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A Comparison Between the Modalities of Interpreting Tax Legislation Applied in South Africa and Australia

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Abstract
Grammatical, purposive, contextual, teleological and comparative interpretations are the most commonly used modalities for construing statutory texts. In Australia, interpretation of tax laws involves a combination of taking account of the law-text, its context, and its underlying purpose or policy. Ultimately, the meaning ascribed must be that which best reflects and gives effect to the legislature's intention as emerging from the statute. A value-based (teleological) interpretive approach does not, as yet, have a strong foothold in Australian jurisprudence, except to a limited extent under, for example, s 30 of the *Human Rights Act 2004* (ACT) and s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In South Africa, on the other hand, the basic approach to interpreting tax legislation is that its words are to be construed by reading and understanding the whole text in the light of its broader context. A meaning assigned must be appropriate and consistent within the limits of (i) the language of the text, (ii) the context and purpose of the text, (iii) the overall objectives of the legislation, and (iv) the relevant values and/or fundamental rights arising from the Constitution of the Republic of South Africa 1996 ('the SA Constitution'). As a result of the SA Constitution's supremacy and the provisions of s 39(2) therein, the meaning ascribed to a law-text must be that which, all legally relevant things considered, best promotes the spirit, purport and objects of the Bill of Rights.

Keywords
constitution, legislative, clarity, fiscal

A COMPARISON BETWEEN THE MODALITIES OF INTERPRETING TAX LEGISLATION APPLIED IN SOUTH AFRICA AND AUSTRALIA

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Grammatical, purposive, contextual, teleological and comparative interpretations are the most commonly used modalities for construing statutory texts. In Australia, interpretation of tax laws involves a combination of taking account of the law-text, its context, and its underlying purpose or policy. Ultimately, the meaning ascribed must be that which best reflects and gives effect to the legislature's intention as emerging from the statute. A value-based (teleological) interpretive approach does not, as yet, have a strong foothold in Australian jurisprudence, except to a limited extent under, for example, s 30 of the *Human Rights Act 2004* (ACT) and s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In South Africa, on the other hand, the basic approach to interpreting tax legislation is that its words are to be construed by reading and understanding the whole text in the light of its broader context. A meaning assigned must be appropriate and consistent within the limits of (i) the language of the text, (ii) the context and purpose of the text, (iii) the overall objectives of the legislation, and (iv) the relevant values and/or fundamental rights arising from the Constitution of the Republic of South Africa 1996 ('the SA Constitution'). As a result of the SA Constitution's supremacy and the provisions of s 39(2) therein, the meaning ascribed to a law-text must be that which, all legally relevant things considered, best promotes the spirit, purport and objects of the Bill of Rights.

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean - neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be the master – that's all." (Lewis Carroll)[1]

I INTRODUCTION

South Africa (SA) has a panoply of fiscal laws distending its statute books which are notoriously complex: their provisions are highly technical, they are not always models of legislative clarity, and they use terminology which is often undefined. This leads to taxpayers and tax administrators wrestling with the meaning of words. This exemplifies the importance of interpretation. In a wide sense, interpretation is an objective, intellectual process of ascribing an appropriate meaning to words.[2] Interpretation is a matter of law, not fact.[3] It is also not a free-wheeling exercise, or an exact science or mechanical process in which a meaning can be ascertained with strict, clinical

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1 Carroll L (Charles L Dodgson) *Through the Looking-Glass* (1934) 205.
2 *Mistry v Interim Medical and Dental Council of SA* 1998 (4) SA 1127 (CC) [3].
3 *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) [39].

precision 'of join-the-dots or paint-by-numbers'.[4] Rather, interpretation is a craft in which a fair and practical meaning[5] is ascribed to words through juridical logic and sound reasoning using a web of accepted aids, maxims and canons. As a process, interpretation cannot be compartmentalised. It is a unitary, integrated exercise.[6] The most commonly used modalities of statutory interpretation are grammatical, purposive, contextual, teleological and comparative. These are interrelated but competing modes that serve as indexes when a meaning of a law-text is to be determined. These techniques are complementary of each other and each may also be resorted to during a single interpretive exercise.

In SA, courts interpret tax legislation by utilising the aforementioned techniques in conjunction with the *Interpretation Act 1957* and by applying traditional rules that originate from the common law, a mixture of Roman-Dutch and English law. All this is subject to the SA Constitution and the scheme of values stemming from it. Adopting a comparative methodology, this article aims to analyse the general approach of South African courts to the interpretation of tax legislation and to contrast it with that applied by their Australian counterparts. Australia is used for comparative purposes because courts in SA rely on Australian jurisprudence, particularly in the sphere of taxation because of the similarity between provisions enacted in tax statutes.[7] The usefulness of foreign sources is, naturally, subject to limits. They are to be approached with due caution.[8] This is because foreign precedent cannot, without more, be transplanted wholesale onto the domestic scene of a sovereign nation. Therefore, whilst interpreters of statutes ought to think global, they must act local.[9] In other words, allowance must always be made for a local context, the language and subject matter of the law-text being construed, and any other relevant consideration relating to local conditions that may affect the application of a right or duty, or the operationalisation of a statutory provision in one country as opposed to a foreign State.

The structure of the discussion in this article is as follows: Part 2 outlines the present judicial attitudes to a literal interpretive methodology. Parts 3 and 4 respectively canvass the modern trend toward purposive *cum* contextual interpretation. Part 5 deals with the degree to which fundamental values plays a role in the interpretation of statutes. Finally, the conclusion will draw together the cardinal principles distilled from the discussion in each of the preceding parts with a view to concluding that, whilst the approaches adopted in SA and Australia to interpreting tax legislation share important common features, they also differ in material respects.

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4 Botha CJ *Statutory Interpretation: An Introduction for Students* 4 ed (2010) 1. Also, see Tokeley K 'Trends in statutory interpretation and the judicial process' (2002) 33 Victorian University of Wellington Law Review 965, 966.

5 A "commercial meaning" must be given to a concept used in tax legislation. See *CSARS v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA) [34]; *CLDC v CSARS* [2016] ZATC 6 (5 September 2016) [15].

6 *Arataki Honey Ltd v Minister of Agriculture and Fisheries* [1979] 2 NZLR 311, 314; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) [12].

7 See, for example, *Richards Bay Iron & Titanium (Pty) Ltd v CIR* 1996 (1) SA 311 (A) and *CSARS v Foskor (Pty) Ltd* [2010] 3 All SA 594 (SCA).

8 *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) [20]-[24].

9 Udombana NJ 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5(1) *African Human Rights LJ* 47, 58. See also *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) 160G-H.

II LITERALISM: A DEAD HORSE IN CONTEMPORARY JURISPRUDENCE?

Historically, courts in Australia[10] and SA[11] adopted a literal approach to interpreting statutes. In SA, this was referred to as the 'golden' rule of interpretation.[12] The cardinal tenet of that approach, which has its origins in English law as exemplified in *IRC v Duke of Westminster*,[13] is that an interpreter must ascertain the legislature's intention with reference only to the language used and then, once determined, give effect thereto by stamping a particular meaning with the legislature's *imprimatur* by way of parliamentary intent. Literalism in this sense resulted in judicial deference to, and utmost respect for, a statutory text and the legislature's will as expressed therein. This plain meaning, or 'objective', approach is an embodiment of the rule *iudicis est ius dicere sed non dare* ('it is the function of a judge to interpret the law and not to make it').[14] The essence of the literal (or textual) approach is usefully captured in the following Australian *dictum* per Higgins J:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning even if we consider the result to be inconvenient or impolitic or improbable.[15]

As is evident from the aforequoted extract, a literal approach to interpretation views a law-text through a narrow lens that isolates the text from its context. This may lead to a distorted meaning. A further shortcoming of this interpretive mode is that it pays little attention to unfairness or inequity that may be caused by the adoption of a strict, literal meaning. Indeed, this interpretive mode was partly responsible for grave injustices perpetrated in SA during its apartheid era through the judicial enforcement of laws in which Parliament authorised, *inter alia*, racial segregation, discriminatory land expropriations without payment of compensation, the denial of basic human rights to Blacks,[16] the creation of Bantustans (homelands) for certain Blacks, and, generally, the unequal and unfair treatment of Black people. Thus, literalism enabled a dominantly executive-minded judiciary in apartheid SA to interpret Parliament's will as expressed in the plain words utilised in a statute and then to permit its enforcement on the basis that Parliament intended the hardship complained of by those who were adversely affected by the legislation.[17] In such instances

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10 See *FCT v Westraders Pty Ltd* (1980) 144 CLR 55.

11 See *Treatment Action Campaign v Rath* [2008] 4 All SA 360 (C) [36]-[40].

12 Sher AJ, in *Ahmed v Minister of Home Affairs* [2016] JOL 36695 WCC [15], refers to this as a "genuflective approach" to interpretation. Kirby M 'Statutory interpretation: The meaning of meaning' (2011) 35(1) *Melbourne University Law Review* 113, 116 points out that the literal rule is premised on the "notion that a word of the English language has a single, objective and scientific meaning".

13 (1936) AC 1, 19. See also *Partington v Attorney General* 21 LT 370.

14 See Haysom N & Plasket C 'The war against law: Judicial activism and the Appellate Division' (1988) 4(3) *South African Journal of Human Rights* 303.

15 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161-162. See also *NAAV v Minister for Immigration and Multicultural Affairs* (2002) 193 ALR 449 (FCA) [430]-[433].

16 The term 'Blacks' was historically used by the Apartheid Government. This paper's use of the word is merely a reflection of historical facts and is not intended to offend.

17 Regrettably, this 'old' orthodox methodology was used in certain cases after SA's political freedom in 1994. This reflected an untransformed judicial mindset steeped in the adherence to the common law traditions of interpretation which brought about results that offended the values of the Constitution (discussed below at 5.1). See, for example, *Kalla v The Master* 1995 (1) SA 261 (T) 269C-G; *S v F* 1999 (1) SACR 571 (C); *CSARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) 273.

the common law presumption that the legislature does not intend harsh or unjust results was held to be rebutted by the provisions of the statute.

