
NOTES

Interpretation of Statutes IOS201-6

1. GENERAL INTRODUCTION

1.1. Definition

Statutory interpretation as a subject of study is the body of rules and principles used to construct and justify the meaning of legislative provisions to be applied in practical situations.

1.2. Why can statutes not be interpreted in a mechanical or rule-like fashion?

Many rules of interpretation overlap and cannot be neatly compartmentalised as:

- ↪ the circumstances and sets of facts will differ from case to case, as well as the context of legislation;
- ↪ the courts are not of one mind when it comes to the application of certain rules, resulting in no clear predictable pattern of application
- ↪ the law is not objective, neutral and value-free: all interpreters have a particular frame of mind¹ which will influence their understanding of legislation;
- ↪ since the spirit and aim of the fundamental rights in the Constitution must be promoted, interpretation necessarily involves value-judgements;
- ↪ Poor drafting, conflicting provisions or a lack of resources to research the current law.

1.3. Two different meanings of the phrase “interpretation of statutes”

Before 1994 and the Constitution, interpretation of statutes was an orthodox system of maxims and rules for interpretation based on parliamentary sovereignty. Today interpretation is based on constitutional supremacy and the spirit and purport of fundamental rights are to be taken into account and thus value judgment can no longer be ignored. According to **Devenish**:

- ↪ courts will be able to test and invalidate legislation;
- ↪ all statute law will have to be interpreted to be compatible with letter and spirit of Constitution;
- ↪ a value-coherent theory of interpretation should become prevalent;
- ↪ a justiciable bill of rights is likely to indicate a new methodology and theory of interpretation.

Interpretation of statutes transformed by six provisions of the Constitution:

Section 1	The foundational provision	Section 8	The application clause
Section 2	Supremacy of the Constitution	Section 36	The limitation clause
Section 7	The obligation clause	Section 39	The interpretation clause

1.4. How are the many rules and principles of statutory interpretation structured?

Interpretation of statutes is neither mechanical nor objective and can never be reduced to a pre-conceived ‘road map’. The following three phase interpretation process is merely a teaching tool:

↪ Initial phase

Basic principles are used as a point of departure:

- (i) Constitution and Bill of Rights the cornerstones of legal order;
- (ii) most importantly, to ascertain and apply the purpose of the legislation in view of (i);
- (iii) text is read to find initial meaning bearing common law presumptions and a balance between text and context in mind.

↪ Research phase

All factors and consideration possibly having a bearing on the particular legislation are studied to determine the purpose.

↪ Concretisation phase

Legislative text, the purpose of legislation and the facts of the particular case are harmonised and the spirit, purport and aim of fundamental rights must be promoted during this process.

¹ Which is the product of each interpreter’s unique history, background, experience and prejudices.

2. WHAT IS LEGISLATION?

2.1. What is regarded as legislation in South African law?

It is important to distinguish legislation from other types of law as the rules and principles of statutory interpretation only apply to legislation.

Section 1 of the Interpretation Act

The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act, in the Republic or any portion thereof, and to the interpretation of all by-laws, rules, regulations or order made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.

Legislation or enacted law-texts is one of the three formal sources of law in South Africa (judicial precedent and custom being the others) and is written law enacted by a body or person authorised to do so by the Constitution or other legislation. This excludes common-law, as does the following:

Section 2 of the Interpretation Act, 33 of 1957

'law' means any law, proclamation, Ordinance, Act of parliament or other enactment having the force of law.²

The Interpretation Act refers to different types of legislation: Acts, ordinances, proclamations, by-laws, regulations, rules and any other enactment with the force of law.

2.2. Classification of different pieces and types of legislation

Chronological (Historical origins)	
Legislation before 1806	Old Dutch plaacaaten (statutes) are viewed as common-law and no formal procedures required for their demise
Old order legislation (enacted before interim Constitution took effect)	
<ul style="list-style-type: none"> • Pre-Union legislation (1806-1910) • Legislation between Union and democratic era (1910-1994) 	Legislation of the British colonies and Boer Republics - most had been incorporated into legislation after 1910 or repealed Most existing legislation
Legislation in the new constitutional order since 1994	All legislation enacted after the start of constitutional democracy in 1994, including the interim Constitution
Hierarchical (Status)	
The Constitution	<ul style="list-style-type: none"> • The supreme law of the Republic, any law inconsistent with it is invalid and the courts may test all legislation (old and new) • Not an Act of parliament, drafted by Constitutional Assembly
Original legislation ³ <div style="text-align: center;"> ↑ Classification according to status ↓ </div>	<ul style="list-style-type: none"> • Acts of Parliament • New provincial Acts (1994-) • Provincial ordinances (1961-1986) • Legislation of the former homelands • Legislation of the former TBVC states • New municipal legislation
Delegated legislation (also subordinate) ⁴	<ul style="list-style-type: none"> • Existing provincial proclamations and regulations (1968-1994) • New provincial proclamations and regulations (1994-) • Other proclamations and regulations

The distinction between original and delegated legislation is relevant as delegated legislation may not be in conflict with enabling (original) legislation.

2.3. What is not legislation?

Legislation must be published in an official *Gazette* before it can take effect, but not everything published in the *Gazette* is legislation. The following texts are not legislation:

- ↪ legal notices;
- ↪ reports;
- ↪ draft Bills;

² This definition excludes common law

³ Derives from the direct or primary legislative capacity of an elected legislative body derived directly from the Constitution

⁴ Where original legislation is drafted in broad terms, delegated legislation then 'adds the flesh'

- ↪ various discussion papers;
- ↪ advertisements;
- ↪ policy documents issues by government departments in the process of formulating public policy to elicit public comment (Green Papers and White Papers); and
- ↪ internal departmental memoranda and policy guidelines on how government departments apply legislation.

Some of these may lead to legislation and may be used in the interpretation process. Legislation should be distinguished from “administrative quasi-legislation” (**Baxter**), which consists of departmental memos and directives (although enforceable ≠ delegated legislation). Legislation must comply with all the constitutional and other legal requirements dealing with authority, adoption and publication. Unwritten law (common-law rules and indigenous law) is not legislation, although a source of South African law and can become legislation once codified.

2.4. The basic structure or parts of legislation

Legislation is drafted in a particular form and structure according to the drafting conventions and rules used by the state law advisors and other legislative drafters.

Component	Explanation
Long title	Short summary of the subject matter of the Act, which is part of the statute and is tabled for adoption in the legislature.
Preamble	States circumstances and background of, and reasons for the legislation and is usually placed after the long title.
Enacting provision	Acknowledges the authority of the body that is enacting the legislation. Section 43 of Constitution states: <ul style="list-style-type: none"> • national legislative authority → vested in parliament • provincial legislative authority → vested in provincial legislatures • local authorities → vested in municipal councils
Definitions	Serve as an ‘internal dictionary’ for the particular legislation and is usually found at the beginning of an Act.
Purpose and interpretation	Such clauses are frequently included in post-1994 legislation and should explain the purpose of the Act and how it should be interpreted.
Repeal / amendment of legislation	Done by means of an amending Act and when passed existing Acts needs to be amended or repealed. New Act must contain a section providing for amendments or repeals and is conventionally dealt with a schedule at end.
Short title	Short title is the title of the Act and is usually the last section in an Act.
Commencement	<ul style="list-style-type: none"> • No date → Commence on date of publication in <i>Gazette</i> • Specific date → As specified in short title • Unknown future date → Short title states come into operation on date to be fixed by President (Premier, provincial) by proclamation in <i>Gazette</i>.
Schedules	Used to deal with technical detail that will otherwise clog up the main body of an Act, used when several Acts are repealed or extensively amended.
Numbering in legislation	Section 1; subsection (1); paragraph (a); sub-paragraph (i); item (aa); sub-item (AA) → Full citation: 1(1)(a)(i)(aa)(AA) Where an additional section is inserted through amendment Act, it takes the next number and gets a capital letter after it – between 66 and 67 = 66A. In older Acts inserted sections were number <i>bis</i> , <i>ter</i> , <i>quat</i> .
Amendments	When amendment Act is published, there is a General Explanatory Note on second page, which includes the following: <ul style="list-style-type: none"> • [] Words in bold type and in square brackets indicate deletions from existing enactments. • ___ Words underlined with a solid line indicate insertions in existing enactments. Amendments (deletions and insertions) are also indicated clearly in the amended version of an Act.

2.5. The relationship between legislative interpretation and common law

Common-law is not sacred, untouchable or protected from constitutional scrutiny and any law that is inconsistent with the Constitution, the supreme law, is invalid. The spirit, purport and objects of the Bill of Rights must be promoted by the courts when developing common-law.

In *Carmichele v Minister of Safety and Security*, the Constitutional Court held that a court is obliged to develop common law in view of the Constitution. In *Pharmaceutical Manufacturers Association of SA*, common-law was clearly put in a constitutional framework as it is not a body of law separate and distinct from the Constitution. There is only one system of law shaped by the Constitution and all law derives its force from the Constitution.

The Constitution and express legislative provisions will override common-law rules, but certain common-law rules such as presumptions are used to interpret legislation insofar as they are not in conflict with the Constitution. Common-law presumptions of interpretation should have played a more important role during the interpretation process in the past. These presumptions may be described as preliminary presumptions as to the meaning of legislation and it is assumed that legislation has a particular purpose, which should accomplish an ideal predefined result. Before 1994 and in the absence of the Bill of Rights, one could have referred to a rebuttable 'common-law bill of rights'. The principles of justice, fairness and individual rights were always part of our common-law, but ignored by parliamentary sovereignty. These principles can no longer be overturned and are entrenched in the Constitution thus some of the presumptions will be applied less and less in future due to disuse.

2.6. The Plain Language movement

The Plain Language movement is a worldwide continuation of the Plain English campaign, which started in the United Kingdom in reaction to pompous and difficult legal language (legalese) and it aims reach beyond legislation to include all legal documents (eg contracts, legal notices, etc). Its golden rule is that authors of legal texts must write clearly and comprehensible so that the readers of legislation know what the law expects of them and legal certainty and accuracy will not be sacrificed. The drafter is forced to take the context of the end-used into account.

'Plain' in 'Plain Language' does, however, not mean single clause sentences, but emphasis is on comprehensible language. The ideas are not simplified, but the language used to convey them. Constitutional values of transparency, equality and a fair legal process can hardly be maintained if people do not understand legislation and in this respect the Plain Language movement may help to bring those values and principles underlying the Constitution closer to the people. The principles are already reflected in some of the newer legislation: shorter sentences, better structured paragraphs, 'shall' is replaced by the more comprehensible 'must', footnotes and diagrams, etc.

3. COMMENCEMENT OF LEGISLATION

3.1. Adoption and promulgation of legislation

Adoption refers to the different stages through which legislation has to pass before it is accepted by the relative legislative body.

When parliament has adopted (passed) an Act, the President has to sign it to become law. When provincial legislature has adopted an Act, the premier of the province has to sign it to become law.

Promulgation refers to the process by which legislation commences and takes effect, thus when it is formally put into operation.

Legislation is promulgated by publication in an official *Gazette*.

3.2. Requirement of publication

In terms of Sections 80 and 123 of the Constitution, Acts take effect when published in an official *Gazette* or on a date determined in terms of those Acts. The same applies to municipal by-laws in terms of Section 162 of the Constitution.

The underlying principle of publication: Law should be made known to whom it applies.

Question: Since the *Gazette* may only appear days after publication in remote areas, does it then commence on date of publication or when it becomes known?

In *Queen v Jizwa* the court held that legislation commences on the date of publication. This has been criticised and *Steyn* suggest a period of days (eg. 8) between *de facto* (actual) publication and *de iure* (legal) promulgation of legislation. In *President of the Republic of South Africa v Hugo* the court addressed the issue for the need of accessibility of the law and held that a person should know the law to conform his/her conduct to the law.

In terms of Section 16A of the Interpretation Act, President may prescribe alternative procedures by proclamation if the Government Printer is unable to print the *Gazette* by some reason.

