

THEORETICAL (DIS-) POSITION AND STRATEGIC LEITMOTIVS IN CONSTITUTIONAL INTERPRETATION IN SOUTH AFRICA

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SUMMARY

This essay takes a look at the historic restoration that bequeathed this country and its people a prototypical, justiciable *Constitution*. The advent of constitutional democracy in South Africa went hand in hand with an about-turn in the interpretation of enacted law-texts (including the *Constitution*) and a critical interrogation of certain dominant beliefs about the interpretation of law in general and enacted law in particular. Hitherto mostly unnamed or unlabelled (but not entirely alien) interpretive strategies pursued and developed by users of the *Constitution* are discussed, concentrating mainly on the jurisprudence of the Constitutional Court.

Central to the author's approach is an acknowledgement of the decisive actuality of an interpreter's theoretical position becoming visible through (interpretive) leitmotivs. These recur as keynote or defining ideas, motifs or *topoi* lending direction to specific instances of construing law. Four leitmotivs pertinent to certain constellations of events in constitutional interpretation are discussed and their applicability and utility assessed, drawing on examples from constitutional case-law. The leitmotivs are: (i) transitional constitutionalism; (ii) transformative constitutionalism; (iii) monumental constitutionalism; and (iv) memorial constitutionalism. (i) and (ii) belong together as (A) programmatic leitmotivs and (iii) and (iv) as (B) commemorative leitmotivs.

The author concludes that, although scouting out and engaging with leitmotivs call for profound reading and for text analysis of a sort with which "logical" jurists are not always too comfortable, the said endeavours have the potential to be exceptionally rewarding.

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OPSOMMING:

In hierdie opstel word die historiese nalatenskap wat aan ons land en mense 'n prototipiese, beregbare grondwet besorg het, in oënskou geneem. Die koms van demokrasie in Suid-Afrika het hand aan hand gegaan met 'n ommekeer in die vertolking van verordende wetstekste (insluitend die Grondwet) en 'n kritiese bevraagtekening van sekere dominante opvattinge oor die vertolking van die reg oor die algemeen en verordende reg in besonder. Dusver onbenoemde of ongeëtiketteerde (maar nie geheel en al vreemde) vertolkingsstrategieë (nie), nagevolg en ontwikkel deur gebruikers van die Grondwet, word bespreek met klem op regspraak van die Konstitusionele Hof.

Sentraal tot die outeur se benadering is erkenning van die sleutelrol wat 'n vertolker se denkhouding in die vertolking van verordende wetstekste speel, en hierdie denkhouding kom tot uitdrukking in (vertolkende) leitmotiefs. Hierdie leitmotiefs herhaal hulself as sleutel- of definiërende idees, motiewe of *topoi* wat rigting gee aan besondere gevalle van wetsteksvetolking. Vier leitmotiefs in bepaalde konstellasies van gebeure in grondwetsvetolking word bespreek en hulle toepaslikheid en nut word geëvalueer, met verwysing na voorbeelde uit ons grondwetlike presedentereg. Die betrokke leitmotiefs is (i) oorganklike grondwetmatigheid; (ii) transformatiewe grondwetmatigheid; (iii) monumentale grondwetmatigheid, en (iv) kummemoratiewe (ook moontlik: kummemorabele) grondwetmatigheid. (i) en (ii) hoort saam as (A) programmatiese leitmotiefs en (iii) en (iv) as (B) leitmotiefs van gedenkmatige hoop.

Die outeur kom tot die slotsom dat, hoewel die identifisering van en omgang met leitmotiefs 'n diepgaande lees en teksanalise vereis waarmee "logiese juriste" nie altyd gemaklik is nie, die onderneming as sodanig in verskeie opsigte lonend kan wees.

TREFWOORDE: Grondwet; Grondwet – vertolking; grondwetmatige herinnering; leitmotiv – Grondwet – vertolking; monumentale grondwetmatigheid; oorganklike grondwetmatigheid; transformatiewe grondwetmatigheid.