

Interpretation of Statutes Exam Notes

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Section A: Introduction

Chapter 1

Overview of Chapter

1.1 What is the Interpretation of Statutes?

CONCEPT	KEYPOINTS
Definition	Also known as the Juridical understanding of legislation, deals with those rules and principles which are used to <u>construct and justify</u> the meaning of legislative provisions to be applied in practical situations. However it is not as simple as using a dictionary to get meanings of ambiguous or vague words. It requires more than mere reading of provisions, it is not a mechanical exercise with predetermined formulas.
How its done	<u>Technical aspects</u> , like the structure and language rules must be applied in conjunction with <u>substantive aspects</u> like constitutional values and fundamental rights.
What to keep in mind	Provision must be read, applied and understood within the framework of the supreme constitution and the Bill of rights, What is the impact of other legislation (PAIA, PAJA, etc), the current standing effect of the legislation in question, read the provision with the act as a whole, what is the context of the legislative text, use of external aids,
Legalese	It refers to the perplexing and specialized language used by lawyers in legal documents, incomprehensible to the non-lawyer. This has been another cause to the complexity of the interpretation process.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Du Plessis (2002:18)	“Statutory interpretation is about construing enacted law-texts with reference to and reliance on other law texts, concretising the text to be construed so as to cater for the exigencies of an actual or hypothesized concrete situation”		

Du Plessis(1999:230)	“One cannot understand a legal text merely by concentrating on its language. You must also understand how law works and what it seeks to achieve in order to understand how to communicate with you and what it wants to tell you”	This example is just meant to emphasise the fact that the texts should not be read literally but there are other factors to consider when interpreting a text.	<i>S v Makwanyane(1995)(CC)</i> The right to life stipulated does not mean the state guarantees immortality, this is an absurd interpretation, instead it simply means that the state cannot take someone’s life as retribution
		Goes to show the complex process that the Interpretative process entails and that it is not an exact precision process.	<i>Corocraft Ltd v Pan Airways Inc(1968)</i> Judge explained the interpretation of statutes as “ In the performance of this duty the judges do not act as computers into which the statutes and the rules and expect mathematically correct answers. Interpretation of Statutes is a craft rather than a science.”

1.2 The New Constitutional Order

CONCEPT	KEYPOINTS
The history (The pre-1994 era)	Traditionally, IOS in SA was saddled with unnecessary and unacceptable baggage: a confusing system of maxims and canons of interpretation, tentative principles, a golden rule, overriding principles, so-called primary, secondary and tertiary rules, manifest and clear meanings, rules of Roman-Dutch law influenced by English Law, misconceptions about the structure and meaning of language, exceptions to the rule as well as differences of opinion about how the so-called intention of legislature should be ascertained. They were based on the sovereignty of parliament and no court could test the validity of its acts.
The 1994 Interim constitution	Apart from its constitutional implications and political ramifications, it also changed the interpretation of the statutes as we knew it. Not only was the principle of parliamentary sovereignty replaced by constitutional supremacy, but the interpretation clause stated the spirit and purport of the fundamental rights had to be taken into account during IOS. In other words, the courts could no longer ignore

	value judgment.
The 1996 Constitution	Those principles of the Interim constitution which transformed statutory interpretation were retained in the constitution of 1996. Apart from the constitutional values, the interpretation of statutes was transformed by six provisions of the Constitution, in particular s1(founding provision), s 2 (the supremacy clause), s 7 (the obligation clause), s 8 (the application clause), s 36 (the limitation clause) and s 39 (the Interpretation clause)

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Devenish (1992:290-291)	“The constitutional doctrine of parliamentary sovereignty, the jurisprudence of positivism, and the political hegemony of Afrikaner nationalism have greatly influenced the methodology and theory of interpretation in SA.....The demise of the apartheid system and the emergence of a new political and legal order involving a negotiated and legitimate constitution with an entrenched and justifiable bill of rights must of necessity influence the process and theory of interpretation”	This is the nutshell of the situation before the 1994 constitution and how the change from parliamentary sovereignty to constitutional supremacy will obviously need to lead to change to the whole interpretation process.	

1.3 THE PROCESS OF INTERPRETATION : A TEACHING TOOL

CONCEPT	KEYPOINTS
Explanation	Statutory interpretation refers to both the process or activity of interpreting statutes and to the law (the body of rules and principles) that regulate the way statutes are interpreted.

SECTION B

Chapter 2

Overview of Chapter

2.1 What is legislation?

CONCEPT	KEYPOINTS
Definition	Legislation is the written law enacted by a body or person authorized to do so by the constitution or other legislation. The Interpretation act not only refers to legislation emanating from certain geographical areas (national, provincial local authority) but also to a time line(old order and post-1994). This means that the terms legislation has to be understood, interpreted and applied in terms of a horizontal timeline, geographical space and vertical hierarchical authority.
	Before we begin to interpret the meaning of legislation, one must first establish whether the legislation is in force. When it came into force and whether it has ever been amended or repealed.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Interpretation Act s1 n 2	“any laws, proclamations, ordinances, Act of parliament, all by-laws, rules, regulations or orders and (2) any other enactment having the force of law”	The Interpretation Acts definition of law. Note it is limited to enacted statutes only as law, that means no case law or common law is applicable	

2.2 CATEGORIES OF LEGISLATION

CONCEPT	KEYPOINTS
Chronological categories	This classification explains all forms of existing legislation according to their historical origins. (a) Legislation before 1806- Staten-General or placaatens, they have without formal procedure become part of common law and may be abrogated by disuse. IOS will not apply on them. (b) Old order legislation- defined in item 2 of schedule 6 of the C

	as any legislation in force before the IC. Pre-Union legislation (1806-1910) Legislation adopted between British annexation of the Cape in 1806 and the creation of the Union in 1910. It consists of legislation between the British colonies and the Boer Republics. There are still quite a few still in force. Legislation between Union and the democratic era (1910-1994)- It's also part of the old order legislation. Legislation in the new constitutional order since 1994, it includes the IC, the 1996 C, Acts of parliament, provincial legislation.
Hierarchical categories-The constitution	It is not easy to define, it was before the constitution when legislation was straight forward, now with the spheres of gvt, it becomes difficult (a) The constitution- It's the supreme law of the land, top of the food chain, any law inconsistent with it is invalid. The courts now test all legislation on it. (b) Original legislation- Based on two interrelated principles, first enacted by an elected, deliberative law-making body. Provincial ordinances, legislation of former homelands, legislation of former TBVC states, New municipal legislation.
Subordinate (delegated or secondary) legislation	In principle, subordinate legislation is a violation of the separation of powers principle because unelected persons, sometimes members of the executive obtain law-making powers. Acts of parliament and sometimes drafted in broad terms (skeleton form), subordinate (delegated) legislation adds flesh, it also allows flexibility.

