

Interpretation of Statutes IOS2601

STUDY UNIT 1

GENERAL INTRODUCTION

1. WHAT IS INTERPRETATION OF STATUES?

Definition: **Statutory Interpretation** (*juridical understanding of legislation*)

Statutory interpretation deals with the body of rules and principles used to construct and justify the meaning of legislative provisions to be applied in practical situations.

Du Plessis explains it as follows:

Statutory (and constitutional) interpretation is about construing exacted 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 hypothesised concrete situation.

Interpretation of legislation requires more than reading provisions → It's not a mechanical process

One cannot understand a legal text merely by concentrating on its language

→ You must also understand how law works & what it seeks to achieve in order to understand how it communicates with you and what it wants to tell you. (Du Plessis)

Corocraft Ltd v American Airways Inc:

Donaldson in explaining interpretation of legislation:

→ Judges = not computers into which statutes & rules for its construction is fed

→ "Statutory interpretation is a craft rather than a science"

Reasons why the interpretation of statutes is not a rule-like activity:

Interpretation is not mechanical process: multifaceted (complex), rules overlap & cannot be compartmentalized:

- The circumstances & sets of facts will differ from case to case, as well as the context of legislation
- Courts are not of one mind when applying principles → interpretation has no clear, predictable pattern of application.
- The law is not objective, neutral and value-free: All interpreters have particular personal attributes which influence their understanding of legislation.
 - These attributes are as a result of the interpreter's history, background, experiences and prejudices
- Since the spirit & purport of the bill of rights must be promoted during the interpretation of all legislation, the interpreters must of necessity involve value judgments.
- Other external factors (e.g. dictionaries or commission reports) may be used to establish the meaning of the legislation. Sometimes the interpreter will be confronted by the results of poor drafting, conflicting provisions or a lack of resources to research the current law.

Interpretation is not a mechanical exercise during which predetermined formulae, well-known maxims and careful reading will reveal the meaning of the legislative provision

- Technical aspects of the structure and language of legislation must be applied together with substantive aspects of the constitutional values and fundamental rights.

- The interpreter has to keep other interrelated issues in mind apart from difficulties of language and meaning. Is it in force, amended, provisions, regulations, conflicting law etc
- Read, understand and apply the provision within the framework of the supreme constitution and the bill of rights.

2 THE NEW CONSTITUTIONAL ORDER:

Before 1994 and the Constitution, interpretation of statutes was an orthodox system of maxims and rules for interpretation based on parliamentary sovereignty.

- The old system was saddled with maxims and canons of interpretation all unnecessary and unacceptable!
- Today interpretation (a fundamental-rights dispensation) is based on constitutional supremacy and the spirit & purport of fundamental rights are to be taken into account → thus value judgment can no longer be ignored.

(In the new constitutional dispensation, value judgments have to be made in interpretation of statutes, since the courts must consider the spirit and purport of the fundamental rights while making statutory interpretation as prescribed by the interpretation clause of the supreme constitution.)

According to **Devenish:**

The need for a new method of statutory interpretation in a constitutional democracy:

- 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.

He expressed this need as follows:

*“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 South Africa. Steyn'S advocacy of the subjective or intention theory of interpretation facilitated a sympathetic interpretation of apartheid and draconian security legislation. . . **The demise of the apartheid state and the emergence of a new political and legal order involving a negotiated and legitimate constitution with an entrenched and justiciable bill of rights must of necessity influence the process and theory of interpretation. In effect, the introduction of a justiciable bill of rights is likely to herald a new methodology and theory of Interpretation of statutes.**”*

On 4 February 1997 the 1996 Constitution came into operation.

- Those principles of the interim Constitution which transformed statutory interpretation were retained in the 1996 Constitution.

Clauses in the supreme constitution that influence interpretation

Apart from the constitutional values, the interpretation of statutes was transformed by six provisions of the Constitution → in particular:

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

Factors which have influenced the shift in the mode of statutory interpretation are: -

1. Supremacy of the Constitution
2. Human Rights as considered in the Bill of Rights provision
3. Constitutionalism & fundamental values.

3. DEFINITIONS

Act:

Refers to legislation: either a parliamentary / provincial statute.

- “act” = conduct of a government organ.

Concretisation:

Final phase of the interpretation process.

- The text, purpose and situation are harmonised.

Constitutionalism:

Refers to government in accordance with the Constitution → government derives its powers from and is bound by the Constitution.

- State where the Law is supreme → government & state authorities = bound by the rule of law.

Constitutional state (Rechtsstaat):

State in which constitutionalism prevails → Country where the constitution is supreme.

→ A constitutional state is underpinned by two foundations:

- A **formal** one: includes separation of powers, checks and balances, legality.
- A **material** one: refers to a state underpinned by fundamental values: justice, equality.
 - The preamble of 1993 Constitution expressly referred to SA as a constitutional state.

Context:

The circumstances surrounding something / the situation in which something happens.

Contextualisation:

Process during which legislative text is read, researched within its total context to obtain its purpose.

Entrenched:

Provisions in a Constitution which can only be altered / amended / repealed with difficulty (IE: rigid or inflexible provisions.)

- Legislation: usually changed by simple majority vote in legislature (50%+ 1 of members present)

- Entrenched provision: it would entail some / other more difficult procedure
(2/3 of all members (not only present) of both houses sitting together)

Intra Vires:

When government organ acts within the scope of the powers conferred on it → it acts *intra vires*.

Judicial law-making:

Although courts are primarily involved in application of the law → also have secondary lawmaking function.

- This involves the **development of the common law** to adapt to modern circumstances, as well as giving form, substance and meaning to particular legislative provisions in concrete situations
- The exercise of a judicial discretion → Judiciary may modify or adapt ordinary meaning of a provision to conform to the purpose.

Jurisdiction:

The competency of a particular court to adjudicate on a specific case. → where may which court adjudicate what type of case.

- Generally speaking, a court's jurisdiction is determined by two factors:
 - The **geographical area** in which the court operates: there must be a link between the court's area and the litigants, and
 - the **type of case** which the court may hear.

The Law and a law:

- **A law** = a written statute enacted by those legislative bodies which have the authority to make laws while **the Law** consists of all forms of law:

Statutory law / legislation:

Consists of all the different types of enacted legislation

→ Acts of parliament, provincial legislation, municipal by-laws, proclamations & regulations

Common law:

Rules of law which were not written down originally, but came to be accepted as the law of the land – it's made up of the underlying original / basic legal principles.

→ South African common law is known as Roman-Dutch law.

Indigenous law:

Rules of law not written down originally but came to be accepted as the law of the land

→ this may be unwritten customary law or codifications thereof

Case law: (*judicial precedent*)

The law as it has been decided by various courts in specific cases before them.

→ Precedent system (*stare decisis*)- judgments of higher courts bind lower courts and courts of equal status.

Legality:

The lawfulness and control of arbitrary state action → Government by & under the law).

- The government must act within the letter and spirit of the law.
- The term 'Legality' is given different meanings by different writers:
 - may mean nothing more than formal compliance with the letter of the law (in the sense of 'legalism' or 'legalistic').
 - also been interpreted to mean just the opposite - conformity with the principles of reasonableness and justice with due regard to the public interest.

Legislature:

An elected body which has the legal power to enact laws.

- Collective name for these laws = legislation.

Legitimacy:

Legitimacy has two meanings.

- the level of acceptance of a constitution, government and legal system by the citizens of a country.
 - the faith of the population in a system.
- It is the subjective consciousness of justice in a community.

Locus standi:

Deals with access to the courts → it determines whether a person has a right to be heard by the court (who may bring a case before the court).

- The Constitution has considerably widened the base for approaching a court to hear a matter when a fundamental right has been infringed (see s38).

Parliamentary / Legislative sovereignty:

It means that Parliament is supreme → Not only is parliament the highest legislative body, capable of enacting any laws it wishes, but no court may test the substance of parliamentary Acts against standards such as fairness or equality.

- This was the system of government which operated in South Africa before the 1993 Constitution came into operation → also referred to as a "Westminster system".

Proclamation:

A specific category of subordinate legislation.

Promulgation:

Legislation made known to the population by promulgation and comes into operation by publication in an official gazette.

- Promulgation of a statute should be distinguished from the adoption of Legislation → which deals with the formal enactment procedures.

Purpose: (of legislation)

The legislative scheme, object, aim or scope of legislation.

Supreme Constitution:

The Constitution is the highest law in the land.

- Although parliament remains the highest legislative body in a system of government with a supreme constitution, any legislation or act of any government body (including Parliament) which is in conflict with the Constitution, will be invalid.
- However, constitutional supremacy does not imply judicial supremacy.
- The courts are also subject to the Constitution, and merely act as the final guardians of the values and principles embodied in the Constitution.
- On 27 April 1994 the system of sovereignty of parliament in South Africa was replaced by a system of constitutional supremacy.

Testing legislation: (Constitutional / judicial review)

The process whereby legislation which is alleged to be in conflict with the Constitution is reviewed or tested by the court

- This is done by **measuring** the legislation against the provisions of the **Constitution** and decides whether the legislation is valid or invalid.

Textual approach:

Same as literal / plain meaning approach

Ultra Vires:

The act (conduct) of a government organ which goes beyond the authority conferred upon it

- It acts outside the scope of its powers

4. PROCESS OF INTERPRETATION A TEACHING TOOL

Interpretation is neither mechanical nor objective and can never be reduced to a "road map". The following three phase interpretation process is merely a teaching tool:

1. Initial phase

A number of basic principles are used as a point of departure:

- The supreme Constitution & BoR are the cornerstones of the legal order;
- Most important principle of statutory interpretation→ to ascertain & apply the purpose of the legislation in the light of the BoR;
- The legislative text is read to find the initial meaning of the text
 - the common law presumptions are borne in mind, &
 - a balance between the text & the context of particular legislation is kept in mind.

2. Research phase

- The purpose of the legislation is determined by studying all the factors and considerations that may have a bearing on the particular legislation:
- The Interpretation Act, presumptions, intra-textual aids and extra textual aids.

STUDY UNIT 2

WHAT IS LEGISLATION?

[ADD STUDY GUIDE]

1. WHAT IS LEGISLATION

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. The other 2 are judicial precedent & custom.

This definition & the definition of 'law' exclude common law.

NB: the importance of distinguishing between legislation & other types of law lies in fact that rules & principles of interpretation apply only to interpretation of legislation. → NB to study these definitions

Definition:

Legislation is written law enacted by an elected body authorized to do so by the constitution or other legislation.

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

Section 2 of the Interpretation Act:

NB

- **Law:** means any law, proclamation, Ordinance, Act of parliament or other enactment having the force of law.

→ Note: law in this definition does not include common law.

Section 1 of the Interpretation Act

NB definition

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.

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

Section 239 of the Constitution

→ also defines legislation, distinguishing between national and provincial legislation:

In the Constitution, unless the context indicates otherwise 'national legislation' includes

- (a) Subordinate legislation made in terms of an Act of parliament; and
- (b) Legislation that was in force when the Constitution took effect and that is administered by the national government;

'Provincial legislation' includes —

- (a) Subordinate legislation made in terms of a provincial Act; and
- (b) legislation that was in force when the Constitution took effect and that is administered by a provincial government

2. CATEGORIES OF LEGISLATION

In SA law, legislation is classified into 3 broad categories according to its:

- History (Chronological)
- Hierarchy
- Status

The various hierarchical categories of legislation differ tremendously from each other.

→ These differences have an impact on the commencement & demise of legislation & play an NB role in other branches of the law

Summary of what follows:

Chronological (Historical origins)	
Legislation before 1806	Old Dutch <i>placaaten</i> (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; color: red;"> ↑ 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

2.1 Chronological categories

The Classification of existing legislation according to their historical origins.

→ This part is quite simple: it's a little bit of history & legislation is categorised into a chronological time-line.

(1) Legislation before 1806

- Old dutch *placaaten* (statutes) are viewed as common law
- No procedure needed for their demise.
- They are abrogated by disuse

(2) **Old order legislation**

Definition ito item 1 of schedule 6 of the 1996 Constitution:

Any legislation enacted before the interim Constitution took effect.

⇒ **Pre-union legislation (1806 -1910)**

- legislation adopted between
 - the British annexation of cape in 1806 & the creation of the union in 1910.
- It consists of legislation of
 - the British colonies & the Boer Republics
- Most of these were either
 - incorporated into legislation of the Union (1910-1961) & the Republic (since 1961), or
 - repealed.

⇒ **Legislation between the unions & the democratic era (1910 – 1994)**

In the view of the constitutional changes since 1994, this legislation is known as 'old order legislation' and would include most existing SA legislation:

- Acts of parliament
 - including 'general affairs' & 'own affairs' legislation between 1983 & 1994 ito the 1983 Constitution
- Legislation of the ('independent') homelands / TBVS states
- Provincial ordinances enacted by the provincial councils of the 4 'white' provinces (1910-1986)
- Bylaws enacted by local authorities
 - town councils & municipalities
- Other delegated (subordinate) legislation

(3) **Legislation in the new constitutional order since 1994**

All legislation enacted after the start of constitutional democracy in 1994.

It Includes:

- The Interim Constitution 1993
 - (since repealed)
- The Final Constitution 1996
- National Legislation
 - (Acts of Parliament & delegated legislation issued in terms thereof)
- Provincial legislation
 - (Acts of the 9 provincial legislatures & delegated legislation issued in terms thereof)
- other regulations, promulgations, proclamations
- legislation by the new local authorities created after 1994 (ordinances)

2.2 Hierarchical categories

(NB)

This classifies the legislation as per status. → it's place in the hierarchical order

⇒ **Before 1994 – constitution was not supreme**

Therefore classification was fairly simple & straight-forward:

- Original legislation → IE: Acts of parliament
- Subordinate legislation → IE: Regulations and Proclamations.

⇒ **Post 1994 = more complicated**

We now have:

- a Supreme Constitution,
- old order legislation,
- new-post 1994 legislation &
- 3 spheres of co-operative government (national, provincial & local).

The constitution = supreme & all other legislation is subordinate to it.

- Can be argued that legislated issued by the administrator (previously known as subordinate legislation) should now be referred to as 'delegated legislation' to avoid confusion.
- However, the Constitution adds to this confusion as it expressly refers to regulations, proclamations & other instruments of subordinate legislation

Du Plessis correctly distinguish between classification based on the hierarchy & status of legislation.

- His distinction brings a new type of legislation into the equation: 'superordinate non-constitutional legislation'.

However, the Constitution still refers to subordinate legislation as do most courts.

(1) The Constitution

The Constitution is at the top & is followed by legislation.

- it is the supreme law of the Republic & any legislation inconsistent with it is invalid (s2) &
- the obligations imposed by it must be fulfilled.

The courts may now test all legislation (including new & old order Acts of parliament) & government action in the light of the Constitution.

The Constitution is officially known as the Constitution of the Republic of SA, Act 108 of 1996.

- Incorrect to refer to the Constitution as an Act.
- Its not an Act & not adopted by parliament but drafted by a Constitutional Assembly and certified by the CC.

Van Wyk & Du Plessis criticise this methods of numbering.

- Every year ordinary Acts of parliament are numbered in chronological order.
- The Constitution is not merely Act 108 of 1996: it's the highest law in the land & incorporated the rights, aspirations & values of all its people.

→ Its degrading to number such an exalted (glorious) document (the birth certificate of the new constitutional order) as merely the next statute on the list.

(2) Original legislation

Original legislation derives from the complete and comprehensive legislative capacity of an elected legislative body.

→ It is also known as direct or primary legislative capacity, since it is derived directly from the Constitution or another Act of parliament.

(a) Acts of Parliament

Includes all Acts of parliament since 1910:

- Between 1910 & 1983, parliament consisted of the House Assembly and the Senate;
- Between 1983 & 1994 it comprised the House of Assembly, the House of Representatives, the House Delegates & the President's Council;
- Since 1994, parliament consists of the National Assembly & the NCOP.

The legislative authority of current parliament is derived directly from the Constitution – (ss 43(a) & 44)

- Parliament is the highest legislative body in SA & it may, subject to the Constitution, pass legislation in any matter.

→ This means that the courts may review (test) Act of parliament against the Constitution.'

Although the Constitution is the supreme law, some Acts of parliament have higher status than other original legislation.

→ Acts enacted to give effect to specific human rights, as required by the Constitution:

- The Promotion of Access to Info Act,
- PAJA,
- Promotion of Equality and Prevention of Unfair discrimination Act

As a result, these 'constitutional' Acts have a specific status in the SA legal order, both hierarchically & substantively.

▪ Examples

→ 'superior status': section 5 Paja

→ Other original legislation may also contain provisions stating that it prevails over any other law in a particular field of law: section 70 of the Higher Education Act.

- Provisions like these have to read in conjunction with the supreme Constitution as well as with the 'constitutional' Acts→ PAJA in particular

The constitution is the supreme law (constitutionalism) and all law or conduct which is contrary to the Constitution is invalid.

(b) New provincial Act (1994 -)

This category comprises the legislation enacted by the nine new provincial legislatures.

- Their legislative power is also derived direct from the Constitution / assigned to them by Acts of parliament.
- Courts also have the power to review provincial Acts in the light of the BoR.

(c) Provincial ordinances (1996-1986)

The Provincial Government Act 32 of 1961 empowered the four former provincial councils of that time to enact provincial ordinances on matters concerning the respective provinces.

- These provincial councils were abolished on 1 July 1986 by the Provincial Government Act 69 of 1986.
- Since these ordinances were enacted by an elected body, could alter the common law and could even have retrospective force, they represent a category of original legislation.
- A particular ordinance applies only in the old geographical area of the former province concerned.

(d) Legislation of the former homelands

The homelands (self-governing territories) enjoyed concurrent original legislative powers with the central government.

- In terms of the repealed Self-governing Territories Constitution Act 21 of 1971, these territories were granted complete legislative capacity with regard to certain specific matters (e.g. health and welfare, education and agriculture).
- In these matters the particular legislative assemblies could enact any legislation and even repeal or amend parliamentary legislation.
- Prescribed matters such as defence & foreign affairs fell outside their legislative competence.
- They were also not empowered to repeal the Self-governing Territories Constitution Act / the proclamations into the Act which granted self-governing status to a particular homeland.