3.3. Commencement of legislation

'Law' in Section 13 of the Interpretation Act refers to any law, proclamation, ordinance, Act of parliament or any other enactment having the force of law. This includes delegated legislation and in terms of Section 16 it must also be published in an official *Gazette*. In terms of Section 17, a list of proclamations and notices under which delegated legislation was published must be tabled in parliament. Legislation will commence as follows:

↳ Commencement on date of publication

- (i) Unless another date is provided in the particular legislation.
- (ii) Publication in the *Gazette* includes both the *Government Gazette* and the official *Gazette* of a province.
- (iii) Day begins immediately at the end of the previous day, being at 00:00 and thus a bit retrospective as publication is only a few hours later

↳ Commencement on a date specified in the legislation

Legislation as published may prescribe another fixed date for its commencement, which may be total or partial.

↳ Commencement on an unspecified date still to be proclaimed

Legislation as published may indicate that it will commence at a later unspecified date to be proclaimed, which may be in total or partial.

3.4. The presumption that legislation only applies to the future

Unless the contrary appears expressly or by necessary implication, it is presumed that legislation only applies to the future based on the prevention of unfair results. In *Curtis v Johannesburg Municipality* the court held that legislation presumably applies to the future so that vested rights are not taken away.

↳ Express retrospective application

Section 35 of the Constitution deals expressly with retrospective operation of legislation:

- S35(3)(1): A new offence may not be created retrospectively.
- S35(3)(n): An accused has the right to the least severe of prescribed punishments if it has been changed since offence was committed and time of sentencing.

Legislation may enact retrospective provisions other than penal provisions, but courts will have to 'test' such against the Bill of Rights to ensure that there is no violation of fundamental rights.

↳ Retrospectivity by necessary implication

The presumption is rebuttable if it appears that the legislature intended retrospectivity, which will be the case if the result of not applying legislation retrospectively would be absurd or unfair. In *Kruger v President Insurance Co* it was held to be easier to decide that legislation is retrospective by necessary implication if vested rights won't be affected and the purpose of legislation is to grant a benefit or to effect even-handedness in the operation of the law.

- (i) If the enactment deals with procedure

General rule: Presumption won't apply if it deals with rules of procedure and evidence unless expressly provided for.

At times the distinction between procedural rules and substantive rights is fine, but courts will apply retrospective application of rules of procedure by necessary implication with caution. It must first be determined whether existing rights and obligations are affected and if they are enforceable by means of the new procedures.

In *Grand Wholesalers v Ladysmith Metal Industry* it was held that the legislature didn't intend the increase in jurisdiction of the Magistrate's Court to apply to a matter in which pleadings had closed and costs had been incurred.

- (ii) If retrospectivity favours the individual

The presumption will also not apply. However, if a person will receive a benefit without a vested right being taken away, the retrospective application of the legislation will be beneficial and the presumption becomes unnecessary → in line with Section 35(3)(n). In *R v Sillas* the new, more lenient sentence was imposed.

- (iii) If retrospectivity does not benefit the individual:

If the amendment places the person in a worse position than before, the presumption will apply. In *R v Mazibuko*, where there was an appeal against the death sentence for robbery for which a more lenient penalty was imposed earlier, court held that if a penalty is increased by an amending Act, the presumption applies. This rule is redundant in view of the express provisions of the Constitution.

4. DEMISE AND AMENDMENT OF LEGISLATION

4.1. General

Common-law rules can become abrogated by disuse, but legislation must be repealed by a competent body. Before 1994, courts could only invalidate delegated legislation which did not comply with common-law rules of administrative law. After 1994, courts can test all legislation against the Constitution. All legislation remains in force until amended, repealed or declared unconstitutional.

4.2. Amendment to legislation

↳ By a competent legislature

Legislation may be amended by a competent legislature, eg. parliament may amend an Act of parliament and a provincial legislature may amend provincial ordinances and provincial Acts, etc. If a number of Acts are amended at the same time, this will be done by a General Laws Amendment Act. Specific legislation will usually be amended by specific amending legislation.

↳ Modificative interpretation by courts

Sometimes words used in the legislation lead to absurd results or results which don't serve the purpose of legislation. In such cases, courts have changed or adapted the initial meaning of the legislation in order to avoid these results. This is a completely legitimate, necessary exercise of judicial power. Constitutional Court may declare whole pieces of legislation unconstitutional, but the principle is that they should try everything in their power to keep the legislation in force as far as possible. In order to achieve this result, the Court has adopted the following remedies:

(i) Reading down

Sections 35(2) and 232(2) of the interim Constitution provided that if legislation is, on the face of it, unconstitutional, but is reasonably capable of a more restricted interpretation which will be constitutional and valid, such restricted interpretation should be followed (i.e. "reading down"). These provisions have not been repeated in the 1996 Constitution, but the principle that courts should, as far as possible, try to keep legislation constitutional (and therefore valid) is a well-known principle of constitutional interpretation.

(ii) Reading in

This is a more drastic remedy used by the courts to change legislation in order to keep it constitutional and the court will "read" something into a provision in order to rescue a provision, or a part of it. It should be applied with caution, since the court then changes the legislation.

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs

Facts: The constitutionality of Section 25(5) of the Aliens Control Act, which allows the spouse or child of a person with the status of a permanent resident to immigrate to South Africa to join her/his spouse or parent, was disputed as gay and lesbian permanent residents were not allowed to rely on this section to arrange for the immigration of their life partners. This, they claimed, was a form of unfair discrimination against them on the basis of their sexual orientation.

Legal issue: Reading in

Finding: The Constitutional Court laid down the following principles to be considered and followed before "reading in" or severance is applied:

- Results of reading in/severance must be consistent with Constitution and its values;
- Result achieved must interfere with the existing law as little as possible;
- Courts must be able to define with sufficient precision how the legislative meaning ought to be modified to comply with the Constitution;
- Court should endeavour to be as faithful as possible to the legislative scheme (i.e. aim, purpose) within the constraints of the Constitution;
- Remedy of reading in ought not to be granted where this would result in an unsupportable budgetary intrusion.

It was held that the constitutional defect in Section 25(5) can be cured with sufficient precision by reading in after the word 'spouse' the following words: 'or partner, in a permanent same-sex life partnership' and that it should indeed be cured in this manner.

(iii) Severance

This is the opposite of "reading in" and the court will try to rescue a provision from the fate of unconstitutionally by cutting out the offending part of the provision to keep the remainder constitutional and valid.

4.3. Invalidation of legislation (by a court)

↳ Unconstitutional provisions

In terms of Section 172 of the Constitution, the High Court, Supreme Court of Appeal or the Constitutional Court may declare legislation unconstitutional. Such a declaration may have immediate effect, or may be suspended to give the relevant legislature the opportunity to correct the defect. Such declaration by the High Court or Supreme Court of Appeal must be confirmed by the Constitutional Court. If an enabling Act is declared unconstitutional, the delegated legislation issued in terms thereof will cease to exist unless a court orders otherwise.

↳ Invalid delegated legislation

Delegated legislation may be invalidated by a court if it doesn't comply with the requirements of administrative law.

4.4. Repeal and substitution

Section 11 of the Interpretation Act – Repeal and substitution

When a law repeals wholly / partially any former law and substitutes provisions for law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.

In *Solicitor-General v Malgas* the court held that, if the provisions of earlier legislation are incorporated into subsequent legislation, the incorporated provisions are not affected when the earlier statute is repealed. In *Morake v Dubedube* it was held that if legislation had been partially repealed, the remaining provisions must be interpreted in their own context, which includes the repealed provisions.

4.5. Effect of repeal

Section 12 of the Interpretation Act – Effect of repeal of a law

- (1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.
- (2) Where a law repeals any other law, then, unless the contrary intention appears, the repeal shall not -
 - (a) revive anything not in force or existing at the time at which the repeal takes effect; or
 - (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
 - (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any law so repealed; or
 - (d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any law so repealed; or
 - (e) affect any investigation, legal proceeding, or remedy in respect of any such rights, privilege, obligations, liability, forfeiture, or punishment as in this sub-section mentioned.

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, any such penalty, forfeiture, or punishment may be imposed, as if the repealing law has not been passed.

Principle: Everything which was done or achieved or began before an Act was repealed remains in place or must be completed as if the Act was still in force.

Nourse v Van Heerden 1999 (2) SACR 198 (W)

Facts: In 1992 a physician was charged in terms of the Abortion and Sterilisation Act with the performance of illegal abortions. By 1997, his trial was not completed and his legal representative brought an application to have the charges against him dropped as his actions did not constitute a crime anymore. The application was based on the following arguments:

- ↳ the provisions of the Abortion and Sterilisation Act became abrogated by disuse;
- ↳ the Choice on Termination of Pregnancy Act repealed this Act; and
- ↳ in view of the Bill of Rights, the prohibition on abortions is unconstitutional in retrospect.

Legal issue: The application of the demise of legislation, Section 12(2) of the Interpretations Act, as well as retrospectivity.

Finding: Court held that legislation cannot be abrogated by disuse and the existing legislation remains in force until repealed or declared unconstitutional. The trial started before the repeal and it must be completed as if there had been no repeal. Trial also commenced before either of the Constitutions and they are not retrospective. **(The Abortion Act was never declared unconstitutional)**

4.6. **The presumption that legislation does not intent to change the existing law more than is necessary**

Legislation should be interpreted in such a way that it is in accordance with existing law (legislation, common law, customary law and public international law) or changes it as little as possible.

↪ Common law

Legislature is free to change the common law whenever it sees fit, provided it does so in a way that leaves no doubt that the new legislation has replaced the old common law. Only then will the presumption not apply and changes must be implemented – *Seluka v Suskin and Salkow* and *Gordon v Standard Merchant Bank*. If this isn't done, the presumption applies and legislation must be interpreted in the light of the common law rules which apply to the same issue.

↪ Legislation

In interpreting a subsequent Act, it is assumed that the legislature did not intend to repeal or modify the earlier Act. Any repeal or amendment must be effected expressly or by necessary implication. An attempt should be made to read the earlier and subsequent legislation together and to reconcile them (*Shozi v Minister van Justice, KwaZulu*) and, if such reconciliation is impossible, it's presumed by necessary implication that the later of the two provisions prevail, resulting in the amendment or repeal of the earlier one. This rule only applies if the objects of the two conflicting provisions are essentially the same. Legislative repeal by implication will be accepted by the court only if the subsequent legislation manifestly contradicts the earlier legislation - *Minister of Police v Haunawa*.

Government of the Republic of South Africa v Government of KwaZulu

Facts: By means of proclamation, the President stipulated that the Ingwavuma territory, which had belonged to KwaZulu, would no longer be part of that territory. Should the President have consulted the KwaZulu government or not? The proclamation had been issued in terms of Section 1(2) of the Self-Governing Territories Constitution Act, 21 of 1971, which provided that the territory of a self-governing territory could be altered only after consultation with the self-governing territory.

Legal issue: Repeal of an earlier Act by necessary implication

Finding: The Appellate Division heard the appeal against a decision of the Natal Provincial Division in which the proclamation taking away the Ingwavuma territory had been declared null and void. Appellants averred that the proclamation had been promulgated in terms of the Black Administration Act, 38 of 1927, which did not require consultation prior to the alteration of the territories of the national states. Court found that Section 25(1) of Act 38 of 1927 conflicted with Section 1(2) of Act 21 of 1971. As the two provisions could not be reconciled, it was presumed that the unrestricted powers conferred by the 1927 Act had, by necessary implication, been repealed by the specific provisions of the 1971 Act.

5. HOW LEGISLATION IS INTERPRETED

5.1. Introduction

A basic understanding of the theoretical background of statutory interpretation is essential for a perspective on and understanding the subject. The two main approaches to statutory interpretation are the literal (text-based) approach and the purposive (text-in-context) approach.

5.2. Theories of interpretation

↪ The orthodox text-based (literal) approach

Interpreter should concentrate primarily on the literal meaning of the provision to be interpreted and the interpretation process should proceed along the following lines:

- (i) **Primary rule:** If the meaning of the words is clear, it should be put into effect and equated with the legislature's intention - *Principal immigration Officer v Hawabu*.
- (ii) **Golden rule:** If the so-called 'plain meaning' of the words is ambiguous, vague or misleading, or if a strict literal interpretation would result in absurd results, then the court may deviate from the literal meaning to avoid such an absurdity - *Venter v R*. Then the court will turn to the secondary aids to interpretation to find the intention of the legislature (e.g. the long title of the statute, headings to chapters and sections, the text in the other official language, etc).
- (iii) Should the secondary aids to interpretation prove insufficient to ascertain the intention, then the courts will have recourse to the tertiary aids to construction (e.g. the common law presumptions).

