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Chapter Six

Interpretation of the Bill of Rights

6.1 The Stages of Interpretation

Constitutional interpretation is the process of determining the meaning of a constitutional provision. More narrowly, for purposes of Bill of Rights cases, the aim of interpretation is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with that provision. Interpretation therefore involves two enquiries: first the meaning or scope of a right must be determined, then it must be determined whether the challenged law or conduct conflicts with the right.

This chapter is principally concerned with the first of these enquiries — determining the meaning of the rights in the Bill of Rights.[1] The provisions of the Bill of Rights sometimes protect certain kinds of activities or they demand the fulfilment of certain objectives. Sometimes they do both. The first type of provision places a negative or defensive obligation on the actors that it binds while the second type places positive obligations on those it binds. A right may therefore

[1] The interpretation of legislation to give effect to the Constitution and the Bill of Rights is considered in 3.4*(a)* in Chapter 3 above.

be infringed by limiting protected activities or by failing to fulfil a positive obligation [2] For example, if pornography is a form of expression that is protected by the right to freedom of expression in s 16, a law that prohibits violent or child pornography is an infringement of this right [3] If the right to vote in s 19 requires arrangements to be made to allow prisoners who cannot attend a polling station to exercise their right to vote, a failure to make such arrangements will be a violation of the right [4] In the first example, interpretation involves determining what it is that the right protects (is pornography 'expression'?) In the second example, interpretation involves determining what it is that the right requires someone (in this case, the state) to do

The second enquiry — whether law or conduct is in conflict with a right — involves the interpretation of the challenged law or a determination of what the challenged conduct amounts to or what its effects are Thereafter, one must determine whether there is conflict between the law or conduct and the Bill of Rights

6 2 Interpretation of The Bill of Rights

As with ordinary language, the meaning of a constitutional provision depends on the way it has been used [5] Much of constitutional interpretation is therefore about establishing the context within which a particular constitutional provision must be given meaning Sometimes the context is obvious (or at least uncontroversial) and the meaning of the provision is unlikely to give rise to a dispute [6] Other provisions are however quite likely to be the subject of argument about their proper meaning This is because in some cases, provisions are the result of political compromises made during the drafting process, and were therefore left deliberately vague or open-ended Other provisions, notably the rights in the Bill of Rights, are formulated in general and abstract terms Their application to particular situations and particular circumstances will necessarily be a matter for argument and controversy [7]

[2] In respect of positive obligations s 7(2) provides that the State must respect protect promote and fulfil the rights in the Bill of Rights and s 237 provides that all constitutional obligations must be performed diligently and without delay

[3] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) paras 47 8

[4] *August v Electoral Commission* 1999 (3) SA 1 (CC) para 16 (the right to vote by its very nature imposes positive obligations upon the legislature and the executive)

[5] Ludwig Wittgenstein *Philosophical Investigations* (1953) GEM Anscombe (trans) 43 the meaning of a word is its use in the language

[6] *Kalla v The Master* 1995 (1) SA 261 (T) The Constitution does not only deal with lofty ideals and principles It has many provisions on mundane matters Van Dijkhorst J gave the example of s 106(2) of the interim Constitution which provided that Bloemfontein is the seat of the Appellate Division But even the interpretation of such mundane provisions of the Constitution may be a matter of controversy and disagreement Suppose that the name of Bloemfontein is changed by the municipal authorities to Mangaung Would this violate the Constitution?

[7] Necessarily means that controversy and the need to argue about and eventually come to a decision about the proper interpretation of the provisions of the Bill of Rights is unavoidable The rights are not formulated as detailed sets of rules designed to deal with specific envisaged situations Rather the Bill of Rights lays down as Ronald Dworkin puts it general comprehensive moral standards that government must respect but leaves it to statesmen and judges to decide what these standards mean in concrete circumstances *Life's Dominion* (1993) 119

What then are the rules, principles and methods that apply to the interpretation of the Constitution? The Constitution itself does not prescribe how it should be interpreted Section 39 contains an interpretation clause which pertains to the Bill of Rights and s 239 contains certain definitions which apply to the interpretation of the Constitution as a whole However, the instructions contained in s 39, important as they may be, are themselves sufficiently abstract to require a great deal of interpretation [8] As for s 239, it defines only three terms 'national legislation', 'organ of state' and 'provincial legislation' Because the interpretation, application and limitation of fundamental rights is not (indeed, cannot be) regulated completely by the text of the Constitution, the Constitutional Court has laid down guidelines as to how the Constitution in general and the Bill of Rights in particular should be interpreted These guidelines are discussed immediately below Section 39 is discussed in 6 4 below

6 3 The Point of Interpretation A Generous and Purposive Interpretation that gives Expression to the Underlying Values of The Constitution

(a) The role of the text

The obvious starting point for determining the meaning of a provision of the Bill of Rights is the text itself In the very first judgment of the Constitutional Court, *S v Zuma*, Kentridge AJ warned against underestimating the importance of the text

> While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument I am well aware of the fallacy of supposing that general language must have a single objective meaning Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean We must heed Lord Wilberforce's reminder that even 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 I would say that a constitution 'embodying fundamental principles should *as far as its language permits* be given a broad construction [9]