(e) Legislation of the former TBVC states

Although the legislation of Transkei, Bophuthatswana, Venda and Ciskei (i.e. the former independent homelands) did not form part of SA legislation, it remains valid as part of SA law in the area where it previously applied, because these states have been re-incorporated into the Republic.

- It will have the same force of law as provincial Acts, provincial ordinances and legislation of the former self-governing territories in their areas of operation.
- Although the legislation of the TBVC states is original legislation, the High Court has the jurisdiction to test its constitutionality against the provisions of the supreme Constitution like any Act of Parliament.

(f) New municipal legislation

In terms of the Constitution (s156) municipal councils may enact by-laws in respect of local government matters.

- The principle of co-operative government, as well as the fact that municipal councils are fully representative elected bodies, now means that new: municipal by-laws are original legislation.

(3) **Delegated Legislation**

Subordinate legislation is also known as delegated legislation Acts of parliament

Other forms of original legislation are sometimes drafted in broad terms (skeleton form), because the respective legislative bodies are not continuously in session to deal with every possibility in a changing society.

- Delegated (subordinate) legislation then adds the flesh.
- The legislature may find it necessary to delegate some of its powers to other persons, bodies or tribunals.
- These are then vested with subordinate legislative powers under enabling legislation.
- Such subordinate legislative enactments are known as legislative administrative acts whose validity may be reviewed by the courts.
- In each case the scope of the subordinate legislation will depend on the provisions of the particular enabling (giving the authority to act) legislation.
- Subordinate legislation is legislation by the administration.

(a) **Existing provincial proclamations and regulation (1968-1994)**

Before the provincial councils were abolished in 1986, certain ordinances enabled members of the various provincial committees to issue regulations and proclamations.

- The Provincial Government Act 69 of 1968 abolished provincial councils and therefore any elected legislative body for the provinces and its accompanying original legislative competency.
- The legislative authority for the provinces was transferred to the Administrator of each province.
- The Administrator enacted or amended or repealed provincial legislation by proclamation and could issue regulations under existing or new parliamentary Acts, provincial ordinances or new proclamations.
- As a result, old order provincial legislation consists of both original and subordinate legislation which may have to be read together.

(b) **New provincial proclamations and regulations (1994-)**

The new provincial legislatures will, like their parliamentary counterparts, be able to empower other functionaries, such as the Premier or members of the provincial cabinet, to 'add the flesh' to provincial Acts through proclamations or regulations.

→ These will also have to satisfy the requirements and limits set by the enabling Act

(c) **Other proclamations and regulations**

An Act of parliament may contain a provision by which –

- The **President** is authorised to promulgate certain rules by promulgation
- IE: Defence Act 44 of 1957, which authorises the President to make regulations with regard to a wide range of defence matters;

- A **Minister** is authorised to promulgate certain regulations in accordance with the prescription of the particular statute
 - IE: section 75 of the National Road Traffic Act 92 of 1996;
- A **municipality** is authorised to make regulations (by-laws) with regard to a particular local affair
 - IE: section 32(1) of the Slums Act 76 of 1979 which empowers a local municipality to make regulations, with the approval of the premier of the particular province, with regard to the occupation and the use of any premises under the control of the municipality;
- A **statutory body** may be empowered to make regulations
 - IE: section 17 of the Universities Act 61 of 1955 which authorises the Council of a university, subject to the approval of the Minister of Education, to issue regulations and statutes of the university in relation to the general management of such a university; s43 of the Supreme Court Act 59 of 1959, in terms of which the judges president of the various provincial divisions of the High Court may, subject to the approval by the Minister of Justice of the CC, issue certain rules of court for their respective divisions

The functionaries promulgating subordinate legislation may only act within the framework of the authority bestowed on them and the subordinate legislation may not be in conflict with original legislation.

→ They may therefore not issue subordinate legislation unless specifically authorised to do so.

NB:

- Empowering legislation may not issue delegated legislation unless specifically authorized to do so.
- Delegated legislation may not be in conflict with empowering legislation
- Delegated legislation cannot influence the meaning of enabling legislation.
- Law of general application as referred to in the limitation clause includes all legislation (original and delegated) + common law & indigenous law.

Note:

- If an enabling Act is repealed, all the subordinate legislation issued in terms of the repealed Act also ceases to exist (*Hatch v Koopoomal* 1936 AD 197), unless a new Act expressly provides otherwise.
- Subordinate legislation must be read together with its enabling legislation but it cannot influence the meaning of such enabling legislation.

Keep in mind:

- Parliament cannot confer a power on a delegated legislative body to amend / repeal an Act of parliament.
 - ***Exceucutive Council Western Cape Legislature v President of the RSA.***
- Although delegated legislation must be read & interpreted together with its enabling legislation, it cannot influence the meaning of such enabling legislation.
 - ***Moodley v Minister of Education & Cultre, House of Delegates.***

2.3 The legislative practicalities of the new constitutional order

Section 229 of the interim Constitution stipulated that all existing legislation would remain in force until repealed or amended by a competent authority.

- In effect this means that the vast majority of legislative enactments, including those of the previous provinces and self-governing territories, as well as the former so-called "independent homelands", remain on the statute book.

In terms of Item 2 of Schedule 6 of the Constitution, all law in force when the Constitution took effect continues in force, subject to any amendment or repeal, and consistency with the Constitution.

- Old-order legislation (e.g. Legislation which was in force before the commencement of the interim Constitution) remains in force.

Each of the new provinces has its own provincial legislature and executive, generating new original and delegated legislation.

- Often the new provincial boundaries overlap with old ones and sometimes neighbouring local authorities have been amalgamated

The new authorities at national, provincial and local level have to contend with both existing and new legislation, applicable to old and new areas of jurisdiction.

- Some of the old order legislation has been repealed fully, some merely in part, while the greater part of existing legislation remains in force to enable the new structures and authorities to govern, and services to continue.
- New Acts of parliament have to be read together with other existing original legislation, as well as a vast amount of delegated legislation (e.g. provincial regulations and local government by-laws) to keep "the system" going.

In terms of section 36 of the Constitution (limitation clause), a fundamental right in the Bill of Rights may be limited in terms of a law of general application.

2.4 'Law of general application'

What is "law of general application"? Is it all law, or only legislation?

For our purposes, it is sufficient to note that the term "law of general application" in section 36 of the Constitution includes all forms of legislation (original and delegated), as well as the common-law and indigenous law (*Du Plessis v De Klerk*).

3. WHAT IS NOT LEGISLATION?

Legislation is written law enacted by a person or body with authority to do so.
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Legislation must be published in the official gazette before it takes effect

However, not all that is published in the gazette is legislation → IE:

- Legal notices, reports, draft Bills, discussion papers are regularly published in the Gazette but do not amount to legislation;

- Green papers, white papers and other Government policy documents are published in the Gazette but are not legislation;
 - Legislation should also be distinguished from administrative documents such as department memos and directives;
 - Rules of unwritten law (common law rules), case law and indigenous law rules are not legislation.
- These & other official documents are not legislation.
- Some of these may possible lead to legislation and may be used as extrinsic evidence during the interpretation of legislation.

Legislation (especially delegated legislation) should be distinguished from what **Baxter** refers to as “administrative quasi-legislation”.

- This consists of departmental memos & directives, which, although enforceable in some instances ≠ not constitute delegated legislation).

Before any document can be classified as legislation→ it must comply with all the constitutional and other legal requirements dealing with authority, adoption and publication.

Thus: What is not legislation: documents which may be used during interpretation & application of legislation which does not comply with all the prescribed formalities.

Rules of unwritten law (uncodified) law:

- common-law rules and indigenous law) is not legislation, although a
 - source of South African law and can become legislation once codified.
- **Not legislation: but Formal sources of SA law**

Sometimes indigenous law is codified in legislation but otherwise these rules are NOT legislative enactments.

Note:

Common-law rules, indigenous law & case law must be used during the interpretation of legislation. (A requirement of statutory interpretation→ sound knowledge of all existing law & where to find it)

4. STRUCTURE OF LEGISLATION (NB)

To start the interpretation of legislation, it must be read and 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.

(1) Long title

- An Act always has a long title. It is not really a title, but rather a **short summary** of the subject matter of the Act.
- The long title is a part of the statute and is tabled for adoption in the legislature.

(2) Preamble

- The preamble (if there is one) states the circumstances and background of, and reasons for the legislation.
- In earlier years a statute would always commence with a recital of the objects of the legislation.
- Unlike Private Acts, where a preamble is always used, its use in ordinary Acts is usually restricted to legislation of constitutional or national importance.
- It is usually placed after the long title and is an integral part of the legislation.

(3) Enacting Provision

- This acknowledges the authority of the body that is enacting the legislation.
- Section 43 of the Constitution states that the national legislative authority is vested in parliament; the provincial legislative authority is vested in the provincial legislatures; and the legislative power of local authorities is vested in the municipal councils.

(4) Definitions

- The definitions serve as an 'internal dictionary' for the particular legislation.
- The definition section is usually found at the beginning of an Act.
- In older legislation the definitions were placed at the end of an Act.

(5) Purpose & interpretation

- Purpose and interpretation clauses are frequently included in post-1994 legislation.
- These clauses should explain the purpose of the Act, and how the Act must be interpreted.

(6) Repeal / amendment of legislation

- Repeals and amendments of legislation are usually done by means of an amending 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 of dealing with repealed or amended Acts is with a schedule at the end of the Act.

(7) Short title & commencement

The short title is the title of the Act and is usually the last section in an Act.

- Where no commencement date is included, the Act will come into operation on the date on which it is published in the Government Gazette.
- Where a specific date of commencement is specified, it is included in the short title.
- Where an unknown date of commencement in the future is contemplated, the short title will state that the Act comes into operation on a date to be fixed by the President (or the Premier if it is a provincial Act) by proclamation in the Gazette.

(8) Schedules

These are used to deal with technical detail that would otherwise clog up the main body of an Act.

- Schedules are used when several Acts or parts of Acts are repealed, or for a number of amendments.
- In both instances it would be unnecessary to include the details about the repeals and/or amendments in the main body of the Act.

(9) Numbering in legislation

The following is the traditional numbering system employed by legislative drafters:

Section 1; subsection (1); paragraph (a); subparagraph (i); item (aa); sub item (AA).

The full citation of such a provision will read as follows:

Section 1(1)(a)(i)(aa)(AA)

- Where an additional section is inserted into an Act through an amendment Act, the section to be inserted takes the number of the section after which it is to be inserted and gets a capital letter after it.
- If, for example, you need to insert a new section between the current sections 66 and 67, you will insert section 66A.
- This system of numbering is necessary, otherwise the whole Act must be renumbered, and such renumbering will have to be done by means of an amendment Act.
- In older legislation the inserted sections were numbered *bis*, *ter*, *quat*, etc.

(10) Amendments

When an amendment Act is published in the Gazette, there is a General Explanatory Note on the second page, which includes the following:

- [] 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 (including insertions and deletions) are also indicated clearly in the amended version of an Act.

Summary:

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, ter, 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.

5 RELATIONSHIP BETWEEN LEGISLATION & COMMON LAW

Please note: this paragraph goes with other chapter so there will be repetition

(Justice, fairness and individual rights = common law rules / presumptions)

- 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 Constitution is the highest law in the land, & any law (including common-law) inconsistent with the Constitution is invalid (s 2), and its section 39(2) the courts must promote the spirit, purport and objects of the Bill of Rights when they develop the 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.

Presumption: Legislature does not intend to alter the common law more than necessary however express legislation overrides the common law, whereas the constitution overrides both legislation and common law.

- However, since 1994, both legislation & the common-law are trumped by the supreme Constitution.

⇒ EFFECT OF THE CONSTITUTION AND THE PRESUMPTIONS

The Constitution is the highest law of the land, and trumps both common law and legislation.

- Express legislative provisions will in turn override the common law.
- However, just to make things really interesting, certain common-law rules (such as presumptions) are used to interpret legislation.
- The courts and other interpreters may still rely on these common-law maxims and presumptions insofar as they are not in conflict with the values of the Constitution. In the past, the common-law presumptions of interpretation should have played a more important role during the interpretation process.
- The principles of justice, fairness and individual rights were always part of our law.
- Unfortunately those values were rebutted, ousted, debased and ignored during the era of parliamentary sovereignty.
- The role and character of the presumptions of statutory interpretation have been fundamentally changed by the new Constitution.
- If one compares these presumptions to the fundamental rights in the Bill of Rights, it appears that many of the values underpinning the presumptions of interpretation are now to a large extent reflected in the Bill of Rights.

- These fundamental rights can no longer be overturned by the legislature at will, or ignored by the courts.
- Although these presumptions have not been "abrogated" by the Constitution most of the underlying principles of the rebuttable common-law presumptions are reflected in the entrenched fundamental rights in the Constitution.
- Because the fundamental rights are entrenched in the Constitution, it must be accepted that some of the presumptions will be applied less and less in future, possibly even disappearing as a result of disuse.
- Some of the more important presumptions are discussed later in these lectures.

Understand the following in conjunction with the above discussion

⇒ THE SUPREME CONSTITUTION

- Traditionally interpretation of statutes in South Africa was saddled with unnecessary baggage:
- a confusing system of primary rules, so-called 'maxims', tentative principles; golden rules, overriding principles, secondary rules, canons of Roman-Dutch law influenced by **English law** tertiary rules, misconceptions about the structure and meaning of language, exceptions to the rule, as well as differences of opinion about how and when the so-called 'intention of the legislature' should be ascertained.
- With the introduction of the Interim Constitution (1993) and the Final Constitution (1996), interpretation of statutes was fundamentally changed.
- The principle of parliamentary sovereignty was replaced by constitutional supremacy and the purpose and spirit of human rights now must be taken into account when interpreting statutes.
- The rules of statutory interpretation now include an analysis of values and human rights

Interpretation of statutes has been heavily influenced by the following constitutional provisions:

- **Sec 1** - democratic, fair values which reflect human dignity, non-racialism and non- sexism;
- **Sec 2** - the Constitution is supreme:
- **Sec 8** - the Constitution applies to all laws, binds the legislature the executive, the judiciary, and applies to both natural and juristic persons;
- **Sec 39** - the interpretation of the Constitution must be in line with the values of a democratic society based on human dignity, equality and freedom.

In 1992 **Devenish** made the following prophetic statement:

A new post-apartheid constitution for South Africa should contain a provision authorising a teleological method or theory of interpretation.

If such a teleological (value-laden) method of interpretation had been prescribed, it would have ensured that in future the interpretation of statutes and constitutional interpretation would be based on similar methods and theories.

Note: Traditionally the South African rules of statutory interpretation were based on the sovereignty of parliament, while a fundamental rights dispensation is based on a supreme constitution and fundamental values.

⇒ THE EFFECT OF THE CONSTITUTION

All types of legislation must now be tested against the Constitution.

- However, in terms of item 2 of Schedule 6 of the Constitution of 1996, all law that was in force when the Constitution of 1996 took effect, continues in force, subject to any amendment or repeal, and consistency with the new Constitution.
- Old order legislation (i.e. legislation which was in force before the commencement of the 1993 Constitution) that continues in force, does not have a wider application that it had before, and continues to be administered by the authorities that administered it when the Constitution took effect (unless the Constitution stipulates otherwise).
- New Acts of parliament have to be read together with other existing original legislation, as well as a vast amount of subordinate legislation (e.g. provincial regulations and local government by-laws) to keep 'the system' going.
- Existing legislation cannot simply disappear.
- Legislation has to be repealed by a competent authority, and officials and administrative bodies derive their powers and authority from existing enabling legislation.

⇒ IS THE DISTINCTION BETWEEN ORIGINAL & SUBORDINATE LEGISLATION STILL IMPORTANT?

In the past Parliament was sovereign and the courts could not test the substantive contents of parliamentary legislation.

→ Only delegated (subordinate) legislation could be reviewed by the courts.

With the commencement of a justiciable, supreme constitution, the distinction between original and subordinate legislation is not as watertight as it used to be:

- In a sense all legislation is subordinate, because everything is subject to the supreme Constitution. The courts may test all legislation against the Bill of Rights in the Constitution.
- In terms of s40 of the Constitution, government in South Africa comprises national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.
- This principle of co-operative government now means that the traditional hierarchy of original and subordinate lawmakers has fallen away.
- All municipal councils are elected bodies and representative of all the people within the municipal boundaries.

6. THE PLAIN LANGUAGE MOVEMENT

(READ)

STUDY UNIT 3

COMMENCEMENT OF LEGISLATION

[ADD STUDY GUIDE]

Before the process of interpretation and application of legislation can start the interpreter has to determine whether the legislation is actually in force.

1. ADOPTION AND PROMULGATION OF LEGISLATION

Passing (adoption) & promulgation of legislation = 2 distinct processes

Adoption: refers to the different stages, readings and processes through which the particular legislation has to pass before it is accepted and issued by the relevant legislative body.

- (The procedures to be followed in adopting Acts of parliament and provincial Acts are found in Chapters 4 and 6 of the Constitution.)
- When parliament has passed (adopted) a Bill, the Act then has to be signed by the President.
 - In the case of a Bill passed by a provincial legislature, the premier of that province has to sign the Act.
 - Once signed, such an Act (parliamentary or provincial) becomes law. However, although such an Act is now legally enacted legislation it is not yet in operation.

For legislation to become operational, it needs to be promulgated. → promulgation follows adoption

Promulgation refers to the process by which legislation commences and takes effect, thus it's a necessary step in putting the legislation into operation.

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

2. REQUIREMENT OF PUBLICATION

General rule: legislation comes into operation upon publication in the *Gazette*.

Other instances: legislation may expressly indicate that it'll commence at a later unspecified date

In terms of s 81 & 123 of the Constitution, Acts of parliament & provincial Acts take effect when published, or on a date determined in terms of those Acts.

- Acts of parliament & provincial Acts must be published in the Government Gazette or the Provincial Gazette of the relevant province (ss 2 and 13 of the Interpretation Act).
- Ito s 162 of the Constitution municipal by-laws may be enforced after they have been published in the Gazette of the relevant province.

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, irrespective of whether it has come to the knowledge of everybody in the remote areas.

