

# The usage and interpretation of the Constitution for effective oversight

Hybrid NCOP Members Training Workshop  
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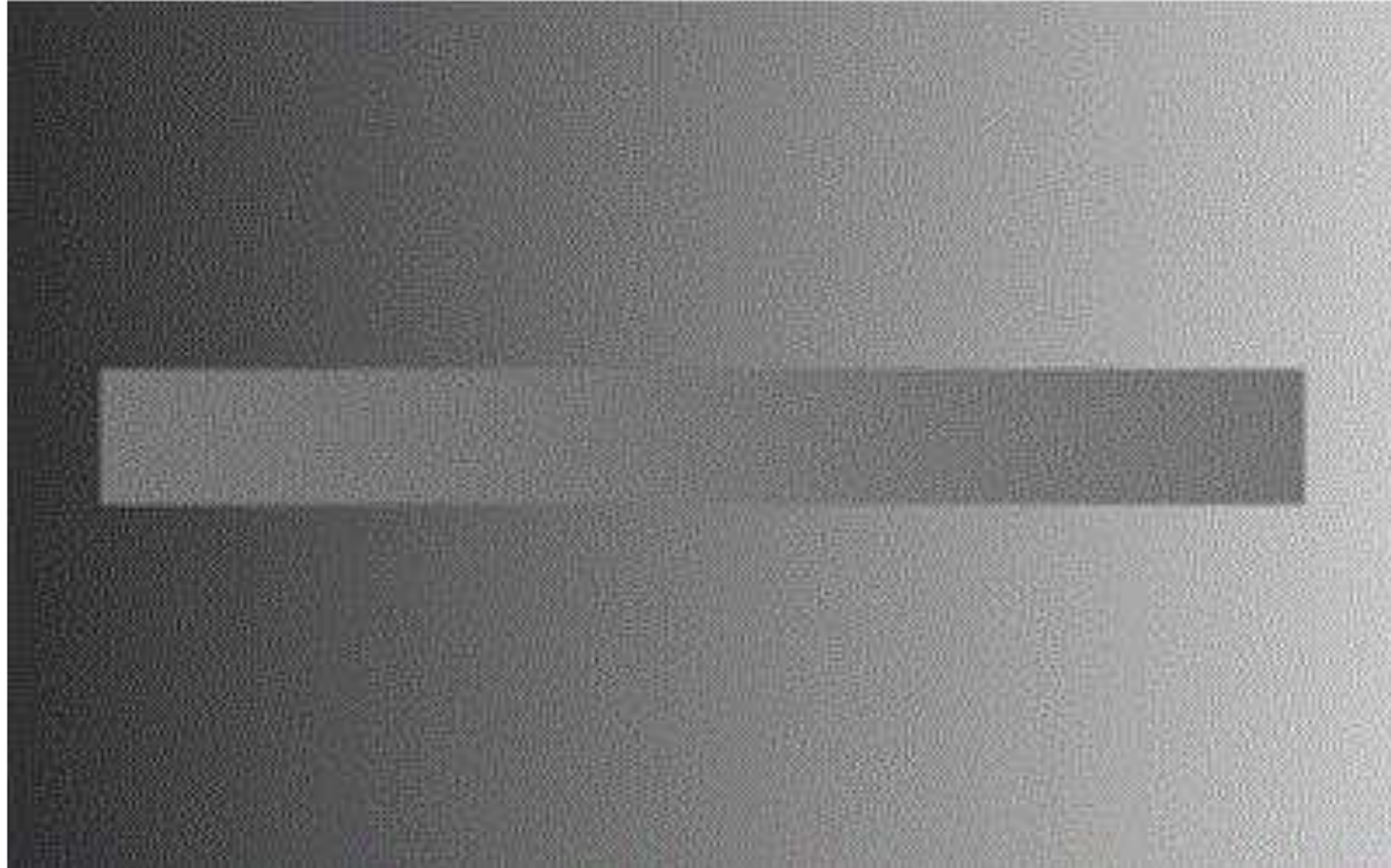
# Background

- AIM: “to empower honourable members on the effective usage and interpretation of the constitution of the Republic of South Africa to ensure that they are effective in their oversight, including in their committee work, during debates, motions and questions to the Executive”.
- BRIEF: “The presentation must also cover the following areas:
  - Understanding and interpreting the Constitution of the Republic of South Africa
  - Understanding general principles applied by South African courts when interpreting the Constitution
  - Building a purposive interpretation of the Constitution

# Overview of presentation: three headings

- (1) The purposive approach to constitutional interpretation
  - Interpretation under section 39(1)
- (2) Beyond purposive interpretation
  - Rationality review under section 1(c)
  - Reasonableness review under section 36
- (3) Is purposive interpretation possible here?
  - The Court vs The Council?
  - Swearing/affirming to uphold and protect the Constitution under Schedule 2

# The power of context (1)



# The power of context (1)



# The power of context (2)



# In law (and politics) context is everything

- Politicians quoted out of context by journalists
- Lawyers also mischievous – quoting word and phrases out of context; left with only the language; known as the literal interpretation
  - The way statutes and the legal texts are drafted invited this practice of quoting out of context
- Must take into account the effect of the context surrounding the quoted or cited provision
  - Move from text to context (contextual approach)
- Also known as the purposive approach
- What belongs to the context? Language; structure of the text; purpose of the specific provision; telos or purpose of the Constitution as a whole

# The purposive (or contextual) approach to constitutional interpretation

- Two dominant approaches to the interpretation of legal documents
  - Literal and purposive
  - Also known as textual and contextual
- Literal interpretation focusses on the letter of the law and what the law says (the text is a thing in itself)
  - “No vehicles in the park” Is a wheelchair a vehicle? It depends on how you define the word
- Purposive interpretation treats the letter as a means to an end and uses the interpretive process to promote certain purposes or values; read the letter of the law in light of the spirit of the law; understand the text in its broader context
  - It depends on the reason why vehicles are not allowed in the park; what is the purpose or policy objective behind the ban? Will allowing wheelchairs promote or undermine that purpose?