There are four factors which led to the adoption of the textual approach in England:

- (i) Misconceptions about the doctrines of the separation of powers (*trias politica* doctrine) and resulted in the idea that the court's function should be limited to the interpretation and

application of the will of the legislature, which is to be found in the words of the legislation only.

- (ii) The doctrine of legal positivism: what is decreed by the state is law and the essence of the law is to be found in the command or decree - the role of the court is limited to the analysis of the law as it is.
- (iii) England has a common law tradition, in which the courts traditionally played a very creative role in regard to common law principles. As a result legislation was viewed as the exception to the rule, altering the traditional common law as little as possible.
- (iv) Legislation was drafted to be as precise and as detailed as possible, for the sake of legal certainty - Legislature has prescribed everything it wishes to prescribe.

The approach was introduced into our legal system in *De Villiers v Cape Divisional Council* where it was held that legislation adopted after the British occupation should be interpreted in accordance with the English rules, which was a strange decision as English law prescribed that the conquered territory should continue to apply its own legal system. The Roman-Dutch rules of interpretation hold that the purpose of the legislation should prevail. Over the years, the courts came to regard the clear literal meaning as identical to what the 'legislature intended'.

The 'plain meaning' approach means that the words to be interpreted should be given a literal or grammatical meaning and the intention of the legislature should be inferred from the words used in the legislation – *Union Government v Mack* and *Farrar's Estate v CIR*. If the legislature had a specific intention, it would be reflected in the clear and unambiguous words of the text – *Ensor v Rensco Motors (Pty) Ltd* and *Engels v Allied Chemical Manufacturers (Pty) Ltd*.

Criticism of the textual approach:

- (i) The role played by the common law presumptions is reduced to a mere 'last resort'.
- (ii) In this narrow approach, the literal meaning of words are regarded as the primary index of the legislature's intention.
- (iii) Other important internal and external aids to interpretation are ignored unless the textual meaning is ambiguous or unclear.
- (iv) The intention of the legislature is dependant on how clear the language is to a court.
- (v) Few legislative texts are so clear that only one interpretation is possible.

This approach leaves very little room for the court's inherent law-making discretion and they are seen simply as mechanical interpreters of the law created by the legislature. According to the maxim *iudicis est ius dicere sed non dare*, the function of the court is to interpret and not to make law (*Harris v Law Society of the Cape of Good Hope*) and the inflexible approach to this rule results in a misunderstanding of the separation of powers doctrine, which is used to justify the literal approach, and most courts still follow the textual, plain meaning approach. The *casus omissus* rule (courts may not supply an omission in a law) is derived from the principle that the function of courts is to interpret law, not make it – *Ex parte Slater, Walker Securities (SA) Ltd*.

Public Carriers Association v Toll Road Concessionaries

Facts: A portion of the N3 between Johannesburg and Durban was declared a toll road in terms of Section 9(1) of the National Roads Act. Section 9(3) of the Act provided that a toll road shall not be declared unless "an alternative road to the intended toll road, along which the same destination or destinations may be reached" is available to road users. The alternative road which was provided overlapped the toll road for a total distance of 79km, but bypassed all the toll gates, thereby enabling motorists travelling along it to avoid paying toll charges. An association of public road carriers challenged the new toll road on the grounds that a proper "alternative road" had not been made available as required by Section 9(3) of the Act. The association claims that the phrase "an alternative road" means an alternative roadway and not an alternative route. It was thus argued that, for there to be an alternative road, two physically separate roadways must exist for the motorist to choose from. Since the use of the so-called alternative road involved travelling a total of 79 km along the toll road, it was not an "alternative road" as required. The toll road operators argued that "alternative road" means "an alternative route". In this sense two roads (or routes) are alternative roads, even though parts of them are common to both.

Legal issue: How should the phrase "an alternative road" be interpreted?

Finding: One of the last authoritative statements of the textual approach before the introduction of the new constitutional order. It also suggested that the purpose of the legislation could solve interpretation problems as a last resort when the textual approach could not. The court thus partially recognised the value of the purposive or text-in-context approach, but restricted its application to cases where the textual approach had failed. The case provides a bridge between the old textual approach and the new contextual approach.

The court decided the case in favour of the toll road operators. It began its reasoning by applying the rules of the textual approach to the question. It stated that the primary rule in the construction of statutory provisions is to ascertain the intention of the legislature. The court proceeded to say that it is now well established that one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the legislature could not have contemplated it. Subject to this proviso, no problem would normally arise where the words in question were only susceptible to one meaning: effect had then to be given to such meaning. In other words, the court turned to the dictionary, hoping to find a clear meaning for the terms “road” and “alternative”. Having consulted the dictionary, the court discovered that the words “an alternative road” are not linguistically limited to a single ordinary grammatical meaning. The phrase could mean either “a different roadway” (as the association argued) or “a different route” (as the toll operators argued). Because both interpretations were linguistically feasible, the court turned to the so-called secondary aids of textual interpretation. However, it found that none of the recognised internal or external aids helped to indicate which one of the two meanings of the term “road” was intended by the legislature. The court then turned to the common law presumptions. However, none of the presumptions helped to indicate which of the two possible meanings of the term “road” we should accept as the legislative intention. The textual approach therefore didn’t provide any solution to the problem.

To resolve the dispute, the court decided to look at the purpose of the provision. The court declared that it should adopt the interpretation which best served that purpose. *“It must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it. But where its application results in ambiguity and one seeks to determine which of more than one meaning was intended by the legislature, one may in my view properly have regard to the purpose of the provision under consideration to achieve such objective.”*

The court proceeded to state that the purpose of Section 9(3) was to ensure that road users who wished to do so could reach their original destination without paying the new toll fees. That being the primary object of Section 9(3), the court held that “an alternative road” meant “an alternative route” and not “an alternative roadway”. It was not necessary to provide a wholly separate roadway in order to achieve the object of the Act. All that was required was a route that bypassed the toll gates. It followed that the declaration of the relevant portion of the N3 as a toll road was valid.

↪ The purposive (text-in-context) approach

The purpose or object of the legislation is the dominant factor in interpretation. To determine such purpose, the context of the legislation, including social factors and political policy directions, are taken into account. The mischief rule stand in contrast to the literal approach and is the basis of a purposive, contextual approach to interpretation. It acknowledges the application of external aids such as the common-law prior to enactment of the legislation, the mischief in the law not provided for, the new remedies and the reasons for such remedies to provide the interpreter with the purpose and meaning of the provision.

This approach establishes a balance between the grammatical, literal meaning and the overall contextual meaning as the interpretation of the provision cannot be complete until the purpose and extent of the legislation are also taken into account. This harmonises the flexibilities and peculiarities of language, and all internal and external factors, in the lifespan of the legislation.

Jaga v Dönges

Facts: Jaga was caught selling unwrought gold and was sentenced to 3 months imprisonment suspended for 3 years. The Minister declared Jaga an undesirable inhabitant of the Union and a warrant for his deportation to India was issued. Jaga challenged his deportation on the basis that he hadn’t been sentenced to imprisonment and the Minister argued that a suspended sentence of imprisonment is still a sentence of “imprisonment” within the ordinary meaning of the provision. Jaga argued that “imprisonment” meant actual (as opposed to merely potential) imprisonment and he wasn’t actually and physically held in prison.

Legal issue: How should the phrase “sentenced to imprisonment” be interpreted?

Finding: The majority of the court decided to adopt the textual approach and it was held that “imprisonment” meant that the sentence imposed on the offender contained a period of imprisonment (suspended or not) as an element and the warrant was legally issued as Jaga did receive a sentence of imprisonment.

In his minority judgment, **Schreiner JA**, by contrast adopted a contextual approach and came to the opposite conclusion. He identified the following guidelines for interpretation of statutes:

- From the outset, the interpreter may take the wider context of provisions (e.g. its ambit and purpose) into consideration with the legislative text in question.

- Irrespective of how clear or unambiguous the grammatical meaning of the legislative text is, the relevant contextual factors must be taken into account.
- The wider context may even be more important than the legislative text.
- Once the meaning of the text and context is determined, it must be applied, irrespective of whether the interpreter is of the opinion that the legislature intended something else.

The contextual approach was supported in *Mjuqu v Johannesburg City Council* and *University of Cape Town v Cape Bar Council*.

This approach is more flexible in that it allows the courts to modify and adapt the initial meaning to accommodate the purpose of the legislation, which supports the court's inherent law-making discretion. The court's discretion is, however, limited by the prerequisite that such modification or adaptation of the meaning is only possible when the purpose and extent of the legislation are absolutely clear to support such a modification or adaptation. This approach is not intended to limit the legislature's legislative function, but rather to broaden the court's powers during the interpretation and application of legislation. The provision of the legislation is not modified, but rather the meaning attached thereto to give effect to the true intention of the legislature.

↪ The influence of the supreme Constitution

(i) The supremacy clause – Sections 1 and 2

Section 2 of the Constitution – Supremacy of the Constitution

This 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.

This must be read with: Section 7, which states that the Bill of Rights is the cornerstone of the South African democracy and that the state must respect, protect, promote and fulfill the rights in the Bill of Rights; Section 8(1), which states that the Bill of Rights applies to all law and binds the legislature, executive, judiciary and all organs of state; Section 8(2), which provides that the Bill of Rights applies to both natural and juristic persons; and Section 237, which states that all constitutional obligations must be performed diligently and without delay.

All law and conduct, all traditions, dogmas, perceptions, rules, procedures and all theories, canons and maxims of interpretation are, therefore, influenced and restricted by the Constitution, which is supreme and everything and everybody is subject to it. This entails that the Interpretation Act, Roman-Dutch common-law or traditional common-law cannot be used to interpret the Constitution and the interpretation now also involves balancing competing fundamental rights and freedoms.

Section 1 of the Constitution – Republic of South Africa

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

(ii) The interpretation provisions – Sections 39 and 233

Section 39(2) of the Constitution – Interpretation of Bill of Rights

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

Section 233 of the Constitution – Application of international law

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.

These are peremptory and, without stating it expressly, the interpreter is compelled to revert to external aids and, in effect, follow the contextual approach as the interpreter is, from the outset, required to promote the spirit, purport and objects of the Bill of Rights and interpret law so that it is consistent with international law. It is thus clear that the interpretation of statutes will not be properly served when using the textual approach as the mere plain meaning of the text would not necessarily reflect this purpose.

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism

Facts: The case concerned the allocation of quotas in the fishing industry. The amount of fish that may be caught by a deep-sea fishing trawler is limited by a quota system, which is determined by the Minister of Environmental Affairs and Tourism in terms of the Marine Living Resources Act. Section 2 of the Act is headed “Objectives and principles” and lists the objectives of the Act, including to achieve sustainable development, to further biodiversity, and to restructure the fishing industry in order to achieve equity. The section states that the Minister must “have regard to” these objectives when he allocates quotas. Section 18(5) deals specifically with the allocation of fishing quotas. It again states that the Minister must make allocations that will achieve the objective contemplated in Section 2. Bato Star was allocated a quota for the year, but complained that its quota was too small and approached the court to have the allocation of quotas set aside. The case turned on the question whether the Minister did “have regard to” the objective of achieving equity in the fishing industry when quotas were allocated.

Legal issue: How should the phrase “have regard to” be interpreted?

Finding: The Supreme Court of Appeal asked, in a textualist fashion, what the ordinary meaning of the words “have regard to” was and to answer this question, the court looked at the way in which the phrase has been applied by our courts for many years. These cases made it clear that “to have regard to” meant no more than “to take into consideration” or “to take into account” or “not to overlook”. This meant that, when granting quotas, the Minister had to take the principle of equity mentioned in Section 2 into consideration, but did not have to make it his special concern. It was clear from the facts that the Minister did take the need to transform the fishing industry into account when quotas were allocated. The quotas were therefore validly allocated.

Bato Star appealed to the Constitutional Court claiming that the Supreme Court of Appeal had interpreted the phrase “have regard to” incorrectly. Bato Star argued that the phrase “have regard to” equity not only meant that equity should be “taken into account” (as the ordinary meaning of the words suggests), but that equity should be “promoted as the overriding concern”. This alternative meaning is suggested by the context in which the phrase operates. The Constitutional Court agreed.