- This has been criticised & **Steyn** suggest a period of days (eg. 8) between **de facto** (actual) publication and **de iure** (legal) promulgation of legislation is required.

Why is accessibility of the law such an issue?

→ 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.

If for some reason beyond its control, the Government Printer is unable to print the *Gazette*, the President, ito section 16A of the Interpretation Act, may by proclamation prescribe alternative procedures for promulgation of legislation.

3. COMMENCEMENT OF LEGISLATION

NB: study 3.1 & 3.2 carefully

Legislation may come into operation at 1 of 3 times:

- i. upon publication in the *Gazette*
- ii. on a date specified in the statute itself, or
- iii. on an unspecified date to be proclaimed.

Ito of section 13(1) & (2) of the Interpretation Act:

- s 13(1) deals with the 1st 2 options
- s13(2) in relation to the requirement that legislation commences on the date of publication, states that that day shall commence immediately on the expiration of the previous day.

⇒ **Commencement:**

Section 13 of the Interpretation Act – Commencement of laws.

- (1) The expression 'commencement' when used in any law and with reference thereto, means the day which that law comes or came into operation, and that day shall, subject to the provisions of sub-section (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 law.
- (2) Where any law, or any order / warrant / scheme / letters patent / rules / regulations or by-laws made / grant or issued under the authority of a law, is expressed to come into operation on a particular day, it shall be construed as coming into operation immediately on the expiration of the previous day.
- (3) If any Act provides that that Act shall come into operation on a date fixed by the President or the Premier of a province by proclamation in the *Gazette*, it shall be deemed that different dates may be so fixed in respect of different provisions of that Act.

“Law” in section 13”

- must be read with s 2.
- 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*.

Ito section 17

When the President / a minister / a premier / a member of the executive committee of a province has the power to issue delegated legislation → a list of proclamations and notices under which delegated legislation was published must be tabled in parliament

- Certain new legislation also requires regulations made to the particular Act to be furnished to parliament before publication.

→ IE: the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000).

⇒ **Legislation will commence as follows:**

3.1 Commencement on date of publication

Section 13(1)

Unless the particular legislation itself provides another date, it commences on the date of publication in the *Gazette*

→ (which ito s 2 of the Interpretation Act, includes both the *Government Gazette* and the official *Gazette* of a province.

Section 13(2)

'Day' begins immediately at the end of the previous day, being at 00:00.

→ This effectively means retrospective commencement, because by the time the Gazette is published, the legislation would have been in force for a few hours.

3.2 Commencement on a date specified in the legislation

If legislation does not prescribe a date of commencement → it automatically commence when its published.

→ However, ito s13(1) the legislation as published may prescribe another fixed date for its commencement, which may be total or partial. ie the whole Act / specific sections only.

3.3 Commencement on an unspecified date still to be proclaimed

When publish, legislation may indicate that it will commence at a later unspecified date to be proclaimed.

→ There could also be a combination of commencement of individual provisions at a date still to be proclaimed.

→ IE: the PEPUD¹ Act provides that it'll commence on 16 June 2003, unless otherwise indicated.

Thus: interpreter must be very careful as to whether a particular provision is in force.

¹ Promotion of Equality and Prevention of Unfair Discrimination Act

4. THE PRESUMPTION THAT LEGISLATION ONLY APPLIES TO THE FUTURE

Common law presumptions continue to apply provided they are consistent with the Constitution. The values underlying the presumption that legislation deals only with future matter have found their way into the BoR.

Section 35(3)(n) proves that: "Every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted."

However, legislation may expressly state that it applies retrospectively, provided that the retrospective application is constitutionally justified.

4.1 General

Unless the contrary appears either expressly or by necessary implication, it is presumed the legislature intends to regulate future matters only.²

→ According to case law, this rule is based on the prevention of unfair results.

In *Curtis v Johannesburg Municipality* the court declared that legislation presumably applies to the future so that vested rights are not taken away.

It can therefore be presumed that the legislation applies only to cases / transactions occurring after the coming into operation of the Act in question.³

→ Unless a retrospective intention is clear, it is presumed that legislation applies to the future & not the past.⁴

4.2 Express retrospective application

An enactment may provide expressly that it has retrospective force.

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

- S 35(3)(1): A new offence may not be created retrospectively.
- S 35(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.

→ this means that offences cannot be created, and punishment may not be increased retrospectively.

These 'parts' of the presumption, which prohibit retrospective offences & increased punishment, are now entrenched as fundamental rights in the Constitution → In all other respects the presumption will apply as in the past.

² Transnet Ltd v Ngcezula

³ Principle Immigration Officer v Purshotam

⁴ Katzenellenbogen Ltd v Mullin

Although the legislature may expressly enact retrospective legislation (other than penal provisions), the courts will have to 'test' such against the Bill of Rights to ensure that the effects of the retrospective application don't violate one of the other fundamental rights.

4.3 Retrospectivity by necessary implication

The presumption could also be rebutted if it appears from the enactment that the legislature intended the legislation to be retrospective by necessary implication.

→ Such a necessary implication could be inferred if the legislation would result in absurd or unfair results should it not be retrospective.⁵

- In ***Brown v Cape Divisional Council*** it was found that because of their original legislative powers, provincial councils could also enact retrospective ordinances.
- In ***Bell v Voorsitter van die Rasklassifikasieraad*** the court took the common law view that, unless the contrary appears, an Act expressly retroactive in nature will not affect transactions or actions already brought to a close during a repealed Act's existence.

→ (section 12(2) of the IA regulates those cases where commencement into a particular Act, but not completed before its repeal – see chapter 4)

- 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 by the retrospective operation of the legislation; or
 - the purpose of legislation is to grant a benefit or to effect even-handedness in the operation of the law.

Note: any decision that legislation is retrospective by necessary implication is also subject to constitutional scrutiny.

(1) If the enactment deals with procedure

General rule: the Presumption will not apply if the retrospective legislation deals with procedure.

→ New rules of procedure apply to future cases, the facts of which may date from the past.

- The new Act is retrospective only in that the new procedural rules apply even in the case of claims or disputes which arose before the new rules came into effect;
- Unless expressly provided for rules of procedures will not necessarily be retrospective.

Generally, rules of procedure do not infringe upon vested rights, but at times the distinction between mere procedural rules and substantive rights is a fine one, the courts will apply retrospective application of rules of procedure by necessary implication with caution.

⁵ Lek v Estate Agents Board

In ***Euromarine International of Mauren v The Ship Berg*** it was held that a provision in the relevant Act not only created a new remedy, but also imposed a new obligation on persons who had no previous legal obligations.

→ This is an example where substantive (and not merely procedural) rights are involved, and retrospective operation is therefore excluded.

In ***Minister of Public Works v Haffejee*** the court cautioned that when a provision introduces new rules of procedure, it does not necessarily mean that the provision is retroactive.

It must first be determined whether existing rights and obligations are affected by it, and whether those rights and obligations are enforceable by means of the new procedures.

Example:

In ***Grand Wholesalers v Ladysmith Metal Industry*** the retrospective operation of an enactment was at issue. The appellant was the defendant in an action instituted in the magistrate's court by the respondent. The claim amounted to R4 666.29. The amendment to the Magistrate's Court Act, which increased the monetary jurisdiction of the magistrate's court to R5000, had only come into effect after the pleadings had been closed. The appellant (the defendant in the court *a quo*) raised the defence that the magistrate's court did not have jurisdiction, since the claim exceeded the monetary jurisdiction of the court. The magistrate found that he did have jurisdiction: since the amendment was only procedural, it did have retrospective force. However, it was held on appeal that the amendment was not retrospective, since it was not merely procedural. The amendment came into operation after the pleadings had been closed and costs had been incurred. It would be inconceivable that the legislature could have intended to deprive a defendant of a valid defence, incurring costs in that regard, without stating expressly that the amendment had retrospective force. It was held that the magistrate's court did not have jurisdiction in the matter and the appeal was allowed.

(2) If retrospectivity favours the individual

If the retroactive operation of legislation will benefit the individual, the presumption also does not apply.

The reason for the presumption against retrospectivity = to avoid unfair results.

- 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.
- This rule is fully in line with section 35(3)(n) of the Constitution, to which a person is entitled to the benefit of the least severe of 2 prescribed punishments if the prescribed punishment for the offence had been changed between the time that the offence was committed and the time of sentencing.

Example - the new, more lenient sentence was imposed:

In ***R v Sillas*** the amending Act reduced the existing penalty after the accused had committed the crime, but before sentence was passed.

The court found that the presumption against retrospectivity had in this instance been rebutted by 'other considerations'. → The amendment was applied retrospectively and the new, more lenient penalty imposed.

One of the 'other considerations' might well have been the presumption that the legislature intends to burden its subjects as little as possible.

On the other hand, if an amendment Act places the individual in a worse position than before, the presumption will apply.

(3) If retrospectivity does not benefit the individual:

In the past, if the amendment places the person in a worse position than before, the retrospective 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.

- IE: In *R v Mazibuko* the court found that if the penalty provided for in an Act is increased by an amending Act, the presumption against retrospectivity applies.

Conclusion:

The presumption does therefore not apply if the retrospective legislation deals with procedure where no rights are affected, or if the retrospective application will benefit the individual.

Under the supreme Constitution & the BoR, its not even necessary to apply the presumption against retrospectivity to avoid increased punishment.

→ Section 35(3)(n) of the constitution provides that an accused person has the right to the benefit of the least severe of the prescribed punishment s, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

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[NOTES]

STUDY UNIT 4

DEMISE & AMENDMENT OF LEGISLATION

1. **GENERAL**

The legal position is that all legislation remains in force until either of 2 things happen:

- (1) the legislation is amended / repealed by the legislature, or
- (2) the legislation is amended / declared unconstitutional by the CC.

Common-law rules can become abrogated by disuse, but legislation cannot simply disappear

→ it must be repealed by a competent body.

- Before 1994 parliament was sovereign, and the 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.

It is also important to understand that the Constitution is not self-executing.

- Although section 2 of the Constitution expressly states that legislation which is in conflict with the Constitution is invalid, this merely means that legislation is potentially unconstitutional.
- Legislation that is inconsistent with the Constitution will not automatically be unconstitutional and invalid.
- To remove potentially unconstitutional legislation, a competent body must either amend or repeal it, or a competent court must declare it unconstitutional.

2. **AMENDMENT (changes) TO LEGISLATION**

2.1 **Amendment of legislation (By a competent legislature)**

Legislation may be amended / changed by any competent legislature by means of another Act

IE → parliament may amend an Act of parliament

→ a provincial legislature may amend provincial ordinances & Acts, etc.

The legislature can adopt a:

- Specific amendment act / legislation
- when reforming a whole area & many Acts or specific legislation
- General Laws Amendment Act

→ If a number of Acts are amended at the same time

2.2 **Modificative interpretation (By the courts)**

(study with ch8)

Sometimes under certain circumstances courts may change legislation / its meaning.

→ This is contrary to the principle of separation of powers however courts have a limited law making role to adjust the legislation to be applicable in practical situations

Courts may sometimes modify the meaning of legislation.

- 1) Sometimes, the words used in the legislation **lead to absurd results**, or results which do not serve the purpose of the legislation (or, as was said in the old days, could not have been intended by the legislature). In such cases, the courts have changed or adapted the initial meaning of the legislation in order to avoid these absurd or dysfunctional results. This is a completely legitimate and necessary exercise of judicial power.
- 2) The Constitutional Court may also modify legislation. The **Constitutional Court can declare whole pieces of legislation, or a whole Act, unconstitutional** - However; 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 two strategies for changing smaller parts of the legislation. These strategies are called "severance" and "reading in".

Remedies the court can adopt:

(1) Reading down, reading in & severance during constitutional review

The courts try to modify legislation to keep it alive and constitutional to avoid leaving a vacuum by simply invalidating it.

⇒ **Reading down**

Is a restricted constitutional interpretation that will be preferred instead of declaring the statute invalid.

- This remedy stems from the principle that:
 - The courts should try to keep legislation constitutional and in line with common law presumption that the legislation is not futile or meaning less.
- 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
 - IE: "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.

⇒ **Reading in**

This is a more drastic remedy used by the courts to change legislation in order to keep it constitutional

- In exceptional circumstances 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.
- The legislative function is entrusted to bodies and persons authorised to enact legislation.

In ***National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*** the CC laid down a number of principles to be considered and followed before "reading in" or severance is applied:

Principles to be followed before Reading In

1. Results of severance or reading in must be consistent with the constitution & its values
2. Result must have only minimal interference with existing legislation
3. The courts must be precise in defining scope of modification to the meaning of legislation in order to make it compliant
4. The courts must endeavour to remain within legislative scheme (aim purpose) as much as the constitution allows
5. Reading in remedy should not be employed where the result would impose unattainable/unsupportable budgetary burden.

Note: Its NB to study the principles laid down in the case & the way applied to the facts.

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 SA 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:

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. → The problem was what to do next.

The Constitutional Court laid down the principles summarised by Botha in paragraph 4.2.2(i) and continued as follows: (see above)

- *"The striking down of s 25(5) will have the unfortunate result of depriving spouses, as presently defined, from the benefits conferred by the section: it will indeed be 'equality with a vengeance' and create 'equal graveyards'*
- *The benefits conferred on spouses express a clear policy of the government to protect and enhance the family life of spouses.*
- *All these considerations indicate that, if reasonably possible, a striking down order should not be the remedy resorted to [] Against the background of what has been said above*
- *I am satisfied that the constitutional defect in s 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.*

- *Permanent in this context means an established intention of the parties to cohabit with one another permanently. []*
- *No case has been made out for the suspension of an order giving effect to such reading in Permanent same sex life partners are entitled to an effective remedy for the breach of their rights to equality and dignity.*
- *In the circumstances of this case an effective remedy is one that takes effect immediately."*

⇒ **Severance**

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

(2) **Modification of the legislative meaning during interpretation**

Courts may under exceptional circumstances modify the initial meaning of the legislative text to ensure that it reflects the purpose and objectives of the legislation. → *(Explained in chapter 8)*

3. INVALIDATION OF LEGISLATION (BY A COURT)

3.1 Unconstitutional provisions

⇒ **How the CC can declare a part / whole piece of legislation invalid:**

In terms of s 172 of the Constitution the following courts may declare legislation unconstitutional:

- the High Court / Supreme Court of Appeal / Constitutional Court

→ Such a declaration may:

- have immediate effect, or
- be suspended to give the relevant legislature the opportunity to correct the defect.

- If an Act of parliament or a provincial Act is declared unconstitutional by the High Court or Supreme Court of Appeal, the declaration of unconstitutionality must be confirmed by the Constitutional Court.
- Local government & delegated legislation may be declared unconstitutional by HC & SCA and need not be confirmed by the CC.

If an enabling Act is declared unconstitutional, the delegated legislation issued in terms thereof will cease to exist unless a court orders otherwise.⁶

3.2 Invalid delegated legislation

Delegated / subordinate legislation (such as regulation) may be invalidated by a court if it does not comply with administrative law requirement

→ IE: vagueness, ultra vires

This was the only possible legislative review before 1994.

⁶ Moseneke V Master of High Court 2001 BCLR 103 (CC)

4. **REPEAL AND SUBSTITUTION**

Note: what's the effect when legislation is not simply repealed as a whole but only in part / supplemented by newer legislation dealing with the same issue?

→ This position is regulated by s 11 of the Interpretation Act, 1957.

NB: study wording of section 11 & difficulties which arise when only certain parts of legislation is repealed & the cases.

Section 11 of the Interpretation Act deals with repeal & substitution of legislation.

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.

Example: S v Koopsman

- The accused was found guilty in the magistrate's court of a contravention of the Road Traffic Act & sentenced to a fine & an endorsement of his driver's license.
- On review, the question was raised whether the endorsement was valid as the Road Traffic Ordinance had been repealed by the RTA.
- The provision in the Act providing for the suspension, endorsement or rescission of driver license had not yet come into operation.
- The court held that in section 11 of the Interpretation Act, the provision in the particular ordinance providing for such an endorsement was still in operation.
- The endorsement of the license by the magistrate's court was confirmed.
- The court also applied the presumption against futile / nugatory results.

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.

→ These provisions were, in effect, twice adopted as legislation, and the repeal of the earlier legislation does not operate to repeal the incorporated provisions.

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.

→ Although the repealed provisions cannot be applied anymore, they may be used as part of the context of the remaining legislation.

In summary then:

- If some provisions of repealed Act are incorporated in new Act it is assumed they are in effect adopted twice and therefore continue in force.
- The remaining (unrepealed) provisions of an Act that has been partially repealed remain in force and are interpreted in context including repealed provisions.

5. EFFECT & REPEAL

Section 12 of the Interpretation Act deals with the effect of repeal of legislation:

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.

Note: what is the effect on existing rights & proceedings if a piece of legislation is repealed? This position is regulated by the Interpretation Act.

NB: study wording of section 12 in detail & the *Nourse* case.

⇒ All the subsections of section 12 rests on the same principle:

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 & 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)

5.1 Section 12(1)

If provision X is repealed & re-enacted as Y, all references to X shall be construed as references to Y.

5.2 Section 12(2)

This is a typical transitional provision. All transactions, actions, processes, prosecutions etc which were instituted but not completed must be finalized as if the legislation has not been repealed.

- All pending cases when the 1996 constitution took effect ought to be finalized in terms of the repealed interim constitution unless the interests of justice require otherwise. (Item 17 schedule 6 of constitution)
- If enacting Act is repealed, all delegated legislation in terms of repealed Act will cease unless the new Act expressly provides otherwise.

(1) Section 12(2)(a)

- This provision means that if an Act which declared a particular action illegal is repealed, the repeal does not have retroactive effect, declaring legal that which was illegal before the repeal.
- It also means that a repealed Act does not regain the force of law if the repealing Act should itself be repealed.
- If the repealed Act has amended another Act, the amendment doesn't lap with the repeal.

(2) Section 12(2)(b)

Actions executed legally & properly in accordance with legislation before that legislation is repealed, remain valid & in force after the repeal.

→ this ss does not result in the continued existence of proclamations, regulations, by-laws or administrative directives made under the repealed legislation.

→ These lapse when the legislation from which they derive their validity is repealed.