In Australia, the literal approach to interpretation was tempered, to a degree, by the golden rule enunciated in *Grey v Pearson*.[18] In terms thereof, if the ordinary and grammatical meaning of words would give rise to an absurdity, repugnance or inconsistency with the remainder of the statute which the legislature could not have contemplated, then in such event the ordinary and grammatical sense of the words may be modified to avoid the absurdity, repugnance or inconsistency, as the case may be, in favour of a construction that would give effect to a result consonant with the legislature's intention. Similarly, in SA, a literal meaning was adopted and enforced, unless a court was satisfied that such meaning would lead to an anomaly, absurdity, inconsistency or hardship that was unintended by the legislature.[19]

In SA, literalism was applied in conjunction with certain rebuttable common law presumptions, some of which continue to have relevance in a post-apartheid SA as auxiliary aids of interpretation.[20] An interpretive presumption applies in instances where there is uncertainty or doubt about the true meaning of a statutory provision.[21] The presumptions include: that a legislature does not intend irrational, unjust, unfair, unreasonable or inequitable results;[22] that a legislature does not intend to enact invalid or purposeless provisions;[23] that legislation does not intend to alter the existing law more than is necessary; that a legislature does not intend to bind the State or organs of state;[24] that a legislature does not intend statutes to operate extraterritorially;[25] that the legislature uses language consistently so that the same words bear the same meaning throughout an enactment;[26] that a legislature intends to advance the public interest; that modes of conduct in a statute refer to legally valid and/or permissible conduct; that statutes operate prospectively;[27] and the presumption against double taxation.[28] A presumption is rebutted if, in a

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18 (1857) 6HL Cas 61, 106. See also *Adler v George* (1964) 2 QB 67.

19 *Bhyat v Commissioner of Immigration* 1932 AD 125, 129.

20 For a discussion of the common law presumptions and their application generally, van Staden M 'A comparative analysis of common-law presumptions of statutory interpretation' (2015) 26(3) *Stell Law Review* 550, 556-581.

21 *CIR v Insolvent Estate Botha t/a Trio Kulture* 1990 (2) SA 548 (A) 559.

22 *S v Mhlungu* 1995 (3) SA 867 (CC) [36].

23 *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC) [57].

24 *Administrator Cape v Raats Röntgen and Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A) 262A. Du Plessis L *Re-interpretation of Statutes* (2007) 176-177 contends that this presumption "is inherently incompatible" with constitutionalism and the democratic value of legality engrained in the rule of law.

25 *Minister of Law and Order, KwaNdebele v Mathebe* 1990 (1) SA 114 (A).

26 *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) [47]; *3M South Africa (Pty) Ltd v CSARS* [2010] 3 All SA 361 (SCA) [25].

27 For the rules governing retrospective statutory provisions, see *Fouldien v House of Trucks (Pty) Ltd* (2002) 23 ILJ 2259 (LC) [9]; *3M South Africa (Pty) Ltd v CSARS* [2010] 3 All SA 361 (SCA) [34]-[36]; *ITC 1882* (2016) 78 SATC 165, 170; *Pienaar Brothers (Pty) Ltd v CSARS* [2017] ZAGPPHC 231 (29 May 2017). For a discussion of the presumption against retrospectivity, see de Ville JR *Constitutional & Statutory Interpretation* (2000) 204-215; van Staden M n 20, 568-570. Also, see Laitos JG 'Legislative retroactivity' (1997) 52 *Washington University Journal of Urban and Contemporary Law* 81; Fisch JE 'Retroactivity and legal change: An equilibrium approach' (1997) 110(5) *Harvard Law Review* 1055; Troy DE 'Toward a definition and critique of retroactivity' (2000) 51(3) *Alabama Law Review* 1329; Bobbett CS 'Retroactive or retrospective? A note on terminology' (2006) 1 *British Tax Review* 15.

28 *Isaacs v CIR* 1949 (4) SA 561 (A).

particular context, its operation would be inconsistent with an express or implied provision in a statute being construed.

In SA and Australia,[29] in relation to tax legislation, literalism was applied together with a 'special' rule known as *contra fiscum*. In terms of this rule, which brings about a restrictive interpretation, if a taxing provision is ambiguous in the sense that one reasonably inferred meaning places a more onerous burden on a taxpayer than another reasonably capable meaning, then, unless a manifest, contrary intention appears, such ambiguity is resolved by giving effect to the least onerous burden.[30] In other words, the statute is construed against the *fiscus*.[31] The *contra fiscum* rule embodies the common law maxim *semper in dubiis benigniora praeferenda sunt* ('in cases of doubt the most beneficial interpretation is always to be preferred') which is traditionally expressed as a presumption favouring the least arduous or burdensome interpretation.[32] The *contra fiscum* rule may be applied provided that the mischief rule is not contravened. In terms of this latter rule, effect must be given to a construction which best advances the achievement of a statute's purpose over one that does not.[33] Consequently, giving effect to a construction of an ambiguous provision that is more favourable to a taxpayer must be consistent with the legislature's aims emerging from the statute.[34] Put differently, the rule in *contra fiscum* ought not to apply in situations where its application would undermine the attainment of the legislature's aim in the sense that it advances the mischief or defect which the statute seeks to cure.

At the heart of literalism lies the notion that a legislature's intention must prevail. Parliament is SA's highest legislative authority. However, the SA Constitution has displaced parliamentary sovereignty with constitutional supremacy.[35] This means that the supreme SA Constitution (or *lex fundamentalis*) is a permanent point of reference at the apex of the *Rechtsstaat* (or constitutional State) in SA. Hence, Parliament is subject to the SA Constitution.[36] Its will is subservient to, and qualified by, the SA Constitution. Parliamentary intent is, thus, no longer the litmus test for interpretation. Constitutional supremacy dictates that every interpretation of legislation must be reconcilable with the SA Constitution. Since strict adherence to a statute's *ipsissima verba* risks doing violence to the spirit, purport and objects of the Constitution, such an interpretive methodology is impermissible

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29 In Australia, see *Anderson v Commissioner of Taxes (Vic)* (1937) 57 CLR 233, 239; *Western Australia Trustee Executor and Agency Co Ltd v Commissioner of State Taxation* (1980) 80 ATC 4567. Also, see Burton M 'The rhetoric of tax interpretation – where talking the talk is not walking the walk' (2005) 1(3) *Journal of the Australasian Tax Teachers Association* 1. In SA, see, *Estate Reynolds v CIR* 1937 AD 57, 70; *Israelsohn v CIR* 1952 (3) SA 529 (A) 540; *Glen Anil Development Corporation v SIR* 1975 (4) SA 715 (A) 726; *Conshu (Pty) Ltd v CIR* 1994 (4) SA 603 (A); *Shells Annandale Farm (Pty) Ltd v CSARS* [2000] JOL 5948 (C); *CSARS v Multichoice Africa (Pty) Ltd* 2011 JDR 0275 (SCA) para 19. Goldswain GK *The Winds of Change- An Analysis and Appraisal of Selected Constitutional Issues Affecting the Rights of Taxpayers* (unpublished Doctor of Accounting Science thesis, University of South Africa, 2012) 37 67 74-78 contends that the *contra fiscum* rule is incorporated indirectly into the Constitution through s 8(3) thereof recognising the common law as being part of the law of SA.

30 Kirby J, in *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd* (1995) 38 NSWLR 173, 175 rejected the notion that ambiguities must, as a rule, be interpreted in favour of a taxpayer.

31 *Dibowitz v CIR* 1952 (1) SA 55 (A) 61. In SA, the *fiscus* is duly represented by the Commissioner of the South African Revenue Service ('SARS'). See *CIR v I H B King; CIR v A H King* 1947 (2) SA 196 (A) 216.

32 Du Plessis L n 24, 161.

33 *Heydon's case* (1584) 3 Co Rep 7a, 7b.

34 *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd* n 29, 175.

35 Section 2 reads: "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

36 *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) [25].

within the discipline of SA's constitutional values.[37] Section 39(2) of the SA Constitution, discussed below at 5.2, does not identify authorial intention as relevant to statutory interpretation. Thus, the constitutionally enjoined approach to interpretation does not entail giving effect to the legislature's intention.[38] This is echoed in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[39] where parliamentary intention was characterised as a misnomer and fiction. At para 20, the following is stated per Wallis JA:

> Many judges and academics have pointed out that there is no basis upon which to discern the meaning that the members of Parliament or other legislative body attributed to a particular legislative provision in a situation or context of which they may only dimly, if at all, have been aware. Taking Parliament by way of example, legislation is drafted by legal advisers in a ministry, redrafted by the parliamentary draftsmen, subjected to public debate in committee, where it may be revised and amended, and then passed by a legislative body, many of whose members have little close acquaintance with its terms and are motivated only by their or their party's stance on the broad principles in the legislation. In those circumstances to speak of an intention of parliament is entirely artificial. The most that can be said is that in a broad sense legislation in a democracy is taken to be a reflection of the views of the electorate expressed through their representatives, although the fact that democratically elected legislatures sometimes pass legislation that is not supported by or unpopular with the majority of the electorate tends to diminish the force of this point. (footnotes omitted)

The aforequoted *dictum* is authority for courts in SA to steer away from reference to the intention which the persons responsible for the statutory text may have had in their minds when they selected the statutory words. Thus, 'intention of the legislature' is in SA, for interpretational purposes, largely inapposite, except perhaps as shorthand when referring to the legislature's purpose or the mischief it aims to cure. Whilst a guiding principle remains that effect cannot be given to a meaning that would lead to either an absurdity or to a result that would stultify the efficacy of the legislation,[40] it is accepted practice that, as a starting point, the plain, ordinary, natural, dictionary meaning of the words must be determined.[41] This is the meaning they bear in common parlance or in ordinary colloquial speech.[42] This mode is referred to as grammatical (or textual) interpretation. This is, however, only a point of departure. Once a grammatical sense of the text is ascertained, then consideration must be given to whether that meaning is congruent with the context and purpose of the law-text.

