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CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

THEME COMMITTEE FOUR FUNDAMENTAL RIGHTS

REPORT ON INTERPRETATION

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THEME COMMITTEE 4

-FUNDAMENTAL RIGHTS

SCHEMATIC REPORT ON INTERPRETATION

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II	**Nature of the clause**	The section on interpretation contained in section 35 of the Interim Constitution, provides the key to the application of the Bill of Rights and is an essential component of the Bill of Rights.		
2.		**Content of clause**	All the parties that made written submissions favour the retention of section 35(1).	The FF proposes a simpler version of section 35(2) dealing with the presumption of constitutionality. Section 35 (1) should be retained with the substitution of the phrase "open and democratic society based on freedom and equality" with "free, open and democratic society based on equality" - PAC There is a clear need to balance the the scales of justice from a religious perspective - ACDP Constitution must stand the test of "ceturies old morality-based aspects of natural justice" - ACDP	

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
3.		**Application**	The NP expressed the view that the purpose of section 35(3) is to provide for the limited application of the Bill of Rights to private law relationships.		

THEME COMMITTEE 4
FUNDAMENTAL RIGHTS

REPORT ON INTERPRETATION

This report is drawn up on the basis of submissions received from political parties, organisations of civil society and individuals; the public participation programme and other activities of the Constitutional Assembly.

PART I

MATERIAL CONSIDERED BY THE THEME COMMITTEE

1. Submissions received from political parties (in alphabetical order):

- ACDP
- DP
- FF
- NP
- PAC

2. Submissions received from the public and civil society[1]:

2.1 Individuals
2.2 Organisations
2.3 Government structures\ institutions

3. Technical Committee reports:

None to date

4. Relevant Constitutional Principles

II

1 A complete listing of all submissions received from the public and civil society is included in the document entitled "Public Submissions". The document is being circulated separately.

PART II

1. NATURE OF THE CLAUSE

1.1 The section on interpretation contained in section 35 of the Interim Constitution, provides the key to the application of the Bill of Rights and is an essential component of the Bill of Rights.

2. CONTENT AND SCOPE OF THE CLAUSE

2.1 Non-Contentious Issues

2.1.1 All the parties that made written submissions favour the retention of section 35(1).

2.2 Contentious\ Outstanding[2] Issues

2.2.1 The FF proposes a simpler version of section 35(2) dealing with the presumption of constitutionality.

2.2.2 Section 35 (1) should be retained with the substitution of the phrase "open and democratic society based on freedom and equality" with "free, open and democratic society based on equality" - PAC

2.2.3 There is a clear need to balance the the scales of justice from a religious perspective - ACDP

2.2.4 Constitution must stand the test of "ceturies old morality-based aspects of natural justice" - ACDP

3. APPLICATION OF THE CLAUSE

3.1 The NP expressed the view that the purpose of section 35(3) is to provide for the limited application of the Bill of Rights to private law relationships.

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2. It should be noted that items marked *"Outstanding"* do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

ADDENDUM

PARTY SUBMISSIONS

- ACDP

AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE FOUR

INTERPRETING A BILL OF RIGHTS

The importance of the current process of constitutional reform in South Africa, is such that it may rightly be said that now, like never before, is the time to make correct decisions regarding the future.

Having a history of arbitrary decisions being made by constitutional manipulation, the records needs to be set straight. It would be equally unwise to repeat the past and to discard the lessons learned from it.

The ACDP has consistently pointed out the moral aspects of any law and the source of power and authority behind it. It is equally true for the constitution.

The true authority behind this constitution, apart from the apparent source thereof, will be the men and women interpreting the aspects thereof for translation into everyday social intercourse. In the American experience, it has clearly been shown that through the process of interpretation the Supreme Court has managed to "rewrite" the American Constitution into a product which the original Christian framers thereof, will scarcely recognise. It is acknowledged widely, that shifts in philosophy were the main contributing factor to this phenomenon - from being based and grounded in the rich Christian heritage of the United States to a legal viewpoint originating in the religion of secular humanism.

