relevant constitutional and other legal norms and standards."
[309] D Bhana "The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution" (2013) 29 *SAJHR* 351-375 at 353 speaks to this need: "The power wielded by private actors is often comparable to, if not greater than, that of the state itself."
[310] Wallis "Interpretation" 10-12. See also Moosa "Interpretation of wills" 7-10.
[311] 2003 1 SA 155 (SCA).
[312] Wallis "Interpretation" 7. See the subsequent decisions of the SCA cited at 7 n 18 that followed suit on matters of contextual construction of meaning. Patent law has long recognised the English doctrine of purposive construction, first propounded in *Catnic Components Limited and Another v Hill & Smith Limited* [1982] RPC 183 and *Codex Corporation v Racal-Milgo Ltd* [1983] RPC 369 (CA) and taken up in South African law in *Multotec Manufacturinq (Pty) Ltd v Screenex Wire Weaving Manufacturers (Pty) Ltd* 1983 (1) SA 709 (A), *Selas Corporation of America v Electric Furnace Co* 1983 (1) SA 1043 (A) and *Stauffer Chemical Company and Another v Safsan Marketing and Distribution and Others* [1986] ZASCA 78, which hold that the integers or features of a patent claim in the patent specification document must be interpreted purposively when establishing whether a particular word or term in the patent description should be construed as an essential element of the claimed invention. This doctrine has frequently been invoked to determine the scope of a claimed invention: see the SCA (or its precursor, the AD) decisions in *Sappi Fine Papers (Pty) Ltd v ICI Canada Incorporated* 1992 (3) SA 306 (AD); *Water Renovation (Pty) Ltd v Gold Fields of SA Ltd* 1994 (2) SA 588 (AD); *Nampak Products Ltd and Another v Man-Dirk (Pty) Ltd* [1999] 2 All SA 543 (A); *Triomed*; *Vari-Deals 101 (Pty) Ltd and Others v Sunsmart Products (Pty) Ltd* 2008 (3) 447 (SCA); *Pharma Dynamics (Proprietary) Limited v Bayer Pharma AG and Another* [2014] 4 All SA 302 (SCA); *Mantella Trading 310 (Pty) Limited v Kusile Mining (Pty) Limited* [2015] ZASCA 10; *Pasadena Leather Products CC t/a Pasadena Products and Another v Resca and Another* [2016] ZASCA 204; *Orica Mining Services SA (Pty) Ltd v Elbroc Mining Products (Pty) Ltd* [2017] 2 All SA 796 (SCA).
[313] This argument was made even more emphatically in the concurring decision of Victor AJ in *King*, who explicitly attributes her interpretive endeavour and the result it produces to the project of transformative constitutionalism: see paras 166-169.

not give courts licence to ignore the textual basis in contextual interpretation and adopt considerations of equity as their starting point.[314] Notwithstanding, it does mean that constitutional norms should infiltrate – permeate – the interpretation of all legal documents in every judicial encounter, which may involve the interaction of values and interests that may seem foreign to the statutory regime under investigation. Wallis explains the relationship:

> "The provisions of the Interpretation Act 33 of 1957 operate as interpretative guides in certain situations, and finally section 39(2) of the Constitution contains the injunction that legislation must be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. So, as with all law, the Constitution provides a context for its interpretation that cannot be avoided and will plainly affect the meaning of specific provisions, even though its terms may not specifically address the problem under consideration. It provides the norms by and through which the interpretative process is undertaken."[315]

2.6 Conclusion

The purpose of this chapter is to introduce the central questions implied by the aspirational transition from a legal culture characterised by formal reasoning to one of substantive engagement. It starts by positing that adjudication requires a theoretical account of law and a working theory of interpretation. Dworkin's descriptive work on the main traditions in Anglo legal interpretation – namely conventionalism and pragmatism – is rehearsed and many commonalities found with the pre-constitutional South African traditions in respect of legal interpretation. The difference between theories of interpretation and interpretive strategies is explained in the broader context of South African constitutional interpretation. Specifically, the role of authorial intention in each respective tradition is investigated and the constitutional mandate of fidelity to justice over plain and ordinary meaning is noted.

Regrettably, the transition from formal to substantive reasoning and the methodological imperatives of the principle of a single-system-of-law under the supreme Constitution are yet to find traction in South African copyright law. At most,

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[314] On the plasticity of meaning in determining what the Constitution demands, see *Zuma* para 17-18 (per Kentridge AJ):

> "I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. […] But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. … [E]ven a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

[315] Wallis "Interpretation" 18.

copyright cases may consider any constitutional impact towards the end of the decision and never in any more detail than a quick recital of the implicated rights and a vague reference to some balancing act that must apparently be performed in terms of section 36 of the Constitution, and the outcome of this analysis always coincides with the conclusion towards which the decision was already headed.[316] There is never any substantive engagement with the normative spirit of the Bill of Rights and what effect that may have on the interpretive strategy being followed. This is the conservative legal culture at work; adjudicators employ conventional interpretive devices like searching for the plain and ordinary meaning (assumed to reflect the legislative author's intention) rather than construing the statutory text holistically to embody the fundamental political values that animate the legal system.

This chapter argues that the shift from the traditional legal culture to one that embraces a constitutional ethic and structure is an exploratory and on-going process. While it may not be desirable to elevate a single political theory above all alternatives, there is still tremendous benefit in adjudicators declaring the theoretical account that they believe would give best effect to the values underlying the Bill of Rights as applicable to the case at hand. This is arguably what the constitutional culture of justification demands of all adjudicators: the exercise of their authority through justificatory argument and reasoned elaboration of political principle.[317] This tactic forces adjudicators to be conscious of the ideological underpinnings of the statutory provision or common law doctrine being dissected, which brings to bear the obligation to effect normative rejuvenation to extant law. Moreover, such declaration enables future courts to further develop that account in a principled manner in light of the facts that they encounter, contributing to the doctrine of precedential authority and the ideal of legal stability.

The crucial point that this chapter makes is that the traditional legal culture that has survived the constitutional shift should be juxtaposed against that characterising the constitutional era. The rights-as-trumps model (or, at least, a strong version of the thesis that holds rights by their nature to be a high bar for competing policies to overcome) is seemingly antithetical to the idea of a normative vision that requires the

[316] See eg *Moneyweb* paras 106-110 & *Biotech Laboratories (Pty) Ltd v Beecham Group PLC and Another* [2002] 3 All SA 652 (SCA) para 16.
[317] Roux *Politics* 65.

active and deliberate dismantling of institutional legal oppression through substantive reasoning.[318] From this brief account of the chief mandates of the constitutional transition to a society based on human dignity, freedom and equality, the next chapters will start to anchor elements of this transformative mission in the context of adjudication by exploring the judicial activities of interpreting and applying law. Following this, the research turns these insights towards South African copyright law, showing how a transformative adjudicator might be able to fashion a robust model of constitutionalised copyright law without legislative intervention.

[318] Moseneke “Transformative adjudication” 317. See also Albertyn & Goldblatt “Facing the challenge” 267.

CHAPTER 3: CONSTRUCTIVE INTERPRETATION AND SOUTH AFRICAN LAW

3.1 Introduction

At the time of constitutional transition, a political compromise was reached that resulted in the retention of the body of pre-constitutional law (which derived inter alia from the Roman-Dutch and English legal traditions as well as statutory enactments) subject to its compliance with constitutional dictates.[319] As explained in Chapter 2, all law must comply with the constitutional value system and give effect to the normative objectives and guarantees reflected therein. The questions of how and to what extent the Constitution, and specifically the Bill of Rights, should permeate the substance of private and mercantile law fields are usually answered by resort to one of two clauses in the constitutional text: sections 8 and 39, labelled application and interpretation respectively.[320] This chapter discusses the implications of the interpretation clause before turning to the application clause in the next chapter.

Every legal system is premised upon a political theory that translates the deontological precepts and teleological aims that it comprises into the language of law. Often this political theory is not expressly identified or explicitly drawn out in legislation or policy documents, leaving it to courts to derive the relevant normative values from an overall consideration of the legal text itself, supplementary legislation, and prior judicial decisions construing such provisions and common law doctrine. Yet, the supreme legal text, the Constitution of the Republic of South Africa, 1996, sets out a socio-political vision of the society it seeks to bring into existence, positing an objective normative value system to guide the construction and development of all law under its domain. While not a fully-fledged political theory, this model of values and objectives provides considerable guidance on the desired systemic characteristics of a transformed body of law and the types of outcomes to legal disputes that cohere with

[319] See Schedule 6 item 2(1) of the Constitution of the Republic of South Africa, 1996.

[320] The purist objection to the transformative requirement for these clauses is usually on the basis that the existing (pre-1994) common law doctrine can (and as a normative matter should) "work itself pure" (D Dyzenhaus & M Taggart "Reasoned decisions and legal theory" in D Edlin (ed) *Common Law Theory* (2007) 134-167 at 134; see also Dworkin *Law's Empire* 407) and thereby be shorn of its recent discriminatory taint and attendant political baggage, then being left to function as it was intended – equally (and thus fairly) among all. This amounts to formal equality and cannot be countenanced as it preserves pre-constitutional relations in society. As Botha "Values and principles" 234 explains, positivism is in no way value neutral and actually expresses a "preference for law and order over freedom and equality". Many problems arise with the positivistic reasoning described, starting with the fact that such claims of value neutrality are typically attempts to obscure from view the implicit value choices that are simply assumed as starting points.

its normative vision. This enables lawyers and judges to position their approaches to legal interpretation within a range of options that the Constitution opens up to them.

This chapter argues that judges require a reading strategy that guides them in their interpretation and development of the law, and in appraising the compatibility of different interpretive methodologies with the Constitution's vision. Dworkin's model of constructive interpretation is offered as a viable approach to constitutional adjudication that can be adopted to achieve a constitutionally-friendly application of (pre-constitutional) statutory law. The terms "constitutional adjudication" and "constitutional interpretation" are used here to denote the interpretation of law under the Constitution and on its terms, not merely the interpretation of the Constitution. Consistent with this holistic and Constitution-oriented approach, Dworkin's theory of interpretation postulates the possibility of a best answer to a legal question based on its appropriate fit with past precedent (and the legal principles that these cases established) and its allegiance to the political morality that constitutes the rule of law in the given legal system, which he develops on the basis of two principles of dignity. The chapter further argues that the duty in terms of section 39(2) of the Constitution to interpret law in conformity with the Constitution is grounded in principles of constitutional normativity based on the fundamental triumvirate of dignity, equality and freedom, much like Dworkin's interpretive device is informed (and arguably constituted) by the value of dignity. The prominence of legal values in this adjudicative-interpretive scheme is highlighted throughout and the jurisprudence of the Constitutional Court is consulted for instruction. The significant overlap between the constitutional interpretive scheme constituted by section 39(2) and Dworkin's model of constructive interpretation is emphasised to demonstrate the case to be made for Dworkin's model as the appropriate choice for adjudicators to consult when interpreting any source of law. Given that copyright law is governed almost exhaustively by statute, the focus is on statutory interpretation and courts' power to develop common law is considered only peripherally.

Section 2 of this chapter sets out Dworkin's theory of law as integrity, which posits law as an interpretive exercise that should be directed towards producing outcomes that adhere to the two dimensions of fit and political integrity, which together constitute his theory of constructive interpretation. After investigating the constitutional mandates pertaining to interpretation, this section argues that Dworkin's theory of constructive

interpretation of the sources of law is a viable strategy for South African judges looking to effect substantive transformation of law. Section 3 explores the normative underpinnings of the Bill of Rights and identifies commonalities between this objective normative value system that is invoked in constitutional interpretation and Dworkin's dual principles of dignity that comprise his value system. The chapter concludes in Section 4 by drawing together the two approaches that will be used to situate the discussion to follow.

3.2 Dworkin's model of law as integrity through constructive interpretation

3.2.1) Law as interpretation

> "Under law as integrity, controversial constitutional issues call for interpretation, not amendment."[321]

Dworkin offers his model of law as integrity as an alternative to the approaches of conventionalism and pragmatism. He proclaims that law as integrity is "more relentlessly interpretive […] [because] [t]hese theories offer themselves *as* interpretations. […] Law as integrity is different: it is both the product of and the inspiration for comprehensive interpretation of legal practice."[322] Dworkin sees law as a fundamentally interpretive exercise, which places significant responsibility for the law's meaning on the judiciary. To explain his meaning of "law" and what scholars and judges mean when they talk about law, Dworkin distinguishes between different approaches to law, such as the sociological concept, doctrinal concept, taxonomical concept, and the aspirational concept of law.[323] Each of these concepts features in all legal systems to varying degrees, but the aspirational concept of law is especially pertinent to the South African situation, even if the best articulation of the rule of law in this context is subject to some dispute. Dworkin describes his political ideal of integrity as innate to the aspirational concept of the rule of law. While "some philosophers hold that the rule of law is a purely formal ideal", there is also a more substantive rendering of the ideal according to which "legality only holds when the standards that officials accept respect certain basic rights of individuals".[324] This

[321] Dworkin *Law's Empire* 371.
[322] Dworkin *Law's Empire* 226 (emphasis in original).
[323] Dworkin *Justice in Robes* (2006) 4-5.
[324] Dworkin *Justice in Robes* (2006) 5.

makes the entire endeavour of legal interpretation one of incrementally concretising the aspirational rule of law, sometimes in great strides and sometimes glacially but always in service of a vision of greater normative substance than formal compliance.

> "[Pure integrity] consists in the principles of justice that offer the best justification of the present law seen from the perspective of no institution in particular and thus abstracting from all the constraints of fairness and process that inclusive integrity requires. […] It declares how the community's practices must be reformed to serve more coherently and comprehensively a vision of social justice it has partly adopted, but it does not declare which officer has which office in that grand project."[325]

Dworkin builds his adjudicative theory of law on the basis that adjudicators are always the ones who supply the legal language with meaning; accordingly, adjudication constitutes the necessary final stage of concretising the law on the books through its application.[326] Judges establish the meaning of a textual clause by constructing the most complete picture of the legal provision that they can, which is inherently a creative act rather than one of following formulaic instruction. It follows that the adjudicator's choice of reading strategy not only informs but fundamentally shapes the law in its application and its ultimate legitimacy.

3.2.2) Integrity in the interpretation of law

Dworkin explains his reading of statutory provisions embedded in their broader context with the objective of discovering the meaning that is most coherent and gives expression to the spirit of the text in addition to its wording:

> "Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. […] Creative interpretation, on the constructive view, is a matter of interaction between purpose and object."[327]

Dworkin postulates that judges embark on a similar interpretive process as literary critics.[328] Like any sentence or paragraph from a literary text, the comprehensive meaning of a statutory provision can only be properly understood in context; specifically, the context of what comes before and after, and how this clause fits in

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[325] Dworkin *Law's Empire* 407.
[326] Under the culture of justification discussed in Chapter 1, the courts also occupy this crucial role of concretising law by pronouncing on its validity and meaning, as "any law that places a burden on a person [must] be justifiable, and […] the assessment of a law's justifiability is carried out by the courts": Möller "Justifying" 1089.
[327] Dworkin *Law's Empire* 52.
[328] Dworkin *Law's Empire* 49.

with the greater statutory regime and the legal system more broadly as an embodiment of the constitutional project of transformation more broadly still.[329] Dworkin argues that judges, just like literary critics, always resort to a broader context than the individual rule or principle; from the very beginning, judges employ a reading strategy that gathers all pertinent information in a linearly ordered manner. Further, the reader is not necessarily looking only for the plain, dictionary-bound definition of words, but how they are used in context. Yet, the mere fact that his approach is hermeneutic does not render it indeterminate or arbitrary, a point of critique emanating from multiple camps;[330] his model is explicitly principle-based, with the principle of integrity taking prime position in the hierarchy. Accordingly, the meaning of all words must be guided not by the plain or abstract construction, but the type of reading that would maximise the normative integrity of the system holistically construed. This is so not only when there exists some linguistic wiggle-room that enables the generation of new meanings, but as a primary focus of the interpretive activity as informed by the relevant normative theory.[331]

Being a normative theory of interpretation, the purpose attributed to the interpretation must fit the substantive principles of the legal system as best possible while delivering a respectable version of the text's meaning. On this understanding, the meaning of a snapshot of the text (a specific provision or passage) can only be sensibly construed in the context of everything else that appears around it.[332] By imposing a normative purpose on the text, the interpreter is endowing it with exogenous intentions that cannot be found on a narrow construction of the provision, and in doing so inspires new meaning that may not otherwise be present in the wording and may have been absent from past interpretations. In a passage that speaks to the active role that judges

[329] The exact scope of contextual interpretation under the Constitution is further discussed below: see section 2.6.
[330] M Rosenfeld "Dworkin and the One Law principle: A pluralist critique" in J Allard (ed) *Dworkin: With his responses* (2005) 363-392 at 369 characterises it as hermeneutic as opposed to textualist or intentionalist and suggests that it escapes the Realist and Law and Rhetoric attacks by binding adjudicators to coherent and systemic application of cogent legal principles. In some ways this begs the question, but Dworkin's answer is provided by narrative-based strategies and techniques like the chain-novel metaphor and the construction of the legal community and its value system.
[331] Dworkin *Law's Empire* 17.
[332] The role of context in all legal interpretation was made abundantly clear in the unanimous Constitutional Court judgment in *Rustenburg Platinum Mine v SAEWA obo Bester and Others* 2018 (5) SA 78 (CC), where the use of the term "*swartman*" (black man) was found to be discriminatory and racist. Clearly this term is not always or in itself derogatory, indicating that the context of its invocation determines much of the meaning.

take in the process of constructive interpretation, which is the model that he proposes to achieve the virtue of integrity in law, Dworkin explains the holistic vision of integrity:

> "Law as integrity, then, begins in the present and pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did […] in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future. […] When a judge declares that a particular principle is instinct in law, he reports not a simple-minded claim about the motives of past statesmen, a claim a wise cynic can easily refute, but an interpretive proposal: that the principle both fits and justifies some complex part of legal practice, that it provides an attractive way to see, in the structure of that practice, the consistency of principle integrity requires."[333]

In Dworkin's account, precedential authority on the meaning of statutory terms or common law doctrine remains important but in a different way: precedent informs the interpretation as a chronological record of elaboration and development of abstract legal principle in the historical tradition of that jurisdiction.[334] Ultimately, a limited set of interpretations of a text may be reasonably possible, but selecting the appropriate reading is not a predetermined matter of following precedent or searching for authorial intent. This means that precedential authority does not exhaust the possible meanings of those terms and their consequent application; new content could be garnered for such rules and doctrine by the changing context, holistically considered. The statutory purpose is more important in this endeavour than the plain meaning of a provision or the authorial intention at the time of promulgation. Therefore, authorial intent does feature in Dworkin's theory, but in a more teleological form than what conventionalists are accustomed: judges must seek to discover the purpose of the statutory or common law regime and locate it in the larger enterprise of law.[335] Dworkin's deployment of the concept of legislative intention relies less on psychological fact relating to the collective state of mind of the legislature than the identification of legislative purpose. However, in contrast to the formalistic machinations of hard positivism and its ilk, Dworkin's theory only looks to statutory purpose or intent as one piece of the full picture and legislative intent will never itself deliver the complete meaning of the rule or principle

[333] Dworkin *Law's Empire* 227-228. This comports with what Perumalsamy "The life and times" 18 contends, namely that legislative history is no longer a relevant factor in purposive interpretation because it represents the search for the intention of the legislator, although it formed part of contextual interpretation under Roman-Dutch common law.
[334] Dworkin *Law's Empire* 211; Cornell & Friedman "Significance" 17.
[335] Dworkin *Law's Empire* 58-59 (emphasis in original).

or legal position of a party. This is markedly different to the crass version of the concept that seeks to divine the authorial state of mind at the time of legislative drafting.

Law as integrity still has a place for the intention of the legislature, but only in so far as it points to the intended purpose of the legislation and its provisions, not in informing the ultimate purpose of the law.[336] Substantive reasoning becomes all-important as the judge's engagement with textual authority determines not only the practical content that the relevant rule is given in that case, but also the justification for that construction of the available legal material and devices and how it gives effect to the contextual (i.e., extra-textual) normative demands.[337] By (re)constructing the intention of the legislature as part of the purpose of the legislation, Dworkin emphasises the legislature's actions as deontological or teleological pursuits which must be articulated in contemporary society in light of present political priorities and objectives overlayed on the legal scheme being construed. This accords with recent developments of contextual statutory interpretation in South African jurisprudence:

> "When dealing with a statute, context does not involve guesswork as to the intention of the legislature, but a reasoned assessment of the broad purpose underlying its enactment. Statutes directed at ameliorating a distinct social problem are entitled to a more generous construction, given that purpose, than a technical regulatory statute such as the Companies Act."[338]

The intention of the legislature has taken a backseat in constitutional interpretation; indeed, "[i]t is generally acknowledged that the text of a constitution or any other statute is but one amongst many factors that may signify the meaning of that text. It is no longer regarded as *the* definitive factor."[339] Still, authorial intention remains present in many decisions that treat one area of law as normatively distinct from the constitutional system of law.[340] Dworkin's model supplants the legislature's intention

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[336] Cornell & Friedman "Significance" 11 explain: "When we posit intent we construct the best possible reading in light of what would most fully realise the implied purpose of the practice."

[337] Roux *Politics* 75. This view resonates with South African constitutional legal culture, specifically the views of legal scholars who are sometimes referred to as nonfoundationalists. See further Lenta "Constitutional interpretation" 291. This is also the view endorsed in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O*. 2001 (1) SA 545 (CC): see Bishop & Brickhill "In the beginning" 698.

[338] Wallis "Interpretation" 17 (citations omitted, emphasis in original). I submit that some statutes, notably the Copyright Act 98 of 1978, can be construed as addressing social dynamics in such a way that it either contributes to perpetuating or resolving certain social issues and the value-laden nature of interpretation should make this clear when substantive reasoning is employed over formal.

[339] IM Rautenbach "Engaging the text of section 8 of the Constitution in applying the Bill of Rights to law relating to private relations" 2002 4 *TSAR* 747-756 at 747 (emphasis in original).

[340] For example, in *Vollenhoven* the court formalistically cited the Constitution as relevant to the interpretation of the Copyright Act (para 28) but considered it irrelevant to the facts before the court as

with the objective purpose of the statute, moulded to fit the constitutional objective normative value system.[341] On this score Dworkin's model accords with the constitutional approach to statutory interpretation, which no longer searches for the meaning of statutory provisions by way of authorial intent, but instead construes the purpose of the provision itself along with the statute's purpose more broadly. More broadly still, this feeds into a holistic vision of law driven by the aspirational ideal of law as integrity. Today, "[i]t is generally acknowledged that the text of a constitution or any other statute is but one amongst many factors that may signify the meaning of that text. It is no longer regarded as *the* definitive factor."[342]

Dworkin's approach does not necessitate the existence of objectively determinable standards against which to assess the correct interpretation, merely the existence of communally shared standards.[343] Most political communities will share some basic ideas about political concepts and would try to organise law and social convention to produce such systemic outcomes, which Dworkin dubs political virtues.[344] Regardless of jurisdiction, the political virtues underpinning a legal system almost invariably include the normative facets of justice and fairness.[345] In addition to these political virtues, Dworkin proposes the distinct virtuous ideal of systemic coherence and consistency of purpose, which he calls integrity.[346] This virtue takes centre stage in Dworkin's early work on legal interpretation and survives into his later work, where he develops it into a more fully-fledged moral theory of interpretation. Dworkin proposes "constructive interpretation" as a model of principled legal interpretation that works to reflect the virtue of integrity in the legal system.

> "An overall legal interpretation […] seeks principles that would justify the substantive claims about legal rights, duties, and the rest that a particular legal practice recognizes and

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all implicated constitutional interests were duly secured by the existing statutory regime. The court considered the historical development of the statutory regime regulating copyright to discover legislative intention (paras 30-31) and considered the Bill of Rights to effect no normative intercession on such legislative purpose (paras 38-43). This is reminiscent of the SCA's decision in the trade mark case *Laugh It Off Promotions CC v South African Breweries International* [2004] 4 All SA 151 (SCA), which was emphatically overturned by the Constitutional Court (*Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC)) for lack of engagement with the constitutional rights and methodology involved.

[341] See *Endumeni* para 20, where the court was careful to avoid following conventional canons of interpretation, labelling the search for authorial intention a misnomer.

[343] Dworkin *Law's Empire* 78-83.

[344] Dworkin *Law's Empire* 164.

[345] Dworkin *Law's Empire* 177, 374.

[346] Dworkin *Law's Empire* 176

> enforces, but it must also justify the great army of constitutional and procedural practices in which these substantive claims are embedded."[347]

This ideal posits a holistic approach to orchestrating legislative and judicial action, because "[e]ven when the question is one of legislative interpretation, not legislative power, the political principles that are taken to justify legislation remain powerful because they justify interpretive strategies."[348] This speaks to consistency of principle in a coherent legal system, whereby all forms of state power are wielded towards the same normative outcomes. Dworkin explains:

> "Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards. That style of adjudication respects the ambition integrity assumes, the ambition to be a community of principle."[349]

Law as integrity is a normative vision of the rule of law that demands consistency between the facts at hand in any given matter (as instance of judicial construction and application of law) and the political-moral principles of law that can be read from precedential authority.[350] Adjudicators must seek normative resonance between all sources of law, legislative, customary and precedential, and drive the application of all law towards the fundamental values identified by the legal community as being of paramount importance or urgency. It is as if the same institutional author were responsible for the promulgation and enforcement of all law, and it is the task of the courts to identify and implement this vision.[351] Each judge, then, interprets the numerous sources of law before them as cohesively and congruently as they are able, and then gives effect to the political principles of law that emerge.[352] They are constructing the best account of the law that they can, given the context in which they operate.[353]

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[347] Dworkin *Justice in Robes* (2006) 16.
[348] Dworkin *Justice in Robes* (2006) 17.
[349] Dworkin *Law's Empire* 243.
[350] Cornell & Friedman "Significance" 15.
[351] Dworkin *Law's Empire* 225.
[352] Cornell & Friedman "Significance" 16.
[353] On this point, it could be argued that a best interpretation, or even asserting the existence of one that is better than another, amounts to roughly the same claim from the positivist camp that there is a correct construction of law in all cases that can be objectively determined from the source material. Certainly, the Crit counterargument would be that the outcome can never be reliably determined in advance, meaning that the best interpretation amongst many competing ideologies can never be determined. However, this argument misstates the metric against which the interpretations are judged and the appropriate form of reasoning. On the conventional positivist view, the formal structures of legal authority (canons of interpretation, mostly, as well as axioms of liberal legal theory like judicial deference

3.2.3) Constructing the best interpretation

If law is merely interpretive (that is, constituted solely and exhaustively by the practice of interpretation), the obvious question is whether there is a correct interpretation of law through a succinct statement of relative rights and duties accruing to any person or entity. Dworkin seeks to produce the meaning that puts law in its best light; he contends that there is a best interpretation of the given assortment of rules, values and principles, construed in light of the country's particular historical and political context and the legal instruments that set forth those propositions of law. Theunis Roux succinctly explains:

> "[According to Dworkin], the ideal of adjudication according to law requires judges to make moral choices between the principles informing a particular legal tradition. Principled adjudication, on this view, is about more than the creation of a rationally coherent body of law that *reflects* the institutionalised norms and practices of a particular legal tradition. It is about the creation of a rationally coherent body of law that *reconstructs* those norms and practices in a morally attractive way."[354]

On Dworkin's argument, the preferability of one construction of a legal text or common law rule over another depends on its ability to give cogent expression to the substantive principles of political morality that underlie the law.[355] This means going beyond the narrow confines of the formal branch of law (copyright law, for example) to rather feed into the holistic system of normative values that operate in concert to give practical effect to the political vision encapsulating the conception of law in that community.

> "Law as integrity, then, requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole."[356]

In short, integrity demands that all legislative actions and judicial decisions must feed into the set of principles that the communal political ideology embodies.[357] Judges play a major part in construing the law as they are conjunctively responsible for determining

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that have been extrapolated into all sorts of derivative theory and doctrine) are exhaustive of the validity (of law) question. Dworkin requires moral resonance across all sources of law that creates normative coherence throughout. Moreover, a "best" answer necessarily means that there are better and worse answers, which speaks to a different form of reasoning than the binary structures at work in correct/incorrect thinking. See further Roux "Transformative constitutionalism" 279-280.

[354] Roux *Politics* 61 (emphasis in original).

[355] R Dworkin "Response to overseas commentators" (2003) 1 *IJCL* 651-662 at 652-653 applies this argument to the South African Constitutional Court's first bench on the question of socio-economic rights. See in this regard Roux *Politics* 41.

[356] Dworkin *Law's Empire* 245.

[357] Dworkin *Law's Empire* 243.

what the law is. Under this model, judges must "test [their] interpretation of any part of the great network of political structures and decisions of [their] community by asking whether it could form part of a coherent theory justifying the network as a whole."[358] They seek "in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community […] [and] try to make that complex structure and record the best these can be."[359]

Dworkin sources the principles to which the ideal of integrity devotes its allegiance from the underlying political theory of the legal system. This is the same normative source as the individual rights that are upheld against decisions of government policy, making the relationship between the individual rights and the web of principle in which they are embedded a familial one.[360]

> "[A judge] constructs his overall theory of the present law so that it reflects, so far as possible, coherent principles of political fairness, substantive justice, and procedural due process, and reflects these combined in the right relation."[361]

Importantly, "[i]ntegrity is about principle and does not require any simple form of consistency in policy."[362] Divergent policy positions can be adopted if this presents the best way to give expression to the multitude of covalent values. It becomes clear that the view of law as integrity operates on the principles that undergird law and does not adopt a "rulebook" conception of the legal obligations that bind the state and community.[363]

Dworkin's approach is definitively normative and will always produce an outcome that is responsive to the political input received in the form of legal values and consequently reflective of the legal system's political character. The South African Constitution provides a useful set of objective normative values which can be harnessed for more coherent holistic interpretation on Dworkin's model. Constitutional Court jurisprudence on the questions of interpreting and applying law in light of this value system is

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[358] Dworkin *Law's Empire* 245.
[359] Dworkin *Law's Empire* 255.
[360] Dworkin *Law's Empire* 223. Dworkin has always been an avid proponent of substantive equality over formal equality, having spent much thought on the issue in *Justice in Robes* (2006) arguably devoting *Justice for Hedgehogs* (2011) to propounding a vision of substantive equality premised on equal dignity as concern and respect for one's interests.
[361] Dworkin *Law's Empire* 405 (emphasis in original).
[362] Dworkin *Law's Empire* 221 (citations omitted).
[363] Dworkin *Law's Empire* 214.

pertinent to understanding how Dworkin's adjudicative theory of law would apply in South Africa. Furthermore, Dworkin's work suits the constitutional era remarkably well because constructive adjudication hinges on dignity as the foundational value towards which the ideal of integrity gravitates. In the South African context there can be no suggestion that interpretation under the Constitution should continue the normative canon established under pre-democratic law and precedent, regardless of whether it furthers an ostensibly discriminatory purpose, in the name of integrity.[364] Rather, law as integrity requires the interpolation of constitutional values into a reconstituted normative trajectory that bends towards the ends of substantive justice and fairness. These ideals provide the normative purposes that Dworkin seeks to identify in all sources of law, but they still require substantive theories of law and justice to provide content to these ideals. Naturally, this cannot be the same content that informed the legal principles prior to the intervention of the Bill of Rights that now provides the moral foundation for all law in South Africa. Dworkin's interpretive theory arguably allows for such normative intervention:

> "The methodology directs us to reconstruct a narration of the past in light of the best possible story we can tell of the embodied purposes expressed in a community of principle. […] Integrity is demanded of us only in so far as it relates to a past, if a principled past. But what if we find that the past does not live up to principles of justice or fairness (such as a judge in contemporary South Africa is certain to find […])? We must break with the past."[365]

Only judges can fix (determine) the meaning of law and doing so should always proceed in accordance with that society's conception of justice rather than some past postulation thereof. In this way, law as integrity overcomes artificial divisions imposed on law by conventions of traditional legal culture, which private lawyers are often inclined to perpetuate in opposition to the constitutional system of rights and values.[366] Moreover, the methodological principles of subsidiarity are congruent with the vision of substantive coherence that law as integrity pursues as it conducts the orderly search for appropriate sources of law that reflect the paramount values of the Bill of Rights.

In sum, Dworkin's ideal of integrity presents a unificatory normative theory that bodes well with the holistic approach evinced by the South African Constitutional Court. Dworkin's account places judges at the heart of the enterprise of law by performing

[364] Cornell & Friedman Cornell & Friedman *Mandate* 72: "From *Taking Rights Seriously* onward, Dworkin has argued that the gravitational pull of precedent is not one of mechanical fit but is instead one of fairness."
[365] Cornell & Friedman "Significance" 19-20.
[366] Cornell & Friedman "Significance" 2 describe this school of thought as anti-constitutional.

the last necessary act of situationally fixing its meaning; "because of the normative character of legal interpretation, the judge must engage in the process of reconstruction, which is prospective as well as retrospective."[367] This speaks to the dual nature of adjudication: resolving the dispute between the parties as a retrospective matter and providing guidance to other courts as the forward-looking function of their role in constructing the law on the facts.[368]

3.2.4) Constructive interpretation of law

> "Lawsuits always raise, at least in principle, three different kinds of issues: issues of fact, issues of law, and the twinned issues of political morality and fidelity."[369]

Constructive interpretation, which is geared towards realising the ideal of integrity in law, comprises the twin notions of fit and political integrity. Dworkin employs these analytical devices of consistency in principled action and moral-political appeal to guide judges in construing statutory provisions to give them their "best" contextual meaning. The dimension of fit, sometimes called fidelity, requires that judges' decisions comport with the principled jurisprudence of that legal system, holistically construed.

It is the task of every judge to contribute to the shared creative endeavour of expounding on legal values and principles in an effort at achieving normative coherence across the law. Therefore, every judgment must take account of previous decisions on the relevant question of law and, in turn, account for its own consistency and congruence with the matters previously decided.[370] Dyzenhaus concisely explains:

> "In Dworkin's account, the explanatory aspect is analytically prior. A judge must first show that his decision is one which 'fits', or is consistent with, the bulk of relevant positive legal material before he moves to show that it is the decision he should give because it also coheres best with fundamental legal principles. The requirement of fit or consistency which Dworkin builds into the notion of integrity purports to make integrity into a working account

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[367] Cornell & Friedman "Significance" 24.
[368] Dyzenhaus & Taggart "Reasoned decisions" in *Common Law Theory* 146-147; L du Plessis "Theoretical (dis-) position and strategic leitmotivs in constitutional interpretation in South Africa" (2016) 18 *PER/PELJ* 1332-1365 at 1354.
[369] Dworkin *Law's Empire* 3.
[370] This function is uncontroversial even to the conservative legal culture in South Africa. As Roux *Politics* 128 describes it, one could draw a parallel between Dworkin's model and traditional approaches to law on this aspect.

> of adjudication. It purports to bring the principled or justificatory part to earth in contrast to those natural law accounts of the morality of law which prefer to brood futilely in the sky."[371]

This means giving the best plausible reading of statutory provisions and common law rules to fit the chain-novel-like serial narrative of law that is presented by the succession of court decisions extrapolating legal rules and principles.[372] As Dworkin puts it, "[c]onvictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all."[373] If an interpretation does not fit with the line of authoritative judicial pronouncements on the point of law, it should be excluded from consideration.[374] When more than one possible reading of a statutory provision or common law rule meets the threshold requirement, the interpreter is required to go beyond the dimension of fit and establish "which of these eligible readings makes the work in progress best, all things considered".[375] The proposed interpretation must therefore display the dimension of political integrity.

Political integrity calls for congruence between the proposed reading and the normative edifices in a political theory that one would be permitted under the first dimension, which involves a choice of appropriate reading strategy. It asks which of the candidate constructions that have passed the threshold requirement of fitting the record of case law on point is a better fit with the moral content of the political theory at work.[376] Dworkin explains that on this conception of law, "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[377] This can be determined according to the following dual principles:

> "The first is the principle of integrity in legislation, which asks those who create law by legislation to keep that law coherent in principle. The second is the principle of integrity in adjudication: it asks those responsible for deciding what the law is to see and enforce it as coherent in that way. The second principle explains […] why judges must conceive the body

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[371] D Dyzenhaus "Law as justification: Etienne Mureinik's conception of legal culture" (1998) 14 *SAJHR* 11-37 at 16.
[372] For a discussion of the chain-novel metaphor, see Dworkin *Law's Empire* 228-238.
[373] Dworkin *Law's Empire* 255.
[374] Of course, some points of law have no precedential authority or, as in the case of a transition to constitutional supremacy, can no longer be interpreted in direct linearity from previous decisions due to the seismic shift in normative setting, rendering inapt interpretations that previously may have enjoyed a solid grounding.
[375] Dworkin *Law's Empire* 230. Dworkin uses this phrase to describe the task of a literary critic but implies that this is the same function that the legal interpreter performs.
[376] I submit that the approach of finding a better (or even the best) interpretation is more congruent with the constitutional style of adjudication than one that adopts a mentality of searching for right/wrong interpretations.
[377] Dworkin *Law's Empire* 225.

> of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one, with nothing but a strategic interest in the rest."[378]

Adjudicative integrity is how Dworkin keeps judges accountable to the moral system of rules and principles that comprise the legal system.[379] This pinnacle ideal "requires our judges, so far as this is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones."[380] It aims at producing outcomes to legal disputes that are coherent in normative principle and giving proper effect to the community's expectation that everyone is treated equally under the law.[381] Every decision must be consistent with the overarching political norms of the legal system and must reflect unity of purpose.

Integrity should not be confused for the common law doctrine of *stare decisis*, which binds courts to apply law consistently across similar cases. Integrity builds from the universal axiom that law should apply equally to all and, consequently, like cases should be treated alike unless there is compelling normative reason (that is, a reason of fairness or justice) to deviate. Describing the relation between this "catchphrase that we must treat like cases alike" and his postulation of political integrity as a systemic virtue, Dworkin explains:

> "It requires government to speak with one voice, to act in a principled and coherent manner towards all citizens, to extend to everyone the substantive standards of justice and fairness it uses for some. […] This particular demand of political morality is not in fact well described in the catch phrase that we must treat like cases alike. I give it a grander title: it is the virtue of political integrity. […] Integrity becomes a political ideal when we make the same demand of the state or community taken to be a moral agent [as from persons who act consistent with moral principles], when we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are. […] The integrity of a community's conception of fairness requires that the political principles necessary to justify the legislature's assumed authority be given full effect in deciding what a statute it has enacted means. The integrity of a community's conception of justice demands that the moral principles necessary to justify the substance of its legislature's decisions be recognized in the rest of the law."[382]

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[378] Dworkin *Law's Empire* 167.

[379] Cornell & Friedman "Significance" 50:

> "If our aspirational concept of the law requires us to adopt the ideal of integrity at the jurisprudential stage, it can and will lead us to adopt an integrity-based interpretation at the doctrinal stage, where we are called on to determine the conditions under which a proposition of law is true in the light of that ideal."

[380] Dworkin *Law's Empire* 217.

[381] In *Justice for Hedgehogs* (2011), Dworkin develops a more nuanced understanding of this basic principle, that every person's interests be treated with equal care and respect, which is unpacked in Section 3.2 of this chapter.

[382] Dworkin *Law's Empire* 165-166 (citations omitted). At 219 the author qualifies this description:

Dworkin's ideal of integrity adheres to substantive coherence with identifiable moral principles that the case law of the given jurisdiction has delivered rather than the narrow replication of results from previous similar cases.[383] Integrity pledges law's allegiance to the moral principles that ground and animate the conceptions of political justice and fairness of that community. In the South African situation, these principles are derived from the constitutional project of transformation and the associated moral vision of law and society that bestows and defines legislative and adjudicative power.[384] Needless to say, this moral vision differs from the old-order orthodoxy of liberal legalism in numerous crucial respects, significantly including the role of South African courts (especially the Constitutional Court) in bringing about transformation of law. Arguing that a constitutional court in the position that the South African bench finds itself, namely in a transformative context, would first need to adapt its style of adjudication to that required by the transformative constitution, Roux argues:

> "[T]he adoption of a constitution that mandated a court to review the conformance of all law to the standards prescribed by a bill of rights would necessarily require the court to adapt its decision-making methods to suit this new institutional function. In particular, where the existing legal culture was predominantly 'formal' in character, the court, especially a newly established constitutional court, would need to give greater interpretive weight to the substantive moral and political considerations informing [new and extant] legal rules. Instead of treating legal rules as conclusive reasons for the resolution of disputes falling within their sphere of application, legal rules would need to be interpreted purposively, as context-sensitive expressions of the moral and political considerations that went into their construction."[385]

The formal style of adjudication is an important determinant of the type of outcomes that courts reach and therefore is often felt in subtle ways. Yet, Roux observes that in comparison to the transformation of the legal form (style of adjudication), the second element of substance (moral content or "shared values") of the law is much more difficult to transform:

> "[T]his criterion concerns the substantive content of the 'shared values' that underpin a particular legal-professional culture. Depending on the precise formulation of the constitutional text, it would almost certainly be required that the court should prefer the new constitutional value system to existing legal-cultural values where the two were inconsistent.

> "Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation. An institution that accepts that ideal will sometimes, for that reason, depart from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the scheme as a whole."

[383] Cornell & Friedman Cornell & Friedman *Mandate* 24.

[384] Dworkin *Justice in Robes* 16: "That role of morality is particularly evident in nations like the United States (and, increasingly, the other mature democracies) where legislative power is created in constitutions that also limit that power."

[385] Roux *Politics* 64 (citations omitted).

> To do this, the court would need to give some type of moral content to constitutional rights."[386]

Accordingly, any judicial engagement with South African law must interrogate the moral substance of the law at hand. This raises the question whether Dworkin's gives the normative commitments of the transformative legal project sufficient prominence in the practice of adjudication. As has been repeatedly stated above, Dworkin's theory on constructive interpretation as a reading strategy is inherently normative and is committed to upholding a coherent moral vision of law with its twinned dimensions of integrity and fit: fit ensures coherence while integrity speaks to moral content. This necessarily requires substantive reasoning as a mode of inquisition, as the interpreter will need to be conversant with the political underpinnings of the Constitution. However, given that a variety of reading strategies are possible to give effect to the substance of the Bill of Rights, the question becomes whether Dworkin's approach provides the best strategy considering available alternatives.

3.2.5) Constructive interpretation as transformative reading strategy

Although there are many disputed readings of the constitutional text, Klare argues in his seminal article that it is a postliberal text because it displays "welfarist" or socio-economic features that tame the strong liberty bias of the classical liberal canon captured in provisions like the right to privacy and freedom of expression. Notwithstanding, the systemic structural features are democratic and reflect the fundamental values that are enunciated in section 1(a).[387] Accordingly, the text comprises multiple seemingly opposing normative facets that work in concert to create a pluralistic model of complementary and overlapping value claims.

Klare's suggestion of a postliberal reading has met some resistance, notably from Roux.[388] Roux questions whether a postliberal interpretation would yield any different

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[386] Roux *Politics* 64-65 (citations omitted).

[387] KE Klare "Legal culture" 152-153. Roux *Politics* 212 argues that "the institutional form of the 1996 Constitution is essentially liberal-democratic". FI Michelman "Liberal constitutionalism, property rights, and the assault on poverty" (2011) 22 *Stell LR* 706-723 at 706 also considers that some of the Constitution's "main features bring it recognisably within the broad historical tradition of liberal constitutionalism". However, see Botha "Democracy and rights" 563 who argues that "a classical-liberal understanding of democracy, rights and the judicial function is particularly ill-suited to the interpretation of the South African Constitution." See also generally Cheadle & Davis "Structure" in *CL SA* 1-1 – 1-2.

[388] See Roux "Transformative constitutionalism". The author argues that although various possible interpretive approaches may be appropriate to achieve the social justice objectives of the Constitution,

outcomes to other mainstream strategies.[389] Furthermore, Roux argues that Klare's postliberal stance that adjudication is unavoidably political delegitimises his proposition of constitutional review of extant law. In this respect, although Dworkin's model of law as integrity is equally political in nature, it presents a better option for South African constitutional interpretation by providing metrics of legitimacy for interpretive outcomes. Dworkin argues that any theory of political morality must try to accommodate competing values and is holistic in this sense, meaning that any version of liberty that is not reconcilable with equality is not a feasible political theory.[390] As Cornell and Friedman attest, "Dworkin's defense of legality as integrity, which in turn implies equality, takes us back to an interpretive holistic approach to the meaning of law (not only in the United States but in modern democracies in general)."[391] In this regard, both the postliberal reading strategy and law as integrity through constructive interpretation are heavily contingent on the political morality inherent in the Constitution.[392] For this reason, both are able to operationalise the political values explicitly and implicitly enshrined in the Bill of Rights[393] and the Constitution generally.[394] Furthermore,

> "the interpretive guidelines that the Constitutional Court has laid down display all of the core features of interpretation as Dworkin sees it—that is, the court is committed to a mode of interpretation that (a) is faithful to the text it interprets, (b) seeks coherence between the different parts of that text, and (c) remakes the law in the image of the principles inherent within it."[395]

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including a Dworkinian best-interpretation or Hartian positivist approach, it cannot be said that the Constitution requires the adoption of one over others. Furthermore, the author views Klare's postliberal interpretation as reconcilable with Dworkin's approach to constructive interpretation, which is characterised as a liberal approach. See further Roux *Politics* 212-213, 231.

[389] This critical view finds support from J Brickhill & Y van Leeve "Transformative constitutionalism – Guiding light or empty slogan?" 2015 *Acta Juridica* 141-171 at 155-156. However, DM Davis "Transformation: The constitutional promise and reality" (2010) 26 *SAJHR* 85-101 at 100 n 60 derides this argument, specifically as made by Roux "Transformative constitutionalism").

[390] Dworkin *Justice in Robes* (2006) 160-161.

[391] Cornell & Friedman Cornell & Friedman *Mandate* 76.

[392] Cornell & Friedman *Mandate* 77.

[393] The foundational values that are explicitly said to underlie the Bill of Rights include "human dignity, the achievement of equality and the advancement of human rights and freedom" (s 1(a)), as well as "non-racialism and non-sexism" (s 1(b)).

[394] These include "[s]upremacy of the constitution and the rule of law" (s 1(c)) and "accountability, responsiveness and openness" (s 1(d)), as well as the separation of powers between branches of government.

[395] Cornell & Friedman *Mandate* 42. At 47, the authors claim *that in Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 (2) SA 181 (CC), the Constitutional Court "adopt[ed] a teleological approach to interpretation, consistent with Dworkin's own view of interpretation […] in which the constituent parts of the Constitution are interpreted so as to cohere with one another, and to further the purposes of the Constitution as a whole."

Methodologically, there is a clear convergence between Dworkin's approach and the Constitutional Court's professed style of substantive engagement with sources of law. Similarly, while some traditions within legal liberalism focus on one value (usually liberty) to the exclusion of others (like equality), others accommodate values beyond individual liberty within the posited ideal. Roux argues that on Dworkin's theory of constructive interpretation, a transformative reading of the Constitution is more suitable than the post-liberal strategy proffered by Klare.[396] Annie Singh and Zaryl Bhero also endorse Dworkin's model of constructive interpretation as appropriate for the South African constitutional project,[397] as do Dennis Davis and Halton Cheadle,[398] and Drucilla Cornell and Nick Friedman, respectively.[399] As Cornell and Friedman argue, "section 39(2), one of the key provisions through which the Constitution seeks to do its revolutionary work, is the very embodiment of the obligation that, for Dworkin, flows from the nature of law itself: that is, it embodies the obligation to develop the law in light of the best justification we can offer for the law on the basis of the principles that inhere within it".[400] Accordingly, I submit that there could scarcely be a better example of a progressive liberal model that is useful to the South African project of constitutional transformation than Dworkin's, which I shall now discuss in the context of the clearest constitutional instruction on interpretation, contained in section 39.

3.2.6) Constitutional interpretive mandates

The primacy of the Constitution in every judicial interpretation and application of law is a central feature of constitutional interpretation (evident from a cursory reading of section 1, 2, 7, 8, 36 and 39). As explained above, this does not mean that the words used in statutory provisions are irrelevant, or even less relevant, to determining the meaning of the text but that textual fidelity is to be replaced with a sincere attempt at

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[396] Roux "Transformative constitutionalism" 261–262, 272–276. See also Lenta "Constitutional interpretation" 290-291 where the author shows support for a transformative constructive interpretation via Dworkin rather than a conservative positivist one as propounded by Fagan "Longest erratum note".
[397] Singh & Bhero "Judicial law-making" 5-6. The authors argue (at 9-10) that the teleological approach evident from section 39(2) is compatible with the holistic reading of legislative provisions that utilises surrounding context to supplement the meaning of a legal rule and sources legal norms from beyond the statute ostensibly regulating the matter. At 9, the authors quote Sachs J in *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC) para 46 to this effect.
[398] Cheadle & Davis "Structure" in *SA CL* 1-7.
[399] See generally Cornell & Friedman "Significance".
[400] Cornell & Friedman *Mandate* 11.

achieving constitutional justice, to which cause all sources of law have been conscripted.[401] In service of constitutional justice, legislative intention is displaced by discovery of the purpose of the statute, which is teleologically and holistically construed in accordance with constitutional values and precepts. The Bill of Rights places an active duty on all courts to promote the constitutional values and spirit when interpreting any law and to strive towards a reading that gives meaningful expression to the fundamental values identified in section 1, which are also assumed implicit to all democratically passed legislation.[402] As Singh and Bhero explain,

> "[I]n any matter that comes before the court, the mandate of the courts is to ensure that they enforce and protect the values embodied in the Constitution. As a result thereof there has been a noticeable paradigmatic shift from a literal or textual methodology to a more value-based or a teleological mode of interpretation."[403]

This shift is textually borne out by section 39, known as the interpretation clause. Cornell and Friedman describe the interpretation provision as "one of the primary tools through which the Constitution is intended to do its revolutionary work".[404] This provision reads:

> "Interpretation of Bill of Rights
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> 39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

The opening clause recognises that interpretation should account for the normative nature of law, immediately disarming any resort to alleged value-neutral interpretation as being either possible or desirable. Section 39(1)(a) provides explicit instructions on how the Bill of Rights is to be interpreted, stating that when provisions in the Bill of Rights are relevant, they must be interpreted to "promote the values that underlie an

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[401] See eg *Thebus v S* 2003 (6) SA 505 (CC) para 24 (per Moseneke J): "Since the advent of constitutional democracy, all law must conform to the command of the supreme law, the Constitution, from which all law derives its legitimacy, force and validity."
[402] Currie & de Waal *Handbook* 57. See in this regard *Hyundai* para 22 for the Court's explanation of the purport and object of the Bill of Rights being synonymous with these values.
[403] Singh & Bhero "Judicial law-making" 9.
[404] Cornell & Friedman *Mandate* 48.

open and democratic society based on human dignity, equality and freedom". This is very close to the instruction in section 39(2) that the interpretation of legislation and common law "must promote the spirit, purport and objects of the Bill of Rights" and clearly both provisions are aimed at achieving the same types of outcomes. Each provision provides useful guidance on the appropriate reading strategies that courts must employ in constitutional interpretation. The most obvious difference between the two – namely, that the former applies to provisions in the Bill of Rights and the latter to non-constitutional sources – speaks to the necessity for the normative unity of all law under the single-system-of-law principle. As Cornell and Friedman observe, "under section 39 of the South African Constitution, the substance of the ethical revolution must guide the transformation of all social relationships—all law in South Africa must therefore live up to the ideals of the Constitution, and each judgment must state explicitly how the law is adequate to the new constitutional dispensation."[405]

Section 39(2) extends constitutional normativity to all sources of law, even when there is no apparent conflict with the substantive provisions of the Bill of Rights. Under the principles of subsidiarity,[406] the non-constitutional sources of law must first be exhausted (thus making section 39(2) the first clause to find operation) before constitutional provisions are relied on directly. However, the near identical instructions in section 39(1)(a) and section 39(2) relating to the interpretation of constitutional provisions and non-constitutional law respectively show that the order in which sources are consulted should not make a difference to the outcome.

There appears to be consensus that section 39(2) is the minimal starting point for "constitutionalising" the law, although what it requires of courts is the subject of some debate.[407] Section 39(2) applies to two distinct judicial activities, namely statutory interpretation and the development of the common law. In other words, at every opportunity that courts get to interpret and apply a legal rule, they must do so in accordance with the values explicated in sections 1, 2 and 39.[408] Davis bills section

[405] Cornell & Friedman *Mandate* 10.
[406] Chapter 2 Section 3.3.
[407] Indirect application was implied to be the default, at-all-times mandatory method of engagement between the Bill of Rights and common law: *Thebus* paras 24-32. It follows that direct application takes place whenever a chapter 2 right is identified as applicable law in terms of the rules of subsidiarity, at which point the interpretation proceeds to determine the scope of the implicated right and subsequently whether it limits, or is limited by, a competing right in the particular instance.
[408] Section 2, read with section 237, demands that the whenever section 39(2) is involved, which should be always, the values explicated in sections 1 and 7 are applied to the dispute.

39(2) as "[introducing] new principles which mandate judges to fill old forms with new content", describing the clause as a "seepage" provision for its normative seepage of values into all other sources of law.[409] Considering the explicit guidance on the role of constitutional adjudication provided by section 39(1)(a) and 39(2), "[the interpretive] exercise should not be merely positivistic, but should rather be value-drenched and sensitive to the broader social context and the peculiarities presented by each case at hand."[410] This is sometimes also described as a teleological approach because it poses the constitutional interests as ultimate objectives that all law should serve.[411] It may be recalled that the moral dimension of law is just as deeply entrenched in Dworkin's model of law as integrity, which does not consider it to be distinct and non-legal, or applicable only under limited circumstances when judges are forced to exercise judicial discretion.[412]

The decision in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O*. ("*Hyundai*") has come to serve as a bedrock of constitutional interpretation as it relates to transforming existing law in line with section 39(2).[413] This case concerned the interpretation of various provisions of the National Prosecuting Authority Act 32 of 1998 that were alleged to be unconstitutional for violating the constitutionally enshrined right to privacy in section 14 of the Constitution. While certainly not proffering a textualist approach, Langa DCJ made it clear that statutory construction is not an exercise in pragmatic proclamation designed merely to produce a constitutionally desirable outcome. When multiple interpretations are reasonably possible, the Constitution sets the bounds for which possible meaning should be preferred: "judicial officers must prefer interpretations of legislation that fall within

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[409] Davis "Interpretation" in *SA CL* 33-6. See further DM Davis "Elegy to Transformative Constitutionalism" in H Botha, AJ van der Walt & J van der Walt (eds) *Rights and democracy in a Transformative Constitution* (2003) 65.
Botha "Democracy and rights" 567 argues similarly, noting that the Constitution calls this divide into question.

[410] Moseneke "Taking stock" 7. See also Moseneke "Transformative adjudication" 315. On the interpretive duty to promote the values mentioned in this provision, see Penfold "Substantive reasoning" 88.

[411] Singh & Bhero "Judicial law-making" 9: "It is evident that section 39(2) clearly mandates a more teleological or a value-orientated approach to the process of the interpretation of law."

[412] Cornell & Friedman "Significance" 51: "Importantly, judges are not looking to morality as part of an outside discretion, as in the case of Hart's account, but rather to determine to how (*sic*) political morality informs and deepens the legal ideal of integrity."

[413] 2001 (1) SA 545 (CC).

constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section".[414] This has become axiomatic in constitutional interpretation and serves as the starting point for interpreters.[415]

The Constitutional Court has on numerous occasions noted that the interpretive *modus operandi* has shifted away from textualism to value-oriented construction of legislation.[416] In *South African Police Service v Public Servants Association,* O'Regan J clarified that the meaning given to a statutory provision may perhaps not be the first one to suggest itself but must always be one that "it is reasonably capable of bearing".[417] This demonstrates the value-centric nature of interpretation: the spirit of the constitutional norms legitimates interpretations that are not necessarily self-evident from the text of a statutory provision but that nevertheless carry moral weight from a constitutional vantage point. Accordingly, the first threshold for a possible interpretation is that it falls within constitutional bounds: this restricts the array of permissible meanings that any statutory provision may be given to those that give expression to the constitutional vision. Any potential construction must also be reasonably ascribable to the wording; in the words of Langa DCJ, it must not be "unduly strained".[418] Notice how different this is to searching for an alleged plain meaning or literal construction of the wording: the preference for legislative intention is no longer present and a range of meanings is acknowledged and explored before exogenous (to the text) considerations are consulted for normative guidance. When more than one interpretation of a statute is possible, section 39(2)-(3) instruct courts to opt for whichever approach is constitutionally compliant, and, if there is still more than one such possible interpretation, courts should opt for the one that best captures the constitutional spirit.[419] When no constitutionally compatible interpretation is

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[414] *Hyundai* para 23. See also Bishop & Brickhill "In the beginning" 683-684.
[415] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 (6) SA 596 (CC) para 135.
[416] See eg *Du Toit v Minister Safety and Security and Another* 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) per Langa CJ:
"The move away from the 'plain words' of the statute is necessitated by the fact that the text of the Constitution and the legislation giving effect to its provisions is value-laden and 'value can hardly be expressed in clear and unambiguous language.'" (citations omitted).
[417] *Public Servants Association* para 94. This restates the *Hyundai* command but points out that the best meaning – that which the constitution demands – will not always be the one that fits the wording most naturally, given that its chief function is to serve constitutional mandates. See further Bishop & Brickhill "In the beginning" 689-690.
[418] *Hyundai* para 24.
[419] Davis "Importance of reading" 58.

reasonably ascribable, the judicial analysis moves on to appropriate remedies like invalidation, severance and reading in.