Unlike their South African counterparts, Australian courts continue to resort to legislative intention as a legal basis for statutory interpretation. The judicial stamp of approval for this approach is evident in *Singh v The Commonwealth*[43] where Gleeson CJ refers to intention of the legislature as an 'orthodox' and 'legitimate term' of legal analysis, provided that the objective of its use is not

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37 *S v Mhlungu* n 22 [2]-[24].

38 *Mansingh v General Council of the Bar* 2014 (2) SA 26 (CC) [27]. Also see Michelman FI 'Constitutional authorship, "Solomonic solution", and the unoriginalist mode of constitutional interpretation' 1998 *Acta Juridica* 208, 219; Moseneke D 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18(3) *South African Journal of Human Rights* 309, 316. De Ville JR n 27, 36 contends that a resort to authorial intention as a basis for interpretation is an evasion of responsibility for judicial decision-making and must be avoided.

39 2012 (4) SA 593 (SCA) [20].

40 *S v Zuma* 1995 (2) SA 642 (CC) [13]-[14].

41 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) [88]-[92].

42 *Association of Amusement & Novelty Machine Operators v Minister of Justice* 1980 (2) SA 636 (A) 660.

43 (2004) HCA 43 [19]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518.

'overlooked'. Similarly, in *NAAV v Minister for Immigration and Multicultural Affairs*,[44] French J characterised legislative intention as a 'legitimising and normative term' that "directs courts to objective criteria of construction which are recognised as legitimate". Accordingly, whilst the notion of legislative intention remains a dominant theme of Australian jurisprudence, the SA Constitution, as interpreted by the judiciary in SA has, by and large, dealt it a fatal blow. Despite this difference, the courts in SA and Australia have moved from a dogmatic adherence to a literal approach to interpretation in favour of a purposive *cum* contextualist approach. These interpretive modes will now be discussed.

III CONTEXTUAL INTERPRETATION

'In law, context is everything.'[45] Statutory words would be meaningless if they are read in the abstract or in isolation from their context.[46] Put differently, a word must 'take its colour, like a chameleon, from its setting and surrounds'.[47] Grammar, syntax and dictionary meanings are 'merely principal (initial) tools rather than determinative tyrants'.[48] Therefore, interpretation ought not to involve excessive peering at the language of a text without sufficient attention to its context.[49] This is referred to as contextual (or systematic) interpretation. In this mode, a meaning is ascribed to words according to, *inter alia*, its legal traditions and the linguistic usages thereof.[50] This 'does not imply a return to literalism and the orthodox 'plain meaning rule' but merely accepts the authoritative … text as a very important piece in the jigsaw puzzle of … interpretation.'[51]

An issue requiring consideration is which factors are relevant and admissible in determining the context of a provision[52] In Australia, it has been held that 'the modern approach to statutory interpretation …. uses 'context' in its widest sense to include such things as the existing state of the law and the mischief … which the statute was intended to remedy'.[53] Therefore, in Australia, contextual considerations include those internal and external material that aid in determining the meaning of a statutory provision.[54] Relevant internal material include the statute's long title, preamble, definitions section, and any other provision that may shed light on the meaning of the words being construed. In accordance with s 15AB(2) of the *Acts Interpretation Act 1901* (Cth),

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44 (2002) 193 ALR 449 (FCA) [430]-[433].

45 In SA, see *Aktiebolaget Hassle v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) [1]. In Australia, see *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 187 CLR 384, 408.

46 In SA, see *Novartis v Maphil* 2016 (1) SA 518 (SCA) [28]. In Australia, see *Cooper Brookes (Wollongong) (Pty) Ltd v Commissioner of Taxation* (1980) 147 CLR 297, 304.

47 *Standard General Ins v Commissioner for Customs and Excise* 2005 (2) SA 166 (SCA) [25]; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) [53].

48 *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) [17].

49 *Jaga v Dönges NO; Bhana v Dönges NO* 1950 (4) SA 653 (A) 664H, quoted with approval in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* n 40 [90].

50 *S v Zuma* n 39 [14]-[15].

51 Botha CJ n 4, 122. Wallis JA, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* n 38 [19], states that the proper approach to interpretation is one that "considers the context and the language together, with neither predominating over the other".

52 For the contextual considerations taken into account in SA, see *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) [40]-[42]; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) [22]; *South African Police Service v Public Servants Association* n 47 [20]; *Haffejee NO v eThekwini Municipality* 2011 (6) SA 134 (CC) [30]; *Mansingh v General Council of the Bar* n 37 [22]-[23].

53 *CIC Insurance Ltd v Bankstown Football Club Ltd* n 44, 408.

54 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 396–397.

relevant external material include the Second Reading Speech,[55] any relevant reports, explanatory memoranda,[56] and any treaty or international agreement referred to in a statute.[57] In *Tabcorp Holdings Ltd v Victoria*[58] consideration was even given to the commercial context in which the *Gambling Regulation Act 2003* (Vic) was enacted so as to determine whether Tabcorp was entitled to the financial benefits of the terminal payment provision in the new gaming and wagering license regime under s 4.3.12.

In SA, contextual interpretation "is not limited to the language of the rest of the statute 'as throwing light of a dictionary kind on the part to be interpreted' and 'often of more importance is the matter of the statute, its apparent scope and purpose and within limits, its background'".[59] Thus, in SA, context[60] includes (i) the law-text and its interplay with other internal content of the enactment which may reveal the text's purpose (such as, the preamble, postamble, definitions clause, schedules, long title and short title),[61] (ii) 'the consequences in relation to justice and convenience of adopting one view rather than another',[62] and (iii) extraneous or extra-textual *indiciae* (such as, legal precedent, earlier 'kindred' legislation,[63] *travaux preparatoires*,[64] evolving standards and the normative framework of the Constitution,[65] the aims of an open and democratic society, any relevant social, economic, historical and institutional factors, the factual matrix, the mischief aimed at,[66] the existing state of the law, and any explanatory memoranda).[67]

In SA, whilst extra-curial *indiciae* may be explored to determine a legislature's aim, it is impermissible to use extrinsic aids in a way that would add to, or modify, or contradict a statute. By virtue of the principle of separation of powers,[68] judicial officers ought not to trespass onto the lawgiver's terrain

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55 Heydon J, in *Lacey v Attorney-General (QLD)* (2011) 242 CLR 573, 605 states: "Excessive recourse to second reading speeches is one of the blights of modern litigation."

56 Mason CJ, Wilson and Dawson JJ, in *Re Bolton: Ex parte Beane* n 42, 518, cautioned: "The words of a Minister must not be substituted for the text of the law."

57 The Court, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, held: "Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text." See also *Catlow v Accident Compensation Commission* (1989) 167 CLR 543. Section 15AB(3) sets forth a threshold which must be met in order that external material may be relied on for interpretational purposes. See *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416, 420. A discussion of s 15AB(3) is beyond this article's scope.

58 (2016) 328 ALR 375.

59 *Ahmed v Minister of Home Affairs* 2017 (2) SA 417 (WCC) [15].

60 Du Plessis LM & de Ville JR 'Bill of Rights interpretation in the South African context (3): Comparative perspectives and future prospects' (1993) 4(3) *Stell Law Review* 356, 367 use "intra-textual contextualisation" and "extra-textual contextualisation" to refer to internal and external factors respectively that may influence and shape a law-text so that they may be useful interpretive aids.

61 *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) [33].

62 *Leibbrandt v South African Railways* 1941 AD 9 12-13. See also *Kuhne & Nagel (Pty) Ltd v Elias* 1979 (1) SA 131 (T) 133E-F.

63 De Ville JR n 26, 233-234.

64 *Mansingh v General Council of the Bar* n 37 [27].

65 *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [18]; *South African Police Service v Public Servants Association* n 47 [19].

66 *Sarrahwitz v Martiz NO* 2015 (4) SA 491 (CC) [39].

67 *CLDC v CSARS* [2016] ZATC 6 (5 September 2016) [25]; *XO Africa Safaris v CSARS* (unreported case no. 395/15) [2016] ZASCA 160 (3 October 2016) [20].

68 See O' Regan K 'Checks and balances – reflections on the development of the doctrine of separation of powers under the South African Constitution' (2005) 8(1) *Potchefstroom Electronic Law Journal* 120; Langa P 'Symposium: "A delicate balance": The place of the judiciary in a constitutional democracy: The separation

to 'fill the gap'[69] in a statute by way of 'amendment, enactment or innovation'.[70] Some dosage of deference is required. In Australia, a court may read words into a statute if, by inadvertence, Parliament failed to deal with an eventuality that is required to be dealt with in order to achieve the purpose of a statute.[71] In SA, words may only be read into a statute out of necessity where, without it, effect cannot be given to the statute as it stands due to a constitutional defect.[72]

If a statutory provision is reviewed through the prism of the Constitution and found to be inconsistent therewith, then, in accordance with s 172(1)(*b*) of the Constitution that permits the granting of 'just and equitable' relief, a court *may* read words into the relevant statute in order to bring the impugned provision into line with the Constitution. Reading-in is a remedial measure that may be utilised in exceptional circumstances where it is just and equitable to do so to save the impugned legislative provision. Owing to the principle of separation of powers between the three branches of government, courts are to exercise this power sparingly.[73] South Africa's apex court, namely, the Constitutional Court, has articulated principles that ought to guide judicial officers when considering if the technique of reading-in is to be employed.[74] These principles are: (i) a provision to be read into a statute should be consonant with the Constitution; (ii) the result achieved by reading-in should interfere with an enacted law as little as possible; (iii) a court should define with sufficient precision how a statute may be extended in order that it complies with the Constitution; (iv) a court should be as faithful as possible to the legislative scheme or purpose within the constraints of the Constitution; and (v) even if the remedy of reading-in is justified in a particular instance, it ought not to be used where it would bring about an unsupportable budgetary intrusion on the State or an organ of state.