Keeping firmly in mind the importance of religion and specifically Christianity in this country, there is a very real need to balance the scales of justice from a religious perspective. A court with constitutional jurisdiction, comprised mainly of secular-minded jurists will surely lean toward their specific ideology in their judgements.

This fact, coupled with the preponderance - world-wide - of secular and positivist institutions of education, translates into an international saturation of the legal system with this particular mind-set. It follows quite naturally that making international law trends a compulsory aspect of constitutional interpretation, will lead to an imbalance in the application of the constitutional ideals, with one religion (Secular humanism being identified as being such by the US Supreme Court in Torcaso v Wilkens, 1961), being unjustly favoured in our judicial system.

One way to address this aspect, is to provide that the composition of any constitutional interpretative body must balance in the religious - philosophical grounding of the members of such bodies.

To this end, it is envisaged that there must be keen adherence to any promotion of education institutions aimed at providing this country with a balanced academic and judiciary - religiously and philosophically speaking.

In summary thus, after recognising the philosophy behind every jurist, everything possible needs to be done to balance these aspects in a body charged with constitutional interpretation.

Moving then to a very vital next aspect, the ACDP underwrites the sentiments expressed by Professor Lourens du Plessis in his introductory work on the law on page 111, where he states:

"A jurist should not be out to evade legal procedures or find loopholes in the law or try and outwit his opponents on 'technical points'. Such an attitude implies that the legal system does not really make sense but is simply an obstacle to be overcome. But the system does make sense to the extent that it is mindful of the rights and interests of people. This is why a jurist must strive as much as they can to rectify the deficiencies and inhumane aspects of the system and insure that the impact of unjust measures (which still exist) be minimised as far as possible."

He continues on page 112 in the same vein, where again, he states:

"Jurists in positions of Authority (such as Judicial officers), who apply the law in a formalistic and legalistic way are also undermining respect for the course of justice of the law and bring the legal system into disrepute."

That it should even be necessary to mention this aspect in an introductory to the legal system, shows clearly the importance of the embodying idea behind the base concept:

Any law primarily exist to benefit society and to guard against arbitrary and unjust behaviour. It was well put in the **Monnakale** decision (1991G) SA 598 (BGD) at 610E) regarding the Bophuthatshana precursor to our own constitution that it is difficult to encapsulate and characterise the spirit animating [the bill of rights]... "*save to say that it is an* ***august assertion of the will of the citizens of this country for righteousness and the rule of law."***

Every interpretation of the constitution must have regard to the truth encapsulated in the above quotation and must strive to recognise the individuals whose very lives may be irrevocably changed by the mere stroke of a pen.

When the framers of the American Constitution, completed their drafting in 1776 and the initial amendments, a short while later, they could not have even imagined that an aspect of constitutional privacy will in 1973, come to weigh
heavier than the right to life of millions of unborn persons slaughtered after having been judicially relegated to the status of non-persons, despite incontrovertible evidence to the contrary: (cf. the expert evidence in the matter of Davis v Davis (Circuit Court for Blount County State of Tennessee, USA, (Div I), by Professor Jerome Lejeune, Professor of Fundamental Genetics in the Faculty of Medicine of the University of Paris).

This was because they recognised that the US Constitution was grounded in the revelational knowledge of Biblical Divine Law. As such they did not even consider the possibility of having "their" constitution interpreted with another agenda to have a purport totally foreign to the very belief-system of the framers of the US constitution.

The ACDP has learnt this lesson and is not apt to have it be repeated locally, despite the possible intentions of the current forces at work behind the current constitutional process.

Because "democracy" or "free and open society" might mean something different to an interpreter two, three or five years from now, we realise that vague terminology that is not grounded in common law or natural justice, the way it crystallised during the past centuries can be manipulated and contorted to whim. Thus we propose that a mechanism be provided that would prevent the tyrannising effect of the constitution on the will of the people as was amongst others made abundantly clear with the abolition of the death penalty - which was mainly done, as Mr Justice Chaskalson put it, because the Constitution says so - rendering public opinion on the matter virtually useless.

If the constitution is indeed to be the august assertion of the will of the citizens of the country as evidenced earlier, then it must stand the test of centuries old morality-based aspects of natural justice and last, but definitely not least, the common will of the people in the form of a referendum - especially in moral issues such as abortion, euthanasia, capital punishment and pornography to name only a very few.