It was held that the starting point when interpreting any legislation is the Constitution and that, firstly, the interpretation must advance at least one identifiable value enshrined in the Bill of Rights and, secondly, the legislation must be capable of such interpretation. This case thus confirms that the primary and golden rules of textual interpretation do not apply in our law any more and the Constitutional Court agreed that an alternative meaning should be ascribed to a provision regarding fishing quotas as suggested by the context in which it operates. Ngcobo J expressed concern about the textual method of interpretation followed in the court *a quo* and insisted that it is no longer the ordinary meaning of words that must be applied, but the purpose of legislation and the values of the Constitution. He also referred to the minority judgment in *Jaga v Dönges* (see above) with approval.

Investigating Directorate: Serious Economic Offences v Hyundai Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit

Finding: The constitutional foundation of the interpretation methodology was explained by referring to Section 39(2) of the Constitution. It was held to mean that all legislation must be interpreted to promote the spirit, purport and objects of Bill of Rights. Therefore, when interpreting the Constitution, the context in which we find ourselves and the Constitution’s goal of society based on democratic values, social justice and fundamental human rights must be recognised. The constitutional venture is, as a whole, characterised by the spirit of transition and transformation.

Holomisa v Argus Newspapers Ltd

Finding: The interpretation clause of the Constitution was held to be “...not merely an interpretive directive, but a force that informs all legal institutions and decisions with the new power of constitutional values”.

(iii) The values underlying the Constitution

The three core values: **Freedom Equality Human Dignity**

The spirit, purport and objects of the Bill of Rights must be promoted during the process of statutory interpretation, thus the courts are the guardians and enforcers of the values underlying the Constitution. Since the values underlying the Constitution is not absolute, the interpretation of legislation is also an exercise in the balancing of conflicting values and rights and can no longer be a mechanical reiteration of what was supposedly ‘intended’ by parliament, but rather what is permitted by the Constitution.

Unfortunately the courts still apply the literal approach as in *Kalla v The Master* where the view of a supreme constitution was not held that, but rather that the traditional rules of statutory interpretation were not affected by the interim Constitution. Also in *Geyser v Msunduzi Municipality* an orthodox approach was followed.

↪ Practical inclusive methods of interpretation

Du Plessis and Corder suggested 5 methods of constitutional interpretation. The techniques are complementary and should be applied in conjunction with one another:

(i) Grammatical interpretation

It acknowledges the importance of the role of the language of the legislative text. It focuses on the linguistic and grammatical meaning of the words, phrases, sentences and other structural components of the text, without implying a return to the literal approach.

(ii) Systematic (or contextual) interpretation

It is concerned with the clarification of the meaning of a particular legislative provision in relation to the legislative text as a whole. Words, phrases and provisions cannot be read in isolation. The emphasis on the 'wholeness' is not restricted to the other provisions and parts of the legislation, but also takes into account extra-textual factors such as the social and political environments in which the legislation operates.

(iii) Teleological interpretation

It emphasises the fundamental constitutional values and a value-orientated interpretation. The aim and purpose of the legislation must be ascertained against the fundamental constitutional values. The fundamental values in the Constitution form the foundation of a regulating, value-laden jurisprudence against which legislation and actions are evaluated.

(iv) Historical interpretation

It refers to the use of the 'historical' context of the legislation, including factors such as the circumstances which gave rise to the adoption of the legislation (mischief rule) and the legislation history (prior legislation and preceding discussions). Although an important aspect, this method cannot be decisive on its own.

(v) Comparative interpretation

This refers to the process (if possible and necessary) during which the court examines international human rights law and the constitutional decisions of foreign courts.

All these techniques were identified in *Minister v Land Affairs v Slamdien*:

The purposive approach made clear by the Constitutional Court requires:

- ascertain the meaning of the provision to be interpreted by an **analysis of its purpose** and, in doing so;
- have regard to the context of the provision in the sense of its **historical origins**;
- have regard to its context in the sense the **statute as a whole**, the subject matter and **broad objects of the statute and the values underlying it**;
- have regard to its immediate context in the sense of **the particular part of the statute in which the provision appears or those provisions with which it is interrelated**;
- have regard to the **precise wording of the provision**.

6. BASIC PRINCIPLES

6.1. The purpose of legislation

↪ The constitutional demands

The most important rule of interpretation is to establish the purpose of the legislation and to give effect to it ('intention of the legislature'). In *Matiso v Commanding Officer, Port Elizabeth Prison* it was pointed out that, since the Constitution is supreme and not the Legislature, the rule of ascertaining the intention of the legislation doesn't belong in our system. The purpose of legislation must be ascertained and applied in the light of the Bill of Rights and the Constitution and, therefore, a contextual approach is prescribed rather than a textual or literal approach.

↪ Why not the 'intention of the legislature'?

It originated from parliamentary sovereignty and **Steyn** defines statutory interpretation as "*the process by which the will or thoughts of the legislature are ascertained from the words used by the legislature to convey their will or thoughts*". Intention indicates a subjective state of mind, which is inconceivable when it comes to all the members of a legislative body because:

- (i) a large number of persons are involved in the legislative process;
- (ii) some members usually oppose the legislation, resulting therein that legislation ultimately reflects the intention of majority;

- (iii) some members may support legislation for the sake of party unit, although they are personally opposed to it;
- (iv) not all parliamentarians can be expected to understand complex, technical legislation;
- (v) bills are drafted by drafters acting on the advice of bureaucrat from State departments and not by parliamentarians;
- (vi) some members may be absent when the voting on a bill takes place.

In **Public Carriers Association v Toll Road Concessionaries (Pty) Ltd** court tried to make a distinction between the 'intention of legislature' and the purpose of the legislation and pointed out the following:

- (i) it is important to distinguish between the purpose of the legislation and the reasons why the members of the legislative body voted for the measure;
- (ii) the purpose of the legislation can be determined logically, where the 'intention of the legislature' is a matter of speculation;
- (iii) the purpose of the legislation should be determined by objective means and cannot be found by mere guesswork.

The 'intention of the legislature', when used in a narrow sense, is a disguise for the literal approach and in **R v Kirk** it was held that the intention of the legislature can only be arrived at by construing the actual words used and words cannot be inserted or intention assumed.

The 'intention of the legislature' when used in a broad sense, imply a more purposive approach and in **Stellenbosch Farmers' Wineries v Distillers Corporation** it was held that, to find the true intention of the words, the goal of the legislature and the reason for it must be ascertained.

The most important rule of statutory interpretation is that the interpretation must reflect the purpose of the legislation. However, the application of legislation that dates from the years of Apartheid cannot be restricted by what the parliament originally intended, but must be directed by the question of what function that legislation plays in today's constitutional democracy and human rights culture (without any reference to the intention of the apartheid legislators). Thus, it's better to speak of the purpose of legislation.

↩ The meaning of the text

The literal approach no longer applies, although text is still read for its meaning. It is, however, the purpose of the legislation viewed against the fundamental rights in the Constitution which will qualify the meaning of the text.

- (i) The initial meaning of the text

The process begins with the reading of the legislation attaching the ordinary meaning to the words. However, this normal principle of language was elevated to the primary rule of literary interpretation. The ordinary meaning principle is only the starting point of the process; the context of the legislation must also be taken into account from the outset. In technical legislation that applies to a specific trade or profession, words that have the specific meaning in that field must retain that meaning if it differs from the ordinary.

- (ii) Every word is important

Derived from (i) above, is the principle that a meaning must be assigned to every word and legislation should be interpreted in such a way that no word or sentence is regarded as redundant or superfluous. Sometimes it is essential to regard a word as unwritten as overlapping and repetition often occur as a result of overly cautious drafters. Provisions should be read as a whole in order to obtain the meaning. The principle that a meaning should be assigned to every word is not absolute and the purpose should be the deciding factor in determining whether a word is superfluous or not. This principle is also related to the presumption that legislation doesn't contain futile or nugatory provisions.

- (iii) The continuing timeframe of legislation

Question: Should words be interpreted according to their present-day meaning or retain the meaning they had when the legislation was passed?

Cowen deems it unnecessary for words to retain their original meaning. Initially, courts held that legislation must be given the meaning at the time it was passed and that the intention of the legislature must be determined in accordance with the meaning of the provision at the time when it was enacted. However, recently it has been held that the purpose of an Act suggested that the definitions should be interpreted flexibly in order to keep up with new technologies rather than update legislation periodically.

- (iv) No addition or subtraction

This is a basic principle and, in the final analysis, the purpose of the legislation is the qualifier of the meaning of the text. If the purpose of the legislation is clear, the court, as

the last link in the legislative process should ensure that the legislative process reaches a just and meaningful conclusion.

↪ Balance between the text and context

Initially, the context of the legislation was only taken into account if the language of the legislation was deemed to be ambiguous. In *Jaga v Dönges* this narrow view was rejected and it was held that, even if there is a clear meaning, the context must be taken into account. The purposive approach doesn't separate text from context, but strikes a balance between them.

6.2. Other basic principles

↪ Legislation must be read as a whole

Legislation must be read as a consistent whole. In common law, this is known as interpretation *ex visceribus actus* (all parts of the legislation must be studied), also applying to the Constitution and *Du Plessis* refers to this principle as the 'structural wholeness of the enactment'.

↪ The presumption that legislation does not contain futile or nugatory provisions

Unless the contrary is clear, it is presumed that the legislature doesn't intend legislation which is futile or nugatory⁵. This forms the basis of the most important principle of interpretation: Court must determine the purpose of legislation and give effect to it. The foundation of this presumption is an acknowledgment that legislation has a functional purpose.

If the intention of the legislature is clear, it should not be defeated merely because of vague or obscure language and court must attach a meaning to the words which will promote the aim of the provision. If a provision is capable of two meanings, the meaning which is consistent with the legislative purpose must be accepted.

R v Forlee

Facts: Forlee was found guilty of contravening an Act by selling opium. It was argued on appeal that he didn't commit an offence as the Act prescribed no punishment.

Legal issue: The presumption that legislation doesn't contain futile or nugatory provisions

Finding: The court relied on the presumption against futility, finding that the absence of a penal clause didn't render the Act ineffective since the court has the discretion to impose punishment. This gave rise to wide-spread criticism as the *nullum crimen sine lege* (if there is no penalty, there is no crime) was not adhered to. Although both presumptions applied, the *nullum crimen sine lege* rule is the basis of the criminal justice system and should have outranked the presumption against futile results.

The presumption applies to delegated legislation. The maxim *ut res magis valeat quam pereat* applies: an interpretation that will leave the delegated legislation *intra vires* (valid) and not *ultra vires* (invalid) must be preferred. Courts should strive to interpret legislation in a manner that evasion of its provisions is prevented and that a *casus omissus* (omission) is avoided.

7. RESEARCH: ASCERTAINING THE LEGISLATIVE SCHEME

7.1. General introduction

Fundamental principle: The purpose of legislation must be decided in the light of the Constitution.

Both internal and external aids may be used or consulted to ascertain the purpose. The interpreter must do research and *Du Plessis* refers to such a research process as one of contextualisation. Internal aids comprise the legislation and all its parts, while external aids are mostly other texts. The difference in opinion between the approaches as to when these aids will be used:

↪ The **textualists** will refer to these aids only where the legislative text is ambiguous and unclear.

↪ The **contextualist** will refer to all internal and external factors from the outset.

The Constitution supports a purposive approach, thus courts must be able to use all the internal and external aids to interpretation at their disposal to ascertain the aim and purpose of legislation and should have the discretion to decide on the importance and relevance of a particular aid.

7.2. Internal aids

↪ The legislative text in another official language:

Prior to the commencement of the 1993 Constitution, legislation was drafted in two official languages and text in any other language was used to clarify obscurities.