A *Purposive Interpretation in Australia*

Australian jurisprudence has migrated from a literal (or constructionist) approach towards a purposive methodology where words are given a meaning that, viewed through the prism of their statutory context, gives effect to the legislature's discernable intent, that is, the legislation's true 'purpose and spirit'.[75] This interpretive approach accords with the common law rule that, so far as is reasonably possible, effect ought to be given to a provision's purpose. Thus, purposive interpretation may be traced to the mischief rule established in *Heydon's Case supra*.[76] In terms thereof, discussed above in 2, words are given a meaning which is consistent with a statute's underlying purpose ('mischief'). However, purposive interpretation is broader in scope than the mischief rule.

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of powers in the South African Constitution' (2006) 22(1) *South Africa Journal Human Rights* 2; Venter F 'Judges, politics and separation of powers' (2007) 21(1) *SJ* 60; Mojapelo PM 'The doctrine of separation of powers (a South African perspective)' (2013) 26(1) *Advocate* 37.

69 *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) [52].

70 *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) [100].

71 *Birmingham v Corrective Service Commission of New South Wales* (1988) 15 NSWLR 292, 302.

72 *Medox Ltd v CSARS* 2015 (6) SA 310 (SCA) [16].

73 *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) [82]-[84].

74 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) [74]-[75]; *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality* 2015 (6) SA 115 (CC) [27]-[28].

75 *IRC v McGuckian* (1997) 1 WLR 991, 1005 (per Lord Cooke).

76 Lonnquist T 'The trend towards purposive statutory interpretation: Human rights at stake' (2003) 13(1) *Revenue Law Jorunal* 18, 20.

This purposive approach is predicated on the assumption that a legislature, being a rational body, acts reasonably having regard, on the one hand, to its purpose or policy in enacting a statute, its constitutional role and those of the other government branches and, on the other hand, to the rights, freedoms and immunities that the common law protects because they are important in a constitutional democracy.[77] A statute's purpose may, however, only be used rationally to elucidate a provision's aim if the statute's objects is identified at an acceptable 'level of specificity'[78] or rationality.[79]

Purposive interpretation does not entail determining the actual, subjective intention which the legislature had in mind when it passed a law. Rather, it entails inferring an intention by ascertaining the statute's objective purpose having regard, *inter alia*, to the legislative scheme and the objective evidence in authorised materials.[80] The materials referred to here are the various internal and external contextual factors discussed above in 3.

Purposive interpretation is given Federal Government force in s 15AA of the *Acts Interpretation Act 1901* (Cth). It reads:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.[81]

Although s 15AA refers to the contemporaneous existence of "other interpretation[s]", its operation is not dependent on the presence of an ambiguity or inconsistency in the provision being construed.[82] An interpretation of s 15AA reveals that the directive therein does not apply in every instance of statutory interpretation. Rather, it only applies when a provision is susceptible to more than one plausible meaning. In such instances, an interpreter is directed to select and give effect to a construction which, in the particular circumstances of the case, best advances the statute or provision's ascertained purpose and does not frustrate, hinder or defeat its attainment. Since s 15AA does not demand a purposive construction in every instance, it is an important but not decisive step towards bringing about a pure purposive approach to interpretation.

B *Purposive Interpretation in South Africa*

In SA, purposive interpretation derives its force from judicial *fiat*. Purposive interpretation gives effect to a meaning which best advances the fulfilment of the broader aims of a statute.[83] The

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77 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* n 56.

78 Justice John Middleton "Statutory interpretation – mostly common sense" (speech delivered at the Melbourne University Law Review Annual Lecture, 14 April 2016).

79 Burton M n 28, 15.

80 Burton M n 28, 15.

81 Similar provisions to s 15AA exist in interpretation statutes adopted by various States and Territories. For example, s 33 of the *Interpretation Act 1987* (NSW) reads: "In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object."

82 Lonnquist T n 75, 21 (and the authorities cited there).

83 *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) [17]-[20]. For a useful summary of the factors considered by South African courts when ascertaining legislative purpose, see *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC) 422. See also Goldswain GK

purpose of a statute, which is distinct from the mischief that the statute, or a provision in it, aims to overcome or cure,[84] is reflected in the statute's language read with its underlying policy or object, as well as the overall legislative scheme. If a provision is susceptible of more than one meaning, then a sensible meaning is to be preferred over one that "leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation".[85] To be valid, a legislative purpose must be fair, just and reasonable, each of which are universally recognised norms of a democratic society. The rule of law, another universal norm, demands the existence of a rational connection between a legislative purpose and the means chosen by the lawgiver to give effect to such aim. This salutary legal principle demonstrates that in the *Rechtsstaat* of SA based on the rule of law, a founding value in s 1(c) of the Constitution, "justice is not a cloistered virtue".[86] In view of the foregoing, the remit of purposive interpretation is considerably wider than the literal approach to interpretation discussed above at 2. As such, a purposive interpretation avoids the "austerity of tabulated legalism"[87] that is a hallmark and weakness of literalism.

C *Purposive Interpretation of Statutory Provisions Limiting Fundamental Rights*

Tax legislation often confers power on a tax administration authority that, if exercised, would encroach on a fundamental right recognised in the Bill of Rights ('BOR') of the Constitution (in SA)[88] or the *Human Rights Act 2004* (ACT) or the *Charter of Human Rights and Responsibilities Act 43/2006* (Vic).[89] In SA and in Australia, the validity of an infringement of a protected fundamental right is determined purposively. For example, in SA, the *Tax Administration Act 2011* ('TAA') empowers SARS to conduct warrantless inspections (s 45) and searches and seizures (s 63).[90] These

'The purposive approach to the interpretation of fiscal legislation – the winds of change' (2008) 16(2) *MA*R 107, 117-119.

84 *Natal Joint Municipal Pension Fund v Endumeni Municipality* n 38 [21]-[22].

85 *Really Useful Investments 219 (Pty) Ltd v City of Cape Town* [2015] JOL 33067 (WCC) [21].

86 *S v Mamabolo* (*E TV and Others intervening*) 2001 (3) SA 409 (CC) [1], [27]. For the relationship between justice and equity in statutory interpretation, see van Zyl DH 'The significance of the concepts "Justice" and "Equity" in law and legal thought' (1988) 105(2) *South Africa Law Journal* 272, 279-280; Goldswain GK 'Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law' (2011) 15 *Southern African Business Review* 3-6, 8-12.

87 *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC) [27].

88 A fundamental right may not be waived. See *S v Shaba* [1998] 2 All SA 48 (T) 51. See also Hopkins K 'Constitutional rights and the question of waiver: How fundamental are fundamental rights?' (2001) 16(1) *South Africa Public Law* 122.

89 Australia does not have a federal legislative or constitutional Bill of Rights. In accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), all Bills introduced into its Federal Parliament must pass the muster of compatibility with human rights norms and standards. Certain Australian states and territories (such as Victoria and the Australian Capital Territory) have passed legislation that incorporate human rights protections for their respective citizenry.

90 The possibility that an unscrupulous SARS official acting with ulterior (impure) motives may abuse a power is no basis for challenging its constitutionality. See *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) [72]. The Court, in *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* 2015 (5) SA 370 (CC) [13], held: 'Whether a law is invalid is determined by an objective enquiry into its conformity with the Constitution. … A law that has been found to be inconsistent with the Constitution ceases to have any legal consequences.' However, this is not the position under, for example, s 32(3)(a) of the *Human Rights Act 2004* (ACT) and s 36 and s 37 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

powers limit a taxpayer's privacy protected by s 14 of the BOR.[91] Generally, fundamental rights are designed to curb the predatory appetites of the State and its inclination to place restrictions thereon for reasons that its functionaries consider appropriate in the public interest. The scope of every right guaranteed by the BOR must be determined by analysing its purpose, namely, the interests that it is meant to protect.[92] To this end, relevant considerations include: (i) the values underlying the right concerned, (ii) the character and larger objects of the BOR, (iii) the language used to articulate the specific right in question, (iv) the historical origin of the particular right, and (v) where applicable, the meaning and purpose of other rights with which the right in question is associated within the BOR's text or structure read holistically.

In SA, s 36(1) of the Constitution, which is comparable to s 28 of the *Human Rights Act 2004* (ACT)[93] and s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic),[94] sets the litmus test for validity of any law that limits a fundamental right. It reads:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.

The society referred to in s 36(1) is not the present South African society, but rather an abstract or ideal (Utopian) one.[95] A democratic society is 'a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all'.[96] The 'notion of an open and democratic society is … not merely aspirational or decorative, it is

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91 For a discussion of whether the limitations imposed by s 45 and s 63 of the TAA pass constitutional muster, see Moosa F 'The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing efficient and effective tax administration with taxpayers' rights' (unpublished LLD thesis, University of the Western Cape, 2016) 378-445.

92 *S v Makwanyane* 1995 (3) SA 391 (CC) para 9; *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) [16]-[17].

93 Section 28 reads: "(1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following: (a) the nature of the right affected; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve."

94 Section 7(2) reads: "A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including – (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the nature between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve."

95 Currie I & de Waal J *The Bill of Rights Handbook* 6 ed (2014) 146.

96 *Speiser v Randall* (1958) 357 US 513, 537.

normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply and the final measure we use for testing the legitimacy of impugned norms and conduct'.[97]

In tax cases in SA, the taxpayer must prove that a law infringes a fundamental right in the sense contemplated by s 36(1).[98] If proved, then the impugned statutory provision is considered to be *prima facie* unlawful.[99] Then the State or other litigant who seeks to enforce the limiting provision, bears the burden to show that constitutional justification exists for it.[100] In this context, the onus does not carry its usual connotation of a burden of proof, namely, on a balance of probability (in civil cases) or beyond reasonable doubt (in criminal matters). A special onus applies. It is simply a burden to justify the limitation.[101]

In a review of legislation concerning the validity of a limitation in relation to a fundamental right, s 36(1) expressly obliges a court to engage in purposive interpretation. Under s 36(1)(b), the importance of a limitation's purpose is a relevant factor when determining its constitutional validity. A limitation is not, in relation to s 36(1)(b), regarded as reasonable and justifiable for constitutional purposes unless a substantial State interest or legitimate public purpose justifies it.[102] Assessing the importance of a limitation's purpose involves a normative evaluation of the abstract weight to be attached to the interests and rights protected or promoted by the limitation. In this context, 'purpose' includes "the benefit that can be achieved by limiting the right and the importance of achieving that benefit in an 'open and democratic society based on human dignity, equality and freedom"'.[103] The "mere existence of a legitimate power or legal competence is not the purpose that must be noted for balancing purposes; the importance of the purposes for which such powers and competences are exercised must be determined".[104] The extent of a limitation must be weighed against its purpose, importance and effect: if, to an extent that meets the standards set by s 36(1),

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97 *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) [46].