(3) Section 12(2)(c)

This provision deals with rights derived from legislation only & not those stemming from common-law. The right / privilege in question must've been acquired / accrued to the repealed legislation before the repeal.

(4) **Section 12(2)(d)**

In *R v Smith*, the accused was convicted of a contravention of the regulation made under the 1960 state of emergency, although these regulations were repealed before the trial took place.

(5) **Section 12(2)(e)**

In *S v Erasmus* it was held that an enquiry under an Act, into this section, must continue, even if the particular Act is repealed before the enquiry can be completed.

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

The presumption means:

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.

- A new piece of legislation that sets out to repeal / change the existing common law, or sets out to repeal / change the existing legislation regulating a particular topic, must do so in clear terms.
- Where this is not done, & doubts arise whether the new legislation has in fact repealed the existing law / merely supplemented it, the working presumption is that the new legislation has not changed the existing law more than is absolutely necessary (unless the contrary appears from the circumstances).

6.1 Common law

This presumption reflects an inherent respect for our common law heritage.

→ ***Johannesburg Municipality v Cohen's Trustees & S v Ebrahim*** reaffirms the stature of the common law within the legal system.

In ***Seluka v Suskin & Salkow*** the court pointed out that although it is presumed that legislation does not alter the common law, this presumption is rebutted if the legislation in question clearly provides that the common-law (on a particular point) is being altered.

If the legislature expressly alters the common-law, the presumption doesn't arise & the changes must be implemented.⁷

- The 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.⁸
- 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.

⁷ *Gordon v Standard Merchant Bank.*

⁸ *Seluka v Suskin and Salkow & Gordon v Standard Merchant Bank.*

6.2 Legislation

With regard to legislation, the presumption means that in interpreting a subsequent (following) Act it is assumed that the legislature did not intend to repeal or modify the earlier Act.

- Any repeal or amendment must be affected expressly or by necessary implication.
- An attempt should be made to read the earlier and subsequent legislation together and to reconcile them.⁹

If such reconciliation is impossible, it has to be presumed by necessary implication that the later of the two provisions prevail, resulting in the amendment or repeal of the earlier one.

- Obviously this rule only applies if the objects of the two conflicting provisions are essentially the same → The legislative repeal by implication will be accepted by the court only if the subsequent legislation manifestly contradicts the earlier legislation.¹⁰

The presumption has another aspect: ito the rule *generalia specialibus non derogant* it's presumed that a provision in a subsequent general Act does not repeal an earlier specific provision.

An interesting example of the repeal of an earlier Act by necessary implication concerned the Ingwavuma KZ land issue:

<u>Government of the Republic of South Africa v Government of KwaZulu</u>
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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 → whether the State President should have consulted the KwaZulu government or not.

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.

- The 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.

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⁹ *Shozi v Minister van Justice, KwaZulu*

¹⁰ *Minister of Police v Haunawa*

STUDY UNIT 5

HOW LEGISLATION IS INTERPRETED

1. INTRODUCTION

A basic understanding of the theoretical background of statutory interpretation is essential for a perspective on and understanding the subject.

One of the reasons for the dismal state authority of statutory interpretation in SA is the lack of a sound theoretical basis for the discipline, resulting in a hotchpotch of conflicting rules & principles.

2. THEORIES OF INTERPRETATION

The two main approaches to statutory interpretation are the literal (text-based) approach and the purposive (text-in-context) approach.

2.1 The orthodox text-based (literal) approach

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

- **Firstly** → the primary rule of interpretation:
 - if the meaning of the words is clear, it should be put into effect, &, indeed, equated with the legislature's intention.¹¹
- **Secondly** → the 'golden rule' of interpretation:
 - if the so-called 'plain meaning' of the words is ambiguous, vague / 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.¹²
 - Then the court will turn to the so-called **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*).
- **Thirdly** → should these 'secondary aids' to interpretation prove insufficient to ascertain the intention, then the courts will have recourse to the so-called 'tertiary aids' to construction,
 - IE: the common law presumptions

The literal approach was popular in legal systems influenced by English law.

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

1. Misconceptions about the doctrines of **the separation of powers** (the *trias politica* doctrine) and **sovereignty of parliament** resulted in acceptance of the idea that the court's function should be limited to the interpretation and application of the will of the legislature (as sole enactor of legislation), as recorded in the text of the particular legislation. In other words, the will of the legislature is to be found only in the words of the legislation.
2. **The doctrine of legal positivism** influenced the **literal approach** in England. The positivist idea is based on the validity of the decree (command): that, which is decreed by the state, is

¹¹ Principal Immigration Officer v Hawabu 1936 AD 26

¹² *Venter v R* 1907 TS 910 914).

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 (the intention of the legislature), not as it ought to be. A strict distinction is made between law and morality, because value judgements by the courts would lead to the justiciability of policy issues

3. 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.
4. English legislation was drafted to be as precise and as detailed as possible, for the sake of legal certainty and to cover any number of possible future cases. The well-known maxim that the legislature has prescribed everything it wishes to prescribe is derived from this approach. The text of the provision always takes precedence in the process of interpretation.

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 of statutory interpretation.

→ this 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.

- the RD approach was replaced by the literal approach of English law.
- Traditionally, the RD rules of statutory interpretation are based on a functional / purpose-orientated approach, but after the British occupation of the Cape the English rules of interpretation started to play an ever-increasing role.

The essence of textual interpretation is based on the following principles:

- (1) If the **meaning of the words is clear**, that **meaning is deemed** to be what the legislature **intended**. The intention of the legislature is derived from the plain meaning of the statute's words.
- (2) **The golden rule of textual interpretation** is that the court may deviate from the literal meaning of the statute only if the words are unclear, ambiguous or if a literal interpretation will lead to an absurdity.
- (3) The textual approach is derived from legal positivism. **Legal positivism argues that all law is derived from the state**. The command of the state (i.e. legislation) is the essence of the rules which make up the law.
- (4) **The textual approach leaves very little room for judicial lawmaking**. The courts are seen as mere mechanical interpreters of the law.
- (5) In the cases of *Union Government v Mack*, *Dadoo Ltd v Krugersdorp Municipal Council* & *Farrar's Estate v CIR*: it was held that **the intention of the legislature should be deduced from the particular words or phrases used in the text**; in other words; the 'plain meaning' of the text in an "intentional disguise. Only lip-service was paid to the principle of

legislative intent, because the courts automatically elevated the 'clear and unambiguous meaning of the words' to the status of the will and intention of the legislature. (**Note:** This means that intentionalism is not synonymous with the literal approach but may be used to support it).

- (6) According to the textual approach, the legislature has a specific intention and the ordinary, grammatical meaning of the text is decisive in determining it (*R v Kirk*) (words come before context.)
- (7) The plain meaning approach/the golden rule/predominance of the word approach was adopted into South African law by Lord De Villiers in *De Villiers v Cape Divisional Council* 1875 Buch 50.

→ in ***Engels v Allied Chemical Manufacturers (Pty) Ltd*** it was held that:

The rules of construction of Acts of Parliament ... clearly state that they must be construed according to the intention of the legislature expressed in the Acts themselves. One consequence of this rule is that a statute may not be extended to meet a case for which provision has clearly & undoubtedly not been made.

Criticism of the textual approach

(1) Presumptions and context is ignored:

The central role played by the common law presumptions during the interpretation process is reduced to a mere 'last resort', to be applied only if the text is ambiguous.

→ This leads to the absurd situation that the ignored context and presumptions suddenly regain importance and become 'necessary' as soon as the text seems ambiguous!

(2) The approach is too narrow:

The words are regarded as the primary index of the legislature's intention (legislative meaning).

→ This means that other internal and external aids to interpretation which are applied to establish contextual meaning is ignored.

→ The crucial role of the context of the legislative text is reduced to a mere inanity, only to be looked at if the text proves unclear.

→ Unless the textual meaning is ambiguous or unclear, the interpreter will not have recourse to the wide range of aids to interpretation at his disposal.

→ The data necessary to reach a just and meaningful conclusion are excluded from the process, increasing the risk of incorrect concretisation.

It should be borne in mind that the text serves only as the medium through which meaning is communicated.

(3) The literal approach is inherently subjective and depends on the interpreter's understanding of the words:

Since The court will deviate from the so-called 'plain meaning' of the text only if it is unclear or ambiguous, and the eventual application of the intra- and extra-textual aids to interpretation depends on how clear the text may seem to the particular interpreter.

→ As a result, the 'intention of the legislature' is ultimately dependent on the court's decision on the clarity of the particular legislative text!

(4) Very few legislative texts are so clear that only one interpretation is possible:

The view that a legislative text can be clear and unambiguous must be questioned. Few texts are so clear that only one interpretation is possible.

→ The mere fact that a discipline such as interpretation of statutes exists would by implication suggest that legislative texts are seldom clear and unambiguous.

(5) The textual approach leaves very little room for judicial law-making or for the exercise of a judicial discretion:

The judge is seen as a mechanical interpreter of the law. This view creates the impression that once the legislature has spoken the courts cease to have any lawmaking function.

→ According to the textualists the legislature has enacted everything it wanted to, and is aware of the existing law.

→ As a result of a slavish and rigid adherence to the doctrine of the separation of powers, the courts may only interpret the law, not make it.

→ The legislature creates the legislation, and the courts have no lawmaking capacity with regard to legislation.

→ Only in very exceptional cases may the courts deviate from 'the literal meaning' of the legislation to apply so-called 'modification of the text'.

→ Generally speaking, it is the function of the legislature to correct omissions and bad drafting in legislation.

→ The principle that nothing should be added to or subtracted from the text of legislation has a very inhibiting influence on the law-making discretion of the courts.

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.

The idea that a judge may not add to or subtract from the legislative text is based on an incorrect misinterpretation of two common law principles (which are constitutionally no longer relevant):

- In terms of the maxim *judicis est ius dicere sed non dare* it is the function of the court to interpret and not to make the law.

- According to ***Harris v Law Society of the Cape of Good Hope*** the court is bound by the clear letter of the law, and the *iudicis est rule* means that only the legislature may supplement or alter deficiencies in legislation.
 - This approach is derived mainly from a misunderstanding of the separation of powers doctrine.
 - As a result, this principle was, in the past, used in a number of cases to justify the literal approach to statutory interpretation.
 - The general context and the purpose of the legislation were neglected as a result
 - **(This rule no longer applies in SA due to s39 of the Constitution).**
- The well-known ***casus omissus rule*** (the courts may not supply an omission in a law, as this is the function of the legislature) is derived from the principle that the function of the courts is to interpret law and not to make it.
 - **(This rule is also redundant in the light of s39 of the Constitution).**

Unfortunately some of our courts still refer to the traditional approach.

Smallberger in ***Public Carriers Association v Toll Road Concessionaries*** states:

“It must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it”

2.2 The purposive (text-in-context) approach

Traditionally, the Roman-Dutch rules of statutory interpretation were based on a functional or purpose-oriented approach, but after the British occupation of the Cape, the English rules of interpretation started to play an ever-increasing role. One of the main reasons for this is that the majority of South African jurists were trained in England, with the result that English law influenced South African law for a number of decades.

The objective, purpose-orientated contextual approach provides a balance

A purpose oriented 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 search for the purpose of legislation requires a purposive approach which recognises the contextual framework of the legislation right from the outset.

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 & 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.

Objective intention

'Intention' must be determined objectively; the subjective related to 'Intention' of the legislature (the composite body) must be replaced by 'intention' (legislative purpose) in the objective sense

- i.e. the purpose or object of legislation (in other words, what did the legislature 'intend' to achieve with the legislation?).

The mischief rule

- The so-called mischief rule is the basis of contextual interpretation: The mischief rule stands 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.

The position in South Africa before 1994

Before the commencement of the 1993 Constitution, statutory interpretation in South Africa was in a gradual state of transition from the rigid literal approach towards a more flexible contextual approach.

(see in particular Jaga v Donges – Study Guide) [Note: Definite exam question!]

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 & purpose) into consideration with the legislative text in question.
 - The plain grammatical meaning of the legislation is the beginning of this process.
- Irrespective of how clear or unambiguous the grammatical meaning of the legislative text is, the relevant contextual factors must be taken into account.
- Unlike the textual-literalist approach, there is no primary, secondary or tertiary hierarchical order of importance of aids;
- In **S v Zuma**, the importance of words in constitutional interpretation was stressed;
- Sometimes this wider context may even be more important than the actual grammatical meaning of the legislative texts.
- 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.

This was one of the concrete efforts in SA case law to move beyond the plain grammatical meaning by using the wider context to ascertain the legislative purpose → After that, a few courts were more prepared to interp the text of the legislation in the light of the wider contextual framework.

During the 70's **Cowen** started to question the theoretical foundations of literalism & the 'intention of the legislature'. Unfortunately this process of change proved slow, with progress alternating in regression (failure).

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

- The decision in **Mjuqu v Johannesburg City Council** can almost be regarded as a model of the contextual approach, since **Jansen JA** utilises virtually the entire spectrum of available aids & surrounding circumstances to determine the purpose & scope of the legislation in question.
- In **University of Cape Town v Cape Bar Council** it was held that the court has to examine all the contextual factors in ascertaining the intention of the legislature, irrespective of whether / not the words of the legislation are clear & unambiguous.

Inherent law making discretion

The contextualists hold the view that the judiciary has inherent law-making discretion during statutory interpretation.

- This discretion is, however, limited (qualified) 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 law-making function of the judiciary is not an infringement of the legislature's legislative function, but merely a logical extension of the powers of the court during the interpretation & application of the relevant legislation in each practical instance.

- Consequently, the application & utilisation of the presumptions and the various aids to interpretation are very NB tools for the contextualists in the quest for the scope & purpose of legislation.

According to the text-in-context approach, the court may modify / adapt the initial meaning of the text to harmonise it with the purpose of the legislation.

→ The role of the courts is therefore far more flexible & is not limited to mere textual analysis & mechanical application of the legislation.

2.3 The influence of the supreme Constitution

(1) The supremacy clause – Sections 1 and 2

Although section 1(c) of the Constitution refers to the supremacy of the Constitution & the rule of law:

→ section 2 is the constitutional supremacy clause.

According to **Du Plessis**: section 1(c) merely anticipates the supremacy of the Constitution:

→ section 2 unambiguously confirms it.

Section 1 of the Constitution reads:

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.

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.

Section 2 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 fulfil 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.

If all these provisions are read together, one principle is indisputable: the Constitution is supreme, and everything and everybody are subject to it.

- This means that the Constitution cannot be interpreted in the light of the Interpretation Act, Roman Dutch common law / the traditional customary law.
- On the contrary! Everything and everybody, all law and conduct, all traditions and perceptions and procedures are influenced & qualified by the Constitution.
- In ***Holomisa v Argus Newspaper Ltd Cameron J*** summarised this principle very well:
→ The Constitution has changed the context' of all legal thought and decision-making in SA.
- The traditional SA approach to statutory interpretation was characterised by a strict devotion to the legislative text & sovereignty of Parliament.
- Now the supreme Constitution, underpinned by universally accepted values & norms, is the fundamental law of the land.
- It is the ultimate value-laden yardstick against which everything is viewed & reviewed.

Although section 2 is officially known as the supremacy clause, s1 is even more important (at least with regard to entrenchment).

- Section 7(4) of the Constitution provides that s1 (just as s74(1) itself) may only be amended if 75% of the members of the National Assembly & six of the nine provinces agree to the amendment.
- No other provisions in the Constitution are as strongly entrenched (protected)

(2) **The interpretation provisions – Sections 39 and 233**

Section 39(2) deals with the interpretation of statutes→ legislation other than the BoR:

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.

- The Constitution does not expressly prescribe a contextual and purposive approach to statutory interpretation.
- However, s 39(2) is a peremptory provision, which means that all courts, tribunals or forums must review the aim and purpose of legislation in the light of the Bill of Rights: plain meanings and so-called clear, unambiguous texts are no longer sufficient (**The textual approach is therefore redundant**) Even before a particular legislative text is read, s39(2) 'forces' the interpreter to have "one foot in the Bill of Rights" of the Constitution.
- This inevitably means that the interpreter is consulting extra-textual factors before the legislative text is even considered.
- Factors and circumstances outside the legislative text are immediately involved in the interpretation process.
- In short, interpretation of statutes starts with the Constitution, and not with the legislative text!

- In **Bato Star Fishing (Pty) Ltd**, Ngcobo J said:

“The starting point in interpreting any legislation is the Constitution. First, the interpretation that is placed upon a statute must where possible be one that would advance an identifiable value enshrined in the Bill of Rights. Second, the statute must be capable of such interpretation-... legislation must be interpreted purposively to promote the spirit, purport and objects of the Bill of Rights”

(See end of chapter)

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

- 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.

Section 39(2) cannot merely be windows-dressing / hollow rhetoric (expression):

In **Holomisa v Argus Newspapers Ltd** the court referred to section 35(3) of the interim Constitution (the former s39(2)) that 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”.

After section 39(2)→ the next step is to determine the **spirit of the Bill of Rights**. This brings the next set of factors outside the legislative text into play.

Section 39(1) reads as follows:

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

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

- The **first part** of the provision is also **peremptory**: when interpreting the Bill of Rights, a court, tribunal or forum **must make value judgements** (i.e. promote the values which underlie an open and democratic society based on human dignity, equality and freedom), **and must have regard to international law**.
- The international law referred to is international human rights in particular. This is a set of universal rules and norms dealing with the protection of fundamental human rights and consists of a number of international documents (**such as the Charter of the United**

Nations, the Universal Declaration of Human Rights, the European Convention for the protection of Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights, to name a few) and rules of customary international law.

- Furthermore, a court, tribunal or forum may also refer to foreign law when interpreting the Bill of Rights.
- In a sense, this is not a new principle, because the South African courts always in the past, where appropriate, refer to foreign law.
- The rules of foreign law applicable here are those legal principles (in particular case law) which do not conflict with the South African legal order (s35(1) of the 1993 Constitution referred to comparable foreign case law): In other words, those legal principles applied in a legal order also based on a supreme justiciable constitution.
- **Botha NJ (1994:249) points out that decisions of foreign courts dealing with bills of rights are in any event one of the sources of international human rights law.**
- Strictly speaking, the directory provision in s39(1) is superfluous, and one could argue that a court of law will have to consult comparable foreign case law when interpreting the Bill of Rights.