(i) Original legislation

Legislative texts are signed alternately in the different languages in which they were drafted and the signed text enrolled for record at the Appellate Division. With the 1961, 1983 and 1993 Constitutions, should an irreconcilable conflict between various legislative

⁵ Stated differently: the court must avoid an interpretation that negates part of the legislative text or leaves part of the text without a meaning or purpose. The basic principle that every word must be given a meaning is further supported by the common-law presumption that legislation doesn't contain invalid or purposeless provisions.

texts exist, the signed text prevailed. Section 240 of the 1996 Constitution provides that, in the event of any inconsistency, the English text will prevail. In terms of the Constitution, all national and provincial legislation which have been signed by the President or premier must be held at the Constitutional Court. The signed text will be conclusive evidence of the provisions of that legislation. The Constitution doesn't refer to irreconcilable conflicts between texts of other legislation. The signed text doesn't carry more weight simply because it is signed:

- The signed version is conclusive only where there is an irreconcilable conflict between the versions – *Handel v R*. The signed version is only used as a last resort.
- Where one version is wider, the 'common-denominator' rule is followed.
- If there's no conflict, the versions complement one another and must be read together. An attempt must be made to reconcile the texts with reference to the context and the purpose of the legislation.
- Even the unsigned version may be used to determine the intention of the legislature.
- If amendment Acts of an Act are signed alternately in English and Afrikaans, there are conflicting opinions as to which version will prevail. In *R v Silinga* it was suggested that the amendment Act be regarded as part of the original statute and the version of the statute signed originally will prevail if there are irreconcilable conflicts between the texts of amendment Acts.

(ii) Delegated legislation

In practice, all the versions of delegated legislation will be signed and the signed text cannot be relied on to solve conflicts between texts. If the texts differ, they must be read together – *Du Plessis v Southern Zululand Rural Licensing Board*. If there is an irreconcilable conflict, the court will give preference to the one that benefits the person concerned. It's based on the presumption that the legislature doesn't intend legislation that is futile or nugatory. If the irreconcilable conflict results in legislation that is vague or unclear, the court may declare it invalid.

(iii) Criticism

All versions of the text should be read together from the outset as they're all part of the structure of the same 'enacted law-text'. Interpreters have the benefit of having two versions of the same legislation available for comparison in different languages. The notion that 'the signed text prevails' is confirmation of the textual approach, because the purpose is ignored if there is conflict between the versions. *Botha* suggests that if an irreconcilable conflict between versions of the same legislative text exists, the text which best reflects the spirit and purport of the Bill of Rights must prevail.

↪ The preamble

It usually contains a programme of action or a declaration of intent with regard to the broad principles contained in the particular statute. It may be used during interpretation of legislation as the text as a whole should be read in its context, although on its own it cannot provide the final meaning of the text. In *Green v Minister of the Interior*, it was held that the preamble should be considered only if the provisions are unclear, which approach is a narrow and textual. In *Jaga v Dönges*, the preamble was considered to be part of the context of the statute. In *National Director of Public Prosecutions v Seevnarayan*, the approach held in *Green* was considered and outdated approach to interpretation.

↪ The long title

Provides a short description of the subject matter and forms part of the statute to be considered by the legislature during the legislative process. The courts are entitled to refer to the long title to establish the purpose of the legislation - *Bhyat v Commissioner for Immigration*.

↪ The definition clause

It is an explanatory list of terms in which certain words or phrases used in the legislation are defined. A definition in this section is conclusive, unless the context indicates another meaning when the ordinary meaning will be adopted. In *Kanhym Bpk v Oudtshoorn Municipality* it was held that a deviation from the meaning in the definition clause will only be justified if the meaning is not the correct interpretation within the context of the particular provision.

↪ Express legislative purpose and interpretation guidelines

Provides a more detailed description of the legislative scheme than the long title, but cannot be decisive as this view would create a new and sophisticated version of literal interpretation. The interpreter must analyse the text as a whole with external aids.

↪ Headings to chapters and sections

In the past courts held the literal viewpoint that the heading may be used to establish the purpose of the legislation only when the rest of the provision wasn't clear. Headings should be used to determine the purpose of legislation in the contextual approach. In *Turffontein Estates v Mining Commissioner Johannesburg* the court pointed out that the value attached to headings will depend on the circumstances of each case.

↪ Paragraphing and punctuation

It is a grammatical fact that punctuation can affect the meaning of the text. In *R v Njiwa* it was held that the punctuation must be taken into consideration during interpretation. In *Skipper International v SA Textile and Allied Workers' Union* it was held that, as punctuation was considered by the legislature, it must be considered during interpretation.

↪ Schedules

Schedules serve to shorten and simplify the content-matter and the value depends on the nature thereof, its relationship to the rest of the text and the language in which the legislation refers to it.

General rule: Schedules which explain sections of an Act should have the same force of law.

If there is conflict between the schedule and a section, the section prevails with the exception of the interim Constitution where the schedules form part of the substance. A particular schedule may state that it isn't part of the Act and that it doesn't have the force of law, in which case it may be considered as part of the context, e.g. the Schedule 4 of the Labour Relations Act with flow diagrams explaining the procedures for dispute resolution.

7.3. External aids

↪ The Constitution

It is the most important aid to interpretation. No argument about plain meanings and clear texts could prevent the Constitution from being used or referred to during interpretation.

↪ Preceding discussions

Discussions about a specific Bill before parliament, the debates and report of the various committees which form part of the legislative process and the reports of commissions of inquiry constitute preceding discussions. One should distinguish between debates during the legislative process and commissions of inquiry after the passing of legislation.

(i) Debates during the legislative process

The use of debates hadn't been accepted by the courts. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* the court referred to parliamentary debates, reports of task teams and the view of academics in interpreting an Act and in *S v Tilly* and *S v Tshilo* the court referred to a report of the South African Law Commission and a ministerial speech in parliament during the interpretation of a statute.

(ii) Commission reports

In some earlier cases the court didn't accept the use of a commission report and some it was accepted only if a clear link exists between the recommendations and the provisions. **Steyn** points out that the reasons for the courts not accepting reports are not convincing. Certain reports and speeches are useful in understanding the legislation. The reports of parliament and its committees may be used to ascertain the purpose.

↪ Surrounding circumstances

Those conditions before and during the adoptions of legislation which led to its creation, thus the context of the legislation.

(i) The mischief rule

The historical context of legislation is used to place provisions in perspective. The rule was laid down by Lord Coke in the famous *Heydon* case, which forms the cornerstone of the contextual approach. It poses 4 question that must be answered to establish the meaning of legislation:

- What was the legal position before the legislation was adopted?
- What was the mischief (defect) not provided for by existing legislation or common law?
- What remedy (solution) was provided by the legislature to solve this problem?
- What was the true reason for the remedy?

Object: To examine the circumstances leading to the measure in question.

In *Santam Insurance Ltd v Taylor* the court was obliged, on account of ambiguous language used in the Act, to examine the historical background of the Act to ascertain its purpose. In *Qozeleni v Minister of Law and Order* it was the suggested approach to interpret the Constitution is not foreign to the mischief rule.

- (ii) Travaux préparatoires
Travaux préparatoires refers to the discussions during drafting of an international treaty, but is increasingly used with regard to deliberations of the drafters of a constitution. If the deliberations of constitutional drafters become the deciding factor during the interpretation of such a constitution, there will be no development or adaptability. Thus, *travaux préparatoires* of a constitution may be consulted as a secondary source but cannot be the deciding factor.
- (iii) Contemporanea expositio
 This is an exposition (description) of the legislation at the time of its adoption or shortly thereafter. The marginal notes, punctuation, division into paragraphs and the first application may all serve as such. The implication is that the exposition was probably given by persons who were involved in the adoption of the legislation or shortly afterwards during its first application.
- (iv) Subsecuta observatio
 This refers to the established use or custom which may originate at any time after the adoption, which may be in conflict with the *contemporanea expositio*. The long-term use of a measure may be the deciding factor where more than one interpretation is possible.
- (v) Ubuntu
 An indigenous African concept referring to a practical humanist disposition towards the world and refers to compassion, tolerance and fairness. The concept was applied and explained in **S v Makwanyane** where it was held that it translates to 'humaneness', 'personhood' and 'morality'. It's not referred to in the Constitution, but it can be argued that ubuntu lives on the references to human dignity in the Constitution. It forms an important bridge between communal African traditions and individual Western traditions.

↪ Dictionaries and linguistic evidence

In an ever increasing technical and highly specialised era, dictionaries are used more frequently in a contextual framework. In **De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka** it was held that the interpretation of a word cannot be finally determined by its meaning in a dictionary as it was only a guideline and the context in which a word was used should be the decisive factor. The courts have held that the testimony of language experts or supplementary linguistic evidence isn't admissible as an aid.

S v Makhubela

Facts: The accused was charged with being behind the wheel of a vehicle that was being pushed by a group of people on a public road, without a driver's licence. He was found guilty of driving a vehicle on a public road without a valid driver's licence.

Legal issue: The use of a dictionary

Finding: On review, the court decided that the definition of the word 'drive', as found in the Road Traffic Act, was inadequate. The court held that the word 'drive' shouldn't be construed only according to its dictionary meaning, but should be understood within the context of the Act as a whole. The legislature had meant that a person driving a vehicle propelled by its own mechanical power should be in possession of a driver's licence. The conviction and sentence were set aside.

↪ The source of a provision

Sometimes an English provision that's been incorporated verbatim into South African legislation has to be interpreted and the interpretation used by the English courts will serve as a guideline, but will always construe legislation in the light of South African common-law. If the legislation is identical to original English legislation and the interpretation of the English courts isn't in conflict with our common-law, courts may take cognisance of the English cases. Not only the rules of common-law determine whether our courts refer to foreign law, but also the Constitution.

↪ Explanatory memoranda, examples and footnotes

The publication of a Bill is often accompanied by the publication of an explanatory memorandum from its drafters, which may help to determine the purpose of statutory provisions. In **Shoprite Checkers (Pty) Ltd v Ramdani** the court used the explanatory memorandum to interpret the Labour Relations Act. Footnotes and examples are used to facilitate confusing text and should be used as part of the context.

7.4. **The Interpretation Act 33 of 1957**

- Part I** General provisions regarding the interpretation of statutes that apply in the Republic
Parts II – V Particular provisions applying in the different provinces
Part VI Provides that the Act binds the state

The time factor

↪ The meaning of 'month'

'Month' means a calendar month and not a lunar month of 28 days:

- (i) a month as it appears on the calendar, e.g. 1 to 31 January ('calendar month'); or
- (ii) a month as it is measured in for example prison terms, e.g. 9 June to 9 July ('month').

↪ The computation of time

It's very important as a number of statutory and contractual provisions prescribe a time or period in or after which certain actions are to begin or are to be executed, abandoned or completed. Failure to discharge certain obligations within a certain period may affect the rights of parties concerned. Section 4 of the Interpretation Act should be read with the common-law methods.

(i) The statutory method (Section 4 of the Interpretation Act)

This section refers only to days, not to periods of months or year, and will be applied only where other legislation has no other arrangements. Our courts have accepted that in cases where it is not applicable, the ordinary-civil method applies. In **Brown v Regional Director, Department of Manpower** it was held that, if this section has to be used, it has to be interpreted as follows: the purpose of the calculation of time envisaged in section 4 is to determine the end and not the beginning of the particular period. The beginning of the period is when the particular right in question arises.

Section 4 of the Interpretation Act – Reckoning of number of days

When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or any public holiday, in which case the time shall be reckoned exclusively on the first day and exclusively of every such Sunday or public holiday.

(ii) Common-laws methods

- **Computatio civilis** (ordinary, civil method)

This method is directly opposed to the statutory method. The time is computed *de die in diem*: the first day of the period is included and the last day excluded. The last day is regarded as ending at the very moment it begins as it were (at midnight the previous day). In **Minister van Polisie v De Beer** it was held that, where a collision took place on 5 August 1967, the summons was served 1 day too late on 5 February 1968 where this method was used to determine the 6 month period to institute.

- **Computatio naturalis** (natural method)

The period is calculated from the hour or minute of an occurrence to the corresponding hour or minute on the last day of the period in question (*de momento in momentum*).

- **Computatio extraordinaria** (extraordinary civil method)

Both the first and the last day of the period are included.

7.5. Other common law presumptions

↪ Government bodies are not bound by their own legislation

General rule: The state is not bound by its own legislation, unless the legislation expressly or by necessary implication provides otherwise.