2.2 WHAT IS NOT LEGISLATION

CONCEPT	KEYPOINTS
Definition	Not everything published in the gvt gazette is legislation. The key note on how to see what's not legislation is to note the words "enacted-texts". Common-law, indigenous law, case law, policy documents,

2.4 STRUCTURE OF LEGISLATION

CONCEPT	KEYPOINTS
Definition	To start the interpretation process, the legislation must be analysed. 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. Although the language and structure of the legislative text are not the only aspects that are considered during statutory interpretation, students must understand the structure of legislation and how these structural components interact. How and when the different components, as well as the structural interrelatedness of legislation, may be used during the interpretation process will be explained in chapter 6.
List of amendments	If applicable, before the long title an Act will include a list of Acts that that have amended it since:

List of regulations	If applicable, after the list of amendments an Act will include a list of regulations issued in terms of the Act
Preamble	The preamble states the circumstances of, the background to the reasons for the legislation. (Underlining philosophy)
Long title	An act always has a long title. It is not really a title, but rather a short descriptive summary of the subject matter of the act. The long title is part of the statute tabled for adaptation by parliament, and always ends with an open-ended phrase such as “as matters incidental thereto’
Enacting provision	This acknowledges the constitutional authority of the body that is enacting the primary legislation (the national legislative authority is vested in parliament; the provincial legislative authority is vested in the provincial legislature; and the municipality legislative authority is vested in the municipality councils)
Table of contents	It is the road map of the act, it not only provides a quick reference to the reader as to where to find particular provisions, but it also gives an initial overview of the legislative scheme:
Definitions	They serve as an internal dictionary for the particular legislation. Usually found at the beginning of the Act
Purpose and Interpretation	These clauses are frequently included in post-1994 legislation. These give an immediate overall picture of what the Act wants to achieve, and they help to explain the purpose of the Act and how it should be interpreted.
Repeal/amendments of legislation	Repeals and amendments of an Act are made by means of another act. When a new act is passed, other existing Acts may need to be amended or repealed. The new act must contain a section that provides for amendments and/or repeals. The conventional way is with a schedule at the end of the act.
Short title and commencement	The short title is the title of the Act and is usually the last section in an Act.
Schedules	These are used to deal with the technical detail that will otherwise clog up the main body of an Act. Schedules are also used when several acts or parts of acts are repealed, or a large number of amendments.
Numbering in legislation	

2.5 RELATIONSHIP BETWEEN LEGISLATION AND COMMON LAW

CONCEPT	KEYPOINTS
	Roman-Dutch common law is subject to constitutional scrutiny, see s2 of the constitution that stipulates constitutional supremacy. And s 39(2), the courts must promote the spirit, purport and the objects of the bill of rights when they develop the common law.
BUT.....	However this does not mean it has been abolished. It is presumed that legislature does not intend to alter the common law more than necessary, it may still be trumped or overruled by legislation. If legislation trumps a rule of common law and is later repealed, the

	common law rule will revive again.
The Plot thickens...	Certain common law rules (such as presumptions) are used interpret legislation. These presumptions may be described as preliminary assumptions as to the meaning of the legislation. In other words, it is assumed that legislation has particular purpose, which should accomplish an ideal pre-defined result. The role and character of the presumptions of statutory interpretation have been fundamentally changed by the new constitution. These presumptions have seemingly been reflected in the Constitution, because of this, there is less and less need and use to rely on these presumptions since we have the fundamental bill of rights. They might eventually fade away with disuse.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Key case law to enforce the relationship btwn the C and common law, the supremacy of the C and the application of case law in the legal system.	<i>Carmichelle v Minister of Safety and Security</i> ; The CC stressed that a court stressed that a court is obliged to develop the common law in view of the Constitution
		Key case law for constitutional control of common law and supremacy of constitution.	Pharmaceutical Manufacturers Ass of SA; In re: Ex parte Application of the President of the RSA: "I cannot accept this contention, which treats the common law as a body of law separate and distinct from the constitution. There is only one system of law, all law including the common law derives its force from the constitution and is subject to its control"
		Legislation trumps common law but it can still provide for the consideration of common law.	<i>Rand Ltd v De Jager (1982)</i> "Legislation trumps common law...most of the time. Of course it possible for new legislation to

			provide expressly that it will operate side-to-side with existing common law rules”
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Chapter 3

COMMENCEMENT OF LEGISLATION

Overview of Chapter

3.1 ADOPTION AND PROMULGATION

CONCEPT	KEYPOINTS
Adoption	The adoption of legislation by the relevant legislative body refers to the constitutionally prescribed and other legal processes and procedures required for the draft legislation to become law, introduction of the bill into the legislature, and public participation (if required), as well as the committee stages, voting and assent.(prescribed in chapter 4 and 6 of C). Once passed by parliament, it has to be assented and signed by president. Once assented and signed, it becomes law.
Promulgation	For it to become operational it has to be promulgated. It is the process of putting legislation officially and legally into operation.

3.2 REQUIREMENTS OF PUBLICATION

CONCEPT	KEYPOINTS
	Legislation is promulgated by publication in the gvt gazette or on a stipulated date within the act. S 81 and s 123 of the constitution, acts of parliament and provincial acts take effect when published. However note, not everything published in the gazette is legislation and not all legislation will be in operation. The principle behind the requirement that it should be published in the gazette to become operational is that it simply has to be available to the public. One cannot be transgress something they did not know. If gazette cant print for whatever reason there are alternative procedures.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
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Steyn(1981:180-181)	critics this as an arbitrary application of the law and suggests that they should be a period (8days) between de facto (actual) publication in the Gazette and the de iure (legal) promulgation and taking effect of legislation	This is case law and academic opinion opposing the issue of when an act should take effect.	<i>Queen v Jizwa(SC)</i> It was held that legislation becomes effective on the date of gazette publication irrespective of whether it has come to the knowledge of everybody in the remote areas.
		Legal precedence by CC on the matter of accessibility.	<i>President of the RSA v Hugo (1997)(CC)</i> “The need for accessibility, precision and general application, flow from the concept of the rule of law. A person should be able to know of the law and be able to conform his or her conduct to the law.”

3.3 COMMENCEMENT OF LEGISLATION

CONCEPT	KEYPOINTS
Who promulgates	Since it is the lawmaker who speaks, legislation is promulgated by the lawmaker in question. This authority is then delegated to President or Premier on behalf of the legislature. The parliament has power to challenge president’s decision. Note Pharmaceutical saga (Act of 1965 vs Act of 1998)
When is it in force	S 81 and s 123 of C, (a) if it is not stipulated in the act, on the date of publication in gazette. (b) When it is published it can also stipulate a future commencement date (or even certain sections) and it won’t have to be published again. Also note and remember the City of Johannesburg with the Administrative Adjudication of Traffic Offences Act and the traffic tickets blunder. Issuing tickets on the wrong Act.(d) Retroactive commencement: publication on a specific date, but the legislation is deemed to have commenced earlier on a date prior to the publication. This is the exception rather than the rule. Section 14 of Interpretation Act provides that certain regulatory framework that has to be in place before an act can take effect but is enabled by the same act can be enforced prior to commencement of act so as to avoid an act being enforceable without the necessary framework (pharmaceutical saga).