98 Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-42. A legal provision is a 'limitation' under s 36(1) if it has the effect of curtailing, that is, restricting, impairing or encroaching on, the protected content, space or sphere of a fundamental right. A measure that eviscerates or negates a fundamental right by leaving nothing of its substance or essence intact, is not a 'limitation'. Rather, it is a revocation, abolition or suppression of the right. Such a measure cannot pass constitutional muster. It is incongruent with the values of a constitutional state. See Moosa F n 90, 314.

99 McQuoid-Mason D 'Invasion of privacy: Common law v constitutional delict – does it make a difference?' 2000 *Acta Juridica* 227, 246. Ngcobo J, in *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) [74], held that 'a constitutional right cannot be denied on the basis of mere speculation unsupported by conclusive and convincing evidence'. For analysis of the Constitutional Court's approach to evidential matters, see Bilchitz D 'How should rights be limited?' (2011) 3 *TSAR* 568, 573-574. For a discussion of the meaning of 'conclusive proof' and its distinction from 'prima facie proof', see *TM v NM* 2014 (4) SA 575 (SCA) para 14.

100 *Phillips v Director of Public Prosecutions, WLD* 2003 (3) SA 345 (CC) [19].

101 See *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC) paras 18-19; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders* 2005 (3) SA 280 (CC) [34]-[36].

102 *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC) para 65; *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) [55].

103 Rautenbach IM 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17(6) *PELJ* 2229, 2255.

104 Rautenbach IM n 102, 2255.

the benefit flowing from allowing an intrusion on a fundamental right outweighs the loss that the intrusion will entail, then the law will recognise the validity of the intrusion.[105]

Under s 36(1)(d), a limitation will not be reasonable and justifiable unless a strong causal link exists between the purpose of the law and the limitation imposed by it.[106] The greater the extent of a limitation, the more compelling its purpose must be and the closer the relationship must be between the means chosen and the ends to be attained.[107] Any limitation would be invalid if its purpose is incongruous with the Constitution.[108] This is part of the principle of legality in the rule of law, a constitutional value requiring a limitation to be rationally related to achieving or furthering a legitimate governmental purpose or State interest that serves a broader public interest for public benefit.[109] A rationality review is an objective enquiry[110] that does not need to show that the legislative provision is reasonable or appropriate.[111]

Revenue yielded from taxation enables the State to satisfy its positive duties arising from s 7(2) of the Constitution, namely, to "protect, promote and fulfil the rights in the Bill of Rights". Accordingly, and as a general rule, a compelling public need exists for SARS to be granted broad-ranging information gathering and other powers that would be part of its arsenal to manage tax collection and administration efficiently and effectively for the benefit of the *fiscus* and society at large by, *inter alia*, combatting tax leakages that impedes the South African government's ability to fulfil its constitutional mandate. These aims are congruent with the values of a democracy and are of such importance and incontestable necessity that, in certain circumstances, they would justifiably diminish the invasiveness of a limitation on a taxpayer's fundamental right.[112]

Interpretation ought, as far as is reasonably possible, to secure the fullest protection of a fundamental right. Thus, a limiting provision ought to be interpreted in the least restrictive way.[113] This requires "a generous construction over a merely textual or legalistic one".[114] Such a construction envisages a high degree of "flexibility" and "generosity".[115] Consequently, interpreters ought, generally, to construe a law-text in the widest possible way having regard to the spirit, ethos and tenor of the Constitution. These aspects must transcend the whole interpretive process.[116] However, if the context of a provision indicates that, in order to give effect to its true purpose, a narrower or specific meaning should be given to an affected fundamental right, then in such an instance, the more limited meaning ought to be ascribed to the right concerned so as to avoid an

105 *Midi Television (Pty) Ltd v DPP (Western Cape)* [2007] 3 All SA 318 (SCA) [11].

106 *Magajane v Chairperson, North West Gambling Board* n 101 [72].

107 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) [35].

108 *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) [123].

109 *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) [100]; *Minister of Home Affairs v Scalabrini* 2013 (6) SA 421 (SCA) [69].

110 *ARMSA v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) [50].

111 *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) [86], [89]-[90]. A finding of rationality must be reasonably supported by concrete evidence. See Erasmus DN *An Analysis of Challenging the Commissioner's Discretionary Powers Invoked in terms of Sections 74A and 74B of the Income Tax Act 58 of 1962 in light of the Constitution of the Republic of South Africa 108 of 1996* (unpublished PhD thesis, University of Kwa-Zulu Natal, 2013) 55 (and the authorities cited there at fn 143 and fn 144).

112 For a useful outline of the general purpose of tax, see *Gaertner v Minister of Finance* n 72 [50]-[55].

113 *SATAWU v Moloto NO* 2012 (6) SA 249 (CC) [43].

114 *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* n 46 [53].

115 Botha CJ n 4, 120.

116 *S v Acheson* 1991 (2) SA 805 (Nm) 813C.

"overshoot" [117] of the right's purpose. Ultimately, interpreters ought to construe statutory provisions "fairly and broadly, without being too astute or subtle in finding defects". [118]

As discussed more fully at 5.1 below, the Constitution contains an objective, normative legal framework. [119] Its provisions are to be interpreted broadly, liberally and purposively so that the Constitution can "play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation". [120] Accordingly, fundamental rights "conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law". [121] This is part of a "generous" and "full benefit" [122] interpretive approach that ought to be followed. However, as shown above, purposive interpretation within the discipline of s 36(1) of the Constitution is "predicated upon the purpose of a right, with the result being that the widest possible interpretation will not inevitably be the one which will be supported". [123]

IV VALUE-BASED INTERPRETATION

The foregoing discussion reveals that courts in SA and Australia are, in terms of s 36(1) of the Constitution, s 28(1) of the *Human Rights Act 2004* (ACT) and s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) respectively, enjoined to apply a principled, value-based approach when they interpret statutory provisions that limit human rights. In terms thereof, such provisions are to be interpreted and tested for validity with reference to norms and standards that are outside of the statute, namely, reasonableness and the fundamental values of a democratic society. [124] Examples of values of a universal nature are the rule of law, human dignity, equality, freedom, privacy, social justice, non-racialism, non-sexism, accountability, transparency, multi-party elections, and the advancement of human rights and freedoms. [125] Such values are, on the one hand, the building blocks of a democratic society and, on the other, the barometers or yardsticks that set legal requirements for an acceptable interpretation. A question to be answered is whether, in SA and/or the Australian Capital Territory, interpreters must apply fundamental values when construing legislation in general. The ensuing discussion will show that the answer to this question is 'yes' for SA and largely 'no' for Australia.

The *Constitution of the Commonwealth of Australia* ('the Australian Constitution') does not direct how statutes are to be interpreted. Section 15A of the *Acts Interpretation Act 1901* (Cth) requires interpretation to be faithful to, and respectful of, the Australian Constitution. [126] Since this

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117 *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia* [2011] 1 BLLR 15 (NmS) 3[[.] See also *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* 2010 (2) SA 181 (CC) [44]; *Soobramoney v Minister of Health (KwaZulu-Natal)* n 91 [17].

118 Per Hoexter JA in *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) 514B-F.

119 *Thebus v S* 2003 (6) SA 505 (CC) [27]-[28].

120 *S v Mhlungu* n 21 [8].

121 *S v Zuma* n 39 [15].

122 *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) [58].

123 Basson DA *South Africa's Interim Constitution: Text and Notes* (1994) 56.

124 Tokeley K n 4, 971.

125 These values are incorporated as part of the foundational ones listed in s 1 of the Constitution.

126 Section 15A reads: "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would,

instrument does not contain a Bill of Rights, interpretation through its prism does not entail interpretation through the lens of a rights charter.[127] This does not, however, mean that the process of interpretation is devoid of adherence to, or consideration of, human rights norms and standards. In the Australian Capital Territory, the *Human Rights Act 2004* (ACT) requires interpretation to be sensitive to human rights, their advancement and protection. Section 30[128] thereof requires that interpretation "must" occur in a manner "compatible with human rights". Although the word 'must' indicates that the duty imposed in s 30 is peremptory, a plain reading of its provisions reveals an internal shortcoming, namely, that s 30 only permits a human rights compatible meaning to the extent that this is possible in a manner consistent with a statute's purpose. If not, then the construction consistent with the legislature's purpose will prevail. This is so even though the meaning would give rise to a result that is not congruent with human rights norms and standards.

This is a clear indication that Parliament's will is supreme in Australia and fundamental values play a secondary role in statutory interpretation. This is unlike the position in SA where, as will be shown below, interpretation is directed at ascertaining whether the legislation is capable of an interpretation which conforms to fundamental values or principles of the supreme Constitution and, in so doing, promotes the spirit, purport and objects of the BOR.[129] This interpretive methodology will henceforth be discussed.

A *Teleological Interpretation of Legislation Under the Constitution*

The Constitution is an organic, *sui generis* instrument.[130] It is both backward- and forward-looking. By virtue of its supremacy (s 2), all laws are subject thereto and must be read as such. Therefore, a statute need not expressly incorporate the Constitution's terms into its text.[131] By virtue of

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but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

127 Tretola J 'The interpretation of taxation legislation by the courts – a reflection on the views of Justice Graham Hill' (2006) 16(1) *Revenue Law Journal* 73, 86-87 points out that Australian courts do not apply a value-based approach to statutory interpretation because, unlike New Zealand, there is no *Bill of Rights Act* applicable in Australia.