Section 39(3) provides as follows:

The Bill of Rights does not deny the existence of any other rights / freedoms that are recognised or conferred by common / customary law or legislation, to the extent that they are consistent with the Bill.

The principle that courts should as far as possible try to keep legislation constitutional (& valid) is a well-known principle of constitutional interpretation (in Germany: *Verfassungskonforme auslegung*).

→ This principle is similar to the common law presumption that the legislation does not contain futile or meaningless provisions.

Section 233 of the Constitution is another interpretation clause:

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.

Section 233 is peremptory as it states that a court must prefer a reasonable interpretation that's not in conflict with international law:

- Any interpretation of s233 is subject to s1 (the supremacy of the Constitution), s2 (the Constitution is the supreme law of the Republic and all inconsistent with it is invalid), s8(1) (the BoR applies to all law) & all reference to the SA democracy & democratic values.
- It is a confirmation of the principle that legislation must, as far as possible, be interpreted constitutionally. In ***Prinsloo v Van der Linde*** the CC pointed out (with ref to s35(2) of the interim Constitution, the so-called reading-down clause) that legislation must be 'kept alive' if more than 1 reasonable construction is possible.

- Section 233 is also qualified by the 2 preceding provisions dealing with international law in the Constitution (ss231 & 232): in these provisions the application of international law in SA is in any event subject to the Constitution.
- Lastly it may be argued that it strengthens section 39(2) of the Constitution: any reasonable construction which is consistent with international law (international human rights in particular), will promote the spirit, purport and objects of the BoR.

These sections 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.

(3) The values underlying the Constitution

(extremely NBNB)

The three core values:

- **Freedom**
- **Equality**
- **Human Dignity**

⇒ Value judgements and the Constitutional State

The preamble to the 1993 Constitution stated that the RSA is a constitutional state (*regstaat*), but the Constitution of 1996 does not expressly refer to a constitutional state.

- Nevertheless, there're a number of provisions in the Constitution implying a constitutional state:
 - The preamble refers to a society based on democratic values, social justice & fundamental human rights;
 - Section 1 states that SA is, inter alia, a democratic state founded on the supremacy of the Constitution and the rule of law;
 - Section 7 entrenches the Bill of Rights as the cornerstone of the democracy
- As the supreme law of the land, the Constitution not only deals with the institutional structures of government and formal checks on state power, but **is first and foremost a value-laden document**.
- It is underpinned by a number of express and implied values and norms.
- These fundamental principles are not only the ideals to which the South African society has committed itself, but they form the material (substantive) guidelines which must regulate all the activities of the state.
- **The spirit of the Bill of Rights (s39(2)) is a reflection of these fundamental principles.**
- Apart from the Constitution itself, these values are found in various sources:

→ the principles of international human rights law and foreign case law dealing with similar constitutions (s39(1)); the African concept of *ubuntu* and our common law heritage.

⇒ **The values which apply**

The preamble of the Constitution refers to a society based on democratic values, social justice and fundamental human rights.

What are these democratic values?

→ They are, amongst others:

- freedom, equality and human dignity (s7(1)),
- the achievement of equality,
- the advancement of human rights and freedoms, non-racialism and non-sexism.

- Ss 36(1) & 39(1) refer to an open and democratic society based on freedom, equality and human dignity.

→ It appears as if these are the three core values on which the Constitution rests: **freedom, equality and human dignity.**

- The spirit, purport and objects of the Bill of Rights must be promoted during the process of statutory interpretation.

→ In other words: **the courts are the guardians and enforcers of the values underlying the Constitution.**

- As a matter of fact, in the official oath of judicial officers (item 6(1) of Schedule 2 of the Constitution) the courts must uphold and protect the Constitution and the human rights in it.

→ This means that the courts will have to make certain value judgements during the interpretation and application of all legislation.

- **Since the values underlying the Constitution are not absolute, the interpretation of legislation is also an exercise in the balancing of conflicting values and rights.**

→ **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 spirit of the interim Constitution lives on in the 1996 one.

- Ito section 71 of the interim Constitution: the so-called 'final Constitution' had to comply with a number of CP's which were contained in sch 4 of the interim Constitution.
- In ***Ex parte Chairperson of the CA: In re Certification of the 1996 Constitution (1st)***: it was held that the CP's in the interim Constitution are 'broad constitutional strokes on the canvas of constitution making of the future'.
- Sch4 was repealed with the rest of the interim Constitution but the CP's live on in the 1996 Constitution.

- The preamble to the interim Constitution stated that the NT had to be adopted in accordance with a solemn pact embodying the CP's.

The textual approach which is a mechanical interpretation of the grammatical meaning of the words of a statute is therefore redundant and not in line with the constitution.

The contextual (purposive) approach of statutory interpretation is the better approach because it conforms to s39 of 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 *Geysler v Msunduzi Municipality* an orthodox approach was followed.

⇒ Summary of the modern approach to statutory interpretation

- During the interpretation process of all legislation the courts must promote the **spirit and purpose of the Bill of Rights (s39(2))**, but in order to do that, **s39(1) applies**.
- Not only are **external factors immediately involved** in the interpretation process, but these factors are **value laden** as well (e.g. the 'spirit' of the Bill of Rights and the Values which underlie an open and democratic society based on freedom, equality and human dignity').
- This is nothing other than **unqualified contextual and purposive interpretation**.

2.4 Practical inclusive methods of interpretation

Plessis & Corder suggest 5 five general methods of constitutional interpretation.

These traditional methods (techniques) are complementary and should be applied in conjunction with one another. In other words, they are in a continuous interaction:

(1) 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.

(2) 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. → This is also known as a holistic approach.

- 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 & political environments in which the legislation operates.

(3) 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 → in other words section 39(2)
- The fundamental values in the Constitution form the foundation of a normative (regulating), value-laden jurisprudence against which legislation and actions are evaluated.

(4) Historical interpretation

It refers to the use of the 'historical' context of the legislation

- The historical context includes factors such as the
 - circumstances which gave rise to the adoption of the Constitution (mischief rule),
 - preceding discussions and negotiations (the so-called *travaux préparatoires*), &
 - 'original intent' of the drafters / ratifiers of the constitutional text.
- Although an important aspect, this method cannot be decisive on its own.

(5) Comparative interpretation

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

IE: such as that prescribed by s 39(1) of the Constitution.

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**.

[CASE NOTES]

⇒ **The orthodox text based approach (textual) (intentionalist)**

Public Carriers Association v Toll Road Concessionaries

Botha refers to the case *Public Carriers Association v Toll Road Concessionaries Pty (Ltd)* 1990 (1) SA 925 (AD) as a recent example of the textual approach.

- It is indeed one of the last authoritative statements of the textual approach by the (then) Appellate Division before the introduction of the new constitutional order.
- However, what Botha does not mention is that the judgment also suggested that the purpose of the legislation could solve interpretation problems where the textual approach could not.

The Court thus recognised the value of the purposive or text-in-context approach, but restricted its application to cases where the textual approach failed.

Facts:

A portion of the N3 between Johannesburg & 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 & 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 (contextual) approach**

Jaga v Donges

- Two Indian men were convicted of illegally dealing in unwrought gold and sentenced as follows:
"Each Fined £50 or three months imprisonment with bard labour and a further three months suspended for three years on condition the accused are not convicted of a similar offence."
- Section 22 of Act 22 of 1913 read as follows:
"Any person who has been sentenced to imprisonment for any offence committed by the sale of unwrought precious metal and who is deemed by the Minister to be an undesirable inhabitant of the Union may be removed from the Union under a warrant".

- The Minister declared the two men undesirable inhabitants of the Union and warrants for their deportation to India were issued.
- The two men argued that the Minister had acted unlawfully as neither of them had been "sentenced to imprisonment" within the meaning of section 22.
- The case thus turned on the question whether the phrase "sentenced to imprisonment" included a suspended sentence of imprisonment.
- The two men argued that the ordinary meaning of imprisonment meant actual (as opposed to merely potential) imprisonment. "Sentenced to imprisonment" thus meant to be sentenced to be actually and physically held in prison, which they were not. The majority of the Court rejected this argument.
- Relying on a textual approach, the Court held that the words "sentenced to imprisonment" were not further qualified by the legislature and thus meant simply that the sentence imposed on the offender contained a period of imprisonment (suspended or not) as an element.
- The warrants were thus legally issued. In the minority judgment by Schreiner JA, to which Botha refers in the textbook, a different conclusion was reached.
- Schreiner JA expressed the contextual approach which it favoured in the following terms:
- "Certainly no less important than the oft-repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The First is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together".
- Schreiner JA adopted the last-mentioned version of the contextual approach (ie "one may from the beginning ..."). Schreiner JA insisted that very few words have a natural or ordinary meaning in the sense that their meaning is entirely independent of the context in which they are used. The question is thus what words mean, not only in the context in which they are used in the legislative text, but also in the context of the purpose of the legislation and the mischief that it was designed to remedy. The text and the context must be balanced, otherwise the context may receive such an exaggerated importance that the language used in the legislation becomes strained, or otherwise the text may receive such an exaggerated importance that verbalism and consequent failure to further the aims of the legislation might result.

- Scheiner JA held that even the textual approach should have led to a different approach from that adopted by the majority. The ordinary meaning of the expression "sentenced to imprisonment" is ambiguous since it could mean both "being physically removed to prison" or "being sentenced where the sentence includes a period of imprisonment even if that imprisonment is suspended and the sentenced offender is free to go home".
- Because of this ambiguity, the secondary rules must be applied. Since there were no secondary rules which could resolve the choice between the two meanings, the tertiary rules had to be applied. One common law presumption is that legislative provisions must be interpreted in favour of individual freedom.
- It must thus be presumed that the legislature intended the deportation of persons only where these persons were unconditionally sentenced to imprisonment.
- It is worthwhile to reflect on the implications of Schreiner's critique of the way in which the majority applied the textual approach. It ties in closely with some of the criticisms levelled against the textual approach discussed by Botha. Of particular importance is the fact that the majority failed to give the common-law presumption that encapsulates the value of freedom any normative role in its judgment.
- It simply resolved the case with an appeal to the clarity of the words used alone (Botha's first point of criticism). However, the words used were not so clear to the majority's own fellow judges (Botha's fourth and fifth points of criticism).
- But the real impact of Schreiner's judgment lies in his willingness to accept that the phrase "sentenced to imprisonment" had the clear and ordinary meaning which the majority claimed it had. Even so, he insisted, the broader context and purpose of the legislation overrode that clear meaning. The purpose of the provision was to create an objective test for the identification of undesirable persons which should be removed from society by deportation. However, the suspension of prison sentences has the opposite aim. It is a means of keeping an offender within society while aiding his or her rehabilitation. To include suspended sentences in the meaning of "sentenced to imprisonment" would therefore not serve the purpose of the legislative provision. It would also subject an unnecessarily large range of offenders to the very drastic measure of deportation. It would thus also fail to protect the value of individual freedom.

⇒ **The influence of the constitution**

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

Botha argues that the new approach to statutory interpretation has received its most authoritative statement in the case of *Bato Star Fishing Pty (Ltd) v Minister of Environmental Affairs and Tourism* 2004 (4) SA490 (CC).

→ The case concerned the allocation of quotas in the fishing industry.

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 SCA 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 CC claiming that the SCA 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 CC 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.

In his judgement, Ngcobo J expressed concern about the textual method of interpretation followed in the SCA.

- He agreed that the ordinary meaning of the phrase "have regard to" was "to take into account", but 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.
- Referring to the minority judgement in *Jaga v Donges* with approval, the Court made the following statement:

I accept that the ordinary meaning of the phrase "have regard to" has in the past been construed by our Courts to mean "bear hi mind" or "do not overlook". However, the meaning of that phrase must be determined by the context in which it occurs. In this case that context is the statutory commitment to redressing the imbalances of the past, and more importantly, the constitutional commitment to the achievement of equality. And this means that the phrase as it relates to section 2 must be construed purposively to "promote the spirit, purport and objects of the Bill of Rights".

The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2).

I am troubled therefore by an interpretative approach that pays too much attention to the ordinary language of the words "have regard to".

It is important that you carefully identify the various elements of the purposive or contextual interpretation which the Court adopted in this case.

- The first is the claim that section 39(2) of the Constitution requires that paragraph 2 of the Marine Living Resources Act, 1998, must be read purposively.
- This point is discussed in detail by Botha in paragraph 5.2.4 (ii) of the textbook.
- The second element is the claim that the purpose in question is the promotion of the spirit, purport and object of the Bill of Rights.
- This implies that all legislation should be approached as more detailed attempts to implement constitutional rights.
- However, the spirit of the Bill of Rights is contained in the foundational provisions of the Constitution.

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STUDY UNIT 6

BASIC PRINCIPLES

[Add study guide]

1. THE PURPOSE OF LEGISLATION

Study this paragraph 1.1 & 1.2 together & as part of debate between textualists & contextualists about the proper method of interpretation, ch 5

Following basic principles come into play in the initial phase:

- The supreme Constitution in general & the BoR in particular is the cornerstone of the legal order
- section 7(1) of the Constitution states that the BoR is the cornerstone of the SA democracy
- The most NB principle of interpretation is to determine & apply the purpose of legislation in the light of the BoR
- The interpreter studies the legislative text to determine the initial meaning of the text, while keeping the presumptions in mind & at the same time striving to strike a balance between the text & the context of the legislation

1.1 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').

Whether it's referred to as the purpose (or legislative scheme), the intention of the legislature or the objects of the legislation

→ it was pointed out in ***Matiso v Commanding Officer, Port Elizabeth Prison***:

'The interpretative notion of ascertaining 'the intention of the legislature; does not apply in a system of judicial review based on supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that both the purpose & method of statutory interpretation should be different from what is was before the commencement of the Constitution on 27 April 1994.'

The rule of ascertain the intention of the legislation does not apply in a state of constitutional supremacy: The Constitution is supreme & not the legislature. Text is not the end point.

→ thus the Constitution prescribes a "contextual approach"

Now the most important rule is to establish the purpose of legislation in the light of & assessed ito the Constitution.

→ Everything that has been said about the aim, purpose, scope & intention must now be assessed in the light of the supreme Constitution.

1.2 Why not the 'intention of the legislature'?

The traditional textual and intention of the legislature approach:

- The 'intention of the legislature' originated in the principle of sovereignty of parliament.
- Parliament was the supreme legislature in the Republic and as a result of its supremacy; legislation had to reflect its underlying legislative intention.

- **Steyn** was the leading proponent of the intention theory and his work *Die uitleg van wette* was for many years the only authoritative textbook on statutory interpretation in South Africa.
- **He defines statutory interpretation as the process in which the will or thoughts of the legislature are ascertained from the words used by the legislature to convey that will or thoughts.**

The intention of the legislature approach has been criticised as follows:

Intention denotes a subjective state of mind, an individual formation of will directed toward a specific result. Such a subjective state of mind is, however, inconceivable, when it comes to all the members of a legislative body:

- The legislature is composed of a large number of persons all of whom take part in the legislative process.
- Some of the members of this body usually oppose the legislation for various reasons, with the result that the legislation ultimately reflects the 'intention' of the majority of the legislature only.
- Some members will support legislation for the sake of party unity, though they may be personally opposed to a bill. (This would mean that the 'will' of the legislature is subject to what the individual members of the legislative body, under pressure from their party caucus, 'had to' intend!)
- Not all parliamentarians can be expected to understand complex and highly specialised technical legislation.
- The bill before parliament is not drafted by the parliamentarians themselves, but by draftsmen acting on the advice of bureaucrats from state departments.
- Some members of the legislative body may be absent when voting on a bill takes place.

To put it in another way – **Intention of the legislature:**

Refers to the fictional collective intent of the majority of the legislative body present at the time when the vote took place, expressing their will within the constraints of the voting guidelines laid down by the caucus (group) of the ruling party in the legislature, and voting for draft legislation (formulated by legal drafters on the advice of bureaucrats (administrators) from a government department) which has been approved earlier by the state law advisers!

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

→ **Cowen pointed out a number of significant distinctions with regard to the 'intention of the legislature'.**

- It is important to distinguish between the purpose or objectives of the legislation, and the reasons why the members of the legislative body voted for the measure.
- The aim or purpose of the legislation should be distinguished from the 'intention of the legislature' in the psychological sense.
 - The former is an aim that is either explicitly stated or can at least be determined logically.

- The latter is a matter of speculation.
- It must be clearly understood that the purpose of the legislation cannot be found by mere guesswork and made to suit a particular interpretation:
 - it should be possible to determine the purpose by objective means.

The modern approach:

- The 'intention of the legislature' is an ambiguous concept in South African law both in meaning and in application. It is used in a narrow sense (as a disguise for the 'plain meaning' approach), or in a broad sense (to imply a more contextual approach).

The classic example of the textual (orthodox) **intention of the legislature** is the dictum of Kotze J in *R v Kirk*:

"But we can only arrive at the intention of the legislature by construing the actual words used. We cannot import words into the section not to be found therein, so as to arrive at what we may think or assume is the intention of the Act. The Courts must interpret and give effect to what the legislature has actually said, and not to what it may have intended to have said. We cannot insert words not used by the legislature to meet what we may conceive was its real intention".

In other words: The 'intention of the legislature', when used in a narrow sense, is a disguise for the literal approach & as was held in **R v Kirk** 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 & 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 contextual approach is the better and the more modern approach which conforms to the Constitution.
 - Cowen emphasises that the interpretation must be reconcilable with the purpose of the legislation, even when the words of the particular measure may seem to have only one unambiguous meaning.
 - It must be emphasised that this principle is now qualified and extended by the supreme Constitution.

1.3 The meaning of the text

Botha identifies 4 rules / principles applicable to the 1st reading of the legislative text. Study each heading & subheading in simple terms.

(IE: every word must be given a meaning, words must be given their ordinary meaning, technical words must be given their technical meaning, etc)

- The literal approach no longer applies, although text is still read for its meaning.
- The legislation as a whole & its context plays an NB role in the interpretation process.
- Note that the purpose of the legislation will still qualify the meaning of the text.
- As such, it is the purpose of the legislation viewed against the fundamental rights in the Constitution which will qualify the meaning of the text.