However, constitutional disputes can seldom be resolved with reference to the literal meaning (sometimes called the 'ordinary' or 'dictionary' meaning) of the Constitution's provisions alone The Constitution provides a complex framework for the exercise of state power, a framework with both procedural and substantive elements Particularly when it comes to substantive prescriptions such as the rights in the Bill of Rights, the Constitution is abstract and open-ended in much of its formulation This means that constitutional interpretation unavoidably involves more than the determination of the literal meaning of particular provisions In fact, even when there is an apparently self-evident literal

[8] For example s 39(1) requires a court interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity equality and freedom There can be few instructions more in need of interpretation than this

[9] *S v Zuma* 1995 (2) SA 642 (CC) para 17 (emphasis original)

meaning that can be given to a constitutional provision the proper interpretation of the provision may entail looking beyond that meaning

In *S v Makwanyane*, the Constitutional Court (quoting Kentridge AJ in *Zuma*) adopted the following approach to the interpretation of the Bill of Rights

> whilst paying due regard to the language that has been used [an interpretation of the Bill of Rights should be] generous and purposive and give expression to the underlying values of the Constitution [10]

What Kentridge AJ had stressed in *Zuma* is that interpretation of the Constitution must be grounded in the text itself and that the text sets the limits of a feasible interpretation [11] If there is an evident and plain meaning of a provision it cannot be ignored in favour of a 'generous' and 'purposive' account of the provision's meaning But, by contrast, the dictum in *Makwanyane* emphasises that while the literal meaning must be taken into account (given 'due regard') it is not necessarily conclusive To put it another way, a literal meaning will be an acceptable interpretation of a provision only if it accords with a 'generous' and 'purposive' interpretation that 'gives expression to the underlying values of the Constitution' It is clear that the *Makwanyane* passage better describes the Constitutional Court's interpretative practice On a number of occasions the Court has preferred 'generous' and 'purposive' interpretations to contrary interpretations based on the literal meaning of a provision [12]

(b) Purposive interpretation

Purposive interpretation is aimed at teasing out the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer the interpretation of a provision that best supports and protects those values In this regard the Constitutional Court has approved the following statement by the Canadian Supreme Court in *R v Big M Drug Mart Ltd*

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee, it was to be understood, in other words in the light of the interests it was meant to protect In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter [of Rights and Freedoms] itself, to the language chosen to articulate the specific right or freedom to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter The interpretation should be a generous rather than a legalistic one aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection [13]

[10] *S v Makwanyane* 1995 (3) SA 391 (CC) para 9

[11] See Moseneke J in *Daniels v Campbell NO* 2004 (5) SA 331 (CC) para 83 (language of the text not infinitely malleable)

[12] For example in *Sanderson v Attorney General Eastern Cape* 1998 (2) SA 38 (CC) paras 20–24 the court came to the conclusion that despite contrary indications in the text the right to be tried within a reasonable time protects both trial and non trial related interests of the accused Perhaps the most controversial example of the use of generous and purposive interpretation to reach a conclusion at odds with the apparent literal meaning of the text is *S v Mhlungu* 1995 (3) SA 391 (CC) The case is discussed in detail in 6 3*(c)* below See also *S v Twala* 2000 (1) SA 879 (CC) para 17 (change in language of provision between interim and 1996 Constitution not indicative of change in meaning if the language in its context does not require this)

Purposive interpretation tells us that once we have identified the purpose of a right in the Bill of Rights we will be able to determine the scope of the right A right that has the purpose of protecting value or interest X will not be infringed by a law that harms Y But the identification of the values or interests protected by the rights in the Bill of Rights is a difficult task Take, for example, the right to free expression in s 16 What value does it protect, what is its purpose? It may be that the only value of free expression in a society is that it encourages political debate If that is so then little or no purpose would be served by protecting pornography from censorship laws If, however, the right to freedom of expression is also underpinned by the values of personal self-fulfilment and autonomy (the idea that being able to read and see and say what one pleases will encourage individuals to exercise independent judgment on what is valuable to them), then pornography may well fall within the scope of protection afforded by s 16 [14]

The purposive approach to interpretation therefore inevitably requires a value judgment to be made about which purposes are important and protected by the Constitution and which are not It is, however, not a value judgment to be made on the basis of a judge's personal values

> It is a value judgment which requires objectively to be articulated and identified regard being had to the contemporary norms aspirations expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution and further having regard to the emerging consensus of values in a civilized international community (of which Namibia is a part) which Namibians share This is not a static exercise It is a continually evolving dynamic What may have been acceptable as a just form of punishment some decades ago may appear to be manifestly inhuman or degrading today Yesterday's orthodoxy might appear to be today's heresy [15]

It must also be emphasised that while the values referred to have to be objectively determined by reference to the 'norms, aspirations, expectations and sensitivities of the people' they may not be derived from or equated with public opinion [16] In *S v Makwanyane*, the Constitutional Court held that, while public opinion may be relevant, it is in itself no substitute for the duty vested in the court to interpret the Constitution This is so for two reasons If public opinion were to be decisive, the protection of rights may as well be left to Parliament, which after all has a mandate and is answerable to the public Also, the very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic

[13] *R v Big M Drug Mart Ltd* 1985 18 DLR (4th) 321 395–6 cited in *Zuma* (note 9 above) para 15

[14] See further the discussion in 16 1 and 16 2 in Chapter 16 below

[15] Mahomed CJ in *Ex parte Attorney General Namibia In Re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) 91D–F

[16] See *S v Williams* 1995 (3) SA 632 (CC) paras 36–7

process.[17] If the court was to attach too much significance to public opinion, it would be unable to fulfil its function to protect the social outcasts and marginalised people of our society, the 'worst and the weakest among us'.[18]

Purposive interpretation is helpful in that it recognises that the interpretation of the Bill of Rights involves a value judgment. Ultimately, however, it does not prescribe how the value judgment is to be made. The making of this judgment is central to the exercise of interpreting the Bill of Rights. We now turn to the other principles and methods of interpretation in search for an answer to this problem.

(c) Generous interpretation

Generous interpretation is interpretation in favour of rights and against their restriction. It entails drawing the boundaries of rights as widely as the language in which they have been drafted and the context in which they are used makes possible.

In *S v Zuma*, the Constitutional Court approved of the following passage from a judgment of Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher*:[19]

> [A supreme constitution requires] a generous interpretation . . . suitable to give to individuals the full measure of the fundamental rights and freedoms referred to . . . .[20]

Generous interpretation was put to decisive use in *S v Mhlungu*, where the Court referred again to the dictum of Lord Wilberforce and added:

> A constitution is an organic instrument. Although it is enacted in the form of a statute it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid [what Lord Wilberforce called] 'the austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government.[21]

Generous interpretation was then used by the majority of the Court in *Mhlungu* to support an interpretation of s 241(8) of the interim Constitution that allowed persons involved in cases pending at the commencement of the Constitution to rely on the rights in the interim Bill of Rights. This was in spite of the apparently clear literal meaning of the provision:

[17] See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 25: 'It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening.'

[18] *Makwanyane* (note 10 above) para 88. A theory of interpretation known as 'process theory' (see, for example, the exposition of J Ely *Democracy and Distrust* (1980)) sees a Constitutional Court not as counter-majoritarian, but as supplementing the democratic process by, among other things, assisting marginalised groups to enforce their rights. The Constitutional Court has, on several occasions (see also *Williams* (note 16 above) para 48) referred to its special role in the protection of the 'worst and the weakest amongst us', recognising that it has a duty to assist those who are unable to protect themselves adequately through the democratic process.

[19] *Zuma* (note 9 above) para 14.

[20] *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) 328–9.

[21] *Mhlungu* (note 12 above) para 8.

> **241.(8)** All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution.

According to a minority of the Constitutional Court, the ordinary meaning of the language used in s 241(8) was to be preferred. According to Kentridge AJ, 'There are limits to the principle that a Constitution should be construed generously so as to allow to all persons the full benefit of the rights conferred on them, and those limits are to be found in the language of the Constitution itself . . . . Section 241(8) of the Constitution provides expressly that pending cases shall be dealt with as if the Constitution had not been passed. When the language is clear it must be given effect . . . . With all respect to the judges who have taken a different view I find it difficult to see what meaning other than that which I have suggested can reasonably be given to the language used.'[22] The majority of the court found this to be too narrow and legalistic an approach. According to the majority:

> An interpretation which withholds the rights guaranteed by Chapter 3 of the [interim] Constitution from those involved in proceedings which fortuitously commenced before the operation of the Constitution would not give to that chapter a construction which is 'most beneficial to the widest amplitude' and should therefore be avoided if the language and context of the relevant sections reasonably permits such a course.[23]

In effect, the majority held that, where the text reasonably permits, a broad interpretation should be preferred over a narrow interpretation, if the result of the latter would be to deny persons the benefits of the Bill of Rights.

While it is all fair and well to ensure that individuals get the full benefit of the Bill of Rights, the *Mhlungu* judgment does not explain why this requires a generous interpretation of constitutional provisions. It becomes particularly problematic when the other principles and rules of constitutional interpretation point to a different, narrower, meaning of a provision. The use of generous interpretation in such cases may lead to a strained interpretation of the text, despite the attempt of the majority in *Mhlungu* to require generous interpretation to conform to the 'language and context of the relevant sections'. It may also run counter to the court's commitment to purposive interpretation. The purpose of

[22] Ibid para 78 (per Kentridge AJ, Chaskalson P, Ackermann J and Didcott J concurring).

[23] Ibid para 9 (per Mahomed J, Langa J, Madala J, Mokgoro J and O'Regan J concurring).

[24] *Makwanyane* (note 10 above) para 9, note 8. See also *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 17: 'The purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the Bill of Rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision "a narrower or specific meaning" should be given to it.' See further *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C), 1036–7.

a constitutional provision may indeed be a narrow one, in which event a broad or generous interpretation would produce a different outcome from a purposive interpretation. The Constitutional Court is aware of this possibility,[24] but has not indicated explicitly how it would resolve such a tension. The resolution of the conflict will depend on the rationale behind the court's commitment to generous interpretation.