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Limits of promulgation power of presidency and framed into context. Is not a mode of appeal by president of legislation but instead a public power, meant to be exercised as the will of parliament.	<i>Ex Parte Minister of Safety and Security: In re S v Walters</i> - The court explained that the power conferred by the legislature on the President to fix a date of commencement is a public power and has to be exercised lawfully. However such a power cannot be lawfully used to veto or block implementation of the new law.
Section 81 of C- Publication of Acts	"A bill assented and signed by the President becomes an Act of parliament must be published promptly and takes effect when published or on a date determined in terms of the act"	Provision for gazette publication and commencement.	
Section 123 of C- Publication of provincial Acts	"A bill assented and signed by the Premier of the province becomes a provincial act must be published promptly and takes effect when published or on a date determined in terms of the act"	Provincial publication provision.	
		This is the application of section 14 of the Interpretation Act. It is possible to enable regulatory frameworks	<i>Luckster v Minister of Justice(1995)(T)</i> The minister wanted to set up a lottery and gambling board that

		prior to the commencement of an act if it is clear that it is ineffective to empower the act without them being set up.	was enabled in an act before it had commenced on the grounds that in order to make effect and carry out the stipulations of the act, this board had to come into existence 1 st , the court agreed with him.
		The upside to the provision.	R v Magana (1961)(SA) the court found that also bringing the act into operation stipulated in s 14 of the Interpretation Act also includes rendering it operative', in other words, making it possible for the Act to be applied fully.
Section 13 (1) of Interpretation Act- Commencement of Laws	"The expression 'commencement' when used In any law with reference hereto, means the day in which the law comes into operation and that day shall, subject to the provision of subsection (2) and unless some other day is fixed by or under the law for the coming into operation thereof, be the day when the law was first published in the gazette as a law"		
Section 14- of Interpretation Act- Exercise of conferred powers between passing and commencement of a law;	"Where a law confers a power (a) to make an appointment or (b) to make, grant or issue an instrument, order, warrant, scheme, letters, patent, rules, regulations, or by laws or (c) to give notices or (d) to prescribe forms	Section 14.....vast applications. "bringing the law into operation" before date of commencement for the purpose of setting the necessary regulatory framework to make the act effective.	

	<p>or (e) to do any other act or thing for the purpose of the law, that power may, unless contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof: Provided that any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws made granted issued under such power shall not, unless the contrary intention appears in the law or the contrary is necessary for bringing the law into operation, come into operation until the law comes into operation”</p>		
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Activity Answers

3.4 THE PRESUMPTION THAT LEGISLATION ONLY APPLIES TO THE FUTURE

CONCEPT	KEYPOINTS
Definition	The time honored tradition that legislation should only apply to the future is one of the basic foundations of a legal system based on the rule of law. This rule is to prevent unfair and unreasonable results, and to ensure predictability and legality: individuals must be able to know what the law is in order to adapt to it accordingly.
The difference between retrospective and retroactive	In practical terms the rule that legislation only applies to the future should not have a retro-effect. Retroactivity (true or strong retro-effect) Legislation operates as of a time prior to its enactment, in other words, it operates backwards in time and changes the law from where it was. Retrospectivity (weak retro-effect) legislation only applies to the future in line with basic principle. The legislation is prospective but could bring new results in respect of a past event. It operates forward but it looks backward. The difference between the two is the commencement date, retroactive legislation is commencement before

	date of publication. The deeming clause is the principle that applies the virtual application of retroactivity, because it cant be applied in physical time, it creates a presumption that something is deemed to have happened.
What prevents legislation from applying with retro-effect	Three legal obstacles: the common law presumption- before constitution that legislation only applies to the future, however remember that legislation trumps common law, so if an act has a provision for a retro effect, it stands. 2- New offences and higher penalties- the constitution s35(3)(l) states that a person may not be convicted for an act that was not an offense at the time it was committed, in other words, it is a basic human right that a new offence may not be created with retro-effect. Also s35(3)(n)states that a person has a right to the lighter sentence when legislation is changed between time of offense and time of sentencing. 3- Other constitutional rights- Should the first two fail, they are other constitutional provisions that prevent a retro-effect e.g, the right to property, the right to fair administrative action, right to access to information.
No harm done: exception to the rule.	Two instances when the principle that legislation applies to the future only will not apply: where legislation grants procedure or grants benefits. In procedure- if substantive rights and obligations remain unimpaired and capable of enforcement by using the newly prescribed procedure, then the general rule does not apply. In benefits- if a person would receive a benefit and no vested rights are taken away, the retroactive or retrospective application becomes unnecessary.
Retroactivity and other constitutional issues	The principle that legislation should only apply prospectively also applies to the constitution. This means that the constitution itself is also not retroactive

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Legal precedence on principle of let bygones be bygones.	<i>Gardner v Lucas (1878)</i> the presumption that legislation applies only to the future is a general rule of every civilized country.
		Presumption of future application backed constitutionally in matters where constitutional rights were concerned.	<i>Veldman v Director of Public Prosecutions Wits local Division (2007) (CC)</i> The well established common-law principle was given constitutional backing. The court affirmed that

			unless otherwise provided, legislation was not to be interpreted to take away existing rights and obligations, because this principle was to the notion of fairness and justice that are integral to the rule of law, a foundational principle of the constitution(s1)''
		Explains the concept of retrospective and retroactive	<i>National Director of Prosecutions v Carolus (1999)</i> The difference between retrospective and retroactive explained.

Chapter 4

DEMISE AND AMENDMENT OF LEGISLATION

Overview of Chapter

4.1 GENERAL

CONCEPT	KEYPOINTS
Common law	Common law rules can be abrogated by disuse, but not legislation, it cannot simply disappear, it has to be repealed by a competent body or declared invalid by a court. Before 1994 courts could only invalidate delegated legislation which did not comply with the rules of admin law.
Who can amend or repeal legislation	The C is not self executing, if legislation is declared inconsistent it does not necessarily mean it has be repealed, someone with the power has to actively do it. A competent lawmaker can do this, one with the authority to do so. Original legislation-the relevant legislative authority and in the case of subordinate legislation, the power to enact includes the power to repeal and amend (organs of state) or subordinate legislature.

4. Amendment to Legislation

4.1 AMENDMENT OF LEGISLATION BY A COMPETENT LEGISLATURE

CONCEPT	KEYPOINTS
	In practice they are two types of amending legislation: the non textual (indirect) amendment and the textual (direct) amendment. A non textual is when there are no direct changes to the actual wording of the initial legislation but the scope or nature or effect is just prescribed. A textual amendment is when the actual wording is changed. There is also General law amendment act when you amend a number of acts at the same time and specific legislation by a specific amendment act.

4.2.2 MODIFICATIVE INTERPRETATION

CONCEPT	KEYPOINTS
Courts	The courts primary function is the application of law, they also have a secondary law making function. This is the development of common law as well giving form or subject to a particular text in concrete situations. They can also modify or adjust in such a way as it still conforms to the purpose of the act.
(a)Attempts to save legislation during constitutional review	If a court does apply legislation against the constitution and decides it is invalid, the legislation cannot be applied anymore. This could create a legal vacuum. Therefore competent courts may try to modify or adapt legislation to keep it constitutional and alive, thus the employment of a number of modification techniques, reading up, reading down, reading in and severance so as to keep it valid.
	Remember, this is modify to keep it constitutional, not the meaning of the text, this is also possible but in exceptional circumstances, the modes listed above are to keep it constitutional by application and not changing the meaning.