It doesn't create a *carte blanche* (unrestricted authority), but rather a principle of effectiveness to ensure state is not hampered in its government functions. **Wiechers** points out that if state is only bound by its own legislation in exceptional circumstances, there would be no question of state liability and the principle of legality would fall away. This was rejected in **S v De Bruin** and the application of this presumption was again confirmed in **Administrator, Cape v Raats Röntgen & Vermeulen (Pty) Ltd**. In **Evans v Schoeman** court held that the presumption against the state being bound isn't limited to instances where the state's prerogatives are involved and the following are indications that the state isn't bound:

- (i) if state would be rendered subject to the authority of or interference by its own officials; or
- (ii) if the state would be affected by penal provisions.

Whether the state will be bound depends on the particular legislation, circumstances and each case's merits. Examples of practical applications are:

- (i) Government bodies and state-controlled agencies are bound by town-planning schemes;
- (ii) Security official when acting outside the scope of his duties cannot rely on presumption;
- (iii) The driver of a fire engine may disregard a red traffic light while fire fighting;
- (iv) An agricultural official who combats stock disease is not bound by statutory requirements regarding hunting permits.

It is argued that this presumption should no longer apply under new constitutional order. Section 8(1) of the Constitution provides that government organs are bound by the Bill of Rights. The Constitution refers to principles such as accountability and openness, the values underlying an open and democratic society, the state is bound by the Constitution etc.

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* the court explained the principle of legality: it is central to the constitutional order, no legislature or executive may exercise power beyond that conferred upon them by law. The principle of legality is, therefore, implied in the interim Constitution.

State organs should always be bound by their own legislation, unless they can prove it would hamper their execution of duties.

↳ Legislation does not oust the jurisdiction of the courts

Unless expressly stated or necessarily implied, it is presumed that the legislature doesn't wish to restrict the courts' jurisdiction. In *De Wet v Deetlefs* it was held that the intention of the legislature should clearly indicate where a court's jurisdiction is to be excluded. The presumption was applied in *Mathope v Soweto Council*. A statutory provision which denies or restricts the right of an individual to appeal to a court has also been interpreted strictly - *Du Toit v Ackermann*. The presumption is entrenched in Section 34 of the Constitution, which provides that every person has the right to access a court, as a fundamental right. Read with Section 33 (the right to just administrative action) and Section 35(3) (every accused person has the right to a fair trial), this means that the legislature can no longer, as in the past, oust the jurisdiction of the courts at will.

8. CONCRETISATION: CORRELATION OF TEXT AND PURPOSE IN THE LIGHT OF THE CONSTITUTION NB!!

8.1. What is concretisation?

During **concretisation** the abstract text of the legislation and purpose of the legislation (which was determined earlier in the process) are correlated with the concrete facts of the case within the framework of the prescribed constitutional principles and guidelines.

It is the final stage in the interpretation process where the legislative text and purpose, as well as the facts of a particular situation are brought together to reach a conclusion and the result is applied to the facts of the case to reach the correct solution. It is not an arbitrary expression of personal preferences, but a discretion within the boundaries and parameters of the purpose of the legislation. Thus, a flexible and purposive method of interpretation doesn't imply a free-floating and unbridled application of legislation.

8.2. The law-making function of the courts

It is the greatest point of disagreement between the textualists and contextualists. It is misleading to describe this creative discretion as a law-making function as the court isn't making new law, but merely realising or giving effect to the existing law in new circumstances.

↳ The orthodox viewpoint

This approach rests on the assumption that the meaning of legislation is fixed and fully developed when it is promulgated and the subsequent application thereof doesn't add anything to the meaning thereof. The assumption is that meaning is not created through interpretation and any modifications, corrections or additions should be left to the relevant legislature (the *iudicis est ius dicere sed non dare* principle). In *Engels v Allied Chemical Manufacturers (Pty) Ltd* it was explained that by remedying the defect, the court would be usurping the function of the legislature and making law, not interpreting it.

↳ The purposive viewpoint

The contextualists claim that the court does have a creative law-making function, which doesn't mean that they take over the legislative powers of the legislature. *Du Plessis* claims that it is not sufficient to establish the plain meaning or purpose of legislation without reference to the set of facts or concrete situation to which the legislation must be applied. The meaning of legislation doesn't exist in a fixed and fully developed form before that legislation is applied. Thus, it is not a question of establishing the meaning of the legislation (step 1) and the applying it to the facts (step 2). What the legislation means only becomes clear when it is applied and concretisation creates, in effect, the meaning of the legislative text.

Labuschagne makes the same theoretical point and distinguishes between the abstract text of legislation (the structural statute) and the concrete realisation of the legislation (the functional statute). Court doesn't create a new statute when it gives the abstract structure a concrete or functional meaning as it merely completes the legislative process. There are two reasons why courts must necessarily play this role in the law-making process:

- (i) the legislature must inevitably use general language when it drafts legislation and what those general words or terms mean in specific circumstances is left to the courts to work out;
- (ii) legislation is drafted in the form of general rules that can apply to many different cases. The problem with all general rules is that they frequently tend to be either over-inclusive (covering more than they were supposed to) or under-inclusive (covering less than they were supposed to) and it is the task of the court to neutralise these effects and to ensure that the purpose of the rule is achieved. This sometimes means modifying the initial meaning of the rule (extending it where the rule is under-inclusive, and restricting it where the rule is over-inclusive).

To describe this process as “law-making” is a misnomer as what the court is doing is merely to ensure that the purpose of the legislation is not defeated or obstructed by the general language that the legislature had to adopt. Modification or adaptation of the initial meaning of the text involves the exercise of a creative judicial discretion, being nothing more than the authoritative application of legal principles: “Not an arbitrary expression of personal preferences, but an application of discretion within the boundaries and parameters of the purpose of the legislation.”

↪ The myth that courts merely interpret the law

The literalist viewpoint that the courts will usurp the powers of the legislative body if and when legislation is interpreted creatively is based on a number of false assumptions, namely:

- (i) They confuse the modification of the meaning of legislation with the literal modification of the text or language of the legislation;
- (ii) They are willing to accept a literal interpretation of a statute which goes beyond the purpose of the legislation;
- (iii) They rely on the doctrine of parliamentary supremacy which has been replaced by the Constitution.

This has already been discussed in paragraph 5 above.

↪ Factors which support and limit judicial law-making

There are important factors that both support and restrict the lawmaking discretion of the courts and these should ensure that courts apply their law-making function within the boundaries set by the core principle underlying modificative interpretation: the aim and purpose of legislation within the framework of the Constitution must support the modification.

(i) Restrictions on the law-making powers of the courts

The following factors restrict the law-making discretion of the courts:

- The principle of democracy;
- The principle of separation of powers;
- The common-law presumption that the legislature doesn't intend to change the existing law more than is necessary;
- The rule-of-law principle (including the principle of legality);
- Judges and judicial officers are accountable and responsible on 3 levels for the judgments and actions;
- Penal provisions or restrictive provisions in the legislation, as well as the presumption against infringement of existing rights, are also factors which limit the discretion of the courts to modify the initial meaning of the text.

(ii) Factors which support modificative interpretation

Factors supporting the law-making discretion of the courts during the interpretation of legislation are:

- The reading-down principle;
- Section 39(2) of the Constitution;
- The Bill of Rights is the cornerstone of the South African democracy and the state must respect, protect, promote and fulfil the rights in the Bill of Rights;
- Constitutional supremacy;
- The common-law presumption that the legislature doesn't intend futile, meaningless and nugatory legislation;
- The independence of the judiciary.

8.3. Possibilities during concretisation

The various possibilities during the concretisation phase of interpretation may also be influenced by the Constitution. The final 'result' or outcome of the interpretation process may not be in conflict with the Constitution in general, and the fundamental rights in particular. Thus, the concretisation

has to be constitutional. All the various possibilities that will be discussed below are qualified by the principle of constitutionality. Modificative interpretation (restrictive and extensive interpretation) may be applied only if it is permitted by the purpose of the legislation. The legislative purpose, however, may not be in conflict with the Constitution.

↪ No problems with correlation

There are no difficulties applying the provisions to the facts within the framework of the purpose and the prescribed constitutional guidelines, and the process is completed.

↪ Modification of the meaning is necessary

Modificative interpretation occurs when the initial meaning of the text doesn't correspond fully to the purpose of the legislation and modification of the initial meaning of the legislation will only take place where:

- (i) the purpose of the legislation is clear; and
- (ii) the initial meaning of the legislation goes beyond the purpose of the legislation (it is over-inclusive) or the initial meaning falls short of the purpose of the legislation (it is under-inclusive).

In order to ensure that the purpose of the legislation is not frustrated by the language of the legislation, the meaning of the words used in the legislation must either be:

- (i) restricted (language is over-inclusive) → restrictive interpretation; or
- (ii) extended (language is under-inclusive) → extensive interpretation.

Both are forms of modificative interpretation. Court may modify the initial meaning of text on the grounds of ambiguity, absurdity or vagueness. Only if there can be no doubt about the purpose of the legislation and if the text, context and Constitution are compatible with the modified meaning, will the court be entitled to deviate from the initial textual meaning.

(i) Restrictive interpretation

- **Restrictive interpretation in general**

Although the courts traditionally refer to two forms of restrictive interpretation, it should be clear that restrictive interpretation isn't limited to *eiusdem generis* and *cessante ratione legis, cessat et ipsa lex*. Any interpretation which reduces (limits) a wider initial meaning of the text to the narrower purpose of the legislation, is by definition restrictive interpretation.

- **Cessante ratione legis, cessat et ipsa lex**

This maxim literally means that 'if the reason for the law ceases (falls away), the law itself also falls away'. Since legislation cannot be abolished by custom or altered circumstances, this rule isn't applied in South African law in its original form and legislation remains in force until repealed by the legislature concerned – *R v Detody*. The *cessante ratione* rule has from time to time been applied by the South African courts in an adapted form. In these cases the provisions were merely suspended as the purpose of the legislation had already been achieved in another manner. Under the circumstances it would have been futile or unnecessary to apply the legislation. It is difficult to prove that the reason for legislation has fallen away and, consequently, such cases are infrequent.

- **Eiusdem generis**

The term *eiusdem generis* literally means 'of the same kind' and is based on the principle *noscitur a sociis* (words are known by those with which they are associated, or, more colloquially, 'birds of a feather flock together'). This means that the meaning of words is qualified by their relationship to other words. The rule stipulates that the meaning of general words is determined when they are used together with specific words. Apart from the general requirements to be met before the initial meaning of the text may be modified, other prerequisites for the application of this rule must also be satisfied:

- The rule cannot be applied unless the specific words refer to a definite genus (common quality or denominator) or category;
- The specific words must not already have exhausted the genus;
- The rule can be applied even where a single specific word precedes the general words;
- The order in which the words occur is not important;
- The rule may be applied only if the 'legislature's intention' supports such a restrictive interpretation.

S v Kohler

Facts: The court heard an appeal against a conviction by a magistrate's court, which convicted Kohler of having contravened a municipal poultry regulation by keeping a peacock within the municipal boundaries without a licence. The regulation defined 'poultry' as any fowl, duck, goose, turkey, guinea fowl, partridge, pheasant, pigeon or the chickens thereof, or any other bird. The defence alleged that peacocks are not poultry.

Legal issue: The *eiusdem generis* rule

Finding: After consulting dictionaries, the court found a peacock to be "a chicken-like decorative bird". Since there already is a definite genus (i.e. poultry), the general words "any other bird" are restricted to that genus. A peacock is a species of that genus and the appeal was dismissed.

(ii) Extensive interpretation

Extensive interpretation is the opposite of restrictive interpretation. What we have here are those instances where the purpose is broader than the initial textual meaning of the legislation. The meaning of the text is then extended (widened) within the framework of the purpose of the legislation to give effect to that purpose. The initial meaning of the text is modified (in this case expanded) to include things which, on the face of it, fall outside the scope of the legislation but are actually implied by the legislative provision. This applies where the legislation has specified less but intended more.