26th June 1995
[BILL.R1)

- DP

20 June 1995

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4

DEMOCRATIC PARTY SUBMISSION

26.OTHER FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES
27.INTERPRETATION OF BILL OF RIGHTS

26. OTHER FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES

Some favour the inclusion in the Bill of Rights of what are known, following the Indian Constitution, as Directive Principles of State Policy. Directive Principles would be part of the Bill (or at least of the Constitution), but they would not be fundamental rights, and they would in consequence not annul Acts of Parliament with which they were in conflict. The category of Directive Principles is therefore a halfway station which can accommodate values thought important enough to merit recognition in the Bill of Rights, but not important enough to merit the force of a fundamental right. Recognition of a value as a Directive Principle is a compromise often suggested to resolve conflict between those in favour of elevating a value to the status of fundamental right and those altogether against including it in the Bill of Rights.

But what is the content of the compromise? The point of relegating a value to the Directive Principles is to deny it the force of a fundamental right. But the inclusion of a value in the Bill of Rights (or elsewhere in the Constitution), however that is done, sooner or later generates demands for it to be given some legal effect. In India, one effect given to Directive Principles is a power to restrict the fundamental rights. Entailed in that power is a capacity to immunise from legal challenge government action which is repugnant to a fundamental right, just because it pursues a goal postulated by one of the Directive Principles. In the name of pursuing democratic ends, the power of restriction given to Directive Principles may consequently be used to sanction undemocratic means.
The best known theory of Directive Principles is the Indian one. To include Directive Principles in our own Bill of Rights would invite the adopting of the ideas that have grown up in India about Directive Principles, including the idea that they have the power to restrict fundamental rights. It may be that the Indian courts have somehow avoided the worst dangers inherent in that idea. But because the dangers are inherent in the idea, there can be no assurance that our own courts would do the same. No one can restrain the internal logic of an idea. To import Directive Principles, therefore, would be to import their capacity to erode the fundamental rights. Justice Bhagwati, former Chief Justice of India, once went so far as to say that "it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate". (Minerva Mills Ltd v Union of Indian 1980 AIR 1789 SC at 1847).

In India, moreover, fundamental rights were given years to establish themselves before the courts started invoking the Directive Principles to restrict them. It may be that when fundamental rights are established and flourishing, the harm done by permitting their restriction is less than fatal. In South Africa, however, fundamental rights are still struggling for their constitutional birth. If we allow them liberally to be restricted before they exist, they may well be stillborn.

Furthermore, although Directive Principles may be thought a useful way of remedying the deficiencies of a weakly drafted Bill of Rights, it is far from clear what they can contribute to a carefully considered one. A value is sometimes consigned to Directive Principles to avoid the hard work of resolving a dilemma about whether it should be included in the fundamental rights, and, if so, in what way. The Directive Principles may consequently become the rubbish bin of the Bill of Rights. Proper attention to difficult values can avoid this consequence, and produce a far more coherent Constitution.

The rights to shelter and health care, for instance, obvious candidates, since they are so problematic, for relegation to Directive Principles, are dealt with by the Democratic Party in its previous submission, in an article named "Right to the Essentials of Life", in a way which gives them real content without usurping the proper province of the legislature or the executive. The guarantee of equality in section 8 is likewise so much stronger than many other alternatives as to make the recognition of gender rights as Directive Principles pointless.

We consequently believe that, in a thoughtfully drafted Bill of Rights, Directive Principles are unnecessary, that they can ruin the coherence of the Bill, and that they could undermine its fundamental rights. In short, that they would weaken rather than strengthen the Bill of Rights.

27.INTERPRETATION OF BILL OF RIGHTS

1. Content of the Right

We support the formulation contained in section 35:

1.1 Section 35(1) is a statement of principles of interpretation which have been recognised by many courts (see Gilbert Marcus (SA Journal on Human Rights Vol.10 Part I 1994 at 95)).