4.3 INVALIDATION OF LEGISLATION BY A COURT

CONCEPT	KEYPOINTS
	In terms of the SOP doctrine, it is important to distinguish between the terms 'repeal' and 'invalidation of legislation and establish who has authority to do what. Repeal-when legislation is deleted and removed from books (legislature). Invalidate- when it is declared legally unacceptable on constitutional grounds (judiciary).
(a)Unconstitutional provisions	i.t.o s 172(1) of the C, the High Court upwards may declare legislation unconstitutional, if it violates a Bill of right fundamental right. However declarations by courts have to be validated by CC before it can be repealed by legislature, s 172(2).
(b)Invalid subordinate legislation	If original legislation is declared unconstitutional by a competent court, the subordinate legislation ceases to exist. May be invalidated if it does not comply with <i>ultra vires</i> doctrine. It can also be declared invalid if it is declared vague
Repeal of legislation by a competent lawmaker (a) Substitution (repeal & replace)	When one is repealed, the new one doesn't always necessarily come in force right there and then. To avoid this, the legislation can include a transitional measure. But if there is no transitional measure, one applies s 11 of IOS acts, where the repealed enactment remains in force till it is replaced.
(b)Repeal (deletion)	Removal from the books altogether. S 12(1) deals with cases that are in process when the enactment is repealed. If an act was declaring something illegal, but not yet in force, the old enactment cannot have a retroactive effect, it is immediately enforceable. Otherwise the repealed act is still enforceable in most circumstances.
Sunset clause	Is a provision which terminates (repeals) all or portions of the law by a specific date, unless further action is taken to extend it. Most laws do not have sunset clauses.
Implied repeal	When two different enactments dealing with the same matter clash, it is presumed by the judiciary that the relevant legislature by implication intended the later enactment repeal the earlier one. They have to be on the same level for this principle to be applied.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 172(1)- Powers of courts in constitutional matters	(1)When deciding a constitutional matter within its power, a court (a) must declare that any law that is inconsistent with the constitution is invalid to the extent of its inconsistency.	The power of the courts to declare legislation inconsistent with the C. to invalidate.	
		A reason or invalidating subordinate legislature, vagueness, and the case law	<i>MEC for Public Works v Morning star Minibus Hiring Services (2003)</i> court provided a

			number of guidelines to determine vagueness. The reasonability test applied. The law required reasonable clarity to be understood by the reasonable person. Is the purpose and intention understood
		The principle of s 11 of IOA, if the replacing enactment is not yet operational, you apply the old one till the new one comes into being.	<i>S v Kopman 1991(NC)</i> accused found guilty of contravention of a repealed traffic law, but its replacement was not in force yet, the courts applied s 11 of IOA, the old one was applied
		Repeal proactively, whether it is still valid in times of a vacuum.	<i>Nourse v Van Heerden (1999)(W)</i> An abortion matter, doctor performed an illegal abortion, but before his case was finalized, the act was amended and abortion was no longer illegal, the court found that the old legislation still applied

4.4 REPEAL AND SUBSTITUTION

CONCEPT	KEYPOINTS
	Legislation is can be temporarily suspended, in other words it remains in force but its operation is halted for the time being until some or other condition is met or requirement complied with. This is within the system of cooperative governance, likely to happen with schedule 4 provisions were both national and provincial have jurisdiction over. The legislature can also apply a sunset clause while deliberating with a formal legislative amendment.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
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Section 149	A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.	Temporary suspension of legislation while the court is deciding which one will eventually stand	

4.6 THE PRESUMPTION THAT LEGISLATION DOES NOT INTEND TO CHANGE THE EXISTING LAW MORE THAN IS NECESSARY

CONCEPT	KEYPOINTS
	This presumption means that legislation should be interpreted in such a way that it is in accordance with existing law and changes as little as possible.
Common law	An inherent respect of our common law. But this is rebutted if there is legislation prescribing otherwise.
Legislation	Presumption means that in interpreting a subsequent act it is assumed that the legislature did not intend to repeal or modify the earlier act. Any repeal has to be indicated expressly or by necessary implication. If such reconciliation stipulated in the Shoji case below is not possible then the latter enactment prevails

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Presumption of conformity to law other than against it in interpretation.	<i>Johannesburg Municipality v Cohen's Trustees(1909)TS</i> "It is a sound rule to construe a statute in conformity with common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law"
		Presumption of conflicting legislation i.t.o of interpretation rules.	<i>Shoji v Minister of Justice, Kwazulu (1992)</i> "If two apparently contradictory provisions are capable of sensible

			interpretation which would reconcile the apparent contradiction, that interpretation should be preferred.

SECTION C

Chapter 5:

HOW LEGISLATION IS INTERPRETED

Overview of Chapter

5.1 INTRODUCTION

CONCEPT	KEYPOINTS
The general rule of Hermeneutics	Defined as the science of understanding or more specifically, as the theory of the interpretation of texts. The understanding and explanation of texts to reveal the inherent meaning. The art of understanding the techniques used in interpretation of texts. Derived from the Greek word <i>hermeneuein</i> meaning interpret. Today it is an important tool in Christian theology and jurisprudence. Legislation cannot provide an exhaustive description of all possible legal questions; therefore it is the courts task to concretise the general precepts of the legislature through interpretation of legislation. Note there is a difference between exegesis- that which the author originally wanted to say and hermeneutics- what the author wants to say to present day readers. Note Gadamer's hermeneutics which took into cognizance the socio-historical situation or context of interpreter, this is a contextual approach hermeneutics. Hermeneutics scholars said that words and phrases do not have an inherent meaning, but meaning is derived from the total use of language, including the context used. The contribution of the interpreter, value judgment.
Context and Interpretation	Picasso painting analogy: painting (text) plus context (background) equals understanding (or at least the beginning of the process of understanding)
The Influence of certain modern critical theories	Critical legal scholars reject the formalist position that law is rational, objective and neutral. Instead they say some law is subjective and ideological. Thus the literal vs contextual interpretation approaches. Post-modernism, a school of thought that rejects preconceived ideas and macro-arguments and categorization, instead that every idea is

	only as good as the preconceptions and presuppositions that are there.
(a)The Critical Legal Studies Movement (CLS)	Originated in reaction to the inability of liberalism to solve social problems. It does not have an alternative programme, but rather unmask the ills of liberalism. It states that in IOS legal theories and legal reasoning are supported by political considerations, and the existing political and social balance of power is consolidated.
(b)Deconstruction	It's a reaction against structuralism. Structuralism claims that the meaning of language can be ascertained and pinned down from its grammatical structure; it supports literal interpretation and positivism. Deconstruction on the other hand calls for a person to consider and reconsider, and ultimately to reformulate, dominant theories and opinions about society. It states that; the meaning of a text is not determined by the author, allowing the reader to interpret impartial and unbiased manner. a text can never acquire a fixed final meaning, the meaning depends on the set of codes, social cultural and political. Meaning is not embedded I the text, instead it is subjective to any number or interpretations. Interpretation has everything to do between the text and the interpreter.
The Linguistic turn	The linguistic turn in legal interpretation at any rate amount to this: meaning is not discovered in a text, but is made in dealing with the text. Meaning is never at any given time, a fixed and stable presence. The possibilities for the meaning are boundless. Language is the hyper-complex, boundless open system that makes such proliferation meaning possible.