It may be argued that generous interpretation simply recognises that a supreme constitution cannot be interpreted in the narrow and legalistic way in which statutes tend to be construed under a system of Parliamentary supremacy. This possibility may be discarded immediately. Generous interpretation does of course result in a difference in approach between constitutional and statutory interpretation but this does not explain why the generous approach is adopted in the first place. In any event, the courts are well aware that the interpretation of a supreme law requires a different approach to that adopted when interpreting ordinary legislation[25] and it would be fanciful to suggest that generous interpretation is merely a reminder of a basic principle of constitutional theory.

A more plausible explanation is that the existence of a general limitation clause (as is the case in the Canadian and South African Constitutions) permits a court to adopt a broad construction of the right in the first (interpretative) stage of the enquiry, then to require the state or the person relying on the validity of the infringement to justify the infringement in the limitation stage of the litigation. Viewed in this light, the generous approach dictates that, when confronted with difficult value judgments about the scope of a right, the court should not expect the applicant to persuade it that a right has been violated. Instead, it should be prepared to assume that there has been a violation and call on the government to justify its laws and actions.[26] However, there are indications that the Constitutional Court is not following this approach.[27] The court has been unwilling to extend the protection afforded by the rights to an indefinite and unforeseeable number of activities. It seems as if the court will always choose

[25] See Chaskalson P in *Makwanyane* (note 10 above) para 15 See also Mahomed AJ in *S v Acheson* 1991 (2) SA 805 (NmHC), 813B 'The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed It is a "mirror reflecting the national soul", the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion ' The courts have expressed doubt as to whether the common-law presumptions of statutory interpretation apply to the interpretation of the Constitution See *Mbebe v Chairman, White Commission* 2000 (7) BCLR 754 (Tk), 769G and the authorities referred to there The courts have also not followed the 'constitutional' methods in order to interpret statutes In *Derby-Lewis v Chairman, Amnesty Committee of the TRC* 2001 (3) SA 1033 (C), the Cape High Court rejected the submission that a 'purposive' approach and one benevolent to the applicant should be adopted The court held that it had to interpret the statute as it stands according to established principles of interpretation, of which legislative purpose, (as distinct from intent) was one This meant that where the language was less than clear, the court could have regard to the overriding purpose in order to establish legislative intent

[26] Support for this rationale may be found in *Zuma* (note 9 above) para 21 and, more explicitly, the judgment of Ackermann J in *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 82

[27] The best proof of this is the debate on the meaning of the right to freedom between Ackermann J (a right not to have obstacles to possible choices placed in your way) and the other members of the Constitutional Court (a right to physical liberty) in *Ferreira* (ibid)

to demarcate the right in terms of its purpose when confronted with a conflict between generous and purposive interpretation.[28] If this is so, the notion of generous interpretation does not contribute much to constitutional interpretation.

(d) Context

The meaning of words depends on the context in which they are used. The provisions of the Constitution must therefore be read in context in order to ascertain their purpose.[29] 'Context' here has a narrower and a wider signification. The wider sense of context is the historical and political setting of the Constitution. The narrower sense is the context provided by the constitutional text itself.

(i) *Historical context*

(aa) Political history

South Africa's political history plays an important role in the interpretation of the Constitution.[30] The Constitution is a consequence of and a reaction to South Africa's history. One of the purposes of the Constitution is a desire that there should be, in the words of Mahomed J, 'a ringing and decisive break with the past'.[31] A purposive interpretation will therefore take this history and the desire not to repeat it into account when determining the meaning of a constitutional provision:

> the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and

[28] See, further, *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC) para 28 (court adopting a generous interpretation without much explanation or justification)

[29] See, for example, *Sanderson v Attorney-General Eastern Cape* (note 12 above) para 19 'it is not useful to attempt a universally valid interpretation of a word so vague ['charged' in s 25(3)*(a)* of the interim Constitution] and which therefore derives much of its content and meaning from the particular context in which it is used' Context features strongly throughout the judgment of Kriegler J See also his judgment in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 170 on the meaning of the words 'based on' 'In the case of such a protean phrase a resort to dictionary definitions is futile Colourless words must derive their meaning from their context'

[30] We focus here on interpretation of the Bill of Rights but political history tends to be even more important in structure of government litigation, where it often provides direct and decisive guidance for the interpretation of the Constitution See for example *Executive Council, Western Cape v Minister of Provincial Affairs* 2000 (1) SA 661 (CC) para 44

[31] *Mhlungu* (note 12 above) para 8

equality'. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment.[32]

The use of historical interpretation is well illustrated by the Constitutional Court's judgments dealing with the equality clause. In *Brink v Kitshoff NO* the Constitutional Court held that:

> As in other national constitutions, s 8 [of the interim Constitution] is the product of our own particular history. Perhaps more than any of the other provisions in chapter 3, its interpretation must be based on the specific language of s 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly ninety percent of the landmass of South Africa; senior jobs and access to schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.[33]

(bb) Drafting history

Statements by politicians made during the negotiations and drafting process, sometimes called the 'ipse dixit' of the political role players, are of little value in the interpretation of the Constitution. In *S v Makwanyane*, the Constitutional Court quoted with approval the following passage from a Canadian judgment:

> [T]he Charter [of Rights and Freedoms] is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. How can one say with any confidence that within this enormous multiplicity of actors . . . the comments of a few federal civil servants can in any way be determinative.[34]

[32] *Shabalala v Attorney General of the Transvaal* 1996 (1) SA 725 (CC) para 26. Compare however *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 11: 'simply because a practice was established during the apartheid era does not, without more, render it bad or unconstitutional'.