Four rules:

(1) The initial meaning of the text

- The interpretation process begins with the reading of the legislation concerned.
- The ordinary meaning must be attached to the words¹³

Unfortunately, what was a normal principle of language was elevated to the 'literal rule', or primary rule of literal interpretation.

IE: → In ***Volschenk v Volschenk*** it was decided that the most important rule of interpretation was to give words their ordinary, literal meaning.

→ In ***Sigcau v Sigcau*** it was decided, further, that the term 'ordinary meaning' could be held to include the ordinary grammatical meaning.

→ In ***Association of Amusement & Novelty Machine Operators v Minister of Justice*** the court held that this means colloquial speech.

The principle that the ordinary meaning should be attached to the words of legislation is only the starting point of the interpretation process

→ means: interpreter should not attached a strained meaning to the text

→ the context of the legislation, including all factors inside & outside the text which could influence & qualify the initial meaning of the provision, must also be taken into account from the outset.

In the case of **technical legislation**,¹⁴ words that have the specific meaning in that field, which is different from the ordinary, colloquial meaning, **must retain** that specialised, **technical meaning**.

(2) Every word is important

The principle that a meaning must be assigned to every word derives from the rule that words are to be understood according to their ordinary meaning.

- Strictly speaking this is a principle which applies when any text is read.

¹³ Union Government v Mack

¹⁴ Legislation that applies to a specific trade / profession

- Legislation should be interpreted in such a way that no word or sentence is regarded as redundant or superfluous.

In **Keyter v Minister of Agriculture** it was pointed out that the court's function is to give effect to every word, unless it is absolutely essential to regard it as unwritten.

- In practice, however, a court will not easily decide that words contained in legislation are superfluous.¹⁵
- Sometimes, it is impossible to assign a meaning to every word in a statute, as tautological (unnecessarily repetitive) provisions are often added as a result of excessive caution (*ex abundante cautela*).
- Overlapping and repetition often occur, because the drafters of the legislation are overcautious in guarding against anything important being omitted.
- The resulting redundancy may be ignored in the interpretation of a clause.¹⁶

Steyn points out, that if superfluous words serve to define the meaning of other words more clearly, they are not redundant, and the provision should be read as a whole in order to obtain the full meaning.

However, in **Secretary for Inland Revenue v Somers Vine**, the court stated clearly that the principle that a meaning should be assigned to every word is not absolute.

- This is correct, because the purpose of the legislation should be the deciding factor in determining whether a word is superfluous or not.
- This principle is closely related to the presumption that legislation does not contain futile or nugatory provisions.

(3) **The continuing timeframe of legislation**

In the light of the principle that words should bear their ordinary meaning:

→ Question arises whether, in the case of old legislation, words should be interpreted to accord with their present-day meaning, or whether they should retain the meaning they had when the legislation was passed.

Cowen feels that the so-called 'rule' that words should retain their original meaning is unnecessary:

→ it indicates a tendency to glance over one's shoulder, based on an incorrect reconstruction of an historical legislature's thoughts, and negates the future-oriented frame of reference of legislation.

The courts, however, felt otherwise:

¹⁵ *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd.*

¹⁶ *R v Herman*

- In ***Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein*** the AppDiv decided that unless later legislation explicitly provides otherwise, words in legislation must be construed according to their meaning on the day on which the bill was passed.
- Following this judgment the court in ***Minister of Water Affairs & Forestry & others v Swissborough Diamond Mines*** held that the intention of the legislature must be determined in accordance with the meaning of the provision at the time when it was enacted.

It would seem as if the courts would be less rigid (strict) in the future.

→ 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 on a continuous basis rather than to interpret a provisions narrowly, forcing the legislature periodically to update the Act.¹⁷

All legislation, however, must be interpreted to promote the spirit and scope of the Bill of Rights but a supreme constitution is not a static document, nor are the values underpinning it.

- In ***Nyamakazi v President of Bophuthatswana***, Friedman J stated that a supreme constitution must be interpreted in the context and setting existing at the time when the case is heard, and not when the legislation was passed, otherwise the growth of society will not be taken into account.
- In ***Baloro v University of Bophuthatswana***, Friedman J once again explained this constitutional dynamic:

"This Constitution has a dynamic tension because its aims and purport are to metamorphose South African society in accordance with the aims and objects of the Constitution. In this regard, it cannot be viewed as an inert and stagnant document. It has its own inner dynamism, and the courts are charged with effecting and generating changes".

(4) **No addition or subtraction** (from the words used in legislation)

This is a basic principle that there may be no addition to / subtractions because, in the final analysis, the purpose of the legislation is the qualifier of the meaning of the text.

→ Unfortunately, the courts have elevated this principle to a so-called 'primary rule'.

- In ***Greenshields v Willenburg*** it was stated that a court should be careful not to extend the meaning of the legislation beyond that of the words used.
- The court should give effect to what the legislature has said, & not try to cover eventualities that the legislature, for whatever reason, has not covered.¹⁸
- **It's sufficient to know that the courts may not supply omissions in legislation at will.**
- If, however, the purpose of the legislation is clear, the court as the last link in the legislative process should¹⁹ ensure that the legislative process reaches a just and meaningful conclusion, by supplying an omission. (see chap 8)

¹⁷ *Golden China TV Game Centre v Nintendo Co Ltd*

¹⁸ *R v Kirk*

¹⁹ according to Labuschagne (1985:60)

1.4 Balance between the text and context

Study this para with chap 5. this is a continuing of the discussion of the contextual & textual approaches.

Note: it's not entirely correct to say that the courts before 1994 only subscribed to the literal approach. In *Jaga*, Schreiner emphasised the NB of the contextual framework during interpretation. This does not mean that the legislative text is no longer NB. The text has to be anchored to the context in question. The judgment of the CC in **S v Zuma** confirms that the text of the Constitution is of paramount NB, inspite of the fact that section 39(1) prescribes a purposive approach to constitutional interpretation. The same applies to statutory interpretation.

- As explained earlier, the courts had long held the view that if the text of the legislation was clear and unambiguous, effect should be given to it.
- The broader context of the legislation was taken into account only if the language of the legislation was ambiguous.
- In **Jaga v Donges**, Schreiner JA rejected this narrow view & stated that the interpreter could examine the broader context even when the text was quite clear.
- Legislation cannot be construed properly if text and context are separated.²⁰
- The meaning of the words of the text should be weighed up against the broader context of the legislation.
- From the outset the purpose of the legislation, the statute as a whole and the surrounding circumstances should all be taken into account, together with the words of the provision.
- **Stellenbosch Farmers' Wineries v Distillers Corporation (SA) Ltd** described this balancing process very well:

"the section of the act which requires interpretation must be read with regard on the 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 as well as the matter of the statute, its apparent scope and purpose, and, within limits, its background. In the ultimate result, the court strikes a proper balance between these various considerations and thereby ascertains the will of the legislature and states its legal effect with reference to the facts of the particular case which is before it".

- In **Diepsloot Residents' and Landowners' Association v Administrator, Transvaal**, the court recognised the importance of legislative context. It held that it's permissible to interpret the provisions of legislation against the background of the dismantling of apartheid.
- The fact that there must be a balance between the text and context does not mean that the legislative text may be ignored.
- After all, the context has to be anchored to the particular text in question.

²⁰ Kruger

- Although dealing with constitutional interpretation, Kentridge J explained the general principle very succinctly in **S v Zuma** :

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral perceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean ... We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected.

- The purposive (text-in-context) approach does not propagate a method of statutory interpretation based only on the legislative context.
- On the contrary, it merely wants to move away from the rigid and legalistic text-based approach to statutory interpretation and restore the balance between text and context

2. OTHER BASIC PRINCIPLES

2.1 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)
- **Du Plessis** refers to this principle as the 'structural wholeness of the enactment'.
- **Devenish** describes it as follows:
Interpretation should be ex viscenbus actus, i.e. from the bowels of the Act, to paraphrase, within the four corners of the Act.

- In **Nasionale Vervoerkommissie v Salz Gossow Transport** the court stated clearly that when interpreting certain provisions, a statute must be studied in its entirety.
- This principle also applies to the Constitution²¹

2.2 The presumption that legislation does not contain futile / nugatory provisions

This NB presumption can also be stated as follows:

The court must avoid an interpretation that negates part of the legislative text / leaves part of the text without meaning / purpose.

Remember rule:

every word must be given a meaning → this basic principle is further bolstered (supported) by the common-law presumption that legislation does not contain invalid / purposeless provisions.

²¹ Nyamakazi v President of Bophuthatswana; Qozeleni v Minister of Law and Order ; Matiso v The Commanding Officer, Port Elizabeth Prison → All these cases adopt a contextual and purposive approach to both legislative and constitutional interpretation).

Presumption:

- Unless the contrary is clear, it is presumed that the legislature doesn't intend legislation which is futile or nugatory 5.
- This forms the basis of the most important principle of interpretation: Court must determine the purpose of legislation and give effect to it.
- Since statutory interpretation is a purposive activity, this presumption constitutes its very essence.

Foundation for this presumption:

- is an acknowledgment that legislation has a functional purpose & object.
- In ***Ex parte the Minister of Justice : in re R v Jacobson and Levy*** the court found that if the intention of the legislature is clear, the purpose of the legislation should not be defeated merely because of vague or obscure language.
- The court must, as far as possible, attach a meaning to the words which will promote the aim of the provision.
- In ***SA Medical Council v Maytham*** the court held that futile (useless) legislation must be avoided, and that an attempt should be made to promote the 'business efficacy' of a provision.
- In ***Esselman v Administrateur SWA*** the court emphasised an 'effective and purposive' interpretation above one which would defeat the provision, leaving it useless.
- The Appellate Division held in ***South African Transport Services v Olgar*** that if a provision is capable of two meanings, the meaning which is more consistent with the purpose of the legislation should be accepted.
- 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.

IE: <u><i>R v Forlee</i></u>
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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.
- The *ut res magis valeat quam pereat* rule applies only where two interpretations of a provision are possible.
- The presumption cannot be used to rescue an administrative act (conduct) which is defective from the outset (*Mamogalie v Minister van Naturellesake* 1961 1 SA 467 (A)).
- In addition, it follows that the courts should strive to interpret legislation in such a manner that evasion of its provisions is prevented.²²

In *Dhanabakium v Subramanian* the court held that as far as possible, legislation should be interpreted in such a way that **casus omissus** (omission) is avoided.

[**Note:** As will be discussed later, the courts may indeed modify (adapt) the initial meaning of the legislative text (in the light of the presumption against futile provisions and within the framework of the purpose of the legislation)]

The constitutional influence

- This presumption complies with & is supported by constitutional requirements.
- The best example of a meaningless provision is legislation which is declared unconstitutional because it is in conflict with the Constitution.
- Sections 35(2) & 232(2) of the 1993 Constitution (the so-called 'reading down' clauses) provided that if legislation was *prima facie* unconstitutional (because it was in conflict with the provisions of the fundamental rights or the rest of the Constitution), and the legislation was reasonably capable of a more restricted interpretation which would be constitutional and valid, such restricted interpretation should be followed.
- The principle that courts should as far as possible try to keep legislation constitutional is a well-known principle of constitutional interpretation.
- This is nothing else than a restatement of the underlying principles of the presumption against futile and meaningless legislation: legislation should as far as possible be 'kept alive'.

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[NOTES]

²² (Dadoo Ltd v Krugersdorp Municipality 1920 AD 530).

STUDY UNIT 7

RESEARCH:

ASCERTAINING THE LEGISLATIVE SCHEME

(when the purpose of legislation must be consulted in the interpretation process)

1. GENERAL INTRODUCTION

Fundamental principle:

The purpose of legislation must be decided in the light of the spirit, purpose and objects in the BoR.

The legislative purpose must be established; it is not spelt out in the legislation, nor is it magically revealed to the interpreter.

→ Both internal & external aids may be used or consulted to ascertain the purpose.

This means: The interpreter must do research

→ **Du Plessis** refers to such a **research** process as one of **contextualisation**.

Aids fall into 2 categories:

Internal aids comprise the legislation and all its parts.

External aids comprise factors that are outside the text of legislation.

→ IE: mostly other text such as other legislation, commission reports, dictionaries etc.

The difference in opinion between the approaches as to when these aids will be used:

- The **textualists** will refer to these (both internal & external) aids only where the legislative text is ambiguous and unclear.
- The **contextualist** will refer to all internal and external factors from the outset.

As is explained above, this difference of opinion has been settled by s 39(1) & (2) of the Constitution.

The Constitution supports a purposive approach to statutory interpretation:

- Section 39(2) provides that interpretation must take into account the spirit, purport and object of the Bill of Right when interpreting any legislation.
 - But to do that, the instructions of s39(1) must be followed.
 - The court must take note of public international law, and foreign law (in particular those legal principles concerning human rights infringements in systems with similar supreme constitutions) may be consulted.
- Thus: courts must be able to use all the available data (internal & external aids) at their disposal to ascertain the aim & purpose of legislation.
 - the range of various aids should be restricted as little as possible.
- The courts should have the discretion to decide on the importance & relevance of a particular aid to interpretation.

[In this chapter another difference of opinion between the two approaches will be highlighted:]

*[- **which** & to **what** extent aids = better suited to ascertain purpose of legislation]*

2. INTERNAL AIDS (intra-textual aids)

2.1 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 the other language was used to clarify obscurities.

Devenish refers to this as: 'Statutory bilingualism':

SA now has 11 official languages & legislation is still drafted in 2/more languages.

(1) Original legislation

Signing of legislation = part of the prescribed procedure during the passing of original legislation.

Legislative texts are signed alternately (in turn) in the different languages in which they were drafted & the signed text enrolled for record at the AppDiv.

With the **1961, 1983 & 1993 Constitutions:**

→ should an irreconcilable conflict between various legislative²³ texts exist, the signed one prevailed.

With the **1996 Constitution:**

→ Section 240 provides that, in the event of any **inconsistency**, the English text will prevail.

→ Ito the Constitution:

- all national & provincial legislation which have been signed by the President / premier must be held at the CC²⁴ for safekeeping.
- 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.

→ In ***Du Plessis v De Klerk***, it was held that the existing legal position will apply to conflicting versions of the same text.

The signed text doesn't carry more weight simply because it is signed → the existing legal position is as follows:

- 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.

²³ 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 / purposeless provisions

²⁴ Constitutional Court

- In ***R v Siling*** 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.

(2) **Delegated legislation**

In past: there were no constitutional guidelines with regard to conflicting texts of 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 texts do differ, they must be read together. (*Du Plessis v 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 / unclear, the court may declare it invalid.

(3) **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 in SA have the benefit of having two /more versions of the same legislation available for comparison in different languages.

The notions that the signed version automatically prevails (arbitrary manner of conflict resolution) is merely a statutory confirmation of the textual approach

- because the purpose is ignored if there is conflict between the versions. (**Devenish**)

By following this 'signed version' view:

- it could be that the unsigned version reflects the true purpose of the provision and that the signed text is the incorrect one.
- As such: following the signed version 'blindly', the purpose of the legislation will be defeated by the court!

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.

- (This being in terms of sections 39 & 233 as well as the principle that legislation should as far as possible be interpreted to render it constitutional)

2.2 **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.

2.3 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***)

2.4 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.

2.5 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.

2.6 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.

2.7 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.

2.8 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,
→ IE: Schedule 4 of the Labour Relations Act with flow diagrams explaining the procedures for dispute resolution.

3. EXTERNAL AIDS

[study as whole]

3.1 The Constitution

- Section 39(2) of the Constitution contains a provision dealing with ordinary statutory interpretation.
- Therefore: when interpreting any legislation, the constitution as supreme law should be consulted.
- The constitution in general & the BoR in particular = most NB external aid to statutory interpretation.
- No argument about plain meanings & clear texts could prevent the Constitution from being used or referred to during interpretation.
- It prescribes how other legislation must be interpreted, contains the BoR & is the repository of fundamental rights.

3.2 Preceding discussions

Preceding discussions:

- Discussions about a specific Bill before parliament,
- the debates and report of the various committees which form part of the legislative process &
- the reports of commissions of inquiry.

One should distinguish between debates during the legislative process and commissions of inquiry after the passing of legislation.

Note: before the advent of the new constitutional dispensation, the courts were reluctant to seek guidance in the debates which precede the passing of legislation in question.

However, in recent decisions the courts have invoked these aids. As far as the reports of commissions of inquiry are concerned, the picture looks considerably better, in that the courts have shown some willingness to consult the reports of commissions of inquiry.

(1) **Debates during the legislative process**

Steyn refers to **Eckard** (common-law writer) who believed that the debates preceding the acceptance of a bill are a useful aid in establishing the intention of the legislature, especially when it is not evident from the wording of the legislation.

The use of debates (this view) has not been accepted by the courts.

IE: In ***Bok v Allen & Mathiba v Moschk***, the use of preceding discussions was rejected outright, although the court *a quo* in the *Moschke* case had taken preceding discussions into account.

The 'dislike' against the inclusion of debates may be disappearing.

IE: 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.

IE: In ***S v Tilly*** and ***S v Tshilo*** the court referred to a report of the SA Law Commission & a ministerial speech in parliament during the interpretation of a statute.

(2) **Commission reports**

In some earlier cases the court didn't accept the use of a commission report & some it was accepted only if a clear link exists between the recommendations and the provisions. IE:

- In ***Hopkins v Bloemfontein District Creamery*** the court held that the prevailing law prevented the use of a commission report on the Companies Act.
- But in ***Rand Bank v De Jager*** the court decided that the report by the one-man commission of inquiry, which was largely responsible for the Prescription Act, was an admissible aid to interpretation of the Act.
- In ***Westinghouse Brake & Equipment Pty Ltd v Bilger Engineering Pty Ltd*** the court held that the report of commission of inquiry, which preceded the passing of an Act, could be used to establish the purpose of the Act if there was a clear link between the recommendations of the report and the provisions of the Act.
- In ***Dilokong Chrome Mines v Direkteur-Generaal, Department van Handel & Nywerheid*** the court found that the report by a member of a standing committee was inadmissible since it merely represented his own subjective opinion of the deliberations.