Davis observes that section 39(2) may act as a presumption of constitutionality; that is, not only is a constitutional reading strategy prescribed, but legislation must, when possible, be interpreted in a constitutionally compliant manner rather than one that exposes it to a finding of invalidity.[420] Christopher Roederer points to section 39(2) as actually constraining interpretation of constitutional provisions to those interpretations that promote the spirit, purport and objects of the Bill of Rights generally, making the plain text (ordinary) meaning of words an unreliable indicator of the veracity (or "fit", in Dworkin's terms) of the interpretation.[421] This function makes the interpreter distil from all possible interpretations only those readings of legislation that are compliant with the constitutional directive of transforming law through the underlying values of the Constitution as a whole and the Bill of Rights in particular. This amplified duty is arguably justified by the urgent plight of transforming the pre-constitutional body of law. Taking this point further, one could argue that a reading that achieves more of the objectives of or gives fuller expression to discrete provisions in the Bill of Rights should be preferred over those that achieve mere compliance or non-violation. Identifying which of the available interpretations offers the best expression of the constitutional ethos is the logical extension of this mandate and arguably better accomplishes the goals of transformation of law. Further persuasion that section 39(2) requires courts to move away from the conventional binary logic of adjudicating right from wrong, or correct from incorrect as the dichotomy relates to statutory interpretation, comes from the Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another*.[422] Kroon AJ stated that courts must "adopt the interpretation which *better* promotes the spirit, purport and objects of the Bill of Rights".[423]

[420] Davis "Interpretation" in *SA CL* 33-4. This is, however, different to the presumption of constitutionality established in the next subsection, 39(3), namely that pre-democratic law is deemed constitutional unless demonstrated otherwise.
[421] C Roederer "Remnants of Apartheid common law justice: The primacy of the spirit, purport and objects of the Bill of Rights for developing the common law and bringing horizontal rights to fruition" (2013) 29 *SAJHR* 219-250 at 237. As mentioned above, such an interpretation can be either restrictive or expansive, depending on the provision in question.
[422] 2009 (1) SA 337 (CC).
[423] Para 45 (emphasis in original).

The Constitution requires all courts to engage in principled purposive interpretation,[424] especially (but not only) when the statute being interpreted touches on questions of constitutional import.[425] Roederer points to one benefit of section 39(2) being that even if courts abscond from the envisioned duty of directly applying the Bill of Rights to private law disputes, judges are required to bring the constitutional ethos into play and in this way engage the substantive norms in every case.[426] Bishop and Brickhill describe section 39(2) as "an explicit response to the overly literalist approach to interpretation that is often blamed for the judiciary's failure to curb the injustices of apartheid",[427] ensuring that all interpretation foregrounds the normative element and constitutional conformity. The transformative imperative is of interpretive significance to every dispute that feasibly intersects with a constitutional right, value or aim and lends constitutional purpose to otherwise isolated legal provisions that are construed in an internal (to that area of law) perspective with the legal morality drawn exclusively from the realm of values that animate it.[428]

Even when there is no justiciable right in the Bill of Rights that pertains to the matter at hand, courts must consider the objective normative value system that underlies the Bill of Rights when construing any common law or statutory normative doctrine or concept (such as reasonableness, fairness, wrongfulness, etc.). This involves evaluating the outcome of the dispute against the systemic properties, aspirational values, and teleological objectives of the project of constitutional transformation. Courts are permitted to go beyond the text and context even when there is no ambiguity.[429] With constitutional interpretation, "[t]he role of the context is not primarily to clarify the legal meaning of a text but rather to ensure the best available justification of the legal meaning ascribed to a text."[430] The central concern is now establishing which of the available meanings is most constitutionally viable rather than which remains truest to the legislative author's original intention. Dworkin's model is

[424] *Bertie Van Zyl* para 21.
[425] Bishop & Brickhill "In the beginning" 684-685.
[426] Roederer "Remnants" 225.
[427] Bishop & Brickhill "In the beginning" 683.
[428] Cornell & Friedman *Mandate* 48 express this same conclusion regarding interpretation and the substantive revolution that the Constitution portends.
[429] Bishop & Brickhill "In the beginning" 684, relying on *Bato Star* para 90 & *Du Toit* para 37. See also Le Roux "Legal interpretation" 4.
[430] Le Roux "Legal interpretation" 4. This statement may just as well have been written by Dworkin for how well it fits his theory.

compatible on this score, as judges are not permitted to substitute their personal morality for the political morality that inheres in the legal system:

> "Instead, the judge is required to develop the best interpretation of the propositions of law at stake, even when law is silent on the particular situation at hand, by appealing to a more comprehensive view of how the law actually speaks through a system of principle."[431]

3.2.7) Interpretation and judicial transformation of law

The Constitution now requires of courts to find the interpretation that will produce the most constitutional reading through a holistic, purposive and arguably constructionist approach. Singh and Bhero read section 39(2) as "a cue for the courts to engage in judicial activism, but only for as long as it protects or promotes the rights contained in the Bill of Rights."[432] However, this should not be read as an open invitation for judges to substitute their personal morality for legal doctrine whenever the opportunity arises, as the Crits notoriously aver and the pragmatists shamelessly advocate. Michael Bishop and Jason Brickhill suggest a two-stage approach to statutory construction that treads a middle path between the two elements of text and context, which evidences a Dworkinian approach and bears quoting at length:

> "First, judges should set out the possible meanings of a provision with full regard for both text and context. They should uncover less obvious meanings that emerge from a deep appreciation of the socio-economic and historical circumstances, and interpretations that better serve the purpose of the legislation, and set them alongside plain-meaning approaches. The vital part of the first stage is that the judges must explain how each meaning actually fits with the text. […] The further a meaning strays from the ordinary meaning, the more important it is for a court explicitly to justify selecting it as a plausible interpretation, but every option must have an explanation that relates it, not to the values compelling its adoption, but to the text alone. At the end of the first stage, only meanings that do not 'unduly strain' the text will remain on the table.
>
> The second stage requires the judge to rely on the normative values of the Constitution to choose among the interpretations. […] The less acrobatic the linguistic gymnastics the judge has to perform to get to the interpretation, the slighter the pull of the constitutional values militating in favour of it need be to justify its selection."[433]

It is evident that section 39(2) is the omnipresent constitutional influence which courts are mandated to observe with every engagement with non-constitutional sources of

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[431] Cornell & Friedman "Significance" 51.
[432] Singh & Bhero "Judicial law-making" 17.
[433] Bishop & Brickhill "In the beginning" 713. The authors attribute this approach to the Constitutional Court decision in *Wary*, where the Court spelled out the possibility of finding a *most* constitutional meaning of a statutory provision, moving away from the formal compliance/non-compliance dichotomy. At 714, the authors aver that their approach "also resonates" with *Endumeni*.

law.[434] Similar to the task of developing the common law, the Constitution demands a normative evolution of statutory doctrinal content to reflect the ends of justice that it articulates.[435] The interpretive function of section 39(2) has become known as the indirect application mechanism in academic discourse and case law because it instructs courts to infuse existing doctrine with constitutional meaning. Bishop and Brickhill suggest that this amounts to an explicit instruction to engage value-based theories of interpretation (like constructive interpretation, which devotes one of its two dimensions to the question of political values) in all constitutional adjudication:

> "[T]he command to 'promote the *spirit, purport and objects* of the Bill of Rights' is not limited to winnowing out interpretations that violate discrete provisions of the Constitution. The phrase extends beyond the content of explicit rights to broader values and norms. […] The phrase has no concrete definition and courts are required to give it meaning in a way that considers all the conflicting and overlapping rights and values. […] [Section] 39(2) not only requires courts to avoid interpretations that run counter to this broad, vague notion; courts are 'required to adopt the interpretation which *better* promotes the spirit, purport and objects of the Bill of Rights'. In effect, courts are mandated to choose the 'most constitutional' interpretation of a statute. This requires courts to distill (*sic*) a general command to promote vaguely defined values into a theory that not only gives content to those values, but also includes a method for balancing the advancement or limitation of each value against the advancement or limitation of every other value."[436]

Roederer distinguishes the objectives of section 39(2) from the general objects of the Bill of Rights and notes that this provision denotes an array of normative values and principles like rule of law, democracy, social justice, transformation, etc. that go beyond those explicitly listed.[437] I support this reading of the clause because it is more compatible with the holistic tenor of constitutional interpretation and gives better effect to the wording of the provision. Roederer goes even further, arguing that "the historical background and the factual context in which the Constitution operates can in fact

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[434] Friedman "Revisiting horizontality" 76:

> "Every time a court makes a legal pronouncement – whether the case involves state or private persons, whether it involves legislation, common law or customary law – it is under a 'general obligation' to promote the spirit, purport and objects of the Bill of Rights." (citing *Carmichele* paras 39, 54.)

This is clearly a mandatory step (indicated by the word "must") to contribute towards the reconstruction of the law envisioned by the transformative Constitution. DM Davis "Where is the map to guide common law development?" (2014) *Stell LR* 3-14 at 4 agrees with this reading of the non-discretionary judicial imperative.

[435] The Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 31 (per Ackermann J) extended the teleological duty of developing the common law to the interpretation of all legislation. See also *Thebus* para 39.

[436] Bishop & Brickhill "In the beginning" 685 (emphasis in original, citations omitted).

[437] Roederer "Remnants" 224. See also Le Roux "Legal interpretation" 4.

generate the need for the duty".[438] Of course, this is in stark contrast to the conventional separation of justiciable rights from non-justiciable values, which holds that rights can ground duties, but values cannot. Roederer's view is in line with the overarching requirement of justification in South African law, and if the historical account of law leads one to the conclusion that the imposition of a duty on a private person or the state is justified, that outcome should not be stymied by conservative legal culture.

Davis,[439] Ig Rautenbach[440] and Stuart Woolman[441] all argue that section 39(2) has incorrectly been assigned the role of applying constitutional norms, which does a disservice to the distinct function of section 8(1) as the locus for direct application. Bishop and Brickhill contend that the indirect route of section 39(2) has all but taken over the place and function of constitutional challenges based on direct application (discussed in Chapter 4).[442] They agree with Woolman that this does a disservice to the Constitution because it "denudes the rights in the Bill of Rights of any meaningful, substantive content".[443] On this argument, interpretation of legislation is an inadequate proxy for direct transformation because piecemeal, case-specific construction of legislation is less useful than a self-standing constitutional right that could be extended through direct application.[444] They contend that this contributes to uncertainty in two ways: first, by relying on strained interpretations of legislation that may not be fit for the purpose for which they are deployed; and second by obviating any independent content for constitutional provisions that can be used to found a case in future (whereas precedential construction is almost always limited to the facts at hand).[445] Notwithstanding these points of criticism, the clause holds tremendous potential in realigning existing statutory law with constitutional objectives by ensuring that a suitable reading strategy is elected.

This provision can certainly be read in line with Dworkin's adjudicative ideal of integrity, as it instructs judges to seek integrity through their interpretation of legal rules in light

[438] Roederer "Remnants" 225.
[439] Davis "Interpretation" in *SA CL* 33-2 – 33-3.
[440] Rautenbach *Constitutional Law* 262.
[441] S Woolman "The amazing, vanishing Bill of Rights" (2007) 124 *SALJ* 762-794 at 763.
[442] Bishop & Brickhill "In the beginning".
[443] Bishop & Brickhill "In the beginning" 702, referring to Woolman "Amazing, vanishing" 763.
[444] Bishop & Brickhill "In the beginning" 702-703.
[445] This is one of the arguments made in respect of the majority judgment in *Daniels v Scribante* 2017 (4) SA 341 (CC) by Marais & Muller "ESTA occupier".

of constitutional norms and dictates. The dimension of fit gains a component: in addition to the canon of case law precedent, an interpretation must now fit with the intervening instruction of constitutional supremacy. In other words, the question becomes how well the law coheres with the command that all law should give effect to the spirit, purport and object of the Bill of Rights. It would be challenging to draft a more explicit textual recognition of the interpretive nature of law or embodiment of Dworkin's command to observe the key principles of the legal system, holistically considered, than this provision that modifies and supplements law in a top-down fashion.

3.3 Normative imperatives of transformation

3.3.1) Value-based interpretation under the Bill of Rights

> "[The] notion of an open and democratic society is […] not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply and the final measure we use for testing the legitimacy of impugned norms and conduct."[446]

Constitutional adjudication is inherently value-based and innately holistic.[447] The express articulation of the underlying values is a very helpful feature of the Constitution, as it renders purposive normative interpretation more coherent by providing a metric by which to direct the constitutionally compelled interpretation or development even if the meaning of these values remains contested. Ultimately, this describes the purpose of the objective normative value system that the Bill of Rights posits: to underpin all law with the same set of values, rather than allowing the proliferation of conceptually distinct ethical realms across the range of legal disciplines.

The Constitution is clear on the intention to inject a new normative inspiration into all sources of law. This can be surmised from sections 1, 2, 7, 8 and 39, aside from the manifold normative positions asserted in the form of specific rights throughout Chapter

[446] *Coetzee* para 46 (per Sachs J).
[447] Cockrell "Rainbow jurisprudence" 3. It could also be argued that all disputes, private, public and constitutional, are value-based, although they are less explicitly so – usually the values are couched in doctrine or principles, where they remain, unacknowledged by those wielding them, or obscured by those who wish to retain the status quo under a guise of neutrality and objectivity (i.e., that common law doctrine is inherently neutral, not value-laden). See generally JC Froneman "The horizontal application of human rights norms" (2007) 21 *Speculum Juris* 13-24.

2 of the Constitution. Such intention and the consequent existence of this objective normative system has been affirmed by the Constitutional Court on multiple occasions.[448] The opening provision proclaims the founding values of the Constitution:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> b. Non-racialism and non-sexism.
> c. Supremacy of the constitution and the rule of law.
> d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."[449]

The first two subsections of this provision demand the substantive reform of all law to reflect the fundamental norms that they adumbrate, which necessarily requires a theory of law that gives appropriate content to these values. Roux observes that transforming the substance of the law as well as its form (style of adjudication) poses a challenge of considerable importance, as courts are tasked with giving effect to a moral reading of the constitutional values over existing legal values.[450]

Some of the basic principles of the constitutional order are explicit (rule of law, accountability and responsiveness) while others are found in the implicit meaning of the constitutional text (constitutionalism, separation of powers).[451] Section 2 of the Constitution states that all law must comply with the Constitution to retain validity. The standards against which law must be measured are set out inter alia in Chapter 2 of the Constitution and include the substantive and procedural aspects of all recognised rights and values.[452] Fareed Moosa provides a concise summary:

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[448] The objective normative value system has been asserted in numerous Constitutional Court decisions: see *Carmichele*; *Thebus*; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC); *Barkhuizen*; *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC); 2008 (1) BCLR 1; *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC); 2015 (5) BCLR 509; *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC). See also Davis "The underlying theory" 394:

> "The emphasis placed upon human dignity and social justice indicates that certain value choices have been made by the drafters of the Constitution. These values need to be reconciled to ensure that the interpretative process promotes the integrity of the entire Constitution."

See further Moosa "Understanding the spirit"; Davis "Private law"; Chaskalson "From wickedness to equality".

[449] Section 1.

[450] Roux *Politics* 64-65, citations omitted.

[451] Currie & de Waal *Handbook* 7; Penfold "Substantive reasoning" 88.

[452] Sections 7 & 8 in particular perform this function: Friedman "Revisiting horizontality" 68. Moosa "Understanding the spirit" 5 explains the difference between principles and standards:

> "[The Constitution] is a codification of a common set of norms, objective values and democratic principles that are the true strands from which the fabric of a new socio-politico-legal order is woven. Since the Constitution's underlying aims are not set out in any particular provision, they are to be distilled from that instrument read as a whole. The Constitution's aims and objectives are reflected by *inter alia*: (i) The Preamble's expression of mutual interests and common aspirations or convictions towards transformation …; (ii) The re-definition of a common, objective, normative value system, including the subjection of government (s 41) and public administration (s 195(1)) to a set of democratic values and principles …; (iii) The displacement of parliamentary sovereignty by constitutional supremacy …; (iv) The recognition of a common South African citizenship in s 3(1); (v) The entrenchment of a Bill of Rights that rejects injustice, establishes a culture of human rights and freedoms, and advances universal rights ensconced therein by imposing, in s 7(2), duties on the State to 'respect, protect, promote and fulfil the rights' …; (v) The creation of an independent judiciary in s 165(2) whose make-up is designed to reflect the diversity among SA's people (ss 174(1), (2)); and (vi) The establishment of a culture of democracy in s 234."[453]

Dikgang Moseneke describes the objective value system that the Constitution prescribes as a "juridical ideology".[454] This is a useful term as it lays emphasis on the political-ideological nature of adjudication (in that the objective normative value system is explicitly elected as the relevant ideological basis for the judiciary to adopt, taking as starting point the supposition that law and adjudication is political). This phrase makes it impossible for judges to deny their involvement in electing one set of values over another, as well as alerting them to the constitutional mandate of adopting this particular set of values over others. The constitutional values serve as an objective framework from which the constitutional objects can be derived and according to which interpretation of otherwise incongruent provisions from diverse ideological traditions can be unified.[455] In this process, it is crucial that the array of values is construed as complementary rather than competing and that each constitutional norm plays a supporting role in the concomitant realisation of other norms.[456] Moosa explains the point:

> "As for the Bill's 'objects', these are to be found in, for example, the fundamental rights it guarantees and the values that underlie them. However, those rights do not operate as independent normative regimes isolated from each other. Their disparate textual protections

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> "[C]onstitutional values are the barometers or yardsticks against which law and conduct are tested for constitutional congruence. On the other hand, constitutional principles are … those founded in, and which give expression to, a specific constitutional value."

Principles are thus a practical manifestation of the abstract values that are contained in legal sources.

[453] Moosa "Understanding the spirit" 3 (emphasis in original).

[454] Moseneke "Taking stock" 4. The Constitutional Court in *Carmichele* para 54 spelled out this point. *See also* Davis "Where is the map" 4-5.

[455] Moosa "Understanding the spirit" 7.

[456] Moseneke "Transformative adjudication" 315. See also Moosa "Understanding the spirit" 6.

> are unified by the constitutional values immanent in them all. Thus, the relationship between the rights and their values is 'osmotic rather than hermetic'."[457]

The three fundamental normative values of human dignity, equality and freedom operate in two manners:[458] they inform the content of all rights in the Bill of Rights (as well as the interpretation of statute and common law as per section 39(2)), and they feature in the limitations analysis whenever a constitutional right is alleged to have been infringed per section 36.[459] Accordingly, they permeate and animate law with a new normative reading and inform the relevant thresholds of justifiability for limitations of all constitutional rights. Each value in this triumvirate contributes normative meaning to the others, not so much combining function as fortifying each other value. This speaks to the utility and necessity of holistic interpretation, whereby each value is construed in accordance with the network of values that interpretation necessarily implicates.[460] A brief discussion of the co-constitutive relationship between this triumvirate as comprising the primary commitment of the Bill of Rights follows.

3.3.2) The primary normative commitments of the Bill of Rights

The importance of human dignity to the project of constitutional transformation as both a deontological commitment and a normative objective cannot be overstated. The constitutional value of human dignity emerged as foundational legal norm towards the middle of the twentieth century as a direct result of the atrocities committed during the second world war.[461] However, as a social value that "share[s] a common core" with

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[457] Moosa "Understanding the spirit" 7 (citations omitted).

[458] These are in addition to direct application of these values as rights as iterated throughout the Bill of Rights, notably sections 9-10, 12-19, 21-22, 31 & 35.

[459] O'Regan "From form to substance" 15. See also Cheadle & Davis "Structure" in *SA CL* 1-11:

> "When a limitation of a right is analysed, the four foundational values of human dignity, equality, freedom and democracy play a crucial role in determining the purpose of that part of the right which is affected by the limiting provision. In this way, the four values animate each right and are crucial to the determination of its purpose."

Penfold "Substantive reasoning" 88 describes the trifecta of normative values as "democratic values". See N Haysom "Dignity" in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (SI 26 2019) 5-1 – 5-2 where the author explains the conjunctive operation of the value of democracy with this trifecta.

[460] Dworkin *Justice for Hedgehogs* (2011) 154.

> "Interpretation is pervasively holistic. An interpretation weaves together hosts of values and assumptions of very different kinds, drawn from very different kinds of judgment or experience, and the network of values that figure in an interpretive case accepts no hierarchy of dominance and subordination."

See further Cornell & Friedman *Mandate* 107-108.

[461] Barak *Human Dignity*34-35.

the legal value, human dignity's evolution can be traced throughout ancient philosophy and religion.[462] South Africa's history of the systematic desecration of the dignity of the majority of the population displays clear parallels to the German situation where it first appeared as *grundnorm* and the legal value now has many complementary and interdependent roles in South Africa.[463]

Human dignity is a multifaceted legal concept that has both individualistic and communitarian elements.[464] Dignity is intricately linked to the other foundational values of freedom and equality, and in many accounts dignity comprises a constituent component of both values.[465] Many commentators, including Dworkin, pose human dignity as a dynamically embedded condition for and constituent element of both freedom and equality, formulating the concept of dignity as concerning the right of every individual to equal freedom.[466] Jacob Weinrib identifies "modern constitutionalism's overarching purpose: the realization of a legal order in which the exercise of power is accountable to the inherent dignity and fundamental rights of each

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[462] Barak *Human Dignity* 7. For an overview of the development philosophical and religious conceptions of human dignity prior to its constitutional recognition, see above at 17-28 where the author discusses the Stoics and Cicero, Judaism, Christianity, Islam, and Immanuel Kant. At 28-33 the author discusses the twentieth century contributions to liberal rights theory of Dworkin and Jeremy Waldron. See further L Ackermann *Human Dignity: Lodestar for equality in South Africa* (2012) 30-48 for a discussion of dignity in religious traditions, and 48-84 for the secular counterpart from ancient history to contemporary thinking.

[463] C Albertyn "Equality" in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (SI-26 2019) 4-2; S Woolman "The widening gyre of dignity" in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 193-216 at 212. See also generally H Botha "Human dignity in comparative perspective" (2009) 20 *Stell LR* 171-220. Cornell & Friedman *Mandate* 107:

> "[I]nterpretation of the Constitution should not only be thought holistically, so that no part of it is rendered redundant, but each aspect of the Constitution must ultimately seek integrity to the mandate of the substantive revolution, which is that the dignity of each human being must be respected."

[464] S Woolman "Application" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* (2nd ed RS 5 2013) at 36-6 – 36-17 attributes five distinct purposes or ideals of dignity as discussed in legal scholarship: the individual as end in themselves; equal concern and respect; self-actualisation; self-governance; and collective responsibility for the material conditions of society. See also Woolman "Widening gyre" in *Constitutional Conversations* 197-205.

[465] Dignity has even been held to be inextricably intertwined with the right to life, as demonstrated most clearly by O'Regan J's judgment in *Makwanyane* para 326:

> "The right to life […] incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity. "

[466] Weinrib *Dimensions of Dignity* 7:

> "[T]he concept [of dignity] concerns the equal right of each person to freedom. As free, each person has the right to determine the purposes that he or she will pursue. As equal, each person has a duty to pursue his or her purposes in a manner that respects the right of others to freedom."

See also Botha "Human dignity" 203. This tracks very closely to Dworkin's conception of equality as equal concern for our dignity, expounded most comprehensively in *Justice for Hedgehogs*, building on his work tying freedom to equality in *A Matter of Principle* and *Law's Empire*.

person subject to its authority".[467] This is certainly one stated purpose of the South African Constitution, affirmed throughout the text and embodied in its content, and human dignity is cast into multiple loadbearing roles in many different contexts.

Weinrib's understanding of human dignity equates to the independence to determine one's own life purpose and to pursue that purpose to its fullest, subject to the constraints posed by the simultaneous existence of these rights for others, which comprises the free and equal treatment of all in society.[468] Laurie Ackermann's account also reflects this aspect of dignity, though he emphasises the intellectual and moral capacity for respect, which quality empowers individuals to perform certain functions (including self-determination and self-fulfilment of one's life, like Weinrib's construction).[469] Similarly, "[the] value of equality promotes and protects the ability of each human being to develop to their full potential and to forge mutually supportive human relationships in the home, the community, the workplace, and society as a whole."[470] This coalesces with Dworkin's invocation of dignity as the normative basis for his entire theory of law as integrity; indeed, in his later work, "Dworkin makes an expressly Kantian turn in which fidelity to the past is transformed into fidelity to his two principles of human dignity", because of which "a further synergy emerges here between the evolution of Dworkin's thought and the trajectory of the South African constitutional project."[471]

Dworkin's first principle of dignity protects the intrinsic value of all human life as a basic Kantian duty. Dworkin calls this the principle of self-respect and extends its range of application to apply to all others through the simple proposition that it is equally important to each person that they live well.[472] This postulation means that "because the objective importance of living well applies equally to all human beings, one cannot separate the notion of self-respect from respect for the importance of the lives of others".[473] Dworkin's second principle of dignity relates to self-responsibility over one's own life, which he dubs the authenticity principle and describes as "the other side of

[467] Weinrib *Dimensions of Dignity* 19.
[468] Weinrib *Dimensions of Dignity* 47-48.
[469] Ackermann *Human Dignity* 86. Ackermann additionally includes the functions of exercising judgment, possessing self-awareness and a sense of self-worth, shaping oneself and nature, and the development of personality in his description of the legal concept.
[470] Albertyn & Goldblatt "Facing the challenge" 254.
[471] Cornell & Friedman *Mandate* 10.
[472] Dworkin *Justice for Hedgehogs* (2011) 203, 205. See also Cornell & Friedman *Mandate* 80.
[473] Cornell & Friedman *Mandate* 80 (citations omitted).

self-respect".[474] Cornell and Friedman understand Dworkin's second principle of dignity to be one of accountability to oneself and others.[475] This concerns each individual's values and objectives for their own life, and the choices they make as reflecting their authentic selves and their "normative personality – [their] settled desires, ambitions and convictions", necessarily implicating that person's liberty.[476] Thus both freedom and equality are almost invariably relevant when construing the ambit of dignity. Accordingly, no assertion of liberty or equality can be made without reference to the role of dignity in the matter, which significantly expands the latter's reach.

In the South African instance, human dignity is "pre-eminent of all fundamental rights" and informs their scope and content.[477] Human dignity is explicitly recognised as a fundamental value alongside freedom and equality in section 1(a) of the Constitution; it is invoked as a democratic value in section 7(1); it is protected as a standalone justiciable right in section 10;[478] it poses a normative constraint on permissible incursions on all constitutional entitlements per the limitations clause in section 36(1); and as legal principle it serves as the interpretive lodestar towards which the transformation of South African society is directed in terms of section 39(1)(a).[479] The outwards-facing element of human dignity is the flipside of self-respect: respecting the humanity in others.[480] This dimension of human dignity acts as an overarching

[474] Dworkin *Justice for Hedgehogs* (2011) 209. This realm of inquiry is more ethical than moral, as it relates to the question of what it means to live well but is arguably also a moral one as it concerns the issue of how to treat others. See Cornell & Friedman *Mandate* 87-88.
[475] Cornell & Friedman *Mandate* 79-80.
[476] Dworkin *Justice for Hedgehogs* (2011) 228-229.
[477] Haysom "Dignity" in *SA CL* 5-1. This view accords with Dworkin's Kantian approach to constitutionalism.
[478] The right to dignity enshrined in section 10 comprises two conjunctive clauses: the recognition of the inherent dignity of all, and the right to have this dignity recognised by others and the state. Cornell & Friedman *Mandate* 107.
[479] This metaphor is selected by former Justice Ackermann in *Human Dignity*, invoking dignity as the central metric to measure the consequentialist objective of "the achievement of equality" as per section 1(a) of the Constitution. See further Barak *Human Dignity* 7.
[480] Both Dworkin *Justice for Hedgehogs* 204, 209-210 and Barak *Human Dignity* 30 call this the authenticity principle, though Cornell & Friedman "Significance" 79-80 prefer the term "accountability" over "authenticity". This aspect of dignity bears significant resemblance to the African concept of *ubuntu*: see Y Mokgoro & S Woolman "Where dignity ends and uBuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts" (2010) 25 *SAPL* 400-407. The authors explain (at 402):

> "[T]hough uBuntu may shadow Western notions of dignity (drawn from the work of Kant) or communitarianism (drawn from the work of Rousseau or Marx), it provides a distinctly Southern African lens through which judges, advocates, attorneys and academics ought to determine the extension of the actual provisions of the basic law."

principle for interpreting the dual duties of self-respect and respecting others.[481] Moseneke recognises the impact of human dignity on other interrelated rights, noting that "the requirement of dignity is central to, but also part of, mutually reinforcing fundamental rights such as the rights to life, equality and non-discrimination, freedom and the security of the person".[482] Additionally, human dignity may provide interpretive content to other constitutional rights, again notably the right to equality and the various iterations of freedom.[483]

The role of freedom as a fundamental value to a transformed South African society is, as a historical matter, clearly of paramount importance. Freedom is usually conceived in negative terms; that is, freedom from arbitrary interference with the exercise of one's liberty. However, when construed in conjunction with values like dignity, freedom acquires a positive dimension that denotes autonomy and self-development – in other words, liberty with substantive content. On a Kantian reading of freedom like the argument Dworkin makes, dignity imbues freedom with a dimension of independence, but also interdependence, as every person has the moral and legal right to engage with others in society on the basis of equal freedom.[484] Freedom thus reinforces the equal dignity of all and dignity contributes a positive component to an otherwise negatively enforced political ideal. Similarly, the inaugural President and Chief Justice of the Constitutional Court Arthur Chaskalson ties his account of substantive equality to the value of human dignity, showing the crucial importance of this dynamic relationship.[485]

The importance of the interrelationship between the three fundamental values can hardly be overstated; indeed, they are so intricately linked that the Court is sometimes

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[481] Barak *Human Dignity* 30. Barak describes this Dworkinian concept as an objective, relational principle.

[482] Moseneke "Taking stock" 4. Botha "Human dignity" 199-200 adds the rights to privacy, property, the presumption of innocence and a fair trial, the freedoms of religion, expression and occupation, the guarantee against cruel or unusual punishment, and numerous socio-economic rights to this list. Case law has made this point abundantly clear: see *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas and Another v Minister of Home Affairs* 2000 (3) SA 936 (CC) per O'Regan J (citations omitted, emphasis in original):

> "Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights."

See also *Prince v President Cape Law Society* 2001 (2) SA 388 (CC) *para 50 per Ngcobo J:*

> "Human dignity is an important constitutional value that not only informs the interpretation of most, if not all, other constitutional rights but is also central in the limitations analysis."

[483] Botha "Human dignity" 199-200.

[484] J Weinrib *Dimensions of Dignity: The theory and practice of modern constitutional law* (2016) 7.

[485] Chaskalson "From wickedness to equality" 600 describes the constitutional objective of the achievement of equality as "very closely linked with the value of human dignity".

criticised for making one value do the work of another.[486] On Dworkin's view the three values are inextricably bound up with one another, each being a prerequisite for the attainment of the others.[487] This is precisely the type of systemic approach that the holistic construction of the Bill of Rights and its scheme of values demands. This mutual constitution of the three normative concepts is surely compatible with the constitutional normative mandates generally and those contained in section 1(a) and 7(1) of the Constitution specifically.[488]

3.3.3) Classifying dignity as right and value

While many jurisdictions recognise human dignity as both a value and a right, there are marked conceptual differences that influence the work that human dignity does as each respectively, and the roles and praxis of dignity ultimately depend on the historical and contemporary context of its appearance as a legal concept.[489] Importantly, while it unmistakeably confers justiciable rights to human dignity on all persons, the Constitution merely acknowledges that human dignity inheres in all human beings rather than ostensibly bestowing human beings with dignity.[490] Human dignity as a value overlaps with human dignity as a right, with the latter stemming from the former.[491] Moreover, dignity can ground an outcome as both a value and a right

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[486] The criticism of placing human dignity at the core of equality is that it tends to focus the adjudicative efforts on the personality or other individualist interests that are accommodated under the dignity label, whereas a substantive approach to equality that does not zoom in on the individual case is more attentive to the systemic effects of the given regime from a "group-based understanding of material disadvantage": See eg Albertyn & Goldblatt "Facing the challenge" 256-260 where the authors make this argument, pointing to O'Regan J's judgments in *Brink v Kitshoff* 1996 (5) BCLR 752 (CC) and *Harksen v Lane NO* 1998 (I) SA 300 (CC) as reflecting the type of substantive systemic thinking that they advocate.

[487] Dworkin *Justice for Hedgehogs* 367-368. Dworkin *A Matter of Principle* 191 puts it such:

> "What does it mean for the government to treat its citizens as equals? That is, I think, the same question as the question of what it means for the government to treat all its citizens as free, or as independent, or with equal dignity."

[488] Albertyn & Goldblatt "Facing the challenge" 254.

[489] Barak *Human Dignity*13.

[490] Ackermann *Human Dignity*95; Chaskalson "Human dignity" 196; A Chaskalson "Dignity as a constitutional value: The South African perspective" (2010) 5 *American University International LR* 1377-1408 at 1382. For a brief explanation of the difference between enshrining and bestowing rights, and the reasons that the South African Constitution follows the former approach, see DM Davis "Rights" in MH Cheadle, DM Davis & NRL Haysom (eds) *Constitutional Law of South Africa: The Bill of Rights* (SI-26 2019) 2-2.

[491] However, Chaskalson CJ in *Minister of Home Affairs v National Institute for Crime Prevention* 2005 3 SA 280 (CC) took a firm stance that rights are justiciable and values are not. See further Woolman "Widening gyre" in *Constitutional Conversations* 210; Cowen "South Africa's equality jurisprudence" 47."

and the latter does not always comport with the former.[492] As a value, dignity operates as guiding interpretive framework in terms of section 39(1)-(2)[493] that demands law be interpreted and developed in a certain manner, thus generating a judicial duty of fidelity.[494] It also provides a first-order rule as a justiciable and enforceable ground (as a cause of action or defence) with a concomitant right/duty structure when non-constitutional law is constitutionally lacking.[495] Alternatively, dignity can function as a right by generating subsidiary entitlements (what Barak calls daughter-rights,[496] like the right to reputation) that vest in private law sources like common law or statute.[497]

Susie Cowen argues that in the South African situation dignity does far more than protecting individual and collective autonomy, and could feasibly "justify state intervention aimed at material advancement and economic progress, and to encourage an analysis that takes account of forces that prevent their achievement."[498] Rinie Steinmann contends that dignity also acts as a principle, "as so-called universal and utilitarian ideal" according to which all conduct can be measured.[499] Henk Botha summarises the multifarious functions of dignity in the South African legal-constitutional context:

> "Dignity is invoked as a supreme value, an interpretive Leitmotiv, a basis for the limitation of rights and freedoms, and a guide to the principled resolution of constitutional value conflicts."[500]

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[492] See Botha "Human dignity" 198-199 and the decisions discussed there.
[493] This is arguably what occurred in *Daniels* in respect of sections 5-6 of the Extension of Security of Tenure Act 62 of 1997. See Marais & Muller "ESTA occupier". The value of dignity as a desirable systemic feature may also play a similar role in the structuring or development of discrete legal institutions like a property system, where the outcome of the dispute is relevant to determining the best resolution to the case.
[494] Woolman "Widening gyre" in *Constitutional Conversations* 208 calls this application of the section 10 right a second-order rule, to be distinguished from the application of the value of human dignity. Woolman observes (at 209) that dignity is most often invoked as a value because this allows the courts to proceed by developing law rather than creating it.
[495] Botha "Human dignity" 198; Woolman "Widening gyre" in *Constitutional Conversations* 207-208.
[496] Barak *Human Dignity* xxi.
[497] Such rights are possible to derive by concretisation of constitutional rights in private law. The label of subsidiary, although used in a completely different context to the methodological approach that the South African Constitutional Court takes, applies well enough to denote a constitutionally recognised right that is protected in a subsidiary source of law in accordance with the methodological approach described above.
[498] Cowen "Equality jurisprudence" 53.
[499] AC Steinmann "The core meaning of human dignity" (2016) 19 *PER/PELJ* 1-32 at 3. This arguably comports with Dworkin's postulation of dignity as the fundamental legal principle in his model of law as interpretation. See also Haysom "Dignity" in *SA CL* 5-9.
[500] Botha "Human dignity" 171.

This succinct articulation of the roles that dignity plays in South African jurisprudence will be especially useful for analysing the viability of Dworkin's theory of constructive interpretation as informed by his later work on Kantian dignity as the generative political ideal that casts the normative lodestar towards which adjudicators can direct all interpretive activity. Human dignity is often treated as a Kantian deontological imperative,[501] meaning that it cannot be sacrificed in pursuit of other objectives and any objectification or instrumentalization of human beings necessarily derides their human worth.[502] The Kantian model poses a duty-based imperative that no person's dignity may be violated, and Steinmann suggests that section 7(2) "resembles the Kantian injunction on rights and their corresponding duties", which can extend horizontally as well as vertically.[503] Further, the socio-economic rights present in the Bill of Rights secure the material elements of dignity and speak to the sanctity with which human dignity is treated in the project of transformation. As Cowen observes, "[r]ights coupled with state duties such as the protection of socio-economic rights […] reflect a value-ordered system, as opposed to the US Constitution, which does not contain textual reference to constitutional values."[504] Human dignity is placed at the pinnacle of this hierarchy, although this does not mean that it operates as an automatic trump value, overriding all other considerations with no regard to context.[505]

Human dignity has arguably found the most traction in constitutional jurisprudence as a value, inspiring a vast array of outcomes that are beyond the auspice of the section 10 right.[506] In its role as value, dignity "harmonises" competing rights and constitutional values by informing their meaning and ensuring that a mutually complementary

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[501] Botha "Human dignity" 183-186 describes this as the object formulation of dignity in the context of German constitutional law and 202-204 for South African law, in terms of which no person may be treated as a means to another end as they constitute an end in themselves. See also Haysom "Dignity" in *SA CL* 5-4 – 5-8; Woolman "Widening gyre" in *Constitutional Conversations* 198-200.

[502] Ackermann *Human Dignity* 54-62, 99-102. Ackermann points to this Kantian conception of dignity being present in Constitutional Court jurisprudence, specifically in *S v Dodo* 2001 (3) SA 382 (CC) para 38 and *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC) para 19. This is not to suggest that it cannot be limited, as all constitutional rights are susceptible to limitation in appropriate circumstances, but as a judicial matter it seems less likely to bow to a competing constitutional entitlement given its prominence and importance in the constitutional scheme and can never be sacrificed as a means to a greater end. This can be contrasted with property rights, for example, which have some other higher value (often argued to be human dignity or personal autonomy) as their ultimate end and do not serve any intrinsic human value of their own.

[503] Steinmann "Core meaning" 9. Later at 20-21, the author asserts that this provision "places South African constitutional law firmly in the footsteps of the post-war rights-protecting paradigm".

[504] Steinmann "Core meaning" 9.

[505] Cowen "Equality jurisprudence" 47.
Cf Haysom "Dignity" in *SA CL* 5-18."

[506] Cowen "Equality jurisprudence" 45-48.

construction of all legal values and provisions contributes towards the constitutional vision.[507] This is also part of Dworkin's model of law as instantiation of the ideal of Kantian dignity. With Dworkin's theory of interpretation providing answers to the questions of both legal method and normative content, it remains necessary to assess the feasibility of resolving copyright disputes according to its evaluative framework. Chapter 5 proposes Robert Merges's taxonomy of intellectual property law as a suitable vehicle for importing Dworkin's work into this environment, notably by incorporating dignity directly into copyright adjudication in the role of midlevel principle.

3.3.4) Constitutional jurisprudence on the triumvirate of fundamental values

The Constitutional Court has something of a chequered record in conceptualising and applying human dignity, specifically as it relates to the other two fundamental normative values. As mentioned, the values of equality and dignity are frequently invoked together in equality cases.[508] The distinction between equality as a value and equality as a right is conceptually similar to the dualism of human dignity:

> "As a value, equality gives substance to the vision of the Constitution. As a right, it provides the mechanism for achieving substantive equality, legally entitling groups and persons to claim the promise of the fundamental value and providing the means to achieve this."[509]

In *Dawood v Minister of Home Affairs*[510] the Court distinguished between the right to and value of human dignity on the basis that the latter plays an interpretive role in the construction of all other constitutional rights; the latter may find concrete expression through an array of these rights while the former constitutes a justiciable ground that must be enforced as a protected right.[511] In the case of *Khosa v Minister of Social*

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[507] Haysom "Dignity" in *SA CL* 5-9. This accords with Dworkin's model of constitutionalism: Dworkin sees human dignity as foundational to all rights, indeed the very thing that those rights arise to serve. In his last academic work, Dworkin develops a robust model of dignity on a Kantian basis, which renders it amenable to application in the South African situation. In addition to being a deontological priority, human dignity should also be seen as a desirable systemic characteristic resembling an instrumentalist objective. This model is discussed in the next chapter as it is integrally related to Dworkin's theory of constructive interpretation.

[508] Albertyn "Equality" in *SA CL* 44-12 notes that the value of dignity generally features in equality jurisprudence when it is a negative conception at play, and that the value of equality is usually drawn upon in positive claims of equality.

[509] Albertyn & Goldblatt "Facing the challenge" 249. See further C Albertyn "Substantive equality and transformation in South Africa" (2007) 23 *SAJHR* 253-276 at 254-255.

[510] *Dawood*.

[511] Para 35 per O'Regan J. See further Ackermann *Human Dignity* 100. See also *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) paras 41-42.

Development,[512] the complementary role of equality in this interpretive exercise was noted, where "the Court [went] beyond dignity as minimal respect, or dignity as equal concern and [arrived] at dignity as a collective concern".[513] This is a decidedly South African rendering of the universal concept of dignity that responds to the socio-legal setting by expanding on the individualist imperatives of freedom, rendering both liberty and autonomy more robust than is typical from a liberal constitution.[514] Unfortunately, some decisions, notably *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*[515] and *Prince v President Cape Law Society and Others*,[516] fail to give full effect to this thicker conception of dignity,[517] effectively subjugating it to public policy concerns over policing practicalities. This is an impossible conclusion if human dignity is taken to mean anything approximating the purposes and functions outlined above. It is broadly in this context that Botha remarks: "Human dignity, equality and freedom have been grounded in abstract notions which seem more at home in a nineteenth-century treatise than in a society trying to come to terms with a history of institutionalised inequality and deprivation."[518] In this regard it may be more beneficial to adopt context-dependent interpretations that relate to the material conditions in contemporary society and inspire transformative judicial reasoning and outcomes that reflect the interdependence of liberty, autonomy, dignity and equality.

These cases demonstrate that dignity as an abstract value provides a normative impetus to the interpretation of all other constitutional rights, but also takes much of its meaning from those same complementary rights.[519] While equality is arguably among

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[512] 2004 6 SA 505 (CC). See at para 42 (per Mokgoro J): "Equality is also a foundational value of the Constitution and informs constitutional adjudication in the same way as life and dignity do."
[513] Mokgoro & Woolman "Where dignity ends" 403 n 10. The authors also point to *Hoffmann v South African Airways* 2001 1 SA 1 (CC) and *PE Municipality* as displaying the same collectivist approach toward dignity. See also *Tshabalala-Msimang and Another v Makhanya and Others* 2008 (6) SA 102 (W) at para 2, where Jajbhay J describes the culture of *ubuntu*.
[514] Albertyn "Equality" in *SA CL* 4-10. On dignity as a collective construct, see J Waldron "The dignity of groups" 2008 *Acta Juridica* 66-90.
[515] 2002 (6) SA 642 (CC).
[516] 2001 (2) SA 388 (CC).
[517] Woolman "Widening gyre" in *Constitutional Conversations* 203 n 25 seems to support this view, noting that these two decisions, as well as *Volks NO v Robinson* 2005 5 BCLR 466 (CC) and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC), 2003 12 BCLR 1333 (CC), "sound cautionary notes about the extent to which the Court will extend itself on behalf of non-traditional associations, vocations or professions".
[518] Botha "Human dignity" 212.
[519] Chaskalson "Human dignity" 204:

the greatest aspirational features of South African constitutional democracy, the term is certainly not homogenic in conception or application and is used by different people to mean different things. It becomes clear that the content that the value of dignity acquires is dependent on the theoretical basis of both other components, freedom and equality, as well as the array of other constitutional rights and values with which it intersects.[520] For instance, dignity under a classical liberal rights theory would hold a meaning synonymous with the right to be free of public coercion (beyond that which is reasonably necessary for the existence of the liberal state) without any positive component;[521] similarly with equality, which is construed as formal equality (equality before the law)[522] without any substantive dimension. Dworkin's normative content is compatible with a substantive rendering of these values that recognises the positive components of each,[523] including the claims for material conditions conducive to the attainment of human dignity.[524] The danger of under-construing freedom is especially fraught, because the liberal-legal inclination is towards a libertarian conception that

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"As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony."

[520] Botha "Human dignity" 201 warns against a conception of dignity that either "*overemphasises* the break between the old and the new, which legitimates continuing inequality and degradation in the name of the Constitution's promise of universal human dignity" and one that underestimates that same break and consequently conflates it with the common law concept of *dignitas* and reputation (emphasis in original). See further H Botha "Equality, plurality, and structural power" (2001) 25 *SAJHR* 1-37.

[521] See Botha "Human dignity" 219:

"Dignity is closely related to personal freedom and presupposes the right of the individual freely to choose her own ends. At the same time, however, respect for dignity requires us to set limits to freedom – particularly in an age characterised by pervasive private power, excessive consumerism and deepening inequality."

See also Chaskalson "Human dignity" 202.

[522] Albertyn "Equality" in *SA CL* 4-6:

"Formal equality is best described as the abstract prescription of equal treatment for all persons, regardless of their actual circumstances. It perceives inequalities as irrational aberrations in an otherwise just social order, which aberrations can be overcome by extending the same rights and entitlements to all, in accordance with the same neutral standard of measurement." (citations omitted).

[523] See eg Langa "Transformative constitutionalism"; C Albertyn & B Goldblatt "Towards a substantive right to equality" in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 231-254; Albertyn "Equality" in *SA CL* 4-4 – 4-7.

[524] The first President of the Constitutional Court, Chaskalson "Human dignity" 202-203, explains:

"To be consistent with the underlying values of the Constitution, equality must also include equality of worth, requiring everyone be treated with equal respect and with equal concern, a principle which Ronald Dworkin describes as being 'of quite breathtaking scope and power'." (quoting R Dworkin *Freedom's Law: The moral reading of the American Constitution* (1996) 10).

See also Albertyn "Equality" in *SA CL* 44-12 n 47. As the author notes, the Constitutional Court explicitly drew a link between the equality provision in section 9 and Dworkin's work in *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) para 32..

protects individuals against state coercion without a substantive component that demands positive fulfilment.

The model of freedom that the Constitutional Court has sought to enact has varied from a strongly individualist account of autonomy[525] to the more embedded and dependent conceptions that cohere better with a holistic reading of the Bill of Rights.[526] To illustrate, consider the links between freedom and human dignity that were drawn out in the early Constitutional Court decision in *Ferreira v Levin NO; Vryenhoek v Powell NO* ("*Ferreira*")[527]

Chaskalson P's separate concurring decision in *Ferreira* conceived individual freedom in the classical protection-from-state role, warning against giving it too strong a general role of protecting liberties of all varieties.[528] Similarly Ackermann J defined it in his majority opinion in the same case as the right not to have "obstacles to possible choices and activities" placed in one's path by the state.[529] On Ackermann J's view, the right to personal freedom acts as a residual right to freedom that applies when other rights that are entrenched in the Bill of Rights do not find application. Ackermann's approach gives distinct meanings to freedom of the person and security of the person and separates both from the function of human dignity.[530] It proffers a

[525] Consider the strong model of personal autonomy employed by Mokgoro J in *S v Jordan (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642; 2002 (11) BCLR 1117, which had the effect of placing all responsibility for non-compliance with (debatable at best and prudish at worst) moral views on the issue of prostitution imputed to the pluralistic national community. Botha "Structural power" 18-20 chastises numerous decisions of the first bench of the Constitutional Court for overlooking the complexity of the forces of inequality in issue, reducing the complainants' positions to an assortment of group identities in a way that quashes plurality and difference, which derides the dignity of the parties involved.

[526] This account, which is more communitarian in nature, recognises that "all identities are relational, and that the Western conception of the autonomous individual is possible only within a network of social relations and cultural understandings": Botha "Democracy and rights" 569. The judgment of O'Regan and Sachs JJ in *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* 2002 (6) SA 642; 2002 (11) BCLR 1117 evinces such an account.

[527] 1996 (1) SA 984 (CC), most prominently in para 49 per Ackermann J. O'Regan "From form to substance" 15-16 points to this paragraph as illustration of the axiomatic shift from formal to substantive reasoning. See further *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) para 150. See also Davis "The underlying theory" 392.

[528] Paras 158-186. This case was decided under the Interim Constitution, which included a counterpart to the present section 12 in section 11.

[529] *Ferreira* para 54. See on this Currie & de Waal *Handbook* 50, specifically at n 80.

[530] However, Ackermann has subsequently stated that he "agree[s] fully with the conclusion that dignity requires freedom, and that freedom is accordingly a cardinal aspect of dignity" on the basis that freedom is an essential component of the many dimensions of dignity (capacity for self-fulfilment and development of one's personality, for example) that he identifies and "indeed constitutes a capacity of this nature": Ackermann *Human Dignity* 103. See also Sachs J's statements on the "mutually supportive" relationship between the two values in his separate decision in *Ferreira* para 253.

negative conception shorn of any positive claims or content, in which it is every person's individual responsibility to exercise their freedom; individuals are able to tell the state to refrain from interfering with their chosen way of living, but cannot demand that the state enable it in any way.[531] In *Ferreira*, both Sachs J and O'Regan J offered a more robust understanding than Ackermann J's majority opinion, giving positive accounts of this value construed in its historical and constitutional context.[532]

Davis suggests that the negative conception of freedom is at odds with the constitutional guarantee of substantive equality, which has the additional dimension of social welfare attached.[533] Indeed, it is difficult to imagine substantive liberty being attained – including, as it does, positive elements of human dignity and equality – through the negative construction of this right.[534] Construed as mere negative entitlement, the value of freedom is unable to adequately contribute to the constitutional vision that the three fundamental values generate as normative meta-framework under which all other constitutional and non-constitutional legal values are interpreted and applied.

Substantive equality "contemplates both social and economic change and is capable of addressing diverse forms of inequality that arise from a multiplicity of social and economic causes".[535] Accordingly, it goes beyond the formal prohibition of irrational distinctions and group discriminations that equality before the law is occupied by and instead investigates the complex systemic causes of inequality and possible responses to this institutional legacy.[536] The consideration of the state of material inequality in society, which translates to lack of power and status for those in a position of disadvantage, is another aspect that distinguishes the substantive conception of equality from the formal.[537]

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[531] By contrast, Chaskalson "From wickedness to equality" 600 suggests that Dworkin's thesis in *Taking Rights Seriously* would consider positive obligations on the state (in pursuit of the objective of equality) to be closer to policy/political considerations than legal principle.
[532] Davis "Socio-economic rights" 60.
[533] Davis "The underlying theory" 391-392. On the conceptual definition of freedom in Ackermann J's decision in *Ferreira*, see further DM Davis "Socio-economic rights in South Africa: The record after ten years" (2004) 2 *NZJPIL* 47-66 at 59; see at 60 for Sachs and O'Regan JJ's positive account. See also Haysom "Dignity" in *SA CL* 5-2; Woolman "Widening gyre" in *Constitutional Conversations* 213-214; Cowen "Equality jurisprudence" 51-52.
[534] Hassim "Decolonising equality" 351 draws the link between these three values most clearly.
[535] Albertyn "Substantive equality" 253.
[536] Albertyn "Substantive equality" 254-256.
[537] Writing on the mutual recognition and communal responsibility conception of human dignity, Woolman "Widening gyre" in *Constitutional Conversations* 206 clarifies:

Botha argues for a "complex" understanding of equality and identifies the values of equality, dignity and democracy as underpinning the constitutional right to equality.[538] This is compatible with the Constitutional Court's purposive and value-based approach to equality and commensurate with the transformative democratic conception of copyright proposed in Chapter 5.[539] On the link between equality and dignity, Botha points out that "systemic inequality is irreconcilable with the idea that individuals have inherent dignity and worth and that they are free to make their own choices, rather than having their choices severely circumscribed by virtue of being black, poor and/or female".[540] Accordingly, it looks past the veneer of formal equal treatment and enquires into the socio-economic conditions that are created as a consequence of systemic design and perpetuation.[541] Moreover, the institutions that are subjected to scrutiny include private orderings of (economic) power as well as public.[542] In public law, human dignity can be said to form the "legitimising basis of public authority and the purpose to which all public authority must be directed".[543] Yet dignity can only prevail in a society when individuals are protected from the exercise of private power that enfeebles dignified ways of living.[544] On this view dignity has much work to do in regulating private relationships by establishing legal institutions that "render private persons accountable to one another in their conduct" quite apart from its role in public law.[545] The recent decision in *Blind SA* indicates that the nascent shift towards

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"It is simply not enough to (a) not turn away from suffering, (b) end discrimination and (c) grant all citizens the franchise. Once we recognise others as ends we must be committed — at some level — to the provision of those material means necessary to live as ends."

[538] Botha "Structural power" 16 explains the term complex equality. For a definitional excursus on the numerous meanings and instantiations of substantive equality, see Albertyn "Equality" in *SA CL* 4-6 – 4-7.

[539] Albertyn "Equality" in *SA CL* 4-7

[540] Botha "Structural power" 8.

[541] See eg C Ngwena & L Pretorius "Substantive equality for learners in state provision of basic education: A commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*" (2012) 28 *SAJHR* 81-115. In these authors' estimation (at 83), "[i]n its short history, the Constitutional Court has been in the vanguard of fashioning a notion of equality that is transformative, breaks from the shackles of formal equality, and seeks to erase systemic patterns of dominance and subordination among social groups." (citation omitted).

[542] The Constitutional Court in *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 74 stated (per Mokgoro J):

"Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole." (citation omitted).

[543] Weinrib *Dimensions of Dignity* 15.

[544] Chaskalson "Human dignity" 204.

[545] Weinrib *Dimensions of Dignity* 16. This is the essence of infusing the constitutional culture into the domain of private law.

substantive equality is finally reaching the enclaves of copyright law and morphing this trade-based proprietary edifice into something that serves human rights concerns, albeit incrementally. It is submitted that no account of dignity or equality (or, by implication, freedom) can be considered complete until this dimension of dignity as social interaction and responsibility to one another is incorporated. This is ultimately the upshot of Dworkin's theory of law as integrity.[546]

3.4 Conclusion

This chapter situates adjudicative interpretation as the necessary last step to the legislative promulgation of statutory law. Accordingly, the choice of interpretive theory is critical to the outcome of all litigated disputes and vests judges with tremendous responsibility in effecting the transformation of law in service of constitutional norms and values. The seminal decision of the SCA in *Endumeni* is a forceful reminder that, in keeping with the precepts of a culture of justification, courts must "articulate their reasons, both linguistic and contextual, for arriving at their decisions on questions of the construction of documents".[547] *Endumeni* sought to establish "a single reasonably clear standard by which to approach questions of interpretation" that can guide courts in all matters.[548] This part concludes that interpretation in the constitutional system of law is driven by and towards the rights contained in and values underlying the Bill of Rights.