[33] *Brink v Kitshoff* NO 1996 (4) SA 197 (CC) para 40. Section 9 prohibits 'unfair discrimination', requiring a court to interpret what forms of law or conduct fall within the scope of the prohibition. One of the factors to be taken into account in this interpretation is historical. In *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 52, the Constitutional Court held that, when determining whether discrimination is unfair, one of the factors that must be taken into account is whether the complainant suffered in the past from patterns of disadvantage. See also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) paras 45–8; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 60; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 2. See, further, 9.1*(b)* in Chapter 9 below. See also the historical interpretation given to the phrase 'detention without trial' in s 12(1)*(b)* in *De Lange v Smuts NO* 1998 (3) SA 785 (CC), discussed in 12.1*(d)* in Chapter 12 below. History does not only mean the grand narrative of apartheid and its demise but also more mundane matters engaged during the constitutional transition. See, for example, See also *Minister of Defence v Potsane* 2002 (1) SA 1 (CC) (the words 'There is a single national prosecuting authority in the Republic' in s 179(1) when read in their historical context' do not mean 'exclusive' or 'only' but denote the singular, 'one'; the phrase refers to the unification of existing public prosecution authorities under a single authority and does not prohibit a separate system of military justice).

[34] *Makwanyane* (note 10 above) para 18, quoting *Reference re section 94(2) of the Motor Vehicle Act (British Columbia)* (1986) 18 CRR 30 49.

The Constitutional Court then added that

> Our Constitution is also the product of a multiplicity of persons, some of whom took part in the negotiations, and others who as members of Parliament enacted the draft. The same caution is called for in respect of the comments of individual actors in the process, no matter how prominent a role they might have played.[35]

The ipse dixit of the negotiators should be distinguished from background materials compiled during the drafting process. In international law, similar material is referred to as the 'travaux preparatoires' or 'preparatory work' of a treaty and can be taken into account in the interpretation of the treaty.[36] The Constitutional Court does attach some significance to such documents when interpreting the Constitution. In *S v Makwanyane*, the court stated that

> [o]ur Constitution was the product of negotiations conducted at the multi-party negotiating process. The final draft adopted by the forum of the multi-party negotiating process was, with few changes, adopted by Parliament. The multi-party negotiating process was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the travaux preparatoires, relied upon by the international tribunals. Such background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it.[37]

The court then added that the background materials, including the reports of the various Technical Committees,[38] provided that they are clear, not in dispute and relevant, may be useful to show why particular provisions were or were not included in the Constitution. In *Makwanyane*, these materials were used to show that, by deliberately leaving the right to life unqualified, the framers intended to leave the question of the constitutionality of the death penalty for the Constitutional Court to decide.[39]

The *Makwanyane* criteria are not a substantial barrier to the introduction of background materials.[40] As long as the document was officially recognised, as most relevant and useful documents usually are, it is hard to imagine how its content can be placed in dispute. As for the relevance of the materials, the

[35] *Makwanyane* (note 10 above) para 18.

[36] Article 32 of the Vienna Convention on the Law of Treaties (1969): 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion . . .'. The 'travaux preparatoires' are the record of the drafting of a treaty.

[37] *Makwanyane* (note 10 above) paras 17–18.

[38] Technical Committees were groups of advisors (predominantly lawyers) who advised the political negotiators during the CODESA, MPNP and Constitutional Assembly proceedings. See, generally, Hassen Ebrahim *The Soul of a Nation: Constitution-Making in South Africa* (1998)

[39] *Makwanyane* (note 10 above) fn 33.

[40] As far as statutory interpretation is concerned, the general rule is that evidence of the circumstances surrounding the adoption of a statute is not permissible. See *Christian Lawyers Association of SA v Minister of Health* 1998 (11) BCLR 1434 (T). In this case, the High Court followed a similar, restrictive approach, to the admission of background evidence aimed at assisting the court with the interpretation of the word 'everyone' in s 11 of the Constitution. McCreath J even referred to a principle of contract law that requires the defendant to be apprised of the background material on which the plaintiff will seek to rely.

inclusion of a particular formulation of a constitutional provision means that a competing formulation was left out (or perhaps that there was no other formulation) All constitutional arguments are therefore attempts to explain why a particular provision was or was not included in the Constitution and background material that assists such an attempt will always be relevant However while the historical angle will always be worth exploring, the weight of background evidence will seldom be decisive [41]

(ii) *Textual context*

When it comes to the interpretation of particular provisions of the Bill of Rights, the courts use the other provisions of the Constitution and the Bill of Rights to provide a further context for the interpretation of individual provisions of the Bill of Rights [42] In other words, rights must not only be understood in their social and historical context, but also in their textual setting [43] Contextual interpretation in the latter sense is also called 'systematic' interpretation Systematic interpretation recognises that the Constitution is the document as a whole and that it should not be read as if it consisted of a series of individual provisions read in isolation [44] The duty to read provisions against the context of the Constitution as a whole also requires courts to harmonise the various provisions and give effect to them [45]

Not surprisingly, the Constitutional Court has made extensive and decisive use of contextual interpretation In *S v Makwanyane*, the court treated the right to life, the right to equality and the right to dignity as together giving meaning to the prohibition of cruel, inhuman or degrading treatment or punishment in s 11(2) of the interim Constitution [46] The fact that the death sentence was imposed in very few cases for murder (243 in the five years preceding the *Makwanyane* decision) when a large number of murders were committed (according to police statistics there were more than 100 000 murders during the same period), made

[41] See for example the use of background material by Ackermann J in *Ferreira* (note 26 above) para 46 to show that the right to freedom and security of the person entails two separate independent but related rights The criteria laid down by Chaskalson P in *Makwanyane* (note 10 above) are not discussed

[42] *Makwanyane* (note 10 above) para 10 see also *Soobramoney* (note 24 above) para 16 *Walker* (note 33 above) para 26

[43] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 22

[44] In *Executive Council Western Cape* (note 30 above) the Constitutional Court held that the rule of statutory interpretation that two subsections dealing with the same subject matter should be read together is also applicable to constitutional interpretation The rule the Court stated is consistent with the purposive approach to constitutional interpretation In our view it is more accurately described as a manifestation of the systematic method of interpretation

[45] *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC) para 83 It was contended that there is an irreconcilable tension between subsection (1) which refers to Schedule 6A and subsection (3) which states the requirement that the electoral system must result in general in proportional representation A court must endeavour to give effect to all the provisions of the Constitution It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision When there is tension the courts must do their best to harmonise the relevant provisions and give effect to all of them Sections 157(1) and (3) must thus be read together in the context of the Constitution and the section as a whole

[46] *Makwanyane* (note 10 above) para 10 note 11

the imposition of the sentence arbitrary and resulted in an infringement of the right to equality The same arbitrariness also made the imposition of the sentence cruel The fact that the death sentence permits killing and is an infringement of the right to life also indicates that it is a cruel, inhuman and degrading punishment

Similarly in *Ferreira v Levin*[47] the majority of the Constitutional Court, in interpreting the right to freedom of the person (s 11(1) of the interim Constitution, now s 12(1)) attached considerable significance to the fact that the provision finds its place alongside prohibitions of 'detention without trial', torture' and 'cruel, inhuman and degrading treatment before reaching the conclusion that the primary purpose of the right is to protect 'physical liberty' The structure of the interim Bill of Rights and the detailed formulation of the different rights were found to militate against an expansive interpretation of the right to freedom Also, the fact that limitations of the right to freedom of the person were subject to the additional requirement of 'necessary' in the general limitation clause of the interim Constitution, indicated that the section is concerned with freedom of an 'higher order' than the other freedoms, the limitations of which are not subjected to such an onerous test The textual context of the right to freedom of the person therefore persuaded the majority to reject the broad definition attributed to it by Ackermann J [48]

In the *Gauteng School Education Bill* case[49] the petitioners argued that s 32*(c)* of the interim Constitution (the right to education) meant that every person could demand from the state the right to be educated in schools based on a common culture, language or religion In responding to this argument, Mahomed DP, who wrote for the Constitutional Court, made decisive use of context

> Considered in context there is no logical force in the construction favoured by the petitioners If a person has the right to basic education at public expense in terms of [s 32*(a)*] and if he or she has the right to be instructed in the language of his or her choice in terms of [s 32*(b)*], why would there be any need to repeat in [s 32*(c)*] the right to education at public expense through a common language? The object of subsection *(c)* is to make clear that while every person has the right to basic education through instruction in the language of his or her choice those persons who want more than that and wish to have educational institutions based on a special culture language or religion which is common have the freedom to set up such institutions based on that commonality, unless it is not practicable Thus interpreted section 32*(c)* is neither superfluous nor tautologous It preserves an important freedom The constitutional entrenchment of that freedom is particularly important because of our special history initiated during the fifties in terms of the system of Bantu education From that period the State actively discouraged and effectively prohibited private educational institutions from establishing or continuing private schools and insisted

[47] *Ferreira* (note 26 above) paras 170–4

[48] Ibid At para 69 of the judgment Ackermann J defined the right to freedom as the residual rights of individuals (where such or similar rights are not protected elsewhere in Chapter 3) not to have obstacles to possible choices and activities placed in their way by the State See further 12 1*(b)* in Chapter 12 below

[49] *Ex parte Gauteng Provincial Legislature in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Policy Bill 83 of 1995* 1996 (3) SA 165 (CC)

that such schools had to be established and administered subject to the control of the State The execution of those policies constituted an invasion on the right of individuals in association with one another to establish and continue at their own expense their own educational institutions based on their own values Such invasions would now be constitutionally impermissible in terms of section 32(c) [50]

In one of its most controversial uses of contextual interpretation, in *Soobramoney v Minister of Health (KwaZulu-Natal)*, the Constitutional Court held that the right to life (s 11) did not impose a positive obligation on the state to provide life-saving treatment to a critically ill patient The court held that the positive obligations of the state to provide medical treatment were expressly spelled out in s 27, and that the court could not interpret the right to life to impose additional obligations that were inconsistent with s 27 [51]