The second clause within Section 35(1) enables a court to have regard to principles of public and international law and comparable case law. It has been argued that this scarcely requires articulation in the constitution as it is inevitable that the Constitutional Court will be significantly influenced by the manner in which other courts have interpreted rights similar to those embodied in the constitution.

1.2 Section 35(2) embraces "the presumption of constitutionality". It directs the courts to interpret laws which are susceptible to constitutional challenge and is not a directive applicable to the interpretation of the constitution itself. The presumption has been explained by Georges C J in Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd (1984)(2)(SA778)(ZS):-

> "Arguments have also been addressed at some length on the presumption of constitutionality. It is a phrase which appears to me to be pregnant with the possibilities of misunderstanding. Clearly a litigant who asserts that an act of parliament or a regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at the conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the constitution and the others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted.
>
> "...One does not interpret the constitution in a restricted manner in order to accommodate the challenged legislation. The constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the constitution."
>
> Properly interpreted, section 35(2) provides a safeguard to prevent an over-zealous court from striking down parliamentary legislation which is capable of a constitutional interpretation. We therefore support its retention.

1.3 Section 35(3) clearly indicates that legislation, the common law and

customary law do fall within the ambit of the constitution. Should such a law fall foul of "the spirit, purport and objects" of the Bill of Rights it may be struck down as invalid. We believe that this approach is both enlightened and necessary, particularly since it will strike at customary law rules which might discriminate against certain categories of persons such as women.

20 June 1995

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4

DEMOCRATIC PARTY SUBMISSION

28.CLASS ACTIONS

Section 7(4)(b) clearly caters for - and anticipates - the initiating of so-called "class actions". The Democratic Party supports the retention and the wording of the section.

The relevant section of the Interim Bill of Rights is S.7(4)(b) which reads as follows:

"The relief referred to in paragraph (a) may be sought by -

(i) a person acting in his or her own interest;

(ii) an association acting in the interest of its members;

(iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;

(iv) a person acting as a member of or in the interest of a group or class of persons; or

(v) a person acting in the public interest."

- FF

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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

INTERPRETATION OF THE CHAPTER ON FUNDAMENTAL RIGHTS (PROVISIONAL)

1) The wording and interpretation of section 35 of the transitional Constitution

Section 35 of the transitional Constitution reads as follows:

'(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

(2) No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this Chapter, provided such law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter'.

The South African Law Commission in its Final Report on Group and Human Rights (October 1994 at page 176) says: 'Section 35(1) is merely a statement of principles of interpretation which have been recognised by many courts, while subsection (2) embraces what might termed a presumption of constitutionality'.

In respect of subsection (2) the Freedom Front prefers a proposal of the South African Law Commission to the present wording, viz.

'Any reasonable interpretation of legislation that will result in the meaning of the legislation being consistent with this Chapter shall be preferred to any other interpretation'. We consider that the latter provision is much simpler than the former one, while reflecting much of its essence. Moreover, the existing subsection (2) is convoluted, with the result that it may itself lead to problems of interpretation.

In De Klerk and Another v Du Plessis and Others 1995 (2) SA 40 (T) the court held (pp 50-51) that 'Section 35(3) is intended permeate our judicial approach to interpretation of statutes and the development of the common law with the fragrance of the values in which the Constitution is anchored. .... Section 35(3) is therefore and aid to interpretation and development of law and custom not found in chap 3. It is not intended for the interpretation of chap 3 itself. That is dealt with s 35(1)'.

It is against the background of this paragraph that the general approach to the interpretation of the Constitution must be considered.

2) The general approach to the interpretation of the Constitution: is it different from the traditional approach to the interpretation of ordinary statutes?

We agree with the statement of the Law Commission (see the abovementioned Report at pages 177-178) that the interpretation of a Constitution guaranteeing fundamental rights calls for a different approach from the traditional approach to the interpretation of ordinary statutes, and that South African courts, including the Constitutional Court, will have to be more contextual in approach and must be willing to have regard to a wide range of evidence of the relevant social context. Nevertheless, many rules reflecting the traditional approach are still applicable, as will appear from the South African cases referred to below. It is submitted that it is only the relative weight to be attached to the different rules that has changed.