128 Section 30 reads: "So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights." Likewise, section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) reads: "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights." Accordingly, the discussion here in relation to s 30 of the *Human Rights Act 2004* applies equally in relation to section 32(1) of the 2006 Victorian statute.

129 For a discussion of valued-based interpretation, see Kruger J 'Is interpretation a question of common sense? Some reflections on value judgments in section 35' (1995) 28(1) *Comparative and International Law Journal of Southern Africa* 1; Kroeze IJ 'Doing things with values: The role of constitutional values in constitutional interpretation' (2001) 12(2) *Stell Law Review* 265; Venter F 'Utilizing constitutional values in constitutional comparison' (2001) 4(1) *Potchefstroom Electronic Law Journal* 20; Devenish GE '*Department of Land Affairs v Goedgelegen Tropical Fruits* – a triumph for teleological interpretation, an unqualified contextual methodology and the jurisprudence of ubuntu' (2008) 125(2) *South African Law Journal* 231; Singh A 'An illustration of teleological interpretation *par excellence* – *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*' (2009) 72(2) *Tydskrif vir hedendaagse Romeins-Hollandse* 336.

130 Justice Oliver Wendell Holmes, in *Gompers v United States* (1914) 233 US 604 610, held: "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions … . Their significance is a vital, not formal one; it is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth."

131 *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC) [18].

constitutional supremacy, the Constitution and its scheme of higher, fundamental values apply to all laws, including fiscal ones. The Constitution triggered a crucial paradigm shift that has changed the context of all legal thought and decision-making in SA.[132] This shift was necessary to attain the Constitution's transformation objectives. Although they are not contained in any specific provision, the Constitution's aims are reflected by *inter alia*: (i) the Preamble's expression of mutual interests and common aspirations or convictions (such as, building a united and democratic SA, healing the divisions of the past, and establishing a society based on democratic values, social justice and fundamental human rights); (ii) the re-definition of a common, objective, normative value system in s 1; (iii) the displacement of parliamentary sovereignty by constitutional supremacy in s 2; (iv) the recognition of a common South African citizenship in s 3(1); (v) the establishment of a human rights culture and the advancement of the human rights ensconced in a BOR which, in s 7(2), imposes obligations on the State to "respect, protect, promote and fulfil the rights in the Bill of Rights"; (v) the creation of an independent judiciary in s 165(2) with a diverse make-up under ss 174(1), (2); (vi) the subjection of government (s 41) and public administration (in s 195(1)) to a set of democratic values and principles; and (vii) the establishment of a culture of democracy in s 234. The Constitution's transformative ethos advances SA's "democratic hygiene",[133] and informs, shapes and gives substance to the "spirit, purport and objects" of the BOR, a charter housed in Chapter 2 of the Constitution.

Froneman J, in *Qozeleni v Minister of Law and Order*,[134] pointed out that, to establish a culture of constitutionality consistent with the vision of the Constitution, judicial officers must embrace the new constitutional order on both an emotional and intellectual level. Doing so will bring about transformative constitutionalism, described by Klare[135] as including interpretation committed to transforming the social, political and legal institutions as well as power relationships "in a democratic, participatory and egalitarian direction". To this end, statutory interpretation within the discipline of the Constitution is not confined to intra-textual considerations (such as, the text, purpose clause, pre- and postamble, long and short title, and definitions clause). Interpretation also takes account of extra-textual interpretive tools that exist outside of the statute (such as, fairness, fundamental values that underlie the rights in the Bill of Rights, public policy, social values and their implications, historical and existential contexts, explanatory memoranda, and such other legally relevant circumstances that will aid in arriving at an "equitably principled judgment").[136] Therefore, du Plessis[137] states, correctly so, that the "*re*-interpretation of statutes … means coming to terms with the Constitution's all-pervading effect on reading, understanding and applying statutes and on the law relating to statutory interpretation – as it used to stand".

The Constitution provides a contextual framework for statutory interpretation.[138] Thus, it is an external aid lying at the epicentre of every interpretive exercise. Understanding the Constitution and its values is the starting point of the interpretive process;[139] promoting the spirit, purport and

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132 *Holomisa v Argus Newspapers Ltd* [1996] 1 All SA 478 (W) 486.

133 *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) [43].

134 1994 (3) SA 625 (E) 635, 637.

135 Klare KE 'Legal culture and transformative constitutionalism' (1998) 14(1) *South African Journal of Human Rights* 146, 150.

136 Per Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue of Land and Shelter* 2000 (2) SA 1074 (SE) 1081G.

137 Du Plessis L n 23, viii.

138 *Daniels v Campbell NO* 2004 (5) SA 331 (CC) paras 44-45; *Du Plessis v De Klerk* n 107 [123]-[149].

139 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* n 40 [72]. However, in C*ity of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* n 60 [33], the minority (per Jafta J, Tshiqi AJ, Moseneke DCJ and Nkabinde J) held that "the text of a statutory provision continues to be the starting point in the process

objects of the BOR is its end-point. Effect must be given to a meaning that, having regard to "all legitimate interpretive aids",[140] reasonably conforms to constitutional values.[141] This value-centric interpretive mode ensures that statutory interpretation is largely a value judgment that must occur on a principled basis. The Constitution is premised on the values of an open and democratic society based on human dignity, equality and freedom. Each value listed in this trifecta is not mutually exclusive of the other. They enhance and reinforce one another.[142] Since, in SA, all constitutional values are equal in rank and legal status, there is no hierarchical order among them. Constitutional values "give shape and colour to all law".[143] They promote fairness, justice and equity within the law.[144] The values form part of the Constitution's 'spirit' that orientate interpreters toward understanding the purpose of a statutory provision in a way that underscores respect for, and the promotion, protection and fulfilment of both the Constitution's aims and the fundamental rights entrenched in the BOR. Hence, the values act "as a guiding principle and stimulus".[145] However, they are not Holy (sacred) cows. The values are simply norms formulated and expressed in general terms to which courts must give specific content.[146]

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of interpretation". This approach suggests a re-shifting of the focus towards the law-text so that the Constitution and its values become secondary considerations. It is submitted that the minority Judges did not intend to alter or adapt the interpretive approach formulated in *Bato Star Fishing*. Rather, they reinforced that which the Constitutional Court stated in *S v Zuma* n 39 [18], namely, that respect must be shown to the language used by a lawgiver so that interpretation does not amount to "divination".

140 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* n 73 [24].

141 *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) [11].

142 *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) [63]. Human dignity, equality and freedom have been referred to as "meta-values" (see Scott C & Alston P 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16(2) *South African Journal of Human Rights* 206, 220), "foundational" (see *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) [23]), "dominant" (see *ABSA Bank Ltd v Trustees for the Time Being of the Coe Family Trust* 2012 (3) SA 184 (WCC) 191B) and "conjoined, reciprocal and covalent" (see *S v Mamabolo* (*E TV and Others intervening*) n 85 [41]). Cheadle H 'Limitation of rights' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 30-36 writes: "If the animating mischief is the starting point of the enquiry, then the values of dignity, equality, freedom and democracy are its Southern Cross." For a discussion of these values, see Jackson VC 'Constitutional dialogue and human dignity: States and transnational constitutional discourse' (2004) 65 *Montana Law Review* 15; Baer S 'Dignity, liberty and equality: A fundamental rights triangle of constitutionalism' (2009) 59(4) *University of Toronto Law Journal* 417.

143 *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) [51].

144 Goldswain GK *The Winds of Change - An Analysis and Appraisal of Selected Constitutional Issues Affecting the Rights of Taxpayers* (unpublished thesis, UNISA, 2012) 58.

145 *Thint (Pty) Ltd v NDPP; Zuma v NDPP* 2009 (1) SA 1 (CC) [375]. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) [54]. Moseneke D n 37, 316 states that resorting to constitutional values in the process of interpretation provides the most effective response to the "countermajoritarian dilemma". See Devenish GE *A Commentary on the South African Bill of Rights* (1999) 4-5; Venter F "The politics of constitutional adjudication" (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 129, 144-145.

146 *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison* n 96 [46].

A meaning given to a statutory provision must be plausible and constitutionally compliant.[147] Moreover, it must not be "unduly strained"[148] or "far fetched".[149] If the application of competing values leads to mutually destructive interpretations, one leading to constitutional validity and the other to constitutional incongruity, then the scales must be tipped in favour of the constitutionally valid meaning. This is known as reading in conformity, a "principle of legal interpretation requiring that the courts must prefer interpretations that fall within the boundaries of the Bill of Rights over those that do not, provided that such an interpretation can be reasonably ascribed to the provision".[150]

The values underlying the Constitution are "deeply imbricated"[151] in the process of interpreting legislation. Their integration therein enables the Constitution's "juridical ideology"[152] to be advanced. A value-based interpretive mode, referred to as teleological interpretation, leads to a purposive approach involving "an investigation into the reasonable goals and/or the social functions of the [Constitution's] norm".[153] Value-coherent interpretation was ushered in by s 35 of SA's interim (1993) Constitution and reaffirmed by s 39 of its final (1996) Constitution. This interpretive style is geared to the development of a normative jurisprudence that seeks to facilitate transformation of SA by, *inter alia*, permitting the fullest possible protection of constitutional guarantees.[154] A value-laden approach to interpretation is, however, not a licence to ignore the language of a statute in favour of a "generalised resort to constitutional values".[155] The result of textual disrespect would not be permissible interpretation but impermissible divination.[156]

B *Statutory Interpretation Through the Prism of the Bill of Rights*

Section 39(2) of the Constitution is an interpretive force that guides the interpretation of laws. However, it does not prescribe any specific method of interpretation, namely, grammatical, purposive, contextual, teleological or comparative. Section 39(2) reads:

> When interpreting any legislation, and when developing the common law and customary law, every court, tribunal or forum[157] must promote the spirit, purport and objects of the Bill of Rights.

The BOR is the high water mark of the Constitution. It is a general, all-purpose charter that confers and guarantees a basket of 27 flexible, open-ended, interdependent, interrelated first, second and

147 *Standard Bank Investment Corporation v Competition Commission; Liberty Life Association of Africa Ltd v Competition Commission* 2000 (2) SA 797 (SCA) [16]-[22]; *S v FM* [2012] 4 All SA 351 (GNP) [19]; *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) [28].