Contextual interpretation is undoubtedly helpful, but it must be used with caution The first danger is to use context to limit rights instead of to interpret them The Bill of Rights differs from most other constitutional texts in that it envisages a two stage approach first interpretation and then limitation The balancing of rights against each other or against the public interest must take place in terms of the criteria laid down in s 36 In the first stage, context may only be used to establish the purpose or meaning of a provision [52]

The second danger is that contextual interpretation may be used as a shortcut to eliminate 'irrelevant' fundamental rights In accordance with the principle of constitutional supremacy, a court must test a challenged law or conduct against all possibly relevant provisions of the Bill of Rights, whether the applicant relies on them or not Contextual interpretation should not be used to identify and focus only on 'the most relevant right' [53]

[50] Ibid para 8

[51] *Soobramoney* (note 24 above) para 15

[52] For this reason the approach of the Court in *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 67 to the interpretation of the right to privacy cannot be supported According to the Court [t]he truism that no right is to be considered as absolute implies that from the outset of interpretation each right is already limited by every other right accruing to another citizen In the context of privacy this would mean that it is only the inner sanctum of a person such as his her family life sexual preference and home environment which is shielded from the erosion by conflicting rights of the community

[53] But see contra the approach of Chaskalson P in *Soobramoney* (note 24 above) *S v Lawrence* 1997 (4) SA 1176 (CC) para 1(The Constitution deals with unequal treatment and discrimination under section 8(2)[IC] but that section was not relied upon by the appellant in the present case) *Osman v Attorney General Transvaal* 1998 (4) SA 1224 (CC) fn 2 (since the appellants did not place reliance on a specific fundamental right in the High Court it was not open to them to raise it before the Constitutional Court especially since no notice was given and neither party was prepared for it) There is little that a court can do when the applicant mistakenly challenges the incorrect statutory provision as was the case in *Lawrence* paras 71 81 and *East Zulu Motors v Empangeni/Ngwelezane Transitional Council* 1998 (2) SA 61 (CC) When the applicant challenges the correct statutory provision but with reference to the wrong fundamental right this should be pointed out to the parties and they should then be allowed to make submissions on the issue

64 The Interpretation Clause

Interpretation of the Bill of Rights

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

(a) Section 39(1)

Section 39(1) requires an interpretation that promotes the values which underlie an open and democratic society based on human dignity equality and freedom It seems that the society referred to is not necessarily the current South African society, but an abstract and ideal one In other words, an exercise is required that is analogous to that of ascertaining the boni mores or legal convictions of the community in the law of delict [54] Despite the importance of context, the everyday realities of South African society will therefore not feature as much in the interpretative stage of fundamental rights analysis, when the scope of the right is determined They may prove to be decisive at the stage when the constitutionality of limitations of the right is considered [55]

Section 39(1) refers to the use of public international law and foreign law In *S v Makwanyane*, the Court stated that both binding and non-binding public international law may be used as tools of interpretation

> International agreements and customary international law provide a framework within which [the Bill of Rights] can be evaluated and understood and for that purpose decisions of tribunals dealing with comparable instruments such as the United Nations Committee on Human Rights the Inter American Commission on Human Rights and the European Court of Human Rights and in appropriate cases reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions [56]

[54] The legal convictions of the community cannot be established by expert evidence it is for the court to say what they are More realistically the court after considering all the facts will form an intuitive opinion as to whether the defendant should have acted which it will then justify by invoking the legal convictions of the community as interpreted by itself a policy decision is called for P Boberg *Law of Delict* (1984) 214

[55] Compare however *S v Diamini* 1999 (4) SA 623 (CC) para 55

[56] *Makwanyane* (note 10 above) paras 36–7

These remarks make it clear that the Constitution permits reference for purposes of interpretation to international human rights law in general [57] It is not confined to instruments that are binding on South Africa [58] The fact that South Africa is at present party to relatively few international human rights agreements is therefore not an obstacle to invoking international human rights law for the purposes of s 39(1) Section 39(1) invokes public international law primarily for the purpose of interpretation of rights and for determining their scope, not for proving their existence

It should be noted that s 39(1) states that courts 'shall' consider applicable public international law, but 'may' consider foreign law [59] There is an injunction to consider applicable international law, but not to consider foreign law In fact, in its early jurisprudence the Constitutional Court seldom referred to public international law, with the exception of the jurisprudence of the European Court of Human Rights [60] Those references to international law that are made do not appear to be as persuasive to the Constitutional Court as comparative foreign case law

The Constitutional Court held, in *S v Makwanyane*,[61] that comparative human rights jurisprudence will be of great importance while an indigenous jurisprudence is developed However, added the Court, foreign case law will not necessarily provide a safe guide to the interpretation of the Bill of Rights In another case, the Constitutional Court expressed its concerns in this regard as follows

> Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies Both the interim and the final Constitutions moreover indicate that comparative research is either mandatory or advisable Nevertheless the use of foreign precedent requires circumspection and acknowledgement that transplants require careful management Thus for example one should not resort to the *Barker* test or the *Morin* approach without recognising that our society and our criminal justice system differ from those in North America Nor should one, for instance adopt the assertion of right requirement of *Barker* without making due allowance for the fact that the vast majority of South African accused are unrepresented and have no conception of a right to a speedy trial To deny them relief under section 25(3)*(a)* because they did not assert their rights would be to strike a pen through the right as far as the most vulnerable members of our society are concerned It would be equally unrealistic not to recognise that the administration of our whole criminal justice system including the law enforcement and correctional agencies are under severe stress at the moment [62]

Despite these remarks, many of the Constitutional Court's decisions read like works of comparative constitutional law [63] Extensive reference is almost always made to the legal positions in other open and democratic societies

(b) Section 39(2)

Section 39(2) has little to do with the interpretation of the Constitution, but concerns the interpretation of statutes and the development of the common law and customary law While the section does not concern the 'interpretation' of the Constitution, it is crucial to the 'application' of the Constitution Section 39(2) should therefore be read with s 8 — the application clause — since it provides for indirect application (sometimes called 'the permeating effect') of the Bill of Rights to the law The indirect application of the Bill of Rights is discussed in Chapter 3 above

[57] The court reached its conclusion with reference to the work of John Dugard (see footnote 36 of the judgment) According to Dugard s 39(1) does not merely require a court to consider treaties to which South Africa is a party or customary rules that have been accepted by South African courts but also to— *(a)* international conventions whether general or particular establishing rules expressly recognised by the contesting states *(b)* international custom as evidence of a general practice accepted as law *(c)* the general principles of law recognized by civilized nations *(d)* judicial decisions and the teaching of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law Dugard argues that such a conclusion follows logically from the use of the term public international law without qualification in s 39(1) and to give maximum effect to the otherwise incomplete catalogue of rights in the Bill of Rights See J Dugard The Role of International Law in Interpreting the Bill of Rights (1994) 101 *SAJHR* 208

[58] Binding international law has greater persuasive force since the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of [such] international law See *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 26 *Dawood* (note 24 above) 1034A

[59] See *Sanderson* (note 12 above) para 26

[60] South African courts seldom refer to public international law even though some forms of international law (notably customary international law) are according to s 232 part of the law of the land See however the extensive examination of international law in recent decisions such as *Grootboom* (note 43 above) paras 26-33 and 75 *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC) and *Kaunda v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC)

[61] Note 10 above para 37

[62] *Sanderson* (note 12 above) para 26 Several High Court judges have also cautioned against use of foreign law because of the different contexts within which other constitutions were drafted the different social structures and milieu existing in those countries as compared with those in this country and the different historical backgrounds against which the various constitutions came into being *Park Ross v Director Office of Serious Economic Offences* 1995 (2) SA 148 (C) 160H See also *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E), 633F–G *Berg v Prokureur Generaal van Gauteng* 1995 (11) BCLR 1441 (T) 1446 *Shabalala v Attorney General of Transvaal* 1995 (1) SA 708 (T) *Potgieter v Kihan* 1996 (2) SA 276 (N) In *Makwanyane* (note 10 above) para 109 Chaskalson P stated that the margin of appreciation doctrine of the European Court of Human Rights has the effect of reducing the comparative value of the Court s jurisprudence But as pointed out by Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 33 above) para 41 this reasoning only applies when the European Court finds no violation of the European Convention When the Court does find a contravention despite affording a member state a margin of appreciation the finding is all the more persuasive In *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T) Roux J declined to take account of decisions of Canadian and United States courts on legal recognition of homosexual life partnerships to which he had been referred by counsel because as he put it I know nothing about the hierarchy of these Courts (316I) But since foreign decisions can only provide substantive reasoning in support of a conclusion the hierarchy of courts in foreign jurisdictions (or even whether a judgment that is relied on is a majority or minority decision) is irrelevant

[63] See for example the judgment of Ackermann J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) The value of the extensive comparative analysis of constitutional remedies undertaken by Ackermann J (which considers the position in the United States Canada Britain Trinidad and Tobago New Zealand Ireland India Sri Lanka and Germany) was questioned by Kriegler J In my respectful view it is neither necessary nor prudent to range as wide as does Ackermann J in his judgment I decline to engage in a debate about the merits or otherwise of remedies devised by jurisdictions whose common law relating to remedies for civil wrongs bears no resemblance to ours and whose constitutional provisions have but a passing similarity to our s 7(4)*(a)* [of the interim Constitution]

(c) Section 39(3)

Section 39(3) confirms that the Bill of Rights does not prevent a person from relying on rights conferred by legislation, the common law or customary law. But since the Bill of Rights is supreme law, such rights may not be inconsistent with the Bill of Rights.

For example if the right against self-incrimination (s 35(3)*(j)*) is only available to persons accused in criminal proceedings, nothing prevents a person in any other proceedings from relying on his or her common law right against self-incrimination to the extent that the right is available. Or, if a person may not invoke the Bill of Rights to obtain a remedy when that person is refused accommodation in an hotel, nothing would prevent the person from seeking a remedy in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

6.5 Other Provisions of The Constitution

The Preamble may be used in the interpretation of the substantive provisions of the Bill of Rights. Some of the general provisions contained in Chapter 14 of the Constitution may also be relevant. Finally, s 240 provides that 'in the event of an inconsistency between different texts of the Constitution, the English text prevails'.