3) A survey of recent cases: the broad approach to the interpretation of the Constitution

The rules of interpretation applicable to the Constitution were considered various recent South African decisions, inter alia Kalla and Another v The Master and Others 1995 (1) SA 261 (T); Phato v Attorney-General, Eastern Cape, and Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape, and Others 1995 (1) SA 799 (E); De Klerk and Another v Du Plessis and Others 1995 (2) SA 40 (T); Park-Ross and Another v Director: Office for Serious Economic Offences 1995 (2) SA 148 (C); Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another 1995 (2) SA 221 (T); Nortje and Another v Attorney-General, Cape, and Another 1995 (2) SA 460 (C), and S v Zuma and Others 1995 (2) 642 (CC) (Constitutional Court).

In Phato's case it was held (page 809): 'It is often stated that a bill of rights is sui generis; .... that it must accordingly be interpreted widely or liberally or beneficially or purposively, rather than narrowly or strictly or 'legalistically' or with rigorous regard to the literal meaning of its wording rather than to its spirit' (stress supplied).

In De Klerk's case it was held (page 46) that '...one must apply the purposive approach to interpretation of our Constitution, determining from it as a whole what was the aim of chap 3 and its constituent sections individually, what problems and aspirations did it seek to address, and what does it have in mind for our society. In short, what are the values and norms our society cherishes and intends to uphold. This approach does not mean that in some or many instances this will not result in a 'generous' interpretation. It will, but that is not the starting point' (stress supplied).

In Park-Ross's case (pp 160-161) it was held that the South African Constitution must be interpreted within the context and historical background of the South African setting. In this regard the court agreed with the view that 'the Bill of Rights element of a Constitution calls for a "generous and purposive interpretation", avoiding what has been memorably referred to as "the austerity of tabulated legalism" so as to give to individuals the "full measure of the fundamental rights and freedoms referred to" ' (stress supplied).

In the 'Sunday Times' case above it was held (page 225) that, in interpreting the Constitution, 'whilst paying respect "to the language which has been used and to the traditions and usages which have given meaning to that language " ... a generous and liberal construction must be adopted. ... The judiciary as guardian of the Constitution must be astute in determining the full ambit of the rights enshrined in the Constitution and be vigorous in its protection thereof' (stress supplied).

In Kalla's case (page 269) the court considered the interpretation of certain transitional arrangements contained in the Constitution. It held that the question to be asked is still: what did the draftsmen have in mind? The intention of the legislature still has to be determined. The correct approach is to determine whether the provision in question is ambiguous. The rules to be applied in the case ambiguity have not been abolished. They form part of the law of the land, which has not been abrogated by the Constitution (section 33(3)).

In Nortje's case it was held (page 471) that legislation of the nature of the South African Constitution is sui generis. 'It provides, in the main, a set of societal values to which other statutes and rules of the common law must conform, and with which

government and its agencies must comply in carrying out their functions. It is short on specifics and long on generalisation. ..... There is general agreement that, because of these fundamental distinctions between ordinary legislation and this kind of legislation, many (but certainly not all) of the traditional rules of interpreting statutes will be inappropriate when interpreting legislation of this kind' (stress supplied).

In Zuma's case the Constitutional Court held (pp 651- 653) 'that regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its Constitution are to be fully understood'. ... Referring to Qozeleni v Minister of Law and Order and Another 1994 (3) SA 625 (E) the Court said that is was sure that Froneman J in that case 'did not intend to say that all the principles of law which have hitherto governed our Courts are to be ignored. Those principles obviously contain much of lasting value. Nor, I am equally sure, did the learned judge intend to suggest we should neglect the language of the Constitution. While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. ... If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination' (stress supplied).

4) What method of interpretation should, according to international law, be adopted?

According to section 35(1) of the transitional Constitution public international law must be taken into account, where applicable in the present context (see paragraph 1 above).

In interpreting international instruments such as treaties the method of interpretation adopted is often decisive as far as the merits are concerned. In this connection Judge Tanaka expressed himself as follows in the South West Africa Cases ((Judgment (Second Phase) (1966) at p 278):

'In short the difference of opinions on the questions before us is in the final instance attributed to the difference between two methods of interpretation: teleological or sociological and conceptional [conceptual] or formalistic'.