# What belongs to the context?

- The PURPOSE (as the name of the approach suggests)
- Two types of purpose
  - Purpose at the level of the rule or right (purpose)
  - Purpose at the level of the Constitution as a whole (telos)
  - Sometimes called the spirit of the law
- The WORDING of the Constitution (language)
- The STRUCTURE OR SCHEME of the Constitution
- The CONTEXT consists of the language, structure, purpose and telos of the constitutional provision in question

# Contextual or purposive interpretation

- Involves four argument types or modes of interpretation that must be undertaken together from the start in one holistic process
- Language = grammatical interpretation
- Structure = schematic interpretation
- Low Purpose = purposive interpretation (incl historical interpretation)
- High purpose = teleological interpretation (incl comparative interpretation)
- Process concludes by weighing up the various interpretations and deciding which interpretation make the constitution the best constitution it can be (constructive interpretation)

# Contextual or purposive interpretation under section 39(1)

- **Interpretation of 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
- Use interpretation of Constitution to promote the founding values of an open and democratic society - the TELOS of the Constitution
- Interpret rights “generously, purposively and contextually”
- But must still consider the language and structure

# Power of context: structure and scheme

- Preamble and founding provisions and values (chapter 1)
- Bill of Rights (chapter 2)
- Government (chapters 3 to 14)
- Read constitution as a harmonious whole
- Example: ***Zuma v NDPP*** case (2009)
- Section 179(5)(d): “the NDPP may review a decision to prosecute or not to prosecute after taking representations from the accused person” No representations taken from Mr Zuma before decision to reinstate prosecution was taken

# Power of context: History and purpose

- ***New Nation Movement*** electoral system case (2020)
- Section 19(3): “Every adult citizen has the right to vote and stand for office”
- Language?
- Structure (other sections) – section 18 (freedom of assembly)
- Our history as context and purpose of right (“Never again constitution”)
  - But lessons of history contested
  - Minority: denial of equal voice (1948)
  - Majority: denial of voice (1936)

# Power of context: the telos (ethos) morality)

- Preamble: We recognise the injustices of the past and adopt the Constitution in order to
  - ‘establish a society based on democratic values, social justice and fundamental human rights’ and to
  - ‘improve the quality of life of all citizen and free the potential of each person’ and to
  - ‘heal the divisions of the past and build a united and democratic South Africa’ and to
  - ‘take our rightful place in the family of nations’
- Section 39(1): ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’
- TRANSFORMATIVE CONSTITUTIONALISM
- Example: *Doctors for Life* case
- Sec 72(1): “must facilitate involvement in the legislative process”
- Language; structure vs ethos (promote ethos of participatory democracy)

# Beyond purposive interpretation

- Two important constitutional processes cannot properly be described as interpretive but lies at the heart of constitutional compliance
  - Reasonableness review
  - Rationality review
- Constitutionalism means that power must be exercised rationally and reasonably
  - Rationality review: power is limited by its purpose; tests whether a power serves its purpose; rational connection test; rule of law; legality review; prevent arbitrary exercises of power
  - Reasonableness review: is exercise of power reasonable given other commitments and obligations?

# Beyond purposive interpretation: Rationality review

- *Bobroff* case para 7: “A rationality enquiry is not grounded or based on the infringement of fundamental rights under the Constitution. It is a basic threshold enquiry, roughly to ensure that the means chosen in legislation are rationally connected to the ends sought to be achieved. It is a less stringent test than reasonableness, a standard that comes into play when the fundamental rights under the Bill of Rights are limited by legislation”.
  - Challenge decisions by members of the executive on the basis of legality or rationality review under section 1(c) of the Constitution – appointments



# Beyond purposive interpretation: reasonableness review

- Reasonableness review is the essence of human rights litigation under our Constitution
- Interpretation of right followed by reasonableness review or limitation analysis under section 36 of the Constitution
- Weigh up right limitation against policy objective
- Limitation must always be rational
- Limitation must always also be reasonable
  - Proportionality analysis
- Every right is a right to ask “why” – rights are triggers not trumps
- Politics not an exhibition of power (majoritarianism) but of public reason

# Is purposive interpretation possible here?

- Purposive constitutional interpretation is an art not a science; a mode of thinking or reflection
- Is interpretation possible in modern multi-party legislatures?
- In dominant party democracies?
- Some constitutional scholars contrast Court and Council
  - Court a forum of principle; Council a forum of power
- But both Court and Council swear allegiance to Constitution (section 62(6) and 174(8))
- As long as allegiance holds, purposive interpretation must still be possible here:
- *UDM* secret vote of no confidence case:
  - [79] “Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail”.