Interpretation by implication

Interpretation by implication involves extending the textual meaning on the ground of a reasonable and essential implication which is evident from the legislation. Express provisions are thus extended by implied provisions. There are various grounds on which the provisions of the legislation may be extended by implication. However, they remain no more than indications: the legislation in its entirety and its purpose continue to be the decisive test whether provisions may be extended. Interpretation by implication involves the extension (widening) of the meaning on the grounds of a reasonable and essential implication and these grounds, which are not always easy to prove, are:

- **Interpretation ex contrariis** - arise from opposites. If legislation provides for a specific situation, by implication it makes a contrary provision for the opposite situation. This overlaps with the *inclusio unius est exclusio alterius* (inclusion of the one means the exclusion of the other) - ***Keeley v Minister of Defence***.
- If legislation demands or allows a certain result or action, whatever is reasonably necessary to bring about that express result or action may be implied;
- If a principal thing is forbidden or permitted, the accessory thing is also forbidden or permitted (e.g. if the selling of dagga is prohibited, it may be implied that the production of the dagga is also prohibited);
- Implied inherent relationships (e.g. the power to issue a regulation implies the power to withdraw it);
- If a particular result is prohibited by legislation, it by implication prohibits all indirect means by which such a result can be achieved.

↪ No modification of the meaning is possible

The discretion of the judiciary to modify the initial meaning of the text is limited. If modification of the meaning is not possible, the court will have to apply the legislation as it reads. If legislation isn't clear or doesn't support a modification of the initial meaning, the legislature has to rectify it.

9. PEREMPTORY AND DIRECTORY PROVISIONS**9.1. General introduction**

Legislation which contains the formal or procedural requirements that have to be followed before a legal privilege is obtained, or status achieved, often stipulates what the consequences will be if these requirements are ignored. These consequences could range from criminal punishment to the nullity of the privilege granted or status achieved. However, where legislation fails to specify what the consequences are where statutory requirements are ignored, difficulties arise and courts have to determine whether the provision is:

- ↪ **peremptory** – a statutory provision that requires **exact compliance** and failure to comply with it will leave the ensuing act null and void;
- ↪ **directory** – a statutory provision that requires **substantial compliance** only and failure to comply with it will not result in the ensuing act being null and void.

The question isn't whether mechanical (formal) compliance with the statutory requirements is required, but rather substantial compliance. Full compliance isn't necessarily literal compliance (*Comrie v Liquor Licensing Board for Area 31*), but substantial compliance (*Commercial Union Co of SA v Clarke*), in other words: substance over form and compliance with the aim and purpose of the legislation within the context of the legislation as a whole. Courts generally follow a purposive (contextual) approach to the interpretation of peremptory and directory provisions. The language of the provision is read in its context and all internal and external aids are used to determine the purpose of the legislation.

Strictly speaking, it is incorrect to refer to 'peremptory' and 'directory' provisions. **Wiechers** points out that in principle all legislative provisions are peremptory. If this wasn't the case, they wouldn't be binding legal rules but merely 'non-obligatory suggestions for desirable conduct'. The question is whether the prescribed formal requirements were complied with exactly or merely substantially. Unfortunately, these categories have become firmly entrenched in practice.

In *Weenen Transitional Council v Van Dyk* the court held that peremptory and directory rules are mere guidelines: what is important is the purpose of the provision, as well as the consequences of not adhering to the statutory requirements.

Ex parte Dow

Facts: On 7 July 1984, a marriage was solemnised by a minister of the Presbyterian Church (a duly designated marriage officer) at a privately owned residential property in Johannesburg. In breach of the provisions of Section 29(2) of the Marriage Act, 25 of 1961, the entire ceremony took place in the front garden in the open (not in a private dwelling house). This section states that "[a] marriage officer shall solemnise any marriage in a church or other building used for religious service or in a public office or private dwelling-house, with open doors and in the presence of the parties themselves and at least two competent witnesses". The "marriage" subsequently turned sour, and the "husband" approached the Court with an application to have the purported marriage declared null and void from the start (null and void *ab initio*). He claimed that no marriage came into being as the requirements of the Act were not complied with. The question is, then, what the consequences are of the fact that the marriage took place in the garden.

Finding: The argument of the "husband" sounds convincing enough, but this wasn't what the court decided. The court held, instead, that the marriage was legally concluded and that the disgruntled husband would have to follow the standard divorce proceedings if he wanted to bring an end to his marriage. The fact that the statutory requirement was ignored and that the marriage took place in a garden didn't in any way affect the validity of the marriage.

9.2. **Some guidelines**

Although the purpose of the relevant legislation remains the deciding factor, a series of guidelines has been developed by the courts as initial tests or indicators of the purpose. **Wiechers** points out that these guidelines aren't binding legal rules, but merely pragmatic solutions with persuasive force. Any guideline, test or indication will only be tentative and the guidelines or 'tests' set out below are not binding rules as the purpose of the legislation will always be decisive in establishing whether a requirement is peremptory or directory.

↳ Semantic guidelines

Courts have formulated some semantic guidelines and these are based on the grammatical meaning of the language used in the provision:

- (i) Word/s with an imperative or affirmative character indicate a peremptory provision (e.g. the words 'shall' or 'must');
- (ii) Permissive words indicate a discretion and will be interpreted as being directory, unless the purpose of the provision indicates otherwise (e.g. 'may');
- (iii) Words in negative form indicate a peremptory connotation;
- (iv) Positive language suggests that the provision is merely directory;
- (v) If the provision is formulated in flexible and vague terms, it is an indication that it is directory.

↳ Jurisprudential guidelines

'Jurisprudential' guidelines are tests based on legal principles which have been developed and formulated by the courts. These guidelines are more influential than the semantic guidelines and involve an examination of the consequences, one way or another, of the interpretation of the provisions:

- (i) If the wording of the provision is in positive terms, and no penal sanction (punishment) has been included for non-compliance of the requirements, it is an indication that the provision in question should be regarded as being merely directory;

- (ii) If strict compliance with the provisions would lead to injustice and even fraud (and the legislation contains neither an express provision as to whether the action would be null and void, nor a penalty), it is 'presumed' that the provision is directory;
- (iii) The historical context of the legislation (in other words, the mischief rule) will provide a reliable indication whether the provision is peremptory or merely directory;
- (iv) Adding a penalty to a prescription or prohibiting is a strong indication that the provision is peremptory;
- (v) If the validity of the act would defeat the purpose of the legislation, this is an indication that the act should be null and void.

↪ Presumptions about specific circumstances

These are nothing more than initial assumptions and the purpose of the legislation may prove otherwise:

- (i) Where legislation protects the public revenue, a presumption against nullity exists, even if a penal clause has been added (e.g. rates, taxes and levies due to the state);
- (ii) Where legislation confers a rights, privilege or immunity, the requirements are peremptory and the right, privilege or immunity cannot be validly obtained unless the prescribed formalities are complied with;
- (iii) If other provisions in the particular legislation would become superfluous where non-compliance with prescribed requirements would result in the nullity of the act, there is a presumption that the requirements are merely directory;
- (iv) Where the freedom of an individual is at stake, the court will stress the peremptory nature of a requirement;
- (v) If a provision requires that a certain act must be performed within a prescribed time, and the court hasn't been empowered to grant an extension of the time period, the requirement is presumed to be peremptory.

The Constitution contains a number of peremptory provisions. Some of the most important of these for statutory interpretation are Section 2 (supremacy), Section 7(2) (application of Bill of Rights) and Section 39(2) (the interpretation clause).

Weenen Transitional Local Council v Van Dyk

Facts: A dispute arose about the procedure which had to be followed for the levying of taxes. The Local Authorities Ordinance 25 of 1974 allowed municipalities to assess and levy, once a year, a general water and sewage rate upon all immovable property in its district. The Weenen municipality sued Van Dyk for payment of his outstanding rates and taxes for the year. Van Dyk denied that the taxes were due. He based this denial on the fact that the municipality had failed to follow the correct procedure for the assessment of the rates and taxes for that year. The ordinance required of the municipality to publish a notice in a newspaper stating that the assessment of the taxes for the year could be inspected. After the inspection period, 2 further notices listing the total amount of tax on each property had to be published at least 5 days apart. The Act further stated that the rates and taxes will become due and payable a month after the last of these notices had been published. The municipality, however, had published only 1 notice in which the final rates and taxes were set out and a period for inspection stipulated.

Finding: The judgment of the court was in favour of Van Dyk. The imperative language of the provision ('shall publish') had to be considered, but also had to be balanced against the object and importance of the provision as a whole. These objectives couldn't have been met by condensing the 3 required notices into 1. To achieve the objectives of the provision, strict adherence to the publication requirements was required. This requirement was peremptory and the taxes weren't due.

Commercial Union Assurance v Clarke

Facts: An insurance company denied that it was liable to pay compensation to an injured road user because that road user failed to follow the correct procedure when his claim was instituted. Section 11 bis of the Motor Vehicle Insurance Act 29 of 1942 states that a claim for compensation "shall [...] be sent by registered post or by hand to the registered company". It goes on to provide that no claim "shall be enforceable by legal proceedings if it commenced within sixty days from the date upon which the claim was sent or delivered to the registered company". In this case the notice was delivered in time, but was sent by ordinary post. The insurance company used this technical point to try to escape liability. It argued that the statutory mail requirement was peremptory.

Finding: The court rejected the company's argument and held that the provision was directory. The court held that "each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other". This means that the court must not look at the legislative text itself to try to solve the issue (as textualists tend to do), but must instead ask whether the consequences of requiring strict compliance would be fair (just) in the circumstances or practical (functional) in the circumstances

(given the purpose of the legislative provision in the first place). This is an open-ended question that can only be solved on the facts of each case. The purpose of the legislation is decisive in this regard. The court took the following into account:

- i) the imperative use of the language in the section;
- ii) the purpose of the section, which was to protect claimants by ensuring that they had definite proof of the date upon which the 60 days period started to run;
- iii) that if a claimant decided not to register the letter, he forfeited this protection himself and took the risk upon himself;
- iv) that the company was not prejudiced in any way by the fact that the letter was sent by ordinary post and received more than 60 days before legal proceeding commenced.

In the circumstances, to hold that the company could escape liability on the basis of a technicality which had not prejudiced them at all would be unfair and unjust. The court therefore held that the provision was directory only, and that it had substantially been complied with. The decisive thing to note is that the court essentially decided the case on what would be fair (and practical) in the circumstances, given the overall purpose of the legislation. It thus applied a purposive approach.

African Christian Democratic Party v Electoral Commission

Facts: The Constitutional Court recently confirmed that the adoption of the purposive approach in our law has rendered obsolete all the previous attempts to determine whether a statutory provision is directory or peremptory on the basis of the wording and subject of the text of the provision. The case also illustrates how what is “fair and just” in the circumstances given the purpose of the legislative provision (the test laid down in *Commercial Union* and *Weenen Municipality* cases) must now be determined with reference to the object, spirit and purport of the Bill of Rights (see Section 39(2) of the Constitution).

Section 14(1) of the Local Government: Municipal Electoral Act 27 of 2000 states that a political party may contest a local election only if it had given notice of its intention to do so and if it had paid the required deposit before the stipulated deadline. During the 2006 municipal elections, the ACDP gave notice of its intention to participate in the Cape Town municipal election, but failed to include a separate deposit in a cheque which covered all the municipalities in which the party wanted to contest the election. When the mistake was discovered, the deadline for the payment of deposits had come and gone. The Electoral Commission refused to register the ACDP for the election. The Commission argued that the statutory deposit requirement in Section 14(1) was peremptory. The ACDP argued that the provision was directory and that it had substantially complied with the provision. It pointed out that, on the day of the deadline, there was a surplus available in its account at the Electoral Commission that could have been used as deposit for the Cape Town elections. The ACDP appealed to the Electoral Court but the court also held that the deposit requirement was peremptory and that the ACDP had failed to comply with it. The ACDP then turned to the Constitutional Court.

Finding: The Constitutional Court held that the ACDP had (substantially) complied with the provisions of Section 14(1) and ordered the Commission to register the party for the Cape Town elections. According to the court, there is a general trend in our law away from “the strict legalistic to the substantive” (ie purposive). Given this trend, the question was “whether what the [ACDP] did constituted compliance with the statutory provisions viewed in the light of their purpose”. The court held that the overall purpose of Section 14(1), and of the Act as a whole, was to promote and give effect to the constitutional right to vote. The specific purpose of Section 14(1) and the deposit requirement was to establish which parties had the serious intention to participate in the elections. The ACDP had given proper notice of its intention to participate in the Cape Town elections and had paid over an amount to the Electoral Commission in excess of what was required. They had established their serious intention to participate in the Cape Town elections in spite of the fact that no specific mention was made of Cape Town. The provisions of Section 14(1) must in the circumstances be treated as directory. As the ACDP had substantially complied with those provisions, it should be allowed to participate in the Cape Town election.

10. CONSTITUTIONAL INTERPRETATION

10.1. Introduction

Section 35(3) of the 1993 Constitution blurred the traditional difference between the interpretation of 'ordinary' legislation and constitutional interpretation, and Section 39 of the Constitution of 1996 reiterated this. South African courts now have to interpret all legislation in the light of the fundamental rights enumerated in the Bill of Rights. Every court, tribunal and forum will have to become involved in constitutional interpretation to some degree.

↳ Constitutional interpretation and 'ordinary' statutory interpretation

Section 39(2) of the Constitution prescribes the 'filtering' of legislation through the fundamental rights during the 'ordinary' interpretation process. Constitutional interpretation refers to the

authoritative interpretation of the supreme Constitution by the judiciary during judicial review of the constitutionality of legislation and government action. **Du Plessis** and **Corder** point out that the differences between constitutional and 'ordinary' interpretation mustn't be over-emphasised, because they are interrelated and it's preferable they be seen as 'members' of the same broad interpretative family. It would be problematic to reconcile a purposive method of constitutional interpretation with a literal method of 'ordinary' interpretation and Section 39(2) ensures that 'ordinary' interpretation should be based on a contextual and purposive method similar to that used in constitutional interpretation.

The difference between constitutional and 'ordinary' interpretation was explained in ***Matiso v Commanding Officer, Port Elizabeth Prison***:

"Constitutional interpretation is aimed at ascertaining the fundamental values inherent in the Constitution and legislation interpretation is directed at ascertaining the purpose of legislation and whether it is capable of interpretation which conforms with the values of the Constitution".

↪ A supreme constitution and ordinary legislation

A supreme Constitution's status in the legal order is the main reason for the difference between constitutional interpretation and 'ordinary' interpretation; the old system of parliamentary sovereignty is no more. The Constitution is now the frame of reference within which everything must function and against which all actions must be tested and is the ***lex fundamentalis*** (fundamental law) of the South African legal order. As such, it embodies the values of society, as well as the aspirations, dreams and fears of the nation and should be the most important national symbol. It does more than describe the institutional framework of government.

10.2. Why is a supreme Constitution different?

A constitutional state is underpinned by 2 foundations, namely: a **formal** one (includes aspects such as the separation of powers, checks and balances on the government and the principle of legality) and a **material or substantive** one (refers to a state bound by a system of fundamental values such as justice and equality). There reasons why the text of the Constitution is different from the text of ordinary legislation are:

↪ A constitution as a formal power map

The Constitution is a formal 'power map', which deals with the institutional and organisational structures and procedures of the state (e.g. the type of state and government, the powers and functions or the various persons and institutions, the different branches and tiers of government (separation of powers) and checks and balances etc).

↪ Substantive constitutionalism

The Constitution sets out a system of fundamental the state and the state authority is bound by a set of higher, substantive legal norms.

↪ Constitutional symbolism

The Constitution forms a bridge in a divided society, a bridge from a culture of authority to a culture of justification. It is a mirror reflecting the nation's ideas and aspirations. It is a shield for the individual against abuse by the state and a instrument for positive transformation in the light of the fundamental values it contains. It is open-ended, value-laden and it has a dimension of futurity. In ***Nortje v Attorney-General of the Cape*** it was held that a supreme Constitution:

"Is not a finely tuned statute designed ad hoc to deal with one particular subject, or to amend or repeal another specifically named statute, or a specifically identified rule of the common law. It is sui generis. It provides, in the main, a set of societal values to which other statutes and rules of the common law must conform, and with which government and its agencies must comply, in carrying out their functions- It is short on specifics and long on generalisation."

10.3. How to interpret the Constitution

In the ***Nortje*** case the categorisation of theories and canons of constitutional interpretation was questioned and it was held that the adopted approaches were a valuable aid to understanding what is entailed in those processes, but it was unwise to settle too strictly on one approach at this stage.

↪ Constitutional guidelines

Section 39(1) of the Constitution – Interpretation of Bill of Rights

When interpreting the Bill of Rights, a court, tribunal or forum -

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

- (a) **Peremptory**: When interpreting the Bill of Right, value judgments must be made.
- (b) **Peremptory**: There is a universal set of rules and norms dealing with the protection of fundamental human rights.
- (c) **Directory**: Only those legal principles not in conflict with our legal order.

Section 39(1) must be read with Sections 1, 39(2) and 233 (see paragraph 5). Following are some of the general principles of constitutional interpretation formulated by our courts:

- (i) ***Shabalala v The Attorney-General of Transvaal***: A supreme Constitution must be given a generous and purposive interpretation.
- (ii) ***Nyamakazi v President of Bophuthatswana***: A purposive interpretation of the Constitution is necessary, since it enables the court to take into account more than legal rules.
- (iii) The Constitution must be liberally interpreted, referring to 'flexibility' and 'generosity'.
- (iv) ***S v Acheson***: During the interpretation of the Constitution, its spirit and tenor must be adhered to.
- (v) ***S v Makwanyane***: A provision in the Constitution cannot be interpreted in isolation, but must be read in the context as a whole.
- (vi) ***Shabalala v The Attorney-General of Transvaal***: Respect must be paid to the language in the Constitution, the context is anchored to the particular constitutional text.
- (vii) ***S v A Juvenile***: The Constitution has bestowed on the court the sacred trust of protecting human rights.
- (viii) ***Khala v Minister of Safety and Security***: The Constitution was drafted with a view to the future, providing a continuing framework for the legitimate exercise of government power and the protection of individual rights and freedoms
- (ix) ***Qozoleni v Minister of Law and Order***: The Constitution must be interpreted in the context and setting existing at the time when the case is heard, and not when it was passed, otherwise the growth of society will not be taken into account.
- (x) Constitutional interpretation is an exercise in the balancing of various societal interests and values.
- (xi) ***Nortje v Attorney-General of the Cape***: These methods and principles of constitutional interpretation don't constitute a firm set of rules and constitutional interpretation is an inherently flexible process.
- (xii) ***S v Zuma***: The principles of international human rights and foreign law must be applied with due regard for the South African context
- (xiii) ***S v Makwanyane***: Constitutional interpretation must start and end with the Constitution.
- (xiv) ***Prince v Cape Law Society***: All judges and judicial officers are obliged to continuously interpret and apply legislation to give effect to fundamental values and rights in the Constitution.

Prince v Cape Law Society

Facts: Rastafarian with previous conviction of possession and use of dagga denied admission to the Law Society as he also intended to use dagga in future in legal ceremonies. Prince believed that this infringed his constitutional rights.

Legal issue: Setting out the correct way of interpreting the Constitution.

Finding: Limitations analysis under our Constitution is based not on formal or categorical reasoning but on processes of balancing and proportionality as required by Section 36. This Court has accordingly rejected the view of the majority in the United States Supreme Court that it is an inevitable outcome of democracy that in a multi-faith society minority religions may find themselves without remedy against burdens imposed upon them by formally neutral laws. Equally, on the other hand, it would not accept as an inevitable outcome of constitutionalism that each and every statutory restriction on religious practice must be invalidated. On the contrary, limitations analysis under Section 36 is adverse to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against immovable object of constitutionalism and protection of fundamental rights. What it requires is the maximum harmonisation of all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by, international experience, articulated with appropriate frankness and accomplished without losing sight of the ultimate values highlighted by our Constitution. In achieving this balance, this Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the Legislature and the Executive, and what falls squarely to be determined by the Judiciary.

↪ A comprehensive methodology

Du Plessis and **Corder** discuss 5 techniques (see paragraph 5, page 13) of interpretation and these complementary techniques apply to constitutional interpretation as well.

(i) Grammatical interpretation

It acknowledges the importance of the role of the language of the constitutional text. It focuses on the linguistic and grammatical meaning of the words, phrases, sentences and other structural components of the text.

(ii) Systematic interpretation

It is concerned with the clarification of the meaning of a particular constitution provision in conjunction with the Constitution as a whole ('a holistic approach'). The emphasis on the 'wholeness' is not restricted to the other provisions and parts of the Constitution, but also takes into account extra-textual factors such as the social and political environment in which the Constitution operates.

(iii) Teleological interpretation

The aim and purpose of the provisions, and the values embodied in a constitution are also taken into consideration. In other words, it is used to ascertain what the particular constitutional provisions must accomplish in the legal order.

(iv) Historical interpretation

It refers to the use of the 'historical' context of the Constitution, including factors such as circumstances which gave rise to the adoption of the Constitution, preceding discussions and negotiations (the so-called *travaux préparatoires*), as well as the 'original intent' of the drafters or ratifiers of the constitutional text.

(v) Comparative interpretation:

This refers to the process (prescribed by Section 39(1) of the Constitution) during which the court examines international human rights law and the constitutional decisions of foreign courts.

S v Makwanyane

The following was said regarding the above:

"When dealing with comparative law we must bear in mind that we are required to construe the South African Constitution and not an international instrument and this has to be done with due regard to our legal system, our history and circumstance and the structure and language of our Constitution. We can derive assistance from international law and foreign case law but we are not bound to follow it".

Glossary of definitions and terms	
Term	Definition
Act	A parliamentary statute or the legislation of a provincial legislature.
act	Conduct such as the act of a government official or an organ of state.
Adoption	The formal enactment procedures.
Case law	Law as decided by various courts in specific cases before.
Common-law	Composed of the rules of law which were not written down originally, but came to be accepted as the law of the land.
Concretisation	Final phase of interpretation process during which legislative text, purpose and situation are harmonised to bring process to a meaningful conclusion.
Constitutional state (<i>Rechtsstaat</i>)	State in which constitutionalism prevails, ie a country where the constitution is supreme. Two foundations underpin a constitutional state: <ul style="list-style-type: none"> • Formal: Includes separation of powers, checks and balances, legality; • Material: State underpinned by fundamental values, ie justice, equality.
Constitutionalism	Government in accordance with Constitution: Government derives powers from and is bound by the Constitution. It refers to a state where law is supreme and government and state authorised as bound by the rule of law.
Context	Circumstances surrounding or situation in which something happens.
Contextualisation	Process during which the legislative text is read and researched within its total context to ascertain its purpose.
Entrenched	Provisions in a constitution which can only be altered or amended or repealed with difficulty.
Indigenous law	Traditional law of the indigenous black people of South Africa.
<i>Intra vires</i>	When an organ of state acts within the scope of its powers conferred on it.
Judicial law-making	The courts have a secondary, law-making function involving development of the common law. The judiciary may modify or adapt ordinary meaning of a provision to conform to the purpose or aim of the legislation.
Jurisdiction	The competency of a particular court to adjudicate on a specific case determined by two factors: <ul style="list-style-type: none"> • Geographical area in which it operates; • Types of case which the court may hear.
Law	Consists of all forms of law, while a law is a written statute enacted by those legislative bodies which have the authority to make laws.
Legality	Lawfulness and control of arbitrary state action, thus government by the law and under the law. All government action is governed by the letter, as well as the spirit of the law.
Legislation	Comprises of all the different types of enacted legislation, ie Acts of parliament, provincial legislation, municipal by-laws, proclamations and regulations.
Legislature	An elected body, which has the legal power to enact laws.
Legitimacy	On the one hand, the level of acceptance of a constitution, government, legal system etc. by the people, and on the other the formal legality of a legal system.
<i>Locus standi</i>	Access to the courts meaning " <i>one has a place of standing in the court</i> ".
Parliamentary sovereignty	Parliament is supreme and is the highest legislative body capable of enacting any laws and no court may test the substance of parliamentary Acts against standards such as fairness or equality.
Proclamation	Specific category of subordinate legislation.
Promulgation	Legislation made known to the population by promulgation and comes into operation by publication in an official gazette, unless another date specified.
Purpose	The legislative scheme or object or aim or scope of legislation.
Supreme constitution	The Constitution is the highest law in the land and any legislation or act of any organ of state which is in conflict with it will be invalid.
Testing legislation	Constitutional or judicial review where court measures legislation against provisions of the Constitution.
Textual approach	Same as the literal or the 'plain meaning' approach.
<i>Ultra vires</i>	When an organ of state acts outside the scope of its powers conferred on it.