The three main approaches to interpretation in public international law can be succinctly stated as follows:

(a) The most generally accepted method of interpretation is that of giving effect to the expressed intention of the parties (or authors), i.e. their intention as expressed in the words used by them in the light of the surrounding circumstances. This is called the textual or exegetic(al) method, which stresses the literal approach.

(b) Directly opposed to the method referred to above is the

extreme view of free (or subjective) interpretation. The aim of this method is to bring about 'international social justice'. This is the extreme teleological approach.

(c) The so-called contextual approach lies in-between the two approaches referred to above. According to this method the goal of interpretation should be 'the approximation of the parties' genuine shared expectations of agreement through an analysis of all the relevant features of the context'. This approach can be equated with a moderate teleology.

What are the relative merits and demerits of these different approaches? The Freedom Front prefers the method set out in (c) above (the contextual approach), for the reasons given below. (This is also in agreement with the view adopted by our courts, as appears from paragraph 3 above.)

The textual method suffers mainly from the defect that, by stressing the intent of the authors at inception, insufficient notice is taken of circumstances which have since changed.

The extreme teleological method suffers mainly from the defect that the ideal of 'international social justice' is an amorphous concept, which does not clearly state the normative rules that form the essence of any legal discipline. In this regard the International Court of Justice in its judgment in the South West Africa Cases (Judgment) (Second Phase) (1966) at page 34 said: 'Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered' (stress supplied).

The contextual approach suffers neither from the technical rigidity of the textual approach nor the lack of certainty as to norms which characterises the extreme teleological approach. It reflects a moderate teleology, which is probably the most acceptable approach to matters of construction, provided that its application does not blur the legal rules of the applicable legal 'system'. This qualification ensures the retention of that element of formalism which is characteristic of any legal discipline.

5) Conclusions

The exposition above indicates that the main rule of interpretation of the provisions of the Chapter on fundamental rights ought to be the contextual rule, and not the grammatical or literal rule. However, the context is very wide, as it covers (in a mandatory sense) relevant rules of public international law, as well as comparable foreign case law (in a persuasive sense) as is provided in section 35(1) of the transitional Constitution.

The extent to which particular rules of interpretation should apply in individual cases will, of course, be decided by the courts concerned. It should be remembered that many rules of interpretation apparently contradict one another, and that the court in question will have to select and give predominant effect to those rules which are most relevant to the facts of the case. The main rule should, however, remain the contextual rule, reflecting a moderate teleology, the main advantage of which has been set out above.

- NP

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 4

INTERPRETATION OF THE BILL OF RIGHTS

1. Approach

In the relatively short period since the commencement of the transitional constitution, a number of cases have been reported in which our courts have expressed themselves on the question of the correct approach to the interpretation of the constitution and the bill of rights in particular. The cause of the attention given to this aspect is the commonly held view that the interpretation of a bill of rights requires a somewhat different approach than other laws (see Rautenbach *General Provisions of the South African Bill of Rights* (1995) 21 *et seg*). More directly, this attention has, of course, been prompted by section 35 of the transitional constitution, which is an important aid in the interpretation of the constitution, and which provides, *inter alia*, that "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality....." (subsection (1)).

Generally speaking, and with varying degrees of conviction, our courts have adopted the view that a so-called "generous and purposive" approach to the interpretation of the bill of rights is called for (*Khala v the Minister of Safety and Security* 1994 2 BCLR 89 (W) 92; see also *Qozoleni v Minister of Law and Order and another* 1994 1 BCLR 75 (E); *Ntenteni v Chairman (Ciskei), Council of State and another* 1994 1 BCLR 168 (Ck); *Matinkinca and another v Council of State, Ciskei and another* 1994 1 BCLR 17 (Ck); *De Klerk and another v Du Plessis and others* 1994 6 BCLR 124 (T)). However, the Constitutional Court has already found it necessary to issue a word of warning in this regard. In *S v Zuma and others* 1995 4 BCLR 401 (SA) 412, Kentridge AJ expressed himself as follows with reference to the approach canvassed in the *Qozoleni* case, where it has been suggested (at 80) that in each case the constitution has to be examined to ensure

that expression is given to the values "it seeks to nurture for a future South Africa".