5.2.1 THE OTHORDOX TEXT-BASED (LITERAL) APPORACH

CONCEPT	KEYPOINTS
Definition	The interpreter should concentrate primarily on the literal meaning of the provision. It is the primary rule of interpretation that, If the meaning of the text is clear (the plain meaning) it should be applied and indeed equated with the legislature's intention. If the 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 absurdity, this is also known as the golden rule of interpretation. Then the court would turn to so called secondary aids (long titles, headings, chapters, sections, other official language), if still that fails then tertiary aids (common law presumptions). This was influenced by English law. Introduced in SA in the De Villiers case. The text based methodology is based on the predominance of the word and phrases, and the intention of the legislature is demoted to the status of the literal meaning of the text. As a result lip-service was paid to the principle of legislative intent, because courts automatically elevated the so-called 'clear and unambiguous' meaning of the words to the status of the will and intention of the legislature: If the legislature had a specific intention, it

	would be reflected in the clear and unambiguous words of the text. Note the Bhyat Judgment, one of the key cases.
The foundations for this approach are many	Legal positivism- the essence of law is in the decree, sovereign parliament- the will of parliament is expressed in legislation.
Criticism of the text based approach	Normative role of common law presumptions is applied as a last resort, other important internal and external aids that could help are ignored. Very few texts are clear enough to do this well the 1 st time around, the intention of the legislature is demoted to simply the language in the text, it leaves very little room for creative judicial law making as the courts are seen as mechanical interpreters of the law. Gives the impression that once the legislature has spoken, the courts will only have to apply. This is a correct but rigid and stringent application of the doctrine of separation of powers. This approach was used as an excuse by the apartheid system by not allowing the courts to exercise any form of value judgment, placing common law rules of assumption as a last resort in order to justify their unequal policies under the “black letter” guise and the principle of legal positivism. Note the S v Adams case.
	This approach was predominant before the Constitution of 1994.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Introduction of textual approach in SA.	<i>De Villiers v Cape Divisional Council 1875</i> Chief Justice De Villiers ruled that legislation adopted after the British came had to be adopted in accordance with British rules of interpretation.
		Precedence prior the 1996 constitution using the stringent text-based approach.	<i>Union Government v Mack (1917)</i> it was held that the intention of the legislature should be deduced from the words, used in the legislation, the plain meaning of the text is an intentional disguise.
		Legal precedence for text based approach.	<i>Bhyat v Commissioner for Immigration(1932)</i> “The cardinal rule of construction of a statute is to endeavour to arrive at the

			<p>intention of the lawgiver from the language employed in the enactment...in construing a provision of an act of parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the legislature could have intended.</p>
		<p>If meaning is clear, the secondary and tertiary methods need not be applied. Also precedence on the text based approach.</p>	<p><i>Swanepoel v Johannesburg City Council(1994)</i> The rules of statutory exegesis are intended as aids in resolving any doubts as to the legislature’s true intention. Where the intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought.</p>
		<p>The moral dilemma of some judges who would not be allowed to use value judgment but simple give effect to acts of parliament, even if they were not right in their opinion they were simply enforcers, interpreters of legislative meaning and would not be allowed to review the merit of legislation.</p>	<p><i>S v Adams (1979)</i> “An act of parliament creates law but not necessarily equity. As a judge in a court of law I am obliged to give effect to the provisions of an act of parliament. Speaking for myself and if I were sitting as a court of equality, I would have come to the assistance of the appellant. Unfortunately, and on an intellectually honest</p>

			approach, I am compelled to conclude that the appeal must fail”

Activity Answers

5.2.2 THE PURPOSIVE (TEXT-IN-CONTEXT) APPROACH

CONCEPT	KEYPOINTS
	The legislative approach is a purposive activity. I.t.o the purposive text-in-context approach, the purpose or object of the legislation (legislative scheme) is the prevailing factor in interpretation. The context of the legislation, including the social and political policy directions, is also taken into account to establish the purpose of the legislation. The mischief rule is said to be the forerunner of this approach. The mischief rule acknowledges the application of external aids: the common law prior to enactment of legislation, defects in law not provided for by common law, whatever new remedies the legislature provides, and the true reason for the remedies. The search for the purpose of legislation requires a purpose orientated approach, which recognizes the contextual framework of the legislation right from the outset, and not only in cases where a literal, text-based approach has failed. Interpretation cannot be achieved without taking into cognizance the contextual environment. In this way, all the intra-textual and extra-textual factors are accommodated. Remember the Jaga decision, one of the 1 st concrete decisions applying the wider contextual approach.
Courts	This approach holds that the courts have an inherent law making discretion during statutory interpretation, more than the textual analysis of the past.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		The guidelines to be followed in contextual in text approach	<i>Jaga v Donges (1950)</i> interpreter can take the wider context of provision, Irrespective of how clear or unambiguous the grammatical meaning seems the relevant contextual factors should be taken into

			account, sometimes the context may even be more important than the legislative text.
		The strong need to apply contextual factors, very thoroughly, even if text is clear. It's a rule.	<i>University of Cape Town v Cape Bar Council (1986)</i> The court held that the court had to examine all the contextual factors in ascertaining the intention of the legislature, irrespective of whether or not the words of the legislation were clear and unambiguous

5.2.3 THE INFLUENCE OF THE SUPREME CONSTITUTION

CONCEPT	KEYPOINTS
Definition	Prior to 1994, they had the textual approach; the debate has become irrelevant, since the new constitution, which included an express and mandatory interpretation provision. Interpretation now has to be founded within the value-laden framework of the Constitution. It was transformed by six provisions of the constitution. S1 (foundational provision) s 2 (supremacy of the Constitution, s 7 (the obligation clause), s8 (the application clause), s36 (the limitation clause) and s 39 (the interpretation clause)
Interpretation clause	Forces interpreter to consider the Bill before even interpreting, This eventually means that the interpreter is consulting extra textual factors. Factors outside the text are immediately involved in the Interpretation process.
Constitutional values	Use the S v Makwanyane Judgment, it explains the need to use the values in the constitution as we interpret. The preamble to the constitution refers to a society based on democratic values, social justice and fundamental human rights. S 7, 36, 39. The courts have to protect these rights and values. Consequently, the interpretation of statutes can no longer be a mechanical reiteration of what was supposedly intended by parliament but rather what is permitted by the constitution.
The Impact of the Constitutionalism	A constitutional state has two underpinning foundation, a formal one (which includes aspects such as the s.o.p, checks and balances, principle of legality) and the other the material or substantive one (the

	<p>fundamental values such as justice and equality). S v Makwanyane-In SA the constitution represents a decisive break from a disgracefully racist past. Although it does expressly refer to SA as a constitutional state, the provisions have the characteristics. Some courts still follow and still believe in the text based approach. Geysers v Msunduzi Municipality(2003) (N) still applied the text based approach to find the intention of the legislature.</p>