Steyn points out that the reasons for the courts not accepting reports are not convincing.

→ He points out that speeches given by the Minister at the second reading of the bill, explanatory memoranda, deliberations and reports of the large number of standing, ad hoc and joint portfolio committees of Parliament may all be used to ascertain the purpose of legislation.

The argument that not all debates in parliament apply to the purpose of the legislation is not relevant.

→ The courts are expected to use their discretion in imposing punishment and in reaching decisions amidst conflicting evidence.

→ The judiciary in SA ought therefore to be able to ascertain the relevant debates in parliament for the purpose of statutory interpretation.

3.3 Surrounding circumstances

Surrounding circumstances: those conditions before & during the adoptions of legislation which led to its creation, thus the context of the legislation.

Some courts have held that the historical background to the adoption of a particular statute is equally NB during the process of interpretation.

- This approach made its 1st appearance in the *Heydon* case.
- SA courts have also looked the surrounding circumstances when interpreting legislation.

IE: In ***Santam*** the court took into account the historical background which led to the adoption of the Act in question.

(1) 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.

(2) 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.

(3) Contemporanea expositio

Contemporanea expositio: 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 / shortly afterwards during its first application.

(4) **Subsecuta observatio**

Subsecuta observatio: 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.

(5) **Ubuntu**

Postamble of English text of interim Constitution referred to *Ubuntu*:

“There’s a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation...”

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 & explained in ***S v Makwanyane*** where it was held that it translate 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 &
- since *ubuntu* was used in *Makwanyane*, it forms part of new SA constitutional jurisprudence.

It forms an important bridge between communal African traditions and individual Western traditions.

3.4 **Dictionaries and linguistic evidence**

As stated, most statutes contain a definition clause / section in which the words used in the statute are defined.

→ In cases where the words used in legislation are not defined, it’s permissible for the courts to seek guidance in dictionaries.

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.

3.5 The source of a provision

Legislative drafters sometimes borrow extensively from other jurisdictions.

IE: PAJA²⁵ includes concepts that were taken verbatim from the Australian Administrative decisions Act & the German Law on Administrative Proceedings.

The question which arises: How should SA courts interpret these provisions?

Should the courts follow the Australian & German jurisprudence when interpreting PAJA?

Botha suggests: in such case, the courts could use jurisprudence as developed in other jurisdictions as guidelines.

→ but will always construe legislation in the light of SA 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.

3.6 Explanatory memoranda, examples and footnotes (*study this para as a whole*)

As argued, the interpreter should be able to use these aids when interpreting legislation right from the outset → 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 ***National Mine Workers of SA v Driveline Technologies & Shoprite Checkers (Pty) Ltd v Ramdaw*** the court used the explanatory memorandum to interpret the Labour Relations Act.

The structure of the latest legislation is far more user-friendly than in the past.

→ Footnotes & examples are used to facilitate cross-referencing (text) & should be used as part of the context (surrounding circumstances) of the legislation.

²⁵ Promotion of Administrative Justice Act 3 of 2000

4. THE INTERPRETATION ACT 33 OF 1957

The Act consists of six parts:

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

4.1 The time factor

(NB)

(1) The meaning of 'month'

According to s2, 'month' means a calendar month & not a lunar month of 28 days.

The application of this definition is ambiguous because the term 'calendar month' may be construed in two ways:

- a. A month as it appears on the calendar
 - e.g. 1 to 31 January
 - {this construction is usually found in service contracts};
- b. A month as it is measured in, for example, prison terms, from a certain day of a month to the corresponding day of the next month,
 - e.g. 9 June to 9 July.

It would be more appropriate to use the term 'calendar month' for the first alternative (above), and 'month' for the latter.

(2) 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 which deals with the computation of time → should be read with the common-law methods.

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

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.

In other words → a number of days must be calculated by excluding the first day and including the last day. Unless the last day falls on a Sunday or on a public holiday, in which event these days are excluded.

- This section refers to days only, and not to periods of months or years.
- S 4 will be applied only when the legislature has made no other arrangements in the legislation concerned (s1 of the Interpretation Act).
- In cases where s4 is not applicable, our courts have accepted that our ordinary civil method (see below) applies, as it corresponds to common law.
- Another method will be used only if a contrary intention is apparent in the legislation concerned.²⁶

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.

(b) Common-laws methods

Although these 3 common law methods do not form part of the Interpretation Act, it must be understood with the statutory method of time computation:

→ ***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.

- The cause of action in this case was a motor car collision involving a police vehicle.
- In terms of s32 of the Police Act 7 of 1958, a civil suit brought against the police as a result of an action executed in terms of the Police Act must be instituted within six months.
- The collision took place on 5 August 1967.
- The summons was served on 5 February 1968.
- On appeal, the Supreme Court found that the ordinary civil method should be used to calculate the time.
- The last day was therefore excluded and the serving of the summons was therefore one day too late, and the action was refused.

²⁶ Kleyhans v Yorkshire Insurance Co Ltd

→ **Computatio naturalis** (natural method)

Where this method is used, the prescribed period is calculated from the hour (or even 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.

It should be borne in mind that, with regard to both the statutory and the common law methods of computing time, the purpose of the legislation will remain the decisive factor, and accordingly exceptions may be made to the above methods.

5. **OTHER COMMON LAW PRESUMPTIONS** (NBB!!)

Note: how the common law presumptions has become enshrined in the Constitution is s 33, 34 & 35.

5.1 **Legislation does not oust the jurisdiction of the courts**

Unless expressly stated / necessarily implied in the legislation → it is presumed that the legislature does not wish to exclude or restrict the courts' jurisdiction.²⁷

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.

Sometimes legislation confers the power to make decisions on certain persons (e.g. immigration officials) or bodies (e.g. licensing boards).

- Whether the courts were competent to review such decisions depended, of course, on the particular enabling legislation.
- The High Court's jurisdiction to review administrative decisions (e.g. those of police officers) was often ousted by security legislation during the various states of emergency of the late 1980s, but under a supreme judicial Constitution this will not be possible any more (see below).
- Even if such legislation expressly excluded the courts' jurisdiction, their power to review such a decision was not totally excluded.
- The High Court always has had an inherent common law jurisdiction to review such decisions, e.g. on the ground of *mala fides* (bad faith).

The presumption was applied in ***Mathope v Soweto Council***.

- The court found that s 12 of the Community Councils Act does not exclude jurisdiction of the magistrate's / Supreme Court.
- Section 12 provides that a civil action between a black & a community council shall be heard by the erstwhile commissioner's court.

²⁷ *Tefu v Minister of Justice*.

STUDY UNIT 8

CONCRETISATION:

CORRELATION OF TEXT & PURPOSE IN THE LIGHT OF THE CONSTITUTION

!!!NB!!! unit

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.

Du Plessis: Concretisation - is the final stage in the interpretation process.

- The legislation is realised (becomes a reality).
- During concretisation the legislative text and purpose, as well as the facts of a particular situation are brought together to reach a conclusion.

Synonyms for concretisation: correlation, harmonisation, realisation or actualisation.

It is the process through which the interpreter moves from the abstract to the practical reality to apply the particular legislation.

After the text has been studied & all the presumptions, aids and principles to contextualise and to determine the aim and purpose of the legislation employed → the result is applied to the facts of the case to reach the correct solution.

- All the loose threads are gathered together to finalise the process.
- The concretisation phase always takes place, irrespective of the approach to interpretation employed by the interpreter.

However, the contextualists feel that contextualisation provides more data to the interpreter with which to exercise a better discretion during the interpretation and application of the legislation.

In other words, the interpreter is better equipped to concretise accurately.

Du Toit: the essence of successful interpretation -

→ lies in the current realisation of the possible meanings of the original legislation.

- The meaning of the text is identical to its application in a given concrete situation.

Lategan: defines interpretation as –

The concretisation of the meaning of a text in a concrete, present situation during the last stage of the interpretation process. Such a process is not simply the application of the provision of the legislation, but rather the process of transition²⁹ from interpretation to application.

2. THE LAW-MAKING FUNCTION OF THE COURTS

The law-making role of the courts:

→ is the greatest point of disagreement between the textualists and contextualists.

²⁹ Shift

- It's 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.

2.1 The orthodox viewpoint

(see chap 5)

This approach rests on the assumption that the meaning of legislation is fixed & 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
- The classic formulation of textualism insists that the clear & unambiguous text of legislation is equated with the intention of the legislature.

Bulawayo Municipality v Bulawayo Waterworks:

"The intention of the legislature can alone be gathered from what it has actually said, and not from what it may have intended to say, but has not said."

- Only if the words seem ambiguous and inconsistent may the court use the secondary and tertiary aids to interpretation.
- The court should interpret legislation only within the framework of the words used by the legislature.
- 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:

This orthodox viewpoint was explained as -

- 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.
- According to this view the courts are seen as mere mechanical interpreters of the law (the court has no lawmaking function).
 - As a result of an incorrect interpretation of the *trias politica* doctrine, the textualists hold that courts may only interpret the law and not make it.
 - Only in very exceptional cases may the courts deviate from the literal meaning of the legislation to apply the so-called modification of the text.
 - It is, according to the literalists, the function of the legislature to correct omissions or bad drafting in legislation.
 - The principle that nothing should be added to or deleted/subtracted from legislation has a very inhibiting influence on the lawmaking function of the courts.
 - The *iudicis est ius dicere sed non dare* and *casus omissus* rule form the basis of this principle.

In ***Harris v Law Society of Good Hope*** it was decided that the court was bound by the clear letter of the law and that the *iudicis est* rule meant that only the legislature may supplement or alter deficiencies in legislation.

2.2 The purposive viewpoint

The contextual approach claims that the court does have a creative lawmaking function during statutory interpretation.

→ Such a creative role by the courts does not 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.

Du Plessis explains this as follows:

- The interpretation of statutes invariably - & by its very nature - involves much more than the mere reproduction of either the plain meaning of language or the intention of a legislature.
- It is much rather a reconstruction of the generally framed provisions of an enactment with a view to their actual and specific application to and in a particular concrete situation.
- This can still be done as long as the court bears in mind that its function is to interpret (i.e. to creatively reconstruct) the enactment without repromulgating it (i.e. making a new one instead).

Labuschagne:

- makes the same theoretical point & 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 / 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:
 - (1) the legislature must inevitably use general language when it drafts legislation & what those general words or terms mean in specific circumstances is left to the courts to work out;
 - (2) 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.

Labuschagne points it out as follows:

- The court is the final link in the legislative chain and it should be its task to ensure that the legislative process has a meaningful and just end.
- The legislation contained in the document is incomplete and is only the structure of the statute.
- Only when the court applies the legislation does it become a 'real' and complete functional statute.
- The legislation is situation-bound and the process passes through stages from the generality of the structural statute to the particularity of the functional statute. It is an ongoing case-to-case process, in reality; legislation is not interpreted, but shaped or moulded.

Modification or adaptation of the initial meaning of the text:

- involves the exercise of a creative judicial discretion.
- This discretion is 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 courts are confronted with the exercise of discretions on a daily basis when they have to deal with criminal jurisdiction and the evaluation of evidence, as well as with judge-made law emanating from the interpretation of our common law sources.
 - Although the legislature has the primary legislative powers, those powers are not exclusive, since the courts play a secondary legislative role.
 - The legislature and judiciary are partners in the lawmaking process.

This principle was explained very well in ***Zimnat Insurance Co Ltd v Chawanda***:

- The court said that judges did not merely discover the law but they also made the law.
- They take part in the process of creation.
- Lawmaking is an inherent and inevitable part of judicial process.
- If the maxim *est ius dicere sed non dare* therefore means the courts do not make legislation, but only interpret it, it conforms with the contextual approach.
- If, however, it is translated to mean that the courts do not make law but only interpret it, it clearly conflicts with this approach.

2.3 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:

- (1) They confuse the modification of the meaning of legislation with the literal modification of the text or language of the legislation**
 - The literature and case law refer to so-called 'modification of the language'.
 - However it must be pointed out that it is not the language of legislation that is modified, but the meaning of the legislation which is 'adapted' (reconstructed) to give effect to the legislative purpose.
 - When the courts deal with a *casus omissus* (omission) or 'modify' the meaning of a word or phrase, the provision is not physically modified and repromulgated by the court.
 - The particular provision remains as it was originally promulgated by the legislative body: the meaning of the particular legislation is modified only for that specific, concrete situation.

- (2) They are willing to accept a literal interpretation of a statute which goes beyond the purpose of the legislation;**
 - **Devenish** explains that these kinds of modifications do not infringe the separation powers doctrine (*trias politica* doctrine).
 - Such modification does not amount to a usurpation of the legislator's function, but to the legitimate exercise of judicial lawmaking of a complementary nature in order to give effect to intention or the presumed intention of the legislature.

- (3) They rely on the doctrine of parliamentary supremacy which has been replaced by the Constitution.**
 - **Du Plessis** points out that the orthodox viewpoint of the textual school prohibiting any form of modification could result in an incorrect and unjustifiable form of judicial lawmaking.
 - By implication it means that when the court adopts an interpretation that does not give effect to the purpose of the legislation, law is made that is in conflict with the original legislative purpose.
 - Consequently the proponents of literalism transgress their own rigid principle that the judiciary should only interpret the law and not make it.

In reality, the courts (according to Du Plessis), do not infringe on the separation of powers because they are performing within the parameters of their own functions.

The influence of the Constitution

The Constitution should bring about more flexibility in this regard:

- The principle of parliamentary sovereignty has been replaced by that of constitutional supremacy.
- During interpretation the courts must try to reconcile the aim and purpose of the legislation with the provisions of the Constitution in general, and the Bill of Rights in particular.

- Section 35(3) & 232(3) of the 1993 Constitution (the so-called 'reading down' clauses) provided that if legislation is *prima facie* unconstitutional (because it conflicts with the fundamental rights and the rest of the Constitution respectively) but the legislation is reasonably capable of a more restricted interpretation which would be constitutional and valid, such restricted interpretation should be followed.
- These provisions have not been repeated in the Constitution of 1996.
- However, 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.

In terms of judicial lawmaking the Constitution (s39) provides the following role to the courts:

The courts bear a responsibility of giving specific content to the wide and general values contained in the Constitution. In doing so, the courts will invariably create new law (*Matiso v Commanding Officer, Port Elizabeth Prison*).

- Judicial lawmaking is not unbridled.
- Judicial officers are accountable and responsible for their actions on three levels:
 - (1) personal responsibility, because they have to take personal moral responsibility for their decisions;
 - (2) formal responsibility, consisting of the formal constitutional and other legislative controls over the judiciary;
 - (3) substantive accountability, in that judicial decisions are open to public debate and academic criticism (with reference to the constitutional values of accountability).

2.4 Factors which support and limit judicial law-making

There are important factors that both support & restrict the lawmaking discretion of the courts

- 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.

(1) 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.

(2) 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.

3. POSSIBILITIES DURING CONCRETISATION

The various possibilities during the concretisation phase of interpretation may also be influenced by the Constitution.

- The final 'result' / 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.

Note: In many cases where the courts have extended the meaning of the text, they have not regarded this as extensive interpretation in general, but rather as so-called 'modification of the language' (rather than of meaning). The reason for this is the courts inclination towards the textual approach.

3.1 No problems with correlation

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

3.2 Modification of the meaning is necessary

What is modification of meaning?

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; &
- (ii) the initial meaning of the legislation goes beyond the purpose of the legislation (it is overinclusive) or the initial meaning falls short of the purpose of the legislation (it is underinclusive).

In other words, when the text has stipulated either more or less than its purpose, or when the initial meaning of the text is in conflict with the Constitution.

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.

When and why may the courts modify the initial meaning of the text?

Court may modify the initial meaning of text on the grounds of ambiguity, absurdity or vagueness.

- The purpose of the legislation (within the framework of the Constitution) constitutes the qualifier.
- 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.
- The sources cite various grounds such as ambiguity and absurdity which may be combined in a single principle:
 - If it appears that the initial ordinary meaning of the text will not give effect to the aim and purpose of the legislation.
 - Therefore, the purpose of the legislation in question must be determined in each case, even if the initial meaning of the text seems to be clear.
 - The initial textual meaning must always be compared with the purpose of the legislation to ensure that effect will be given to the aim of the legislation concerned.

(1) Restrictive interpretation

As mentioned, restrictive interpretation is applied when the words of the particular legislation embrace more than its purpose → The meaning of the text is then modified to reflect the true purpose.

Restrictive interpretation in general, & two specific forms of restrictive interpretation, will be discussed:

(a) Restrictive interpretation in general

Although the courts traditionally refer to two forms of restrictive interpretation, it should be clear that restrictive interpretation is not limited to *eiusdem generis* & *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.

Skinner v Palmer:

The court substituted 85 for 95 → restricting the scope of the provision.

Trivett & Co v WM Brandt's Son's & Co:

The court restricted the meaning of the phrase "every court of law in a British possession" to read "every court of the Republic of SA".

(b) 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 / altered circumstances, this rule isn't applied in South African law in its original form

→ 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.
- Consequently, such cases are infrequent. (**Minister of Police v Haunawa**).

(c) Eiusdem generis

The term *eiusdem generis* literally means: '**of the same kind**'

& is based on the principle ***noscutur a sociis***

→ (words are known by those with which they're 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** category
→ In *Colonial Treasurer v Rand Water Board* the court referred to such a genus as a 'common quality' / 'common denominator'.
- The **specific words must not already have exhausted the genus**
→ In such a case, it is assumed that the general words refer to a broader genus & therefore cannot be interpreted restrictively.
- 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 general words may precede, appear amongst or follow the specific words.
- The rule may be applied only if the 'legislature's intention' supports / points to such a restrictive interpretation.
→ The courts therefore apply this rule with circumspection. (**S v Kohler**)

[See the explanation at the end of the chapter]

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.

---oOo---

(2) 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.

(a) Interpretation by implication

Interpretation by implication involves: extending the textual meaning on the ground of a reasonable & 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.