> "I am, however, sure that Froneman J... did not intend to say that all the principles of law which have hitherto governed our courts are to be ignored. Those principles obviously contain much of lasting value. Nor, I am equally sure, did the learned Judge intend to suggest that we should neglect the language of the Constitution. 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. If I may again quote *Attorney-General v Moagi (supra)* at 184, I would say that a constitution
>
> > "embodying fundamental rights should *as far as its language permits* be given a broad construction." (My emphasis.)"

(See also *Park-Ross and another v The Director, Office for Serious Economic Offences* 1995 2 BCLR 198 (C); *Nortje and another v Attorney-General of the Cape and Another* 1995 2 BCLR 236 (C).)

Without trying to oversimplify the matter (see, for example, the remarks by Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 85), we believe that this balanced approach should be adopted in the application of section 35.

2. International law and foreign case law

It seems as if there is consensus that international law shall be a mandatory source of reference in the interpretation of our bill of rights and that our courts shall have regard to international law in the process. The fact that reference to foreign case law is not similarly mandatory, but merely directory, is understandable. In *Park-*

Ross and another v The Director, Office for Serious Economic Offences 1995 2 BCLR 198 (C) 208, the reasons was explained as follows by Tebbut J:

"While it is indeed so that section 35(1) of the Constitution provides that in interpreting the provisions of Chapter 3 thereof, the Court may "have regard to comparable foreign case law", this should be done with circumspection 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".

3. Section 35(2)

This subsection of the transitional constitution provides that a statute which on the face of it conflicts with the constitution, should be interpreted not to be in conflict if it is possible to give the statute such a more restricted interpretation. This is a necessary and not at all alien rule and should be retained.

4. Horizontal application (section 35(3))

This aspect has been belaboured at length by various commentators (see, for example, Du Plessis and Corder 110 *et seq*; Rautenbach 68 *et seq*). Our courts have also addressed this question on at least two occasions but, after lengthy arguments, *inter alia* with reference to section 35(3), they have reached opposite conclusions - see *De Klerk and another v Du Plessis and others* 1994 6 BCLR 124 (T) where it was held that the bill of rights does not have horizontal application, and *Gardener v Whitaker* 1994 5 BCLR 19 (E) where the court found that it does.

Our view is that, in principle, the bill of rights is first and foremost an instrument regulating the relationship between the individual and the state and that, as such, it is not primarily and directly applicable to private relationships. However, it is obvious that the values and norms laid down by the bill of rights are supposed to permeate throughout the entire legal system and affect or influence

legal rules governing private relationships as well. This is, of course, an *indirect* application of the bill of rights to private relationships (Du Plessis and Corder 113 refers to the "seepage" effect of section 35(3)), and seems to conform with the approach advocated by Rautenbach 76-80. In his view there is room for the application of the bill of rights in the case of unequal private law relationships, in the application of general and undefined private law concepts (such as *boni mores* and good faith), and in the application of the equality principle.

We believe that the purpose of section 35(3) is to provide for this indirect and limited application of the bill of rights to private law relationships. As such, we support the retention of section 35(3).

- PAC

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26 June 1995

PRELIMINARY SUBMISSION OF THE PAC ON INTERPRETATION OF A BILL OF RIGHTS.

The PAC accepts the usefulness of a clause similar to S35. These guidelines will guide our Courts as they embark on this new task of Constitutional interpretation. The temptation to resort to a Literalist or strict Constructionist approach suitable for Legislative interpretation, is still too great for our Courts. An interpretation clause will assist the Courts towards a broad and purposive approach to Constitutional Interpretation.

Content

1. S35 (1) should be retained with the substitution of the phrase "open and democratic society based on freedom and equality" with "free, open and democratic society based on equality". There must be a clear injunction to all in our society that the need for social justice is imperative. We should not attempt to put freedom as a stumbling block to equality.

2. S35 (2) and (3) can be retained as they are.

R K Sizani - MP