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section1- Foundational provision	The Republic of SA is one sovereign, democratic state founded on the following values.....	Founding provision setting out the values, the underlying value of the whole constitution	
Section 2- Supremacy of 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	Supremacy of Constitution, setting the fact that interpretation should be done taking into cognizance the constitution and its values.	
Section 7- Bill of Rights	This Bill of Rights is a cornerstone of democracy in SA.	Importance of Bill	
Section 8- Application	The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary.	Covers even Interpretations	
Section 36-Limitation	The rights in the Bill of Rights may be limited only in terms of laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, freedom, taking into account all relevant factors		
Section 39- Interpretation of Bill of Rights	When interpreting a bill of rights a court (a) must promote the values that underlie an	This is the epitome of Interpretation of statutes in SA. Also justifies the value	

	open and democratic society based on human dignity, equality and freedom. (2) When interpreting any legislation and when developing the common law or customary law, every court or forum must promote the spirit, purport and objects of the Bill of rights	judgment encouraged by the contextual approach in the courts.	
		Legal precedence on the Constitutions effect on Interpretations.	<i>Holomisa v Argus Newspapers(1996)(W)</i> The constitution has changed the context of all legal thought and decision making in SA
<i>Investigating Directorate: Serious Economic offences v Hyundai Motors Distributors: In re Hyundai Motors Ltd v Smit (2001)(CC)</i>	“s39(2) of constitution means that all statutes must be interpreted through the prism of the Bill of Rights. All law making authority must be exercised in accordance with the constitution. The constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which represents the dignity of all citizens and includes all in which respects the dignity of all citizens, and includes all the process of governance. As such the process interpreting the constitution must recognize the context in which we find ourselves and the C’s goal of a society based on	Another key legal precedence on the importance of the constitution and that it should be applied first.	<i>Bato Star Fishing Ltd v Minister of Environmental Affairs and Tourism (2004)(CC)</i> The constitution is the starting point in interpreting any legislation, first the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights and 2 nd the statute must be capable of such interpretation. The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words are construed are clear and unambiguous.

	democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole.		
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Activity Answers

5.2.4 PRACTICAL INCLUSIVE METHOD OF INTERPRETATION

CONCEPT	KEYPOINTS
	An approach were intentionalism, positivism and literalism are brought together to interpret, the problem is these are very different and their application will only lead to the step by step application of the approaches differently. We call this the hybrid approach. The different components are:
Words and phrasing: language aspect	It acknowledges importance of the role of the language of the legislative text. It focuses on the linguistic and grammatical meaning of words and phrases, punctuation, sentences and other structures. This does not necessarily go back to the orthodox literalism approach; it just acknowledges the importance of language.
Structure and context: The systematic aspect	This method is concerned with the clarification of the meaning of a particular legislative provision in relation to the legislative text as a whole. This is known as the holistic approach. Words cannot be read in isolation, also all the contextual considerations are considered as well.
Teleological Interpretation: The value-based aspect	It emphasises the fundamental constitutional values and value-coherent interpretation. Aim and purpose ascertained against the C.
Historical Aspect	This method refers to using the historical context of the legislation. These include circumstances which gave rise to the legislation, the prior legislation, this is important but it cannot be decisive on its own.
Comparative aspect	This is when the courts examines the interpretation of similar legislation by foreign courts, as well as international law.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
<i>Public carriers Association v Toll Road Concessionaries(1990)</i> The court allowed the use of the purposive approach, only after the textual had failed(Toll		Hybrid system precedence.	<i>Shackleton Credit Management Pvt Ltd v Scholtz</i> the three approaches of the golden rule, the purposive approach and the reading in were all

road issue)			applied.

Chapter 6

BASIC PRINCIPLES

The language dimension

6.1.3 THE MEANING OF THE TEXT

CONCEPT	KEYPOINTS
Definition	The text based approach no longer has any place in statutory interpretation. As much as the reading of the text is important it does not qualify as a means to figure out the meaning of the text, the meaning is now discovered by finding the purpose of the act and applying it against the fundamental rights in the constitution. The interpretation process does begin with reading the legislation concerned, ordinary meaning attached to the words. Remember giving it an ordinary meaning is only the starting point and only used to make sure the interpreter does not use an artificial, strained or unnatural meaning of a text. However the context, both inside and outside the text could influence the meaning.
Every word is important	Legislation should be interpreted in such a way that no word or sentence is regarded as redundant. However sometimes the drafters of legislation, in their quest to be thorough and overcautious can overlap and use repetition, these can be omitted.
No addition or subtraction	It is a basic rule of interpretation that there may be no additions and subtractions in interpretation. This is a default setting to the SOP rule.
The continuing time-frame of legislation: the law is always speaking	Initially, the ordinary meaning given when the text was enacted remains the same years later, however later the courts became less rigid, it was held that the purpose of the act suggests that the definitions in that act were to be interpreted flexibly in order to deal with new technologies on a continuous basis rather than to interpret it narrowly forcing the legislature to periodically update the act

6.1.2 Internal language aids in interpretation

The legislative text in another language	Statutory bilingualism, the other text used to clarify obscurities.
Original legislation	In 1996 constitution, the English version will prevail in the event of inconsistencies between the texts. If one is wider than the other, the common denominator is applied. If they differ but don't conflict, they

	have to be read together and efforts must be made to consolidate using context. Zulu v Van Rensburg(1996), (use this to prove use of context in interpreting constitution).
Subordinate legislation	There are no statutory or constitutional rules about conflicting language versions of subordinate legislation. In practice, all the versions of subordinate legislation will be signed, and the signed text cannot be relied on to resolve conflicts between texts, if they do differ they must be read together. If there is irreconcilable conflict, the courts will give preference to the one that benefits the person concerned.
The Preamble	Usually contains a programme of action or declaration with regard to the broad principles contained in the particular statute. They may be used to interpret a meaning of a text since legislation has to be read in whole to find meaning. Although on its own it can never provide the final meaning, it should provide the interpreter with a starting point.
The long title	Provides a short description of the subject matter of the legislation. Since it forms part of the statute consideration in the legislature during the legislation process, the courts are entitled to use it to establish purpose.
The definition clause	This is an internal dictionary, a deviation from the meaning in the definition clause will be justified only if the defined meaning is not the correct interpretation within the context of the particular provision.
Express purpose clauses and interpretation guidelines	The express purpose clause has the same but a lot more detail than the preamble and definition clause and should play a bigger part in interpretation.
Headings to chapter and sections	In text based they were used to determine purpose of the legislation only when the rest of the provision is not clear. The value will differ.
Schedules	Serve to shorten the content matter of the sections in legislation. The value depends on the nature of the schedule

6.1.3 External language aids to interpretation

CONCEPT	KEYPOINTS
Dictionaries and linguistic evidence	In an era that is becoming ever more technical and highly specialized, courts often use dictionaries during interpretation. The dictionary meaning is only a guideline to ascertain the scope of the meaning of the word; it cannot point out which of a number of meanings can be applied to a text, thus the need for the context.
Examples and footnotes	The use of footnotes in interpretation is a new trend, used to facilitate better and more streamlined cross-references. Although they are not part of the act, they may be used as an external aid.
Definitions in the constitution and the interpretation act	There is a large number of definitions in other legislation that expressly have a wider application, definitions in s2 of the Interpretation act will apply to all other legislation unless expressly provided otherwise.
The clock ticking: computation of time	Legal documents must be filed on time, debts paid within a certain time etc. The matter of the computation of time is very important,

	because a large number of statutory enactments and contractual provisions prescribe a time or period. This help in interpretation.

6.2.1 LEGISLATION MUST BE READ AS A WHOLE

CONCEPT	KEYPOINTS
	Interpretation involves more than analyzing the particular provision in question. To interpret a text in its context includes the intra-textual context (the enactment as a whole, including its unique structure and legislative codes) as well as the extra-textual context (the rest of the existing law and other contextual considerations that might be applicable). The part to be interpreted has to be construed, the bigger picture including the constitution and other relevant law, including old order legislation that is still active and common law.
Balance between text and context	Kruger (1991:251) Legislation cannot be pointed out if text and context are separated. The meaning of the words of the text should be weighed up against the context of the legislation. From the outset the legislation as a whole, the surrounding circumstances, constitutional values and the text have to be considered to ascertain the purpose of legislation.
Structure of legislature	Structural aspects such as table of contents, paragraphing, layout of the text and punctuation could play a meaningful role during the interpretation process. It is a grammatical fact that punctuation can affect the meaning of a text. Since it is considered in the legislative process it has to be considered in interpretation.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Legal balance to striking a balance not only between textual and contextual but also between the language of the particular text and the rest of legal field, relevant law.	<i>Stellenbosch Farmers Winery v Distillers Corporation (1962)(A)</i> “In my opinion it is the duty of the court to read the section of the Act which requires sensibly with due regard, on one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the

			section in question and , on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute, its apparent scope and purpose and within limits, its background.

CONFLICTING LEGISLATION

6.2.2 THE PRESUMPTION THAT LEGISLATION DOES NOT CONTAIN FUTILE OR NUGATORY PROVISIONS

CONCEPT	KEYPOINTS
	Unless the contrary is clear, it is presumed that the legislature does not intend legislation which is futile or nugatory. Hlalo and Khan call it ‘the principle of effectual and purposeful legislation’. In a sense this presumption encapsulates the basis of the most important principle of interpretation: the court has to determine the purpose of the legislation and give effect to it. Since statutory interpretation is a purposive-activity, this presumption is an acknowledgement that legislation has a functional purpose and object.
Conflict with other legislation	If there is a conflict between national and provincial legislation, national usually trumps the national legislation. There is a process set out in s 146 & 150 of C on how its done. If two different pieces of legislation at the same level are in conflict, they must be read together, if this doesn’t solve the problem, if they deal with the same issue the earlier one will be repealed by implication by the later one. If they deal with separate issues they will be allowed to co-exist. Another possibility is to see which one is closest to giving effect to the bill of rights.
The King can do no wrong	As a rule, it is presumed that the gvt bodies are not bound by their own legislation, unless the legislation expressly or by necessary implication provides otherwise, this is not lawlessness of gvt, but a provision so that the gvt’s operations are not hampered by legislation.
The value laden (teleological) dimension	The supreme constitution is the mirror to the nation’s soul (Chief Justice Mohamed. The value based dimension of interpretation is more than simply lip-service, but involves making those values real; animating them through law, interpretation, and application of the law as well as ensuring that the law is respected and adhered to. It involves a willingness to keep those values in mind, right from the outset; a mind shift that comprises more ideologies, power, politics, policies and the meaning of the words on paper.
Ubuntu	Is an indigenous African concept and refers to a practical humanist

	disposition towards the world, including compassion, tolerance and fairness. Although it is not expressly mentioned in the new constitution, that does not mean it will disappear. It is also argued that it lives in the different human dignity references in the constitution. It forms a bridge between the communal African traditions and Western traditions, which focus on the individual, and could be very useful extra-textual aid to statutory and constitutional interpretation.
Preamble of the Constitution	The preamble should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows.
Prior legislation	If legislation had been partially repealed, the remaining provisions had to be interpreted in their context, which included the repealed provisions. Although the repealed provisions can no longer be applied, they may be used as part of the context of the remaining legislation.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		In times of conflict, PURPOSEFUL interpretation here seen again, the interpretation that gives effect to the legislation. It goes without saying reasonable and in accordance to the fundamentals in the Constitution.	<i>Attorney General v Van Zyl(1961)(C)</i> The court favoured a practical, purposive interpretation. So if there are two possible interpretations, the court must try, if it is reasonably possible, to adopt an interpretation that will render the legislation effective.
		The issues of putting together the constitutional values and the text in order to find meaning. Legal precedence.	<i>Sidumo v Rustenburg Platinum (2008)(CC)</i> Text and values work together in integral fashion to provide the protections promised by the Constitution.

PRECEDING DISCUSSIONS

CONCEPT	KEYPOINTS
Definition	Debates about a Bill before parliament, the debates and reports of various committees which form part of the legislative process, and the reports of commissions of inquiry constitute preceding discussions.
Debates during the legislative process	Steyn:1981:134) debates preceding the acceptance of the bill are important in establishing the intention of the legislature, especially when this is not evident from the wording of the legislation. In the past

	they were not accepted in the courts but now the opposition has been disappearing.
Commission reports	Cases providing precedence on both sides of the spectrum, Botha believes they should be admissible and the reasons given by the courts are not convincing.
The mischief rule	The historical context of the particular legislation is used to place the provision in question in its proper perspective, this historical context is known as the mischief rule. It is one of the cornerstones of the text in context approach. It poses four questions to help establish the meaning of legislation: What was the existing law (the legal position) before the legislation in question was adopted, Which problem (mischief or defect) was not adequately addressed before the new legislation was adopted, What remedy is proposed by the new legislation to solve this problem, what is the true reason for the proposed remedy. Used extensively for example in <i>Santam Insurance v Taylor</i> .
<i>Contemporanea expositio</i>	This is the explanation of the legislation given by persons in some or other way involved in the adoption of the legislation, or shortly afterwards during its first application. Gvt memos, etc
<i>Subsecuta observatio</i>	This refers to established administrative usage or custom over a long period of time. The way legislation has been applied in practice. It can help decide between a deadlock of two different interpretations.

6.5 THE COMPARATIVE DIMENSIONS

CONCEPT	KEYPOINTS
Foreign law	In the past they could follow foreign law to help interpret, especially when they were some legislation that would be taken word for word from English law. It can only be used as a guideline if it does not contravene, obviously with the constitution but also with SA common law.
International law	S 232, constitutional confirmation of the common law presumptions that legislation does not violate international law. Courts should prefer a reasonable interpretation that does not contravene international law. S 231 says a international treaty becomes SA law when it is enacted into law by legislation

CHAPTER 8

CONCRETISATION: CORRELATION OF AND PURPOSE IN THE LIGHT OF THE CONSTITUTION

Overview of Chapter

8.1 WHAT IS CONCRETISATION?

CONCEPT	KEYPOINTS
	It is the final phase in the interpretative process. When the legislation becomes reality. The legislative text and purpose as well as the facts of a particular situation are brought together to reach a conclusion. It is also known as correlation, harmonization and actualization. It is the process from which an interpreter moves from the abstract to the practical reality to apply the particular legislation. Concretization always takes place no matter the approach of interpretation used.

8.2 THE LAW MAKING FUNCTIONS OF THE COURTS

CONCEPT	KEYPOINTS
	Context in text and text in approach have different opinions about the function of the courts in interpretation.
The text-based viewpoint	They believe that the clear and unambiguous text is equal to the intention of the legislature. Only if the words seem ambiguous and clear can the secondary and tertiary aids be applied, only within the framework of the words used by the legislature. Any modifications, corrections or additions should be left to the relevant legislature. Also explained in the Engels judgment below
The text in-context viewpoint	They are for the law making function of the courts during interpretation, this does not mean they take over the legislative function. Points in support, court has a subordinate law making function which inevitably forms part of the legislative process in concrete cases, court is final link in the legislative chain and inevitably has the responsibility of seeing to a final end of the legislative process, legislation on a document is incomplete and only when the courts applies the legislature does . Legislation is situation bound and no two situations are the same. In essence legislation is not interpreted it is molded and shaped, by the courts in any given situation that they

	apply it.
The myth that courts merely interpret the law	Modification and adaptation of the initial meaning of the text involves the exercise of a creative judicial discretion. Because of the limitations inherent in language, necessarily involves a type of delegation. Zimnat case. Some older sources on modification refer to modification as modification of the language, this is not so, its modification of the meaning, reconstruction during interpretation to get the meaning of the text. This is not an amended or repromulgation of the text, as it would be in the suggestion of the modification of language definition, it is the meaning that is modified for that specific concrete situation.*The aim and purpose of the legislation within the framework of the constitution is the paramount rule of statutory interpretation.
Factors which support and limit judicial law making during interpretation	Limits-The law making functions of the courts are neither based on personal whims, guess work or gut feelings. There are factors which guide and limit this function. These factors should adhere to the underlying philosophy of modificative interpretation; the aim and purpose of the legislation (intention of the legislature) must support the modification within the framework of the constitution. The principle of democracy in section 1, it emphasies that the constitution is in the hands of the people, and as much as the courts are the guardians of the constitution they can't take that from the parliament, which is the people via proxy. The separation of powers doctrine. The common law presumption, which supposedly by the text in approach can only be applied as a tertiary aid, that the legislature does not intend to change the existing law more than is necessary. The principle of legality, through the rule of law. The usual functional and personal independence. JSC, the appeal process leaves an inevitable system of criticism of their decisions.
Support	A number of provisions support it, like: The reading down principle, stipulated in the IC. If a provision is unconstitutional, but with a reasonable restriction in its interpretation can be constitutional. It is not provided for in the new constitution but is very well used. Section 39(2), the reconciliation between the intention of the legislature with the Bill of rights. The binding of the Bill of rights on all branches and spheres of government s7 and s8. Constitution is supreme law of the land s2. The common law presumption that the legislature does not intend, futile, meaningless and nugatory legislation. Independence of judiciary in section 165.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		The text in viewpoint of the intention of the legislature and the functions of the courts in interpretation.	<i>Bulawayo Municipality v Bulawayo Waterworks(1915)</i> "The intention of the legislature can alone be

			gathered from what it may have intended to say, but has not said”
		This comes off to me as that the texts in guys don’t believe in the creative law making functions of the courts.	<i>Engels v Allied Chemical Manufacturers(1993)</i> The basic reasoning behind this approach is that by remedying a defect which the legislature could have remedied, the court is usurping the function of the legislature and making law, not interpreting it”
		Judicial precedence to function of law making of the court.	<i>Zimnat v Chawanda (1991)</i> It sometimes happens that the goal of social and economic changes is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and the application of the law. It is now acknowledged that judges do not merely discover the law, but also make law. They take part in the process of creation. Law making is an inherent and inevitable part of the judicial process.

8.3 POSSIBILITES DURING CONCRETISATION

CONCEPT	KEYPOINTS
	It is the last stage of interpretation, when the facts of the case and the text are harmonized with the purpose of the legislature. It can be influenced by the constitution since no

	modification can be in contradiction with the constitution.
Modification of the meaning is necessary	This happens when the initial meaning of the text does not correspond fully to the purpose of the legislation, when the text provides either more or less than its purpose or when the meaning of the text is against in conflict with the constitution. So if the initial meaning indicates that modification is necessary and possible there are only two possibilities, either restrictive interpretation, (reduced) or extensive interpretation (extended). The courts modify the initial meaning of the text when it presents an absurd or ambiguous meaning, the initial meaning will not give effect to the intention of the legislature. The purpose (intention) of the legislature must always be determined despite the clarity of the initial meaning. The initial meaning must always be compared with the purpose of the legislature to ensure that the effect will be given to the aim of the legislation concerned. Only if there is 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.
Restrictive interpretation	It is applied when the words of a particular legislation embrace more than its purpose. The meaning of the provision is then modified to give effect to the true purpose. It is any interpretation which reduces or limits a wider initial meaning of the text to the narrower purpose of legislation.
<i>Cessante rationale legis</i>	If the reason for the law no longer exists then it fall away, if something was a crime before and it's no longer a crime now then the law on it falls away. It does not apply in SA in its purest form since legislation can only fall away by repeal, it does appeal to common law though.
<i>Eiusdem generis</i>	Means literally 'of the same kind' This means that the meaning of the words is qualified by their relationship to other words, the meaning of general words is determined when they are used together with specific words.
Extensive interpretation	It is the opposite of restrictive interpretation. Were the initial meaning is narrower than the purpose and aim of the legislature, the meaning is then extended. To give effect to the purpose of the enactment.
Interpretation by implication	This involves extending the textual meaning in the grounds of a reasonable and essential implication which is evident from the legislation. However these remain nomore than indicators, the text and its purpose remain the decisive factors in interpretation. The two different types of implications: <i>Ex contrariis</i> - deals in opposites, if legislation provides for a certain circumstance by implication it provides the contrary provision for an opposing circumstance. <i>Ex consequentibus</i> - If legislation requires a certain consequence or results,

	<p>everything which is reasonably necessary to bring about that result may be implied. <i>Ex accessorio</i>- If a principle thing is forbidden, the accessory thing is also forbidden. <i>Anatura ipsuis rei</i>- A power to issue a regulation implies the power to withdraw it. <i>Ex correlativis</i>- The sale of certain things includes the purchase of those things.</p>
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LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		<p>Now this may look like a language modification but its not, it's the meaning of the courts to determine the jurisdiction needed. The current meaning had an absurd effect.</p>	<p><i>Trivett & Co v W M Brandt's & Sons</i> modified the meaning of legislation from every court of law in Britain to every court in South Africa</p>

Activity Answers

8.0 PEREMPTORY AND DIRECTORY PROVISIONS

CONCEPT	KEYPOINTS
	<p>In many cases legislation prohibits an act (conduct) or prescribes the manner in which it must be performed, if the legislation in question expressly prescribes what the consequence will be if the legislative requirements are not followed, there is no problem, difficulties arise, however, if the legislation fails to spell out what the consequences will be of a failure to comply with the prescribed formal requirements.</p>
	<p>A statutory provision that requires exact compliance is peremptory (obligatory or mandatory). Failure to comply with peremptory will leave the ensuing act (action or conduct) null and void. A statutory provision requiring substantial compliance only is merely directory. Non-compliance (defect or partial compliance with a directory provision will not result in the ensuing act being null and void, in other words, exact compliance is not a prerequisite.</p>

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW

Activity Answers

SECTION D

NON-COMPLIANCE WITH LEGISLATION

CHAPTER 9

PEREMPTORY AND DIRECTORY PROVISIONS

Overview Chapter

9.1 GENERAL INTRODUCTION

CONCEPT	KEYPOINTS

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
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Activity Answers

9.2 SOME GUIDELINES

CONCEPT	KEYPOINTS

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW

Activity Answers

SECTION E

CONSTITUTIONAL INTERPRETATION

CHAPTER 10

Overview of Chapter

10.1 INTRODUCTION

CONCEPT	KEYPOINTS

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW

Activity Answers

10.2 WHY IS A SUPREME CONSTITUTION DIFFERENT?

CONCEPT	KEYPOINTS

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW

Activity Answers

10.3 HOW TO INTERPRET THE CONSTITUTION

CONCEPT	KEYPOINTS

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW

Activity Answers

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