The grounds of a reasonable & essential implication (which are not always easy to prove) are:

- 1] **Interpretation *ex contrariis*** – implications 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*)

Example: interpretation based on the principle of opposites

Keeley v Minister of Defence

- Court refused to apply the *inclusio unius est exclusio alterius* rule as doing so would've defeated the purpose of the legislation concerned.
- Section 3 of the Defence Act 44/1957 provided that "every citizen" is liable to render compulsory military training.
- The question arose whether application of the above rule would result in non-citizens not being compelled to undergo military training.
- Referring to other provisions of the Act, the court found that the *inclusio unius est exclusio alterius* rule could not be applied here.

- 2] 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;
- In other words: cases where additional powers / authority are implied as a result of an express power / authority. The test is not usefulness / convenience, but necessity

Example: interpretation based on the principle of necessary relationships (i.e.: if a result is prohibited, all the means to bring about that result are implicitly also prohibited; if a specific end is prescribed, then all the means necessary to bring about the end is also prescribed.)

Bloemfontein Town Council v Richter

- The court found that where a municipality has a statutory right to contain a river for the purpose of water supply, it also, by implication, has a right to remove washed-up silt from the dam.
- In each instance, the underlying principle is whether the conferred power can be exercised effectively.

- 3] If a principal thing is forbidden or permitted, the accessory thing is also forbidden / permitted
- e.g. if the selling of dagga is prohibited, it may be implied that the production of the dagga is also prohibited

- 4] Implied inherent relationships
- e.g. the power to issue a regulation implies the power to withdraw it

- 4] If a particular result is prohibited by legislation, it by implication prohibits all indirect means by which such a result can be achieved.

3.3 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.
- If the court cannot supply an omission in the particular legislation, the common law may be used, if necessary, to complete the concretisation process.

(Remember that in terms of s 39(2) of the Constitution, the rules of common law must also conform to the values and principles of the Constitution).

[Explanation of the *eiusdem generis* rule (see also Study Guide)]

In this paragraph we return to the problem that legislatures cannot foresee every possible circumstance that might arise & are therefore forced to make use of broad, all-inclusive terms & formulations.

A typical example of this was the vehicles in the park discussed above

- ("No motorcar, motorcycle or any other motorised vehicle is allowed in the park").

This provision clearly includes much more than was originally intended.

- ❖ This over-inclusivity was a risk the legislature took rather than face the consequences of a too-narrow provision which would allow certain unwanted vehicles into the park.
- ❖ The phrase "any other motorised vehicle" on the face of it includes many things, including, as we have seen, a motorised wheelchair.

Would it serve the purpose of the legislation to include such wheelchairs under the provision?

If not, how should the initial textual meaning of the provision be modified to exclude such vehicles from its scope?

The *eiusdem generis* rule contains the answer.

- ❖ The general words (i.e. "any other motorised vehicle") must be restricted to the same kind as the specific words in the provision (i.e. "motorcar" and "motorcycle").
- This can only be done if:
 - the specific words all refer to the same category;
 - the specific words have not exhausted all the options in that category; and
 - the purpose (or intention in the wide sense) of the legislation requires a restrictive interpretation.

Note also that the order of the specific words is irrelevant and that one specific word might be enough to establish the relevant category.

To return to our example:

- The specific words refer to a definite category (roadworthy motor vehicles).
- The specific words have not exhausted that category (one also gets trucks, buses, etc within the category of motorised and road going vehicles).
- The purpose of the legislation requires a restrictive interpretation. In other words, the general phrase "or any other motorised vehicle" must be read to mean "or any other motorised vehicle similar to a motorcar and a motorcycle".
- A wheelchair motorised or not, is clearly not similar to a motorcar or a motorcycle.
- The legislation would therefore not apply to motorised wheelchairs, in spite of the initial impression to the contrary (which was created by the broad language used in the legislation).

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[NOTES]

STUDY UNIT 9

PEREMPTORY AND DIRECTORY PROVISIONS

1. GENERAL INTRODUCTION

- Legislation which contains the formal / 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.
- But, 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 / directory:

peremptory:	directory:
a statutory provision that requires exact compliance	a statutory provision that requires substantial compliance only
failure to comply with it will leave the ensuing act null and void	failure to comply with it will <u>not</u> result in the ensuing act being null and void.

In **Commercial Union v Clarke:**

(see end of chapter)

Court held there was substantial compliance with the provision.

→ It was not necessary to follow the requirements to the finest details – as long as the purpose of the provision has been met.

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 & 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 & 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.

Devenish describes it as follows:

South African curial practice in this aspect of the interpretation of statutes clearly demonstrates a preference for teleological theory of interpretation involving an evaluative modus operandi, since the interpretative factors invariably considered in the weighing-up process include the principles of justice, fair play, convenience, logic, effectiveness and morality.

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.

----- (See **Ex parte Dow** - at end of chapter) -----

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 / indicators of the purpose almost like 'mini presumptions'.

- **Devenish** (1992) refers to some of these guidelines as 'presumptions'.
- **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.

In **Nkisimane v Santam Insurance**:

The court held that the intention of the legislature is always the decisive factor.

In **Sentrale Kunsmis Korporasie v NKP Kunsmisverspreiders**:

It was stressed that the form in which a requirement is set out will not necessarily be decisive.

The context of words and other relevant considerations also play a part when it's to be determined whether an apparently peremptory provision is in fact peremptory.

However, in certain circumstances, a waiver of statutory requirements is permissible

(Bezuidenhout v AA Mutual Insurance Ass.)

The guidelines / 'tests' set out below are not exhaustive / binding rules as the purpose of the legislation will always be decisive in establishing whether a requirement is peremptory or directory.

2.1 Semantic guidelines (according to Devenish)

Certain semantic guidelines have been formulated by the court.

These are based on the inherent grammatical meaning of the language employed:

<ul style="list-style-type: none"> • A word or words with an imperative or affirmative character indicate a peremptory provision → IE: the words "shall" or "must" 	<p>In Bezuidenhout: court found that "shall" is a strong indication of a peremptory provision.</p> <p>In Motorvoertuigassuransiefonds: "shall" need not necessarily indicate a peremptory meaning.</p>
<ul style="list-style-type: none"> • Permissive words indicate a discretion and will 	<p>Almalgated Packaging Industries v Hutt</p>

be interpreted as being directory, unless the purpose of the provision indicates otherwise. → IE: “ may ”	
• Words in negative form indicate a peremptory connotation.	<i>Samuel Thomas Meyers v Pretorius</i>
• Positive language suggests that the provision is merely directory.	<i>R v Sopenete</i>
• If the provision is formulated in flexible and vague terms, it is an indication that it is directory.	<i>Leibrandt v SA Railways</i>

2.2 Jurisprudential guidelines

Jurisprudential guidelines: are tests based on legal principles which have been developed and formulated by the courts.

In ***Sutter v Scheepers*** & ***Pio v Franklin***: certain ‘tests’ / guidelines were proposed to determine whether provisions are directory / peremptory.

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:

- (1) 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;
 - (i.e. in favour of validity of the ensuing act).
- (2) 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;
- (3) 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;
- (4) Adding a penalty to a prescription or prohibiting is a strong indication that the provision is peremptory;
- (5) 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.

----- (See ***Weenen Transitional Local Council v Van Dyk & Commercial Union Assurance v Clarke*** - end of chapter) -----

2.3 Presumptions about specific circumstances

The courts have developed a number of 'mini presumptions' relating to specific circumstances.

- These are nothing more than initial assumptions and the purpose of the legislation may prove otherwise:
 - (1) 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);
 - (2) 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;
 - (3) 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;
 - (4) Where the freedom of an individual is at stake, the court will stress the peremptory nature of a requirement;
 - (5) 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.

Constitutional Peremptory Provisions

The Constitution contains a number of peremptory provisions. Some of the most NB of these for statutory interpretation are the following:

- **Section 2:** deals with the supremacy of the Constitution:

This Constitution is the supreme law of the Republic; any law or conduct inconsistent with it is invalid, and the obligations imposed by it **must** be fulfilled.

- **Sections 7(2)** deals with the application of the Bill of Rights:

The state **must** respect, protect, promote and fulfil the rights in the Bill of Rights.

- **Section 39(2)** the interpretation clause:

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.

[CASE NOTES]

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.

Legal Issue:

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.

<u>Weenen Transitional Local Council v Van Dyk</u>

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.

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[NOTES]

STUDY UNIT 10

CONSTITUTIONAL INTERPRETATION

1. INTRODUCTION

Why has Constitutional Interpretation become such an issue?

- Section 35(3) of the 1993 Constitution blurred the traditional difference between the interpretation of 'ordinary' legislation and constitutional interpretation
 → Section 39 of the Constitution of 1996 reaffirmed this.
- SA courts now have to interpret all legislation in the light of the fundamental rights enshrined in the BoR. Every court, tribunal and forum will have to become involved in constitutional interpretation to some degree.
- Although all legislation must now be interpreted to the Constitution there are still some differences.

The aims of Constitutional interpretation	The aims of legislative interpretation
Are set out in the <i>Matiso</i> case	Are set out in the <i>Nortje</i> case
IE: to give meaning to the foundational values of the Constitution	IE: the aims of statutory interpretation are to give a specific meaning to a specific piece of legislation

- The Constitution cannot be interpreted exactly like a statute, since it is a unique document
 → It's *sui generis*, long on generalities and short on specifics
- There is a complex relationship between Constitutional interpretation & ordinary statutory interpretation. The two are interrelated and yet are also separate.

1.1 Constitutional interpretation & '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.
- Both deal with the interpretation of legislative instruments.
- It would be problematic to reconcile a purposive method of constitutional interpretation with a literal method of 'ordinary' interpretation.
- Section 39(2) ensures that 'ordinary' interpretation should be based on a contextual & 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".

1.2 A supreme constitution & ordinary legislation

The status of a supreme Constitution 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.
- It is the prism through which everything and everybody must be reviewed (***Hyundai Motors***).
- The Constitution 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, in fact, be the most important national symbol.
- It does more than describe the institutional framework of government &
- it is more than a mere organisational 'power map' . (Wiechers)

→ **The supremacy of the Constitution, which includes a bill of fundamental rights,**

- means that the rights of the individual will, for the first time in South Africa, prevail over the interests of the state, and may be limited only in those instances provided for in s36.

In ***Nortje v Attorney-General of the Cape***, Marais J pointed out 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.

2. WHY IS A SUPREME CONSTITUTION DIFFERENT?

A supreme constitution is different to the text of an ordinary statute:

- the Constitution is the supreme law and not just a statute
- a constitutional state (which has a supreme Constitution) is underpinned by 2 foundations:
 - **formal** one - includes aspects such as the separation of powers, checks and balances on the government and the principle of legality → in other words, the institutional power map of the country
 - **material or substantive** one - refers to a state bound by a system of fundamental values such as justice and equality.

The Constitution:

- sets out the aspirations of the nation.
- contains language which is rich in symbolism.
- 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.

Ordinary legislation: does not contain the organisational, symbolic & ethical breadth of the Constitution.

3 Reasons why the text of the Constitution is different from the text of ordinary legislation are:

2.1 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:

type or state and government in the country (unitary/ federal state, democracy, one party-state)	symbols of the country (flags, national anthems)
powers & functions / various persons & institutions	elections & appointments
different branches and tiers of government (separation of powers)	financial arrangements
checks and balances on the country, if any	the judicial system
the electoral system	security forces, etc

→ these formal & institutional aspects of a constitution is dealt with in subjects such as constitutional, administrative & local government law

- SA constitutions before 1994 = **formal 'power maps'**
- it did not provide for a system of constitutional review by which courts could test legislation & government conduct against a set of constitutional principles.
- The 1996 Constitution also contains an **extensive 'power map'**.

Most constitutions deals with practical institutional arrangements of government, IE:

Co-operative Government	ch 3	The judicial system	ch 8
Parliament	ch 4	Institutions supporting democracy	ch 9
The president and the executive	ch 5	Public administration	ch 10
The provinces	ch 6	Security services	ch 11
Local government	ch 7	Traditional leaders	ch 12
		Finance	ch 13

It also includes a number nr of schedules dealing with aspects such as national symbols, elections and (concurrent and exclusive) areas of national and provincial powers.

2.2 Substantive constitutionalism

A supreme Constitution

- constitution contains more than a formal 'power map' as it also contains a material / substantive foundation, which includes a justiciable BoR.
- Its' the supreme law & state authority is bound by a set of higher, substantive legal norms.

Constitutional State (*rechstaat*)

- Preamble of Interim Constitution = expressly referred to SA as a constitutional state.
- In a constitutional state (*Rechstaat*) → constitution reigns supreme
→ means: government may only govern its prescribed structural limitations & procedural guarantees entrenched in the constitution.
- These formal characteristics of a constitutional state is supplemented by the fact that the legal order must be substantively³⁰ just → state authority is bound by a set of higher, substantive legal norms. (*Ex parte Attorney-General, Namibia*)

In **S v Makwanyane** the formal & substantive foundations of a constitutional state & a supreme constitution was explained as:

"All constitutions seeks to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premise upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that ethos; and the moral and ethical directions which that nation has identified for its future. In some countries the constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future.

The SA Constitution is different: *it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution."*

2.3 Constitutional symbolism

SA Constitution = rich in symbolism & a many commentators explained the supreme status of the constitution in a number of symbolic references:

Mureinik:

The Constitution forms a bridge in a divided society, a **bridge** from a culture of authority (based on sovereignty of parliament) to a culture of justification (based on a supreme constitution).

³⁰ essentially

Mohamed in *S v Acheson*:

Referred to a supreme Constitution as a **mirror**

“It is a mirror reflecting the nation’s soul, identifying the nation’s ideas and aspirations & articulating the values bonding its people and disciplining its government.”

Du Plessis:

The constitution is both a **monument** which celebrates & a **memoeial** which commemorates.

Botha:

The constitution is more than symbolic **window-dressing**.

- it’s also a transformative document, a commitment to positive action
- IE: the inclusion of the socio-economic rights in the BoR

The Constitution’s **preamble** sets the scene for the programme of action:

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

Section 7(2) of the constitution obliges the state to take **positive action**:

The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

Thus: the constitution is both a **shield** for the individual against abuse (classical 1st-generation ‘negative’ rights) by the state & a **positive instrument to transform** society in the view of the fundamental rights & values it contains.

Supreme constitution has the following characteristics:

- It is open-ended, value-laden & 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.”

3. HOW TO INTERPRET THE CONSTITUTION

Nortje v Attorney- General of the Cape:

The categorisation of theories & canons of constitutional interpretation was questioned.

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.

3.1 Constitutional guidelines

Section 39(1) sets out the rules for interpreting the BoR (constitutional interpretation)

→ this section must be read with s 39(2), s 233 & s 1 (see Chapter 5)

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 BoR → court, tribunal or forum must make value judgments.

IE: promote the values underlying an open & democratic society based on human dignity...

(b) = **Peremptory:**

When interpreting the BoR → court, tribunal or forum must have regard to international law, particularly international human rights law.

→ this is a universal set of rules & norms dealing with the protection of fundamental human rights & consists of a number of international documents & rules of customary international law.

(c) = **Directory:**

A court, tribunal or forum may refer to foreign law when interpreting the BoR.

The rules of foreign law applicable here are those legal principles (ie case law) not in conflict with our legal order → s35(1) interim Constitution referred to 'comparable foreign case law'

→ those legal principles applied in a democratic legal order based on constitutionalism.

Section 1 = one of the most NB provisions in the supreme constitution:

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 & freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

General rules & principles of constitutional interpretation formulated by our courts:

1	<i>Shabalala v The Attorney-General of Transvaal:</i>	A supreme Constitution must be given a generous and purposive interpretation.
2	<i>Nyamakazi v President of Bophuthatswana:</i>	A purposive interpretation of the Constitution is necessary, since it enables the court to take into account more than legal rules. The Constitution must be liberally interpreted, referring to 'flexibility' and 'generosity'.
4	<i>S v Acheson:</i>	During the interpretation of the Constitution, its spirit and tenor must be adhered to. This means that the values and moral standards underpinning the Constitution must be taken into account throughout the entire interpretation process.
5	<i>S v Makwanyane:</i>	A provision in the Constitution cannot be interpreted in isolation, but must be read in the context as a whole. The context includes the historical factors that led to the adoption of the Constitution in general, and the fundamental rights in particular
6	<i>Shabalala v The Attorney-General of Transvaal:</i>	Respect must be paid to the language in the Constitution, the context is anchored to the particular constitutional text. Although the text is balanced and qualified by various contextual factors, the context is anchored to the particular constitutional text. In other words, historical context and comparative interpretation can never reflect a purpose that is not supported by the constitutional text as a legal instrument.
7	<i>S v A Juvenile:</i>	The Constitution has bestowed on the court the sacred trust of protecting human rights.
8	<i>Khala v Minister of Safety and Security:</i>	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
9	<i>Qozoleni v Minister of Law and Order:</i>	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. Constitutional interpretation is an exercise in the balancing of various societal interests and values.
10	<i>Nortje v Attorney-General of the Cape:</i>	These methods and principles of constitutional interpretation don't constitute a firm set of rules and constitutional interpretation is an inherently flexible process.
11	<i>S v Zuma:</i>	The principles of international human rights and foreign law must

		be applied with due regard for the South African context
12	<i>S v Makwanyane:</i>	Constitutional interpretation must start and end with the Constitution.
13	<i>Prince v Cape Law Society:</i>	All judges and judicial officers are obliged to continuously interpret and apply legislation to give effect to fundamental values and rights in the Constitution.

In *Prince v Cape Law Society* the correct way of interpreting the Constitution is set out:

<i>Prince v Cape Law Society</i>

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.

3.2 **A comprehensive methodology**

How do we apply these principles?

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

→ These five principles are also summarised in *S v Makwanyane*

These traditional methods are complementary & should be applied in conjunction with one another.

→ In other words, they are in a continuous interaction:

(1) **Grammatical interpretation (meaning of language)**

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

(2) **Systematic interpretation (text and context)**

- This method is concerned with the clarification of the meaning of a particular constitution provision in conjunction with the Constitution as a whole.
- This is also known as 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 environmental merits in which the Constitution operates.

(3) **Teleological interpretation (content & sweep of the ethos expressed in the structure of the Constitution)**

- This method deals with 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.

(4) **Historical interpretation**

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

(5) **Comparative interpretation:**

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

In *S v Makwanyane* the following was said regarding the above:

