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## Theories of interpretation

### ① The textual approach

- Concentrate primarily on the literal meaning of a provision
- Meaning of words clear = legislature's intention  
Principal Imm Officer v Hanabu
- Plain meaning = ambiguous / vague or misleading or = absurd results  
then court may deviate from literal meaning to avoid absurdity.  
Venter v R
- then turn to 2<sup>nd</sup> aids eg long title / headings / text in other OL
- If 2<sup>nd</sup> fails then 3<sup>rd</sup> eg common law presumptions

#### Four factors to adoption:

- misconception re separation of powers
- doctrine of legal positivism
- common law altered as little as possible
- English law drafted comprehensively

- Courts have equated clear meaning to legislature's intention  
Esoro v Rensco Motas; Engels v Allied Chemical Manufacturers

#### → Criticism

- common law presumptions reduced to last resort, only if ambiguous
- words are regarded as primary index to legislative meaning
- Context ignored, other remedies not available unless ambiguous
- Intention of legislature limited to clear language to that court
- leaves little room for judicial law making and courts are seen as mechanical interpreters of law
- Function of court to interpret Harris v L.S.C. of Good Hope



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### Public Carriers Association v Toll Road Concessionaires

- alternative road v route
- court indicated intention of legislature primary rule but literal interp principle firmly entrenched
- also said if LIP fails resort to 2<sup>nd</sup> methods

### Smonepoel v JHB City Council

where intention proclaimed in clear terms either expressly or by necessary interpretation no need to use aids.

## 2. Method of Interpretation

### Interpretation:

importance of role of language. focuses on linguistic meanings.

### Interpretation: (contextual)

the meaning of a particular legislative provision in the text as a whole. All other contextual considerations.

### Interpretation:

elemental constitutional values and value-coherent (Sect 39(2))

### Interpretation:

↓ context of legislation i.e. circumstances which gave rise to the legislation.

### Interpretation:

interpretation of similar legislation by foreign courts and so on if possible + necessary.

Lord Atkin v Lord Macmillan

isolation

ding officer PE Prison

ation of determining intention of legislature doesn't  
m of judicial reviews based on supremacy of Const  
pre '94 to post '94

ertain + apply purpose of legislation in light of BoK

ective can't be all  
body

complex + technical legislation

/ broad sense

t

→ reading + ordinary meaning  
important → repetition, overcautions

time of legislation → @ time of case so as to take changing  
society into account.

ution → not take legislation beyond scope of words  
- be read as a whole



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## \* External Aids

- Constitution → supremacy
- Preceding discussions
- Surrounding circumstances Mischief rule → what was legal pos by leg  
↳ defect not provided for  
↳ what remedy provided  
↳ True reason 4 remedy.
- Dictionaries + linguistic evidence.
- Source of a provision
- Explanatory memoranda, examples + footnotes



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\* Interpretation Act: Computation of Time

Sect 4

- exclusively of first and inclusively of last day, unless last day on Sunday / Public Holiday, then exclusive of S/PH.
- Only apply if legislature made no other arrangement

Common law method

① Civil method: first day incl last day excl  
Min v Polisse v De Beer

② Natural method: calculated from hour/min of occurrence to corresponding hour/min on last day

③ Extraordinary civil method: first + last day incl



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\* Common Law Presumptions as external aid

Legislation does not oust / restrict jurisdiction of courts:

- Unless expressly stated or necessarily implied
- High Court inherent common law jurisdiction to review  
Mathope v Saveto Council

Sect 34 oo.

Everyone has the right to have any dispute resolved by the application of law decided in a fair public hearing before a court / forum or tribunal.

and purpose as well as facts of a particular situation  
together to reach a conclusion.  
In the abstract text of the legislation or correlated  
facts of the case within the framework of the  
tutorial principles & guidelines.

### action of the courts

was text of legislation is equated with intention of

### ality v Bulawayo Waterworks

legislation only be gathered from what actually said and  
what was intended but not said.

Corrections/additions should be left to relevant legislature

### Chemical Manufacturers

A defect which the legislature could have remedied, court is  
action of legislature and making laws, not interpreting it.

the law making function during statutory interpretation.  
the law making function and inevitably forms part of





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Restrictions on law making powers of court:

- Principle of democracy

Du Plessis v De Klerk

- function of court firstly to ensure legislation does not violate fundamental rights, secondly to interpret legislation in a manner that furthers values expressed in Const, thirdly to ensure common law and custom outside legislative sphere is developed in a manner to harmonise with Const.

- Principle of separation of powers
- Common law presumption that legislature does not intend to change existing law more than is necessary
- Rule of law principle
- Judges and officers accountable on 3 levels

Modification of meaning necessary

Will only take place where:

- ① purpose of legislation is clear
- ② initial meaning of legislation goes beyond purpose of the legislation or initial meaning falls short of purpose of legislation.

In order to ensure that purpose of legislation is not frustrated by language of legislation, meaning of words used in legislation either be restricted or extended.

\* Restrictive interpretation

Applied when words of particular legislation embrace more than its purpose.  
*Administrative Properties v Gemeenskapalbestuur van Mosselbaai*

When interest payable read in may ∴ restricted state's options.

① *De Klerk*, nature, legal context, etc. legal text.

② *State of the Republic of South Africa v Gubbins*



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↳ Coarse nature legis. result et ipso lex

↳ If reason for law ceases the law itself falls away.

In SA legislation remains in force until repealed by legislature

↳ R. v. Maitland found object of act (i.e. compensation) complied with therefore compensatory fine unnecessary. also R. v. Nikto

↳ S. v. Mijalee stopped paying maintenance to court order to institution as child was discharged. Reason for order fallen away: aquired.

↳ Enusium generis

↳ of the same kind. → meaning of words qualified by their relationship to other words.

- Can't be applied unless specific words refer to a definite genus or category.
- Specific words must not already have exhausted the genus
- Can be applied <sup>even</sup> where a single specific word precedes the general words
- Order not important, general words may precede, appear amongst or follow specific words

↳ S. v. Keshner appeal against NAC conviction. Persecute chicken like decorative bird.  
∴ dismissed.

\* Extensive interpretation

- Purpose broader than initial textual meaning of legislation, text then extended to encompass broader purpose

↳ Implication by implication

- expression of one thing by implication means exclusion of the other

- Additional powers or authority implied as a result of an express power or authority

Ribernof Town Council v Ribernof statutory power to contain river implication right to remove washed up silt.



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## A Comprehensive Methodology:

- ① Grammatical interpretation → focuses on linguistic & grammatical meaning of words/phrases/sentences/other structural components of text.
- ② Systematic (Contextual) interpretation → clarification of meaning of a particular constitutional provision in conjunction with Const as a whole
- ③ Teleological interpretation → aim + purpose of provision must be ascertained against fundamental Const values
- ④ Historical interpretation → use of historical context of Const
- ⑤ Comparative interpretation → court examines international law and Const decisions of foreign courts.



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## ② The Purposive (Text in Context) Approach

- Purpose / object of legislation is prevailing factor.
- Context + social factors + political policy directions taken in consideration
- Mischiefs rule acknowledges application of external aids incl common law prior to enactment of legislation, defects in law not provided for by common law, new remedies legislature provided for and true reason for remedies
- Provides balance between grammatical & overall contextual meaning.

### Jaga v Dönges

- From outset interpreter may take wider context of provision (ambit + purpose) into consideration with legislative text in q
- Irrespective of how clear or unambiguous grammatical meaning may be, relevant contextual matters must be taken into account.
- Sometimes wider context even more important than legislative text.
- Once meaning of text + context determined it must be applied irrespective if interpreter thinks legislature intended something else.

University of Cape Town v Cape Bar Council case held it has to examine all contextual factors irrespective of words clear / unambiguous or not.

- Courts may modify / adapt initial meaning of text to harmonise with purpose of legislation. i.e. court's role more flexible



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## Interpretation of the Constitution

### Constitutional guidelines:

- S 39(1) → interpreting Bk → must promote values underlie an open & democratic society based on human dignity equality & freedom
  - consider international law
  - may consider foreign laws.
- A supreme Const must be given a generous & purposive interpretation
- A liberal / flexible / generous interpretation should be followed.
- Values and moral standards underpinning Const must be taken into account throughout entire interpretation process.
- A provision in Const can't be interpreted in isolation but must be read in context as a whole and historical factors led to Const and fundamental rights
- Respect must be paid to language employed in Const
- Const as supreme law has bestowed court trust of protecting human rights.
- Const must be interpreted in context and setting existing @ time when case is heard and not when it is passed otherwise 'growth of society' will not be taken into account.

- Balance of various societal interests & values

- All judges + judicial officers are obliged to continuously interpret & apply legislation to give effect to fundamental values & rights in supreme Const.



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## Preemptory & Directory Provisions:

Preemptory = statutory provision that requires exact compliance. Failure to comply will lead to ensuing act null and void

Directory = statutory provision requiring substantial compliance only. Not  $<^n$ .

### Guidelines:

Semantic • word(s) with imperative / affirmative character indicate preemptory

- permissive words (may) indicate a discretion = directory unless purpose of provision indicates otherwise
- words in negative form indicate preemptory connection
- Positive language suggest provision directory
- flexible + vague terms = directory

Jurisprudential • wording in + terms and no penal sanction = directory

- strict compliance is injustice / fraud = directory
- historical context
- Adding penalty to a prescription or prohibition = preemptory
- if validity of act would defeat purpose of legislation = indication act should be null + void.