148 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) [24].

149 *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* n 116 [23].

150 De Vos P, Freedman W (eds) & Brand D *et al South African Constitutional Law in Context* (2014),788.

151 *ABSA Bank Ltd v Trustees for the Time Being of the Coe Family Trust* n 141,190I.

152 Moseneke D 'Transformative adjudication in a post-apartheid South Africa – taking stock after a decade' (2007) 21(1) *Speculum Juris* 2, 4.

153 Kruger J n 128, 9. See also Devenish GE *Interpretation of Statutes* (1992) 39-48.

154 *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* n 46 [53].

155 *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) [39].

156 *S v Zuma* n 39 [18].

157 The Constitution does not define 'tribunal or forum'. For the ambit hereof in s 39, see *Mkhize v Commission for Conciliation, Mediation and Arbitration* 2001 (1) SA 338 (LC) [18].

third generation fundamental rights of a universal nature.[158] They include administrative, civil, cultural, economic, environmental, labour, linguistic, political, religious and socio-economic rights. Under s 39(2), the BOR plays a central role. Although the BOR borrows from foreign constitutions, it has a distinctly South African texture.[159] Its content is a reflection of "historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse".[160] The BOR shares a common heritage with the rest of the Constitution: they are by-products of the same chequered history under apartheid. That shared historical background shaped their respective transformative character, vision, mission, culture and ethos.[161]

Section 39(2) unequivocally enjoins interpreters to break away from a strict, legalistic approach and cross the Rubicon to principled, value-centric interpretation through the prism of the BOR. Since the BOR is external to all statutes, s 39(2) caters for extra-textual contextualisation referred to above at n 59. An interpreter "must", under s 39(2), tilt the balance in favour of a result that promotes "the spirit, purport and objects" of the BOR. Thus, the promotion thereof is the ultimate destination that interpreters must seeek and strive to reach. There are two implied propositions in the command of s 39(2). First, an interpretation must, where possible, advance at least one identifiable value of the BOR. Secondly, a statute's text must be reasonably capable of sustaining a particular interpretation.[162] The rule in the latter proposition is known as "reading down".[163] If a law-text can sustain more than one plausible meaning, then the preferred interpretation must be that which better or best promotes the spirit, purport and objects of the BOR.[164] The emphasis placed on interpretation through the prism of the BOR's spirit, purport and objects is designed to ensure that statutory interpretation in SA's constitutional era is, unlike during apartheid, an open-

158 Mokgoro J, in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* n 22 [27], described the rights in the BOR as being 'part of a web of mutually supporting rights'. See also *S v Dzukuda, S v Tshilo* 2000 (4) SA 1078 (CC) [9]; *Veldman v DPP, WLD* 2007 (3) SA 210 (CC) [22]-[23].

159 *Law Society of South Africa v Minister for Transport* 2011 (1) SA 400 (CC) [59]. See also Sarkin J 'The effect of constitutional borrowings on the drafting of South Africa's Bill of Rights and interpretation of human rights provisions' (1998) 1(2) *University of Pennsylvania Journal of Constitutional Law* 176.

160 *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) [150]. See also *Laugh It Off Promotions CC v SAB International (Finances) BV* 2006 (1) SA 144 (CC) [45]-[46].

161 Davis DM 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1(2) *International Journal of Constitutional Law* 181, 185-189.

162 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* n 40 [72].

163 De Vos P, Freedman W (eds) & Brand D *et al* n 149, 788 define 'reading down' to mean the "principle of legal interpretation which requires that ordinary legislation is interpreted in line with the spirit, purport and object of the Bill of Rights if the words are reasonably capable of such an interpretation or are not unduly strained".

164 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) [46], [84]. Sachs J, in *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison* n 96 [46], held that interpreters ought to "focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case".

ended, flexible process[165] that promotes a humanistic oriented and extensive, generous or liberal[166] jurisprudential philosophy.

Accordingly, s 39(2) underpins the rights-based culture established by the Constitution and sought to be advanced by the BOR. In keeping with the ethos nurtured by s 7(2) of the Constitution quoted above at 4, the interpretive methodology prescribed by s 39(2) enhances respect for, and the protection of, fundamental, statutory and common law rights, all of which sources of rights are recognised by s 39(3) of the Constitution.[167]

In order to fulfil the obligation imposed by s 39(2), every interpreter must understand the meaning of "the spirit, purport and objects of the Bill of Rights". A practical problem encountered is that the precise contours of this phrase and its constituent elements are undefined in the Constitution. Also, the courts have hitherto not delineated a definitive meaning for them. To understand their import requires that they be interpreted purposively, textually, contextually, teleologically and/or comparatively.[168] Since the phrase in question appears within the structure of the BOR itself, s 39(1) of the Constitution is the first point of reference. It reads:

> 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;[169] and (c) may consider foreign law.[170]

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165 Friedman J, in *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (BG) 566F-G, held the following to be a rule of interpretation of a written constitution containing a Bill of Rights: "The method of interpretation or construction is an open-ended process of elucidation and commentary which explores, reads into, derives and attaches significance to every word, section or clause in relation to the whole context. Therefore, interpretation is not a conclusion but a process which searches for the exact meaning of words and use of terms." For a commentary on this case, see Du Plessis LM & de Ville JR 'Bill of Rights interpretation in the South African context (2): Prognostic observations' (1993) 4(2) *Stell Law Review* 199, 205-206.

166 The use of the labels 'generous', 'liberal' and 'purposive' interpretation has been criticised (even discouraged). See *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) 633G; *Nortje v Attorney-General, Cape* 1995 (2) SA 460 (C) 471-473. For a discussion of this criticism, see Carpenter G 'Constitutional interpretation by the existing judiciary in South Africa: Can new wine be successfully decanted into old bottles?' (1995) 28(3) *Comparative and International Law Journal of Southern Africa* 322, 333-335. These labels are used in this article as they are commonplace in the literature on the subject of statutory interpretation. Also, the use of these labels in South African and foreign cases (for example, *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia* [2011] 1 BLLR 15 (NmS) [37],) reflects that they are terms which have acquired broad-based acceptance through common usage.

167 Section 39(3) reads: "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."

168 The overall approach to interpreting provisions of the Constitution is akin to that discussed above in this article in relation to statutory interpretation. See *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA). It is beyond the purview of this article to engage in a detailed typology and construction of "the spirit, purport and objects of the Bill of Rights" using the various techniques of interpretation highlighted above. Thus, the discussion here is aimed merely at shedding some light on its probable meaning.

169 The word "must" in s 39(1)(b) indicates that a mandatory obligation is imposed. However, the duty to "consider" international law does not equate to a duty to 'apply' it.

170 Section 39(1)(c) grants an interpreter a discretion ("may consider") whether to have regard to foreign law sources when interpreting a provision of the BOR. Comparative foreign sources, labelled "transnational contextualization" (see Venter F 'Why should the South African Constitutional Court consider German sources? Comment on Du Plessis and Rautenbach' (2013) 14(8) *German Law Journal* 1579, 1586), generate

Having regard to s 39(1)(a), it is submitted that "the spirit, purport and objects of the Bill of Rights" is broad in its scope and encompasses the normative standards, values, ethos and principles underlying the Constitution (explained above at 5.1), as well as "the enactment's sense, tenor and ostensible meaning".[171] This recognises that the BOR in Chapter 2 does not exist in isolation from the rest of the Constitution. By virtue that the Constitution's provisions have inherent coherence or unity, so-called intra-textual holism,[172] each Chapter must be read contiguously with every other. Indeed, the BOR is inseparable from, and inextricably linked to, the rest of the Constitution by virtue that they share a common historical background. Therefore, interpreting "the spirit, purport and objects" of the BOR involves viewing the BOR as integrated within its existential context in the Constitution read holistically. Put differently, the meaning of the phrase in question cannot be determined in a manner divorced from the rest of the Constitution. This is part of intra-textual contextualisation referred to above at n 59.

In view of the foregoing, it is submitted that the BOR's 'spirit' is shaped by the Constitution's normative value system (such as, freedom, equality, human dignity, justice, democracy, human rights, and rule of law). This is also evident from s 7(1) of the Constitution which proclaims the BOR to be "a cornerstone of democracy" that "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". The BOR's 'purport' is, it is submitted, its declaration that it "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state" (s 8(1)), and "binds a natural or a juristic person if, and to the extent that, it is applicable" (s 8(2)).

Under s 39(2), when interpreting a statute, the BOR's 'objects' must be taken into account. However, this is only to the extent that they, or any of them, are legally relevant in a particular statutory context. To the extent that they may be relevant, a meaning must be chosen which best promotes any such constitutional goal. This is part of purposive interpretation (discussed above at 4.2 and 4.3). The BOR's 'objects' are to be found in the basket of fundamental rights that it guarantees and the imposition of positive obligations that are designed to ensure that the rights are respected, protected, promoted and fulfilled. Since an interpretation must promote the BOR's objects, an interpreter ought to consider any fundamental right that may be implicated by a statutory provision.[173] In this way, statutes are "filtered"[174] through the fundamental rights and the values that underlie them. Fundamental rights do not operate as independent normative regimes isolated

new ways of understanding constitutional provisions, fundamental rights and their scope. A cross-pollination of jurisprudence enhances the opportunity for transformative interpretation. Comparative research from mature democracies is invaluable to SA whose indigenous constitutional jurisprudence is, since 1994, developing incrementally. For an exposition of the general approach in SA to foreign law sources, see *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) [28]-[33]. Also, see Ackermann LWH 'Constitutional comparativism in South Africa' (2006) 123(3) *South Africa Law Journal* 497. Unlike s 39(1), s 39(2) does not expressly cater for the use of foreign law sources. However, since the Constitution does not prohibit the use of comparative sources for statutory interpretation, it is submitted that interpreters may, in appropriate circumstances, rely on comparable foreign law. Such comparative interpretation would be appropriate in relation to, for example, statutes which stem from foreign law or which have provisions that are worded similarly to those in a foreign statute.

171 *Holomisa v Argus Newspapers Ltd* n 131, 491.

172 Intra-textual holism requires each part of the Constitution to be read and understood in relation to all the other parts thereof. See Du Plessis LM & de Ville JR n 59, 369. Botha CJ n 4, 62 characterises this as a "part-whole approach" to interpretation or "hermeneutical circle" that "underlines the importance of the context of a specific phrase or sentence".

173 *Sarrahwitz v Martiz NO* n 65 [29].

174 Botha CJ n 4, 114.

from one another. Their disparate textual protections are unified by the values immanent in them all.[175] Thus, the relationship between the rights and the values that they embrace is "osmotic rather than hermetic".[176] If more than one right is affected, a meaning must be ascribed that promotes each affected right. It is inappropriate to settle on a meaning that advances one implicated right whilst it is at odds with another.[177]

Section 39(2) applies in tandem with s 233 of the Constitution. The latter provision reads:

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[178]

The tone and imperative language of s 39(2) ("must promote") and s 233 ("must prefer") indicate that their provisions are commands which are "categorical imperative[s]"[179] involving "mandatory constitutional canon[s] of statutory interpretation".[180] The word "every" in s 39(2) in the phrase "every court, tribunal or forum", casts an extremely wide net. Hence, it is sufficiently broad to include a Tax Court, Tax Board and any alternate dispute resolution forum where a tax dispute is adjudicated. Under the TAA, these would include inquiry proceedings (s 52), dispute resolution proceedings (s 103(2)), including a "determination" by an attorney acting under s 64(5) as to whether legal professional privilege is attached to property seized by the SARS during a search.

In the structural design of s 39(2) and s 233, no distinction is drawn between different types of legislation. The word 'any' in the context of "any legislation" in these provisions is an indefinite term that is not used in a limited sense. 'Any' casts the net of "legislation" very widely:[181] all statutes are encompassed. Thus, as in the pre-constitutional era,[182] there remains nothing special about tax laws. Despite their importance for the economic well-being of SA, they are not immune to the discipline of the Constitution and must conform to its normative standards.[183] Also, when interpreting their provisions, interpreters are enjoined to consider public international law and, as far as is possible, to harmonise every interpretation with international human rights law. This is, as

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175 *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* n 59 [34]-[35].

176 *Sidumo v Rustenburg Platinum Mines Ltd* n 159 [151].

177 *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* n 59 [36].

178 Section 233 is a confirmation of the principle that statutes must, as far as possible, be interpreted constitutionally. See Botha CJ n 4, 55. For a discussion of s 233, see *Glenister v President of the Republic of South Africa* n 101 [98].

179 This expression is used by Van Heerden J in *Sayers v Khan* 2002 (5) SA 688 (C) 693G.

180 *Fraser v ABSA Bank Ltd* 2007 (3) SA 484 (CC) para 43; *Phumela Gaming and Leisure Ltd v Grundlingh* 2007 (6) SA 350 (CC) [26]-[27].

181 *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363, 371. See also *Southern Life Association Ltd v CIR* (1984) 47 SATC 15 (C) 18-19; *CIR v Ocean Manufacturing Ltd* 1990 (3) SA 610 (A) 618; *Commissioner for Customs and Excise v Capital Meats CC (in liquidation)* (1999) 61 SATC 1 (SCA) 5; *Body Corporate of Greenacres v Greenacres Unit 17 CC* 2008 (3) SA 167 (SCA) [5;] *ARMSA v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC) [33]-[35].

182 *CIR v Delfos* 1933 AD 242, 254; *Glen Anil Development Corporation Ltd v SIR* 1975 (4) SA 715 (A) 727G-H; *SIR v Kirsch* 1978 (3) SA 93 (T) 94D.

183 *First National Bank of SA Ltd t/a Wesbank v CSARS: First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) [31]. See also Goldswain GK 'Hanged by a comma, groping in the dark and holy cows – fingerprinting the judicial aids used in the interpretation of fiscal statutes' (2012) 16 *Southern African Business Review* 30.

shown above, unlike the position in Australia. Compliance with the directives in s 39 and s 233 is secured by the duties arising from s 2 (quoted above at n 34) and s 237 thereof.[184]

V CONCLUSION

This article shows that statutory interpretation is not a free-floating, haphazard exercise. In Australia, interpretation is a question of law involving, at its core, a determination of the legislature's intention and then giving effect to a meaning which best reflects and gives effect to the legislature's aim, even if the meaning is not compatible with human rights. Thus, Parliament's will, predominates statutory interpretation. This article demonstrates further that in SA, on the other hand, as a result of constitutional supremacy, Parliament's will does not play any meaningful role statutory interpretation. The will of the people, as expressed in the Constitution and its normative value system, predominates. Therefore, under SA's constitutional dispensation, when interpreting tax legislation, the first port of call is "the content and sweep of the ethos expressed in the structure of the Constitution".[185] Thereafter, a fair balance must be struck between conflicting considerations reflected in the law- text being interpreted within its contextual setting, having regard to all relevant internal and external interpretive aids. In the light hereof, tax legislation cannot be peered at with blinkers on. They are to be read and understood in their proper constitutional and statutory contexts.[186]

This article shows further that purpose "plays an important role in establishing a context that clarifies the scope and intended effect of a law".[187] However, every reading of a statute must remain faithful to its actual wording.[188] In other words, purposive *cum* contextual interpretation is not a license to redraft legislation, or to impose a meaning which reflects a judicial officer's own intellectual preference or political philosophy without due regard for the wording actually utilised.[189] Accordingly, a purposive meaning is one that is reasonably capable of being sustained by the words forming the subject of the interpretive exercise.

Moreover, this article demonstrates that the interpretive directive in s 39(2) of the Constitution has transformed the process of interpretation by displacing "subjective ethical or intellectual preferences with a transparent and justiciable set of values" [190] which underscores that

184 Section 237 reads: "All constitutional obligations must be performed diligently and without delay."

185 Per Mahomed J in *S v Makwanyane* n 91 [265].

186 For a useful collation of the jurisprudential development in the law relating to the interpretation of documents and instruments generally, as well as a succinct statement of the relevant principles, see *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) [16]-[20] and *Corpclo 2290 CC t/a U-Care v Registrar of Banks* [2013] 1 All SA 127 (SCA) para 20. For the rules applicable to interpretation of court judgments and orders, see *Daniels v Campbell NO* n 137 para 33; *Eke v Parsons* 2016 (3) SA 37 (CC) [29]-[30].

187 *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* n 116 [21].

188 See *AM Moolla Group Ltd v CSARS* [2003] JOL 10840 (SCA) [20], When interpreting a text, a balance must be struck between the words and its context. See *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* n 116 [46]. A meaning should advance or be reconcilable with a statute's broader aims. See van der Westhuizen Y 'Abusing the Income Tax Act by misusing the letter of the Act' (2008) 71 *Tydskrif vir hedendaagse Romeins-Hollandse* 613, 616-619.

189 *R v L* 49 FCR 543, 548; *Cooper Brookes (Wollongong) (Pty) Ltd v Commissioner of Taxation* n 45, 305.

190 Moseneke D n 151, 4.

interpretation must occur on a principled basis "through the prism of the Bill of Rights".[191]. Any departure from this salutary rule would be inimical to due legal process. Also, a departure therefrom would put at risk the main edifice upholding the pillars of constitutional supremacy, democracy and constitutionalism, potent symbols of SA's hard-won transition to a culture of human rights and freedoms for all, including taxpayers. Accordingly, this article demonstrates that, under the Constitution, a text in a tax statute does not mean whatever an interpreter wishes it to mean. Interpreters must act as informed, open-minded, thoughtful and objective observers sensitive to SA's complex historical, administrative, social, financial and economic realities. Interpreters must guard against succumbing to the influences of their own personal intellectual and moral preconceptions. They must give effect to a meaning that is contextually and linguistically justifiable and legally sound in the light of the Constitution. This new teleological methodology requires interpreters "to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making".[192]

Finally, certainty and clarity in tax legislation are recognised canons of taxation.[193] They are also norms of the rule of law. Thus, since a burden to pay tax must be imposed in clear terms, the following is a guiding rule of interpretation: "There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used."[194] Consequently, courts should not overstretch the plain language to subject a person to taxation who, upon a fair and reasonable construction of the text, does not fall within its proverbial black letter. Although interpretation ought not to lead, as far as is possible, to harsh, unfair, inequitable, unjust, unreasonable or oppressive results,[195] it is trite that, by its nature, there is some inequity about tax.[196] Thus, courts in SA and Australia have, when justified in doing so, obliged a taxpayer to shoulder his/her/its fair share of the tax burden. To do otherwise would be an abdication of judicial responsibility and inimical to the universal norms of fairness and justice that are to be woven into the fabric (or fibre) of taxation and tax administration legislation.

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191 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* n 147 [21].

192 *Govender v Minister of Safety and Security* n 140 [11].

193 See Alley C & Bentley D 'A remodelling of Adam Smith's tax design principles' (2005) 20 *Australian Tax Forum* 579, 586-588; Gutuza T *An Analysis of the Methods Used in the South African Domestic Legislation and in Double Taxation Treaties Entered into by South Africa for the Elimination of International Double Taxation* (unpublished PhD thesis, UCT, 2013) 2-9.

194 Per Centlivres JA in *CIR v Simpson* 1949 (4) SA 678 (A) 695. See also *Vestey's (Lord) Executors v Inland Revenue Commissioners* (1949) 1 AER 1108, 1120.

195 *ITC 1384* (1984) 46 SATC 95, 100-103.

196 See *CIR v Nemojim (Pty) Ltd* 1983 (4) SA 935 (A) 958; *COT v CW (Pvt) Ltd* 1990 (2) SA 245 (ZS) 266D; *Cactus Investments (Pty) Ltd v CIR* 1999 (1) SA 315 (SCA) 322I-323B; *First National Bank of SA Ltd t/a Wesbank v CSARS: First National Bank of SA Ltd v Minister of Finance* n 182 [27].