Endumeni does not engage section 39(2), likely because the court was not engaged in statutory interpretation, but some have argued that it should have found guidance in this provision nonetheless.[549] Bishop and Brickhill suggest that if the *Endumeni* approach were augmented by the objective normative value system per section 39(2) the result would be their preferred method.[550] Their emphasis on how the elected

[546] Cornell & Friedman *Mandate* 108-111.
[547] Wallis "Interpretation" 22.
[548] Wallis "Interpretation" 7.
[549] Le Roux "Legal interpretation" 4 n 11 describes this as "one of the unfortunate features of the *Endumeni* judgment".
[550] Bishop & Brickhill "In the beginning" 715.

interpretation coheres with the constitutional value system may as well have been taken from Dworkin for how well it mirrors his model.[551]

For this reason, Dworkin's theory of constructive interpretation is suggested as suitable strategy for judges working with South African law, as it offers the possibility of transforming law while retaining a principled moral integrity across a range of different areas of law. This comports with the principles of subsidiarity and especially with the single-system-of-law ideal that it serves. Dworkin's reliance on context and purpose in lieu of authorial intention as the focal point of the interpreter is a good illustration of the overlap with the systemic approach under section 39(2), which similarly serves the function of contextualisation by locating each statutory provision in reference to the legislative or constitutional scheme as a whole, depending on the nature of the provision being construed.[552]

Section 39(2) clearly has in mind the kind of systemic comity that promotes a unitary normative vision of law, which is closely aligned with Dworkin's theory. Dworkin's proposed analysis assists courts in identifying what he calls the best interpretation of law: one that best serves the constitutional values and objectives as well as the systemic logic and normative commitments of the regulatory regime while displaying principled congruence with precedent on point – through either restrictive or extensive construction of the common law rule or statutory provision.[553] This approach pays due attention to structural provisions and embedded norms that other interpretive approaches eschew (like normative and theoretical commitments reflected in statutory preambles, schedules, and memoranda of objectives) and establishes an intra-textual normative basis for the construction of meaning.[554] Like Dworkin's approach, constitutional interpretation under the South African Constitution calls for holistic

[551] See eg at 713, where the authors explain the first stage of their proposed method of statutory construction: "The vital part of the first stage is that the judges must explain how each meaning actually fits with the text".
[552] Du Plessis *Re-interpretation* 225. See also at 249 where the author describes the relation between teleological and systematic approaches to interpretation as overlapping.
[553] Du Plessis *Re-interpretation* 225-226. As discussed in Chapter 4 Section 3.4 the majority decision in *Wilkinson v Crawford N.O.* [2021] ZACC 8 shows that a holistic interpretation will not always yield the most constitutionally desirable outcome, and that the appropriate choice of interpretive strategy will not be the end of the enquiry.
[554] For more on the prominent role of such interpretive aids, see Du Plessis *Re-interpretation* 239-246. Du Plessis views the post-democracy uptake of including preambles and explanatory memoranda for statutes as an indication that the legislature wishes to redirect interpreters away from the traditional literalist-cum-intentionalist attitude "and to opt for more constructive systematic and especially purposive (and purposeful) readings of statutory texts instead": Du Plessis *Re-interpretation* 243. See also the importance with which the constitutional preamble is treated by Sachs J in *Mhlungu* para 112.

construction of legal sources towards systemically desirable outcomes. This shows that Dworkin's approach is compatible with purposive, contextual approaches and can be employed in statutory interpretation.[555]

The constitutional ethos – informed by the structure of the document, the values explicitly identified therein, the introductory context provided by the preamble, and the enunciation of the protected rights and values – inform the textual interpretation and application of all constitutional provisions, and should, by virtue of section 1, 8(1) and 39(2) apply to all law being interpreted and applied. Section 39(2) and its interpretive twin section 8 (discussed in the next chapter) arguably constitute the praxis of human dignity and should be deployed whenever the opportunity arises to entrench the value of dignity in the law as applied by the judiciary.[556] In this fashion a value-plural normative fabric is woven to envelop all interpretations and applications of law.[557] Similarly, Dworkin grounds his theory of law as integrity in a moral vision of law that hinges on the profusion of equal dignity among all; indeed, his entire idea of the rule of law – the fundamental principle of legality itself – is inextricably tied up in providing the conditions for a dignified existence for citizens.[558]

The next chapter continues this thread of inquiry by analysing the counterpart to the interpretation clause, section 8. This provision prescribes the aptness and method of application of constitutional rights, and further unifies law under the single-system-of-law principle. It ensures that constitutional provisions are applied consistently and

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[555] Such cases may arise when two statutory provisions relate to one another or are informed by extraneous matter such as a preamble or the statute's long title. See *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the RSA; Executive Council of KwaZulu Natal v President of the RSA* 1999 12 BCLR 1360 (CC) para 52 per Ngcobo J. This is not to suggest that systemic interpretation should only be adopted when judges decide hard cases – i.e., controversial moral issues of principle in which no clear answer presents itself – but rather in all cases before the court, as otherwise the formal reasoning style described earlier is permitted to continue unabated under the cover of settled law.

[556] Cornell & Friedman *Mandate* 109 echo this point:

> "Ultimately, if the Constitution aspires to ground itself in dignity, and if sections 8 and 39(2) are the mechanisms through which the Constitution implements that vision in the law, then it must follow that sections 8 and 39(2) are inseparably tied to dignity."

[557] Although the Roman-Dutch common law system is renowned for being principle-based in contrast to the English system of law, on which South African copyright law is modelled, Dworkin's approach to constructive interpretation applies just as well to statutory regimes like copyright law given the ubiquity of normative concepts and animating principles. On the applicability of Dworkin's principle-based model to legislation and case law alike, see Barak *Purposive Interpretation* 291.

[558] Cornell & Friedman "Significance" 55:

> "Dworkin's defence of legality as integrity, which in turn implies equality, takes us back to an interpretive holistic approach to the meaning of law (not only in the United States but in modern democracies in general)."

robustly, and along with the preceding provision, section 7, fortifies the role of the normative triumvirate in the interpretation and application of all law. Constitutional jurisprudence shows that the question of the application of the Bill of Rights deserves more attention than it typically enjoys and that a variety of possible avenues are available to courts looking to contribute to the transformation of private law doctrine, whether sourced in legislation or common law.

CHAPTER 4: EFFECTING CONSTITUTIONAL TRANSFORMATION TO SOUTH AFRICAN LAW

4.1 Introduction

Following the analysis of constitutional and statutory interpretation in the previous chapter, with reference to section 39(2) of the Constitution, this chapter turns to the application clause in section 8, which has a major role to play in debates about the transformation of the law relating to private and commercial relations. These two provisions are frequently invoked in tandem in matters concerning the normative implications of constitutional rights and values within the "private sphere". The relationship between the two mechanisms contained in section 8(2) and 39(2) is discussed and guidance is found in academic writing and jurisprudential pronouncements.

The array of rights that are contained in the Bill of Rights could contribute significantly to the project of substantive transformation of law relating to private and commercial relations. However, traditional modes of interpretation and application may leave these provisions without the substance that they could enjoy under a transformative reading. On a textualist approach, one would expect each rights-granting provision to specify its own ambit and reach, especially when it comes to the horizontal application of those entitlements. However, on a holistic teleological approach (like the one that Dworkin offers) these provisions find their meaning in the entire network of interests and entitlements that comprise the Bill of Rights. Moreover, the influence of the triumvirate of fundamental values is only felt on such a holistic rendering of the scheme of constitutional rights and values that take these three commitments as omnipresent and always applicable. To date, the implications of these provisions for copyright law have not been fully explored, with the result that the Copyright Act is left to operate in its own domain without much scope for incorporating constitutional imperatives. Chapter 6 argues that the interpretive modes that cohere best with the mandates of sections 8 and 39(2) should be extended to copyright law, which would be a significant move towards a constitutionally responsive and accommodative copyright regime.

While the target of scholarly writing on the culture of justification has been on the exercise of public power, it is arguable that this basic justificatory norm should extend beyond the

vertical sphere to the horizontal: it should apply to every act of domination in the private realm and the law that sanctions such conduct should be equally reviewable. This discussion uncovers the mandate of substantive transformation that section 8(2) comprises, which holds that at least some of the provisions of the Bill of Rights are capable of direct application to constrain the exercise of private power in horizontal relationships. The methodological implications of the constitutionalisation of non-constitutional law are explored for guidance on when direct application of constitutional provisions is appropriate, and when an indirect infusion per section 39(2) is preferable. Case law on direct horizontal application of the Bill of Rights portrays an initial reluctance to apply fundamental rights directly to private relations. Yet, more recent Constitutional Court decisions clarify that the imposition of private horizontal obligations in terms of section 8(2) and (3) is part of South African law and, where appropriate, should be embraced as a tool of transformation rather than drastic overreach of public power as it is sometimes seen.

The chapter provides an overview of the Constitutional Court's more recent approach to the horizontal application of the Bill of Rights. It examines the most prominent decisions from the past half decade, specifically those that touch on the values of equality, dignity, and freedom. The decisions that are discussed adopt a value-based construction of rights provisions in furtherance of section 39 and provide invaluable guidance on the question of horizontal application of the Bill of Rights in terms of section 8(2) and (3). The analysis reveals how the alternate routes of direct and indirect application of the Bill of Rights operate in the legal setting of property rights, contracts, and testamentary dispositions, each of which holds important lessons for the transformation of the legal relations implicated in copyright law.

4.2 The textual basis for constitutional transformation

4.2.1) Scope of application of the Bill of Rights

The Bill of Rights, contained in Chapter 2 of the Constitution, specifies its own application in the opening provisions. Sections 7 and 8 of the Bill of Rights read:

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

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

These two sections make the Bill of Rights applicable to the entire unified system of South African law. Section 7(1), read with section 1, places the values of human dignity, equality, and freedom at the centre of the spirit, purport and objects of the Bill of Rights to which section 39(2) refers. Section 7(2), read with section 8(1), makes the state the primary duty-bearer in relation to the realisation of the transformative vision of the Bill of Rights (as one may expect from a culture of justification in which all public power must be justifiably exercised).

Section 7(3) then alludes to the limitation of rights, either in terms of limitations or qualifications contained within specific rights provisions or in terms of the general limitation clause in section 36(1). A constitutional culture of justification requires all rights limitations, and, indeed, all state action to be substantively justifiable.[559] State inaction – that is, the state's failure to live up to its section 7(2) duties to "respect, protect, promote and fulfil the rights in the Bill of Rights" by not adopting adequate policy and legislation – is equally subject to the demand for substantive justification.[560] This provision renders the

[559] M Cohen-Eliya & I Porat *Proportionality and Constitutional Culture* (2013) 119-120. See also generally Möller "Justifying".
[560] This could be the case with challenges based on equality, dignity, education, or any other right with a positive element that operates vertically. For example, in *Blind SA*, the applicants averred that visually

rights in Chapter 2 of the Constitution justiciable in that they are enforceable at least against the state, subject to the limitations clause in section 36.[561] In this regard, section 8(1) is clear that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state". However, constitutional obligations do not end with the state: section 8 goes further in promoting and fulfilling these rights. The scope of application is extended to private persons through section 8(2), depending on the nature of the right and concomitant duty that is generated.[562] It can be argued that the culture of justification (and the justiciable right of review that it bestows upon affected persons) applies to all law, whatever the source and regardless of whether the law regulates public or private relations; *all law* must be justifiable against the text *and* spirit of the Constitution. On this argument, private power is subject to the same mandate (although not necessarily the same standard) of justification as public power and must always conform to, if not directly promote, the fundamental values of the Bill of Rights, as all private conduct is exercised in terms of law of general application.[563] It follows that non-constitutional sources of private law are a primary target of the application clause and the judiciary is commanded to ensure that the substantive content of the Bill of Rights is made manifest whenever one of its norms is triggered.

The importance of horizontal application of the Bill of Rights lies in its potential to address the substantive inequality that prevents ubiquitous attainment of the basic conditions necessary to live a life of freedom, equality and dignity.[564] It would be illogical and specious to insulate the realms of private law from the constitutional value system given the centrality of private law in regulating relations in society. This would lead to the perpetuation of unequal power relations in the private and commercial spheres, exacerbating the divisions of the past that the constitutional project seeks to collapse. Considering the vital importance of private relations to the attainment of a life of dignity,

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impaired persons' constitutional right to equality was infringed by the state's failure to enact amending legislation to provide certain entitlements in respect of access to usable formats of copyright works.

[561] *Thebus* para 24.

[562] See Section 2.2 of this chapter for a more comprehensive discussion of this provision.

[563] For a discussion of the confusion surrounding whether private conduct or the contractual provisions that it produces should be deemed law of general application, see Rautenbach "Constitution and contract" 393-394.

[564] On this point see Friedman "Revisiting horizontality" 67.

equality and freedom, the suggestion of continued normative deference would be anathema to the constitutional vision of transformation.[565] The only question is to what extent private power should be subjected to the operation of constitutional rights and values.

Deeksha Bhana points out that the legitimacy of horizontal application is assumed by section 8(2), and the only thing that the provision does is specify the scope of horizontality.[566] The author draws a distinction between form and scope to explain the difference between direct and indirect application.[567] The form is determined by section 8(3) and section 172(1), which prescribes how the law is to be applied, while section 39(2) should be read with section 173 and instructs courts how the law is to be interpreted. She contends that "the contemplated direct application [in terms of section 8(1)-(2)] within the confines of the *scope* (content) leg of the enquiry does not necessarily pre-empt or mandate the particular mode of application envisaged by the *form* (method) leg of the enquiry".[568] Thus, section 8(1) specifies whether constitutional rights find application, and section 8(2) explains to what extent. This is a sensible division of labour between the respective provisions that avoids redundancy of function. The first subsection of the application clause, section 8(1), provides support for a robust reading of the single-system-of-law principle and clearly binds all state actors. Bhana describes the function of section 8(1) as "to delineate the general scope of application of the Bill of Rights to cover *all state conduct* which, as a matter of course, must include the *consequences* of such conduct."[569] The inclusion of the judiciary in section 8(1) establishes the duty of all courts to embark on transformative adjudication, especially when read with section 8(3) and 39(2). This defuses the argument that common law could retain its essentially Roman character and work itself pure, as courts are instructed to respect the normative impact

[565] This critique is developed later in Chapter 5 in the realm of copyright, where private parties hold virtually all power in the spheres of culture, communication, education, and intellectual self-development and -fulfilment. For now, it may be sufficient to point out that the culture of justification discussed in Chapter 1 prescribes substantive engagement with law as a prerequisite to constitutional justice, which can be thwarted by deference to the legislature. As Möller "Justifying" 1095 points out, "[t]he problem with deference, however, is that it may result in a court upholding a law or act as proportionate and therefore justifiable when in reality it is not." (citation omitted).
[566] Bhana "Horizontal application" 364.
[567] Bhana "Horizontal application" 366-367.
[568] Bhana "Horizontal application" 367 (emphasis in original).
[569] Bhana "Horizontal application" 362 (emphasis in original).

of the Bill of Rights on all law.[570] The preceding section supports this reading. Section 7(2) states that concurrent duties rest on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights", making it the state's unequivocal duty to advance the transformative constitutional mission by implementing the provisions of the Bill of Rights.

Woolman construes section 8(1) as providing the basis for imposing positive duties on private parties, noting that it brings beneath its ambit of normative sovereignty "all law", clearly including private law.[571] Section 8(1) therefore makes the Bill of Rights directly applicable as superior normative source to the common law that applies in private settings, whether contractual, delictual, or one of the many forms of property regulated in common law, breaking down the traditional vertical-horizontal axis as well as the public-private divide.[572] Woolman argues that section 8(1) introduces a new low water mark that must be observed by every state institution.[573] Rautenbach agrees, arguing that "if 'indirect' application would mean anything less than unqualified and full judicial control of common-law rules which regulate private relations, it would be inconsistent with section 8(1)."[574]

Bhana reads direct application as being when a litigant founds a cause of action or mounts a defence on the basis of a constitutional provision without private law sources mediating the legal relationship.[575] She distinguishes direct from indirect application on the basis that the former involves rights-based analysis while the latter entails a value-based analysis in terms of which the Bill of Rights as an objective normative value system is applied to another source of law.[576] Bhana sees indirect application of the Bill of Rights as effecting "a constitutionalisation of the common law from within, ie (*sic*) by invocation of the common law's legal framework, coupled with its concept and methodology".[577] This also describes the application of the Bill of Rights to cases in which statutory law is "constitutionalised" by interpreting it in line with constitutional values. Bhana argues that

[570] Bhana "Horizontal application" 363.
[571] Woolman "Application" in *CLOSA* 31-48. See also Friedman "Revisiting horizontality" 79.
[572] Bhana "Horizontal application" 364.
[573] Woolman "Application" in *CLOSA* 31-45 – 31-46.
[574] Rautenbach "Engaging the text" 753.
[575] Bhana "Horizontal application" 355.
[576] Bhana "Horizontal application" 358-359.
[577] Bhana "Horizontal application" 360.

even if direct and indirect application contemplate and produce the same outcomes, "the *manner of operation* of the common law concepts and methodologies" should be transformed to "reflect the new constitutional ideology and what ought to be an altered legal culture" instead of the inherent common law content and method.[578] This point arguably applies to statutory law as well, as statutory schemes are often permitted their own realm of normative reign. I submit that a holistic reading strategy would look to iterate constitutional rights in private law doctrine through concretisation as well as take the broader array of constitutional values into account, but may allow the fundamental values of freedom, equality and human dignity to occupy prime attention during the interpretive endeavour. Bhana contends that when a litigant relies on a constitutional right directly, the analysis entails determining whether the right applies horizontally, and if so whether it has been infringed, and if so whether that infringement can be justified in terms of section 36.[579] This amounts to challenging the constitutional validity of non-constitutional sources of law by testing them directly against the provisions of the Bill of Rights.

Unfortunately, case law has not always been clear on the question of the difference between direct and indirect horizontal application, nor which should be followed when. What follows is a concise overview of the most recent Constitutional Court pronouncements on direct and indirect horizontal application, focusing on instances of horizontality which are typically decided under the rubric of section 8(2) and which concern human dignity, equality, or property rights. The complicated relationship between sections 7(2), 8(1), 8(2), 8(3) and 39(2) is deconstructed and some of the main contributions to scholarship are considered for clarification.

4.2.2) Direct and indirect horizontal application

Woolman reads section 8(2) as making the Bill of Rights directly applicable to private conduct where the nature of the right and the concomitant duty are construed as being applicable, but only where a gap exists between black-letter law and the provisions of the Bill of Rights. Thus, under section 8(2), the question is whether a right in the Bill of Rights,

[578] Bhana "Horizontal application" 361 (emphasis in original).
[579] Bhana "Horizontal application" 359.

properly construed, is implicated as relevant to the matter at hand and subsequently found to have been contravened by the body of private law rules.[580] However, the remedial work is not done by section 8(2), as, on Woolman's reading, once the two questions relating to this provision have been affirmatively answered, the enquiry moves on to section 8(3). It is under section 8(3)(a) that the constitutional adequacy of legislation will be measured. The readings are assessed for constitutionality and adequacy of protection against the scope specified under section 8(1)-(2). Where the legislation is inadequate, section 8(3)(a) directs courts to find and develop (if necessary and possible) common law rules to accommodate the constitutional dictates. This may be a challenging task, as Bhana anticipates:

> "In most cases, courts are likely to grapple with inherently conflicting constitutional rights as well as fluid underlying values and competing policy considerations. In view thereof, [section] 8(3)(b) provides expressly for the possibility of also developing common law rules (standards and remedies), which *limit* the relevant substantive right(s) and/or underlying values."[581]

Woolman's approach to the interoperation between section 8(2) and 39(2) is that when a substantive right in the Bill of Rights is directly engaged, it should be directly applied; when no such right is engaged, the overarching value system described in section 39(2) should kick in and ensure that all law is applied in conformity with the normative setting that the Constitution creates.[582] Friedman disagrees, arguing that it is not possible for a law to be judged short of violating any provision but nonetheless having contravened the entire set of provisions.[583] Friedman describes this approach (advanced by Woolman and implied in *Thebus v S*) as one that "trades on an undesirably atomistic approach to the interpretation of each right in the Bill of Rights, which contradicts the Court's usual approach of interpreting rights as a mutually reinforcing web of norms."[584] Roederer

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[580] Woolman "Application" in *CLOSA* 31-46.
[581] Bhana "Horizontal application" 368 (emphasis in original).
[582] This approach largely accords with the Constitutional Court's judgment in *Thebus v S* 2003 (6) SA 505 (CC). In a more recent case, *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC), the Constitutional Court's main judgment (per Madlanga J) held that where a court has developed the common law but has done so erroneously, leading to the decision being overturned, this does not amount to a development of the common law because the status quo ante is restored, meaning that the superior court overturning the decision also does not amount to a development of the common law.
[583] Friedman "Revisiting horizontality" 82.
[584] Friedman "Revisiting horizontality" 82, citing *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6; 1998 (12) BCLR 1517 para 114; *NM v Smith* 2007 (5) SA250 (CC) para 66; *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) BCLR

contends that the spirit of the law is just as important a directive as its letter, which sets him apart from both Friedman and Woolman.[585] I submit that Roederer is correct about the importance of the normative spirit but that this does not meld the functions of the distinct provisions, as they can work more effectively conjunctively than when conflated. A statutory provision may be capable of numerous interpretations, and section 39(2) can require one interpretation that promotes the broader array of constitutional values over another meaning that would arguably run counter to the spirit and purport of the Bill of Rights. This plays a different role to mandating that the rights provisions in the Bill of Rights apply where they are directly engaged.

Van der Walt also argues that the "vindication of constitutional rights" can occur indirectly through appropriate common law interpretation and that courts are not bound by the "narrow assumption" (which he attributes to Woolman) that constitutional rights can only be secured through direct application.[586] Van der Walt builds this argument on the basis that the subsidiarity principles are able to conduct the orderly yet transformative development of law without recourse to potentially anarchic fragmentation of law. On this account, the values underlying the Bill of Rights should feature prominently when construing the political theory against which the law is measured to adequately fill the role that discrete constitutional provisions otherwise would on direct application. Put differently, courts should resort to the value-normative elements of the Bill of Rights when establishing the extent of horizontal duties under section 8(2) (on a constitutional basis) as well as when non-constitutional law is being construed in terms of section 39(2).

Application under section 39(2) therefore implicates a political theory, which is also relevant to construing constitutional provisions according to direct application although less obviously so. Similarly, Dworkin's model of interpretation inquires into the political morality of the legal system, adding an outcome-verifying function that ensures integrity in law.[587] Section 39(2) likewise plays an outcome-verifying role that ensures the

339 (CC) paras 51 & 111; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) paras 21–25 & 83.

[585] Roederer "Remnants" 221.

[586] Van der Walt "Normative pluralism" 118.

[587] See Chapter 3 Section 2.2.

conclusion to the interpretive exercise is compatible with the normative underpinnings of the Bill of Rights more broadly than the discrete rights granting provisions.

On the distinct functions of the application clause, Friedman aligns himself with the view that Laurie Ackermann expresses in his academic work; specifically, that section 8(2) is concerned with the validity of law, section 8(3) with possible remedial intervention in cases of invalidity, and that "a court is *compelled* to resort to s[ection] 8 in a dispute between private parties – it cannot choose to rely on s[ection] 39(2) instead".[588] Davis also distinguishes the functions of section 8 and 39(2) on the basis that the former involves "a concrete extension of rights within the context of private law", while the latter "concerns the infusion of constitutional principles into the entire body of law".[589] This clarification adds to Friedman's explanation and offers a very basic dichotomy of functions to guide adjudicative action. On Friedman's account, the interpretation and balancing stages involve giving content to the "abstract" (in Dworkin's terms) constitutional rights, concretising them in private law.[590] Importantly, the Constitution sets the standards that private law doctrine must meet; this is the opposite of fitting constitutional rights and values into the existing private law concepts, as it makes the private law doctrines conform to aspects of the political ideology evident from the Bill of Rights.

While this functional division between the clauses neatly demarcates the function of horizontal application of constitutional rights from the constitutionally inspired interpretation and application of all law, there is no obvious reason that both cannot proceed conjunctively, where relevant. Put differently, the non-constitutional source of law should first be read in the way required by section 39(2) before any relevant constitutional rights have been directly applied to the situation. Indeed, section 39(2) is relevant whenever law is interpreted, indicating that the values of the Bill of Rights are always at play when interpreting non-constitutional sources of law. On this reading, which accords with subsidiarity, section 39(2) is the first port of call for adjudicators tasked with construing common law or legislation in conformity with the Bill of Rights. Only thereafter

[588] Friedman "Revisiting horizontality" 84 (emphasis in original), relying on Ackermann *Human Dignity* 261, 265, 268-269, 292.
[589] Davis "Interpretation" in *SA CL* 33-5 – 33-6.
[590] Friedman "revisiting horizontality" 69.

does section 8(2) come into play whenever a constitutional right is directly applicable to the case at hand when the non-constitutional source does not adequately capture the constitutional entitlement. The section 8(2) inquiry establishes whether a constitutional right applies directly to the legal question presented by the litigation and section 8(3) mandates the appropriate remedy, while the anterior section 39(2) interpretative injunction ensures maximally compliant readings of legislation. This is precisely what Dworkin's "best reading" requires and is in line with the convention of statutory interpretation that prefers upholding validly enacted legislation where possible with minimal judicial intervention or input.

Friedman identifies three distinct functions fulfilled by section 8(2), namely: providing instruction that all law is to be assessed against the standards of the Bill of Rights for validity; declaring that all law that does not measure up to the level demanded by the substantive content of the Bill of Rights is to be remedied; and indicating that all horizontal application (direct and indirect) should proceed under the rubric of section 8(2), as section 39(2) (on the author's view) has nothing to do with horizontality.[591] The wording and purpose of section 8(2) clearly permit and even require the imposition of positive duties on private persons when demanded by the nature of the constitutional right and the concomitant nature of the duty so imposed.[592] Friedman supports this reading of the provisions by noting that courts must first give proper scope to the constitutional rights and the common or statutory law through interpretation, which is undertaken in terms of section 8(2); only if it is found that the law falls short of the constitutional ideal does section 8(3) come into play at the remedial stage.[593]

On Friedman's argument, section 8(2) only sets the standards according to which all law must be judged, namely the applicable rights and concomitant duties sourced in the Bill of Rights, but it is the function of section 8(3) to perform the assessment of whether such standards have been met.[594] He describes section 8(2) as supplying (concrete, private

[591] Friedman "Revisiting horizontality" 63-88.
[592] For example, the nature of a right may be such that a private person is uniquely situated to fulfil or frustrate its purpose. See eg *Governing Body of the Juma Musjid Primary School v Ahmed Asruff Essay N.O.* 2011 (8) BCLR 761 (CC); *Daniels*; *AB v Pridwin Preparatory School* 2020 (5) SA 327 (CC); *King*.
[593] Friedman "Revisiting horizontality" 70-71.
[594] Friedman "Revisiting horizontality" 69, 80-81.

law) content to the rights contained in the Bill of Rights – to ensure that the rights mean something in every legal relationship, whether or not the state is a party.[595] This requires courts to interpret and apply constitutional rights in such a way as to secure their content without being too reluctant to consider the imposition of duties on private parties in horizontal relationships, as the traditional legal culture may dictate.

After determining whether the right in question is applicable to horizontal relationships, the judicial enquiry proceeds to section 8(3). This provision asks whether the constitutional right is given adequate expression in common or statutory law.[596] Section 8(3) comprises two conjunctive clauses that compel courts to develop the law to accommodate, reflect, and, where necessary, limit the implicated constitutional rights; this remedy is designed to save legal rules from unnecessarily being declared invalid for unconstitutionality.[597] Section 8(3), in sum, requires that courts interpret the common law in conformity with the Bill of Rights as far as possible, and develop the common law when necessary for this purpose (where the matter is not addressed by legislation, as per the principles of subsidiarity). When such development has the effect of limiting a right in the Bill of Rights (presumably to give effect to another such right), this limitation must proceed in accordance with section 36 of the Constitution. Davis summarises the position in respect of section 8(3)'s distinct function:

> "Section 8(2) extends the scope of the Bill of Rights to the exercise of private power. It provides that a provision of the Bill of Rights binds natural and juristic persons, if and to the extent that it is applicable, taking into account the nature of the right and of any duty imposed by the right. […] If the enquiry indicates that the relevant constitutional provision binds private parties, section 8(3) requires that effect be given to the right, whether by legislation or the common law. If there is no legislation or common-law rule giving effect to this constitutional right, the Court is mandated to develop a rule to 'fill the gap'."[598]

In the copyright context, direct or indirect application of the Bill of Rights could feature either in vertical or horizontal disputes. Invalidation of legislation would occur by direct

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[595] Friedman "Revisiting horizontality" 69. Of course, this is not to gainsay the observation that the state is always a silent party to every legal relationship by virtue of its role in setting and upholding the law that governs each private legal relationship.
[596] See in this regard Davis "Where is the map" 14.
[597] However, even when no provision in the Bill of Rights is engaged directly by the law or conduct in question, courts are still under a general obligation to develop law in accordance with its spirit, purport and objects according to section 39(2).
[598] Davis "Elegy" in *Rights and Democracy in a Transformative Constitution* 61."

vertical application, as was the case in the recent Constitutional Court decision in *Blind SA* that found section 6 of the Copyright Act to be overbroad and discriminatory in its effects.[599] In cases where provisions of the Copyright Act are found to limit constitutional rights and no constitutionally viable construction is possible, a limitations analysis must be performed to establish whether the limitation is justifiable. Direct application of a constitutional provision in these cases could arguably ground remedies of positive entitlement to use copyright works in certain ways as an alternative or in addition to the invalidation of a statutory provision.[600]

The indirect application of the Bill of Rights through the interpretation of legislation in terms of section 39(2) may result in the proper demarcation of respective rights to avoid conflict.[601] This mechanism arguably holds the most potential for the transformative adjudication of copyright disputes, since it enables courts to bring existing statutory provisions in line with constitutional norms and standards by means of a value-laden interpretation. The mandate to choose an interpretation that would give the most optimal expression to constitutional values, provided that such an interpretation is reasonably possible, clearly resonates with Dworkin's best interpretation standard.

It would be foolhardy to endeavour to sketch out all the ways that copyright conflicts with constitutional rights and values, as such conflicts are reliant on a particular factual matrix that may arise. However, while an articulation of all instances of overlap or intersection is beyond the scope of the present study, it is important to note that courts should always be responsive to constitutional values when construing legislation. Courts could try to bring the statute in line with constitutional values to avoid a finding of invalidity without directly applying any discrete provision. In terms of indirect application per section 39(2), copyright doctrine could amplify numerous constitutional values. When construing the Copyright Act (both in cases involving challenges to the constitutionality of the Act and in the course of horizontal litigation), adjudicators could find points of intersection between

[599] *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33.
[600] See s 172(1)(a)-(b) of the Constitution, which states that courts "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency" and further "may make any order that is just and equitable".
[601] This occurred in *Laugh It Off*, where the scope of the protection given to intellectual property rights under the Trade Marks Act 194 of 1993 was harmonised with the right to freedom of expression in section 16 of the Constitution.

constitutional rights and values (such as freedom of expression in terms of section 16(1) of the Constitution) and copyright doctrine. Examples of copyright doctrine that could be articulated with the constitutional right of freedom of expression include copyright standards (like the threshold for the requirement of originality under section 2(1) as considered in *Laubscher v Vos and Others*[602]), principles (like the idea/expression dichotomy in the substantial part element of the test for direct infringement per section 23(1), as expounded in *Rapid Phase Entertainment CC v South African Broadcasting Corporation*[603]) and exceptions (parody being a notable omission from the fair dealing purposes specified in section 12(1), despite undoubtedly finding protection in section 16(1)(c) of the Constitution). In these instances, the right to freedom of expression could be used to infuse existing statutory doctrine and to expand the contours of the normative concepts that courts already apply.

It should be clear from the above discussion that the duty to construe copyright law in line with the Constitution arises in cases concerning both the vertical and horizontal application of the Bill of Rights. The former category refers to instances where the state is a party to the dispute or where the constitutionality of legislation is challenged, while the latter concerns disputes between private parties in which the constitutionality of the legislation is not in issue. Direct horizontal application, then, occurs when constitutional rights are applied directly to horizontal disputes. In the copyright context, it could result in the enhancement of the rights of copyright holders, or in the imposition of duties on copyright holders to respect the constitutional rights (like equality, human dignity, freedom of expression, or education) of others.

4.3 The jurisprudence of substantive horizontal transformation

4.3.1) The Constitutional Court's inaugural stance

Early indications from the Constitutional Court portended robust engagement with the horizontality provision, establishing a nascent jurisprudence willing to apply constitutional

[602] [1974] 3 JOC (W).
[603] [1997] JOL 393 (W).

rights and standards horizontally.[604] The Constitutional Court in the *First Certification* case rejected challenges to the horizontal application of rights in terms of section 8(2) and held that the doctrine of separation of powers is not threatened by the notion of positive obligations, which, it was at pains to point out, stem from a range of civil, political and socio-economic rights.[605] Then in the first decision to consider horizontal application under the final Constitution, *Khumalo and Others v Holomisa* ("*Khumalo*"),[606] the Constitutional Court made it clear that the Bill of Rights applies directly to private law rules *as required*. *Khumalo* was the first time that a litigant both relied directly on a constitutional right (section 16) and argued for the indirect application of the Bill of Rights through common law development in terms of section 39(2). The Court held that the common law protections against defamation were sufficiently capacious to accommodate the constitutional concepts of dignity and freedom of expression without needing development.

On the issue of horizontality, *Khumalo* marked a clear directional change[607] from the position under the Interim Constitution in *Du Plessis and Others v De Klerk and Another*.[608] *Khumalo* committed courts to the notion that the Bill of Rights should take primacy in developing the law by directing such development from the vanguard, rather than only being evoked through the rear-guard of infusing existing private law with constitutional normative content.[609] This latter route would run the danger of relegating

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[604] In his extra-curial writing, Madlanga J refers to the horizontality jurisprudence under the Interim Constitution as representing a "false start" but states that the Final Constitution "support[s] a construction of [section 8] that private persons are duty-bearers under many Bill of Rights provisions": M Madlanga "The human rights duties of companies and other private actors in South Africa" (2018) 3 *Stell LR* 359-378 at 361.

[605] *In re Certification of the Constitution of the RSA* 1996 (10) BCLR 1253 (CC) paras 53-56, 77. See Liebenberg *Socio-economic Rights* 21. See also Mureinik "Beyond a charter of luxuries" 466-468, where the author discusses the same argument that the CC later accepted in respect of the arbitrary distinction between positive and negative rights on the count of budgetary concerns (judicial officers not being competent to spend public money).

[606] 2002 (5) SA 401 (CC).

[607] Woolman "Amazing, vanishing" 773. See also Friedman "Revisiting horizontality" 64. On Friedman's reading, direct horizontal application only occurs after interpretation of the common law and the Bill of Rights (and, if necessary, balancing any competing constitutional rights to determine their respective scope) and is exclusively concerned with the remedial challenges to defective law. Thus, there has been no direct application in *Khumalo* as the law was not found invalid.

[608] 1996 (3) SA 850 (CC). Bhana "Horizontal application" 356 describes the outcome in *Du Plessis* as being an iteration of a "traditional[] verticalist constitutional framework".

[609] This would involve developing the common law with a new value system in place. Some authors (often labelled positivists by interlocutors) are recalcitrant in accepting the proposition that the values underlying

the Bill of Rights to serving the function of a normative stopgap where the Bill of Rights at most performs a compliance check after the dispute has already been resolved according to non-constitutional law. On this account, the Bill of Rights would do no more than provide normative content where the common and statutory law is silent. Instead, the Court in *Khumalo* established the possibility of direct reliance on constitutional provisions to found positive obligations between private parties by evaluating private conduct against the Bill of Rights. In this respect, the Court started breaking down the dichotomous nature of conservative legal reasoning in respect of the appropriate source of horizontal obligations, indicating that constitutional provisions could find both direct and indirect application. The Court's inaugural stance seemed to show support for the direct horizontal application of the provisions contained in the Bill of Rights. Although the judicial guidance that followed was intermittent and somewhat contradictory, and while there was no principled agreement, there were indications[610] that constitutional precepts could find direct application to private parties where appropriate. However, this encouraging development was subsequently cast aside by an ostensible lack of resolve in following through on this transformative potential. The decisions emanating from the Constitutional Court bench over the next two decades caused some concern that the Bill of Rights was being invoked only in cases of blatant unconstitutionality, otherwise being relegated to supplementing statutory and common law norms. Then, in the much-criticised decision in *Barkhuizen v Napier* ("*Barkhuizen*"),[611] the Court seemed to express a preference for the indirect application of the Bill of Rights over the direct application of constitutional provisions, preferring to route its methodology through the public *boni mores* avenue of contract law. This stance characterised the Court's jurisprudence for the next decade and left the

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the Bill of Rights even comprise a change from common law values stripped of racist baggage: LTC Harms "Judging under a Bill of Rights" (2009) 12 *PER/PELJ* 1-20; Fagan "The secondary role"; Fagan "A straw man".

[610] This is the import of the dissenting minority judgment of Langa CJ in *Barkhuizen*, who stated that he was "not convinced that section 8 does not allow for the possibility that certain rights may apply directly to contractual terms or the common law that underlies them". This was recently confirmed by the concurring decision of Victor AJ in *King v De Jager* 2021 (4) SA 1 (CC) para 220. See also Madlanga "Human rights duties" 373.

[611] 2007 (5) SA 323 (CC). This decision has been the subject of numerous academic criticisms: see Currie & de Waal *Handbook* 47; Woolman "Amazing, vanishing" 772-781; H du Plessis "Human dignity in the common law of contract" (2019) 9 *CCR* 409-441 at 435-437; FI Michelman "On the uses of interpretive 'charity': Some notes on application, avoidance, equality and objective unconstitutionality from the 2007 term of the Constitutional Court of South Africa" (2008) 1 *CCR* 1-61; Davis "Where is the map" 13.

impression that indirect application was always preferable to direct application. However, as Victor AJ pointed out in her concurring minority judgment in *King v De Jager* ("*King*"),[612] the constitutional right in question in *Barkhuizen* was the right of access to the court, which is not one that could feasibly be directly applied in the horizontal plane, making the indirect avenue of public policy the appropriate one to the case at hand. Still, the question of correct methodology for the infusion of constitutional law into private law sources, and the forms that this infusion could take, remained open. Moreover, the direct horizontal application of constitutional rights through dedicated legislation mostly lay dormant until it was taken up again in a recent spate of decisions, starting with *Daniels v Scribante* ("*Daniels*").[613]

4.3.2) Recent developments in direct statutory application of constitutional rights

In *Daniels*, section 8(2) was found to be applicable in the context of a dispute between a land owner and an occupier exercising their constitutional-cum-statutory rights under the Extension of Tenure Security Act ("ESTA").[614] In this case, the respondents thwarted the actualisation of the appellant's right to dignity, refusing consent to make improvements to the property to attain a basic level of dignified existence. The appellant admitted these conditions were both lacking and reasonably necessary to the respondent's dignity but denied that the occupier had any entitlement to effect improvements without consent of the owner. It was not even contended that the respondents would suffer any prejudice;[615] they merely wanted to exercise the power of their property rights for the sake of it. The provisions of ESTA (specifically sections 5 and 6),[616] rendered in their proper historical context and read in line with the pertinent constitutional provisions (sections 10, 25(6) and

[612] 2021 (4) SA 1 (CC) para 179s.
[613] 2017 (4) SA 341 (CC). Even before this decision, the Constitutional Court has been clear that property rights are not always going to be immediately vindicated, and that the property owner's patience, cooperation and compromise may be required to assist in vindicating the rights: see *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 40; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) para 18. See also AJ van der Walt & SM Viljoen "The constitutional mandate for social welfare – Systemic differences and links between property, land rights and housing rights" (2015) 18 *PER/PELJ* 1035-1090 at 1067-1068.
[614] 62 of 1997.
[615] Para 210.
[616] Section 5(a) spells out the fundamental right of every ESTA occupier to human dignity and section 6 lists the various rights and duties that make up an occupier's right of residence.

39(2)) were found to present an embodiment of the constitutional right located in section 25(6). Although the legislation was found to fall short of encapsulating the common law standard of habitability (a necessary component of the right to live a dignified life), Madlanga J (writing for the majority) undertook an expansive interpretation of the relevant provisions to imply this requirement without necessitating legislative amendment.[617] Further, given the horizontal plane that ESTA regulates (frequently involving natural persons occupying land owned by other private parties), section 8(2) was found applicable.[618]

Ernst Marais and Gustav Muller make the case that the majority judgment in *Daniels* does a disservice to dignity jurisprudence because it relies on an unduly strained interpretation of the statutory provisions.[619] The authors argue that it would have been preferable to develop the deficient common law to provide the right to make improvements of an unfit dwelling, which they defend by resort to the principles of subsidiarity. The authors contend that in the event of partial legislation (legislation that only gives partial effect to a constitutional right, stopping short of fulfilling the constitutional mandate), which they view ESTA to be, the common law fills the gaps and should be developed to accommodate the constitutional entitlement where this is lacking rather than embark on an overly broad construction of the statutory provisions that "entails the risk of dignity becoming so broad as to be meaningless".[620] The authors accuse the court of judicial overreach or activism, contending that the statutory interpretation and consequent order amount to judicial legislation that should be avoided in favour of performing the same functions in respect of the common law, which would not present the same problems.[621]

Davis responds to the authors' criticism of the majority decision in *Daniels* by contending that they misconstrue the purpose and praxis of subsidiarity,[622] and minimise the role of constitutional values in statutory interpretation. Further, he argues that they misread the majority judgment as straining the meaning of section 5 of ESTA, whereas Madlanga J

[617] Paras 29-36.
[618] Paras 38-41.
[619] Marais & Muller "ESTA occupier".
[620] Marais & Muller "ESTA occupier" 783.
[621] Marais & Muller "ESTA occupier" 789. Cf Davis "ESTA occupier" 424.
[622] Davis "ESTA occupier" 424.

based his construction on section 5 read with section 6.[623] Davis observes that the contentious term that the relevant statutory right turns on – the right to "reside" – does not "lift itself unaided into a meaning which promotes the objectives of ESTA".[624] He concludes that the majority judgment, "far from employing a strained interpretation as Marais [and] Muller describe it, admirably showed a fidelity to the relevant normative framework which in ESTA is to be found in the statute".[625]

4.3.3) Positive horizontal obligations

The respondents in *Daniels* argued that the Court would be placing a positive obligation on them by requiring them to ensure the habitability of the property.[626] This duty, it was argued, would fall to them to ensure the inhabitants of the property were able to enjoy their rights under section 25(6) of the Constitution. The majority makes it clear that there is no conceptual or theoretical or even textual barrier to imposing positive obligations on private parties.[627] The majority judgment endorses *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* ("*Blue Moonlight*"),[628] as correct and applicable, characterising that judgment as imposing "a direct, positive obligation" on a private party.[629] Yet, the Court was quick to caution against imposing burdens on private parties that properly belong to the state or would present an unreasonable incursion into the private party's patrimony.[630] The majority and multiple concurring minority judgments demonstrate that identical content can be ascribed to a legal duty whether it is characterised as positive or negative in nature. The majority judgment appeared to endorse the concretisation of constitutional rights on the facts, reaffirming that rights could be carved out on the facts that had not previously been recognised.[631] Dismissing the

[623] Davis "ESTA occupier" 425-426.
[624] Davis "ESTA occupier" 430.
[625] Davis "ESTA occupier" 431-432.
[626] Para 37.
[627] Para 39.
[628] 2012 2 SA 104 (CC).
[629] Para 52. Later in the same paragraph, Madlanga J describes this as a "direct, onerous obligation".
[630] Para 40.
[631] Para 27 per Madlanga J: "Whether the right exists must depend on what an interpretative exercise yields."

contention that positive obligations do not arise horizontally from the Bill of Rights, Madlanga J clarifies:

> "I see no basis for reading the reference in section 8(2) to 'the nature of the duty imposed by the right' to mean, if a right in the Bill of Rights would have the effect of imposing a positive obligation, under no circumstances will it bind a natural or juristic person. Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the 'potential of invasion of that right by persons other than the State or organs of state'; and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that."[632]

Although this conclusion enjoyed the support of three of the four decisions handed down in this matter, Jafta J dissented, opting for a "plain reading" of the provisions of the Bill of Rights to discern which were capable of horizontal application.[633] I submit that Jafta J's reasoning is out of step with the constitutional endeavour of transformation and the legal culture that should foster it. He is not willing to recognise positive obligations attaching to private parties, even in principle, which evidences a literalist approach that clings to conventional dogma about the conceptual differences between positive and negative obligations in private law.

Daniels brought on the next wave of academic debate about the horizontal operation of the Bill of Rights. Rautenbach opines that the Court was wrong to base its decision solely on section 8(2), contending that section 8(1) should have been used to assess whether the legislation in question gave effect to the section 25(6) constitutional entitlement.[634] The author argues that section 8(2) was understated by the Court, as it not only avails the possibility of imposing positive obligations, but further states exactly when this is apposite, namely "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[635] Rautenbach avers that

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[632] Para 39 (citations omitted). In *Baron v Claytile (Pty) Limited* 2017 (5) SA 329 (CC) para 36, Pretorius AJ similarly remarked about private disputes involving constitutional rights that "[i]f in the end the result is such that what could be classified as a horizontal obligation is imposed it must be justified".

[633] Para 159.

[634] IM Rautenbach "Sosiale regte en private pligte — Huisvesting op plase: *Daniels v Scribante* 2017 8 BCLR 949 (KH)" (2017) 14 *Litnet Akademies* 959-974 at 964-966.

[635] Rautenbach "Sosiale regte" 969 quoting the Afrikaans text of the provision. The author points out that the negative component of constitutional rights – even those that find positive vertical operation like section 26(1) and 27(1) – is also not explicitly identified in the text like Jafta J seems to expect of positive obligations, which rather undercuts the judge's position on this.

the majority judgment gives greater effect to the project of transformative constitutionalism than Jafta J's approach, as well as portraying a more accurate reading of the decisions in *Governing Body of the Juma Musjid Primary School & Others v Ahmed Asruff Essay N.O. & Others* ("*Juma*")[636] and *Blue Moonlight* in respect of the operation of positive duties against private parties.[637]

Shortly after *Daniels,* the Constitutional Court reaffirmed the general proclivity for imposing positive duties on private landowners, again in terms of legislation giving effect to a constitutional right (in casu, section 10(2) of ESTA) in *Baron v Claytile (Pty) Limited* ("Baron").[638] In *Baron*, the respondent sought an eviction order against certain farmworkers residing on his property. It is trite that an eviction order will not be granted if it will render the resident homeless in accordance with section 26(1) and (3) of the Constitution and the legislation promulgated to give effect to this provision. The legal question was when an eviction order would be considered just and equitable, and specifically what would constitute "suitable alternative accommodation" for the evictees. The appellants argued that the accommodation that the municipality offered for their relocation was both inadequate and too far removed from their places of employment and their children's schools.

On the matter of the horizontal application of constitutional rights, the Court affirmed (per Pretorius J):

> "If in the end the result is such that what could be classified as a horizontal obligation is imposed it must be justified. But often adherence to a strict classification of horizontal or vertical application of the Bill of Rights obfuscates the true issue: whether, within the relevant constitutional and statutory context, a greater 'give' is required from certain parties. Any 'give' must be in line with the Constitution."[639]

In the final order the Court created the positive burden of transporting all children subject to the eviction order to the school where they were enrolled for the remainder of that school year, which the respondent voluntarily undertook to enable the execution of the eviction order. No duties operated in favour of the adult members in the application who were subject to eviction, indicating the nuanced evaluation that is called for in such

[636] 2011 (8) BCLR 761 (CC).
[637] Rautenbach "Sosiale regte" 969-670.
[638] 2017 (5) SA 329 (CC).
[639] Para 36 per Pretorius AJ.

cases.[640] Unfortunately, it is not clear on what basis (constitutional, statutory or contractual) the duty arose as the Court did not invoke any of the constitutional provisions that one may think relevant, like section 28(2). Yet, the *obiter dicta* show how private parties may be expected to shoulder the burden of ensuring that other private parties' interests are duly recognised, and the impact of their actions is factored into the exercise of their rights.

Elsabé van der Sijde suggests that following *Daniels* and *Baron* we should see "positive obligations as a constitutional 'tool' in the toolkit of legislatures (albeit sparingly used), and ambiguous legislation can be interpreted to give effect to this possibility".[641] Equally, courts should recognise horizontal duties when a constitutional principle or provision so requires, regardless of the extant private law position. *Daniels* and *Baron* show that an individual property owner may be expected to contribute to the dignified living conditions of others before their property rights will be enforced, owing to their special position in society as property owner.

Refreshingly, the Constitutional Court subsequently took a clearer approach in respect of the imposition of horizontal obligations. *AB v Pridwin Preparatory School* ("*Pridwin*")[642] concerned a contractual provision, the exercise of which was claimed to infringe on constitutional rights, namely the right to a basic education in terms of section 29(1)(a) (read in conjunction with section 29(3)(a)-(c)) and the right of every child to have their best interests considered paramount in all cases concerning them in terms of section 28(2). The crux of the dispute was whether the school was permitted to invoke its powers to terminate an agreement with the parents or guardians of the children due to the misbehaviour of the parents without affording both the parents and children an opportunity to be heard in the matter. Both the majority (per Theron J) and dissenting judgment (per Nicholls AJ) held that the constitutional right of every child to a basic education – heavily complemented by section 28(2) – must be protected from negative incursion by private parties that are positioned to do so.

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[640] Para 54.
[641] E van der Sijde "Tenure security for ESTA occupiers: Building on the *obiter* remarks in *Baron v Claytile Ltd*" (2020) 36 *SAJHR* 1-19.
[642] [2020] ZACC 12.

Because the school had undertaken to provide the children with an education, they were bound to continue doing so if not doing so would be prohibitively disruptive to or potentially deny the children their due constitutional entitlements, effectively frustrating the fulfilment of a constitutional right. This would lead to an order for the continuation of a positive act that they were already undertaking.[643] By assuming the position of provider of a basic education, the school incurs positive and negative obligations towards children in its care.[644] When a private actor is legitimately exercising a public power, this may be a basis for holding that party to an enhanced or prolonged responsibility before they can be completely absolved of the duty.[645] However, the Court was careful to distinguish the performance of a constitutional function (like the respondent does) from the assumption of a constitutional obligation (like in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*).[646]

The Court found that the obligation that operates between the private school and the children in terms of section 29(1)(a) is a negative one.[647] Nicholls AJ similarly argues that the school did indeed have an obligation not to interfere with the constitutional rights of the children already in its care, characterising it as a negative duty.[648] The Court considered whether there were any "less restrictive sanctions" available to the school in the circumstances, showing the importance of the culture of justification even when exercising private power.[649] The impact on the interests of other private parties is brought into the justification inquiry as "a key consideration in the objective assessment of whether

[643] In this case, the children had already been relocated to another school by the time the case was heard by the Constitutional Court, making the availability of such an order relevant only to future cases.
[644] Para 147, 157, 167.
[645] Para 196.
[646] 2014 (1) SA 604 (CC), para 179. In *AllPay*, the Court unanimously held that constitutional obligations may arise in contract and continue to bind a party even after the termination or suspension if this is required to secure the constitutional right. The Court held that when performing the constitutional functions of the state, a private party assumes constitutional obligations that cannot be shirked at will, and that party may even be required to continue providing the relevant service beyond the terms to which it had agreed. However, as Finn "Befriending the Bogeyman" at 604 observes, these obligations were rooted in section 239 of the Constitution, which defines "organ of state" to include "any other functionary or institution […] exercising a public power or performing a public function". Accordingly, the private party was treated as a public functionary, meaning that this decision has no bearing on section 8(2) and (3).
[647] Para 181.
[648] Para 89.
[649] Para 202.

Pridwin's decision was justified".[650] It seems, then, that the school was under an unarticulated obligation to consider the impact of its conduct on the interests of those in its care and to act in a way that minimises the risk of harm to those parties. Exercising its power from this special position (authorised, it may be repeated, by the Constitution itself) it is then subject to the same type of constraint that a public actor (an agent of the state) would find imposed on their conduct.

Nicholls AJ also found that the duty is negative but arrived at this conclusion by invalidating the contractual clause by direct application of the relevant constitutional rights, although noting that she could reach the same result by following the *Barkhuizen* route of indirect application through public policy.[651] In contradistinction to Jafta's construction of the Bill of Rights' provisions in *Daniels*, Nicholls AJ found that there is nothing in the provisions of the Bill of Rights relevant to this matter preventing the imposition of a duty on a private party.[652] This stance inverts the conventional starting point from one of justifying any impositions of duties on private parties to a more open stance freed from conservative starting points. However, the judge still drew the requisite distinction between public and private power and the nature of duties that the Bill of Rights imposes on the holder of each, respectively, as required by the wording of section 8(2).[653] Nicholls AJ found that the school did indeed have an obligation not to interfere with the constitutional rights of the children already in its care, characterising it as a negative duty.[654]

Finn regards *Pridwin* as a continuation of the trajectory set in *Daniels* because the Court "recognises that private persons can wield great and entrenched power, and thus profoundly impair the realization of rights".[655] Tom Lowenthal also urges an embrace of the position in *Daniels* and *Pridwin* as regards the possibility of positive horizontal obligations, arguing that it presents a transformative interpretation of the constitutional

[650] Para 202.
[651] Paras 67, 91-92.
[652] Para 77.
[653] Para 82-83. However, the nature of the duty is not always determined by the identity and character of the duty-holder, as the nature of the service could be determinative of whether the party bears a duty to other private persons, as in *Juma* and *AllPay.*
[654] Para 89.
[655] Finn "Befriending the Bogeyman" at 593.

provision that is to be welcomed.[656] However, as the author notes, many aspects of the judgment in *Pridwin* could be clearer, like the basis and method for determining whether a duty exists and the relation between this judgment and *Daniels*.[657]

Finn suggests that some of the early decisions of the Constitutional Court have caused litigants to frame their arguments in negative terms "because, historically, the court has made much of the distinction between negative and positive duties in respect of private persons".[658] She argues that this distinction is overstated and has in any event been largely abandoned in subsequent cases, making it of limited utility going forward. Moreover, the author argues that the Court in *Pridwin* imposed positive obligations while claiming that the duties were merely negative.[659] She counsels that "[t]he sharp, and seemingly normatively significant, distinction between negative and positive duties should be abandoned."[660] Lowenthal also observes that the positive-negative distinction that still dominates the discourse on horizontal obligations is becoming increasingly arbitrary and vague, even "tenuous and contingent".[661] Lowenthal is correct in saying that "negative obligations can often relatively easily be restated as positive obligations and vice versa" and that "'negative' respect for rights could require positive action".[662]

Most recently in *Grobler v Phillips*,[663] the Constitutional Court was faced with a possible eviction of an elderly woman and her disabled son from the property on which they had resided for decades and who were claiming the protections of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ("PIE").[664] The landowner had made repeated offers for assistance in relocation and contributions towards their future housing.

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[656] T Lowenthal "*AB v Pridwin Preparatory School*: progress and problems in horizontal human rights law" (2020) 36 *SAJHR* 261-274 at 267.
[657] Lowenthal "Progress and problems" 268, 270.
[658] Finn "Befriending the Bogeyman" at 604.
[659] Finn "Befriending the Bogeyman" at 604:
"If anything, however, the duty in practice is a duty *to do* something positive — that is, to continue to provide a basic education to enrolled learners (unless there is an appropriate justification not to) and the derivative duty to afford the opportunity to make representations before terminating the contract."
[660] Finn "Befriending the Bogeyman" at 604 (emphasis in original).
[661] Lowenthal "Progress and problems" 269:
"If the positive/negative distinction is a proxy for interference with the private autonomy of the putative duty-bearer (or at least, the onerousness of the obligation on them), Pridwin shows it to be a poor proxy."
[662] Lowenthal "Progress and problems" 269.
[663] [2022] ZACC 32.
[664] 19 of 1998.

The main issue of contention arose because the elderly tenant refused to relocate and insisted that she had a right to remain on the property until her death. She pled this case based on *Baron* and made out an argument on the basis of ESTA as the property had formerly been a rural dwelling that had been reclassified as urban during the tenure of her occupation. The Court had to decide whether an eviction order would be just and equitable in the circumstances.

The Court stated that the duty to provide alternative accommodation does not lie with the landowner wishing to evict a tenant, but rather with the local authority in the area.[665] Relying on *Ndlovu v Ngcobo, Bekker v Jika*[666] and *Blue Moonlight*, Tshiqi J held that PIE does not intend to expropriate private landowners of their property or to let them suffer a deprivation through the unlawful occupation of the property. Moreover, the landowner's generous offer to provide such alternative accommodation does not create a duty, but is merely one of the factors that goes into the determination of whether an eviction would be just and equitable in the circumstances.[667] To achieve a just and equitable balance of rights, "compromises have to be made by both parties".[668] The fact that the tenant in this matter took the stance of blunt refusal to consider all alternative accommodation weighed heavily against her. Importantly, the Court cautioned that "[a] just and equitable order should not be translated to mean that only the rights of the unlawful occupier are given consideration and that those of the property owner should be ignored."[669] The Court held that, although the landowner's voluntary offer to purchase another property for the tenants to live in "should not be construed as setting a precedent on what other private landowners are obliged to do in similar circumstances", it assisted the Court in making an eviction order that was just and equitable to all parties.[670] However, while this order was aimed at securing the tenant's rights with the cooperation of the landowner, "there is no obligation on a private landowner to provide alternative accommodation to an unlawful occupier".[671]

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[665] Para 37.
[666] 2003 (1) SA 113 (SCA).
[667] Para 38.
[668] Para 40.
[669] Para 44.
[670] Para 48.
[671] Para 48.

This decision continues the line of cases on the question whether horizontal obligations attach to private property owners, finding that such obligations may be appropriate where they contribute to the balance of rights that make up a just and equitable order. It furthers the notion that private property owners may be expected to contribute to the welfare of others when they are in a position to do so, and that a tenant's right of access to adequate housing must be secured in parallel to the vindication of the owner's property rights. This lesson may be carried over to the copyright context, where copyright owners may not be able to insist on the full enforcement of their rights in all circumstances regardless of the effects that such enforcement may have on the interests of others. When constitutional interests are involved, especially those touching on the right to dignity, it may be incumbent upon property owners – including copyright owners – to compromise if they wish to enforce their rights. This is in furtherance of the constitutional project of equal concern and respect for the dignity of all, as championed by Dworkin's model of law as integrity.[672]

4.3.4) Transformative judicial reasoning

The decision in *Baron* is a good illustration of substantive reasoning replacing the mechanistic logic that usually attends private law disputes like evictions because it consciously uncovers the structure and form of private law reasoning: rights acting as trumps over non-rights interests, operating in the hierarchical fashion to which ownership is accustomed in property disputes.[673] The positive duty to provide transport to the school-going children was occasioned by the owner's wish to obtain and enforce an eviction order despite the fact that the state was not able to house the residents expeditiously in the vicinity of their school.[674] This insistence was the basis on which the Court imposed the positive obligations on the property owners, with the message either to be patient in allowing others' interests to be secured before your own or to help solve the other parties' problem. The Court's approach correctly situates the question of whether private

[672] See Chapter 3 Section 3.2.
[673] Van der Sijde "Tenure security" 10-11.
[674] There are numerous factors that the court is obliged to consider before arriving at an appropriate order in terms of s (10)(3)(c) of ESTA.

obligations accrue at the doorstep of section 8(2) rather than locating the answer in the realm of extant private law obligations, which would be an abdication of the transformative imperative.

Van der Sijde observes that this case was decided in the same context of historical dispossession and indignity that was set out at some length in *Daniels*.[675] Froneman J's decision in *Daniels* spent substantial space relaying the historical context of unsecure tenure and the power that property rights were used to wield in the private sphere during Apartheid.[676] This is a crucial contextualisation of the dispute and explains much of the robust stance that this decision adopts. The interplay between the historical setting of inequality and dispossession of land on the one hand and contemporary property owners' rights on the other was central to both cases and presents a more robust version of contextualism in adjudicative interpretation than has been seen previously. The contextualisation of the dispute in its socio-economic reality is an indispensable feature of transformative adjudication geared towards delivering situational and restorative justice.

Pridwin demonstrates how the culture of justification can take unusual forms: not only when public power is exercised are such obligations triggered, but also when private power is wielded. This conclusion was reached based on public policy considerations (as in *Barkhuizen*) as well as direct application of constitutional provisions (section 28(2)) to create (apparently) negative obligations that require positive action from the private party to avoid incursion into constitutional rights. *Pridwin* shows how a principle (such as the best interests of a child always being paramount) that has attained constitutional stature can direct the interpretive exercise towards securing its underlying values and objectives, even in the face of other prevailing rights.[677]

Victor AJ's concurring decision in *King*, which dealt with the validity of a *fideicommissum* in a private will that discriminated against women, ultimately traced the legal issue to the

[675] Van der Sijde "Tenure security" 5.
[676] Paras 116-132.
[677] The majority judgment (in para 143) describes section 28(2) – the provision that states that a child's best interests shall be considered paramount in all matters concerning them – as generating an "overarching principle" that has been embodied in the Children's Act 38 of 2005.

single question: "whether human dignity is enhanced or diminished, and whether the achievement of equality is promoted or undermined by the measure in whatever legal reasoning is to be applied."[678] While acknowledging the balancing act between freedom of testation and substantive equality that makes up public policy,[679] the dissent ultimately takes the route of applying the legislation that encapsulates the constitutional right to substantive equality to the matter. In applying the legislation to the matter at hand, Victor AJ consulted a wider context than the provision itself, looking at the preamble, structure and "tenor" of the Act, the setting of systemic inequality, the ideological facets and distributive consequences of ostensibly neutral values and principles, and the constitutional vision of equality.[680] This demonstrates the *Endumeni* commitment to holism of legal method across public and private law, construing the legal document in the greater context of constitutional democracy and the associated normative imperatives. In doing so, the judge devoted considerable attention to expounding upon substantive equality as a constituent component of public policy that must be balanced against the principle of freedom of testation.[681] This analysis revealed that discriminatory testamentary provisions contribute significantly towards the systemic disadvantage that women face in society, which substantive equality rebukes. The question of horizontal application has clearly been settled for Victor AJ, who reads South African law as follows:

> "A horizontal application of [constitutional] rights between private individuals is part of our jurisprudence. Rights in the Bill of Rights are capable of horizontal application; in fact, in appropriate circumstances they may even impose positive obligations on private parties."[682]

The judge clarified her opinion that "[t]he attempt to establish a bright line between the public/private divide in respect of freedom of testation and the right to equality might risk the establishment of a private domain in which to discriminate."[683] In rectifying this contentious dichotomy, Victor AJ counselled that the legislation in question "must be interpreted broadly and purposively to give effect to its fundamental objectives", which

[678] Para 196.
[679] Paras 210-215.
[680] Paras 198-202. See further Moosa "Interpretation of wills" 9.
[681] Paras 211-226.
[682] Para 220.
[683] Para 222.

correspond with the relevant constitutional values and objectives.[684] This is about the clearest affirmation of purposive, contextual, value-based interpretation one could hope to find from any court. The judge dedicates considerable space to unpacking the value of *ubuntu* and how it features in the interpretation of legislation as well as the development of common law, concluding that "considerations of social justice and equity" militate against the systemic inequality that an undue reverence for the principle of freedom of testation would produce.[685]

While the majority decision reached the conclusion of clear unconstitutionality of the testamentary provision by reading the common law concept of public *boni mores* as rebuking the discrimination inherent in the differentiation,[686] Victor AJ's concurring minority decision is arguably more aligned to the methodology that subsidiarity prescribes. Her construction of the numerous sources of law regulating the matter provides a fresh reading of the holistic system of statute, common law and constitutional rights and could inspire similar readings in the sphere of copyright law.

The facts in *Wilkinson and Another v Crawford N.O. and Others* (*Wilkinson*)[687] presented a testamentary disposition effected through a private trust that allegedly discriminated against adopted children who were excluded from inheritance.[688] The Court was asked to provide a declaratory judgment on the meaning of four statutory terms: "descendants", "legal descendants", "children" and "issue",[689] leading to a finding on whether adopted children stood to inherit from a private trust. The trust did not expressly exclude them from the line of eligible descendants but the legislation that governed the matter at the time of the testator's death presumptively did.[690]

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[684] Para 231.
[685] Paras 237-245.
[686] Paras 127-128, 137, 154, 161.
[687] 2021 (4) SA 323 (CC).
[688] This exclusion was by operation of law rather than explicit testamentary exclusion, as the legislation at the time of the execution of the testator's will, the Children's Act 31 of 1937, in section 71(2)(a) required testators to expressly include adopted children in their bequests if they wished for them to be included, else they would be deemed to fall outside of the terms "children" and "descendants" in wills and trust deeds.
[689] "Issue" used as a noun in the testamentary instrument, was found to be synonymous with "children": para 50.
[690] Section 71(2) of the Children's Act 31 of 1937 created a presumption of exclusion against adopted children being included in testamentary dispositions unless expressly included.

The Court adopted the golden rule of interpretation as its point of departure in respect of the meaning of the four words in dispute, construing them in the context in which they were originally used.[691] In other words, the question is whether any clear intention is discernible from the testator's selection of the words "children", descendants", "legal descendants" and "issue", either to include or exclude adopted children from inheritance.[692] If the intention to exclude is not clear from the will, the final question emerges whether the presumptive deeming clause of the erstwhile Children's Act which then imputes exclusionary intention to the testator is *contra bonos mores* and thus unenforceable.

Writing for the majority, Mhlantla J held that the contradictory invocations of the terms in the Trust Deed did not provide a sufficiently clear indication ("free from obscurity or ambiguity")[693] of the testator's intention to include adopted children, meaning that the more holistic view of the document (rather than a narrow focus on the terms "descendants" and "legal descendants" construed independently) rendered the conclusion that adopted children could not inherit in equal portion to biological children. Having found that the best interpretation of the Trust Deed revealed no intention to include adopted children in the inheritance scheme, the Court turned its attention to whether the terms of the Trust Deed were *contra bonos mores* and consequently unenforceable.

Mhlantla J acknowledged that freedom of testation operates subject to limitations like the public policy rule, and that "[t]he Constitution is […] our starting point in determining the content of public policy"; further, "based on the need to give meaning and effect to all rights in the Constitution equally, it is perspicuous that several balancing factors must be considered by a court in determining whether a testamentary provision is contrary to public policy."[694] The Court identified the rights to dignity, privacy and property as

[691] Para 36. This accords with what Moosa "Interpretation of wills" 15-16 describes as "a textual or ordinary grammatical meaning" in which "words are given a plain, natural and literal interpretation" when construing the "internal material" of a testamentary instrument, although the author adds that "[c]ontext gives colour to the language of a document […] [and] must be considered, even if the text of the will is clear and unambiguous" (citations omitted). The similarity to constitutional interpretation of legislative instruments is clear.
[692] If this question were answered in the appellants' favour, there would be no need to consider the question of constitutionality as the alleged mischief has been resolved.
[693] Para 59.
[694] Para 69.

underlying the common law principle of freedom of testation and factored it into the public policy analysis accordingly.[695] Importantly, unlike when determining authorial intention, the Court stated that public policy must be determined at the time of the enforcement of the will or trust, not at the time of its conclusion.[696]

Addressing the distinction between public charitable trusts and private trusts, the Court acknowledged that the latter should be treated with more deference than the former, though both are subject to the public policy rule.[697] Moreover, just like with a public charitable trust, if any provision of the Trust Deed of a private trust is found *contra bonos mores* by reason of unfair discrimination, it shall be unenforceable.[698] Finding that adoptive status was analogous to birth as a ground of unfair discrimination, the Court held that the discrimination is unfair.[699] After considering international and foreign law on the issue, the majority concluded that the recognition of adopted children as part of their families is a core component of human dignity, the right to family life, and the best interests of the child.[700] On this basis of constitutionally inspired public policy, the Court found that the offending terms could be interpreted to include adopted children as the Constitution requires. The remedy was to treat the offending provisions as *pro non scripto*, meaning that the Court reads past them as if they were never written, which is similar to the severance of words from statutory provisions.[701]

It is interesting to note that the majority's interpretation of the disputed terms was based on public policy considerations rather than a straightforward novel interpretation of the testator's intention. According to Mhlantla J, the testator's intention was clear enough on a holistic construction of the Trust Deed and could not be second-guessed; however, these wishes would go against constitutional norms and outcomes and could not be sanctioned.[702] However, Majiedt J penned a dissenting judgment, electing instead a direct application of the rights to equality and human dignity of the testator, finding that freedom

[695] Para 70.
[696] Para 71.
[697] Para 73.
[698] Para 74.
[699] Para 78.
[700] Paras 90-94.
[701] Para 100.
[702] Para 152.

of testation is constitutionally entrenched and concluding that the majority's reliance on equality is misplaced.[703] Majiedt J held that the term "birth" must relate to a fact of birth, not a subsequent event that amends whatever status was awarded at birth, calling this its "ordinary meaning" and describing the interpretation reached by the majority as "unduly strain[ed]".[704] Jafta J also dissented, opting for his preferred "plain meaning" approach displaying conventionalist interpretive practices like plain language construction and relying on "ordinary use" meanings.[705] This led the judge to the conclusion that the testamentary clause only precludes adopted children from inheritance if their adoptive parents had biological children and owned property that devolved upon them.[706] Without this operative condition, the potential exclusion does not arise. Accordingly, the clause is not triggered and there is no discrimination against adopted children on a proper reading of the document.

Wilkinson addresses the central normative question in constitutional methodology: to what extent should constitutional morality permeate private law doctrine? The Court answered this question with reference to public policy, finding that the discrimination was unfair because it ran counter to the guarantees of equality, human dignity, and the right to family life that inform this common law concept. The constitutional content injects itself into the existing doctrinal structures of the common law, infiltrating the heart of its normative components. The majority judgment points to the ground of discrimination being analogous to birth to conclude that testamentary dispositions that are executed under contemporary law must comply with constitutional values as represented in the common law concept of public policy.

4.3.5) Direct constitutional application

The Court in *Pridwin* chose to impose duties on the school based on constitutional rights directly rather than indirectly as in its earlier approach.[707] Although the duty is triggered

[703] Paras 118-121.
[704] Paras 146, 161.
[705] This is especially evident in Jafta J's critique of the SCA judgment in the matter at paras 192-195.
[706] Paras 199-200.
[707] Specifically, the Court clarified the stance taken in *Barkhuizen*, which has been treated as authority for the proposition that indirect application is preferable to direct application whenever possible.

by contract, i.e. the voluntary undertaking to provide educational offerings to the children subject to the dispute, the content of the duty is not contractual in nature as the school is bound to respect the constitutional provisions that apply, namely section 29(1) read in conjunction with section 28(2).[708] The fact that the respondent (an elite private school entirely independent from state funding) was exercising its rights to offer an independent education in terms of section 29(3) of the Constitution did not provide a compelling form of countervailing consideration.

A separate concurring dissent (per Cameron J and Froneman J) describes both the majority decision and Nicholls J's dissenting judgment as developing the common law under the auspice of section 8(3)(a) by creating a responsibility that did not previously exist in the common law.[709] The purpose of their separate judgment is to affirm the result that was reached on the basis of direct application of constitutional rights but to point to the indirect route of developing the law of contract through the mechanism of public policy.

Khampepe J delivers a concurring judgment with majority support that takes a more serious reckoning of the best interests of the children in the case.[710] Her decision places the normative premium on the children's interests, which are lost in the noise of litigation between the children's parents and school, and places due weight on the interests that should have been paramount throughout in accordance with section 28(2). Properly construed, this constitutional right and principle comprises a child's right to participate in matters affecting them, recognising their separate personhood and dignity.[711] This shows yet another way of directly applying the provisions of the Bill of Rights in a private law dispute.

Rautenbach reads the majority decision in *Pridwin* as concerning direct rather than indirect application because the Court deviated from *Barkhuizen* in considering the limitation of constitutional rights themselves, rather than merely the contractual dispute surrounding the enforcement of the termination clause.[712] However, Rautenbach accuses

[708] Para 107.
[709] Para 216.
[710] Paras 220-248.
[711] Para 234.
[712] Rautenbach "Constitution and contract" 390.

the Court of following the indirect route of considering whether the enforcement of a contractual clause can be halted on grounds of fairness, which finds its contractual home in public policy, rather than on the basis of a countervailing constitutional provision.[713] He rightly contends that determining whether direct or indirect application of the Bill of Rights is followed should not merely depend on how the litigants frame their pleadings, as is discernible from this judgment.[714]

Lowenthal proffers that in *Pridwin,* "[t]he Constitutional Court appears to have now explicitly abandoned its preference for indirect effect over direct effect".[715] Finn opines that "[s]ection 8(2) […] acts as both an impetus to the state to legislate [to secure the content of the Bill of Rights in statute], and as a defence [of such state action] if legislation that imposes horizontal obligations is challenged".[716] She contends that this provision should have been relied on as an iteration of the latter function in *Pridwin*.

4.3.6) Reanimating statutory doctrine through indirect application

In *Beadica 231 CC v Trustees for the time being of the Oregon Trust* ("*Beadica*"),[717] the Court was faced with another contract law case, this time involving the renewal of a commercial lease agreement in terms of a clause that required written notice of renewal six months before the end of a five-year term. The applicants in the court *a quo* (appellants in the Constitutional Court) argued that the strict enforcement of the renewal term would result in the failure of their business, which was supported by the affirmative action legislative scheme enacted to enhance economic equality.[718] The question before the Court was whether the operation of contractual clauses could be mediated by constitutional influence; in other words, could the expiration due to non-renewal of the contract be rescinded based on the direct or indirect application of the Bill of Rights?[719]

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[713] Rautenbach "Constitution and contract" 390-391.
[714] Rautenbach "Constitution and contract" 392, citing *Pridwin* para 107.
[715] Lowenthal "Progress and problems" 272-273.
[716] Finn "Befriending the Bogeyman" at 601.
[717] 2020 (5) SA 247 (CC).
[718] Broad Based Black Economic Empowerment Act 53 of 2003.
[719] The minority dissent of Victor AJ (para 222) formulates the central question as simply: "should commercial certainty trump constitutionalism?".

Theron J, writing for the majority, took the path of indirect application in terms of section 39(2), infusing public policy with constitutional values. The Court adopted the *Barkhuizen* position but qualified it to the extent that it overemphasised the role of *pacta sunt servanda*: although courts should be hesitant to interfere with the enforcement of contractual provisions, this should not prevent courts from applying constitutional values.[720] The apparent reason for taking the indirect route as espoused in *Barkhuizen* is that no constitutional provisions were pleaded directly, and none obviously pertained. This is despite the right to equality being proffered as relevant, albeit in statutory form, and the right to dignity underlying the general contractual autonomy.

The applicants pleaded commercial inexperience to motivate their failure to timeously exercise their right of renewal, which found sympathy in both dissenting judgments of Froneman J and Victor AJ but was rejected by the majority for not being plausible on the facts.[721] In applying the *Barkhuizen* approach, the Court found that the appellants had not satisfactorily explained their failure to renew the contract, as *Barkhuizen* requires of a litigant seeking to escape the effects of a valid contractual clause.[722] The Court reiterated that the public *boni mores* defence does not allow courts to strike down or suspend the operation of provisions that they regard as unfair or unreasonable because these values do not provide justiciable rights in themselves but rather inform the analysis in a supplementary fashion.[723] Instead, the Court advocated an all-things-considered perspective, which takes account of the principles underlying the law of contract, the values of the Bill of Rights (in which public policy is grounded), legislative endeavours to implement constitutional precepts like equality and economic transformation, and

[720] Paras 87-90.
[721] Theron J explained (at para 94) that the contractual terms were drafted "in simple, uncomplicated language that an ordinary person could reasonably be expected to understand".
[722] Para 95.
[723] In para 79 Theron J states that constitutional values "perform creative, informative and controlling functions" in interpretation, but warns that "abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships". Rautenbach "Constitution and contract" 381 notes that when applied in this indirect manner, abstract values comprise both constitutional values and constitutional rights provisions. At 832, the author explains that:

> "The abstract values include good faith (par 22), fairness, reasonableness, justice, *ubuntu* as a constitutional value (par 72), constitutional principles encapsulated in the bill of rights (par 29), the normative value system that the constitution and particularly the bill of rights embodies (par 71), constitutional rights (par 71) and constitutional values in general (par 76)".

cogency of reason for non-compliance with the contract.[724] This is a clear demonstration that a bald assertion of unfairness or unreasonableness does not satisfy the requisite standards for judicial intervention on public policy grounds.

The minority decision of Froneman J differed on this score: the judge considered that the disproportionate effects of the expiry of the lease were relevant to determining the fairness and reasonableness of the matter, which made this relevant under the public policy implicated by indirect application. Froneman J's decision does not differ with the majority in respect of the applicability of the *Barkhuizen* requirements, namely that the party seeking to escape the operation of a contractual clause is able to provide a good reason for their non-compliance and that the enforcement of the clause would be so unduly harsh on the facts of the case that it would be *contra bonos mores* (which reflects constitutional norms). Yet the judge differs with the majority on the conclusion that he reaches, finding in the affirmative on both counts and consequently holding that the contract should be reinstated as if it had been validly renewed. Further, Froneman J laments that the majority approach does a disservice to constitutional jurisprudence by cementing the perception of values as entirely distinct from legal rules, when in reality they form an integral part of the rules of contract.[725]

The final dissenting judgment was delivered by Victor AJ and revolves around the role of the value of *ubuntu* in contract law. The judge warns against equating *ubuntu* and fairness, noting that the former value is much wider than the latter.[726] Victor AJ pits contractual autonomy against the project of transformative constitutionalism, calling for a balance between the countervailing ideals in the context of black economic empowerment.[727] She characterises *ubuntu* as being evident in the constitutional values of dignity and equality, arguing that its recognition in contract law has become urgent and pressing.[728] Further, the judge proposes a constitutional, purposive, value-based approach to the adjudication of contract disputes that does not sacrifice certainty of

[724] Paras 71-101.
[725] Paras 145, 151, 160. Both Froneman J (para 112) and Victor AJ (para 214) emphasise that giving the legal concept of fairness any content necessarily requires a choice of values, making this a moral decision. This accords perfectly with Dworkin's view on the matter.
[726] Para 207.
[727] Para 209.
[728] Para 213.

outcome for situational justice.[729] She explains that "[t]he emphasis in this dissent illustrates that when adjudicating the law of contract, the underlying values must be consonant with the transformative constitutional values which include the value of *ubuntu,* whilst simultaneously attaining appropriate levels of certainty."[730]

Both Victor AJ and Froneman J hinge their respective dissents on the moral content given to the constitutional values, which they both acknowledge as determinative of the elected resolution, rejecting the possibility of value-neutral principles.[731] Both judgments place the unequal bargaining position at the fore of the public policy inquiry and reach the dissenting conclusion that the contract should be renewed, Froneman J by means of fairness and Victor AJ on the back of *ubuntu*.[732] These decisions both portray context-driven substantive reasoning striving towards constitutional objectives and both arrive at the same conclusion by different constructions of the moral content of the Bill of Rights.

Finn views the decision in *Beadica* as not only contradictory to the direct route taken in *Pridwin* despite the availability of a subsidiary legal rule, but also more congruent with the instruction in *Pharmaceutical Manufacturers* to maintain a single system of law.[733] On her reading of subsidiarity, the Court was not permitted to directly apply the constitutional rights in issue because of the subsidiary sources that could do the work equally well. The author attributes the misstep in the *Pridwin* reasoning to confusion over the source of the right in issue.[734] She explains:

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[729] Para 216 per Victor AJ:
"The additional scrutiny through the prism of *ubuntu*, is but a more focused legal methodology to achieve justice as between two parties. It does not exclude or undermine certainty in contract. It remains a central consideration in harmony with the other values."

[730] Para 218 per Victor AJ.

[731] Para 214 and para 112 respectively. At para 220 Victor AJ explicitly recognises this:
"When adjudicating the law of contract, certainty and the principle of *pactum sunt servanda* will continue to be consonant with what the second judgment refers to as a consideration in the '*underlying moral or value choice'*. Based on this tonal palette, the recognition of the value of *ubuntu* in the interpretive process will not detract from the principles of certainty in contract, instead it will contribute to the achievement of the transformative goals required by the Constitution." (emphasis in original).

[732] Froneman J at paras 121, 188, 202 and Victor AJ at paras 207-208, 224-228. See also Wallis "Interpretation" 16-17.

[733] Finn "Befriending the Bogeyman" at 599-600.

[734] Finn "Befriending the Bogeyman" at 600. The author explains (*ibid*):
"[I]t is entirely possible for a right to be sourced in the Constitution, but be given effect in the common law." (emphasis in original).
By extension, this argument should also apply to legislation, but the author does not consider this point.

> "Just because a right is recognised in the Bill of Rights does not commit the court to upholding that right only through *direct* application. The mistaken idea that it does perpetuates the sense that there are parallel systems of law: one that it (*sic*) shaped by and tested against the Constitution, and another that is autonomous and can be ignored, rather than constitutionally infused."[735]

This is an interesting critique that warrants attention. Finn contends that "[i]ndirect application is simply an instantiation of the principle of subsidiarity" because it prevents courts from resorting to the more general provisions embodied in the Bill of Rights when specific common law rules can accommodate the relevant norms.[736] She proposes the indirect route as appropriate for rebuilding South African private law, as direct application "paradoxically undermines the important idea of constitutional diffusion across all areas of law".[737] Accordingly, Finn posits that indirect application is an occurrence of subsidiarity, specifically, that "more particular norms must first be exhausted before resort is had to the more general norms".[738] Rautenbach disputes this, arguing that "[c]onstitutional provisions are not ordinary general norms that must give way to more specific norms under subsidiarity principles. They are higher norms with which ordinary legal rules and action must comply, even when the bill of rights is applied indirectly".[739] Rautenbach clarifies that her confusion of indirect application and the principle of subsidiarity mistakes the how for the when:

> "Subsidiarity relates to *when* the constitution must be applied, namely only when the constitutionality of an existing legal rule or discretionary action is challenged. Direct application and indirect application are constructions that relate to *how* the constitution must be applied once it has been decided that it is permissible under the subsidiarity principle to apply it."[740]

Only once the statutory embodiment of the constitutional right is determined to be deficient or non-comprehensive does the constitutional right avail itself directly, either to invalidate conflicting statutory provisions or to supplement their content. If the legislation fails to give effect to a constitutional right or fails to go far enough in securing its total scope and ambit, a court may read a provision "up" or "down" to achieve a more extensive

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[735] Finn "Befriending the Bogeyman" at 600 (emphasis in original).
[736] Finn "Befriending the Bogeyman" at 594. The author acknowledges Van der Walt "Normative pluralism" for this argument.
[737] Finn "Befriending the Bogeyman" at 595.
[738] Quoting M Murcott & W van der Westhuizen "The ebb and flow of the application of the principle of subsidiarity — Critical reflections on *Motau* and *My Vote Counts*" (2018) 3 *CCR* 43-67 at 52.
[739] Rautenbach "Constitution and contract" 385.
[740] Rautenbach "Constitution and contract" 383 (emphasis in original).

scope. If the wording of the legislation poses an inescapable violation of a constitutional right, one may challenge the legislation for being unconstitutional and have certain words either "read-in" or severed to achieve constitutional compliance, as appropriate. Otherwise, if the legislation does not cover the field and leaves the matter at hand unregulated, the inquiry moves on to the next subsidiary source of law, namely the common law.

This means that section 39(2) (indirect application in Finn's terms) is applicable before direct application but can lead to direct application when a constitutionally compatible reading cannot be achieved. Indeed, direct application will always only feature after indirect, implying that the indirect application of the Bill of Rights to the common law or legislation still results in a conflict with a constitutional provision. Therefore, indirect application is always the first stop to assess whether the law can be moulded to a compliant form without having to invalidate the legal rule. At every point of the methodology, the Bill of Rights is the appropriate reference point for normative conformity and should ensure the same normative outcome.[741]

However, Finn is still incorrect in arguing that more specific legal norms supplant the general norms. With subsidiarity, the general constitutional norm will always be used to test the conformity of the more specific non-constitutional norms (if that is what subsidiary sources are said to comprise). If insufficient representation of the general is found in the specific, the general plays the additional role of supplementation by filling the gaps left by subject- or topic-specific norms. Direct and indirect application seem, then, to be aimed at separate questions: direct application of constitutional provisions concerns the attainment of the content of the individual provisions of the Bill of Rights, whether they are given effect (partially or fully) in legislation, existing common law doctrine or by reliance on the constitutional provision, while indirect application lends constitutional content to existing legal doctrine in common law and statute. Furthermore, direct reliance on a constitutional provision always follows the conclusion that non-constitutional sources

[741] Woolman "Application" in *CLOSA* 31-45 – 31-46. See generally Friedman "Revisiting horizontality"; Davis "Elegy" in *Rights and Democracy in a Transformative Constitution*.

(which includes direct statutory encapsulation) do not adequately protect the constitutional interest.

This distinction between direct and indirect application was central to the legal question in *King*. Here, the Constitutional Court was confronted with a discriminatory *fideicommissum* provision in a will executed in 1902. The offending clause discriminated against female descendants, presenting a head-on collision between freedom of testation that is deemed sacrosanct in the common law regime (additionally protected as a property entitlement) and the right to and value of equality that is fundamental to the constitutional legal order. The question before the Court was whether any legal grounds existed to intervene in the inheritance scheme, whether by developing the common law, through statutory interpretation, or the direct application of constitutional provisions. While the issue came down to unfair discrimination in both *King* and *Wilkinson*, the dispute in the former was rooted in common law doctrine while the dispute in the latter was rooted in statute, although in *Wilkinson* the public policy development of common law argument as a counterweight to the principle of freedom of testation was also adopted as a secondary line of attack on the discriminatory practice.[742]

The first (concurring minority) judgment of Mhlantla J purports to follow an indirect horizontal approach to conclude that the testamentary provision is contrary to public policy (as determined by the Bill of Rights). Mhlantla J took a principled approach to interpretation by identifying the principles underpinning the common law regime and testing their application *in casu* for constitutional compliance. She endorses the approach in *Carmichele* of coupling section 39(2) to section 173, which awards High Courts, the SCA and the CC "the inherent power […] to develop the common law, taking into account the interests of justice".[743] This is the same approach adopted by the Court in *Barkhuizen* and *Beadica*, which comes down to consulting the objective normative value system as a whole when interpreting the text instead of applying any individual provision directly.[744]

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[742] I do not mean to discount Victor AJ's reliance on PEPUDA to ground her remedy in *King*, not finding it necessary to engage the common law for a remedy.
[743] The court (in para 43) quotes with approval from paras 39 and 54 of *Carmichele*.
[744] On the topic of applying the objective normative value system to the common law through section 39(2), see *Geldenhuys v Minister of Safety and Security* 2002 (4) SA 719 at 728; *Carmichele* paras 39 & 54; *K* para 17. See also *Thebus* para 28; *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum*

Addressing the propriety of the direct and indirect approaches respectively, the judge purports to bind herself to *Barkhuizen* because "[v]arious parallels can be drawn between contractual and testamentary provisions".[745] Mhlantla J regards the search for the testator's intention as the "golden rule of interpretation" in relation to testamentary bequests, which mirrors the traditional approach towards statutory interpretation and, indeed, the construction of contractual terms.[746] However, the same adaptations of statutory interpretive canons do not necessarily translate directly into the private setting in which wills function, as the element of public power that attracts the brunt of the justificatory burden is absent. Notwithstanding, Mhlantla J points out that the Bill of Rights does operate horizontally in respect of the prohibition of unfair discrimination.[747] While this would seem to suggest a direct application of the constitutional provision to the common law rule, she instead opts for the section 39(2) route, concluding that the discriminatory clause cannot be sustained as it is so blatantly *contra bonos mores* for offending against constitutional morality.

Mhlantla J professes that public policy, informed by the public *boni mores* which is "infused with our constitutional values", inescapably leads to the conclusion that private wills must be non-discriminatory.[748] After briefly considering whether to follow the subsidiary legislation route instead of the common law development through public policy, the judge concludes that the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[749] "does not purport to codify the common law public policy standard or the limits of freedom of testation", and that she did not wish to "neglect engaging with this body of jurisprudence and not attempt to bring it in line with a constitutionally infused common law approach".[750]

This shows that transformation-oriented judges may have good reason to pursue indirect above direct application, although the wisdom of doing so in terms of the common law

Ltd 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) para 39; *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) paras 3 & 9; and *S v Boesak* 2001 (1) SA 912 (CC) para 15(b).

[745] Para 39.
[746] Para 34.
[747] Para 70.
[748] Paras 70-85.
[749] 4 of 2000.
[750] Para 41.

instead of constitutionally propagated legislation is up for debate. Indirect application may arguably result in a better integration of constitutional mandates within existing legal frameworks and lead to better normative and structural congruence overall, which is ultimately what law as integrity seeks to achieve. However, whether the subsidiarity principles demand the application of statutory or common law on the facts of a case is another question.

Jafta J, writing for the majority, held that no development of the common law is necessary, as the common law does not permit the enforcement of wills that are contrary to public policy, which incorporates constitutional values.[751] Jafta J distinguished the claim that the right to equality was infringed from the influence that the value of equality may have on the matter.[752] He confirmed that section 39(2) is applicable when values are invoked and the limitations clause in section 36 is reserved for a clash of rights. However, the Court found that the values of freedom and dignity were important to the matter too, as they undergird the right to testamentary disposition that the common law provides as part of the right of ownership.[753]

Ultimately, the Court found that the common law rule itself led to a just and equitable outcome by referencing the constitutional values as the bedrock of public policy.[754] Any testamentary clause that contravenes this bedrock falls foul of the public policy standard as it stands, making it unenforceable according to existing common law. Therefore, the common law was not in need of development and could be applied as is because of its incorporation of constitutional norms.

The final concurring judgment of Victor AJ in *King* also identified the role and content of public policy as the chief issue for consideration, but, in accordance with the principles of subsidiarity, found the practical expression of public policy in this instance to be rooted in the provisions of PEPUDA, which was promulgated to give effect to section 9(4) of the Bill of Rights.[755] Victor AJ explicitly situated her analysis within the project (or in

[751] Paras 90-94.
[752] Para 98.
[753] Para 124-125.
[754] Paras 127-128.
[755] Para 165.

furtherance of the principle, as she labelled it) of transformative constitutionalism.[756] She agreed that there is no section 36 limitation and finds that subsidiarity requires the court to apply the provisions of PEPUDA, constituting direct application of the constitutional provision through its statutory embodiment.[757] Furthermore, there was sufficient reason in this case to transgress the typical separation of the private and public domains, in accordance with the assertive positions on horizontal application in *Daniels* and *Pridwin*.[758] This strong stance on constitutional transformation of private law indicates that the *Barkhuizen* route of indirect application "may need to be reconsidered" in cases where "conceptual difficulties" occasioned by the nature of the right/obligation structure can be overcome.[759] Acknowledging the importance of drawing the values that comprise public policy from the Constitution, the judge emphasised that it is vital to give equality a substantive construction through whichever route is pursued.[760]

4.4 Conclusion

> "Sections 8 and 39(2) have, and were intended to have, profound implications for the South African private law. […] Sections 8 and 39(2) demand that we be returned again and again to the ethical ideals that are supposed to undergird the transformation to a new society. These two sections constantly take us back to ideals, and those ideals are used to transform the law that has remained on the books, but also the false idea that there is some kind of free space in civil society that is unreachable by ideals because it is the so-called place of the free market, a street fight writ large in which the last man standing takes all. Simply put, these sections together deny that there is such a thing called a civil society that is beyond the reach of the critique inherent in the ideals that the Constitution aspires to represent. […] [T]hese two sections are the vehicles through which the aspirational ideals of the Constitution work themselves real through the law."[761]

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[756] Para 166.

[757] Paras 179-190, citing for authority Cameron J's minority decision in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) and Langa CJ's majority in *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC). At para 183 she quotes *My Vote Counts* para 46:

> "Once legislation to fulfil a constitutional right exists, *the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.*" (emphasis in original).

[758] Para 178.

[759] Para 179. As mentioned above, the judge observes that *Barkhuizen* concerned the right of access to courts, which does not lend itself to horizontal application as easily as the right to equality does.

[760] Para 169: "The concept of taking substantive equality seriously means that it should be a component of the public policy test and if necessary, a basis for restricting freedom of testation."

[761] Cornell & Friedman *Mandate* 50 (citations omitted).

Direct horizontal application refers to section 8(2)'s instruction to apply the provisions of the Bill of Rights wherever they may find application, rather than resorting to transformation-oriented constructions of private law doctrine. Although direct application refers to the application of a specific right or rights, the relevant rights provisions must be interpreted within the context of the Bill of Rights as a whole.[762]

The interpretive instruction in section 39(1) is relevant to the application of the rights in the Bill of Rights, while section 39(2) is a mandate for a certain mode of interpretation – purposive, value-based, and aimed at pursuing constitutional goals and protecting constitutional interests and entitlements – that must be employed whenever statutory provisions are read or common law rules are construed and developed. This has become known as the indirect application of the Bill of Rights, which seeks to infuse constitutional content into existing private law doctrine. A better way of thinking about this form of application in respect of statutory interpretation is the reanimation of statutory doctrine, as the normative elements of existing law are given new meaning by invoking constitutional rights and values. The infusion of constitutional normativity into existing doctrine presents a powerful way for the judiciary to transform the law without exceeding its constitutional authority. Contractual provisions or entire agreements could potentially be invalidated to the extent that they conflict with constitutional objectives (as per *Beadica*), and the enforcement of copyright could bump up against a constitutional provision like the right to equality or dignity which is given normative primacy (like the freedom of contract did against the constitutional rights of children in *Pridwin*).[763] Any contractual agreement concluded in terms of the Copyright Act that purports to limit a constitutional right can be invalidated to the extent that it goes against public policy, otherwise a direct application of the relevant constitutional provision may be required.[764]

The Court's decision in *Barkhuizen* had the effect of inclining future courts and litigants towards indirect application whenever it was possible to develop common law doctrine in

[762] Direct application thus calls for an interpretive theory to explain the political content of the provisions of the Bill of Rights, holistically construed, for which something like Dworkin's theory of law as integrity would serve admirably.
[763] See in this regard Van der Walt "Modest systemic status".
[764] In this regard, to the extent that a contractual provision purports to limit a user entitlement that is undergirded by constitutional rights or values (like the fair dealing exceptions in s 12(1)(b)-(c) which instantiate the s 16(1) right to freedom of expression) it may be declared unenforceable.

line with constitutional norms. The subsequent record of case law demonstrates the propensity of the Constitutional Court to opt for the *Barkhuizen* route of indirect application when this option avails but suggests that direct statutory application (as per Victor AJ in *King*) may be the more suitable and orderly route in terms of the principles of subsidiarity. Indeed, the Court has shown a greater willingness to use section 8(2) in the last five years than in previous years, which has dispelled many misunderstandings about its role in cases of horizontal application.

Indirect application has found support in cases like *King* and *Beadica*, where numerous judgments contend that indirect application may sometimes be preferable for reasons of consistency, systemic integrity, and simplicity of using existing concepts (whether derived from common law doctrine or statutory provisions), and that the import and object of the constitutional rights may be adequately secured by wielding existing concepts to greater constitutional effect. In this way all law is shaped by the constitutional concepts in play, ensuring widespread diffusion of constitutional normativity throughout existing sources of law. The majority in *Beadica*, which followed the indirect route of public policy infusion, pointed out that constitutional values do not themselves provide a basis for challenging legal rules but rather inform the holistic contextual assessment of ingrained legal concepts (like the common law principles involved in this dispute). Notwithstanding, Froneman J's dissenting minority judgment makes a viable case for instead considering values as inherent in the law of contract and therefore playing a greater role in the adjudication of cases than on the conservative view that cleaves a formal divide between justiciable rights and non-justiciable values.

Whether indirect application is always preferable is a matter of some contestation. While it seems clear that much transformative good can come from the reanimation of statutory doctrine by reliance on constitutional rights and values, specialised legislation may also give statutory effect to a constitutional entitlement and should be applied where relevant, even if this interoperation of ostensibly private or mercantile law with public constitutional law is not familiar to the adjudicator.[765] Of course, when there is no feasible way of

[765] Where the legislation in question conflicts with legislation enacted to give effect to a constitutional right, the rules relating to legislative conflicts would kick in. These rules should be considered together with, and

reanimating statutory law with constitutional content nor any dedicated constitutional legislation that pertains to the matter, a constitutional right may be applied directly. Ultimately, I submit, it is not important whether a constitutional deficit in non-constitutional law is defeated by the application of a constitutional right, value or superseding legislation; what matters is rather that such an inconsistency with the Constitution is not countenanced. This perspective provides the interpreter considerable leeway in mapping the best route to the constitutional ends, and arguably endows judges with the constitutional authority to develop statutory doctrine by infusing the values of the Bill of Rights into precedential understandings of existing legal doctrine whenever this would be the more fruitful route of engagement. Put differently, when an existing doctrinal concept can accommodate the relevant constitutional norm, this should be encouraged if it achieves a robust embodiment of the normative content. When specialised legislation speaks to the constitutional interest, the legislation may be invoked as a more specific iteration of the general norm. But when a constitutional provision stands without any normative touchpoint in the statute being construed and with no dedicated legislative elaboration of the constitutional provision, it may find direct application as ground for invalidation of the non-constitutional source.

Victor AJ's concurring minority judgment in *King* where she applied PEPUDA as an incarnation of the equality provision presents an interesting methodological approach that appears to better cohere with the principles of subsidiarity than the other decisions in this case. The judge considers that the case presents adequate cause to bridge the divide between the public and private realms, suggesting that the decisions in *Daniels* and *Pridwin* have enabled this stance.[766] She achieves a constitutional outcome in substance and methodology by applying the specialised equality legislation to the matter, holding that this legislation comprises a more detailed form of the constitutional right and norm. However, her most pressing point is to endow equality with a substantive rendering

may be trumped by, the need to give effect to constitutional rights and values (cf. in another context *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* 2020 (2) SA 325 (CC)). Moreover, some legislation that was enacted to give effect to constitutional rights, like PEPUDA, expressly provides in s 5(2) that its provisions will prevail over other legislation in cases of conflict.

[766] Paras 175, 220.

regardless of which avenue of application is followed, suggesting that this is more important than selecting the correct methodology.[767] This represents a truly holistic construction of the law under the single-system-of-law principle that takes seriously the rights granted in the Constitution and strives towards an integrated normative understanding of the fundamental rights and values underpinning the constitutional legal order. This unshackling from conservative constraints arguably leaves courts open to new and creative ways of optimising the constitutional content that is ascribed to private law sources, whether by construing specialised legislation meant to elaborate constitutional rights, new renditions of old normative concepts, or the direct application of a constitutional provision to the facts at hand. This allows a principled normative revision of private law to emerge from the dictates of subsidiarity, which feeds into the important legal ideals of certainty and predictability while simultaneously pursuing the unflinching transformation of all sources under the Constitution.

The Court has eroded other conservative axioms too, like the notion that legal principles are value neutral. Both Froneman J and Victor AJ dispelled this obfuscation in *Beadica*. Both judges showed the importance of utilizing legal values as part and parcel of positive law, and Victor AJ brought the value of *ubuntu* into the contractual setting.[768] Likewise in *King*, Victor AJ took the opportunity to locate *ubuntu* among the values inherent in contract law, even pertaining to the enforcement of commercial contracts.[769] The strict boundary between the vertical and horizontal application of rights has also been broken down, as has the rigid distinction between positive duties that attach only to the state and negative duties that are traditionally imposed to protect incursion into the private realm, providing fertile ground for a robust construction of the Bill of Rights on a transformative constitutional model of adjudication. Agreeing with Van der Sijde, Finn suggests, and I concur, that "[t]he sharp, and seemingly normatively significant, distinction between negative and positive duties should be abandoned."[770] As Madlanga J argues in his extra-curial writing:

[767] Paras 196, 202, 214, 237-243.
[768] Paras 205-221, 228.
[769] Paras 202-204.
[770] Finn "Befriending the Bogeyman" 604, citing Van der Sijde "Tenure security" 87.

> "Except for those rights which – as appears from the language of the section in which they are entrenched – plainly apply to private persons or the state, there should generally speaking be no categorical or bright-line approach. On rights enjoyed as against the state, it might be said that their nature makes them more amenable to fulfilment by the state than by private persons, and may not be capable of direct application against private parties. […] Conversely, the nature of some rights makes them directly applicable to private persons. […] Other rights are expressly made applicable to private persons. […] But many other rights fall somewhere between these two ends of the spectrum."[771]

The recent spate of Constitutional Court decisions challenges the conservative orthodoxy relating to understandings of legal concepts like rights and values, as well as the basis for imposing duties on parties in special positions in relation to the fulfilment or frustration of the constitutional entitlements of individuals or groups of people. Despite a few indications, notably in *Juma* and *Blue Moonlight*, that there could be more to the issue than conservative legal culture recognises, there was no solid jurisprudential basis in the Court's first two decades for an interpretation of constitutional provisions that holds individuals to be under anything other than a voluntarily assumed legal duty to another.

Daniels presented the opportunity to clarify the operation of the right and value of human dignity in cases involving the regulation of a horizontal legal relationship by statute and reignited the academic debate around the issue of positive horizontal duties attaching to property owners. The majority decision renewed confidence that constitutional norms could ground positive duties between non-state parties in horizontal disputes. The potential of both direct and indirect horizontal application was further developed in *Baron*, where the Court again indicated its willingness to hold a private party to a positive duty. This trend was continued in *Pridwin* and *Grobler*, showing a principled willingness to impose positive duties when this is necessary to secure constitutional entitlements. Sometimes, as in *Grobler*, the positive obligation far exceeds any right that could be said to exist in positive law, as the tenant's section 26(1) right of access to adequate accommodation (which operates vertically against the state) was converted into a lifelong right to reside on the property provided for them, which was voluntarily offered by the property owner. Although the aspect of voluntary provision of the residence is notable, it is arguable that the case law on point made it clear to the landlord that the vindication of their property rights was contingent on the residents' constitutional interests first being

[771] Madlanga "Human rights duties" 368-369 (citations omitted).

secured. Likewise in other cases, private parties are held to a duty of non-violation of the constitutional rights of others, even when this requires positive conduct. This was the case in *Pridwin*, where the right of every child to receive a basic education was secured by ordering the school to continue the positive conduct that they had already undertaken. In all these cases, factors like the availability of alternative (less onerous) means to secure the vulnerable party's constitutional entitlements (to education and housing, respectively) were relevant. This demonstrates an embrace of the constitutional transformation of all sources of law and extending responsibility for the justifiability of conduct to private parties, irrespective of under which labels the particular field of law has traditionally been categorized. Indeed, as Cornell and Friedman forcefully argue:

> "In a profound sense, sections 8 and 39(2) seek to guarantee the integrity of the substantive revolution as these clauses mandate that courts review all laws in the light of the new political morality to which South Africa now must aspire, if it is truly to move beyond the horrific legacies of apartheid."[772]

The need to construe all law teleologically to better accommodate constitutional mandates is crucial to this endeavour of substantive revolution, whether the source of the legal rule is statute, common law, or private documents like wills and contracts. The *Endumeni* injunction to construe all legal instruments holistically is arguably followed in *King*, casting the values of human dignity and equality central to the question whether the private document in question (a will) can be enforced on its own terms. Finding that testamentary documents must comply with the common law component of public policy, the Court reaffirmed the value-laden, constitutionally directed nature of the judicial task of interpretation even when it relates to the intimate subject of private bequests. *Wilkinson* presented a very similar legal issue to *King*, although the source of the allegedly discriminatory law was statute instead of common law. The determination of the legal question hinged on the interpretation given to four statutory terms and explicitly dealt with interpretive conventions in respect of both statutory law and private documents. The Court again embarked on a holistic construction of the document in light of the constitutionally informed public policy rule in common law, specifically informed by the rights to dignity, privacy, and property.[773] These decisions emphasise the importance of construing

[772] Cornell & Friedman *Mandate* 109-110.
[773] Para 68.

legislation, common law and private documents holistically in accordance with constitutional normativity and purposively in relation to constitutional objectives.

The key question relating to direct and indirect application under the principles of subsidiarity (which demand first the constitutionally friendly construction of non-constitutional sources per section 39(2)) is whether indirect infusion is sufficient on the given facts, or whether discrete constitutional rights require more than what value-based interpretation can accomplish. Sometimes direct legislative embodiment will provide the fuller scope of the constitutional right, and sometimes it will be only partial and further resort to the constitutional provision is warranted. Only through a holistic interpretation of all sources - always aimed at maximal accommodation of constitutional norms - will it be clear whether the normative elements of the given theoretical account are (or can be) accommodated in extant pre-constitutional legislation. The transformative adjudicator may achieve this by reading the statutory provision up or down, or by utilising specialised legislation dedicated to manifesting the constitutional right or objective even if it seems tangential to the field. Hereafter, they may ask whether the constitutional provision itself retains any dimension that has not been captured in non-constitutional sources. At any of these stages of application of legal rules or sources, the imposition of a positive obligation arises as a possibility if the given source so requires, or even a negative duty to protect the positive performance by another of a constitutional entitlement.

The next chapter builds on this general interpretive framework by crafting a copyright-specific normative model that ensures principled consistency and normative pluralism that is ultimately in service of the foundational triumvirate of values discussed in the previous chapter. As has been shown, this triumvirate is compatible with Dworkin's notion of law as integrity grounded in the dual principles of dignity; even if the former is potentially broader and more inclusive than the latter, Dworkin's model gives it substance by providing a legal framework (comprising rights, duties, values, principles, etc.) and animating it with a Kantian moral and ethical content. The transformative copyright model that the next chapter constructs allows adjudicators to contribute to the project of transformation through a purposive, contextual and normatively robust rendering of their responsibilities as judges and the sources of law before them.

CHAPTER 5: (DE)CONSTRUCTING COPYRIGHT WITH INTEGRITY – A CONSTITUTIONAL-THEORETICAL ANALYSIS

5.1 Introduction

The purpose of this chapter is to develop a transformative theory of copyright adjudication that can contribute to the constitutional development of South African law under the single-system-of-law principle. This chapter brings together the disparate strands of legal philosophical argument that have been presented in the preceding chapters and seeks to adapt Dworkin's model of constructive interpretation to the South African copyright context. The salient features of formal and substantive modes of reasoning are compared and a new approach towards interpretation for copyright adjudication is developed by anchoring the model of constructive interpretation to the theoretical justifications underlying copyright, which are, in turn, informed and amplified by the objective normative value system of the Bill of Rights.

This chapter endeavours to construe copyright law holistically by reference to its intrinsic political and theoretical underpinnings, as well as its location in the South African legal system.[774] On Dworkin's model of law as integrity, "the process of judging always demands that the judges speak to the principles that have been enunciated in the cases, not just to the meaning of the sentences in which the principles are laid out."[775] In line with such a principled understanding of copyright law (as opposed to a plain and ordinary construction of statutory text in isolation), the transformative theory of adjudication proposed here lays emphasis on how the values served by copyright doctrine feed into the constitutional value system. While much of the narrative is descriptive of copyright doctrine and case law, the account is not intended to justify the extant law or supply an account that is only (or entirely) compatible with copyright case law read in the best light possible. Rather, the purpose is to build a model that reflects what courts have done with statutory provisions by identifying the normative commitments of such doctrine, while simultaneously espousing a moral reading of copyright law that gives effect to the constitutional value system in every dispute. In this way the proposed model marries the intrinsic morality of copyright law to the

[774] As A Drassinower "Copyright infringement as compelled speech" in A Lever (ed) *New Frontiers in the Philosophy of Intellectual Property* (2012) 203-224 at 203 puts it, my purpose is "to exhibit the fundamentals of copyright as a coherent whole" by illuminating the "salient features of copyright doctrine as emanations of a single concept".
[775] Cornell & Friedman "Significance" 16.

overarching value structure of the democratic constitutional rule of law. The normative element thus results from a synthesis of copyright law and constitutional morality and methodology, not merely copyright's fundamental normative precepts. The intention is to arrive at a model of copyright adjudication that is optimally compliant with and enabling of the objective normative value system of the Bill of Rights. Copyright's systemic coherence then relies upon the extent to which it integrates into this broader project of transformation of law to reflect constitutional prescripts.

The structural features of copyright law are illuminated primarily with reference to the work of Robert Merges, who employs a similar taxonomical categorisation scheme to Dworkin's early work. This classificatory taxonomy is explained with reference to copyright adjudication, demonstrating the applicability of such abstract theorisation in understanding the operation of law and harnessing its potential for transformative adjudication. Merges's model of law allows us to examine copyright law in a structured and purposive manner. Identifying the principles that can be observed in legislation and case law can aid in descriptively explaining the functioning of judicial reasoning in respect of copyright and even in prescriptively inserting new meaning into these normative concepts or proposing additional principles.

Although there are various theoretical strands that combine to provide the foundation of copyright law, the instrumentalist framework that emphasises incentivising creation through the award of property rights is often privileged over other considerations and justifications.[776] While this instrumentalist framework represents an important aspect of the role and function of copyright law, "the traditional story justifying copyright is inaccurate in many cases".[777] There are significant parts of individual self-development and social interaction that are neglected by this recitation of the conventional tale of copyright's operation, which elements are then typically undervalued when they feature in case law.[778] Notably, aside from Netanel, none of the mainstream accounts

[776] As noted by MA Carrier "Limiting copyright through property" in HR Howe & J Griffiths (eds) *Concepts of Property in Intellectual Property Law* (2013) 185-204 at 199: "US copyright law, in contrast [to property law], is primarily utilitarian in nature, and even then promotes only one goal." It should be noted that this justification does not apply to industrial copyrights (such as cinematograph films, sound recordings, and published editions), where the incentive is directed more towards investment than creative activity.

[777] Carrier "Limiting copyright" in *Concepts of Property in Intellectual Property Law* 196.

[778] *Vollenhoven*. Not only does this conventional tale of copyright unjustly confine the apparent reach of copyright norms to the binary paradigm of authors-cum-owners and users as consumers, which distorts the nature of the creative process and grossly undervalues the ways in which users interact with copyright works, but it also places a great swathe of unrelated activity under the same conceptual

provide a perspective on copyright's location within the democratic constitutional system of law. Moreover, copyright's proprietary aspect has come to dominate contemporary views of its primary features and functions; this conception of property is determinative of the operation of copyright's rights and remedies as it supplies the normative paradigm for adjudication of copyright disputes. Accounts of property can be grouped under either the information theory camp or the progressive property school, which describe different views about the primary value(s) implicated by the property concept.

Information theorists prefer bright-lined property systems that minimise complexity and transaction costs to enable efficient interactions between legal actors. Contrasted to this, progressive property scholars argue that systemic complexity is not only a desirable systemic feature that encourages discursive deliberation above formalistic resolution, but is necessitated by the plural and pluralist accounts that they ascribe to property dispensations. This is compatible with Dworkin's normative account of law as adjudication that demands engagement with preunderstandings of doctrinal content, especially when human dignity, freedom or equality obtain any purchase on the matter. Progressive property theorists move away from the comfort of stability and certainty that unitary conceptions of property countenance to embrace the potential of crafting new proprietary relationships that display a plurality of values. The overtly normative nature of these pluralist accounts makes them particularly interesting from a South African constitutional perspective. Purposive teleological interpretation becomes a crucial tool in deploying the appropriate legal values, as a systematic, orderly, and normatively congruent account becomes possible with such a strategy.

After recounting the midlevel principles that Merges proposes to explain the operation of all intellectual property doctrine, and briefly looking at alternatives that have been offered by others, four principles are suggested to explain and direct copyright adjudication. The inductive, explanatory part of each principle (how well the record of copyright case law reflects the operation of the principle) corresponds to Dworkin's dimension of fit, while the deductive theoretical aspect relates to the dimension of political integrity. Together these twin dimensions ensure that all principles adequately

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and normative framework. For example, the copyright story of incentives for creation and prolific distribution of works applies the same thinking to every object under its control, from poetic literary works to published editions to websites and computer software and sound recordings.

explain what courts have historically done as well as contain the normative directives of copyright and constitutional theory. This adds prescriptive value by instructing adjudicators on how to resolve copyright disputes through statutory interpretation.

The last part of this chapter briefly shows how Dworkin's adjudicative theory integrates with the South African copyright regime as described and the model of midlevel principles postulated. This is a teleological and holistic construction of copyright that contributes to the achievement and optimisation of constitutional and democratic ideals. Whether employing pluralistic (progressive property) or unitary (focusing on human dignity as equal concern and respect as per Dworkin) value systems, transformative adjudicators can construct meanings that contribute to normatively compliant outcomes when the given model accounts for the normative facets of interpreted law. Law as integrity provides a capacious model for doing so by constructing a teleological view of copyright. The mechanism of proportionality (and the associated form of balancing) cannot be comprehensively unpacked here but is recommended as a structural device that integrates the plurality of proposed normative principles. This stratagem is explored more fully in the final part of the research.

5.2 A three-tiered structure for IP

Copyright law recognises a plurality of foundational justifications and justificatory frameworks based variously on moral intuition[779] (often formulated as deontic claims of rights) and consequentialist considerations (expressed as policy objectives). While this rich and diverse intellectual tradition certainly contributes to the fullness of whatever theoretical account is either devised to prescribe rules and norms or wielded to defend existing ones, it does beg the methodological question: it does not stipulate how to integrate this plurality of sources into a succinct legal methodology or methodological device for resolving conflict in concrete cases. For this, one needs both a taxonomical structure of law that details how theory relates to practice, and an adjudicative method for deciding between or reconciling ostensibly contradictory values, whether deontological or consequentialist.

[779] RP Merges "Philosophical foundations of IP law: the law and economics paradigm" in B Depoorter, P Menell & D Schwartz (eds) *Research Handbook on the Economics of Intellectual Property Law* (2019) 72-97 at 86-90.

Robert Merges has proposed a taxonomical structure and descriptive account of intellectual property law that can be useful to South African law. Merges's model divides intellectual property law into three distinct layers: foundational theory, midlevel principle, and practical doctrine. He posits a combination of foundational theories comprising elements from the respective theories of John Locke, Immanuel Kant and John Rawls. Foundations and principles usually do not militate towards one specific conclusion although "they do strengthen considerably the case for one general range of results".[780] Rather, these concepts "supply working presumptions on which public decisionmakers may rely to narrow and focus their decisions in practice […] [but] also leave considerable room for legislators and judges to disagree about important subsidiary doctrinal questions not settled by the presumptions".[781] Accordingly, the foundational justifications supply theoretical context: paradigms of value presumptions and meaning in which adjudication can operate through the stratagem of substantive reasoning. Yet, even with clearly identifiable justificatory theories generating the legal rules and principles in one area of law, the weight that each is given is a matter for determination in the surrounding political and constitutional environment. On this score his theory could feasibly be combined with Ronald Dworkin's theory of constructive interpretation to build a transformative theory of copyright law.

One central tenet of Merges's pluralistic justification of intellectual property is that all intellectual property rules are inherently value-based and that every doctrine contains a normative precept or premise. This is congruent with the Legal Realist insight that is at the heart of the project of transformative constitutionalism, namely, that law is not an apathetic implementation of neutral values, but inherently political. In this vein, the overarching triumvirate of constitutional values (human dignity, equality and freedom) would provide useful grounding (at the foundational level) for South African courts to move in that normative direction by tailoring their reasoning to accommodate such founding values. While such constitutional justifications do not often provide a working theory of any branch of intellectual property law, they provide the context in which more specific theories (justifying copyright law as a legal institution, for example) are

[780] ER Claeys "On cowbells in rock anthems (and property in IP): A review of *Justifying Intellectual Property*" (2012) 49 *San Diego LR* 1033-1067 at 1062.
[781] Claeys "Cowbells" 1062.

situated; therefore, constitutional and copyright theory together make up the justificatory foundations of South African copyright law.[782]

Merges's model does not make the formalistic misstep of reasoning deductively from abstract principles towards pre-determined outcomes; rather, it takes the opposite tact by working upwards from what appears to be a phenomenological account of what (American) courts actually do, thus being practice-based rather than theory based. Therefore Merges builds his midlevel principles inductively as implicit in intellectual property law (built up from doctrine) rather than deductively (derived from abstract foundations).[783] This effectively reverses the traditional formalistic reasoning method, but in doing so arguably goes too far in the other direction by not giving the foundational abstract theory enough (conceptual) due. Put differently, Merges seeks to identify theoretical foundations (abstract values) from a study of intellectual property doctrine in practice, first going through the legal-conceptual mediation of midlevel principles that are thematically identified and categorised according to the ways in which they are used.[784]

Merges contends that while the foundational theories are necessary for the midlevel principles – the thematic principles will not make sense without an underlying normative theory or theories – it is the midlevel principles that actually regulate intellectual property rules and doctrines. As a result, these principles may reflect (or at least may be compatible with) an array of theoretical justifications. They explain the operation of intellectual property doctrine in the normative environment that the given foundational commitments entail. This pluri-dextrous functioning lends the model the pluralistic capacity that Merges champions. This suggests that there is no linear generative relationship between theoretical foundations and midlevel principles; midlevel principles are not omnipresent and do not explain all cases exhaustively, but "their presence is felt" in "a broad swathe of cases".[785] Yet, this is very different from playing a predictive role in how future courts will adjudicate disputes, being backward-

[782] Of course, I do not mean this as a historical matter, but rather as prescribing the relation between constitutional law and all non-constitutional departments of law, including mercantile vestiges like copyright law.
[783] RP Merges *Justifying Intellectual Property* (2011) 143. See also DH Blankfein-Tabachnick "Intellectual property doctrine and midlevel principles" (2013) 101 *California LR* 1315-1359 at 1322.
[784] See also DH Blankfein-Tabachnick "Does intellectual property have foundations? A review of Robert Merges's *Justifying Intellectual Property*" (2013) 45 *Connecticut LR* 995-1016 at 1001-1002; Blankfein-Tabachnick "IP doctrine" 1321.
[785] Merges "Foundations" 1375.

looking rather than forward-looking.[786] In other words, the backward-looking explanatory function does not necessarily involve a prescriptive dimension and predicting how future courts will act is a different matter still.[787] Merges explains:

> "Now, to bring the normative-hypothetical together with the positive: I believe that midlevel principles embody structural values that are the product of ultimate commitments at the foundational level. They are manifested in numerous specific doctrines and rules in the IP system precisely because they reflect basic values and ultimate commitments. These values and commitments work through midlevel principles; they find their expression, in implementable form, in these principles."[788]

Merges explains that "midlevel principles supply a shared language, a set of conceptual categories consistent with multiple diverse foundational commitments […] pitched in a language that is distinct from that of foundational commitments", describing midlevel principles as "meta-themes".[789] Merges stresses that midlevel principles are compatible with multiple foundational accounts.[790] He lyrically describes midlevel principles as "the connective tissue – at the conceptual level – that unites and ties together disparate areas of IP law".[791] However, the author is quick to caution that midlevel principles "are not superdoctrines that control actual case outcomes", but rather are "transcendent principles that emanate from and are expressed in the broad fabric of positive law – including statutes, judicial concurrences, judicial dissents, and academic commentary".[792]

Eric Claeys offers that "the notion of a midlevel principle is a heuristic device and should be judged by how well it clarifies and justifies law as it is practiced by participants in the IP system."[793] Although designed to describe how courts have applied doctrine in the past, midlevel principles assist in the process of determining

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[786] Merges *Justifying IP* 181-182 distinguishes between backward-looking deontic reasons and forward-looking consequentialism (like utilitarianism). His model of Lockean-Kantian-Rawlsian intellectual property departs from a deontological starting point but arrives at a largely consequentialist conclusion. The consequentialist taint is acquired from the Rawlsian tactic of maximisation, which is a methodological component of his theory of justice that bears a distinctly utilitarian origin. See also Blankfein-Tabachnick "IP doctrine" 1322-1323, 1343.
[787] Blankfein-Tabachnick "IP doctrine" 1323 counsels that "the 'engagement' of foundational values and midlevel principles [should] involve guidance rather than chance overlap, although such a view would be incompatible with Merges's claim to midlevel independence".
[788] Merges "Foundations" 1384.
[789] Merges "Foundations" 1364-1365.
[790] Merges "Foundations" 1366: "Midlevel principles emerge from specific cases and can be thought of as the product of multigenerational hypothetical deliberation among holders of divergent ethical foundations."
[791] Merges "Foundations" 1372.
[792] Merges "Foundations" 1374.
[793] Claeys "Cowbells" 1057.

what the law actually is, as they mediate foundational justifications and their practical implementation by the judiciary.[794] Merges explains that "[m]idlevel principles engage foundational values in a number of ways, but they do not depend on any particular set of values for their validity."[795] As with Dworkin's account, this places much responsibility for constructing the law on judges, who Merges calls "the 'official spokespersons' of midlevel principles forged in a pluralistic setting".[796] This comports with the South African situation where much of the law's transformation occurs by adjudication.

I submit that the normative tenets of both the constitutional legal order and the pertinent justifications for copyright protection should dictate the value framework under which midlevel principles are given content. This move involves two distinct steps: identifying normative (midlevel) principles that are sufficiently descriptive of what courts do in copyright cases, and subsequently endowing these principles with constitutional content. This diverges from Merges's view of midlevel principles, which he largely denies the capacity to prescribe normative content as a justificatory matter. In my view, midlevel principles do play a justificatory role, but this justification is rooted in their structural mediation of plural theoretical accounts with differing focus and varying levels of specificity.[797] The job of midlevel principles in all of this is to reflect a synthesis – something between a balancing act and structural ordering – of the plural foundational justifications for the given political society in general enough terms to be useful across a range of issues concerning the particular field of law. Such a multifaceted concept can then be wielded to achieve principled consistency but must still be mediated against the array of other principles that reflect other aspects of the same and other foundations.

When appended to Dworkin's theory of constructive interpretation – principally requiring that decisions fit with what courts have historically done in similar cases and

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[794] Claeys "Cowbells" 1048. Blankfein-Tabachnick "IP doctrine" 1325 identifies the same element in Dworkin's theory:

> "Where the judge cannot simply apply a clear precedent or statute, the judge is to look for principles that are inherent in the legal system, midlevel principles, which would settle the case." (citations omitted).

[795] Merges *Justifying IP* 140. See further Blankfein-Tabachnick "Foundations" 1013.

[796] Merges "Foundations" 1367.

[797] Some midlevel principles describe the enterprise of law more generally than particular institutions within it, while others provide conceptual or normative accounts of the institution of private property, which are taken for granted in developing a theory of intellectual property (like Merges), or even more narrowly a theory of copyright (as Netanel does, for example).

simultaneously cohering with the political ideals which the legal system holds as paramount – this could auger well for South African copyright law. Merges's taxonomy is intrinsically compatible with Dworkin's taxonomical model of sources of positive law[798] as well as his theory of law as interpretation, where legislators make laws that reflect background or foundational theories and norms, and judges construe the "institutional" morality – those norms that have already been positively incorporated into the law.[799] While Dworkin distinguishes between adjudicative justification and foundational justification (or "background morality" in his terminology) in legislating a body of law,[800] Merges does not make this distinction but, as David Blankfein-Tabachnick notes, his method of inductive reasoning would not make sense in the legislative setting and would require theoretical grounding rather than practical.[801]

Dworkin's model of law may even give midlevel principles more prescriptive power than Merges seems comfortable with on his Rawlsian bedrock because of the dimension of political integrity. Dworkin's theory of adjudication arguably utilises midlevel principles as justificatory; that is, judges resort to practically-grounded guidance from precedential case law to support their decisions. Principles occupy a justificatory role in Dworkin's theory of adjudication because of their relation to the foundational political values that he deems central to the interpretation of law.[802] Principles that do not cohere with the case law on point would be descriptively at odds with what came before (thus lacking fit), while whatever candidate principles remain must also accord with the political-legal values demanded by the foundational account of law. Integrity is where the prescriptive function lies because it demands that

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[798] Dworkin develops this aspect in *Taking Rights Seriously* (1977), his first monographic treatment of law.

[799] See also Merges "Foundations" 1366-1367.

[800] Dworkin *Taking Rights Seriously* 93-94, 101-105. This distinction would arguably not hold sway in South African law, given the Constitution's avowed intention to spur on adjudicative transformation. However, this can be adequately accommodated by Dworkin's dimension of political integrity.

[801] Blankfein-Tabachnick "IP doctrine" 1324.

[802] For Dworkin, one dimension of principles has to do with aspirational justice and fairness rather than being concerned with the desirability of the outcome to that case, thus ensuring a coherence across a range of cases that can be said to fit together for this reason. Dworkin maintains that principles invoke moral standards whereas policies generally deal in communal goals and socio-economic objectives: see Dworkin *Taking Rights Seriously* 22, 25-26. In his earlier work, R Dworkin "Social rules and legal theory" (1972) 81 *Yale LJ* 855-890 at 877 explains the justificatory relationship:

> "If a theory of law is to provide a basis for judicial duty, then the principles it sets out must try to *justify* the settled rules by identifying the political or moral concerns and traditions of the community which, in the opinion of the lawyer whose theory it is, do in fact support the rules. This process of justification must carry the lawyer very deep into political and moral theory, and well past the point where it would be accurate to say that any 'test' of 'pedigree' exists for deciding which of two different justifications of our political institutions is superior." (emphasis in original).

individual court decisions give effect to the standards of justice or fairness that underlie and permeate the law, being the twin principles of dignity in Dworkin's normative theory of law.

Merges does not prescribe anything in the way of interpretive strategy aside from it being contingent upon a value-laden or normative approach. Merges's scope for adapting jurisdictionally and situationally appropriate doctrine from the foundational level is notably capacious, as the "theory creates a justificatory structure within which public officials may disagree reasonably about how to implement general policies in doctrine."[803] This sits well with the South African constitutional culture of justification and enables courts and legislators to tailor the practical implications of the underlying theoretical account to what Dworkin calls "local priorities", *in casu* determined by the Bill of Rights. On Dworkin's account, judges do not ask what the law should be, but rather what the best construction of the law is as it stands, considering the key dimensions of fit and integrity measured against the institutional history of the given legal system. Midlevel principles assist judges in deciding hard cases by constructing the most coherent principled account of the law on that topic possible.[804]

Unfortunately, neither Merges nor Blankfein-Tabachnick considers Dworkin's work in any depth, nor do they consult anything later than his first monograph, published in 1977. This inexplicable oversight[805] leaves much work for anyone wishing to explore the aspects of convergence and divergence respectively, as I now propose to do. Blankfein-Tabachnick reads Dworkin as saying that foundational (political) morality is always relevant to the legislative task but never to the judicial.[806] This seems to comport with Merges's ideas but sells the element of integrity short in Dworkin's approach. The author is correct that "[t]he method Dworkin describes may very well be similar to the inductive method Merges advocates," but his description of Dworkin "disavowing a requirement of consistency between background morality and midlevel

[803] Claeys "Cowbells" 1063.
[804] Blankfein-Tabachnick "IP doctrine" 1325: "Where the judge cannot simply apply a clear precedent or statute, the judge is to look for principles that are inherent in the legal system, midlevel principles, which would settle the case." (citations omitted).
[805] The only explanation that suggests itself for neither author going beyond Dworkin's earliest work is that this is where he sets out his taxonomical description of law as comprising different legal concepts, specifically values, principles, and rights, and how public policy fits in with these concepts methodologically. However, to take this work as constitutive – or even representative – of Dworkin's theory of law is to invite criticism.
[806] Blankfein-Tabachnick "IP doctrine" 1324.

or common law principles" is clearly at odds with the requirement of integrity.[807] In fact, the integrity of the relation between the most basic normative values (Kantian dignity in Dworkin's theory) and judges' decisions is the cardinal focus, reinforced by a robust and nuanced form of consistency that can be inductively surmised. The relationship between foundational theory and legal principle is further mediated by the requisite fact of institutional recognition; that is, the legal tradition must actually embody the foundational norm in its canon for the value to find any application. Hence Dworkin's two dimensions of fit and political integrity providing upward and downward (inductive and deductive) methods of ensuring normative resonance. Blankfein-Tabachnick's analysis of Dworkin's work may well be a fair reading of the work he deals with, *Taking Rights Seriously*, but cannot be said to be an accurate reflection of the adjudicative model that Dworkin subsequently develops.

The benefits of Merges's model are readily apparent. It provides a simple taxonomy of one sphere of law (intellectual property law in his account, which for present purposes can be narrowed to copyright law without any distortion) integrated into the overarching legal system and ultimately responsive to a moral political vision of the rule of law under constitutional democracy. It follows a principled approach that caters to the ideal of certainty through equal application of legal doctrine while simultaneously legitimising the judicial power to effect substantive transformation of old law according to new normative imperatives.[808] It charts the normative foundations of law as clearly as any model of law could hope to and accommodates both internal (to copyright law) and external (constitutional law and rule of law generally) theoretical and normative argument. It also makes allowance for different sources of law to work together systematically.

5.3 Justifying copyright: the plural foundational values of copyright

Copyright law is explicable by resort to two broad traditions of political philosophy: rights theory and utilitarianism. If a deontological imperative – a moral claim of right – demands recognition, this should be located at the level of foundational theory and

[807] Blankfein-Tabachnick "IP doctrine" 1325 (citations omitted).
[808] Claeys "Cowbells" 1063 confidently endorses Merges's model on this score: "no one should expect any more determinacy from rights-based theory than Merges promises with his metaphorical three-layer cake".

should explain why a particular rule or ruleset is justified in making the impositions on the dignity and freedom of others that it inevitably does.[809] David Resnik describes libertarianism (as rights theory) and utilitarianism (as instrumentalist policy) as dominating the theoretical and jurisprudential discourse of intellectual property over the past two centuries.[810] The author ascribes the libertarian stance to the Lockean theory of labour creating property, resulting in any redistributive limitations on the natural property rights of the creator being unjustifiable, but cautions against its shortcomings as a prescriptive model of IP.[811] Resnik notes that utilitarianism is especially relevant to copyright and patent law, finding constitutional embodiment in the American Constitution[812] and underwriting much of the policy-based thinking that has become standard in intellectual property discourse.[813]

Merges recognises that one type of theory – deontological or instrumental – cannot do all the work and that both are important; therefore, a middle path should be plotted between the two camps.[814] Foundational justifications are aimed at determining the existence and applicable scope of legal protection over legal objects (in this case, copyright works) rather than their operation. He suggests treating the foundational theoretical account by one metric and policy decisions by another; in other words, recognising the deontological reasons for providing IP protection and implementing operational rules to capture their normative object, then considering the consequences of surrounding supplementary rules according to some predetermined criterion like efficiency. On his reading, consequentialist lenses can aid in achieving socially beneficial outcomes while helping to secure the moral dimensions of the law.[815]

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[809] EC Hettinger "Justifying intellectual property" (1989) 18 *Philosophy & Public Affairs* 31-52 at 35-36. *Similarly on Hegel's theory, explains* J Hughes "The philosophy of intellectual property" (1988) 77 *Georgetown LJ* 287-366 at 332, "property is a genre of freedom and, like any other freedom, it may have deleterious effects on others".

[810] DB Resnik "A pluralistic account of intellectual property" (2003) 46 *Journal of Business Ethics* 319-335 at 322.

[811] Resnik "Pluralistic account" 322-323. See Rognstad *Property Aspects* 83-84 for Rognstad's views on the contradictory outcomes that may be reached on a libertarian reading of labour theory as it relates to IP rights.

[812] Article 1, section 8, clause 8 of the 1787 US Constitution reads: "Congress shall have the power [...] [t]o promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective discoveries."

[813] Resnik "Pluralistic account" 323-326.

[814] Merges "Foundations" in *Research Handbook on the Economics of Intellectual Property Law* 91.

[815] Merges "Foundations" in *Research Handbook on the Economics of Intellectual Property Law* 92: "Efficiency is an operational principle meant to best implement a decision made for other (non-efficiency) reasons."

Academic discourse treats the deontological basis for copyright as the upshot of either Lockean labour theory (rooted in liberty) or Kantian-Hegelian dignity-cum-personality interests, or a combination of the two.[816] Lockean labour theory is widely invoked as a basis for arguing for property rights to attach to the product of an individual's intellectual labour, constituting a claim of natural right to the object created.[817] Lockean labour theory bestows property status on the natural rights that arise between an author (labourer) and their work on the basis that the labourer owns their labour and thus owns everything that it creates (subject to the conditions of there being as good and enough remaining for others, and that no spoilation or waste occurs of that which is appropriated, and a charity proviso that those with abundance should provide for the needs of those with "extreme want" that have no other means of survival).[818] Some modern variations on this core statement have emerged with the result that the authorial claim for recognition of their moral-legal property rights over objects of their creation is firmly entrenched in academic consciousness and public rhetoric.[819]

The other frontrunner in the rights theory school of justification is a dignity-oriented account of the relationship between an author and the products of their creative and intellectual labours.[820] There are two main competing lines of thinking on this issue, broadly identified as Kantian and Hegelian respectively, both of which "rest on

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[816] See eg A George *Constructing Intellectual Property* (2012) 341-344. Rognstad *Property Aspects* 85 affirms that "there is a line between economic rights and moral rights, with moral rights undoubtedly influenced by Kantian and Hegelian personality thinking." (citations omitted). The author explains that "the use of the property metaphor in relation to copyright does not include the moral rights aspect", suggesting that the Lockean argument undergirds the economic property rights that comprise copyright.

[817] Hughes "Philosophy" 296-314; Hettinger "Justifying" 36-45. M du Bois "Justificatory theories for intellectual property viewed through the constitutional prism" (2018) 21 *PER/PELJ* 1-38 at 7-8 explains that this natural law basis for original modes of acquiring ownership "[i]n conjunction with eighteenth century philosophical influences" formed the ideological basis for contemporary intellectual property protection.

[818] Hughes "Philosophy" 297-300, 325-329; Hettinger "Justifying" 43-45; Rognstad *Property Aspects* 31-33, especially at 32 where the author quotes Locke's original writing in respect of the last two provisos.

[819] See generally S Munzer *A Theory of Property* (1990) 266-291; P Drahos *A Philosophy of Intellectual Property* (2016) 47-83; ER Claeys "Intellectual property and practical reason" (2018) 9 *Jurisprudence* 251-275; CJ Craig "Locke, labour and limiting the author's right: A warning against a Lockean approach to copyright law" (2002) 28 *Queen's LJ* 1-60. Hettinger "Justifying" 36 opines that the Lockean labour justification is "[p]erhaps the most powerful intuition supporting property rights". Du Bois "Justificatory theories" 17-19 suggests that a revised and modernized version of the labour theory, notably one that is qualified by external limitations, may indeed find application in the South African constitutional context.

[820] See Drassinower "Compelled speech" in *New Frontiers in the Philosophy of Intellectual Property* 222 (and especially the sources listed in n 26), where the author posits that on a rights-based model, "the purpose of copyright law is not to provide incentives for creativity, but to affirm the inherent dignity of the author as a speaking being". Only human authors are contemplated here, as the justifications discussed do not apply as easily to non-human authors.

concepts of the individual's need to control an object as a result of the individual's free will".[821] Merges adopts a Kantian basis for his intellectual property theory while Dworkin does the same for this theory of law as integrity. Hegelian personality theory has also gained traction in academic literature during the past half century,[822] providing another popular basis for legal theoretical exposition relating to the actualisation of the author's personality and spirit.[823]

On the Kantian rendition, the author's personality is not only intricately tied up in the products of their labour, but such authors require ownership of these objects to realise their personality and will.[824] On the Hegelian account, property is not an extension of the personality as for Kant, but is necessary for self-actualisation and protection of one's personality as manifested in the world of objects.[825] In this sense, personality is merely "the will's struggle to actualize itself", which is known as Hegel's developmental thesis, and property aids this pursuit by allowing individuals the basic capacities necessary for free choice in the development of the personality or subjective will in the

[821] Rognstad *Property Aspects* 36. Drassinower "Compelled speech" in *New Frontiers in the Philosophy of Intellectual Property* 204 develops a Kantian account of authorship that posits certain types of works as speech, concluding that "[c]opyright infringement is ventriloquism practised on an unwilling subject". At 206 the author explains:

> "Not only the defence of independent creation, but also the idea/expression dichotomy, as well as central aspects of the defence of fair use or fair dealing, among other fundamental copyright concepts, are readily intelligible from the standpoint of the work as a 'speaking in one's own words'."

Additionally, this Kantian basis fortifies the legitimacy of permitting transformative uses of works, as allowed by a general fair use exception such as the one contemplated in the Copyright Amendment Bill, as "they are but responses that the author's work as speech necessarily contemplates" (220).

[822] Resnik "Pluralistic account" 326 attributes the resurgence of the Hegelian freedom-property-expression triumvirate to American scholars like Margaret Radin, Jeremy Waldron, and John Rawls.

[823] Du Bois "Justificatory theories" 24. See R Walsh *Property Rights and Social Justice: Progressive property in action* (2021) 36-40 for an overview of this line of thinking. Radin's theory of personhood (elaborated over a series of essays and journal articles published together as MJ Radin *Reinterpreting Property* (1993)) takes this personality-based model even further, arguing that because certain items of property are essential to personhood, a nuanced and context-sensitive protection of rights to personal property at a more intense level is necessary when items of fungible property are intimately connected to the owner or user's personality. Wedding rings and homes are the canonical examples that she enumerates, but du Bois (at 26-27) suggests that her theory could find application to objects like traditional knowledge. I support this idea and would also recommend being sensitive to this link between an author and their work in copyright cases.

[824] Drassinower "Compelled speech" in *New Frontiers in the Philosophy of Intellectual Property* 222 explains the implications of the Kantian position: "Copyright in this sense is an irreducible affirmation of the autonomy of the human person as a speaking being. To appeal to any external benefits that this affirmation may produce is to divest authorship of its self-constitutive authority."

[825] Rognstad *Property Aspects* 36 clarifies that "while Kant regarded property in things as an extension of a person's will (and personality), Hegel viewed things as external factors that could be transformed into alienable property through the expression of a person's will". See also Walsh *Property Rights* 37; Hughes "Philosophy" 330; Drahos *Philosophy* 89-91.

objective world.[826] This is ultimately in service of individual freedom, rendered as positive fulfilment of the subjective will in the objective external world and is to a large extent synonymous with a classical liberal conception of property.[827] In some scholars' view, this argument necessitates that individuals must own sufficient property to satisfy their economic needs at least, else the will is left unrealised in the physical world.[828] For Hegel:

> "Personality begins to lift itself out of this situation by claiming the 'external world as its own'. Property represents the first stage of this actualising process. It is one of the first acts of free will in which the will as personality takes on a concrete, free form. […] The underlying reality is that 'property is the first embodiment of freedom'."[829]

Mainstream contemporary versions of this theory in relation to intellectual property place emphasis on the relationship between a creator and their work, specifically on the way in which creative works and the property rights they entail facilitate the development and expression of the self.[830] In this relationship, control over the object as representation of the self in the external world is essential to the attainment of individual freedom.[831] Accordingly, the restriction of a person's control over their property is tantamount to limiting their autonomous liberty, making property rights instrumental to achieving the greater ideal of freedom.

The implications of Lockean labour theory and the theory of moral desert are identical in their consequence,[832] namely the foundational principle that an author's labour either creates property rights in the product (assuming the provisos are observed) or that an author is deserving of legal protection in the form of property rights over the object produced.[833] Ole-Andreas Rognstad posits that "it is hard to avoid the idea that the labor performed, for which the reward is awarded, will have to serve as a point of departure."[834] The incentive for authors to pursue their creative talents is the other side

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[826] Hughes "Philosophy" 331; S Duncan "Hegel on private property: A contextual reading" (2017) 55 *Southern Journal of Philosophy* 263-284 at 266-269.
[827] Hughes "Philosophy" 331-332. Cf Drahos *Philosophy* 89. Clearly, then, Hegel's idea of freedom comes closer to what we would consider strong autonomy than any conception of negative liberty.
[828] See Duncan "Hegel" 267-268.
[829] Drahos *Philosophy* 90, quoting GWF Hegel *Philosophy of Right* (1821) (TM Knox (trans) (1967)) 39, 45.
[830] See Drahos *Philosophy* 85-109, especially at 89-98.
[831] Resnik "Pluralistic account" 326.
[832] Munzer *Theory* 254-291 even develops a labour-desert theory to combine the two sets of deontological claims into a unified approach. See further Du Bois "Justificatory theories" 20-21.
[833] See eg Hettinger "Justifying" 40-43.
[834] Rognstad *Property Aspects* 81.

of the labour-reward coin and augments the justificatory framework by introducing instrumentalist thinking to the labour argument.

Peter Drahos observes that all natural law claims are contingent upon a very specific conception of law that postulates a certain metaphysical reality and humanity's relation to its creator, which is no longer the dominant social or political view and presents a hoard of justificatory problems as a result.[835] He suggests that this leaves instrumentalism as the necessary theoretical framework in which to build and defend intellectual property theories. Similarly, Rognstad suggests that just because the theoretical justification of a certain type of property is based on the idea of labour in the fruits of one's toils, "the meaning given by Locke to this idea, in the particular context in which it was written, though philosophically interesting, is not necessarily central when using the labor idea as an argument in favor of a particular legal solution today".[836]

Consequentialist theories hold that certain laws are required as an instrument to produce certain outcomes. Such instrumentalist accounts of intellectual property generally and copyright specifically posit that the best way to achieve the end of prolific cultural creation is to incentivise those with such proclivities by awarding property rights in those creations which can be leveraged on the free market to secure a viable income. On this account, there is nothing personal about the rights in the works (in that there is no special relationship between the author and the work that is protected by the rights) and the attendant logic is immune to deontic argument of desert or natural right. Utilitarianism is one such form of argument that constructs a scheme of economic principles by which socially beneficial outcomes – like utility, happiness, welfare, etc. – are produced through incentive strategies.[837]

Incentive-based utilitarianism has been described as "[t]he strongest and most widely appealed to justification".[838] The incentive mechanism is postulated to induce prolific cultural production in the given society. On the economic account, this means that the rights that are granted as incentive should extend no further than necessary to induce

[835] Drahos *Philosophy* 45.
[836] Rognstad *Property Aspects* 14. The author specifies that on the same reasoning he prefers the terminology of labour idea rather than labour theory.
[837] Merges "Foundations" in *Research Handbook on the Economics of Intellectual Property Law* 73.
[838] Hettinger "Justifying" 47.

such creativity, else this would result in inefficiency. Edwin Hettinger formulates the instrumentalist question as:

> "Do copyrights, patents, and trade secrets increase the availability and use of intellectual products more than they restrict this availability and use? If they do, we must then ask whether they increase the availability and use of intellectual products more than any alternative mechanism would."[839]

The instrumentalist labour theory is largely consistent with the deontic claims of moral desert, although they are not conceptually overlapping.[840] The difference can be best understood by resort to the pre-institutionalist and post-institutionalist divide in property theories at the foundational level: whether they rely on natural rights thinking or whether the prior recognition of a political-legal institution is necessary for any property claims to make sense. Proponents of the pre-institutional theories argue that property claims exist once the conditions for their existence are met, and that political-legal institutional recognition is merely an afterthought. By contrast, post-institutionalists regard the institutional recognition of property as the genesis of such claims and the property rights that follow are necessarily shaped and defined by the state that is brought into existence in accordance with the political theory at hand.[841] In the post-institutional account, "property and economic institutions are designed in service to distributive principles, but pre-political morality is— in the first instance— agnostic with regard to the actual content of such principles".[842] The distribution of property entitlements is the product of the fundamental values that are taken to lie at the heart of the political theory and are directed by principles of justice formulated to give effect to the political society's most basic commitments. Notions of property as pre-political employ pre-institutional reasoning; post-institutionalism holds that property is granted, recognised and enforced by political institutions, leaving no natural rights or content outside of the political.[843]

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[839] Hettinger "Justifying" 49.
[840] George *Constructing* 343 calls the theory of moral desert a "variation" on Lockean labour theory. Du Bois "Justificatory theories" 19-20 also calls the desert theory "another variation" of the reward theory, which she distinguishes from labour theory by the mechanism of societal reward for productive labour rather than a natural right to property in the products of one's labour. Rognstad *Property Aspects* 29 describes the moral desert basis of protection as "[o]ne reading of Locke's property theory".
[841] Merges *Justifying IP* 95.
[842] Blankfein-Tabachnick "Foundations" 1009 (citations omitted).
[843] Merges *Justifying IP* 95: "[Property rights] are not really conceivable without a state, so they cannot in any sense precede the state, at least not in their final, mature form." See also Blankfein-Tabachnick "IP doctrine" 1342, where he casts doubt over this."

The difference between pre-institutional and post-institutional conceptions of property is especially relevant to the prevailing theory's nature, and incompatibility on this score would mean theoretical dissonance throughout. For example, a purely utilitarian approach would not be able to account for natural rights claims of property or authorial dignity, rendering them incidental at best to the primary objective of enhancing whichever metric of utility is postulated as the driving force. While he attributes much importance to efficiency as a midlevel principle,[844] Merges does not commit to any utilitarian first-order principles for his foundational theory.[845] His rejection of efficiency as generative value means that he is advocating either a rights-based or fairness-based approach at the foundational level.[846] Indeed, the Kantian-Lockean alliance indicates a strongly rights-based theoretical foundation, with Rawls's case for distributive justice also being made on deontic grounds. Blankfein-Tabachnick contends that the "Rawlsian post-institutional conception of justice has little conceptual space for principled commitment to concepts embodied in any alternative approach to liberalism",[847] making it a bad candidate for combination with others in any pluralist account. This is clearly not the case with Dworkin's theory of law as integrity, which actively seeks out the legal society's conception of justice (himself postulating the two principles of human dignity as normative basis) and tries to give it the best possible effect. If the model of law is post-institutional, the teleological objectives may have distributive-efficiency maximising implications (as the trade-based model of intellectual property generally does) that are at odds with pre-institutional tenets of property distribution (Lockean labour theory having clear distributive implications for original acquisition of property which are not always cohesive with utilitarianism).

Rognstad observes that while some justifications are inherently directed at producing certain consequences, "other ideas of property can be both consequential and non-consequential depending on how the basic ideas are further elaborated", and the significant overlap between the theoretical accounts further blurs the line.[848] Merges also opines that "[u]tilitarian generalization [under rule utilitarianism] […] bears some similarity to Kantian ethics, in particular the categorical imperative."[849] In this regard,

[844] Merges "Foundations" in *Research Handbook on the Economics of Intellectual Property Law* 93.
[845] Merges *Justifying IP* 3; Claeys "Cowbells" 1064.
[846] Claeys "Cowbells" 1043.
[847] Blankfein-Tabachnick "Foundations" 1011. See also Blankfein-Tabachnick "IP doctrine" 1342-1342.
[848] Rognstad *Property Aspects* 15.
[849] Merges "Foundations" in *Research Handbook on the Economics of Intellectual Property Law* 77.

both Kantian and Hegelian perspectives speak to the importance of enabling conditions for every person to have access to sufficient property for them to live a fulfilled life of creative expression. In the copyright context, this would emphasise the need for a rich public domain from which to create, as well as the almost sacred relationship between an author and their work that would be adequate cause to revisit the complete freedom of contract that presently reigns.[850] However, on Resnik's account "[t]he expression of oneself is a relevant moral consideration, but it is not the sole reason for granting property rights with respect to that object".[851] This shows the importance of developing a multifaceted and nuanced account of copyright that is alive to the numerous values that are necessarily entailed in the configuration of a given property system.

Describing the basic architecture of Merges's theory, Ikechi Mgbeoji explains that he "lays down three foundational principles: Lockean appropriation, Kantian (liberal) individualism, and Rawlsian attention to the distributive effects of property. Ultimately, these arguments are premised on possessive individualism."[852] It is important to unpick these fundamental tenets wherever they appear in Merges's model to be aware of the cognitive and doctrinal articulations that follow from the foundations that he builds which may or may not be relevant to the rendition at hand. Accordingly, while Merges's invocation of Kant may be useful to a Dworkinian (or, for that matter, South African constitutional) model of law, his utilisation of Lockean labour theory is somewhat less pertinent to this construction. For present purposes, it is sufficient to be acutely aware of these constitutive elements and to separate the operation and application of each respective strand. While these core threads explain much about the legal property in question, the structure and function of property may reveal an additional dimension to its operation.

Although Dworkin does not offer a theory of property, it is fair to say that his conception of property as a legal phenomenon is post-institutional, given its overt reliance on the political theory animating legal society as the bedrock of all law. Moreover, if one

[850] The Copyright Amendment Bill [B13-D 2017] provisions relating to reversion of author's rights (clause 23 amending section 22) can be considered an instantiation of Hegelian autonomy, in addition to the moral rights triggered by contractual alienation of copyright (section 20) that arguably also embody this form of autonomy.
[851] Resnik "Pluralistic account" 326.
[852] I Mgbeoji "Book Review: *Justifying Intellectual Property*, by Robert P. Merges" (2012) 50 *Osgoode Hall LJ* 291-299 at 296 (citations omitted).

considers Kant's theory post-institutionalist (as Merges does), it is unlikely that Dworkin's stance could be considered anything else. Yet, Dworkin arguably infuses in his model pre-institutional claims akin to Locke's natural rights thinking, although usually only to the extent necessary to facilitate the achievement of his fundamental value of liberty as equal dignity. Dworkin's Kantian model bases its claim for private property rights on their instrumental importance for individuals attaining dignity and autonomy.[853] However, it should be noted that both Kantian and Hegelian theories fail to describe the consequences of the private property protection that they seek to justify, with the result that the doctrinal implications are not certain.[854] Mikhalien du Bois supports the application of these theories where an instance of individual liberty connected to an author's personality or spiritual fulfilment is implicated in a dispute, but cautions that this will likely not be a frequent occurrence as such theories make a strong case for authorial access to their work but do not extend to an author's desire to exclude others from the work.[855]

Hegelian self-expression may indeed find many points of intersection with the model of copyright rules presently employed as a comprehensive regulatory scheme in South African law, and the importance or weight that it is given should, I submit, be determined by the resonance that the theory achieves with the constitutional value system. This means that the legislative intention in protecting Hegelian concerns is not relevant; only how much Hegelian autonomy can be synthesised from the extant copyright rules read in the teleological, value-enhancing manner espoused in the previous chapter that displaces authorial intention for legislative purpose. Thus, for example, the personal relationship between an author and a work may be a persuasive consideration in cases where the author's personality is captured or reflected in the work, but not where the property object is of an industrial nature.[856] Similarly, there

[853] Hettinger "Justifying" 45 classifies this justification as being concerned with the individual exercising sovereignty over themselves as an instantiation of autonomy, additionally encompassing the value of privacy (although, as the author notes at 46, privacy does not fit copyright or patent law as a justification for protection "given that these property rights give the author or inventor control over certain uses of writings and inventions only after they have been publicly disclosed").
[854] Rognstad *Property Aspects* 39.
[855] Du Bois "Justificatory theories" 25.
[856] Notwithstanding, moral rights protection is extended to cinematograph films and computer programs, which are both forms of industrial copyright: see s 20. Of course, self-expression is not a relevant factor in determining originality of a work or any other requirement for copyright subsistence, nor should it be; the suggestion is merely that where this is relevant (as in *Vollenhoven*) the relationship between the author and the work and the copyright owner and the work, respectively, should indeed be considered when determining a claim like that in *Vollenhoven*.

may be a personality interest involved when persons with disabilities are locked out from their respective cultures due to the scarcity of accessible-format works, suggesting that the gravity of dignity interests may be felt beyond the authorial relation to a work. This is largely dependent on the positive law that has resulted from the historical development of copyright law in South Africa, but may also be sourced from the theoretical and normative constitutional framework that dictates the validity of all positive statutory law.

Justine Pila observes that "courts commonly invoke the historical and theoretical roots of IP to assist in the interpretation and application of modern copyright and patent legislation", which holds true for South African case law.[857] South African courts have been more reticent with the theoretical dimension than the historical, but even the historical accounts of copyright that pervade case law lack any recognition of the normative basis or outcomes of the intellectual property regime. In one of the few decisions to consider either dimension, *Biotech Laboratories (Pty) Ltd v Beecham Group PLC and Another*, the Supreme Court of Appeal had cause to construe the historical and theoretical development of South African copyright law on the question of authorship.[858] Harms JA recognized the possibility of copyright being based on:

> "[A] philosophy allegedly underlying the Act, namely that it seeks to create a system whereby the creator of an original work is afforded a qualified exclusive right to compensate him for the effort, creativity and talent expended and to act as an incentive for the creation of further and better works."[859]

This reflects the moral desert thinking fused with the incentive structure that animates copyright law and the instrumentalist approach of deploying incentives.[860] Harms attributes the different approaches in common law countries and civil law traditions

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[857] J Pila "Pluralism, principles and proportionality in intellectual property" (2014) 34 *Oxford Journal of Legal Studies* 181-200 at 190.

[858] [2002] 3 All SA 652 (SCA).

[859] Para 11. However, at para 12 the court was clear on the normative underpinnings being a tussle between the Continental (civil law) approach and the Anglo-American (common law) approach, with the latter winning out against the former in respect of many core doctrines.

[860] Article 7 of TRIPS encapsulates the utilitarian purpose and framework that informs intellectual property law. See also Recital 10 of the European Copyright Directive 2001/29/EC (the "InfoSoc Directive"), which combines the incentive function of copyright with an authorial reward based on moral desert: "[i]f authors and performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work." This single sentence expresses much of the contemporary sentiment regarding the role and propriety of copyright as a system of private property rights. See further Rognstad *Property Aspects* 80-81, who points out that "there is no reference or link to the promotion of wealth or welfare and to the fact that the reward is a means in this respect", potentially undermining the utilitarian element of this provision and amounting to little more than "a normative claim that no one should be expected to work for free".

respectively to their different theoretical commitments.[861] He ascribes civil law approaches to the "principle"[862] of recognising and protecting authorial labour in their intellectual creations rather than the comparatively utilitarian and industrial considerations that focus on publishers as creators of literary property along with authors.[863] However, there is no attempt at reconciling the normative implications of the imputed legislative intention with the constitutional value system, nor even any serious attempt at considering what the latter entails.[864]

Du Bois argues that a robust labour theory could undermine state interventions in the property scheme occasioned by deprivation and expropriation, or even just a limited duration of protection, as these measures would seem illegitimate to the labour theorist.[865] Stephen Munzer offers a contemporary take on the labour theory that infuses it with the main elements of the desert theory, imposing practical constraints on the operation of this amalgamation on the basis of the interests of others (based on need rather than entitlement), limitations concerning original acquisition of unowned property, and some of the incidents of ownership.[866] He further qualifies the application of this theory as marginal in pluralist societies that have theories of law and justice relating to equality as a matter of distribution but maintains that "desert by labor performs a significant role in justifying rights of private property".[867] He describes this as the labour-desert principle, which is useful shorthand for the normative values that the law of property implicates when awarding ownership over newly created copyright works.[868] I incorporate this labour-desert principle into the theory of copyright at the midlevel principle of property.[869]

Once the need for a certain form of protection (copyright, in this instance) has been established on deontological (Lockean or Kantian) or consequentialist (utilitarian)

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[861] LTC Harms *A Casebook on the Enforcement of Intellectual Property Rights* (4th ed 2018) 60-61.
[862] Although Harms calls it a principle, this normative commitment should rather be seen as a foundational value on both Merges's and Dworkin's model.
[863] Harms *Casebook* 61.
[864] The court is apparently influenced by "the spirit of our constitutional values" in adopting an expansive reading of some statutory provisions, specifically in not "[a]llowing the State without more to reap what it did not sow" (para 16). The precise values implicated in this interpretation are never specified.
[865] Du Bois "Justificatory theories" 16.
[866] Munzer *Theory*.
[867] Munzer *Theory* 291. Some of the chief limitations on the applicability of the labour theory (summarised at 283-285) include the role of labour policy in the modern economy, extrinsic concerns for utility and efficiency, and the political dictates of justice that the legal system seeks to uphold.
[868] Munzer *Theory* 283.
[869] See Section 7 1 below.

grounds, attention moves to principled questions concerning the extent or intensity of protection required, or the manner and means of exploitability. This is where Merges's considerations of commensurability (proportionality) and efficiency arise.[870] On his account, proportionality and efficiency are not located at the foundations of IP theory like dignity.[871] It is at the midlevel and doctrinal level where property questions arise and are resolved by resort more to rules and principles than theoretical accounts of justification.

The economic conception of IP as property has become the paradigmatic explanation for the rights granted over ideational objects, given the trade-based operation of intellectual property rights in the global economy as exemplified in the global trade arena by TRIPS.[872] In respect of the most common economic explanation for IP protection, "the economic rationale for justifying IP may vary depending on whether or not one confines oneself to the scarce v. non-scarce paradigm."[873] Economic theory holds that a free-rider problem would arise if the intellectual property objects were not assigned some mechanism of excludability, favouring the property rights solution due to it feeding into the market scheme.[874] This instantiates the famous "tragedy of the commons", which takes the conditions of free and unlimited access to a common resource as disastrous given the alleged rational self-interest with which all economic actors behave.[875] Because of the non-scarce and non-rivalrous nature of the common (intellectual) property, the correlative problem of the free-rider arises.[876] However, the conventional free-rider problem of one person appropriating another's efforts or property is not quite apt, but rather an associated problem "where copying others' creational efforts hampers incentives to innovate and consequently leads to welfare losses".[877] For this reason, economic theory utilises the incentive mechanism and

[870] Merges "Foundations" in *Research Handbook on the Economics of Intellectual Property Law* 93:
[871] The principle of nonremoval also speaks to the Lockean foundations rather than constituting a foundational justification for protection in itself.
[872] Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 15 April 1994, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). See RC Dreyfuss & S Frankel "From incentive to commodity to asset: How international law is reconceptualizing intellectual property" (2015) 36 *Michigan Journal of International Law* 557-602; S Frankel "The fusion of intellectual property and trade" in RC Dreyfuss & ES Ng (eds) *Reframing Intellectual Property in the 21st Century: Integrating Incentives, Trade, Development, Culture, and Human Rights* (2018) 89-114.
[873] Rognstad *Property Aspects* 76.
[874] Rognstad *Property Aspects* 17; Du Bois "Justificatory theories" 27.
[875] G Hardin "The tragedy of the commons" (1968) 162 *Science* 1243-1248.
[876] Rognstad *Property Aspects* 20.
[877] Rognstad *Property Aspects* 20.

logic, positing that property rights are essential "to correct market failures which arise from the high fixed costs of creating and the low marginal cost of distributing the creation", especially in the online environment.[878] While some versions of economic theory hold firm to the original theoretical framework and commitments of their chosen variant,[879] others propose reinvigoration of normative underpinnings or method but retain the basic logic and ethical paradigm of the instrumentalist scheme.[880]

When the property object entails non-exclusive information goods – goods that by their incorporeal nature allow for simultaneous enjoyment by one and all and can be reproduced at zero marginal cost – many of the traditional justifications for attaching property rights falter.[881] The deployment of property rights against the background of the market as the realm of private interaction brings with it certain cognitive biases and rhetorical norms of cost-benefit analysis and other micro-economic assumptions and lenses.[882] Additionally, by introducing artificial (legal) constraints on the intangible property objects, the law necessarily creates new inefficiencies that are externalised in non-economic costs.[883] Moreover, the incentive mechanism is not innately bound up with economic theory.[884] Further, creators are not the focus of the incentive mechanism, but rather the general public (users, in copyright terms).[885] Authors are only important to the extent that they create socially beneficial works and have no inherent claim for recognition or reward for their creations, nor do non-authors' interests feature in this view. The lack of deontic reasoning and priorities is to be expected of an instrumentalist account of any area of law. However, it entails discarding any conception of right and wrong beyond the economic renderings. The instrumental scheme cannot operate as a comprehensive justification of copyright

[878] Du Bois "Justificatory theories" 23.
[879] Merges "Foundations" in *Research Handbook on the Economics of Intellectual Property Law* 73-74. For a thorough exposition of economic theory and its pertinence to copyright, see R Watt *Copyright and Economic Theory* (2000).
[880] MA Lemley "Faith-based intellectual property" (2015) 62 *UCLA LR* 1328-1346 advocates an empirically driven economic model of intellectual property, describing all deontic accounts as faith-based and all extant economic models as equally riddled with methodological problems and an overall lack of empirical verification.
[881] Hettinger "Justifying" 34. On rivalry and exclusivity of information, see Carrier "Limiting copyright" in *Concepts of Property in Intellectual Property Law* 196.
[882] Merges "Foundations" in *Research Handbook on the Economics of Intellectual Property Law* 74 n 1.
[883] S Balganesh "Debunking Blackstonian copyright" (2009) 118 *Yale LJ* 1126-1181 at 1138.
[884] Du Bois "Justificatory theories" 23.
[885] Du Bois "Justificatory theories" 22.

while discarding all human rights commitments, as this would not be constitutionally tenable in South African law.

Egalitarian accounts come in many forms and can accommodate anything from Marxist to liberal values.[886] These theories are mostly concerned with the distributive outcomes of intellectual property rules and are sceptical of the bare claim of justification that IP rules induce creative effort and are therefore socially beneficial. Egalitarian theories are instrumental in their concerns for the effect of the property rights on the non-propertied public and whether property rules improve the lot of the general public compared to the social costs.

One other justificatory model is note-worthy for purposes of this research. Neil Netanel proposes employing the copyright regime as a democracy-enhancing system that contributes to the realisation of democratic values and ideals.[887] Netanel descriptively locates copyright in the economic market as an incentivisation scheme responsible for producing cultural works, which he terms the neoclassicist market paradigm.[888] This single conception of copyright has come to dominate the rhetorical and conceptual frameworks in which copyright legislation is formulated and disputes adjudicated, despite the myriad other civil-democratic values that it implicates besides economic. The monolithic copyright edifice that Netanel describes is similarly prevalent in South African copyright law, especially evident in the adjudication of copyright claims that rarely consider anything beyond economic value in the exploitation of a work. Describing the threats to democracy that the present trade-based paradigm presents, Netanel argues:

> "A bloated copyright [system] frustrates copyright's democracy enhancing goals in two basic ways. First, on too many occasions, copyright owners have sought to use their proprietary entitlements blatantly to suppress political, social, or personal criticism. […] Second, expanded copyright imposes an ever more burdensome 'tax' on audiences and subsequent authors. Expanded control may increase the private cost of reading, viewing, and listening to authors' expression to such an extent that, in some cases and for some people, access becomes prohibitively expensive."[889]

[886] Drahos *Philosophy* 111-137, 199-230. Rawls is often considered the paragon of liberal egalitarianism: see Resnik "Pluralistic account" 329-330 on Rawls's theory of justice as applied to IP, although the author describes Rawls's theory as a combination of egalitarianism, utilitarianism, and libertarianism.
[887] NW Netanel "Copyright and a democratic civil society" (1996) 106 *Yale LJ* 283-387.
[888] Netanel "Copyright" at 309.
[889] Netanel "Copyright" 294-295 (citations omitted). At 296-297 the author elaborates:

This last concern is especially pressing in the South African context, where the rights and democracy-promoting values of freedom of expression, education, and cultural plurality and diversity are directly implicated. Netanel instead poses copyright as a vehicle for the enhancement of democratic values, albeit with a distinctly American bias towards liberty-enhancing rights concentrated in freedom of expression. In contrast to the perceived usurpation of copyright's plural functions, Netanel postulates that his "democratic paradigm […] emphasizes that copyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society."[890] This democratic model of copyright serves the production function that is embodied by the incentive mechanism as well as a structural function of strengthening democratic ideals by ensuring a democratised system of participation, which in turn serves the goals associated with an engaged and culturally informed citizenry. This shows how one value (political liberty cast as freedom of expression) can be instrumental to the democratic legal order, substantively construed, and provides a valuable lens through which to consider intellectual property rules.[891] Netanel recognises the value of freedom of expression in copyright law in the limited duration of its protection and the curtailment of its scope through doctrines like the idea/expression dichotomy and fair use entitlements.[892] However, whether these internal limitations are cumulatively sufficient to secure the objects of the liberty underpinning freedom of expression is a separate question.

George labels Netanel's civil democratic model of copyright a social planning theory because it strives to produce a pluralistic and democratic political and social culture.[893] However, Shyamkrishna Balganesh labels Netanel's reliance on the market for the structural function as displaying libertarian thinking in respect of distributive

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"Given the interest of a democratic society in an educated citizenry and an inclusive, national culture, when some persons are unable to acquire access to expressive works, the harm is arguably not just to them as individuals, but to society as a whole."

Netanel further identifies the issues of copyright duration, exceptions for personal use, and allowance for transformative uses as central to the democratic paradigm that he espouses.

[890] Netanel "Copyright" at 288.

[891] This is arguably congruent with the approach of the Constitutional Court in *Laugh It Off*, where the constitutional right and value of freedom of expression was considered primarily for its contribution to the creation of a vibrant democracy and was cast as an a priori demarcation of the property right granted/constituted by a trade mark.

[892] Netanel "Copyright" at 304.

[893] George *Constructing* 348.

outcomes.[894] To my mind, this is innately instrumental or consequentialist, as the entire copyright edifice is constructed to bring about a set of conditions that has nothing to do with protecting the objects of copyright or the moral worthiness of the author's claim to them. However, this instrumentalist scheme inherently allows a better integration of deontic dictates because of the democratic normative framework that feeds into the human rights structure. Netanel's model casts "a relatively strong copyright only as a blunt instrument for insuring (*sic*) a vital, independent sector for the creation and dissemination of original expression", which is wholly compatible with the constitutional model of law.[895] In this way the basic ontology of Netanel's approach can be instructive to a South African adjudicator, even if the heavy reliance on freedom of expression is unwarranted. Therefore, despite Netanel's heavy reliance on copyright as an "engine of free speech" that is ultimately instrumental to democratic goals, a much broader array of civil-democratic constitutional provisions may lay claim to territory presently occupied by copyright than his model considers, such as the rights to language and culture, access to information, and education.[896] A systemic model like Netanel's civil democratic one that centres on political liberty could arguably be reimagined as a Kantian model, substituting the South African constitutional concern for dignity as deontological and instrumental priority in the place of strong political liberty. Further, doctrinal articulations of the renewed normative objectives that Kantian dignity supplies can be found throughout the provisions of the Copyright Amendment Bill [B13-D 2017].[897]

5.4 The property nature of copyright

> "Put simply, property is what the law defines it to be. Laws relating to property are, in turn, grounded in justificatory theories. Some of these theories involve notions of moral right while others are more instrumental in character."[898]

[894] Balganesh "Debunking" 1146-1147. See 1139 for the author's explanation of copyright's structural function in the civil democratic model.
[895] Netanel "Copyright" at 332.
[896] Netanel "Copyright" 296.
[897] The proposed sections 6A, 7A, 7B, 7C, 7D, 7E, 7F, 8A & 9A display strong elements of Kantian dignity and seek to entrench the economic and moral interests of authors to a far greater extent than the Copyright Act attempted previously.
[898] DG Richards *Intellectual Property Rights and Global Capitalism: The political economy of the TRIPS agreement* (2004) 27.

Copyright is conventionally seen as comprising a set of primarily property rights reinforced by remuneration rights and moral rights,[899] which entails a host of rhetorical and theoretical connotations imbibed by the liberal idea of property.[900] While it is true that much presumptive power is wielded by the label "property" in law, the exact parameters of this default mode of deference are set by the prevailing legal culture. As George points out, "the term 'property' depends on its environment for its meaning; its meaning is utterly contingent on the social, historical context in which it is used."[901] This calls for a more nuanced understanding than simply lumping together fields of law that are conceptually different either as a justificatory or operational matter.[902] Roman-Dutch property law and copyright law are historically and conceptually different, but the legal category of property that envelops copyright determines much about the thinking about and functioning of copyright.[903] Property comprises a series of assertions of underlying core values which the claimant deems enforceable and which they wish to uphold against competing claims based on other values, which are all entirely contingent on the context in which they are raised (in which society, when, by whom, against which countervailing interest, etc.).[904] Accordingly, determining the result of a property claim in the abstract runs the risk of ignoring context and the importance of the competing interest. Only by being attentive to the core values that are borne out by the doctrinal device of property rights can one ensure compatibility and normative convergence with the project of constitutional transformation.

Balganesh observes that copyright resembles legal property in that it constitutes a bundle of exclusive rights, the transgression of any of which is seen as an infringement, but the right to institute action for such infringement is technically not

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[899] But see S Samtani "The domestic effect of South Africa's treaty obligations: The right to education and the Copyright Amendment Bill" (2020) *PIJIP Research Paper No 61* 1-53 at 49-50, who makes the forceful argument that copyright should not be protected as property in South African constitutional law.

[900] As Mgbeoji "Review" 295 wryly notes:

> "In western legal tradition, few principles have attained the divine status enjoyed by individual property rights. The theology of property as a right of unquestioned merit has in some ways bred a fundamentalist concept of property."

[901] George "Difficulty" 797.

[902] OA Rognstad *Property Aspects of Intellectual Property* (2018) 76.

[903] In *Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd* 1993 (4) SA 279 (A); [1993] 2 All SA 521 (A) para 33, Corbett CJ held that applying the principles of *specificatio* and *accessio* in the copyright context was "misplaced", overturning the judgment of Booysen J in the court a quo (*Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd* 1991 (3) SA 240 (D)).

[904] Underkuffler *Idea of Property* 6, cited in George "Difficulty" 797. See also the recent polemic against unitary answers to complex property questions of A Dorfman "When, and how, does property matter?" (2022) 72 *University of Toronto LJ* 81-124.

part of the enumerated bundle.[905] However, the legislative grant of rights and remedies in respect of copyright clearly resembles the structure of delict, as it regulates interpersonal relationships in respect of certain proscribed behaviours. Moreover, even if one uncritically accepts that copyright falls solely under the auspice of property, the inexact boundaries of the property concept make it necessary to consider the implications of classifying a right or a bundle of rights as property.[906]

Rognstad identifies three facets of property in IP rights: the dimensions of theoretical justification, the structure of the rights, and the asset nature of the IP objects. These three facets demonstrate similarity between intellectual property rights (more generally than mere copyright) and their corporeal namesake. At the justificatory level, property norms and metaphors are employed to argue for the similar protection of intellectual creations that do not share the tangible nature of conventional property objects. The property nature of rights stems from their *in rem* nature, which stipulates that such rights relate to things.[907]

Blankfein-Tabachnick charges that Merges's three foundational accounts advance "competing and conceivably conflicting conceptions of property".[908] However, according to Mgbeoji, Merges sketches "an adaptable concept of property, expansive enough to account for both tangible and intangible 'property.'"[909] He opines that "[b]y mapping out a one-to-one concept of power relations between the owner and the user, Merges seems to escape the constraints imposed by a historical essentialist view of

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[905] S Balganesh "Alienability and copyright law" in HR Howe & J Griffiths (eds) *Concepts of Property in Intellectual Property Law* (2013) 161-181 at 173. This metaphor has found some judicial recognition in South Africa, albeit scant. In *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd v Shelburne Associates & Others; Video Parktown North (Pty) Ltd v Century Associates & Others* 1986 (2) SA 623 (T) at 632C, Slomowitz AJ remarked of the Copyright Act that "[…] the connotation of ss 6 to 11 of the Act is obvious. Those provisions attempt to define, possibly to circumscribe, that bundle of rights which constitute copyright." OH Dean & S Karjiker *Handbook of South African Copyright Law* (RS 15 2015) 1-141 describe the copyright "in each category of works in fact [as] consist[ing] of a 'bundle' of rights." See further JE Penner "The 'bundle of rights' picture of property" (1996) 43 *UCLA L Rev* 711-820.

[906] As Walsh *Property Rights* 3 warns:

> "Doctrinal analysis can undoubtedly pay insufficient attention to theory – in particular, to ideas and intuitions about the value of private ownership that influence judicial decision-making, often unconsciously and almost always implicitly" (citations omitted).

Drassinower "Compelled speech" in *New Frontiers in the Philosophy of Intellectual Property* 209 echoes this point: "Insisting that a work is a metaphysical chattel, so as to dissolve the distinction, does nothing to further the analysis, and a great deal to obfuscate it."

[907] Rognstad *Property Aspects* 43.

[908] Blankfein-Tabachnick "IP doctrine" 1341.

[909] Mgbeoji "Review" 295.

property."[910] The essentialist account of property is characterised by its proclivity for abstract reasoning (that is, the operation of law is determined without any regard for the context of a matter and in a mechanical, hierarchical fashion akin to the formalistic mode of reasoning described in Chapter 1) and emphasis on the alleged absoluteness of the position of the owner in respect of their property as a point of departure without due consideration of the property's theoretical basis or operative purpose.[911]

The essentialist view of property focuses on the aspects of exclusivity and the purported absoluteness of the owner's legal ability to exclude.[912] Netanel identifies the attitude of property essentialism as the normative position that dominates copyright discourse.[913] This essentialism denotes a Blackstonian understanding of property and perpetuates the rhetorical force of a market-based model of immaterial property.[914]

> "The idea of property as despotic dominion that is often associated with Blackstone's definition then denotes two somewhat interconnected elements. The first is the idea that property has no limits: absolutism. The second is the idea that once an entitlement is designated as a form of property, its owner is allowed to exercise the exclusionary privilege/right that is central to it, regardless of any underlying reason: essentialism. It is indeed the latter that has proven to be particularly impactful in the copyright context."[915]

Clearly the essentialist iteration of copyright as property favours abstract, a-contextual and largely formulaic resolution of property disputes. On this view, not only is the ability to exclude others from one's property essential to the right being classified as property, but the exclusivity of those exclusionary rights is also an essential characteristic of property ownership, both in respect of corporeal and incorporeal property. As a normative account, it fails to accommodate any form of pluralism, which suggests a kinship with the information theory arguments discussed below.[916] The essentialist view has featured prominently in South African property law and must be defused by

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[910] Mgbeoji "Review" 295.

[911] Balganesh "Debunking" 1134 describes how "[o]wnership over a resource – that is, having a property right in it – is often thought to give its owner an open-ended set of ownership privileges, all or any of which may be exercised with little regard for an underlying principle or purpose."

[912] AJ van der Walt & P Dhliwayo "The notion of absolute and exclusive ownership: A doctrinal analysis" (2017) 134 *SALJ* 34-52. See further P Dhliwayo "Justifying the limitations on the landowner's right to exclude" 2019 2 *TSAR* 252-284.

[913] NW Netanel *Copyright's Paradox* (2008) 7-8. See also Claeys "Cowbells" 1046.

[914] Netanel *Copyright's Paradox* 7:

> "Property rhetoric, whether invoked reflexively or strategically, has tended to support a vision of copyright as a foundational entitlement, a broad 'sole and despotic dominion' over each and every possible use of a work rather than a limited government grant narrowly tailored to serve a public purpose."

[915] Balganesh "Debunking" 1133-1134.

[916] See the deconstruction of property absolutism/essentialism in Van der Walt & Dhliwayo "Absolute and exclusive ownership".

rethinking the normative impetus and implications of attaching property status to a right. Merges's property concept provides a good starting point in this regard as it is not tethered to the essentialist view that was the hallmark of the pre-constitutional property dispensation.[917]

Balganesh decries "the fusion of the ideas of exclusion and exclusivity" into a confusing amalgam that equates the respective powers of excluding others from a property object and protecting the owner's control over the resource.[918] Hugh Breakey similarly points out that exclusion and exclusivity have often been conflated, although "it is not at all obvious that the former follows analytically from the latter, or vice versa".[919] While in some cases both incidents may coexist, this is not necessarily the case.[920] In this regard, Drahos distinguishes the property hallmark of exclusionary rights generally from the prevention function of intellectual property rights: IP rights not only prevent all others from using the existing object of the rights but also from recreating the object for themselves.[921] Breakey observes that the ability to exclude is bolstered by exclusive use privileges in that all non-owners are disbarred from the specific activities that make up these liberties.[922] The specified conduct is the object of the right rather than the possessory relationship that typically accompanies use privileges. Balganesh explains this in respect of copyright:

> "The exclusive rights that copyright grants an owner are not exclusive possessory rights of the kind that real property gives owners. They are instead rights that operate by disabling others from performing certain actions. Copyright's rights become exclusive, owing to the non-rivalrous nature of expression, only when they impose correlative duties on all others."[923]

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[917] For a clear exposition of this trait in South African property law, see Van der Walt "Tradition on trial"; Van der Walt "Dancing with codes"; Van der Walt "Legal history".

[918] Balganesh "Alienability" in *Concepts of Property in Intellectual Property Law* 177-178. At 178 the author further notes that "exclusion operates as a negative liberty while exclusivity operates as a positive liberty" in keeping with the terminology made famous by Isaiah Berlin. As Balganesh notes, Larissa Katz has proffered an agenda-setting model of exclusivity to explain the core of the property owner's exclusive control over the object. Katz proposes that a property owner's position can best be described as an exclusive agenda-setting power over the property: L Katz "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto LJ* 275-315.

[919] H Breakey "Properties of copyright: Exclusion, exclusivity, non-interference and authority" in HR Howe & J Griffiths (eds) *Concepts of Property in Intellectual Property Law* (2013) 137-160 at 138.

[920] Breakey "Properties of copyright" in *Concepts of Property in Intellectual Property Law* 147:

> "Regarding liberties, there is no necessary implication from the mere presence of a liberty to its being exclusive; the addition of exclusivity adds decisively to the entitlement by creating claim-rights to exclude."

[921] Drahos *Philosophy* 160."

[922] Breakey "Properties of copyright" in *Concepts of Property in Intellectual Property Law* 139.

[923] Balganesh "Alienability" in *Concepts of Property in Intellectual Property Law* 175-176 (citations omitted).

Exclusion and the exclusive power to enforce it seem to give strong protections to notions of individual autonomy by granting exclusive control over a valued resource to an owner whose liberty then becomes tied up in the object. This idea is carried over from the legal institution of property that is often resorted to in explaining the nature and operation of copyright, likely because of the chief mechanism of enforcement being akin to exclusion.[924] The normative justification of excluding others from one's property as securing a core element of autonomy has similarly been transplanted from the property context to copyright.[925] Yet, as Balganesh eloquently opines, a "uni-dimensional focus on exclusion and its contribution to copyright's basic legal architecture has had the effect of directing attention away from other equally important analytical overlaps between copyright and property", especially concerning copyright's alienability.[926] Transferability has been described as a *sine qua non* of property.[927] Still, limits and exclusions are routinely imposed on this right in various property contexts, and in many cases the law deems certain rights in property inalienable.[928] In instances where property entitlements are deemed inalienable by statutory regime, this should indicate that a different dimension of the property is operative to the commercial elements that are often seen as the point of departure.

> "What this points to then is that copyright's core emphasis lies not in the identification of a thing (or *res*) along the lines of traditional property regimes, but instead in a focus on specific actions that are in turn thought to be equivalent (though not identical) to the possessory privileges granted to owners of tangible resources. Henry Smith describes this distinction as one between 'exclusion-' and 'governance' based approaches to delineating property rights in intangibles."[929]

Exclusion-based strategies to regulating property relationships purport to prioritise the individual autonomy of property owners by granting to them by default the fullest possible ambit of power over the property, which they can exercise as actualisation of their autonomy. This perspective relies on the array of market-based norms and

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[924] Balganesh "Alienability" in *Concepts of Property in Intellectual Property Law* 161-162.
[925] Balganesh "Alienability" in *Concepts of Property in Intellectual Property Law* 164-165, pointing out that the normative justification is especially cogent in utilitarian and libertarian theories as being essential to the liberty- and welfare-enhancing functions of property rights, respectively.
[926] Balganesh "Alienability" in *Concepts of Property in Intellectual Property Law* 162.
[927] Balganesh "Alienability" in *Concepts of Property in Intellectual Property Law* 162: "[Sometimes] the absence of such a power (or the inalienability of the right) is taken to imply that the interest in question is not a property right at all".
[928] Carrier "Limiting copyright" in *Concepts of Property in Intellectual Property Law* 192-194. Of course, such limits and exclusions are part and parcel of the right to exclude as well: see Dhliwayo "Justifying".
[929] Balganesh "Alienability" in *Concepts of Property in Intellectual Property Law* 177, citing H Smith "Exclusion versus Governance: Two strategies for delineating property rights" (2002) 31 *Journal of Legal Studies* 453; H Smith "Intellectual property as property" (2007) 116 *Yale LJ* 1742.

conventions as background conditions for the operation of the property scheme, implying a neoliberal approach to the configuration of legal relationships. Balganesh describes the distinction in copyright law as follows:

> "The exclusion strategy thus corresponds roughly to the idea of essentialism […] in that it entails a very high level of deference to the owner's decision. The governance strategy on the other hand usually sets out a broadly defined, vague entitlement that courts then give content to contextually. […] The governance strategy thus entails higher costs at the *ex post* stage, but these costs are offset by the benefits associated with having avoided an overbroad entitlement *ex ante*. Governance thus focuses on 'rights in activities,' while exclusion focuses on 'rights to things.'"[930]

Assessing the underlying normative commitments of property theorists, Jane Baron describes a fundamental tension between information theorists (of whom Henry Smith is considered a frontrunner) and the progressive property theorists.[931] According to the latter group, property law systems are better understood by looking beyond the metric of information costs that information theorists associate with complex moral ordering (to which information theorists prefer simple, bright-line rules that apply in all cases).[932] Information theorists conceive of property law relations as being relations between persons and legal objects, not between persons with the legal object simply mediating the relationship.[933] Information theorists take a principled approach to property theory, focusing on the *numerus clausus* principle as the bringer of clarity and stability, both being noble values for a legal system to emulate.[934] This anti-Realist stance allows proponents of this view to bestow the property object with numerous features that serve a publicity function, advertising the property claim to all and sundry with the accompanying instruction to keep off.[935] This is seen as the exclusion strategy towards property law in terms of which all signals emit the same message of exclusion by default, serving the owner's wishes rather than any competing social functions. The value-monist tradition that describes copyright primarily in economic terms of incentive

[930] Balganesh "Debunking" 1176.
[931] JB Baron "The contested commitments of property" (2010) 61 *Hastings LJ* 917-968.
[932] The debate between information theorists and progressive property theorists regarding governance and exclusion strategies is discussed in respect of copyright law by Balganesh "Debunking" 1175-1176. See also Rognstad *Property Aspects* 26-28.
[933] Baron "Contested commitments" 936.
[934] Baron "Contested commitments" 922-923.
[935] This is the role of property rhetoric, which ingrains in the public's mind images of pastures of land enclosed by fences that demand observance of the stated claim. This allegorical heuristic is invoked in respect of all forms of property, tangible and intangible, whether the prohibited activity is trespass or a specific form of conduct like reproduction.

and reward is arguably most compatible with an information theorist approach that deals in clear signals of exclusions like rules to keep off (do not copy).

Copyright law employs the *numerus clausus* principle in respect of many of its defining provisions, such as the objects that may qualify for protection,[936] the rights that owners may exercise over these objects,[937] and the exceptions and limitations to these rights.[938] This method serves abstract certainty at the expense of contextual complexity because everyone is instructed to obey default rules of non-engagement.[939] In this way, "[t]he right to exclude in property law is considered a way of dealing with complexity in systems to keep transaction costs low."[940] By contrast, progressive property theorists embrace complexity and forsake simplistic rules of exclusion in favour of creating more just relationships.

> "Just as the information theorists' approach to duties reflects their commitment to function, the progressive theorists' approach to duties reflects their commitment to evaluate property principally in terms of *ends.* How property coordinates people is less important to the progressive theorists than what relationships property constructs. If those relationships are dramatically unequal – in terms of power, reciprocity, or resources – then they must be reconfigured."[941]

Progressive property theorists focus directly on the values that they deem important: democracy, virtue, flourishing. While there is no authoritative iteration of progressive property theory, the term connotes a loose collective of different theories united by their concern for securing a plurality of values that lead to the inclusion of the interests of a broader swathe of society, whether by legislative promulgation or judicial intervention.[942] This is intended to overcome the dominance that law and economics has gained in property theory, with the result that economic values are given priority

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[936] Section 2(1) of the Copyright Act 98 of 1978 lists the types of work that copyright protects, all of which are defined respectively in section 1.
[937] Sections 6-11B stipulate the rights that owners enjoy, which invariably demarcate a certain activity in respect of the property object. This can be compared to the comparatively open-ended privileges that ownership is often said to entail, where an array of conduct is included under the use privileges and powers that owners can enforce against others through the assertion of claim-rights in the event of their violation.
[938] Sections 12-19B. The implication of the *numerus clausus* principle in this instance is that only the enumerated activities will be exempted from copyright infringement, meaning that there is no public interest defence, for example, to infringement because it is not contained in the governing statute. See eg *Vollenhoven*. Even when exceptions are permitted by regulation (as per s 13), these regulations merely add a number of exceptions, thus maintaining the *numerus clausus* of exceptions.
[939] I include *numerus clausus* as a subprinciple to the midlevel principle of property in Section 7 1 because of its prominence in the statutory scheme of copyright.
[940] Rognstad *Property Aspects* 26.
[941] Baron "Contested commitments" 957 (emphasis in original).
[942] See Walsh *Property Rights* 23-33 for a representative sample of prominent theories falling under this umbrella term.

above all competing conceptions. They eschew abstract certainty in favour of contextual reasoning that elevates human values above any single metric like economic efficiency or utility.[943] In line with the Realist method, progressive property scholars posit a social vision of property that recoils from abstract and mechanistic resolution of normative conflict, preferring to lean into the conflict with the hope of exploring ways of securing a plurality of interests.[944] Any principles (like *numerus clausus*) that derogate from the achievement of multiple values must be recalibrated to reflect a better configuration of the plural values at stake, whether they support property or clash with it.

Progressive theorists are more comfortable with the idea of judicial intervention in reconstituting the law, whereas information theorists prefer legislative authority for reasons of purity of political doctrine.[945] At a thematic level, information theorists are said to be concerned with stability and fixedness of law while their counterparts aim for complexity.[946] Walsh explains:

> "Whereas progressive property theorists accept a significant degree of contextual decision-making in property law in light of owners' social obligations, information theorists prioritise rule-based enforcement of owners' rights to exclude as a more efficient means of ensuring simplicity and predictability in property law. Progressive property and information theorists also diverge on the appropriate division of institutional responsibility for the mediation of property rights and social justice. Progressive property scholars ascribe a larger role to judges in adapting property rights to the needs of social justice on an evolving basis; information theorists argue that such adaptation, where necessary, should be predominantly via legislative reform."[947]

On the progressive argument, complex rule systems in which a multitude of values are embedded as theoretical underpinnings to the reified doctrines will produce more socially desirable outcomes because they will accommodate a richer conception of

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[943] E Rosser "The ambition and transformative potential of progressive property" (2013) 101 *California LR* 107-171 at 110.
[944] Baron "Contested commitments" 939.
[945] Baron "Contested commitments" 923. The progressive theorists' stance can be understood as the legacy of the Realist recognition of judicial politics in adjudication, while information theorists choose to rely on the formal roles attributed to the legislative and adjudicative branches of government respectively. Dworkin's theory of law places far more reliance on the functioning of the judiciary in constructing, developing and applying legal rules than does information theory and is therefore more compatible with a progressive theory of property than an information theory. One gets the impression that information theorists would do away with adjudication completely if their theory worked well enough without it, while Dworkin depends on the interpretive character of all law – as well as the need to identify the underlying political values that are so served and their continued compossibility – which one cannot get from the legislature.
[946] Rosser "Ambition" 109. See also Baron "Contested commitments" 960."
[947] Walsh *Property Rights* 3. This contextual approach is perfectly compatible with Dworkin's model of law as integrity through constructive interpretation, which is premised on contextual normative reasoning reflecting "local priorities", especially when these priorities entail dignity concerns.

what is at stake and thereby secure situational justice over abstract justice. For them, focusing on one value or effect diminishes the holistic gain that attends pluralistic embrace. Accordingly, there is much more at stake in the progressive account than efficiency or other mercantile metrics, and better ways of achieving property's ends than the monolithic right to exclude.[948] Baron reads progressive property scholarship as positing complexity as a value in itself "and, accordingly, a site of contest within property theory."[949] In contrast to the simplistic model propounded by information theorists characterised by blunt signals of exclusion,

> "[t]he fine-grained, nuanced notions of property elaborated by the progressive theorists hardly fit this model. There is no way that 'flourishing,' 'virtue,' 'freedom,' or 'democracy' can be 'stripped down' or formalized. Indeed, formalization is the last thing the proponents of flourishing or democracy seek."[950]

The primary focus of progressive property scholarship is to achieve greater inclusion of people and values by harnessing exceptions and limitations to the dominant rule of exclusion.[951] For these theorists, the focus widens to include all social values that are enveloped by the property system. This is the exact opposite of what information theorists aim to achieve with their focus on the signals of exclusion that property rules are said to comprise, resisting judicial reconstruction of property doctrine for fear of information costs. As Baron describes:

> "Progressive theorists affirmatively value ongoing consideration of whether, in each and every case, property rules are serving the proper values and creating appropriate relationships. Such consideration renders even the most apparently simple case potentially complex [and necessarily contextual]."[952]

The obvious resonance of the progressive approach with South African constitutional culture should be clear. Regardless of the property object or factual setting, the progressive strategy of regulating property relations within a governance paradigm (juxtaposed against the information theorists' preferred exclusion strategy) holds greater potential for the attainment of constitutional ends.[953] Clearly, then, the more

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[948] Rosser "Ambition" 110.
[949] Baron "Contested commitments" 945.
[950] Baron "Contested commitments" 946.
[951] Walsh *Property Rights* 6, 11 citing E Rosser "Destabilizing property" (2015) 48 *Connecticut LR* 397-472 at 402, 428 respectively.
[952] Baron "Contested commitments" 951.
[953] AJ van der Walt is probably the best example of a progressive property scholar writing on South African law. TM Mulvaney "Legislative exactions and progressive property" (2016) 14 *Harvard Environmental LR* 137-171 at 140 n 11 and Walsh *Property Rights* 25 both cite his scholarship as archetypal of the movement (Walsh characterising it as having a "strongly progressive tenor"). His canonical monograph *Property in the Margins* (2009) speaks directly to the question that GS Alexander

suitable approach to copyright in the South African situation is the governance strategy. Fittingly, the Anglo-American copyright scheme already reflects a largely governance-based structure and mode of operation:

> "Copyright does adopt a governance-based approach, in light of its institutional objectives, and this should be taken further, again to adhere more strongly to those objectives. Given copyright's common law structure and its competing purposes, a governance-based approach is a necessity. As a practical matter, courts adjudicating copyright claims should see themselves as balancing a set of competing interests contextually and weigh them in light of copyright's institutional purpose."[954]

This perspective renders copyright inherently contextual in its scope and application, rather than bestowing owners with presumptive authority over every conceivable use to which their property may be put.[955] Balganesh argues that "copyright can be understood as a strongly *conditional* ownership interest in creative expression; where the existence and scope of the interest can only ever be understood contextually and purposively, and thus by a court".[956] This coheres with constitutional modes of interpretation that move beyond literal or "plain-meaning" construction in statutory interpretation and towards the telos of the provision, construed as a value-enhancing (one way or the other) legal mechanism that serves any of a plurality of constitutional norms and objectives. It also comports with Dworkin's view of judges as the final step in the law-making process by virtue of the interpretive nature of law.

Importantly, progressive property means that we should not be too swayed by natural law thinking, like that of labour theory, but simultaneously not rely too heavily on instrumentalism. Rather, an appropriate blend of deontic and teleological frameworks

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Property and Human Flourishing (2018) 320 articulates the central animating feature of progressive property discourse: "Using property to help the lives of marginalized people is, after all, what makes progressive property *progressive*." (emphasis in original).

[954] Balganesh "Debunking" 1176. Harms *Casebook* 61 notes of the current English Copyright, Designs and Patents Act of 1988 that it "differs in form from the classical common-law copyright statutes, although much remains the same", which description also applies to South African law. However, this is not to suggest that courts should adopt what Walsh *Property Rights* 14 calls "the classic liberal understanding of ownership underpinning the common law", which corresponds more to the Blackstonian portrait of property.

[955] If copyright were to entail an open-ended set of use privileges like various other forms of property it would better coincide with the exclusion-based paradigm: see further Balganesh "Debunking" 1134; Breakey "Properties of copyright" in *Concepts of Property in Intellectual Property Law* 153. Instead, copyright provides a qualified monopoly over a very specific set of behaviours that relate to the notional property object, but the owner does not have a general claim to exclude others from interacting with the property in any and all ways as an open-ended claim-right of exclusion with correlative duties burdening all and sundry.

[956] Balganesh "Debunking" 1162 (emphasis in original). The author continues: "In this respect, it closely resembles the way in which entitlements are created and enforced by common law courts in other contexts."

may be incorporated into a holistic understanding of the purpose of the legal rule and the context in which it is invoked. This means embracing complexity instead of seeking to uphold a legal rule on the basis of some canon of validity or authority. It also means being transparent about the value(s) and purpose(s) underlying the doctrine at hand and the ways to best serve these potentially diverse commitments. Frequently the liberty of a copyright owner will feature prominently in a dispute (for example in relying on a free market setting to use and exploit their property rights), which should be identified and secured. However, there is more to liberty than a strong autonomy in the market setting; indeed, freedom is itself a plural value with multiple normative subcomponents.[957] Similarly, autonomy involves aspects of both dignity and liberty.[958] This ties in with Dworkin's approach to individual self-development, which holds that individuals have a moral and normative legal claim to the cultural and material resources necessary for such self-development. Accordingly, autonomy as liberty should not be presumptively prioritised above the values of dignity and equality that may also feature in such cases.

Netanel proffers a reconstituted definition of copyright that clarifies its socio-political nature: "[c]opyright is a limited proprietary entitlement through which the state deliberately and selectively employs market institutions to support a democratic civil society."[959] This definition makes it clear that copyright is not inherently market-bound, nor are market goals (like efficient allocation of valued resources and wealth accumulation and maximisation) the appropriate metrics by which to judge the success of the system of property rules.[960] Rather, copyright is recast as an instrument for higher ends derived from the ideals and principles of democracy.[961]

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[957] See eg J Purdy *The Meaning of Property: Freedom, community, and the legal imagination* (2010) 18, where the author describes freedom as a "master-value" in property theory. See also Walsh *Property Rights* 40-41, where Walsh explains that in terms of this idea "property is understood as involving various distinct values that can be framed as aspects of human freedom, which facilitates human flourishing". See further Rosser "Ambition" 123-125.

[958] On a contemporary Hegelian reading, autonomy as the actualisation of the will requires the objective manifestation of the subjective will, which necessitates the use of certain property objects to facilitate the manifestation of the spirit and the self-development of the individual.

[959] Netanel "Copyright" at 347.

[960] This aligns with Merges's explanation of efficiency operating solely at the midlevel rather without having any justificatory role to play as do dignity and proportionality.

[961] Copyright's structural functions are most interesting to a constitutional lawyer. Netanel "Copyright" 352-364 discusses these functions at some length.

A free-market environment free from state and private censorship is crucial "to maintaining the democratic character of public discourse in civil society".[962] Removing the market mechanism – the ability for authors to recoup some reward on the free market, rather than being reliant on state sponsorship or private patronage – would be profoundly detrimental to both the values of expressive autonomy and diversity, although this does not necessarily call for an unadulterated free market of libertarian description.[963] Netanel points out that not only informative, serious or critical works serve the democratic ideal, but that works of art and fiction (including entertainment in its many modern guises) contribute to the attendant democratic culture.[964] This democratic culture is essential to the ideals of democracy, like (in Dworkin's account) self-government. Accordingly, copyright is instrumental to democracy and "must be defined and delimited in accordance with its constitutive purpose".[965]

While democratic values and ideals are often incorporated into copyright doctrine, the explanation for these is usually expressed in economic terms like market failure and exorbitant transaction costs.[966] This does not adequately accommodate competing non-economic interests or treat them on equal footing with pecuniary interests, as the paradigmatic economic reasoning would presumptively apply across the board (i.e., the economic value of a use would be the predominant metric of analysis). This amounts to what Netanel describes as the neoclassical conception of property, discussed further below.

Netanel proposes a pluralistic account of the values that copyright serves, although it is concerned more with the civil democratic value of freedom of expression than with any of the remaining plethora that the South African Bill of Rights evinces. The contribution that his model makes to this research lies in the redirection of the aims of copyright from a neoliberal property concept to an instrument facilitating the realisation of socio-democratic ideals. From this point of departure, Dworkin's conception of the rule of law (arguably a fundamental tenet of liberal democratic legal systems) as fidelity

[962] Netanel "Copyright" at 352.
[963] Netanel "Copyright" 361.
[964] Netanel "Copyright" 359.
[965] Netanel "Copyright" at 365.
[966] Netanel "Copyright" 290, 325. P Samuelson "Justifications for copyright limitations and exceptions" in RL Okediji (ed) *Copyright Law in an Age of Limitations and Exceptions* (2017) 12-59 at 27-29 suggests that copyright limitations and exceptions often serve user autonomy and personal property interests through doctrinal articulations, such as the first sale doctrine, personal or private use exemption, time- and format-shifting exceptions/privileges, and even some iterations of moral rights.

to the basic principles of human dignity can be followed down its methodological avenue of constructive interpretation (being defined by the dimensions of fit and political integrity) towards the myriad deontological principles and teleological objectives that comprise the South African legal order. Joseph Singer's conception of democratic property also constructs an account based on very similar values to Netanel's democratic model of copyright and even reflects Dworkin's basic ideals and thus may be instructive in how the property concept is treated in constitutional property law.[967]

5.5 Merges's midlevel principles

Midlevel principles must be able to simultaneously describe the operation of black letter doctrine in case law and speak to the underlying theoretical foundations of those doctrines in the form of legal theory. Merges specifies that midlevel principles are accountable to doctrine rather than theory, and that two legal systems could plausibly proffer alternative theoretical foundations for the same doctrine. The pluralistic character of Merges's model accommodates a multiplicity of normative commitments while still aiming to achieve principled congruence in practice. His midlevel principles "engage foundational values in a number of ways, but they do not depend on any particular set of values for their validity".[968] The midlevel principles are therefore reflective of the most basic theoretical tenets of the legal system while adequately explaining the operation of law at the practical level.[969] Merges explains of midlevel principles "are meta-themes that span and tie together disparate IP rules and doctrines."[970]

The term "principle" is used rather loosely in South African case law, often without the necessary correlation to a doctrinal (statutory or common law) principle and certainly

[967] JW Singer "Democratic property: things we should not have to bargain for" in H Dagan & BC Zipursky (eds) *Research Handbook on Private Law Theory* (2020) 220-236 at 220 expresses the same ideal as Dworkin – treating every person with equal concern and respect (implicating "related norms", including dignity). The democratic ideal is expressed: "A free and democratic society not only has a democratic political system but also regulates social relationships to ensure liberty and equality." The author defines equality as "[meaning] that every human being is entitled to be treated with dignity." See further JW Singer "Democratic Estates: Property law in a free and democratic society" (2009) 94 *Cornell LR* 1009-1062; JW Singer "Property as the law of democracy" (2014) 63 *Duke LR* 1287-1335.
[968] Merges *Justifying IP* 140; Blankfein-Tabachnick "IP doctrine" 1321.
[969] Merges "Foundations" 1385.
[970] Merges "Foundations" 1385.

not in the midlevel sense that Merges proposes. As will be recalled from Dworkin's taxonomy of law discussed in Chapter 2, principles can play a variety of roles, like assisting in determining the applicability of a doctrinal rule or proffering a normative standard for emulation.[971] Principles typically do not rely on binary requirements and usually involve a value judgement to approximate the best application of a particular norm.[972] The simple fact of requiring a value judgement from the adjudicator – which many copyright doctrines self-evidently do – renders all such doctrine inherently value-driven rather than being determined by reference to factual evidence alone.[973] Moreover, some principles that are directly relevant to the resolution of a copyright dispute are exogenous to the copyright system, stemming from a different field of law.[974] Doctrinal principles of statutory interpretation or of the law of contract, for example, may become relevant during adjudication and exert material influence on the outcome of a copyright dispute.[975]

Doctrinal principles are typically explicable by resort to another principle at a higher level of abstraction. For example, the idea-expression dichotomy in section 2(2) of the Copyright Act presents a doctrinal incarnation of the principle that copyright protects

[971] For example, in *Trewhella Bros (UK) Ltd v Deton Engineering (Pty) Ltd 57* JOC (A) 62, Wessels JA refers to evidentiary rules as principles, specifically that "a plaintiff who relies on a tacit contract is required to establish that the person whom it is proposed to fix with the contract was fully aware of all the circumstances connected with the transaction". In Dworkin's terminology, this would not qualify as a principle but rather comprise a legal rule because of its binary structure and its all-or-nothing application, whereas a principle can influence the application of a rule or other legal precept in a less binary manner. The structure of the quoted precept is clearly of the nature of a rule.

[972] See eg *Econostat (Pty) Ltd v Lambrecht and Another* (1983) 89 JOC (W) 103, where Ackermann J describes the question of originality as one of principle, and quotes from De Kock J's decision in *Kalamazoo Division (Pty) Limited v Gay and Others* 1978 (2) SA 184 (C) at 190 A-D to the effect that establishing originality is a matter of "fact and degree" whether sufficient skill and labour was expended on the creation of the copyright work, negating the possibility of simple box-ticking as an exercise in judicial reasoning (as may be appropriate with other questions, like whether the author is a qualified person or whether the work in question qualifies for protection as one of the nine types of work specified in the Act). Similarly, in the same decision in *Econostat*, Ackermann J (at 111) identifies the idea/expression dichotomy as "a well established principle", noting that "[i]t is not easy to define the borderline between ideas and that which is copyright".

[973] The doctrine of originality in copyright law is a good illustration of how a statutory provision that arrives at a yes or no conclusion (as would the question whether a party acted in good faith, or whether the principle of freedom of contract can be countenanced, or other such renown private law principles) can employ a different structure of reasoning that better approximates the value-judgment terrain of principles. Clearly arriving at a yes or no outcome is not the same as following a yes-no structure of analysis that determines the outcome based on a binary question of factual evidence.

[974] See eg *Moneyweb v Media 24* 2016 (4) SA 591 (GJ), where Berger AJ imports a "competition principle" from the common law of unlawful competition to assess the commercial acceptability of the respondent's conduct.

[975] Moreover, the structure and normative gist of the constitutional system of law will always be relevant, regardless of the locus of the dispute, and a holistic approach to resolving all legal disputes should be followed.

only expression, not the underlying ideas. This reflects property thinking in delineating the scope of the object, possibly displaying some Lockean overtones, but is too narrow to be of any declarative use in explicating the kind of rights and underlying values involved.[976] Other principles that are too doctrinal for present purposes include originality (section 2(1)),[977] the substantial part component of the test for direct infringement (section 23(1)),[978] and the element of fairness in the fair dealing doctrine (section 12(1)) and exceptions for purposes of quotation and illustration (section 12(2) and (4) respectively) that refer to fair practice.[979] In *Payen Components South Africa Ltd v Bovic Gaskets CC*,[980] even authorship was described in terms of principles rather than rules, presumably as a result of the value judgements that are required to establish authorship.[981] Section 24(3) is replete with principles in respect of courts' powers to award effective damages, incorporating normative standards that call for value judgement.[982] Clearly there are plenty of examples of principles at work at copyright's doctrinal level, but these doctrinal principles do not form midlevel principles or even subprinciples because of their parochial realm of application.

Even at the doctrinal level, the utilisation of open-textured norms in intellectual property doctrine is a key feature of Merges's account, as this provides the interpreter with sufficient space (according to Merges) to balance the legal regime (of copyright law, for example) to secure the proper balance between individual and collective social interests.[983] This stance recognises both the central role of interpretation in the

[976] This is an example of a principle that emanates from international law.
[977] *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) 22-23 explicitly identifies the doctrine of originality as being governed by principles, which is quoted from the standard academic text of the time, ACJ Copeling *Copyright and the Act of 1978* (1978).
[978] In *Juta & Co Ltd and Others v De Koker and Others* 1994 (3) SA 499 at 504-505, numerous doctrinal principles were quoted with approval from an early edition of OH Dean *Handbook of South African Copyright Law* (OS 1987) 1-20 while discussing the test for determining whether a substantial part of a work has been used.
[979] This provision shows that principles like fairness can sometimes be cast in different doctrinal forms, iterating here as a value-based standard: see *Moneyweb v Media 24* [2016] 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ) paras 103-114 for an overview of the relevant considerations, which ostensibly include an array of constitutional provisions that contribute to the value judgement of fairness. However, in the same decision, Berger AJ arguably incorporated the notion of fairness between commercial competitors from the law of unlawful competition, which has a markedly different content from the value-based standard that the court posed in respect of fair dealing.
[980] (1995) 544 JOC (A) 549.
[981] It would not be useful to posit a midlevel principle of authorship as this would explain nothing and give only the vaguest indications of the values so represented.
[982] See the decision of Kroon J in *Metro Goldwyn-Mayer Inc v Ackerman* (1996) 558 JOC (SEC) 586, 589, 591-594 in respect of the numerous factors that make up this value judgement.
[983] Merges *Justifying IP* 190. See also Pila "Pluralism" 34-35. Vagueness in copyright law peaks in doctrines like originality (statutorily adumbrated in s 2(1) of the Act) and the substantial part test for

construction of law as well as the idiosyncratic configuration of moral-legal values that make up a political community's idea of justice, and that this can and should have a pronounced effect on the outcomes of intellectual property cases.[984] This can be achieved without legislative amendment of law, as courts routinely endow open-ended legal norms with content and there is nothing inherently suspicious about this practice, which is very much encouraged by transformative constitutionalism. There is nothing in Dworkin's account of law as interpretation that is noticeably at odds with this part of Merges's theory of intellectual property adjudication.

Merges identifies the following four midlevel principles as being broadly descriptive of the functioning and normative underpinnings of most intellectual property law.

5.5.1) Nonremoval

The principle of nonremoval is a clear iteration of Lockean labour theory, specifically the provisos to his position on original acquisition. In the context of intellectual property, "[n]onremoval is cumbersome shorthand for a norm that information belonging in the public domain should not be removed from the public domain."[985] The Lockean expression of the principle of nonremoval is that authors must always leave enough and as good in common (i.e., in the public domain) for others. Claeys says of the labour theory of property "in the realm of IP[:] the law secures and encourages concurrent labor by equal citizens when it *prevents* the propertization of information already commonly available".[986] It thus serves as a counterbalance to the tendency to attach more and greater property rights to an increasing array of legal objects, reminding policymakers and legislators that the public relies on access to a commons.[987]

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establishing direct infringement (set out in case law as an elaboration of the meaning of s 23(1)). However, this is not necessarily a bad thing, as it allows the contextual determination of what the underlying principles and rationales require in the particular instance.

[984] In a sense, Resnik's invocation of justice as a value of IP simply begs the question of what values, exactly, comprise the relevant conception of justice. The author uses it as shorthand for the redistributive elements of IP law but fails to declare the generative theory that determines the normative content of that term.

[985] Claeys "Cowbells" 1049.

[986] Claeys "Cowbells" 1050 (emphasis in original).

[987] A notable example of over-propertisation is the absolute protection of technological protection measures (TPMs) in ss 85, 86(1), (3)-(4) & 87 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA), which reintroduce protection to works that belong in the public domain simply by applying TPMs to such works which then act as absolute prohibitions of the circumvention of TPMs

Nonremoval is instantiated in the Copyright Act by the idea/expression dichotomy in section 2(2), the news of the day exclusion in section 12(8), and the limited duration of protection of each type of work after which it returns to the public domain to enrich the common store of creative works (which is not a common feature of property rights that often enjoy indefinite duration).[988] Furthermore, the principle of nonremoval aims to prevent the appropriation of another's labour and is the principled rationale for the doctrine of originality in copyright law.[989] Nonremoval is arguably supported by the parallel midlevel principle of proportionality in striking the fundamental bargain that copyright law is said to effect: granting proprietary incentives and rewards to authors to encourage the creation of works that may return to the common stock of cultural resources. The key point is that the incentive and reward must be proportionate and commensurate to the value contributed by the author's creation without unjustifiably restricting the liberties of others to use the author's expression. Accordingly, these two principles ensure that the appropriation of property entitlements is legitimate in instances such as use for fair dealing purposes,[990] transformative use,[991] and using the information underlying the work without reproducing the author's expression.[992]

5.5.2) Proportionality

Proportionality encapsulates copyright law's main objective: to effect a balance between authorial incentive and reward, on the one hand, and ubiquitous access to and gainful use of cultural products on the other. This fundamental purpose is sometimes stated as striking a balance between authors' rights and the public interest. Merges describes proportionality as being "built tightly into the foundational theories" that he considers relevant to IP, specifically those of Locke and Kant, as well as "[tying]

(mandated by art 11 of the WIPO Copyright Treaty (20 December 1996) 2186 UNTS 121; 36 ILM 65 (1997)) that do not admit of any exceptions Compare 17 USC § 1201(a)(1)(C), which requires the Register of Copyrights to determine every three years whether existing exceptions to the prohibition of the circumvention of technical protection measures are still appropriate, and whether new exceptions are required.

[988] Again, this is aside from rights granted by the application of TPMs in accordance with ECTA.

[989] Merges *Justifying IP* 142-143; Claeys "Cowbells" 1050.

[990] Section 12(1).

[991] Transformative use is encouraged under the fair use doctrine, which is not yet part of South African law but features in the amendments that have been on hold for the past few years.

[992] One important qualification is the definition (s 1) of adaptation in respect of an artistic work, which includes in the ambit of infringement any "transformation of the work in such a manner that the original or substantial features thereof remain recognizable".

together all sorts of disparate rules and institutional features […] such as the scope of rights, limits on those rights, and remedies for violating them".[993] However, proportionality is not itself implied in any of the tenets of the legal theory under discussion: labour theory says nothing about the extent of the property protection, implying that all productive labour meets some tacit standard of non-triviality and that the resulting creation contains about as much value as labour was expended. Du Bois righty notes that the reward theory similarly fails on this count, as it does not specify any way of establishing the size of the appropriate reward commensurate with the input or even the social value of the work.[994]

> "Where a right's value is not proportionate to the effort and labour spent, the most fitting reward may not necessarily be a property right. […] Proportionality is an important consideration in determining the appropriate reward, since intellectual property rights may earn the owner much more value or benefits than the initial expenditure of the intellectual product's creation."[995]

Proportionality may be a basis for explaining the application of rules regarding joint authorship of copyright works[996] and acts as a mediator in many of the exceptions that champion a diverse array of values. However, the criticism has been levelled that this principle is too broad to fill any real explanatory role and could perhaps better be employed as a normative failsafe once the other principles have been given their due.[997] This necessarily means that the principle of proportionality incorporates normative content from beyond itself.[998]

Indeed, a normative baseline is required as context for proportionality to operate in – regulating the proportion between two norms is ultimately what the concept seeks to do, and those norms are not imported along with the structure of proportionality (at least not in this context; in constitutional law there is arguably substantial normative content that attaches to the doctrine). Notwithstanding, proportionality offers a useful structure for normative conflict resolution and is able to accommodate the complexity associated with normative pluralism far better than any binary modality: it situates the

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[993] Merges *Justifying IP* 159-160. Rognstad *Property Aspects* 82 notes that "the much used 'formula' in IP, as well as other property law, that a balance must be struck between right holders and other interests, including public interests, can be considered rooted in a proportionality-oriented account of the labor idea."
[994] Du Bois "Justificatory theories" 21.
[995] Du Bois "Justificatory theories" 20.
[996] See the requirements for qualifying as a joint author in *Peter-Ross v Ramesar* 2008 (4) SA 168 (C).
[997] See Blankfein-Tabachnick "IP doctrine" 1335:
[998] Blankfein-Tabachnick "IP doctrine" 1348.

conflict in a spectrum of possibility rather than a right/wrong structure that awards one interest total vindication at the expense of the other.[999]

Merges suggests that the copyright doctrines of substantial similarity, fair use, and copyright misuse[1000] are illustrative of this principle which gives each its sense of proportion.[1001] I agree with this structural assessment but wish to point out that explaining the functioning of this important concept in such broad strokes is of limited value because it appeals to intuitive understandings rather than explicating the intended meaning in a reliable and usefully predictive way. As Blankfein-Tabachnick observes, "[t]he mere discussion of a trade-off or 'balancing' is insufficient to demonstrate [the invocation of] Merges's principle of proportionality."[1002] Indeed, general reference to balancing interests is not the same as invoking the principle of proportionality as a mediative device at the midlevel. Proportionality is unarguably built into the structure of South African constitutional law and presents an appropriate methodological and normative structure for the resolution of value conflicts at the constitutional level.

5.5.3) Efficiency

Much has been written about efficiency as a metric for an economic theory of law and it does not serve the present purpose to recite the chief points of the theory here. The principle of efficiency is almost a meta-principle, as it is a fundamental objective of the neo-liberal economic policy that has come to inform intellectual property jurisprudence. Merges explains the principle of efficiency as "getting things done as cheaply as possible", which arguably makes it of wider scope than the economic principle bearing the name.[1003] Efficiency speaks to economic concerns like information and transaction costs, but also aims to incentivise the prolific creation of copyright works by as many people as possible for an efficient and competitive market. It is reflected in the

[999] Minow & Singer "In favor of foxes" 918: "Neat, ordered, consistent principles are persuasive only in cases that can reasonably be understood as false conflicts."
[1000] There is no equivalent doctrine of copyright misuse in the South African Copyright Act.
[1001] Merges *Justifying IP* 160-162. He also mentions the judicial refusal to apply anticircumvention laws as exemplary of proportionality, but there is no equivalent trend in South African copyright jurisprudence. At 169-176 the author suggests that proportionality would alleviate the problem of rent-seeking that is sometimes associated with strong property rights.
[1002] Blankfein-Tabachnick "IP doctrine" 1332.
[1003] Merges *Justifying IP* 151.

assumption that the free-market mechanism should be trusted in effecting distribution of the property entitlements, severing ownership entitlements from authorial interests in copyright law. Efficiency is aimed at finding the best way of producing a given resource and allocating it to the party that places the highest value on it.

The principle of efficiency concentrates control over a resource in one party and generally limits redistributions of entitlements effected by either treaties or legislation that are not achieved by voluntary transaction among consenting parties.[1004] However, in some instances the relevant entitlements are too concentrated and efficiency demands a dispersion of control of the resource. In such instances, efficiency can be observed in statutory provisions regulating collective licensing of copyright works and may feature as a consideration in the determination of fairness under the fair use defence. This is similar to other avenues of property law that make exceptional allowance for non-owners to make specific use of the property to enhance productive output or other uses that either serve important deontic or policy concerns or do not detract unreasonably from the owner's enjoyment of the property.[1005]

The chief role of efficiency that Merges identifies – getting things done as cheaply as possible – is a useful shorthand for this principle. It serves important policy goals and ties in with the incentive structure that spurs on creative effort.[1006] As I argue below, this principle certainly plays a prominent role in South African copyright law and theory and should be retained as part of a subset of commercial concerns that should operate as a unified grouping under the midlevel principle of trade.[1007]

5.5.4) Dignity

Merges introduces the value of dignity as a midlevel principle to cater to authorial interests in the products of their creative endeavours. Merges's Kantian basis at the foundational level secures dignity a starring role in his theory of intellectual property law, but he does not postulate it as any more central to his understanding of law than

[1004] Claeys "Cowbells" 1059-1060.
[1005] Claeys "Cowbells" 1059.
[1006] This is borne out by the Appendix to the Berne Convention for the Protection of Literary and Artistic Works (1886) 828 UNTS 221, which provides "special provisions regarding developing countries".
[1007] While it is true that efficiency is an important part of the many economic theories of property that have emerged over the past half century or so, it would be inaccurate to regard efficiency as a hallmark or organisational principle of all property and therefore fits better under the umbrella of trade.

any of the other principles, and arguably gives it even less content than proportionality. As discussed in the previous chapter, dignity is a multifaceted concept that contains deontological and teleological dimensions of significant import in the South African concept, and Merges's rendition of this value barely scratches the surface of its potency in this setting. Depending on the theoretical account of dignity, different aspects may attract the analytical spotlight as the situation demands: Kantian dignity makes different demands from Hegelian claims, for example.

Dignity may feature in at least two important ways in copyright law. First, it inheres in the authorial relation to the work which captures a crucial aspect of the author's personality that is invested in the work. Of course, different situations will present varying capacities for dignity to feature depending on the type of work, the nature of the work, the means of its exploitation, and a host of other factors that may become relevant on the facts of a dispute. Second, there is the crucial importance of access to and enjoyment of (at least some) property objects by every person as instrumental to their dignity, properly conceived. The recent decision in *Blind SA v Ministry of Trade, Industry and Competition and Others* is exemplary here: the Copyright Act was held to unfairly discriminate against persons with visual disabilities and was said to deny them an indispensable element of their dignity.[1008]

Of course, there is the additional question whether dignity is not also a property value, as well as why dignity is not cast in the oversight role that proportionality seems to occupy on Merges's model. On the first question, dignity does indeed feature prominently in many theories of property and may fortify an owner's position in respect of their use and enjoyment of the property in question, whether that amounts to a personhood-type relationship between owner and object[1009] or merely a strong autonomy interest in being able to exploit property rights to secure commercial returns.[1010] The answer to the second question is that proportionality not only presents a structure of normative conflict resolution that dignity perhaps lacks, but the former can adequately incorporate the latter in its formulation of its own normative concepts, like weighing the importance of dignity-related uses of copyright works (if

[1008] [2022] ZACC 33.
[1009] Radin's theory of property and personhood is the canonical account: see MJ Radin "Property and personhood" (1982) 34 *Stanford LR* 957-1015.
[1010] However, it is easy to overstate this function of autonomy, with the result that corporate entities or deceased persons are endowed with unfettered discretion in how the property is to be used and alienated.

appropriate)[1011] or in postulating the relationship between the limiting measures implemented and securing the dignity of those it seeks to protect. Indeed, proportionality requires dignity and its ilk to supply the normative dimensions of the pluralistic legal system that it is deployed to oversee and integrate into a coherent normative account of law.

5.6 Alternative midlevel principles of copyright

While Merges's model of midlevel principles mediating the relation between foundations and doctrine is potentially helpful to lawyers outside of his own paradigm of American law and legal culture, the normative content of the midlevel principles that he proposes is up for debate and reconstruction, not least because his project is intended to be more descriptive than prescriptive. However, before Merges devised this explanation, other theorists made more modest proposals for similar explanatory models of intellectual property law.

Munzer offers a pluralistic theory of property (which he does not direct towards intellectual property) that incorporates the normative bedrocks of utility and efficiency, justice and equality, and desert by labour.[1012] He employs these concepts as principles that justify and explain the existence and limitation of private property. Munzer professes that "for a theory to be genuinely pluralist, not only must it have more than one principle, but its principles must also be irreducible".[1013] While acknowledging that the concurrent invocation of multiple principles will lead to conflict, he proffers that the explicit acknowledgement of the legitimacy of each respective value, principle and legal precept is "often the only way to deal honestly with the complexity and uncertainty of moral life".[1014] This sentiment is echoed by others[1015] in the context of a legal system more broadly than just its property dispensation and is an important insight to emerge from the progressive property movement as well. Accordingly, as the progressive property theorists counsel, complexity is a systemic feature that should not be feared

[1011] AJ van der Walt "The modest systemic status of property rights" (2014) 1 *Journal of Law, Property, & Society* 15-106 at 46-48 suggests that dignity interests should never be balanced and should rather be secured as the first priority of any judicial analysis.
[1012] Munzer *Theory* 191-226 (utility/efficiency), 227-253 (justice/equality), 254-291 (moral desert).
[1013] Munzer *Theory* 294. At 295 the author clarifies that a conflict between principles exists when more than one applies to a situation but it is not possible to satisfy all that apply simultaneously.
[1014] Munzer *Theory* 293.
[1015] Minow & Singer "In favor of foxes".

or smoothed over but rather embraced as a site where valid but opposing normative commitments that are fundamentally irreducible beyond their postulated form of political value or ideal can meet to discover their mutual convergence and conflicts.

It seems that aside from the moral content, Munzer's theory of property is congruent with Dworkin's theory of law as integrity, relying on background moral-political theory and "priority rules" as mediating methodological devices that arise in cases of conflict. However, because of the emergence of numerous more recent and arguably more relevant works on the topic (specifically in the progressive property movement, which is centred on the question of how to incorporate pluralistic values in a coherent system of property relations), Munzer's theory of property will not be studied here aside from noting the similarity between his model of pluralistic principles and Merges's taxonomy of intellectual property, as well as the obvious similarity between some of the principles.[1016] Merges's principles, drawn from diverse philosophical origins, would qualify on this count as they fuse economic theory's utilitarianist metric with Kantian dignity, Lockean property theory and Rawlsian ideals of justice and fairness.

Surveying the most prominent theoretical accounts, Resnik identifies the values of autonomy, privacy, utility, and justice as representative of the predominant theoretical commitments of intellectual property law.[1017] While he does not propose these values as midlevel principles in the same way that Merges postulates his normative devices, there is a clear convergence of thinking around the basic normative commitments that animate IP.[1018] Noting the simple fact that "modern democratic societies are

[1016] The first obvious parallel is the principle of efficiency that is common to both theories. The next clearest correlation is between Munzer's principle of desert through labour and Merges's midlevel principle of nonremoval, which is based on the Lockean provisos that also inform Munzer's account. There is also significant overlap between Munzer's principle of justice and equality and Merges's dignity principle, important dimensions of both of which are arguably captured by Dworkin's normative account of law more generally than property or intellectual property law.

[1017] Resnik "Pluralistic account" 330-331.

[1018] Resnik's proposed values of autonomy, justice, privacy and utility as the overarching normative drivers of intellectual property laws are noticeably similar to Merges's midlevel principles of dignity, proportionality, non-removal and efficiency, with autonomy and privacy easily fitting within the concept of dignity and justice being roughly equivalent to, or at least occupying the same role of embodying and leveraging fairness as, proportionality. Proportionality is a narrower form of justice employed in constitutional law to ensure that state action is commensurate with the impact on individual interests, thus depending on a liberal idea of the rule of law generally in the Lockean sense of protection of individual liberty from state power, which is one iteration of a theory of justice. Merges's principle of non-removal – which he draws from the Lockean labour theory of property – is the only one without a corresponding concept in Resnik's model, as efficiency is one form of utility and both derive from a market-based view of property. Thus, the authors share the principles of dignity/autonomy (encompassing freedom and privacy), utility/efficiency, and justice/proportionality, with privacy being

pluralistic", Resnik develops a pluralistic model of intellectual property that recognises the basic value conflict at the heart of many IP disputes and treats this as a question of embodying the appropriate political value rather than a legal-technical question of which rule is authoritative over others.[1019] This value-laden approach comports with the South African constitutional approach to interpretation of statutes explained in the previous chapter. Further, it coheres with Dworkin's model of adjudication, despite Dworkin's supposed value monism, which is the political content that he bestows on the theory as applicable to the American system of law. Pila also notices the theoretical coherence of Resnik's account with both Merges's and Dworkin's, proclaiming that Resnik's set of pluralist values

> "shares the 'midlevelness' of Merges's principles, and exist as principles in the Dworkinian sense: occupying an intermediary space between moral values and legal rules; deriving their force from both their moral content and their fit with existing institutional facts; and existing to be optimized in individual cases by a process of weighing and balancing."[1020]

Pila contends that the importance of principle-based reasoning "may be attributed to the function of principles in pluralistic legal models as a means by which foundational (social and legal) differences can be transcended via the pursuit of common 'midlevel' objectives", suggesting that this approach supports both Merges's theory and Resnik's.[1021] However, the author levels the critique that

> "the emphasis on market-based considerations of efficiency and proportionality in Merges's model of IP enables utility to eclipse the values which he professes to hold most dear in his foundational theory, including those of autonomy and dignity, thereby undermining that theory and the pluralistic claims of his model itself".[1022]

Merges's model does rely on a somewhat economic rendering of proportionality, being framed in terms of economic incentive and reward being proportionate to the author's effort and/or (market) value created. Notwithstanding, both Merges and Pila construe the fairness requirement in the fair dealing doctrine as an iteration of proportionality drawn from more diverse normative origins than economic theory. Blankfein-Tabachnick agrees that Merges's under-explained (or perhaps under-theorised)

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subsumed by dignity and nonremoval being an offshoot of the Lockean theory of justice specified to intellectual property law.

[1019] Resnik "Pluralistic account" 331. On the benefit of constructing such a pluralistic account, see Rognstad *Property Aspects* 40.

[1020] Pila "Pluralism" 187-188 (citations omitted).

[1021] Pila "Pluralism" 191, where the author explains that "the analogy between Merges's and European principles-based legal models is underlined by the central role of proportionality in each, reflected also in Resnik's approach", citing *Justifying IP* 159.

[1022] Pila "Pluralism" 197.

principle of proportionality – which he casts into the chief loadbearing role among midlevel principles – is little more than an unacknowledged invocation of fairness, being so general that it is impossible to distinguish its primary normative traits or classify it according to political theory.[1023] Another aspect of Merges's account that does not comport with the South African situation is that he regards IP as self-contained. He explains:

> "The rules, doctrines, and practices of IP law implicitly bear their own set of normative principles and these ideals, in turn, are neither derived from nor are they instrumental to the practical instantiation of foundational principles".[1024]

It is still sensible to postulate that the midlevel principles that property generates, and the doctrinal forms that they consequently take, must be congruent with the justificatory account for them to be valid, as a distortion of the founding values and ideals would render the legal edifice inchoate and dissonant.[1025] This is the upshot of Dworkin's ideal of law as integrity: maintaining a cohering and integral account of law's operation from theoretical justification to judicial remedies. Indeed, a responsive relationship between the abstract normative values that are said to underlie South African constitutional society and the practical doctrinal articulations that constitute the law as applied is vital to the substantive implementation of the project of transformation as described in this research.

The overlap between different theories of property and intellectual property points to the normative baseline of liberalism that dictates various precepts about law's nature and primary objective. The values of liberty, dignity and equality are inextricably bound up in many progressive theories of liberalism, as is the case with Dworkin. It is therefore no surprise that various theories of property and intellectual property are built up from this foundation.

[1023] Blankfein-Tabachnick "IP doctrine" 1347-1348 (citing Merges *Justifying IP* 8, 159-160, 189-190

[1024] Blankfein-Tabachnick "Foundations" 1001.

[1025] Merges would likely counter that there is certainly a resemblance between the two due to the theoretical basis upon which the doctrines are built, but that this does not mean that judges should always resort back to these foundations when construing the law in a particular case. In turn, I would suggest that this is an important component of the variant of purposive interpretation that has taken root in South African constitutional law (described as teleological interpretation in the preceding Chapter), but that Merges's imputed objection may very well be correct in the American context.

5.7 Constitutionalising copyright's midlevel

Building on the work of Merges, Munzer and Resnik, I wish to propose a set of midlevel principles that will bring copyright law in line with the transformative mission of the nascent constitutional culture that defines present South African law. These principles each offer the descriptive power to satisfy Merges's requirement of explaining legal doctrine pertaining to copyright law. In this way they abide by Dworkin's dimension of fit; that is, they comfortably fit within the canon of case law elucidating copyright law.[1026] The principles can be used as analytical lenses to explain the vast majority of copyright's structure and rules, and their interoperation tells the many stories of value conflict encountered in case law.[1027] Moreover, as explicated below, each principle can be understood as comprising a non-exhaustive set of subprinciples which describe the functioning of the normative concept in a more nuanced and detailed way. By embedding the primary principles with an array of subcomponents, the theory of adjudication demonstrates its capacity for pluralism and complexity, allowing contestation between different normative visions within the constitutional framework of proportionality. The resolution of this type of tension is precisely what proportionality was crafted to achieve. Accordingly, each proposed principle adequately explains enough of the functioning of legislative provisions to contribute to the holistic understanding of copyright law.

Furthermore, the proposed principles are also able to play a prescriptive role in dictating the shape that existing doctrine should take by being attuned to the objective normative value system that the Bill of Rights comprises. This is a crucial component for any (transformative) theory of copyright adjudication to include as it poses the

[1026] The element of fit is captured in the inductive step of judicial reasoning, namely canvassing the case law on the doctrinal issue in question to determine how courts in similar situations have dealt with it. The judicial responsibility is to ensure that the outcome the interpreter produces from the legal material before them is congruent with the normative positions that previous courts have taken unless there is compelling reason for divergence. This inductive step serves the important democratic legal ideal of predictability (an iteration of the value of legal certainty) without compromising the legitimate judicial mission of reconstructing the law to reflect the new constitutional basis.

[1027] Considering the intentional imposition of a new normative foundation for all law occasioned by the transition to a supreme constitution, the dimension of fit may be permitted some leeway when constitutional concepts are not perfectly descriptive of what courts have conventionally done when faced with doctrine if they are able to explain the prescriptive element, namely how courts should mould doctrine in their image. The prescriptive element of political integrity therefore compensates for any descriptive discord that may arise. This poses minimal threat to the legal ideal of certainty and provides a methodical way for the constitutional ethos to be implemented in every aspect of law's application without being hamstrung by what courts have done previously, especially considering the conservative legal culture that determines so much about how courts engage with the law.

transformative element of the theory and is equivalent to Dworkin's dimension of integrity. This entails the deduction of normative content from the relevant foundational theories and constitutional values as well as the inductive construction of each principle based on copyright case law. This process involves maximising certain components and downplaying others as the objective normative value system requires. These principles therefore do more work on this score than what Merges allocates to his midlevel, which additional component is not only justified but necessitated by the pursuit of transformation of South African law. This can be achieved by identifying the innate normative features thematically by grouping them at copyright's midlevel, and then further recognising the constituent features, functions, and objectives of each. Each principle can be understood as a monoscopic placeholder for a plurality of values and goals that operate through concretised notions and structures of reasoning, and each can be mapped onto the Bill of Rights (to varying degrees of resonance).

When conflict arises between two midlevel subprinciples from different philosophical stables, as it invariably does, the appropriate response is not to double down on the preferred subprinciple and allow it to trump all countervailing considerations, but rather to consider the full gamut of interests that feature in the conflict as arising from sometimes competing, sometimes complementary values that call for constructive synthesis rather than domination.[1028] It is not necessary to follow any one theoretical justification or prescriptive account of property over another, merely to identify the prominent themes and features that characterise the legal notion of property and wield them with due sensitivity towards the plural values that may be posed in conflict. I propose the four principles of property, trade, dignity, and public interest as a suitable cohort when ported onto a Dworkinian theory of law as integrity through adjudication. The proposed midlevel principles function contextually rather than *a priori* as an abstract hierarchy and one principle may find predominant application in one case but not another. Further, it is highly likely that at least two principles will be involved in any given copyright dispute, given the plurality of legal values that are implicated in even the most straightforward matters. These principles each comprise multiple

[1028] See Minow & Singer "In favor of foxes". Underkuffler *Idea of Property* 64-84 suggests that when two principles or rules ostensibly conflict but actually serve the same underlying value or interest, the conflict is artificial and can be resolved through interpretation alone without having to pit two values against each other, thus amounting to a delineation exercise rather than a limitations analysis.

subprinciples that warrant brief reflection. Herewith follows a synopsis of the content of each.

5.7.1) Property

Breakey notes that "no single theory of property can possibly explain all the nuances of copyright law".[1029] Given the wide variety of theoretical approaches to justifying property that have been proposed, there are many differing and overlapping norms that may be given expression. As demonstrated above in Section 4, depending on who you ask, the answer to the question what lies at the heart of property will vary between the ability to exclude others, to being able to possess it exclusively, to having the power to set the agenda for the use of the property, and sometimes to be able to exploit the property for its fruits and alienate the property for value or as a donation. How these property norms translate to the intellectual property context is not always clear *ex ante*. Yet, it is still possible to capture the import of copyright's proprietary status as the "property principle", pitched at the midlevel of Merges's hierarchical trichotomy. Postulating property as a midlevel principle accords the property-like features and functions of copyright a hand in the value-based resolution of copyright disputes. Not only does this produce better descriptive clarity in respect of the operation of doctrine, but it also helps attach purpose to the enforcement of rights, which can ensure the suitability of the proposed remedy, specifically that it does not overstep the mark and derogate from other constitutional entitlements.

Many statutory copyright provisions are explicable with reference to property theory, with the property principle informing the application of doctrine in the typical midlevel fashion. This property principle embodies an array of property functions and traits, which give valuable conceptual guidance on how the rights operate and should be treated by the courts. Accordingly, positing property as a principle means identifying the various subprinciples that are associated with property in law; in turn, this allows courts to recognise the numerous values that property protects and the various functions it fulfils in a democratic society.[1030] These subprinciples explain both how

[1029] Breakey "Properties of copyright" in *Concepts of Property in Intellectual Property Law* 151.
[1030] On this score, Merges's model is rather limited, as the justificatory theories have little to do with the practical operation of copyright doctrine. Accordingly, once the justificatory theory is accepted as valid and contextually compelling in the given legal system, it follows that property rights must be created to incentivise or reward the author's labour (or whatever else the theory concludes). Once the justificatory

property rights are treated by courts (as a matter of historical record in the form of precedential case law) and how courts should treat interests regarded as property. This means that such subprinciples may be invoked to clarify the operation of a legal doctrine in whatever case may come up, but also that such principles cannot be allowed to function in isolation from the rest of the property system, further considering how that property system coheres with the constitutional system of law more broadly.

The property principle may be the most pronounced of the four principles in many cases, and the principle of trade will be the most obviously applicable in cases where the parties are in commercial competition or the property rights otherwise function primarily as assets. In some cases, these two principles may overlap in content, like the subprinciple of transferability that is equally applicable to property and trade. The property principle comprises various subprinciples that typify property's normative functioning (often in pursuit of the value of autonomy as liberty) and explain the rhetoric and thinking about copyright as property. These hallmarks are identified not as a prescriptive project, but as the first descriptive step in recognising the normative content at work in copyright cases. The prescriptive element follows: the subprinciples must be ported onto the value-laden framework provided by the legal system more generally and specifically the property regime. I propose that the justificatory theory deemed relevant to a dispute could indeed have an effect on the doctrinal level through the identification of a suitable midlevel principle that both reflects the underlying interest or value and explains the operation of doctrine. This is in line with the praxis of teleological interpretation and is an essential part of the project of transformation of South African law.

The primary subprinciples that can be identified from property law and theory include the principles of exclusion, universality, transferability, exclusivity or agenda-setting, territoriality, and *numerus clausus*.[1031] These principles largely correspond to an information theory approach, but still serve valuable ends that should not be neglected

theory has successfully done the job of arguing for property rights, it plays no further role in how they are awarded or regulated (unless a derivative principle is formulated, like the midlevel principle of nonremoval which Merges takes from Lockean labour theory, in which case the theoretical account may find further influence in that principle's operation). As a result, an unnecessarily strict separation is maintained between the foundational level and the midlevel at the expense of theoretical congruence.

[1031] RA Moosa *Copyright and Property in the Digital Era: Achieving functional equivalence between digital property and physical property* (LLM Dissertation: University of Pretoria 2015) 35-36 only identifies the first two (or, more accurately, the rights of exploitation that stem from the transferability of copyright) as comprising the functional hallmarks of property.

and should always be construed purposively rather than as inflexible axioms of property. Notwithstanding the fact that these subprinciples resemble an information theory approach, this camp's core commitment to simplicity over complexity is not carried over and courts should not rely solely on these subprinciples to resolve disputes. Furthermore, while these subprinciples clearly portray orthodox understandings of property, the constitutional notion of property must always be kept in mind when dissecting the property concept and its various subcomponents, lest the ingrained ideas about the owner's position as absolute and indomitable are allowed to take over the rhetorical and cognitive work of interpretation.[1032] Importantly, the theory of property identified as relevant to the case at hand must display the features described by progressive property theorists, namely the embrace of normative plurality and systemic complexity, as well as the dialogic style of inquiry rather than dispositive resolution by reliance on simple mechanistic heuristics or methodologies.[1033] The relative place and weight of property norms should be modulated accordingly.

The labour-desert principle that derives from natural rights theory can also contribute to the purposive understanding of the property concept as a subprinciple of property.[1034] This subprinciple additionally incorporates elements of dignity as it captures autonomy concerns and personality interests of copyright authors. Accordingly, the postulated principle of dignity may lend support to the labour-desert principle when authorship or first ownership of copyright is in issue. This demonstrates the inherent complexity of the property concept, which is not adequately captured by unidimensional understandings of property. Additional subprinciples can be identified from case law but must correspond to a robust theory of property in law, else the principles will be rendered without purpose or context and will invariably be wielded as abstract devices used to argue for property's supremacy in the case at hand.

[1032] For a concise yet comprehensive explanation of the constitutional concept of property, see Van der Walt *Property and Constitution* 131-168.
[1033] The dialogical nature of progressive property theories is congruent with Dworkin's theory of interpretation; as Cornell & Friedman "Significance" 12 explain, "Dworkin insists that the process of reconstructing intent is dialogical precisely because the author's exact psychological intention cannot be plumbed."
[1034] See Munzer *Theory* 283 for the author's conclusions on this principle in his theory of property.

5.7.2) Trade

Rognstad posits that property rights, and IP rights by implication, are characterised by their functioning as assets.[1035] Certain dimensions of property rights reflect this function, and often the property metaphor that is invoked to describe intellectual property has these connotations.[1036] Copyright reflects this dimension in the entitlements to assign and transfer, license, pledge as security, as well as some of the remedies for infringement, like royalties. Rognstad notes that this role of intellectual property as assets operates regardless of the theoretical justification for the existence of the legal position of property rights.[1037] This observation supports Merges's similar position on the relationship between theoretical foundations and midlevel principles. However, Rognstad suggests that the justificatory accounts may affect how these assets are regulated subsequent to their initial grant.[1038] In a pluralist system of legal values, different elements or entitlements of property can be protected with varying degrees of stringency.[1039] When limits are placed on the exercise of property entitlements, for example rendering certain rights inalienable or partially alienable, this is to protect a certain aspect of the owner's welfare or personality or other fundamental concern.[1040] This is congruent with my advocated approach to adjudication that treats the property rights purposively and teleologically, displaying keen awareness of the normative objective to which each field of law is ultimately beholden. I therefore support the position that the theoretical justifications for granting a property right over creational objects should feature robustly in legislative formulation and enactment of the law – and preferably be made transparent in the text of the resulting law, whether in the substantive provisions, recitals, preface, or memorandum of objectives – and should again feature when courts consider the justifiability of subsequent regulation. This is a crucial aspect of the purposive approach that is advanced here.

[1035] Rognstad *Property Aspects* 68.
[1036] Rognstad *Property Aspects* 68. The author observes that "[w]hen (regional) human rights conventions or instruments protect intellectual property (IP) as property, […] they do so on the basis of IPRs as assets." (citations omitted).
[1037] Rognstad *Property Aspects* 68.
[1038] Rognstad *Property Aspects* 69.
[1039] MJ Radin "Market-alienability" (1987) 100 *Harvard LR* 1849-1937 at 1852.
[1040] Balganesh "Alienability" in *Concepts of Property in Intellectual Property Law* 166 suggests that in such cases, the limit is "promoting a more targeted utilitarian goal, where the welfare of the [owner] is prioritized over that of society more generally", using moral rights in copyright as an example.

The principle of trade will feature in various copyright contexts, from authorship doctrines to the fair dealing analysis to the indirect infringement test and de-compilation of computer software. This principle reflects the perspective of what Netanel calls the "neoclassicist" economic approach to copyright, which posits a trade paradigm in terms of which copyright law "would accordingly treat literary and artistic works as 'vendible commodities,' best made subject to broad proprietary rights that extend to every conceivable valued use".[1041] It is immediately clear that the commercial perspective relies on the property nature of the copyright object.[1042] Further, the market setting and attendant logic is implied, which constructs the normative premises and objectives accordingly.

The trade principle includes the ever-prevalent notion of economic efficiency which may carry trade implications, being from the same normative stable, but it speaks to a host of other concerns as well. Efficiency is well-known as a prime concept in economic theories of law, including most prominently property law and perhaps even more prominently still intellectual property law. It is sometimes even taken to be a proxy for welfare on the thinking that autonomy is maximally served by deferring to the market mechanism for exchange and exploitation of property as assets.[1043] Efficiency in this context is synonymous with utility, which is an instrumentalist concept yearning for moral content, usually supplied by the reigning normative paradigm of trade. This comes with a utilitarian framework where preferences are counted in economic terms and individuals – the primary entities of concern in this value paradigm – are geared towards enhancing their liberty by maximizing the unit of value: wealth. Collective welfare does not feature on this model aside from the aggregate welfare of individuals, individually considered.

Many commercial interests and rationales have been recognised in copyright decisions and copyright as property asset is firmly entrenched in the mercantile milieu with the principle of trade comprising a major component of judicial reasoning about copyright. The principle of trade encourages fair and vigorous competition, as well as supporting non-competing uses that increase the common stock in humanity's cultural

[1041] Netanel "Copyright" at 286, quoting the term from WJ Gordon "Assertive modesty: An economics of intangibles" (1994) 94 *Columbia LR* 2579-2593 at 2579 n 1.
[1042] This is arguably a precondition to the operation of TRIPS, which conceives of the entire array of intellectual property rights as assets in trade.
[1043] Of course, the transferability of the property asset is of central significance here, demonstrating the cooperation of the two proposed principles.

repository.[1044] Competition is thus interlinked with innovation and the two concepts properly fall under the chief principle of trade, each comprising a potent subprinciple that can be wielded for analytical clarity and normative resolution. Similarly, the commercial paradigm implied by the trade principle comes with its own variant of fairness in competition, which is subtly but distinctly different from the notion of fairness as a deontological matter on whichever theory of law one's argument is built.[1045] The applicable standard of fairness under the competition subprinciple favours independent effort over parasitic copying, which demonstrates respect for the labourer's time and effort and feeds into the subprinciple of innovation.[1046] This rendition of fairness hinges on the neoclassicist norms of free-market competition and the fictions associated with economic theory like rational economic behaviour towards wealth maximisation being the only driving force behind individuals' actions. In cases where parties are commercial competitors,[1047] the trade principle should be among the most prominent to direct the adjudication of the dispute. Of course, this principle may be less pronounced in other cases, like with the enforcement of an author's moral rights. Furthermore, trade values and principles can be derived from the

[1044] See eg *Kambrook Distributing v Haz Products* 243 JOC (W) 279 (recognising a "general principle in a free enterprise system").

[1045] In the law of unlawful competition, which is a common law field of intellectual property, the competition principle is recognised as an important determinant of reasonableness, sometimes considered supplementary to the fairness element under the concept of *boni mores*. In *Payen Components* 482, Van Zyl J was inclined to view the competition principle as a policy consideration rather than an inherent part of the law of unlawful competition. The judge counselled that it is "the general considerations of justice, equity, reasonableness, good faith and public policy which underlie the value judgment required of a court when it is called upon to establish whether or not a competitor has indulged in unfair or unlawful competition". He continues (at 484-485) to acknowledge that policy considerations often embody principles that are fundamental to the legal system itself, demonstrating how one distinct area of law may come to reflect values and principles that appear extrinsic to that domain.

[1046] This can arguably be inferred from the court's reasoning about the substantial part step of the test for direct infringement in terms of s 23(1) of the Copyright Act in numerous decisions: see *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 267 (A); [1989] 1 All SA 431 (A); *Moneyweb*; *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* [2015] 3 All SA 478 (WCC); *National Soccer League T/A Premier Soccer League v Gidani (Pty) Ltd* [2014] 2 All SA 461 (GJ). This is also reflected in the reverse-engineering exception for artistic works (s 15(3A) of the Copyright Act), specifically the requirement that the work is reverse-engineered from a three-dimensional object instead of merely copying from a two-dimensional technical drawing of the object.

[1047] A few such prominent cases include *Moneyweb*, *Gidani* and *Media 24 Books*. Matters concerning authorship while under employment could be considered as falling under this principle (*Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA), *Bergh v Agricultural Research Council* [2020] 2 All SA 637 (SCA)), but the specific instance may demand instead the recognition of the elements of dignity and the public interest (*Vollenhoven*) above the commercial, rendering a different outcome necessary to serve the prevailing interests despite the appearance of commerciality.

"objectives"[1048] and "principles"[1049] provisions of TRIPS, which ensure that trade concerns are deemed paramount.[1050] These will be different to the utilitarian concerns that inspire the so-called balance that the mechanism of incentives by property rights strikes, which may feature under the property principle and the public interest principle.[1051]

Regardless of its place in the international copyright scheme, the principle of trade must be properly situated in the South African constitutional value system.[1052] The existence of a neoliberal capitalist framework cannot be taken as a static, unchanging circumstance, but instead must be factored into the interpretive equation as a tenet that needs to be justified for its continued existence.[1053] Only if it serves a worthy objective of the constitutional law system, or contributes to the realisation of other constitutional interests, will it be acceptable to perpetuate the attendant value system.

[1048] Article 7:
"The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

[1049] Article 8:
"1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

[1050] The fact that TRIPS excludes moral rights from the mandatory terms that member states must adopt (art 9(1)) while copyright treaties usually include these rights indicates its commitment to trade interests over authors' interests.

[1051] These utilitarian concerns can have a democratic purpose, for example the objective of having an informed and educated populace, and the aim of having a free and fair press, or they can reflect a different normative vision, like a liberal egalitarian take on resource allocation and redistribution. The consequentialist lens operates in conjunction with the deontic ideals that the other midlevel principles represent and are mediated through legal analytical devices like proportionality, itself the chief principle among nominal equals.

[1052] As mentioned, this principle finds embodiment in the constitutional right to freedom of trade and occupation in section 22, which grants everyone "the right to choose their trade, occupation or profession freely" but qualifies that this right "may be regulated by law". This does not give a very broad basis for arguing for strong constitutional valence of the postulated principle of trade. Indeed, this right should not be read as endorsement for a libertarian approach to resolving either inter-party commercial disputes or vertical disputes between state and private party, which has been frequently averred, especially in contract cases. This could also be utilised to guard against one person misappropriating the labour of another to their own benefit, rather than the Lockean explanation that may be more suitable to explaining propertisation, rules of authorship and ownership, etc.

[1053] Hettinger "Justifying" 47 echoes this point: "Thus one needs to determine whether, and to what extent, the security and survival of privately held companies is a goal worth promoting."

This is in line with the demands of the single-system-of-law principle that demands normative compliance with the objective value system that the Bill of Rights posits.

5.7.3) Dignity

In the South African context, dignity plays a crucial role in the construction of all law, whether directly impacted by section 10 of the Bill of Rights or tangentially implicated as a value. As discussed in Chapter 3, dignity is intricately linked to the values of freedom and equality, and all three find robust textual encapsulation in the Bill of Rights in the form of interpretive values and discrete rights. Considering that all adjudication requires a theory of law, the role of dignity may be further amplified by the choice of interpretive theory. This would be the case with law as integrity, which construes dignity as equal concern and respect.[1054] A brief consideration of Dworkin's constituent principles of human dignity may be apposite before proceeding to outline how dignity pertains to property regimes generally and copyright law specifically.[1055]

The dignity basis features very prominently in both Dworkin's model of law and Merges's model of intellectual property. Dworkin and Merges both use Kant as the moral foundation of their theories, Merges describing this "idea of property as externally-directed self-empowerment".[1056] In the copyright context, the foundational values of liberty and dignity converge in this deontological account that requires control over certain objects (like copyright works, whether as author or user) in securing the freedom of the will as realisation of autonomy.[1057] The Kantian slant on dignity endows members of the public with individual autonomy, positing each user as a speaking being.[1058] It follows that every individual should enjoy entitlements to those goods and

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[1054] Cornell & Friedman "Significance" 5 agree that *"*the South African Constitution is exemplary of the kind of integrity to dignity (as the foundation of constitutionalism) that Dworkin has so powerfully defended*."*

[1055] Long before the development of his normative theory of fidelity to the two principles of dignity that appears in his later work, Dworkin's thinking implied that individuals require access to a range of property objects necessary to secure their dignity. Hettinger "Justifying" 45 makes this argument.:

> "Ronald Dworkin's liberal is right in saying that 'some sovereignty over a range of personal possessions is essential to dignity.'" (quoting R Dworkin "Liberalism" in S Hampshire (ed) *Public and Private Morality* (1978) 139).

[1056] Merges *Justifying IP* 67.

[1057] On a Hegelian reading, the author's dignity is tied up in the property object, which serves as external manifestation of the author's personality. This argument does not apply to the non-author owner of a work.

[1058] Drassinower "Compelled speech" in *New Frontiers in the Philosophy of Intellectual Property* 223: "On this view, copyright law arises not as a distributive balance of intangible commodities, but as a juridical order addressing aspects of the interaction between speaking beings." This could include the

services that are reasonably necessary to live a life of dignity, including access to certain types of intellectual property products and legal relations that protect an author's dignity-based expressions in the world.

The Kantian foundation of Dworkin's model necessitates the recognition of each human life as inherently valuable and imbued with objective worth.[1059] His two principles of dignity are the principle of intrinsic value (every life has innate value which must be respected) and the principle of authenticity (every person bears responsibility for their own life), which conjunctively comprise his normative foundation of the rule of law. Every human life is objectively valuable because it is important aside from any person's subjective preferences or desires and therefore it is important that every life is well lived.[1060] This is embodied in the first part of the constitutional right to dignity in section 10: "[e]veryone has inherent dignity". The Kantian duty-based structure is clear in this expression of the ideal of integrity in law, and the link between law and morality is revealed as fundamental to the entire legal enterprise. The importance of self-respect and the associated care for a well lived life applies with equal force to all lives, and by neglecting this external aspect of dignity as it applies to others, one deprives oneself of self-respect.[1061] In this regard, the state "must show equal concern for the fate of every person over whom it claims dominion".[1062] This is borne out by the second part of section 10: "[everyone has] the right to have their dignity respected and protected". The parallel between Dworkin's first principle and the full and holistic construction of section 10 is obvious. Furthermore, according to the second principle of dignity, authenticity, every person should take responsibility for the way they live their lives and the decisions that they make throughout. Similarly, the state "must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life".[1063] Together, these principles endow individuals with considerable freedom and autonomy, but also with corresponding responsibility for living well and authentically and treating others with equal dignity. Crucially, the

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right to publish the work (often construed as an economic entitlement) if the owner wishes to prevent it and could even span instances where the author's work is being suppressed.

[1059] This model of law is finally refined in Dworkin *Justice for Hedgehogs*. See Cornell & Friedman "Significance" 57-60 for an overview of the development of this Kantian basis leading up to his ultimate encapsulation of the liberal theory of constitutional democracy based on these two principles of dignity.

[1060] Dworkin *Justice for Hedgehogs* 196. See further Cornell & Friedman *Mandate* 80.

[1061] Dworkin *Justice for Hedgehogs* 255. See also Cornell & Friedman "Significance" 58; Cornell & Friedman *Mandate* 80.

[1062] Dworkin *Justice for Hedgehogs* 2.

[1063] Dworkin *Justice for Hedgehogs* 2.

outward-facing dimension of dignity demands equal recognition of the dignity of all others, which Dworkin expresses as equal concern and respect. This comports with a holistic reading of dignity in conjunction with the section 9 right to equality, which opens with the statements that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law [and] [e]quality includes the full and equal enjoyment of all rights and freedoms."[1064]

To instantiate these internal and external components of dignity, Dworkin posits numerous forms of responsibility according to which duties are apportioned.[1065] The most interesting for present purposes are relational responsibility and judgmental responsibility. First, relational responsibility arises in three different forms, namely causal responsibility, assignment responsibility, and liability responsibility.[1066] Specifically relevant to the present discussion, assignment responsibility arises when someone is responsible by virtue of their special position in relation to others, regardless of whether they occupy this position voluntarily or involuntarily. This type of responsibility could attach to property (copyright) owners generally by virtue of their special position in relation to the public, or even to specific copyright owners where the duty is justifiably shouldered by a single owner or class of owners.

Judgmental responsibility augments the picture of legal responsibility by imposing responsibility whenever one's actions register on the moral spectrum. This moral responsibility is "directly related to how I give reasons to myself and how others give reasons for my behavior" and "is a necessary precursor to all the other forms of responsibility [Dworkin] defines".[1067] In this respect, judgmental responsibility bears some resemblance to the constitutional culture of justification's central thesis: that all coercive action must be substantively justifiable.[1068] Furthermore, assignment responsibility helps to further jurisprudence on positive horizontal obligations by providing a basis for legal obligation to others: in this case a moral duty that arises from the special position of an owner vis-à-vis others in society. Similarly, judgmental responsibility grounds a general duty of principled justification for the exercise of power

[1064] Section 9(1)-(2).
[1065] Dworkin *Justice for Hedgehogs* 102-104.
[1066] Dworkin *Justice for Hedgehogs* 103. See also Cornell & Friedman "Significance" 63-64.
[1067] Cornell & Friedman *Mandate* 86 (citations omitted).
[1068] Dworkin *Justice for Hedgehogs* 103-104.

(whether public or private), especially where this impacts on the dignity interests of any person.

In copyright law, the most obvious iteration of dignity is the authorial dignity that defines the relationship between an author and their work as portrayed in the moral rights provision.[1069] The dignity aspect of an author's moral rights is best captured as an author's concern for their reputation, likening the action to enforce this right to a delictual action for defamation.[1070] This takes a number of forms, most notably the claim to be recognised as the author of a work (the paternity right) and the ability to prevent the mutilation or distortion of one's work (the integrity right), both contained in section 20(1) of the Copyright Act. The requirement of sufficient acknowledgement of the author as precondition for fair dealing with a work is another protection of the author's moral right to paternity.[1071] It is certainly conceivable that other claims may be made out on the basis of authorial dignity, whether in the sense of moral rights recognised elsewhere in the world[1072] or even new and idiosyncratic (positive) iterations of dignity that are intimately tied to the author's personality.[1073] Of course, when more specific dignity-related rights avail, like the right to privacy in section 14, the section 10 right plays a secondary role that augments the application of this provision.[1074] Regardless of the exact constitutional point of intersection, the dignity

[1069] Section 20(1).

[1070] Although Hettinger "Justifying" 45 resists the suggestion that copyright and patent law intrude into one's privacy, security or autonomy in the way that access to a home does, like Merges he identifies a dignity interest in being publicly recognised as the inventor or creator of the product. He clarifies that preventing someone from personally using their own invention or creation would be an incursion into their sovereignty, including the liberal values of liberty and autonomy. This sentiment could have found traction in *Vollenhoven* had the court considered the author of the cinematograph film's dignity interests in this light.

[1071] Section 12(1). See *Technical Information Systems (Pty) Ltd v Marconi Communications (Pty) Ltd* (2007) 1047 JOC (T).

[1072] See eg the French *Cour de Cassation* decision in *Huston v La Cinq* (1993) 22 IIC 702, where the director (author) of the film "Asphalt Jungle" sought to prevent the colourisation of the black and white work in the United States. Compare the decision of the Paris *Cour d'Appel* in *Rowe v Walt Disney* [1987] FSR 36.

[1073] Such new instantiations of dignity in copyright doctrine could result from the concretisation of the section 10 right or by means of analogous reasoning that derives entitlements from the application of similar rights.

[1074] As discussed in Chapter 3, dignity operates as both a primary right (where it founds the cause of action or exception) and as a secondary enforcement of another right that is more pertinent to the matter, but which still impacts on any aspect of a party's dignity: See *Dawood* paras 35-36. The privacy interests of an author may become relevant in the moral rights setting when, for example, an author wishes to suppress their identity (the flipside of the right to paternity, which is not statutorily recognized in South African copyright law) or keep a work unpublished. Depending on the scenario, the dignity principle (rooted primarily in section 14 with section 10 playing a secondary role) may then be pitted against another midlevel principle that arises in opposition.

principle could find prominent operation in the context of authorial personality and an author's relationship with their work.

The second prominent role for the dignity principle has to do with the public's access to works that can be deemed essential to self-development and leading a dignified life, including the realisation of numerous constitutional entitlements.[1075] This could operate on many planes but is most acute when an aspect of discrimination is present.[1076] The third value in the constitutional triumvirate, equality, also features centrally in Dworkin's model of law, which posits the equal recognition of and concern and respect for each individual as the normative ideal of law.[1077] This suggests that the attainment of equality is contingent upon the protection of dignity, which shows how bound up the two ideals are with one another.

These two dimensions of dignity in copyright are markedly different in origin and operation, one concerning the author's relation to their work and the other concerning everyone else's relation to that same work, yet both embody the entitlement to dignity bestowed in the Bill of Rights. Both dimensions are contingent on a coherent theoretical account of dignity that coheres with the South African constitutional rendering of the ideal, for which Dworkin's Kantian model would arguably serve as well as any other.[1078] Indeed, Dworkin's dual principles of self-respect and authenticity require that all individuals' interests are recognised as valuable to them and how they live their lives, which carries an objective value that must be recognised and respected. Dworkin argues that the objective intrinsic value of all humans must be

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[1075] In such cases, the dignity principle may be supported by the public interest principle, depending on the particular interests involved.

[1076] This is different from the role that dignity plays as a value, influencing the interpretation of statutory law without relying directly on the constitutional right. See *Dawood* para 35, where the court noted that dignity "is a value that informs the interpretation of many, possibly all, other rights" (per O'Regan J). This is the minimum role that a court in every case is mandated to assign the value of dignity by the section 39(2) instruction, regardless of whether the right to dignity is pleaded (as primary or secondary). See *Fraser v Absa Bank Ltd* 2007 3 SA 484 (CC) para 43 per Van der Westhuizen J: "This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation." (citations omitted).

[1077] Dworkin *Justice for Hedgehogs* 351—363.

[1078] Another viable alternative is to invoke the African compound value of *ubuntu*, which arguably articulates a community-bound equivalent to human dignity that may lead to even more progressive (i.e., more inclusive) outcomes: see IJ Kroeze "Doing things with values II: The case of Ubuntu" (2002) 13 *Stell LR* 252-264; D Cornell "A call for a nuanced constitutional jurisprudence: Ubuntu, dignity, and reconciliation" (2004) 19 *SAPL* 666-675; D Cornell & K van Marle 'Exploring ubuntu: Tentative reflections' (2005) 5 *AHRLJ* 205-220; Mokgoro & Woolman "Where dignity ends" ; T Metz "*Ubuntu* as a moral theory and human rights in South Africa" (2011) 11 *AHRLJ* 532-559; C Himonga, M Taylor & A Pope "Reflections on judicial views of ubuntu" (2013) 16 *PER/PELJ* 369-427; IJ Kroeze "Once more uBuntu: A reply to Radebe and Phooko" (2020) 23 *PER/PELJ* 1-22.

respected and that this requires allowing each person to live a life of their choosing while allowing others the same freedom. Further, each person carries a special responsibility over their own lives, which they must live well to not squander its intrinsic value. This may even amount to a claim for material conditions that are necessary to live their life fully.

In sum, dignity has too many constitutive and supporting roles to play in copyright for it to be relegated solely to application as a rights-provision in the way that other constitutional rights may interact with the Copyright Act. The postulated dignity principle supplements the justiciable right to dignity in section 10 by embodying the constitutional concern for equal dignity among all, which may necessitate access to copyright works by members of the general public or specific groups of people. In this sense, dignity can pose a copyright work as an act of communication essential to the author's autonomy when appropriate. Further, it supplements other related constitutional provisions, like the right to privacy, when they pertain. It also speaks to attribution (reputational) concerns through the statutory incarnation of moral rights.

5.7.4) Public interest

The public interest concept in copyright law is unsurprisingly broad and multifarious, fulfilling numerous roles and representing a host of important interests. Enyinna Nwauche argues that copyright is comprised of the two dimensions of private and public interest, and that the two should enjoy equal recognition in the judicial construction and enforcement of copyright.[1079] He professes that the double-sided private-public justificatory purpose "is evident in all national copyright legislations, without exception", and it is certainly present in the South African statute.[1080] The public interest principle ensures that the purposes underlying the foundational balance that copyright law is said to strike are brought to the front and centre of the judicial inquiry.[1081] Some of its theoretical justifications are explicitly normative and others are

[1079] ES Nwauche "The judicial construction of the public interest in South African copyright law" (2008) 39 *International Review of Intellectual Property and Competition Law* 917-942. At 922 the author explains that "[t]he private interests of a copyright owner enable him to control how people access his work […] [and] how the work is used by others through a number of rights."
[1080] Nwauche "Judicial construction" 920.
[1081] Drassinower "Compelled speech" in *New Frontiers in the Philosophy of Intellectual Property* 223.

rooted in pragmatic policy considerations that rely on an imputed normative framework.

The midlevel principle of public interest seeks to capture the import and object of copyright's non-private functions (private functions are primarily served by the property principle in this model). It posits a countervailing principle that is capacious enough to incorporate copyright's founding purpose[1082] and the considerations of public policy that are routinely invoked in common law cases under the public *boni mores* principle (often used as a portal for constitutional values as discussed in relation to the jurisprudence on indirect application in Chapter 4). It can also capture the plethora of constitutional values and interests that may pertain to the matter at hand. It envelops the public morality that the Bill of Rights is said to inform (if not comprise) and provides a port of entry into the analysis for democratic goals and objectives that may otherwise be side lined from the judicial inquiry. The public interest concept also comes with its own conception of fairness, or what the community deems fair (public *boni mores*), which is markedly different to the concept bearing the same name under the principles of property and trade. Importantly, the common law requirement that a copyright work not be *contra bonos mores* arguably constitutes a precondition for the grant of copyright over all types of works, further fortifying the pivotal role that the public interest plays. Accordingly, the principle displays structural similarity to the common law concept that often features in contract and delict cases, where it serves as the basis for the so-called indirect application of constitutional rights and norms.[1083] It takes its cue from the statutory iterations of the public interest that occur throughout the

"The public interest is neither about incentives nor about dissemination, but about the balance between them. The task of copyright law is none other than the achievement of this balance between creators and users, authors and the public domain."

[1082] The founding purpose of copyright law is commonly understood as encouraging the creation of works that may benefit the public; accordingly, the property rights incentive structure is an instrumentalist scheme with the public interest as the generative ideal. H Sun "Creating a public interest principle for the adjudication of fair use and fair dealing cases" in S Balganesh, NW Loon & H Sun *The Cambridge Handbook of Copyright Limitations and Exceptions* (2021) 233-266 at 234 helpfully points to the Statute of Anne of 1709 (widely considered the inaugural copyright statute) and the American Constitution and Supreme Court decisions as evincing the public interest as the principal purpose for the award of copyright, and highlights Article 8 of TRIPS and the preamble of the WCT as doing the same. TRIPS also encapsulates the public interest quite prominently in articles 4 and 5, which have been read as interpretive provisions and thus hold sway over legal rules.

[1083] Judgments in common law cases often wield the dual concepts of public interest and public *boni mores* as a way of importing exogenous concerns and considerations into the given field of law, which has proven to be a reliable way of gradually and incrementally transforming extant law with constitutional norms and values. In the copyright context, Van Zyl J in *Payen* 484-485, emphasised that policy considerations typically employ legal principles that are not necessarily innate to the field of law under consideration, including notions of fairness that incorporate values from fundamental legal theory.

Copyright Act and seeks to introduce an overtly constitutional aspect at every possible intersection. Therefore, it is possible (and even likely) to have two different conceptions of fairness pitted against each other at the midlevel, such as a trade conception being met by a public interest conception. However, there can be no presumptive privileging of one conception of fairness over another.[1084]

Conventionally, the public interest is structurally embodied in exceptions and limitations to the private property interests that are bestowed by statute.[1085] These limitations and exceptions can serve an array of justifications, some with constitutional interfaces and some without, some even entailing property norms and market-reasoning.[1086] However, even according to the incentive-based paradigm, "[b]ecause instrumentalism construes copyright doctrine as an instrument of the public interest, demonstrable inconsistencies between copyright doctrine and the public interest must be resolved in favor of the latter".[1087]

The ubiquity of the public interest in statutory and case law and its normative resonance with the Constitution makes this a good candidate for a midlevel principle that is simultaneously able to explain a substantial proportion of copyright doctrine and guide adjudicators towards desirable outcomes. A brief exposition of some statutory and judicial elaborations of this concept may assist. Doctrinally, incidental uses and inclusions[1088] can be captured under the public interest principle, as can the *de minimis*

[1084] TRIPS is the only World Trade Organisation agreement without a constitutional carve-out, presumptively ordering it atop a normative hierarchy of unspecified scope. The predecessor to TRIPS, the General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat A-11, 55 UNTS 194 (GATT 1947), did contain such a carve-out, which TRIPs seemingly abandoned. See GB Dinwoodie & RC Dreyfuss *A Neofederalist Vision of TRIPS: The resilience of the international intellectual property regime* (2012) 118-119. However, this does not translate into an automatic precedence in the South African constitutional context because the Constitution sets its own normative agenda (see eg s 39(1)).

[1085] It should be noted that the civil law concept of *ordre public* is not exactly synonymous with public interest or public policy, and some international conventions (eg, art 16 of the Convention on the Law Applicable to Contractual Obligations (19 June 1980 80/934/EEC *OJ* L 266 09.10.1980) cite these terms in the alternative, indicating that they cover the same notion territory but function differently in the respective jurisdictions: see CJ Visser "Applicable law in online copyright disputes: A proposal emerges" (2004) 16 *SAMLJ* 765-778 at 773.

[1086] Exclusions from the ambit of protection also serve other justifications, like the need to address market failure that stems from the principle of trade. See Samuelson "Justifications" in *Copyright Law in an Age of Limitations and Exceptions* 38-41, where the author discusses compulsory licenses as the paradigmatic example of market failure, covering refusals to license as well as statutory licences that collecting societies rely on.

[1087] A Drassinower "Copyright is not about copying" (2012) 125 *Harvard LR Forum* 108-119 at 118.

[1088] See s 15(1) that exempts incidental inclusion of artistic works in cinematograph films or television broadcast.

rule in respect of direct infringement.[1089] These types of exclusions prevent property rights from inhibiting socially valuable activity that no private party should have the power to prevent.[1090] Further in the same vein, some copyright exceptions are crafted for reasons of political expedience, such as broadcasting and public performance licenses.[1091] Pamela Samuelson identifies the enablement of public institutions as another important function underlying statutory limitations and exceptions, which can also be seen in South African copyright law.[1092] This is a clear embodiment of the collective public interest in the efficiency (administrative rather than commercial) of the copyright system rather than in any one individual or group's interests.[1093] The reverse engineering of three-dimensional artistic works falls to be covered mostly by the public interest principle but is also supported by commercial notions of fair competition[1094] and the policy objective of having the market for a wide array of industrial artefacts not clogged up by excessive rights and clearances (i.e., efficiency of the market).[1095] This once again demonstrates how public interest concerns are often wrapped up in alternative and supplementary justifications, values and ideals. Accordingly, the

[1089] Samuelson "Justifications" in *Copyright Law in an Age of Limitations and Exceptions* 37 groups these types of exceptions and limitations under their own principle.
[1090] It can also be considered inefficient for such reproductions to be deemed infringing, as this would plausibly require consent for each such inclusion or reproduction, proliferating transaction costs significantly and resulting in a tragedy of the anticommons.
[1091] Samuelson "Justifications" in *Copyright Law in an Age of Limitations and Exceptions* 42-44.
[1092] The Copyright Act contains an exception to infringement for use in judicial proceedings (s 12(2)) and delimits copyright protection short of "official texts of a legislative, administrative or legal nature" (s 12(8)(a)). See Samuelson "Justifications" in *Copyright Law in an Age of Limitations and Exceptions* 34-35. In *National Commissioner of the South African Police Services and Another v Forensic Data Analysts (Pty) Ltd and Another* [2019] ZAGPPHC 6 (30 January 2019) para 83 the court recognized the significant public interest in the functioning of a firearm licensing registry and held that copyright should not unduly hamper this operation. This led the court to suspend the granting of an interdict for copyright infringement in the computer software that is used to maintain a firearm registry.
[1093] In *Commissioner of SA Revenue Service v Shoprite Checkers (Pty) Ltd* (2004) JOC 901 at 903 the court relies on the public interest to find that a counter-application should not be stood over, and later (at 906) uses it to determine the urgency of the claim before it.
[1094] The element of fairness in this instance is underpinned by the contingency of performing the reverse-engineering on the three-dimensional article rather than simply copying a two-dimensional design and creating a three-dimensional object from it. This injects the need for independent labour to redesign or re-engineer the copyright work, allowing the public to benefit from reduced prices on commonly required articles like spare parts for vehicles and machines as well as the manufacturing competitor who is permitted to derive benefit from their own labour in recreating the work.
[1095] This is known as the tragedy of the anti-commons: MA Heller (1998) "The tragedy of the anticommons: Property in the transition from Marx to markets" (1998) 111 *Harvard LR* 621-688. Section 15(3A) of the Copyright Act makes allowance for reverse-engineering objects protected as artistic works under certain circumstances, which can also be conceived as an iteration of efficiency (among other reasons).

subprinciple of efficiency can be postulated to explain the operation of these provisions.[1096]

Some exceptions are adopted to introduce flexibility to an otherwise rigid system, such flexibility being aimed at allowing law to dynamically adapt to changing social conditions and technologies.[1097] These can all be considered as being in the public interest generally despite serving diverse justifications and can be collectively captured under the subprinciple of policy considerations. Preserving culture and the ubiquitous access to educational material and illustration for teaching exceptions can also be represented by the subprinciple of policy considerations,[1098] which is part of the public interest principle that flows directly from copyright's founding ethic.[1099] However, it may be better to consider these types of provisions as supporting the subprinciple of democratic ideals, which is undoubtedly an important aspect of the public interest.[1100] This includes the regulations permitting archival copies to be made and stored (aimed at preserving cultural history), and the classroom copies that are permitted by regulation are an example of democracy-enhancing ideals like having an educated populace.[1101] The right to participate in the cultural activities of one's society is an immensely important constitutional entitlement that must also feature prominently, both as a matter of dignity and public interest.[1102]

[1096] Although this subprinciple is not animated by the economic iteration of efficiency which features under the principle of trade, but rather, much like Merges' principle, is primarily concerned with getting things done cheaply and without causing administrative holdups, courts do occasionally conflate the two concepts. For example, in *Rapid Phase Entertainment CC v South African Broadcasting Corporation* (1996) JOC 597 the court identified the public policy considerations of the free market and the principle of competition as relevant to the matter. Further, under the *de minimis* rule, minor incursions into an owner's copyright do not rise to a level of actionability because this would make copyright an unwieldy concept that protrudes into all instances of the use of the copyright work, no matter how trivial; the principle allows the system to function more effectively for everyone collectively but works against individual interests in specific cases.

[1097] Samuelson "Justifications" in *Copyright Law in an Age of Limitations and Exceptions* 44-49. Fair use is the obvious example of this (as it injects flexibility into the scope of applicability of the exceptions as opposed to the rigid scope of fair dealing) but even this doctrine can be better explained by the array of normative justifications that are served.

[1098] Of course, the constitutional right to education (s 29) may also be pleaded as an entitlement directly where applicable, but when there is no justiciable right to education of a party to a dispute, these considerations should be factored into the principle of public interest.

[1099] See Samuelson "Justifications" in *Copyright Law in an Age of Limitations and Exceptions* 32-34 for a discussion of the many ways in which social policy objectives are captured in copyright exceptions and limitations.

[1100] For example, in *Moneyweb* paras 60-62, 73 the court states that the section 12(8)(a) exception serves the public's interest in the free flow of legal and political information.

[1101] Sections 3 & 5-9 of the Copyright Regulations, 1978 (GN R2530 in *GG* 6252 of 22 December 1978), as amended.

[1102] From a constitutional point of view, this right (contained in section 31) could also be used to ground a challenge of the copyright regime, as happened in *Blind SA*. Samuelson "Justifications" in *Copyright*

The fair dealing doctrine often carries the brunt of the public interest concept in copyright analysis. Its constituent components protect the public interest in various complementary ways, primarily in respect of freedom of expression, access to information, and a well-informed populace.[1103] While some of these objectives are additionally protected by discrete rights provisions in the Bill of Rights, this merely fortifies the subprinciple and consequently enhances its relevance and function when invoked. In other words, even if the constitutional rights are not pleaded in a given case, the provisions will nonetheless inform the adjudicative exercise by bringing the underlying values and objectives to bear on the matter at hand.

Nwauche posits the public interest as being grounded in the Constitution, specifically the constitutional rights to property, freedom of expression, and privacy, and argues that it is incumbent upon courts to restore balance to statutory regimes that fail to adequately conceptualise the public interest that is at the heart of the rationale for granting copyright protection.[1104] However, this is not the only occurrence of the public interest in the balancing exercise that courts are directed towards in cases of limitation of copyright. Nwauche asserts that the section 16 right to freedom of expression "largely defines the public interest in South African copyright law" and would often overcome the countervailing property interests.[1105] The author makes a strong case for access to protected expression being vital to ideals like the search for truth, democratic participation, and "intrinsic self-worth" as "free moral agents".[1106] While he observes that this right is additionally instrumental to an assortment of other constitutional entitlements like the rights to education and freedom of information, Nwauche stops short of formulating a principle for protecting these values and ideals

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Law in an Age of Limitations and Exceptions 32-34 argues that this is a reason behind accessible format copies exceptions like those in issue in *Blind SA*. While this is certainly one supporting argument, there are further justificatory principles that avail in this instance, arguably of more urgent import, like the dignity interests of people with disabilities.

[1103] The fair use exception that the CAB seeks to introduce to South Africa will necessarily implicate a far greater array of justificatory values and ideals, as this doctrine is not limited to the purposes that are statutorily specified: for a brief discussion of the differences between fair dealing and fair use, see RM Shay "Fair deuce: an uneasy fair dealing-fair use duality" 2016 *De Jure* 105-117.

[1104] Nwauche "Judicial construction" 921-922. Moreover, although property is undeniably protected in the public interest, it also forms the entirety of the other side of the balance between private and public interests, and therefore should not be recounted as constituent of the public interest lest the array of individual interests is counted twice.

[1105] Nwauche "Judicial construction" 929. See M Horten *A Copyright Masquerade: How corporate lobbying threatens online freedoms* (2013) 36-37 where the author discusses this tension in English law, concluding that freedom of expression attracts thicker protection against interference than property and would triumph in the conflict.

[1106] Nwauche "Judicial construction" 930.

directly, preferring the argument that the right to freedom of expression is a precondition to other entitlements that together contribute to the public interest. He helpfully postulates a constitutionally responsive variant of the public interest concept in copyright law:

> "The public interest and the public domain ventilate society's interests that require for its fulfilment that certain works must be accessible and usable with little or no proprietary control. These societal interests are often better framed as human rights, such as freedom of expression and the right to privacy as the foundation of a knowledge system and innovation cycle. Usually principles such as the dichotomy between ideas and expressions and the nature of exceptions and limitations secure the public interest in copyright law because they determine what is protected or otherwise."[1107]

While the author is undoubtedly correct about most of this argument (that the public domain "is the end result of the operationalisation of the public interest in copyright",[1108] that the notional realm of the public interest is often covered by human rights, and that the public interest is embodied in delimitation doctrines and exceptions to infringement), he stops short of embracing the true ambit of the public interest in not only the transformative uses of protected works, but also non-transformative uses that give meaning to the dignity-centred ideal of self-development. Furthermore, while he does recognise that other constitutional rights besides freedom of expression are implicated by the public interest concept, he sees these as following from the section 16 right and being dependent upon it for their existence. Although the right and value of freedom of expression is instrumentally constitutive of democracy and while copyright law can convincingly be posited as an "engine of free speech" in its service,[1109] there are other interests of equal moral valence and systemic importance that are quashed by an exclusive focus on the relationship between these two interests alone.

Similarly, both Louis Harms[1110] and Sadulla Karjiker[1111] identify the public interest in copyright law as residing in the constitutional guarantee of freedom of expression. However, both authors' analyses of freedom of expression seemingly take it as

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[1107] Nwauche "Judicial construction" 923.
[1108] Nwauche "Judicial construction" 922.
[1109] See the US Supreme Court described in *Harper & Row Publishers Inc v Nation Enterprises* 471 U.S. 539 (1985) paras 34 & 125, where this phrase originates. See generally Sun "Public interest principle" in *The Cambridge Handbook of Copyright Limitations and Exceptions* 234-235. See also Netanel *Copyright's Paradox* 81-84, where he reconceptualises copyright as being a crucial driving mechanism of democracy.
[1110] Harms *Casebook*.
[1111] S Karjiker "The case for the recognition of a public-interest defence in copyright law" 2017 3 *TSAR* 451-469.

exhaustive of the public interest and the only constitutional provision to have an impact on copyright law (aside from the property clause).[1112] Perhaps not coincidentally, this incarnation of the public interest long predates constitutional recognition and could be considered an embedded part of the copyright system, a necessary safe haven from copyright's empire. Accordingly, both Harms and Karjiker fail to seriously consider the interchange between the copyright concept of the public interest and the bevy of constitutional norms and entitlements that make up the transformative constitutional iteration of the concept. These perspectives are too myopic to capture the full picture of the public interest's importance, especially as it reflects the myriad faces of the constitutionally informed concept of that name.

The public interest also inheres in the constitutional property clause, which incorporates the public interest as condition for the validity of state regulation[1113] and as one of the permissible purposes of expropriation,[1114] thereby subjecting the protection of private interests that the property clause offers to the demands of the collective good. This invocation of the public interest in the constitutional setting ensures that state action is aimed at securing some aspect of collective welfare when effecting a regulation of the property interest. In this way the public interest principle reflects the same concern for property interests: it ensures that any derogation of property interests is effected for a constitutionally acceptable purpose, thereby drawing the implicit condition from the deprivations clause into the judicial analysis at the private law level.

The public interest principle will mostly feature in at least two ways. First, ensuring that purposive interpretation of statutory rules follows the tacit founding purpose of copyright, which is to facilitate the prolific creation of copyright works for the public's benefit. Second, the public interest principle ensures that constitutional rights and values are given a prominent place in the adjudication of every copyright matter, even if only by instructing interpreters to consider the full array of constitutional provisions

[1112] In his review of the embedded principles of copyright law, the only principles of copyright that Harms identifies that could feasibly be said to capture constitutional or transformative interests is noncommittally titled "Constitutional considerations – freedom of speech and the press": Harms *Casebook* 64. Similarly, Karjiker "Public-interest defence" makes the case for the recognition of a public interest defence but does not contemplate its ambit extending beyond freedom of expression, treating this right and value as the herald of all democratic ideals.
[1113] AJ van der Walt *Constitutional Property Law* (3rd ed 2011) 225.
[1114] Section 25(2)-(4).

that may pertain to the matter, whether or not these provisions have been pleaded.[1115] Constructing the normative context is essential to purposive interpretation and gives the immanent goals and objectives appropriate content.[1116] Recognising the constituent subprinciples that make up the broader concept can be useful in tracking the distinct elements of the normative setting in which the adjudicator is placed. This advances the transformative constitutionalism practice of openly engaging with the normative underpinnings of formally valid law and demanding substantive justification for their continued implementation.

The benefit of devising a public interest principle at the midlevel is that all considerations of this nature can be accommodated in the adjudication of copyright disputes regardless of whether a conflict or limitation of constitutional rights is pleaded. However, as with the other midlevel principles, an exhaustive recitation of the component subprinciples is both unnecessary (as nothing is gained by concretising the constituent parts) and unwise (because then adjudicators are liable to fixate on the static concepts instead of treating the public interest as dynamic and all-encompassing). However, the public interest can be constituted variously by the subprinciples of democratic ideals, public policy, public *boni mores*, and constitutional and human rights considerations, among others.

5.8 Conclusion

This chapter proposes a transformative theory of adjudication of copyright law based on the structural framework of Merges's theory of intellectual property that distinguishes justificatory foundations from the midlevel principles and practical doctrine. This allows adjudicators to attain clarity on the normative underpinnings of any given doctrine as well as endowing them with the ability to utilise any of the four midlevel principles (as applicable) to direct the legal analysis towards outcomes that are theoretically and doctrinally justifiable. As shown above, copyright law owes its existence to numerous theoretical foundations and displays plural value commitments.

[1115] *Fraser* paras 36 & 47.
[1116] This is the lasting impact of the Constitutional Court's decision in *Laugh It Off*. Indeed, the majority judgment of Moseneke DCJ first constructed the normative environment based on the provisions of the Bill of Rights before embarking on the purposive construction of the reigning statute, and the minority judgment of Sachs J was sure to reinforce the imperative of endowing legal doctrine with constitutional normativity.

The theoretical justifications of Lockean labour theory, moral desert and Kantian-Hegelian spiritual theories are investigated as relevant natural law frameworks for copyright, while economic theories and utilitarian incentive schemes are examined as instrumentalist devices to encourage creativity and achieve efficient distributions of entitlements. The comparatively niche theory of democratic copyright proposed by Netanel is introduced as a viable model for viewing copyright as instrumental to the higher ideals of democratic society, which resonates with the project of constitutional transformation of law. This ports onto Dworkin's theory of constructive interpretation by following both inductive and deductive patterns of reasoning: the midlevel principles must be inductively formulated from doctrinal articulation to ensure that adjudicative outcomes appropriately "fit" the record of case law expounding on statutory law, and equally they must reflect the foundational values of both the copyright system and the constitutional paradigm to reflect the political integrity that is required of adjudicators.

The prevailing account of property rights and their place in the constitutional society is extremely important to this endeavour. An information theoretical model invariably flattens the plurality of interests that are implicated in the enforcement of a property right to a single metric that is mechanistically applied in service of simplicity. To be clear, the meaning of property lies in the social, historical and cultural forces that make up the context of the property claim. For the democratic ideals that are embedded in any given property rights dispute to be given their due it is crucial for adjudicators to embrace the complexity that attends copyright disputes by recognising the pluralistic account of property that progressive theories speak to. The praxis and intent of Netanel's model of democratic copyright, which was constructed for the American context around the same time that South Africa was undergoing formal constitutional reform and does not contemplate the majority of constitutional democratic values that the latter encapsulates, may still be useful for present purposes. Netanel effectively recasts copyright to contribute to American constitutional goals, specifically the strengthening of democracy through the vehicle of robust protection of freedom of expression.[1117] Netanel's model provides a useful starting point for considering how copyright can be recast as systemically instrumental in the achievement of greater political ideals; combined with Dworkin's model of constructive interpretation in

[1117] As Balganesh "Debunking" 1132 explains of Netanel's model, "[its strength] lies in its repostulation of values traditionally considered ends in themselves as mechanisms contributing toward an exogenous end – free expression."

adjudication, this produces the outlines of a blueprint for transformative constitutional interpretation of copyright disputes. This approach will share many features with Netanel's proposal and takes heed of the theoretical repositioning that his approach entails, which he explains:

> "Copyright's democracy-enhancing objectives would be better served by an approach that unequivocally places them in the foreground, relying on marketplace economics as a means of important, but of limited utility, in achieving that end."[1118]

I read this instruction to be perfectly compatible with the mandates of constitutional interpretation and transformation and a useful reformulation of the jurisprudential starting point and associated points of reference.

After considering Merges's four midlevel principles and canvassing extant alternatives, this chapter proposes the midlevel principles of property, trade, dignity, and public interest to capture both dimensions of Dworkin's model of adjudication in respect of South African copyright law. Each of these principles is comprised of subprinciples that can be induced from the canon of adjudication on point and subsequently assessed for compatibility with the objective normative value system that the Bill of Rights proffers. The final concluding chapter addresses ways of conducting this normative integration, notably through the methodological structures that Van der Walt identifies and the constitutional notion of proportionality. Proportionality can be utilised as a structural mechanism that resolves normative conflicts between two opposing values that are reflected in subprinciples and synthesises the operation of the model. This ensures the holistic integration of law, which is necessary for the systematic transformation of copyright law towards constitutional ends. The utilisation of this constitutional mechanism of conflict resolution – and the normative content that attaches to it – is a useful way of bringing constitutional norms and methodology to bear on the adjudication of copyright disputes in pursuit of doctrinal articulations that produce constitutionally aligned outcomes. This is in stark defiance of the formalistic ways of conceiving of and adjudicating copyright disputes that frequently fail to engage whichever constitutional imperatives pertain to the matter.

The final chapter synthesises the insights that have been gleaned from the broad spectrum of discussions that this research provides. After illustrating a cogent theory

[1118] Netanel "Copyright" at 336. This approach is remarkably similar to that developed in respect of property law's place in a transformative democracy by Van der Walt "Modest systemic status".

of transformative theory of adjudication for South African copyright law by tying together the various strands of argument that have featured in preceding chapters, the concluding chapter ends by turning this theory towards practical examples from decided case law. This demonstrates the potent capacity for constructing meaning in respect of statutory provisions as they intersect with constitutional rights and methodological mandates and suggests that judges tasked with adjudicating copyright disputes can meaningfully contribute to the transformation of copyright law by utilising a value-laden model like the one proposed.

CHAPTER 6: CONCLUSION

6.1 Introduction

This research aims to develop a theory of transformative adjudication for copyright law in South Africa. The foregoing discussions span a range of issues from legal theory and constitutional law to copyright law and theory, culminating in a viable account of how adjudicators can legitimately effect the transformation in South Africa. It harnesses sections 8 and 39 of the Constitution and the Constitutional Court case law elaborating on these provisions to argue for a reinvigorated reading of the adjudicative task that may assist courts deciding copyright cases. This concluding chapter brings together the main strands of the theory developed in previous chapters and suggests ways in which its constituent elements may be utilised at the operational (adjudicative) level. It then demonstrates the practical utility of its application to concrete copyright cases, which is performed cursorily due to space constraints.

6.2 Integrating copyright's values and purposes into constitutional adjudication

6.2.1) Transformative constitutionalism as orienting frame

The project of transformative constitutionalism is now a quarter century into its actualisation and contextualises the need for this research. The stark distinction between the erstwhile South African legal culture of authority and the nascent constitutional culture of justification serves as a point of departure. The formalism inherent in value-neutral accounts of legal interpretation and judicial deference to legislative intention betrays the promise of substantive transformation. The danger exists that jurists are lulled into thinking that traditional approaches to the interpretation and application of law are appropriate for determining whether the copyright system as a whole complies with the set of normative dictates that the Bill of Rights comprises. As a result of conservative legal culture, courts are often reluctant to give horizontal effect to constitutional rights to the extent that they impose positive obligations or contemplate the direct application of constitutional normativity aside from the invalidation of non-constitutional rules. This is because adjudicators steeped in conservative legal culture tend towards constitutional avoidance and stop short of

embracing the implications of transformation. Such pre-constitutional conventions are innately tied to parliamentary sovereignty rather than constitutional supremacy, which prescribes a different mode of judicial engagement with the law. The sway that conservative legal culture enjoys over interpretive reasoning must be addressed, especially as it relates to the preferred canons of interpretation and role of principles in constituting law and guiding interpretation.

South African adjudication is still predominantly characterised by conservative tendencies in respect of dominant interpretive canons. However, a shift may be observed in constitutional interpretation away from this mode of judicial engagement towards substantive reasoning, which investigates the values and normative justifications that underpin the legal rule in question. The supremacy of the Constitution of the Republic of South Africa, 1996 – specifically Chapter 2 comprising the Bill of Rights – has urgent implications for the validity and interpretation of pre-existing common law, legislation, and customary law. The objective normative value system presented by the Constitution has supplanted the natural law values of justice that animated arguments on the progressive side of the debate over the nature and character of law during the latter part of the twentieth century. By positing the normative value system as the skeletal political content (to be expanded by an adjudicative reading strategy that gives fuller detail to the normative substance and relationship between the array of rights and values), the South African legal system is endowed with an objective normative foundation and aspirational framework of objectives. All non-constitutional sources of law are required to facilitate the normative revolution necessitated by the discrete rights provisions and cohort of values and principles that constitute the Bill of Rights. However, the reading strategy is just as important as the normative substance, as can be gleaned from a few Constitutional Court decisions[1119] that left important constitutional rights and values denuded of any positive content. The traditional deference to authority stands in stark opposition to the culture of justification that is posited as the grounding ethic for the project of

[1119] Such decisions in South African jurisprudence most famously include Ackermann J's majority decision in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC), where the judge purported to give effect to Isaiah Berlin's conception of liberty including its positive dimension, but in effect reverted to a classically liberal conception that protects only against incursion by the state without granting anything more as content. Similarly misguided (in my view) decisions include *Prince v President Cape Law Society and Others* 2001 (2) SA 388 (CC), *S v Jordan and Others* 2002 (6) SA 642, and *Volks NO v Robinson and Others* 2004 (6) SA 288 (C), each of which denies individuals a robust variant of autonomy.

constitutional transformation of all law. In this regard, Dworkin's theory of constructive interpretation bodes well with the Constitutional Court's approach to adjudication, specifically how the successive benches have dealt with the need to adopt a coherent reading strategy of legal material.

Law as integrity is an aspirational ideal iterated in the constitutional text and spirit, starting with the top-down infiltration of constitutional rights, values and principles along with the transformation of South African legal culture. On this model, adjudication is grounded in a practice of adequate justification for decisions in the setting of the idiosyncratic legal culture and system, which in turn determine the types of reasons that satisfy the requirement of justifiability.[1120] Law as integrity sees the rule of law as dependent on the justification of law on a fundamentally normative basis directed towards deontological and teleological priorities.[1121] This approach focuses on the coherence of the legal script from inception to application, with a healthy bias towards the present system of law over an originalist stance that gives paramount position to authorial intention or literal construction. In this way the theory steers adjudication towards the present needs and conditions of the legal society, not those at the time that the law was created, and aims to enhance legal certainty through the coherent application of principled, normative reasoning.

While Dworkin and Klare represent different traditions of legal thought, the former typically being considered a progressive liberal and the latter a Crit, there are some noteworthy commonalities between them. The role of adjudication is central to both, including the importance of value-based substantive reasoning and the need to utilise an identifiable political theory in judicial interpretation. Klare's stance is avowedly critical (in the CLS sense of the term) and consequently he is sceptical of the claim that moral values are always sourced endogenously. Dworkin's stance is that such values are indeed intrinsic to law but require reasoned elaboration of abridged concepts like political values and principles, during which process non-legal practices and sources of meaning become relevant. In this respect, Dworkin offers a constitutionally viable reading strategy that comports with section 39(2) on all accounts

[1120] See generally Dyzenhaus & Taggart "Reasoned decisions" in *Common Law Theory* 134-167; Dyzenhaus "Law as justification".
[1121] Cornell & Friedman "Significance" 55, citing Dworkin *Justice in Robes* 25: "Indeed, it is important for Dworkin's entire argument that often times cases are easily decided by looking to what he calls local priority." See Dworkin *Law's Empire* 250-254 on local priority.

and approximates a vision of law as fidelity to human dignity that arguably offers the potential for application in transforming South African law. Klare argues for a postliberal reading of the Constitution because classic liberal constructions of the contents of the Bill of Rights will not do justice to its contents,[1122] In this vein, Davis describes the Constitution as "[embracing] a social-democratic set of promises".[1123] It is arguable that Dworkin's theory of constructive interpretation premised on the two dimensions of dignity is perfectly compatible with this postulated set of promises and even finds amplified resonance in the constitutional triumvirate of fundamental values and the way the values of dignity, equality and freedom converge in case law. The recent jurisprudence on this score indicates a move towards extending the Constitution's normative framework beyond the bounds of conservative legal culture's preferences of a public morality distinct from private morality, towards a unificatory embrace of constitutional morality across all spheres of legal and social interaction.[1124]

South African constitutional jurisprudence advances a holistic approach to interpretation and application that explicitly relies on the objective normative value system underlying the Bill of Rights as moral lodestar. Indeed, the import of the instruction in section 39(2) is the facilitation and instantiation of the constitutional ethos. Similarly, Dworkin's theory of constructive interpretation supplants parliamentary intention with legislative purpose and expects adjudicators to construct the best possible meaning of the legal rules, taking account of the historical canon of principled interpretation on the issue and, more importantly, the foundational ideals of the legal system. On Dworkin's model, the role of adjudicators is aimed at producing outcomes that instantiate the normative commitments of the entire system of law, which commitments he formulates as political value(s). In this way he brings the normative values adumbrated throughout the Bill of Rights into the interpretive fold. Local priorities then inform the analysis and demand normative resonance with the value-based justifications rooted in the political ideology comprising the fundamental commitments of the rule of law. This is the basic outline of his model of law as integrity,

[1122] Klare "Legal culture" 151-152.
[1123] DM Davis "John Dugard's legacy to human rights activism and litigation" (2010) 26 *SAJHR* 326-353 at 344.
[1124] This jurisprudence includes the SCA decision in *Endumeni* and the CC decisions in *Daniels*, *Baron*, *Pridwin*, *King*, *Beadica*, and *Wilkinson*: see Chapter 4 Section 3.

which can operate comfortably in the South African legal system as an interpretive strategy tied to the objective normative value system that the Bill of Rights comprises.

6.2.2) Constitutional mandates for transformation

In concert with the section 39(2) dictates, section 8 of the Constitution provides instruction on the comprehensive scope of application of the Bill of Rights. Although the Constitutional Court's earlier jurisprudence showed a reluctance to apply the Bill of Rights directly to horizontal disputes, some of its recent decisions demonstrate a greater willingness to do so. Given that most copyright litigation will involve horizontal relationships, it is important to consider how to locate the correct source of law and transform its content as necessary in matters to which the state is not party.[1125] The principles of subsidiarity orchestrate the normative overhaul of all law to reflect the values of the Bill of Rights by coordinating the systematic construction of different sources of law to achieve the methodical integration of constitutional rights and morality into every area of law. By embarking upon the holistic construction of law, the Constitutional Court goes about securing constitutional entitlements in a variety of ways ranging from indirect infusion into extant common law doctrine or statutory provisions, to the direct application of the constitutional provisions, or of legislation that was enacted to give effect to such provisions.

This means not only turning to specialised legislation that gives content to constitutional rights and values (comprising direct statutory application of the Bill of Rights), but also construing statutory doctrine in a manner that attempts to give the constitutional norms their best expression. This may involve supplanting pre-constitutional meaning with constitutional counterparts, or lending enough constitutional vigour to the way legislative concepts are construed to realign the outcomes of the interpretive exercise with constitutional goals and objectives. Common law concepts may come into play to the extent that they supplement the statutory copyright regime,[1126] most notably as regards the propriety of works (which

[1125] The relevant governmental department must be added as a party to the litigation if the constitutionality of the litigation is challenged, but not where a statutory provision is infused with constitutional meaning, implying that courts are at liberty to make such constitutional adjustments to existing law on any matter before them, regardless of whether the constitutionality of the given legislation is challenged. See Rule 5(1) of the Constitutional Court rules, 2003 – GN R1675/2003.

[1126] See eg *Van Zyl N.O. v Road Accident Fund* 2022 (3) SA 45 (CC), where the common law principle of impossibility was used to "fill the gaps" and guide the interpretation of s 23(1)-(2) of the Road Accident

assessment would be constitutionally driven)[1127] and the infiltration of the public *boni mores* in the judicial reasoning. Reading a statutory provision up or down could contribute to attaining a constitutionally desirable meaning by way of indirect application of constitutional norms. On the other hand, appropriate remedies for constitutional incompatibility, like reading-in and severance, provide examples of the capacity of direct application to come to the aid of an alleged copyright infringer by providing an expanded meaning of an existing statutory exception or contracting the ambit of application of the owner's property rights.[1128] The direct application of a constitutional provision clearly plays a much more diverse role in constitutional adjudication than simply posing a limitation (or inviolable standard) to the enforcement of existing legal rules.

As the discussion of some of the most recent decisions from the Constitutional Court shows, often the same outcome can be reached regardless of whether section 39(2) or section 8 is invoked, and sometimes without the aid of either.[1129] Yet, relying on an interpretive theory that is congruent with subsidiarity's ultimate objective of value holism is an important part of transformative judicial interpretation. Dworkin's model of constructive interpretation is silent on methodological questions at this level of systemic granularity but is nonetheless compatible with the South African approach of subsidiarity. Both Dworkin's theory and Constitutional Court case law on the single-system-of-law point to the importance of uniting all sources of law under the same normative umbrella and producing a holistic interpretation that avoids a fragmented

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Fund Act 56 of 1996 in conjunction with s 13(1)(a) of the Prescription Act 68 of 1969 to find that affected persons were protected from prescription running against their statutory claim against the Road Accident Fund.

[1127] For example, the s 16 right to freedom of expression is expressly delimited in s 16(2), which could become relevant during an inquiry into the common law requirement of propriety (based on the public *boni mores*) by means of indirect application.

[1128] Again freedom of expression could feature as a basis to read-in a statutory provision: for example, it may be necessary for a court to read-in a fair dealing entitlement to use a copyright work for the purpose of parody due to the discord between the statutory regime and the constitutional guarantee in s 16, and reading-in as an appropriate remedy to a direct challenge of the constitutionality of the Copyright Act (as in *Blind SA*) could be required to secure the constitutional in the given case.

[1129] *Beadica*, *Pridwin* and *King* all show that direct application and indirect application often achieve the same outcome, and the Court would have likely reached the same conclusion that it did in *Wilkinson* had it applied the constitutional provision directly through the statutory vehicle of PEPUDA. Indeed, the subsidiarity approach that Victor AJ adopts in her concurring decision in *King* leads to the same result, but by applying the Act to the matter. This arguably comprises better adherence to the basic democratic principles that subsidiarity serves, considering that democratically passed legislation is preferred over common law. Instead, *Wilkinson* evinces indirect application by analogous reasoning: it was not applying section 9(3) directly, just using it to inform public policy that encapsulates everything in that provision and more.

mosaic of normative commitments. The purposive, holistic nature of interpretation under South Africa's supreme Constitution is not only mirrored in Dworkin's proposed interpretive strategy but is additionally compatible with the principled stance that Dworkin's theory proposes.[1130] Furthermore, Dworkin's model is useful to sensitise adjudicators to their duty of normative fidelity to the constitutional value system and specifically to translating this content into the sources of law that subsidiarity directs interpreters towards.

6.2.3) Moving past conservative orthodoxies

The most recent Constitutional Court decisions on the matter of horizontality indicate the emergence of a more progressive approach than the preceding two decades foretold. In many ways, conservative dichotomies and conceptualist axioms that dominated South African legal thinking and discourse have been transcended, which opens up space for new ways of dealing with value conflicts in the legal setting. In keeping with the holistic application of the Bill of Rights to all enclaves of law, the rigid distinction between positive and negative duties in the horizontal sphere has been eroded. Starting in *Daniels*, the Court made an emphatic statement about the content of private law relationships and how they must reflect constitutional norms even in paradigms (like private property ownership) that do not traditionally accommodate exogenous moral concerns. Although the Court in *Daniels* says quite explicitly that positive obligations can be imposed based on the horizontal application of constitutional rights, there was in effect no performative content that attached to the alleged duty-bearer.[1131] *Baron* was the first case in which the Court had the opportunity to apply *Daniels* but declined to do so due to the voluntary assumption of duty by the property owner in that dispute, which has since become more prevalent in horizontal disputes. *Baron* serves as confirmation of the negative obligation (as it was termed in *Juma*) to not impinge on constitutional rights that can both require patience in the enforcement of valid property rights and even demand positive conduct from the property owner to ameliorate the impact of the enforcement of their rights on others.[1132]

[1130] Cornell & Friedman *Mandate* 109 profess that "sections 8 and 39(2) are exemplary of the most recent developments in [Dworkin's] legal theory."
[1131] Paras 39-41.
[1132] Madlanga "Human rights duties" 370.

Sometimes private parties will voluntarily agree to the continuation of existing performative duties to enable the efficient enforcement of their rights, even undertaking additional duties or prolonged periods of obligation, most notably in cases like *Grobler*.

The issue of labelling duties positive or negative has not always been dealt with clearly. Decisions like *Blue Moonlight* illustrate an aversion towards the terminology of positive obligations even when imposing a continuation of duties. The decisions in *Juma*, *Daniels, Baron* and *Pridwin* show that private parties can incur obligations towards other private persons in respect of the non-frustration (and thus fulfilment) of constitutional rights when those individuals are in a position to cause the fulfilment or frustration of others' interests and entitlements, even if the obligation is characterised as a negative duty. *Pridwin* also shows that constitutional provisions can found obligations directly, even when there is a mediating contractual relationship between the parties that ostensibly should be able to provide a remedy in common law.[1133] *AllPay* demonstrates that private parties can assume the status of an organ of state and thereby undertake burdensome positive obligations, and further that such obligations may be imposed past the point of voluntary assumption if the circumstances should require. This suggests that the Court is more comfortable ordering the continuation of positive conduct, but that imposing duties anew is not beyond the ken of the Court's powers. This reflects Dworkin's notion of assignment responsibility, in terms of which duties may be apportioned to certain roles in society like property owners.

In the property context, property owners are sometimes expected to shoulder public burdens by virtue of their special position to facilitate or frustrate the achievement of constitutional entitlements like dignity and education. A similar scenario plays out in contract law decisions, where parties who have voluntarily undertaken to fulfil certain duties related to constitutional rights (education, payment of social grants, economic empowerment in pursuit of equality) are obliged to continue performing such conduct beyond their undertaking. Furthermore, parties fulfilling a constitutional function may attract a more onerous level of obligation than parties who do not fulfil such functions

[1133] Finn "Befriending the Bogeyman" 604 identifies these duties as "to continue to provide a basic education to enrolled learners (unless there is an appropriate justification not to) and the derivative duty to afford the opportunity to make representations before terminating the contract."

but who are still involved in serving the constitutional interests of others despite not performing a constitutional function. Accordingly, the Court has made it clear that private parties may be obliged to not interfere with the fulfilment of constitutional rights of others, even when this means performing positive duties when they are in a special position to contribute to the realisation or frustration of such fulfilment.

It has also become clear that rarely will a constitutional right or provision not be applicable when dealing with legal questions of moral import. In light of the normative dimension of constitutional adjudication, the purposive yet principled character of both Dworkin's theory of constructive interpretation and Merges's model of copyright make them amenable to application in the South African constitutional context. A purposive, holistic approach is required to situate each legal rule in the greater context of the project of transformation towards constitutional justice. This purposive slant on adjudicative interpretation counteracts the conservative inclination towards formalistic resolution of disputes without resort to value-based or teleological construction. Ultimately, "[j]udges must rely on the context, purpose and consequences of the interpretation to choose between the various possible meanings."[1134] Accordingly, judicial analysis should be firmly rooted in the constitutional framework of normative values to guide the interpretive endeavour to constitutionally fruitful outcomes. Regrettably, judges in copyright cases arguably still employ pre-constitutional modes of interpretation and reveal an approach akin to the information theories of property.[1135]

The information theorist strategy of employing simplistic bright-line rules typically revolves around the owner's right to exclude regardless of reason. This construction of the operation of law finds a clear parallel in a simplistic rendering of Dworkin's rights-as-trumps argument, which Dworkin has refuted as an inaccurate reflection of his early work.[1136] His rights-as-trumps argument is often described in terms that employ bright-

[1134] Bishop & Brickhill "In the beginning" 715.
[1135] The best example of this in copyright law is *Vollenhoven* , where the corporate copyright owner was permitted to keep a socially valuable work (a documentary film about Apartheid-era bailouts to banks and the post-Apartheid government's actions in this regard) under wraps and unpublished despite the clear dignity and freedom of expression interests of the author, not to even speak of the public interest in this individual scenario and more generally as a matter of principle. After considering the variety of constitutional arguments of interpretation that were proffered by the respondent, the court ultimately elected to follow a simplistic and absolutist rendering of the property rights of the owner that originated in contract.
[1136] R Dworkin "Seven critics" (1977) 11 *Georgia LR* 1201-1268. See R Dworkin "Response to overseas commentators" (2003) 1 *IJCL* 651-662 at 651-653 for Dworkin's thoughts on how the rights in the South

line rules which are apt to short-circuit the normative adjudication of legal disputes. The superficial rendition of this argument entails hierarchically matching up the competing interests according to their formal encapsulation (as rights, vested interests, values, etc.) as a means of resolving legal disputes. The simplistic version of the rights-as-trumps argument that has gained rhetorical purchase worldwide ignores the nuance with which Dworkin endowed it. Even this early work displays sensitivity to both the normative conditions that generate the legal doctrine at issue and those that result from the judicial resolution to the dispute.

6.2.4) Liberal legal theory and progressive approaches

On Dworkin's early model, rights act as trumps over non-rights interests only to the extent that they are not countered by a sufficiently compelling principled argument. Dworkin clarifies that the status of rights should presumptively protect the individual interest from state interference but may be overcome by a sufficiently compelling value or principle if the justificatory account of the rule of law justifies giving preference to the competing non-right interest.[1137] Evidently Dworkin requires a version of substantive legal reasoning in determining whether the right can be overcome or whether it should prevail in the circumstances presented. On this understanding, rights can always be overcome by a sufficiently compelling interest, whatever form it takes in positive law. This calls for more investigation than the formalistic slant suggested by the catchphrase "rights as trumps" and ties in with the culture of justification that South African constitutional democracy demands. This element brings his work closer to the progressive property school of thought, which enquires into the plurality of interests at play and disarms the mechanistic character of adjudication by endowing it with a structural and methodological pliability that is able to accommodate normative pluralism.

Zsa-Zsa Boggenpoel and Bradley Slade observe that progressive property approaches recognise "that property law has the capacity to promote a number of values" and take as their focus the role of property in "(re)constructing social

African Bill of Rights functioned during the Court's first term under Chaskalson P. See also Pildes "Dworkin's two conceptions".

[1137] Dworkin *Taking Rights Seriously* 92. See in response to this view Raz "Critical review" 14. See further Underkuffler *Idea of Property* 68.

relations".[1138] The authors emphasise that the starting point to any property dispute (whether that is exclusion or social values) is likely to determine the outcome. This means that the theoretical posture of the adjudicator is crucial to achieving a constitutionally desirable outcome – simplistic, unitary pre-constitutional notions of property are unlikely to deliver the desired results.[1139] In this regard, property norms that serve as the accepted point of departure can dictate the outcome by means of an implicit logic and normative baseline, incorporating proprietary thinking into the copyright regime by rhetorical fiat. However, copyright law's traditional normative justifications no longer operate as the sole source of values for adjudicating copyright disputes; the constitutional value system is co-constitutive and, in the case of incompatibility, should take normative precedence over copyright norms. This enriches an otherwise static conception of copyright in South African constitutional democracy.

This static conception of copyright as property cannot serve the social function that Netanel identifies in his democratic model, nor will it facilitate the fruition of democratic ideals that he envisions. The social function constituted by the plethora of constitutional rights, values, and objectives encapsulated in the Bill of Rights calls for a coherent and normatively responsible theory of law and interpretation. This plurality of rights and values necessitates a vision of property that is constitutionally responsive and can accommodate more than the singular mode of operation that economic theory provides. A unitary and fixed property concept is unhelpful in realising the many components of copyright's social function, which is inherently pluralistic and multifunctional. As such, it is unable to serve the array of complementary roles that progressive property recognises. Clearly the progressive property camp's insistence on a wider lens sits far more comfortably with the interrogative culture of justification that investigates the normative assertion of a rights claim in the wider context of complementary, supplementary and countervailing normative forces.[1140] The

[1138] Z Boggenpoel & B Slade "Where is property? Some thoughts on the theoretical implications of *Daniels v Scribante*" (2020) 10 *CCR* 379-399 at 384.
[1139] Once again, the applicability of Dworkin's theory is obvious: awareness of one's theoretical commitments (in Baron's terminology) is a prerequisite for both Dworkin's constructive interpretation and the value-activating interpretation mandated under the Constitution. While there have been strong arguments made in favour of the applicability of Dworkin's normative theory to the South African project of constitutional transformation, it remains to make this argument in respect of any branch of intellectual property law.
[1140] Baron "Contested commitments" 951.

adjudicative model of copyright developed here aligns with the progressive property approach because it incorporates a plurality of norms and ideals into the copyright concept, taking property principles as one of numerous sources of value. Further, it moves away from the absolutism and essentialism that characterises the information theory approach and injects a measure of open-ended recognition of both democratic ideals and human dignity in the many ways that they might pertain to the facts of a case.[1141] It also casts copyright as instrumental to exogenous concerns, which is sometimes lost in the focus on copyright as property. This presents a complex understanding of copyright that invites dialogue about its functions and purposes, and how it contributes to the constitutional objectives that may be gleaned from the spirit, purport and object that section 39(2) deems relevant to all interpretive activity. Accordingly, progressive property theories better feed into the democratic culture of justification that characterises the constitutional project of transformation.

6.2.5) A constitutionalised model of copyright

Notwithstanding the economic propertarian construction that has come to dominate copyright discourse, the legal phenomenon of copyright can be cast as central to the democratic values and ideals of a given jurisdiction, as Netanel proposes.[1142] In this perspective, copyright is seen as an instrument for attaining the democratic objectives that constitute the legal system. This comports with Dworkin's value-driven theory of law as integrity and the constructive interpretation that he utilises in its service; it speaks to the need for holistic interpretation of legal rules in the context of the broader legal system and the values that animate it. Conceiving of copyright as an engine of democracy redeploys it in numerous vital roles in the realisation of democratic goals, including the substantive fulfilment of an array of constitutional entitlements ranging from freedom of speech and education to dignity and equality. This recalibration of the neoliberal property concept is an essential element of the constitutional transformation of all property entitlements and follows from the frank recognition of the normative underpinnings of the Bill of Rights, especially the fundamental triumvirate. More than

[1141] The open-ended nature of the principles (that they are open to recognising a non-exhaustive array of subprinciples as may be appropriate) is an important feature of the adjudicative model, as it not only injects an inherent flexibility but also forces judges to engage with the content of the principle rather than merely rehashing what has been done with a particular principle before.
[1142] Netanel "Copyright".

anything, pluralism embraces the expansion of dialogic borders beyond the instrumentalist economic paradigm to a rights-based inquiry of authorial and public interest entitlements, concerns of equality and human dignity, and the myriad other democratic interests that are constitutionally embodied. Remodelling the property concept to be more conducive to constitutional aspirations of socially, politically, and economically inclusive law that can be justified as an instantiation of these sacrosanct values should be the mission of any transformative theory of South African property law or adjudication. This can be meaningfully achieved only by moving away from the reigning paradigm of copyright as property asset that simultaneously protects individual autonomy and optimally incentivises creative work, considering the host of constitutional values that intersect within the ambit of copyright law.

To further this, Merges's three-tier model of intellectual property is proposed as a viable structure for construing South African copyright law. The theoretical justifications that lie at the foundations of copyright display an assortment of deontic underpinnings and instrumentalist objectives. These justifications give crucial meaning to copyright law and should be adopted as interpretive guides to the purposive construction of law when adjudicating copyright disputes. The most pertinent justifications for granting copyright include Lockean labour theory combined with reward for creation, which reward of property rights serves as incentive for such creation. Moreover, elements of authorial personality are evident throughout copyright theory, instantiating dignity as a pervasive feature. Further, the economic undertones of the property concept are felt throughout intellectual property theory and pertain especially to the operation of copyright as an economic asset.

To embody the normative mandates of both copyright law and South African constitutional democracy, the final piece of the theory of transformative adjudication of copyright espouses midlevel principles that both explain what courts do in copyright cases (thus abiding by Dworkin's dimension of fit) and provide guidance on what they should do according to the political integrity of the South African constitutional democracy. Moving from the aspirational concept that Dworkin proffers to the doctrinal stage to the adjudicative stage is remarkably similar to Merges's idea of the foundational level (including, naturally, the iterative legal ideal, which for Dworkin would be integrity through dignity) to the midlevel to the doctrinal. Despite the dissimilar uses of the term doctrinal, Dworkin's doctrinal level is arguably coalescent

with Merges's midlevel principle and his adjudicative stage is exactly where Merges's doctrinal level finds its expression.[1143] The doctrinal stage, for Dworkin, is where judges identify the legal principles that courts have canonically employed in expounding on the law. This tracks with Merges's deductive identification of principle extant in the record of case law (i.e., what courts have actually done, thus descriptive). However, Dworkin's model of interpretation adds the all-important dimension of political integrity, which he develops into fidelity to the dual principles of dignity. Dworkin does not deny the prescriptive character of his theory as does Merges, making it obvious that judges are required to follow the principled account of political morality that comprises the chain novel-like record of the extrapolation of legal precepts. The ideal of integrity demands fidelity to the overarching norms of the legal system, which are in both Dworkin's case and that of the South African constitutional system, the notion of dignity.

The importance of each democratic right and value in the dignity-centred model of law must be made the primary point of reference for all adjudication, including copyright adjudication.[1144] Nonetheless, copyright's fundamental purposes should not be frustrated, even if some doctrinal mechanisms are modified or abated. In this regard, copyright's role in promoting education[1145] and fostering dialogue through expressive communication[1146] must be doctrinally embodied as iterations of the substantive ideals of democracy whenever such functions are relevant,[1147] as well as freedom of information and expression.[1148] On this model, speech should not be treated as a commercial asset devoid of any non-commercial social importance, nor is education to be degraded as little more than a market to be captured. Similarly, the market environment is part and parcel of South African constitutional democracy but cannot be allowed to subsume everything it comes into contact with.[1149] Netanel's explanation is instructive:

[1143] See also Cornell & Friedman *Mandate* 71-72.
[1144] See RM Shay & NI Moleya "Discovering the value of liberty in intellectual property adjudication: A methodological critique of the reasoning in *Discovery Ltd v Liberty Group Ltd* 2020 4 SA 160 (GJ)" (2021) 24 *PER/PELJ* 1-32 where I make a similar argument in respect of trademark and unlawful competition adjudication.
[1145] Netanel "Copyright" 348-349.
[1146] Netanel "Copyright" 349.
[1147] For example, cases like *Blind SA* and *Vollenhoven*.
[1148] These rights featured in *Moneyweb* and *Gidani*.
[1149] Netanel "Copyright" 346:

> "The democratic paradigm is hostile neither to economic analysis nor to neoclassicist insights regarding the operation of copyright markets. But the democratic paradigm makes clear that while copyright may operate *in* the market, copyright's fundamental goals are not *of* the market."[1150]

This passage perfectly situates the proposed midlevel principles and describes their primary function: to synthesise the operation of copyright with the normative democratic ideals underlying the Bill of Rights. In addition to Netanel's democratic civil values, a plethora of human rights values are present in the Bill of Rights that are made directly relevant to the interpretation of legislation by section 39(2) and which Dworkin's model of adjudication (and more recently his Kantian normative framework) casts in a starring role. This swathe of normative legal values can certainly inspire legislative efforts at updating and revitalising all statutory regimes but should additionally play a direct role in the adjudication of copyright cases. To fuse Merges's terminology with Dworkin's model, adjudicators should employ midlevel principles as mediators of political value derived from the theoretical foundations of copyright law as reflected in constitutional morality. Accordingly, the postulated principles inject a measure of value-orientation into every interpretive endeavour, which is no more than section 39(2) requires.

The principles of property, trade, dignity, and public interest are suggested as sufficiently capacious to explain what courts have conventionally done when resolving copyright disputes as well as being representative of the constitutional value system to which judges are beholden in their interpretive task. They distil the normative essence of copyright doctrine and link it to the moral mandates of the Bill of Rights holistically construed as part of the project of reconstruction of the law per transformative constitutionalism. Each midlevel principle constitutes an array of subprinciples that both enhance descriptive clarity and assist in achieving normative resonance with the Bill of Rights by deriving their respective weight from the purposive importance of the underlying justification. Because they are generated by the four

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> "The market presents both a threat and a promise to the democratic character of civil society. An unfettered market can give rise to gross disparities of power, resources, and associational capability, according the wealthy disproportionate opportunities to participate in civil life and to set political and social agendas. […] At the same time, however, the market underwrites opportunities for democratic citizenship that would not be available even in a benignly statist regime. In addition to promoting material well-being, market institutions support a degree of individual choice and possibilities for political autonomy and associational diversity that could not subsist within an all-encompassing bureaucratic state." (citations omitted).

[1150] Netanel "Copyright" 341 (emphasis in original).

midlevel principles, these subprinciples seamlessly integrate into the systemic perspective and contribute to an expanding body of law driven and organised by normative principle. The four midlevel principles and their respective subprinciples capture the teleological schematic and normative core of copyright's plural foundations, amplifying the elements that resonate most clearly with the constitutional value scheme. The most overlooked dimensions in this regard are arguably dignity and public interest, which incidentally also represent the most important aspects of constitutional morality. Accordingly, these two principles should be given maximal range of application to optimise the transformative impetus of the adjudicative theory by endowing copyright with constitutional values and purposes. This situates the copyright regime as instrumental to the achievement of democratic constitutional ideals rather than the neoliberal trade agenda that has been borne out until now.

6.3 The methodological and substantive contributions of the transformative theory of copyright adjudication

The purposive construction of all relevant sources of law in accordance with the principles of subsidiarity produces a holistic rendering of the systematic operation of law as a normative enterprise. By identifying the appropriate source and openly serving these normative values, teleological interpretation can be harnessed to ensure that the constitutional interest is fully protected in positive law, whether by statute, common law, or the direct application of a constitutional provision. While courts are arguably free to do this even without the principled model proposed here, constitutional norms are unlikely to infiltrate statutory doctrine without something like these principles to emphasise the commonality between copyright and constitutional doctrine. This means that statutory interpretation is likely to continue operating according to the mercantile conventions that presently befall it, and constitutional provisions are likely to be invoked solely as inviolable standards for validity testing rather than as a source of normative meaning for the interpreted statutory provisions.

The role of values in statutory interpretation has been emphasised throughout the research. It is argued that section 39(2) gives instruction to engage in a reading strategy like the one proposed here – one that is premised on producing an interpretation of the sources of law that best feeds into the constitutional ideals of

dignity, equality and freedom that underwrite them. The proposed midlevel principles enable adjudicators to seek Dworkin's "best interpretation" – the interpretation of available sources that best coheres with the overarching narrative of precedential principle (in relation to both constitutional and copyright law) and political value: the fit and integrity, respectively. These principles therefore contribute more than they do in Merges's model, as they have the additional prescriptive dimension of Dworkin's political integrity. They combine something akin to the common law method of finding and applying principles with a constitutionally inspired mode of statutory interpretation, which finds and applies legislative values and purposes directed at the normative optimisation of black letter doctrine. They structure law in a way that allows coherent utilisation of the normative commitments of the legal system (as per Dworkin's mandate of political integrity) while remaining adequately descriptive of the record of decisions that defines the copyright regime and therefore provide a compelling account of how the law operates. The crucial insight here is not the claim that such a best interpretation always or necessarily exists, but that interpreters are compelled to produce a meaning that positively engages constitutional morality at every possible intersection and produces an outcome that feasibly captures the normative purpose of each legal rule being interpreted, regardless of source.

Such an approach is at work in the numerous cases where the Constitutional Court engages with both the methodological and normative questions raised under sections 8(2) and 39(2). This is very different from the conservative approach of interpreting away any perceived conflict wherever possible, which often denies the constitutional concept any meaning that would result in conflict with the non-constitutional source and permits copyright law to operate in the way that it always has – free from the influence of constitutional normativity. The transformative Dworkinian-Mergian approach selects the interpretation of copyright's values and purposes that aligns most closely with the spirit, purport and object of the Bill of Rights identified in section 39(2). Moreover, it points to the incarnations of dignity and public interest already inherent in copyright law, which have the potential to hold the property and trade paradigm in which copyright law is routinely construed in balance. By focusing on the pluralistic values that are implicated in copyright disputes, the property logic that dominates the adjudicative framework is supplanted by a more democratic set of normative

considerations.[1151] Like with Netanel's democratic model, copyright law is recast as instrumental to extrinsic values and objectives, in this case located in the Bill of Rights and the Constitution more generally.

Midlevel principles play a role in both the demarcation and balancing of the prevailing rights, irrespective of whether the challenge is brought as a vertical or horizontal matter. When construing the legal sources that avail, courts are tasked with determining the interaction between potentially conflicting statutory provisions and common law doctrine, which must be construed in accordance with the section 39(2) instructions. At this stage, the midlevel principles inject a measure of purposivism by drawing attention to the constituent normative components of copyright, focusing the adjudicator's attention on the points of contact with the rights and values in the Bill of Rights. The midlevel principles provide points of intersection with the objective normative value system that underlies the Bill of Rights and the copyright regime, respectively. These principles also allow adjudicators to incorporate constitutional morality into existing statutory doctrine and normative concepts,[1152] which can be inspired by deontic mandates or guided towards objectives of teleological significance in the constitutional project of substantive transformation.

Every case will likely see at least one principle pitted against at least one other principle, which brings out the plurality of interests that are involved in every dispute and ensures that the relative normative gravity of each is accounted for. The constitutional importance of these elements may pre-emptively resolve any conflict through demarcation as in *Laugh It Off*, or the enquiry may result in an unavoidable conflict between the respective sources.[1153] Moreover, if they point to the same value on both sides, it is not a genuine conflict and instead an issue of interpretation of the doctrinal iterations of this value.[1154] When principles conflict with other principles,

[1151] Drassinower "Compelled speech" in *New Frontiers in the Philosophy of Intellectual Property* 203-224 at 223: "Once the image of the work as a metaphysical chattel or intangible object is left behind, so is the recurrent and habitual inclination to regard any and all unauthorized reproduction as some sort of prima facie actionable conversion of, or trespass on, a proprietary holding."
[1152] OH Dean & S Karjiker *Handbook of South African Copyright* (RS 15 2015) 1-98.
[1153] In this regard, the argument of Van der Walt "Modest systemic status" is apposite: he observes that in cases of ostensible conflict between dignity-equality-life interests and property interests, the former interest is secured first as a matter of priority before the property interest is protected, meaning that in such cases balancing is not appropriate and the tussle will be resolved through demarcation. The modest systemic status approach provides similar priority rules to Munzer's pluralistic model. This approach of demarcating the equality-dignity-life interest before turning to resolve whatever conflict remains through balancing is arguably evident in the High Court decision in *Blind SA*.
[1154] See Underkuffler *Idea of Property* 64-84.

which should prevail is a matter of political ideology and legal policy, both of which contribute to their respective weight. In cases of genuine conflict between copyright and a constitutional entitlement, by shifting focus to first ask (as *Laugh It Off* instructs) what the competing constitutional rights demand, the economic exploitation of copyright works is not side-lined altogether. Rather, once it has been established what is required under the proper scope and ambit of whichever constitutional norms, principles or concrete rights apply, the property rights are construed in the space that remains. Further, the proprietary consequences of copyright may also inform the remedies granted, as the underlying deontic values and instrumentalist rationales will reveal the elements that require protection in the given instance. Therefore, the interpretive exercise should secure the proprietary aspects of copyright by investigating their purposive normative relevance to the project of constitutional transformation.

Wherever the midlevel principles find application, they point to the purposive relevance of the underlying justifications that can be gleaned from the entitlements in issue. This teleological orientation could aid courts in determining the systemic significance of the normative precepts in play. On this account, no single principle should be given exclusive normative reign over the others, as this counteracts the pluralistic synergy that the model offers. As purposive placeholders for political value, the midlevel principles' ultimate contribution lies in their innate ability to apportion importance in due proportion. Accordingly, the midlevel principles that are applicable cannot be determined in the abstract but must result from a fact-specific determination of the relevance of each to the facts and the resonance of those principles that have been selected with the objective normative value system of the Bill of Rights. By taxonomizing copyright in this manner, courts are able to ensure that the constitutional normative value system finds resonance with the value-laden, contextual construction of copyright that safeguards the purposes of both. This transformative approach allows courts to construct the best possible content for statutory doctrine by importing constitutional meaning wherever relevant.

6.4 Value-based interpretation and the interaction between midlevel principles

The **property principle's** constituent subprinciples secure the property-related effects of copyright by pointing out the proprietary hallmarks that pervade the Act. The property principle will be most prevalent when the case before the court concerns property mechanisms and remedies, for example in cases like *Gallo Africa Ltd v Sting Music (Pty) Ltd*[1155] and *Oilwell (Pty) Ltd v Protec International Ltd*[1156] where the property nature of the rights is determinative of the legal questions surrounding jurisdiction. The subprinciples of exclusion, universality, exclusivity or agenda-setting, transferability, *numerus clausus*, and territoriality each represent an important aspect of the operation of the property rights that comprise copyright and each should be consulted when they pertain to the matter at hand. The labour-desert subprinciple, while also a property subprinciple, ties in with dignity as it reflects the autonomy and personality interests of copyright authors and is thus separable from the ownership consequences that the other property subprinciples evoke. This Lockean subprinciple also ensures that the property edifice does not encroach upon the invaluable store of common resources necessary for future authors, limiting the operational ambit of the property concept when required.

The fact that the property subprinciples that have been identified in extant copyright doctrine reflect an information theory approach should not be seen as a flaw in the model; refusal to acknowledge the normative character of the property principle would merely deny the content of existing statutory doctrine and what courts conventionally do with these property concepts. Accordingly, it would be disingenuous to pretend that the plurality of values that comprise a progressive account of property are predominant in South African copyright law or to postulate progressive principles that do not correspond with the content that courts routinely give property concepts in this context. Instead, it is advisable that courts recognise that these concepts are historically determined and not necessarily the best fit for the constitutional notion of property and then work towards fashioning new concepts in their place. Where these subprinciples find application, courts should be sensitive to the normative context in which they are deployed and be sure not to let them override the constitutional imperatives that should

[1155] 2010 (6) SA 329 (SCA).
[1156] 2011 (4) SA 394 (SCA).

be foregrounded in every act of interpretation. In this way the property principle is given due weight in each factual scenario, but the rhetorical force of property rights is counteracted by the holistic construction of the legal rule in the constitutional normative context. Further, the theory of property that the adjudicator invokes may also contribute normative values in the form of property subprinciples to the equation, whether to effect the theoretical underpinnings of human flourishing, social democratic property, or any other progressive theory that can contribute to the array of property purposes. This will bring an additional measure of balance to the property principle itself and will help achieve a synthesis between the property principle and constitutional ideals. For example, on a democratic model of property, the features that concern democratic values and ideals will find prominent application while the comparatively trade-related features may be downplayed to accommodate the more important norms.[1157] In a case like *Blind SA*, the information theory approach is completely out of sorts and a progressive understanding of the functions of property is needed.

In this regard, one benefit of the pluralistic principled model espoused here is that it forces adjudicators to think further than the absolutist position that property rhetoric foists upon the interpreter. Endowing any legal right with property status lends it a rhetorical force that proponents of strong copyright wield to great effect. However, absolutist interpretations of the property principle must be resisted, like the one advanced by Owen Dean and Sadulla Karjiker where they state:

> "The right to control the use of a work in all the manners in which it can be exploited for personal gain or profit is an essential right under the law of copyright and that law does not achieve its objective unless such essential right is granted to the full."[1158]

This stance represents the essentialism that Balganesh cautions against.[1159] This cannot be countenanced in a constitutional system of law premised on the attainment and protection of numerous values and objectives, especially as securing economic rights does not take normative precedence over competing claims to dignity, equality and freedom. The interoperation of midlevel principles helps mediate the normative

[1157] For such a democratic model of property, see the work of JW Singer "Democratic Estates: Property law in a free and democratic society" (2009) 94 *Cornell LR* 1009-1062; JW Singer "Property as the law of democracy" (2014) 63 *Duke LR* 1287-1335; JW Singer "Democratic property: things we should not have to bargain for" in H Dagan & BC Zipursky (eds) *Research Handbook on Private Law Theory* (2020) 220-236.
[1158] Dean & Karjiker *Handbook* 1-1.
[1159] Balganesh "Debunking" 1133-1134, 1176-1178.

overtones of proprietary control, realigning the property concept to reflect a more constitutionally representative scheme. While recognising the existence and validity of the property rights that stem from the copyright regime, the transformative adjudicator will require cogent and compelling justification for the enforcement of copyright when it conflicts with other constitutional interests. This amplifies the justificatory condition in Dworkin's rights thesis, namely, that rights can be overcome by a sufficiently compelling interest. Further, it treats the constitutionally enshrined civic rights as systemically important and requires trade-related property rights (as opposed to property as an exercise of human dignity or another value) to be justifiable in the effects of their application in addition to the formal legitimacy that conservative legal culture emphasises.

The **trade principle** espouses the commercial considerations attaching to property rights as assets and finds a constitutional touchpoint in the autonomy-based right to freedom of trade and occupation. Moreover, it incorporates the principles and objectives of the TRIPS agreement and will often be invoked alongside one or more property subprinciples like transferability and universality. It comprises the subprinciples of competition, efficiency, innovation, and fairness, and serves to anchor the realm of normative contestation in the trade setting introduced by TRIPs and the objectives and principles that it specifies.[1160]

The trade principle would find prominent application in cases like *Vollenhoven* (where it would be met by the principles of dignity and public interest), *Gidani* and *Moneyweb* (where it would be met by the public interest principle), and *Haupt* and *Bergh* (where dignity would be the countervailing principle). It invokes the paradigm of neoclassicist thinking and will often be applicable in tandem with the property principle when copyright functions as an asset in the market.

The **principle of dignity** is both the most capacious and the most pressing in the copyright context. It will often be countered by the principle of either property or trade, or both. Section 36(1) of the Constitution provides that any limitation of a constitutional right must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[1161] Section 37(5)(c) further lists human dignity

[1160] Articles 7 & 8.
[1161] Section 36(1) also posits a list of factors that must guide the assessment of the limitation, ensuring a purposive and contextual construction of the interests involved. These factors include: "(a) the nature

as “entirely” protected against derogation, even in a state of emergency, which fortifies its centrality in the constitutional scheme and secures it as a non-negotiable deontic imperative. This standard of justification is echoed in Dworkin’s ideal of law as integrity being an obligation of fidelity to the dual principles of Kantian dignity, which may be expressed as equal concern and respect for each person’s interests.

Dworkin’s principles of dignity treat the self-development of each person as an essential aspect of the objective and equal value of every life, and the concomitant importance that each life is well lived. These are called the principles of intrinsic value and authenticity, which find expression in sections 9 and 10 of the Bill of Rights. Dworkin postulates various forms of relational responsibility, of which assignment responsibility may be the most relevant to copyright law. This type of responsibility attaches to a person by virtue of their position relative to others, such as their status as property owners vis-à-vis non-owners. This could distinguish the duties that copyright owners bear from the general duties that attach to all. In this regard, while the analysis of case law reveals that the duty not to interfere with or frustrate the fulfilment of a constitutional entitlement attaches to all as a negative obligation, copyright owners could feasibly be charged with positive obligations in accordance with Dworkin’s assignment responsibility. More generally, Dworkin’s notion of judgmental responsibility as a condition for enjoying dignity, which posits that a person is responsible for their actions whenever their conduct registers on the moral spectrum, further provides a point of resonance with the constitutional culture of justification which also requires such justification in respect of the exercise of public power. This duty could arguably accrue to private parties when their conduct impacts on the interests of others, and especially so when they exercise a constitutional function like providing educational services as in *Pridwin*. The scope for potential application of the dignity principle in relation to education in the copyright setting is considerable and the lesson taken from *Pridwin* may hold significant implications for copyright owners.

These theoretical dimensions inform the multifaceted role that dignity could play in copyright law. The intrinsic dimension captures the authorial relationship with a work,

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of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose”.

which embodies personality and self-expression interests. The outward facing dimension augments this relationship by insisting that the dignity of all others is equally important, and that it is crucial that everyone be empowered to live a good life. This has clear implications for the operation of rights in copyright, especially as regards the public's access to copyright works as an essential precondition to self-development and -expression. The facts in the recent case of *Blind SA* provide a good exemplar of the outwards-facing role that dignity may find in copyright law, especially the relation to equality, supplemented by the public interest principle. The *Vollenhoven* case would also implicate dignity inwardly in the authorial relationship with the work and would be countered by the principle of trade. Moreover, anytime that moral rights are involved the dignity principle will feature prominently.[1162]

The **public interest** principle captures copyright's non-private functions, including the utilitarian (public) purposes that the copyright regime is said to serve at its most fundamental level. It contains the subprinciples of democratic ideals, efficiency, policy considerations, fairness according to the public *boni mores*, and an array of constitutional rights and values, including the rights to freedom of expression, basic and further education, and to participate in one's culture. In this regard, the public interest principle complements the substantive rendering of dignity and equality and may therefore find frequent application alongside the dignity principle in its operation. The subprinciple of democratic ideals contains the components of self-development and autonomy, which are crucial to self-respect and inhere in the constitutional text and feature prominently in Dworkin's model of dignity.

Structurally, this principle is statutorily embodied in the exceptions and limitations to copyright (these being the typical counterbalances to the private property rights of owners) as well as constituting a precondition for the enforcement of copyright. However, it may also inform the application of doctrines like originality[1163] and the

[1162] See eg *Technical Information Systems (Pty) Ltd v Marconi Communications (Pty) Ltd* (2007) 1047 JOC (T), where the principle of trade is likely to have met the invocation of the dignity principle.

[1163] This requirement is contained in s 2(1) of the Act. Akin to the American doctrine of merger, freedom of expression could be wielded under the public interest principle to ensure that the standard for originality in respect of works of factual content is not set too low, as this could make the future use of the underlying factual subject matter by other authors problematic. Additionally, the Lockean proviso inherent in the labour-desert property subprinciple requires that enough and as good be left in the public domain beyond the bounds of property protection, which further suggests this conclusion.

substantial part element of the test for direct infringement.[1164] As derived from the constitutional property setting, the public interest comprises an important threshold condition for the validity of state regulation (usually by legislative amendment) of the property rights, as well as for legitimate exercise of the power of expropriation. It also injects a measure of flexibility into the copyright system, which is essential to its efficient and effective functioning with changing social conditions. This principle will find relevance in a large number of cases, notably where issues arise like in *National Commissioner of the South African Police Services and Another v Forensic Data Analysts (Pty) Ltd and Another*[1165] (where it would be met by the property subprinciple of exclusion) and *Moneyweb* (where it is met by the property principle in the form of the labour-desert subprinciple in conjunction with the trade subprinciple of public *boni mores* fairness). In effect, the public interest principle encapsulates any non-copyright rights stemming from the Bill of Rights, and as such may prompt courts to construe the nature and ambit of these rights provisions by means of value-based reasoning rather than merely making reference to them in passing and then pretending that they have been incorporated into the judicial equation. Therefore, the articulation of the intersections of copyright and constitutional provisions requires judges to identify the normative gravity of each, which may then be factored into the balancing exercise that typically follows.

Revisiting the *Vollenhoven* case that was discussed in the introduction, a richer account of the purposes of copyright law emerges that can be harnessed to produce a different reading of the sources of law that were found relevant on the facts. I agree with Karjiker that the purposes of the copyright regime should inform the court's approach to interpreting the Act to prevent the outcome in the case from being formalistically tied to the letter of the law rather than its substantive aims.[1166] However,

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[1164] This test is contained in section 23(1) of the Act and has been the subject of judicial elaboration in cases like *Galago* and *Juta*. Freedom of expression may find indirect application in how it informs the substantial part element of the test for direct infringement, again as part of the public interest principle, as it may require certain similarities between works to be considered permissible if the genre or canon of work (musical works) only permits a finite number of configurations of standard elements (like musical notes played in harmony). Accordingly, freedom of expression could require an interpretation of the substantial part element of the test that gives effect to its underlying democratic values and rationale.

[1165] [2019] ZAGPPHC 6.

[1166] Karjiker "Public-interest" 459 explains his view by noting:

> "[I]t is only by being clear about the purpose of, and justification for, copyright that it will be possible to make a proper determination of the appropriate scope of copyright protection. If the reason for copyright protection is not clear, we have no framework within which to determine the appropriate scope of copyright protection and there is a distinct danger that the resultant law will be arbitrary."

on my account such a purposive approach to interpretation and application of statutory law must draw its teleological meaning from constitutional rights and values as well as the normative underpinnings of the Copyright Act, and in doing so contribute to the principled integrity of South African law, holistically construed. I therefore place more emphasis on the principled normative component of adjudication and propose the midlevel principles to effectively reconstitute the normative framework to be more conducive to a constitutionalised conception of copyright.

The applicant in the *Vollenhoven* case – the South African Broadcasting Corporation – sought to exercise its property rights without reference to the social or economic functions of the rights granted by the Copyright Act, namely, to stimulate the creation of works and encourage their distribution through exploitation of the rights. There is no higher value that the property right serves *in casu*. The proprietary aspects of the owner's position therefore warrant a lesser degree of respect than would be the case had they been expressions of important social or economic purposes. The trade principle – embodied in this case by the maxim of *pacta servanda sunt* in respect of the commissioning agreement – also falls on the side of the applicant, but similarly does not serve the ostensible rationale of commercial exploitation in this case nor does it reflect any higher ideal rooted either in constitutional norms or the copyright regime.

The principle of dignity weighs heavy here, specifically in the relationship between the respondent and the work. The applicant disabused the author of the work of the status of authorship entirely and deprived her of the statutory incarnation of her dignity interests in the moral rights protected in section 20. The dignity principle may have required the court in this case to adopt a different reading of the definition of author of cinematograph films to empower the respondent as the author of the work, feasibly being "the person by whom arrangements for the making of the film were made".[1167] This reading would have given the respondent sufficient argumentative traction to claim authorship on a constitutionally-inspired construction of the definitional clause (that draws from the triumvirate of values, specifically the value of dignity). This would allow her to leverage her dignity interests for a reading in of the desired meaning into section 24 of the Act. This would secure the author's moral rights in the process and potentially allow her to institute a claim for the frustration of her moral rights against

[1167] Section 1(1) sv "author".

the owner, which would present a fascinating case for adjudication. Furthermore, it is undeniable that the public interest would be served by reaching the opposite conclusion to that reached by the court, as it would have resulted in the spread of important information regarding the corruption of previous and serving government officials and the corporate collusion that the documentary uncovered.

6.5 Concluding remarks

This research identifies the need to transform the mode and substance of adjudication in respect of South African copyright law and suggests one way that this could be achieved. Many others could avail that are equally compelling on the metrics of constitutionally aligned reading strategy and normative compatibility. If contributing no more than a general awareness that adjudicative approaches to copyright law are inherently value-laden (thus diffusing ostensible value-neutrality) and should be facilitative of constitutional norms and objectives, it will start a critical conversation that is some quarter century overdue and could lead to renewed creativity in legal thinking and heightened confidence in the judicial power to effect transformation in the statutory realm of copyright. If the Dworkinian-Mergian model developed here can be of any service to courts interested in participating in this conversation, so much the better.

The model of transformative adjudication that is proposed here provides numerous possibilities for elaboration and further development. Further research should include fleshing out the effects of direct application of fundamental rights. This dissertation opens up space for that by investigating the constitutional adjudicative framework for doing so. The potential for comparative study arises in respect of the constitutionalisation of copyright in the European Union (EU), which has elicited extensive academic commentary.[1168] The relatively large amount of case law that

[1168] See generally J Griffiths & T Mylly (eds) *Global Intellectual Property Protection and New Constitutionalism: Hedging exclusive rights* (2019) Oxford University Press: Oxford; C Sganga *Propertizing European Copyright* (2018) Edward Elgar: Cheltenham; C Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (2015) Edward Elgar: Cheltenham; C Geiger, CA Nard & X Seuba *Intellectual Property and the Judiciary* (2018) Edward Elgar: Cheltenham; O Pollicino, GM Riccio & M Bassini (eds) *Copyright and Fundamental Rights in the Digital Age: A comparative analysis in search of a common constitutional ground* (2020) Edward Elgar: Cheltenham; G Ghidini *Rethinking Intellectual Property: Balancing conflicts of interest in the constitutional paradigm* (2018) Edward Elgar: Cheltenham; G Ghidini & V Falce (eds) *Reforming Intellectual Property* (2022) Edward Elgar: Cheltenham; R Giblin & KG Weatherall (eds) *What If We Could Rethink Copyright Law?* (2017) ANU Press: Acton.

avails in the EU provides fertile ground for the testing and practical elaboration of the theoretical model proposed in this dissertation.[1169] While the social, political, and economic conditions of the respective European jurisdictions differ vastly from the South African experience, there are sufficient similarities in the content of the constitutional rights to find some useful guidance. There is thus significant potential for learning from the European experience, particularly in integrating the proportionality test as the appropriate mechanism for mediating conflicts that arise from the intersection of copyright and fundamental rights.

Although the common law logic diverges from the way copyright (and property) issues are treated on the continent, there is a meaningful overlap in purposes between the two legal systems and there is no reason, in principle, that South African law could not learn some of the lessons on offer from the EU case law. It could even be argued that it is precisely because the continental approach to copyright as authors' rights is also markedly different from the Anglo system that South African has inherited, that the former offers a helpful perspective on what copyright law could look like if the focus were displaced from a property-centric system of ownership-based logic and remedies. The intellectual property protection in the EU is akin to that in South Africa, although in the former case it enjoys explicit recognition. Article 17(2) of the Charter of Fundamental Rights of the EU[1170] provides that "[i]ntellectual property shall be protected", giving no indication of the nature or extent of this protection. Yet, as is in the South African instance, intellectual property is also protected as property,[1171] meaning that the property clause in the immediately preceding section, Article 17(1), extends a similar type of constitutional property protection as the South African property clause, preventing arbitrary deprivation.[1172] This is fortified by Article 1

[1169] See eg the decisions of the European Court of Human Rights in *Ashby Donald and others v France* Appl. no 36769/08 [2013]; *Neij and Peter Sunde Kolmisoppi v Sweden* Appl. no 40397/12 [2013]. See further C Geiger & E Izyumenko "Towards a European 'fair use' grounded in freedom of expression" (2019) 35 *AUILR* 1-74.

[1170] 2012/C 326/02,

[1171] C Geiger "Intellectual property shall be protected!? – Article 17(2) of the Charter of Fundamental Rights of the European Union: a mysterious provision with an unclear scope" (2009) 31 *European Intellectual Property Review* 115-117

[1172] "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."

Protocol 1, additionally positing "the peaceful enjoyment of [one's] possessions".[1173] Along with he detailed provisions of Article 17, the European protection of property is arguably more robust than the South African counterpart. This could make for an interesting comparison.

Many of the constitutional rights that intersect with copyright have been considered in the European literature, but perhaps none more so than freedom of expression.[1174] The European case law and literature could provide valuable guidance in trying to achieve a better balance between copyright and fundamental rights,[1175] and in the application of the midlevel principles of dignity and public interest. At the same time, however, the interpreter should not lose sight of the unique features of the South African Constitution, such as its redistributive and egalitarian aims.

[1173] See generally J Griffiths & L McDonagh "Fundamental rights and European IP law - the case of art 17(2) of the EU Charter" in C Geiger (ed) *Constructing European Intellectual Property: Achievements and New Perspectives*. (2013) 75-93 Edward Elgar Publishing.

[1174] C Geiger "'Fair use' through fundamental rights in Europe: When freedom of artistic expression allows creative appropriations and opens up statutory copyright limitations" in S Balganesh, NW Loon & H Sun (eds) *The Cambridge Handbook of Copyright Limitations and Exceptions* (2021) 174-194; C Geiger & BJ Jütte "Towards a virtuous legal framework for content moderation by digital platforms in the EU? The Commission's guidance on Article 17 CDSM Directive in the light of the YouTube/Cyando judgement and the AG's Opinion in C-401/19" (2021) 43 *European Intellectual Property Review* 625-635; C Geiger & E Izyumenko "The constitutionalization of intellectual property law in the EU and the *Funke Medien*, *Pelham* and *Spiegel Online* decisions of the CJEU: Progress, but still some way to go!" (2020) 51 *International Review of Intellectual Property and Competition Law* 282-306; C Geiger & E Izyumenko "Shaping intellectual property rights through human rights adjudication: The example of the European Court of Human Rights" (2020) 46 *Mitchell Hamline LR* 527-612; C Geiger "Freedom of artistic creativity and copyright law: A compatible combination" (2018) 8 *UC Irvine LR* 413-458; C Geiger & E Izyumenko "Copyright on the human rights' trial: Redefining the boundaries of exclusivity through freedom of expression" (2014) 45 *International Review of Intellectual Property and Competition Law* 316-342.

[1175] See eg C Geiger & F Schönherr "Limitations to copyright in the digital age" in A Savin & J Trzaskowski (eds) *Research Handbook on EU Internet Law* (2014) 110-142.

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