

BILL

To provide for the alteration of the sex description of certain individuals in certain circumstances; and to amend the Births and Deaths Registration Act, 1992 in consequence; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:—

Application for alteration of sex description

1. (1) Any person whose sex organs have been altered by surgical or medical treatment or by evolution through natural processes, or who is undergoing such treatment or by evolution through natural processes, may apply to the Director-General of the Department of Home Affairs for the alteration of his or her sex description on his or her birth register.

(2) An application contemplated in subsection (1) must—

- (a) be accompanied by a certificate of the applicant;
- (b) in the case of a person whose sex organs have been altered by surgical or medical treatment, be accompanied by reports stating the nature and results of any procedures carried out and any treatment applied prepared by the medical practitioners who carried out the procedures and applied the treatment or by a medical practitioner with experience in the carrying out of such procedures and the application of such treatment; and
- (c) in every case, be accompanied by a report stating the present sex appearance of the applicant prepared by a medical practitioner other than one concerned in the application.

(3) If the Director-General refuses the application contemplated in subsection (1), he or she must furnish the applicant with written reasons for the decision.

(4) If an application contemplated in subsection (1) is refused, the applicant may apply to the magistrate of the district in which he or she resides for an order directing the change of his or her sex description.

(5) An application contemplated in subsection (4) must be accompanied by the documents referred to in subsection (2) and the reasons for the Director-General's refusal.

(6) On the date and at the time determined by the magistrate the applicant must appear before the magistrate in chambers and must at that time furnish the magistrate with additional information and documents as the magistrate may require.

(7) If the application is refused, the applicant may apply to the Director-General to alter the sex description of the applicant in the birth register.

(8) An application contemplated in subsection (7) must be accompanied by the documents referred to in subsection (2) and the reasons for the Director-General's refusal.

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and International Law

University of South Africa
Pretoria

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Printed and published by the
University of South Africa
Muckleneuk, Pretoria

IOS2016/1/2010

98508598

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Preface

How to get the best out of this study guide

Welcome to this course in the Interpretation of Statutes (IOS2016). We trust that you will find your learning experience intellectually stimulating and personally enriching. As we indicated in Tutorial Letter 101 for this academic period, your study package for this course consists of three things:

- (1) a **prescribed textbook** that you must purchase yourself (Christo Botha *Interpretation of statutes: an introduction for students* (2005 4th ed);
- (2) this **study guide**, which you received at registration; and
- (3) a series of **tutorial letters**, which you will receive during the semester.

The prescribed textbook contains the bulk of the prescribed material that you have to study for this course. This study guide contains a number of additional court cases that must also be studied for the examination. Apart from these cases, the study guide does not contain any other prescribed material.

The purpose of the study guide is to guide you through the prescribed textbook by providing additional explanations and examples from case law, activities based on each prescribed section of the textbook, and feedback on those activities. Please complete all the activities, as many of them contain additional cases that must be studied for the examination.

The format of this study guide is the same for each chapter of the prescribed textbook. We begin by identifying the chapter of the prescribed textbook that you have to study. We then provide general comments about the nature and importance of the chapter and the problems it deals with. We go on to discuss the sections in the chapter one by one. You might be asked to complete a number of activities as you work through each section. Where necessary, feedback is provided on these activities. If you find it difficult to complete any of the activities, it is a good indication that you have not yet mastered the material. Work through the section again, discuss it with fellow students or contact one of your lecturers and then return to the activity. In some of the chapters, we also discuss court cases in

detail. You must study these cases carefully. Each chapter concludes with a list of self-assessment questions.

Some of the chapters also contain a section entitled “Food for thought”. The aim of these sections is to stimulate further thought. You need not study these sections for the examination.

By following the above-mentioned structure, you will work your way systematically through the whole textbook. Since every student’s personal circumstances differ, we do not provide a detailed study programme in this guide. If you have an opportunity to join one of the tutor programmes presented at the various regional centres of Unisa, you will be provided with a study programme broken down into specific weeks (consult your tutorial letters for more detail about this option).

The textbook itself can be divided into a number of smaller themes or sections. It begins with an introduction to the subject (chapter 1). The next three chapters (chapters 2 to 4) focus on the legislative or law-making process. This includes a discussion of the nature, creation, commencement and, finally, demise and amendment of legislation. The next four chapters (chapters 5 to 8) deal with the interpretation of legislation and the three phases of the interpretation process. Chapter 9 deals with the consequences of noncompliance with legislative provisions. Chapter 10 deals with constitutional interpretation.

On the basis of the textbook the content of the course can be divided into the following sections:

SECTION A: General introduction (chapter 1)

SECTION B: The legislative process (chapters 2 to 4)

SECTION C: The interpretation process (chapters 5 to 8)

SECTION D: Noncompliance with legislation (chapter 9)

SECTION E: Constitutional interpretation (chapter 10)

SECTION F: Conclusion

We now invite you to join us in working through each of these interesting sections, one by one. We wish you success with your studies.

SECTION A

GENERAL INTRODUCTION

(Chapter 1)

Before we can study the subject Interpretation of Statutes, we first need to establish what the subject entails and how the prescribed textbook approaches this field of law. Section A discusses the structure and philosophy of the textbook that is used in this module.

CHAPTER 1

General introduction

What will we study in this chapter?

After having worked through this chapter you should be able to

- (1) provide your own definition of statutory interpretation as a subject of study
- (2) explain why statutes cannot be interpreted in a mechanical or rule-like fashion
- (3) discuss the two different meanings of the phrase “interpretation of statutes”
- (4) explain how Christo Botha structures the many rules and principles of statutory interpretation in his textbook.

Although this is an introductory chapter, it contains important information about the way in which Christo Botha approaches the study of statutory interpretation in his prescribed textbook. The chapter tells you something about the approach to, or philosophy of, the subject that was adopted by the author of the textbook. The chapter highlights the key theoretical assumptions or themes of the textbook as a whole. It is important to understand the structure and philosophy of the textbook before you start studying it.

What is the central question to be answered?

There are various possible approaches to the interpretation of the statutes, based on the way the different rules and principles of statutory interpretation are organised. And there are as many ways of organising these rules and principles as there are legal textbooks on the market. The important question to ask before we start using our textbook is how the author, Professor Christo Botha, has chosen to organise the rules and principles of statutory interpretation. What is more, we need to understand why he decided to organise the rules and principles of statutory interpretation in this particular way. In other words, which theoretical assumptions (or philosophical approach) are embodied in the textbook we are about to use? These are some of the questions that we will explore in this introductory chapter.

TIP

Chapter 5 contains a more detailed discussion of the themes that are introduced here. In our experience it is advisable to study chapters 1 and 5 together.

1.1 WHAT IS THE INTERPRETATION OF STATUTES?

In this paragraph Botha supplies a definition of statutory interpretation and discusses the reasons why the interpretation of statutes (legislation) is not a mechanical or rule-bound activity. To better understand what Botha is trying to teach us, consider the following problem of legal interpretation:

During the 2009 national elections, a dispute broke out between the ANC and the opposition parties about the inclusion of Ms Winnie Madikizela-Mandela on the list of ANC candidates for Parliament. Section 47(1)(e) of the Constitution states that anyone who has been “convicted of an offence and sentenced to more than 12 months’ imprisonment” is not eligible to be a member of Parliament for the duration of the sentence and a period of five years thereafter. Ms Madikizela-Mandela had been convicted of fraud in 2004 and sentenced to three-and-a-half years’ imprisonment, suspended for five years. Was she eligible to serve as an ANC member of Parliament? The answer to the question depends exclusively on the meaning of section 47(1)(e) of the Constitution. How should the meaning of the words “sentenced to imprisonment” be determined? Is there a mechanical way of interpreting the section that will give us the only correct answer to our question?

On the one hand it seems fairly clear that the words “sentenced to imprisonment” are used in everyday language to include the kind of sentence that Ms Madikizela-Mandela received. On the other hand, it seems clear that we can hardly determine the meaning of the words without having a clear idea about their purpose. Why should people who were convicted and sentenced to imprisonment for more than 12 months be excluded from Parliament? The answer must be because we want to keep **serious criminals** out of politics (note that the section does not disqualify all criminals). If this is so then the next question becomes what should be regarded as a serious criminal for the purposes of the section (rather than what we ordinarily mean by the words sentenced to imprisonment). The fact that Ms Madikizela-Mandela received a suspended sentence clearly shows that she was not regarded by the court as a serious criminal who had to be removed from society. Her suspended sentence should therefore not be regarded as a “sentence of imprisonment” for the purposes of section 47(1)(e).

Whatever your view of the matter might be, it should be clear that the interpretation of statutory and constitutional provisions is not as clear-cut as many people might assume. Should we look behind the ordinary meaning of words? How do we find out what the purpose of a provision is? The complexity of the interpretation process is the first point Botha tries to bring across. As a starting point for our discussion, carefully look at the definition of statutory interpretation that Botha supplies. Botha defines the interpretation of statutes as “the body of rules and principles used to construct the correct meaning of legislative provisions to be applied in practical situations”. The meaning of the phrase “legislative provisions” is discussed in chapter 2. At this point, let’s look at the other elements of Botha’s definition.

Botha explains that the interpretation of statutes is neither an easy nor a mechanical process (see also paragraph 1.4). Botha mentions many reasons why statutory interpretation is not a mechanical activity. For example, that the many rules of interpretation (also known as the maxims, canons, and presumptions of interpretation) overlap and cannot be neatly compartmentalised, that the language used in legislation is often difficult and obscure, that the circumstances and contexts in which legislation must be applied differ, that the courts have not developed a clear and predictable pattern of application for certain rules, that all interpreters are influenced by their own history and background, and that interpretation involves value judgments. Look at each of these factors carefully.

TIP

This last-mentioned reason refers to the influence of the new Constitutional order on the interpretation process. This influence is further explained in paragraph 1.2, paragraph 5.2.4 and chapter 10 of the prescribed textbook. You should, ideally, study these parts of the textbook together.

Botha believes that the complexity of statutory interpretation is captured well by Donaldson J, whom he quotes. Donaldson J suggests that statutory interpretation is a craft (rather than a science), and that a judge can never function like a computer which can supply us with “the mathematically correct answer” to every legal problem involving the application of legislation. However, when Botha defines statutory interpretation he still speaks about the rules and principles which provide us with the “correct” answers to legal problems. Is Botha not contradicting himself here? If the rules and principles of statutory interpretation are as complex, and the results of interpretation indeed as unpredictable as he suggests, how can he still speak of “correct” answers or meanings? How can he quote someone who says that there are no “correct answers” to legal problems? It seems

that Botha is either overstating the complexity of statutory interpretation, or that he should refine his definition to remove references to the objective “correctness” of interpretations.

We want to suggest that from Botha’s own account of the non-mechanical nature of the interpretive process, a better definition of statutory interpretation might read as follows: “Statutory interpretation as a subject studies the body of rules and principles that are used to construct and justify the meaning of legislative provisions when they are applied in practical situations”.

1.2 THE NEW CONSTITUTIONAL ORDER

In this paragraph Botha describes the recent history of statutory interpretation. He focuses on the fact that a new method of statutory interpretation has been introduced by the new constitutional order. This is a key statement and a central theme of the whole textbook. Botha returns to it frequently. Why Botha says that a new and uniform method was introduced by the new Constitution and what that method entails are discussed in more detail in chapter 5, especially in paragraph 5.2. You must study paragraph 1.2 together with these paragraphs of the textbook.

For now, simply read through paragraph 1.2 and identify at least four characteristics of statutory interpretation in the era immediately before 1994. You will use this list later on to compare the positions before and after 1994.

1.3 GLOSSARY OF DEFINITIONS AND TERMS

The prescribed textbook uses a number of technical terms. The glossary contains many of these terms. The glossary is a handy reference to which you can return while studying the rest of the textbook. You do need to know what all the terms listed mean, but you do not need to be able to restate, verbatim, the various definitions supplied by Botha.

1.4 THE PROCESS OF INTERPRETATION: A TEACHING TOOL

In this paragraph, Botha deals with an important feature of statutory interpretation as a legal subject. He explains that the term “statutory interpretation” refers both to the process or **activity** of interpreting statutes, and to **the law** (ie the body of rules and principles) that regulates the way statutes are interpreted (see our suggested definition above). He says that it is difficult to understand the process of interpretation merely by looking at the legal rules and principles of in-

interpretation. In other words, the **legal rules and principles** cannot, by themselves, tell us anything conclusive about **the activity or process** of interpretation. This is an important theoretical assumption about our subject. Botha says that from the outset we should distinguish between the activity of interpreting legislation, on the one hand, and the laws that regulate that process, on the other. The same distinction applies to the activity of cooking a meal. The process of cooking can and must be distinguished from the study of recipe books (rule books on cooking). A good cook not only knows many good recipes, she also knows how to cook. More is involved in the process than mere knowledge of the rule book. Keep this in mind when you study the rule book on statutory interpretation.

The dual nature of statutory interpretation as both a **body of law** and a **practical activity** has important implications. The first implication involves the way we study the subject. The second implication involves the way in which the textbook is structured. Let's look at each implication briefly.

Note, firstly, that this subject is different from most other legal subjects where the focus falls only on the knowledge of legal rules (as opposed to the ability to perform a specific activity). You should therefore adapt your study methods and your approach to this subject accordingly. Please do not think that you can merely memorise a number of legal rules or principles shortly before the examination (to memorise a recipe does not mean that you can cook a delicious meal). You need to develop an understanding of the interpretive process and activity itself.

Secondly, a textbook on statutory interpretation can either present the rules and principles of interpretation from top to bottom (it would then focus on statutory interpretation as a body of law), or it can present the process of statutory interpretation from beginning to end (it would then focus on statutory interpretation as a practical activity that unfolds in steps over time). Botha has decided to adopt the second strategy. He takes us through the interpretation process from beginning to end and deals with the basic principles and rules applicable to each step of the interpretive process. Because some rules and principles are applicable to more than one step in the interpretive process, the textbook might appear repetitive and poorly structured. This is not the case.

To understand the structure of the textbook, it is important to know that Botha divides the process or activity of interpreting legislation into three phases. During the **initial phase**, the text of the legislative provision in question is read to discover its initial meaning. During the **research phase**, the purpose of the legislation is determined. During

the **concretisation phase**, the facts of the case, the initial meaning of the text, the purpose of the legislation, and the values of the Constitution are reconciled to arrive at an appropriate interpretation of the legislation in question. The textbook discusses each of these steps or phases and the rules applicable to each. The textbook tries to be as practical as opposed to a theoretical guide to statutory interpretation.



ACTIVITY 1

(Doing or knowing statutory interpretation?)

Botha claims that there is a difference between the interpretation of statutes as a practical activity (the process of interpretation) and the interpretation of statutes as a field of law (the rules and principles of interpretation). He continues to argue that the process of statutory interpretation cannot simply be described in terms of the rules and principles of statutory interpretation. Does this make any sense? Write a paragraph in which you describe an activity from your ordinary daily life where the same distinction applies between the activity itself (the process) and the rules which regulate the activity.

FEEDBACK

There are many such activities. We referred above to the example of cooking. The game of soccer is another example. Can somebody really understand soccer and know how to play it by simply studying the official FIFA rule book? Does that person not have to play or at least watch a soccer game being played to really understand what soccer is? Perhaps Botha is trying to make the same point about statutory interpretation. Just as the game of soccer is not the same as the rules of soccer, the game of law (in this case the interpretation of statutes) is not the same as the rules of law (or the maxims and canons of statutory interpretation). Why is this of relevance to us?

Many students complain that the subject lacks the coherence and neat structure of other areas of law. One of the reasons why students experience this subject as (far too) indeterminate is precisely that the activity of interpretation cannot be described in terms of a neat and coherent set of rules. We believe that the same applies to all areas of law. However, law's essentially performative or game-like character (law is a matter of **doing things** with rules and principles, not just the rules and principles themselves) is particularly evident in this subject.

The point we are making is that this course might upset and unset-

tle many of your preconceptions and stereotypes about the nature of law and, even more importantly, about the nature of legal studies. Studying law is not simply about memorising a set of rules (just as learning to play soccer is not simply about memorising the rule book). When you study this course, you are not merely memorising a set of rules and principles, you are learning how to do something, namely, how to interpret or read legislation. You are learning an activity. What is more, as Botha explains, that activity cannot be performed in a logical and rule-like or deductive fashion.

For many students this is where the problem lies. Many students still operate under the impression that the solution of legal problems is a step-by-step, rule bound or logical activity. A rule is supplied or learned, a set of facts is supplied, and the rule is applied to the facts in a logical fashion to establish the correct legal position or solution. This course and the textbook are both based on the assumption that the meaning of legislation cannot be established in the same way. The interpretation of law requires a holistic or lateral mode of reasoning (ie looking at the picture or situation or context as a whole), rather than a linear mode of reasoning (ie following logical steps one after the other). You will achieve success in this course if you understand and appreciate that the interpretation of statutes is not like most other legal subjects, and should not be studied as just another legal subject.

It will help if you keep in mind the analogies of learning to cook and leaning to play soccer. We trust that, with a little bit of practice, you will soon learn how to interpret legislation.



TEST YOURSELF

- (1) List and briefly discuss five reasons why the interpretation of legislation is not a rule-bound activity.
- (2) Identify and discuss the main characteristics of the interpretation of statutes as a legal subject before 1994.
- (3) Although statutes cannot be interpreted by following a set of logical steps in sequence, Botha does identify various phases in the interpretation process. Identify these phases and briefly explain what happens in each phase.
- (4) Explain why learning to interpret legislation is a bit like learning to cook or learning to play soccer.

SECTION B

The legislative process

(Chapters 2 to 4)

Before we can begin to interpret the meaning of legislation, we first need to establish whether the legislation is in force. We also need to establish whether and when the legislation came into force, and whether it has at any point been amended or repealed. In order to determine whether legislation is in force (and, if so, which version of it), we need to study the legislative process from the promulgation (or the commencement of legislation) to the repeal (or demise) of legislation. Section B (chapters 2 to 4) therefore deals with the legislative process as a whole.

CHAPTER 2

What is legislation?

What will we study in this chapter?

After having worked through this chapter you should be able to

- (1) explain what is regarded as legislation in South African law
- (2) classify different pieces and types of legislation
- (3) explain the basic structure or parts of legislation
- (4) discuss the relationship between legislative interpretation and common law.

What are the basic questions to be answered?

The rules and principles of statutory interpretation apply only to legislation. Our first task is therefore to establish what is regarded as “legislation” in South African law. Consider the following example. Section 89 of the Local Government: Municipal Electoral Act 27 of 2000 reads as follows:

Regulations

- (1) The [Electoral] Commission must make regulations regarding any matter that must be prescribed in terms of this Act.
- (2) The Commission may make regulations regarding any matter –
 - (a) that may be prescribed under this Act; or
 - (b) that it considers necessary or expedient in order to achieve the objects of this Act.

The Commission has issued regulations in terms of this section. Are the regulations under the Act also regarded as “legislation”? Do the same rules and principles of statutory interpretation apply to both the Act and the regulations? If the regulations are regarded as legislation; do they fall into the same class or category as the Municipal Electoral Act? These are some of the questions that will be answered in this chapter.

2.1 WHAT IS LEGISLATION?

As a student of statutory interpretation, the first thing that you need to familiarise yourself with is “legislation”. Legislation is one of three formal sources of law in South Africa. The other two are judicial precedent and custom. Legislation or enacted law texts, as Botha explains, are written law enacted by a body (institution) or person (functionary) authorised to do so by the Constitution or other legislation. This definition excludes common law, as does the definition of “law” in the Interpretation Act 33 of 1957. Remember: the importance of distinguishing between legislation and other types of law lies in the fact that rules and principles of interpretation apply only to the interpretation of legislation. You need to study the definitions of the Interpretation Act very carefully.

2.2 CATEGORIES OF LEGISLATION

In this section Botha explains how legislation is classified in South African law. Although legislation may be classified according to various criteria, for the purposes of this course, only three categories are important, namely:

- (i) history (chronological categories)
- (ii) hierarchy
- (iii) status.

Firstly, South African legislation can be divided according to three historical categories, namely: legislation before 1806, old order legislation and legislation in the new constitutional order since 1994. Read paragraph 2.2.1.

More importantly, legislation can also be classified with reference to its place in the hierarchy of legislation and, thirdly, with reference to its status. Study paragraph 2.2.2 very carefully.

As far as the hierarchical classification is concerned, the Constitution is at the top of the hierarchy. Any legislation that is in conflict with the Constitution is invalid. Section 2 of the Constitution says so in so many words. The Constitution is followed by original legislation. This comprises parliamentary, provincial and municipal legislation. Subordinate legislation (eg proclamations and regulations) ranks at the bottom of the legislative hierarchy.

The classification of legislation according to status yields a distinction between original and subordinate legislation. Original legislation is made by elected legislative bodies that derive their authority to enact legislation either directly from the Constitution or from an Act of Parliament. Subordinate legislation, on the other hand, is made

by institutions (bodies) or functionaries (persons) who/which derive their power to enact such legislation from original legislation. In other words, subordinate legislation is authorised by, and is enacted in terms of, original legislation. For example, section 89 of the Electoral Act (an Act made by Parliament) authorises the Electoral Commission to make regulations to further and develop the Act. For more examples of original and subordinate legislation, see Botha.

During the apartheid years the courts could declare subordinate legislation (such as regulations) invalid but they had no authority to pronounce on the validity of original legislation. Under the Constitution the courts can declare any category of legislation invalid. The next question we need to ask is whether the distinction between original and subordinate legislation is still relevant? In our view the distinction is still important for the following reasons: Delegated legislation may not be in conflict with enabling legislation. Persons and/or institutions issuing delegated legislation may only do so within the framework of authority bestowed on them. Delegated legislation cannot influence the meaning of enabling legislation.



ACTIVITY 1

(Original or subordinate legislation)

Look at section 89 of the Municipal Electoral Act 27 of 2000 again. Can you now answer the questions that were posed above: do the same rules and principles of interpretation apply to both the Act and the regulations?

FEEDBACK

Yes. Section 1 of the Interpretation Act states explicitly that the rules of interpretation that are prescribed by the Act apply to the “interpretation of every law” and to “regulations” that were issued in terms of that law. The Municipal Electoral Act is also known as the enabling Act or original legislation, and the regulations as subordinate legislation. In spite of this hierarchical classification, the same rules and principles of interpretation apply to both.

2.3 WHAT IS NOT LEGISLATION?

In the next chapter, which deals with the commencement of legislation, you are told that legislation comes into operation after it has

been published in the *Gazette*. However, not everything published in the *Gazette* constitutes legislation. In this section Botha lists all the documents which, although they may lead to legislation, do not constitute legislation themselves. You will notice that common law rules and unwritten customary laws are not legislation although they are formal sources of South African law.

2.4 STRUCTURE OF LEGISLATION

It is also important that you know how legislation is structured. The extent to which these different structural components may be used to construe legislation is discussed in detail in chapter 7.

2.5 RELATIONSHIP BETWEEN LEGISLATION AND COMMON LAW

Prior to 1994 (before the advent of the new constitutional dispensation) the courts invoked common law rules when interpreting legislation. Common law presumptions are examples of such rules. Although the courts can apply common law presumptions, they have to be consistent with the Constitution. Make sure that you understand the influence of the Constitution on the common law presumptions.

TIP

Study this paragraph on the status of the common law presumptions together with paragraph 5.2, in which the different approaches to common law presumptions in our law are discussed. Specific presumptions are discussed later in the textbook (see, eg, paragraphs 3.4, 4.6, 6.2.2, and 7.5). After studying all these paragraphs, make sure that you have a coherent understanding of the status, use and meaning of the common law presumptions.

2.6 THE PLAIN LANGUAGE MOVEMENT

Read this paragraph in Botha.



TEST YOURSELF

- (1) What is "Legislation"?
- (2) Distinguish between original and subordinate or delegated legislation and give examples of each.
- (3) List the documents that, although they are published in the *Government Gazette*, do not constitute legislation.

- (4) Explain the basic structure/parts of legislation to a colleague.
- (5) Briefly discuss the general effect of the Constitution on the operation of common law presumptions.

CHAPTER 3

Commencement of legislation

What will we study in this chapter?

After having worked through this chapter you should be able to

- (1) explain the difference between the promulgation and the commencement of legislation
- (2) discuss the constitutional and statutory provisions that regulate the commencement of legislation
- (3) discuss the common law presumption that legislation only applies to the future.

What is the central question to be answered?

Before legislation can be interpreted, the first question that needs to be asked is: when did the legislation come into operation and is it still in operation? Consider the following legislative extract:

LOCAL GOVERNMENT: MUNICIPAL ELECTORAL ACT 27 OF 2000

[Assented to 6 July 2000]

[Date of commencement
11 July 2000]

(English text signed by the President)

To regulate municipal elections; to amend certain laws; and to provide for matters connected therewith.

The Municipal Electoral Act was debated in Parliament and adopted by a majority of votes on 4 July 2000. It was signed by the President on 6 July 2008, but it only became law on 11 July 2008.

What accounts for this delay in the commencement of the legislation? Who decided that the legislation should only commence on 11 July 2000? These are some of the questions that will be answered in this chapter.

3.1 ADOPTION AND PROMULGATION

The passing (adoption) and promulgation of legislation are distinct processes. The former refers to the stages through which legislation has to pass before it is accepted by the legislative body concerned. Promulgation follows the adoption of legislation and is a necessary step in putting such legislation into operation.

3.2 REQUIREMENT OF PUBLICATION

The general rule regarding commencement is that legislation comes into operation upon publication in the *Gazette* (see section 13(1) of the Interpretation Act 33 of 1957). Sometimes legislation prescribes another date as the date of its commencement. In other instances, legislation may expressly indicate that it will commence at a later, unspecified, date that will be proclaimed. These general rules have found their way into the Constitution. Sections 81 (not section 80) and 123 of the Constitution provide that an Act of Parliament or a provincial Act must be published and will take effect when published or on the date determined in terms of the Act. Since municipal by-laws may only be enforced after they have been published, this implies that the general rule that legislation commences after publication applies to them as well.

3.3 COMMENCEMENT OF LEGISLATION

As stated, legislation may come into operation at one of three times

- (1) upon publication in the *Gazette*
- (2) on a day specified in the statute itself, or
- (3) on an unspecified date to be proclaimed.

Read the provisions of section 13(1) and (2) of the Interpretation Act 33 of 1957. Now let's look at each section briefly. You will realise that section 13(1) deals with the first two options. In relation to the requirement that legislation commences on the day of its publication, section 13(2) states that that day shall commence immediately on the expiration of the previous day. Study paragraphs 3.3.1 and 3.3.3 carefully.



ACTIVITY 1

(Commencement of legislation)

Look at the extract from the Municipal Electoral Act 27 of 2000

again. Are you now able to answer the questions that were posed above: What accounts for the delay in the commencement of legislation?

FEEDBACK

After the Act had gone through all the stages in the legislature, it was adopted by the legislature on 4 July 2000. It was then sent to the President, who assented to it by signing the Act on 6 July 2008. However, the Act only came into operation on 11 July 2008. In terms of section 13(1) of the Interpretation Act, this could be because that was the day on which the legislation was published in the *Government Gazette* or that was the date determined in the statute itself.

3.4 THE PRESUMPTION THAT LEGISLATION ONLY APPLIES TO THE FUTURE

In the previous chapter we said that common law presumptions continue to apply provided they are consistent with the Constitution. The values underlying the presumption that legislation deals only with future matters have found their way into the Bill of Rights. Section 35(3)(l) provides that “every accused person has the right to a fair trial, which includes the right not to be convicted of an act or omission that was not an offence under either national or international law at the time it was committed or omitted”; and section 35(3)(n) provides that “every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishment if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing”. However, legislation may expressly state that it applies retrospectively, provided that the retrospective application is constitutionally justified.



TEST YOURSELF

- (1) Distinguish between the adoption and the promulgation of legislation.
- (2) What is meant by “commencement” in section 13(1) of the Interpretation Act 33 of 1957?
- (3) Discuss the presumption that legislation only applies to future matters. Also explain:
 - (a) the reason behind this presumption, and
 - (b) the influence of the Constitution on this presumption.

- (4) Suppose there is an Estate Duty Act of 2009 which provides that estate duty should be levied and paid upon the estate of every person who died after the commencement of this Act. The Act is published in the *Gazette* on Monday 9 January 2009, but only reaches the shelves at 10:00 that morning. Would the Act apply to the estate of Ms X who died at 03h00 in the morning of 9 January 2009?

CHAPTER 4

Demise and amendment of legislation

What will we study in this chapter?

After having worked through this chapter you should be able to

- (1) explain how legislation can be amended by the legislature and the courts
- (2) discuss how legislation can be declared invalid by the court
- (3) explain how legislation can be repealed and/or re-enacted by the legislature.

What is the central question to be answered?

In chapter 3 we saw how legislation comes into being and is put into operation. In this chapter, we shall explore how long legislation remains in operation, how it can be changed and, finally, when it ceases to be in operation.

Consider the following case by way of introduction. In 2002, the Khulumani Support Group (representing some 30 000 victims of apartheid) announced that it was claiming damages from 75 multinational corporations in New York (including IBM, De Beers and Barclays Bank), because these corporations had continued to do business with the apartheid government during the 1980s, in spite of the fact that apartheid had been declared a crime against humanity, and that sanctions had been imposed against South Africa (*Khulumani Support Group (and others) v Barclays Bank (and others)*). The Khulumani Support Group was relying on an old piece of American legislation called the Alien Torts Claims Act. The legislation was adopted in 1789 and gave American courts jurisdiction in cases instituted by non-American citizens where the “law of nations” had been violated. For 200 years the Act was rarely used in America and had been all but completely forgotten. However, it was rediscovered in the 1980s by human rights activists, and has since been used on a number of occasions to claim restitution in American courts from multinational corporations for human rights violations committed elsewhere. (For

example the petroleum company Shell was sued for its logistical support of the Nigerian government while the latter was committing widespread human rights abuses in their fight against rebel insurgents.) The Khulumani Support Group similarly claimed that the companies they were suing had all aided and abetted apartheid and thus contributed to the suffering of the victims which they represented. IBM, for example, supplied computers to the apartheid government, Barclays Bank lent money to the apartheid government, and Shell supplied petrol to the apartheid government.

The case was heard on 6 November 2004, but dismissed on the basis that the link between the normal business activities of these companies and the suffering caused by apartheid had not been established. The Khulumani Support Group filed a notice of appeal on 27 April 2005. The appeal is still to be heard.

The case raises a number of interesting questions. Was the old Act really still in force after all these years? Had its legal authority not diminished and its legal meaning changed over the centuries? Was the Act at all applicable to the claims for restitution brought by victims of apartheid, given that neither the idea of a multinational corporation nor that of a crime against humanity had even been thought of in 1789? Surely the drafters of the Act could not have intended it to be used in this manner? When the old Act is interpreted, should not the term “law of nations” be given the meaning which it had in 1789 as opposed to the meaning it has today? Some of these questions will be answered in this chapter, and some in the chapters that follow.

4.1 GENERAL

The legal position is that all legislation remains in force until either one of two things happens: the legislation is amended or repealed by the legislature, or the legislation is amended or declared unconstitutional by the Constitutional Court.

4.2 AMENDMENT TO LEGISLATION

Legislation can be amended or changed either by the legislature or by the Constitutional Court.

4.2.1 Amendment of legislation (by a competent legislature)

Any competent legislature can change or amend its existing legislation by means of another Act. The legislature can adopt a specific amendment Act or, if it is reforming a whole area and many Acts, can adopt a general laws amendment Act.

4.2.2 Modificative interpretation (by the courts)

TIP

A more detailed discussion of modificative interpretation may be found in chapter 8. This paragraph should be studied together with chapter 8 and, in particular, with paragraph 8.3.

Botha first discusses modification in the ordinary course of things. The point is that, 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.

Botha proceeds to discuss the far more drastic powers to change legislation wielded by the Constitutional Court (ie during constitutional review). 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”.

Botha discusses severance only in passing. Severance means to cut away or sever the unconstitutional part of the legislation in order to keep the rest intact. For example, the court will declare a legislative provision invalid, but “to the extent only that” and then stipulate the part of the provision that will no longer apply.

The second strategy is reading in. This means reading new words or provisions into the legislation. Study this paragraph carefully and then complete the following activity.



ACTIVITY 1

(Reading in)

Botha refers to the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC). The case involved the constitutionality of s 25(5) of the Aliens Control Act 96 of 1991 which reads: “A regional committee may, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorise the issue of an immigration permit.” The section allows the spouse or child of a person with

the status of a permanent resident to immigrate to South Africa to join her or his spouse or parent. However, it happened that a number of 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. The Constitutional Court agreed. The problem was what to do next? Was the only option to declare the whole section unconstitutional? If so, what happens to the statutory benefits of heterosexual couples? Discuss these questions with reference to the different ways in which legislation can be amended.

FEEDBACK

The Constitutional Court decided not to throw the baby out with the bathwater. The court laid down the principles summarised by Botha in paragraph 4.2.2(i) and continued as follows:

“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.”

You need to carefully study the principles laid down in this case and the way in which they were applied to the facts.

4.3 INVALIDATION OF LEGISLATION (BY A COURT)

4.3.1 Unconstitutional provisions

Botha discusses when and how the Constitutional Court can declare a part or even a whole piece of legislation invalid.

4.3.2 Invalid delegated legislation

Botha also mentions that, in the ordinary course of things, subordinate or delegated legislation (such as regulations) can be declared invalid because it does not comply with the requirements of administrative law.

4.4 REPEAL AND SUBSTITUTION

What is the effect when legislation is not simply repealed as a whole, but only repealed in part or supplemented by newer legislation dealing with the same issue? The position in this case is regulated by the Interpretation Act, 1957. Carefully study the wording of section 11.

Also study the difficulties which arise where only certain parts of legislation are repealed and the cases mentioned by Botha.

4.5 EFFECT OF REPEAL

When a piece of legislation is repealed, what is the effect of this on existing rights and proceedings? The position is regulated by the Interpretation Act, 1957. Study the wording of section 12 in detail. All the subsections discussed by Botha essentially rest on the same principle: that everything which was done or achieved or began before an Act was repealed remains in place or must be completed as if the Act were still in force. A good example is the case of *Nourse v Van Heerden* 1999 (2) SACR 198 (W), which is discussed by Botha and must be studied carefully.

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

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

4.6.1 Common law

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. If this is not done, the presumption applies and the legislation must be interpreted in the light of the common law rules which apply to the same issue.

4.6.2 Legislation

Botha states that existing legislation is usually expressly repealed. Most new Acts contain a separate schedule in which all the sections and Acts that have been repealed are listed. The Constitution, for example, contains such a list in “Schedule 7: Laws repealed”. However, sometimes an Act does not expressly repeal or amend existing legislation. In such cases the working presumption is that the new Act has not changed the existing legislation on the topic more than is absolutely necessary. The court must try to reconcile or combine the new and the old law. Only where this is impossible must it be accepted that the new legislation has, by implication, repealed or changed the old legislation.

A good example of this presumption is provided in the case of *Government of the Republic of South Africa v Government of KwaZulu* 1983 (1) SA 164 (A), which is discussed by Botha and must be studied carefully.

4.6.3 Constitutional influences

You do not need to study this section.



TEST YOURSELF

- (1) List and discuss the requirements which were laid down in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* before reading in or severance could take place.
- (2) Briefly outline when and how the courts can invalidate legislation?
- (3) Can the repealed provisions of legislation still have an influence on the interpretation of legislation? Discuss with reference to case law.
- (4) Restate the wording of section 12(2) of the Interpretation Act in your own words.
- (5) Restate the reasoning in the judgments of the following cases in your own words: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*; and *Government of the Republic of South Africa v Government of KwaZulu*.

- (6) Can legislation be repealed by
- (i) disuse?
 - (ii) an explicit judgement of a court?
 - (iii) implication?

Discuss.

SECTION C

The interpretation process

(Chapters 5 to 8)

You have already worked your way through the legislative process (chapters 2 to 4). You have traced the path of legislation from its inception to its demise. You now understand how legislation is enacted and how to establish whether it is still in force and thus applicable to a legal dispute. In the next four chapters (chapters 5 to 8), you will learn how to interpret and determine the meaning of that legislation for a particular dispute. This section forms the core of the subject of statutory interpretation.

TIP

It is essential that you study the interpretive process as it is discussed in chapters 5 to 8 as a single unit. Remember that there are two ways in which the interpretive process can be presented to students. The first is to focus on the various methods that can be employed when a piece of legislation is interpreted (the so-called grammatical, systematic, teleological and historical methods). Some textbooks, like Du Plessis's *Re-interpretation of statutes*, introduce students to the interpretive process by discussing each of these four methods of interpretation one after the other. Botha does not follow this approach, however. He introduces the interpretive process to students as it unfolds step by step over time. He explains his "teaching tool" in paragraph 1.4 of chapter 1. Look at that paragraph again. Botha distinguishes between the initial phase (the first reading and impression of the legislative text), the research phase (digging deeper to find the purpose behind the legislation), and finally, the concretisation or application phase (applying the Act to new facts by restricting or expanding the initial meaning to fit the purpose of the Act).

Because Botha focuses on the different steps in the interpretive process, he is repeatedly forced to return to the same methodological debates at different places in the textbook (he must explain when and how the different methodologies undertake the initial reading of the text, then he must explain when and how the same methodologies undertake the research phase of the interpretive process, and so forth). Some students find this confusing and struggle to develop a clear understanding of the interpretive process as a whole.

We have sympathy for this difficulty. However, keep in mind that Botha is defending a contextual approach to interpretation against the older textual approach (see further below). This has led him to combine his *justification* of the contextual approach (WHY we should adopt this method) with his *description* of the contextual approach (WHAT we should do when following this method).

/continued ...

TIP

Botha is especially concerned with the debate between supporters of interpretive methods that concentrate on the text and structure of legislation (he calls them textualists or literalists or intentionalists) and supporters of interpretive methods that concentrate on the broader context of legislation (he calls them contextualists or purposivists). It is this debate that constantly crops up in his discussion. It is very important that you develop a clear understanding of the main arguments in this debate.

Botha devotes chapter 5 to this debate. He is a contextualist himself and presents a critique and historical overview of textualism. Please do not proceed to the rest of the section before you have mastered this chapter. The chapter explains WHY we can no longer follow the textual method of statutory interpretation. When studying chapter 5, it is best also to refer to the paragraphs in chapters 6, 7 and 8 in which the same methodological debates are also discussed (paragraph 6.1 (the difference between the intention of the legislature and the purpose of legislation); paragraph 7.3.3(i) (the mischief rule); and paragraph 8.2 (the law-making function of the courts)). Botha's aim is to justify and defend the contextual method of interpretation. He wants you to understand WHY we are interpreting legislation in post-apartheid South Africa as we do.

Once you understand the theoretical and methodological issues (the WHY question), it becomes easier to study what contextualists do when they interpret legislation. Botha describes how the contextualist approach proceeds through three phases (the WHAT question). With reference to the initial phase (chapter 6), you need to know how one reads the text of legislation when one opens a statute (as opposed to the text of a newspaper, or a holy text like the Bible or Koran). Specific legal rules, principles and presumptions apply to the initial reading of legislation. With reference to the research phase (chapter 7), you need to know how to determine the purpose of legislation and how to align that purpose with the purpose of the Constitution (again, specific rules, principles and presumptions apply).

/continued ...

With reference to the concretisation phase (chapter 8), you need to know how the text and purpose are combined to determine or concretise the meaning of legislation in a particular case.

When studying this section your first aim should therefore be to separate the WHY questions from the WHAT questions of statutory interpretation, and then to develop a clear understanding of each. Chapter 5 deals primarily with the WHY and chapters 6, 7 and 8 with the WHAT questions. However, remember that the WHY question is again discussed in certain paragraphs in chapters 6, 7 and 8. These paragraphs are clearly marked below and with chapter 5.

With these introductory remarks in mind, we are now ready to enter the wonderful world of statutory interpretation.

CHAPTER 5

How legislation is interpreted

NOTE: You do not need to study section 5.3: Jurisprudential perspectives on statutory interpretation.

What will we study in this chapter?

After having worked through this chapter you should be able to

- (1) critically discuss the methodological debate between the textual and contextual approaches to statutory interpretation
- (2) critically explain how textualists interpret legislation by referring to examples from case law
- (3) critically explain how contextualists interpret legislation by referring to examples from case law
- (4) give reasons why the contextualist approach should be adopted in post-apartheid South Africa.

What are the central questions to be answered?

There are many ways to read and interpret legislation. The different methods or approaches often lead to dramatically opposite results. Consider the case of *Jaga v Dönges*. In this case the court had to decide what the term “sentenced to imprisonment” meant (also recall the Winnie Madizikela-Mandela case mentioned in chapter 1 above). Jaga received a suspended prison sentence and the question was whether he could be deported, on the grounds that he had been “sentenced to imprisonment”. The majority of the court adopted a textual method of interpretation (see further below) and concluded that a suspended sentence is a sentence of imprisonment, and that Jaga could be deported. The minority of the same court adopted a contextual method of interpretation (see further below) and concluded that a suspended sentence is not a sentence of imprisonment, and that Jaga could not be deported. On the basis of the judgment, Jaga was ordered to leave South Africa permanently. The method of interpretation that was chosen by the court determined his fate.

Given the far-reaching implications of our methodological choices, what methods are available and what are the differences between

the textual and the contextual methods of statutory interpretation? Which of the two approaches to interpretation should we adopt and why? These questions are discussed and answered in this chapter.

5.1 INTRODUCTION

Botha essentially repeats what was said in paragraph 1.2, namely that statutory interpretation as a discipline lacked a single theoretical starting point before 1994. As a result, a hotchpotch of conflicting rules, principles and methods were applied. However, the Constitution now prescribes a single theoretical starting point and methodology for the discipline as a whole, namely the contextual approach. The rest of the chapter explains these two points. It sets out the theoretical differences between the textual and contextual approaches, and recounts the history of these two approaches in our law before 1994 (paragraphs 5.2.1 and 5.2.2). Botha then proceeds to argue that the new constitutional order has resulted in a move away from the textual towards the contextual approach (paragraph 5.2.4 in the textbook (it should read 5.2.3)). The chapter concludes with a comprehensive description of the contextual approach as the “practical and inclusive method of interpretation” (paragraph 5.2.4).

5.2 THEORIES OF INTERPRETATION

TIP

Read this paragraph with paragraph 6.1 (the difference between the intention of the legislature and the purpose of legislation); paragraph 7.3.3(i) (the mischief rule); and paragraph 8.2 (the law-making function of the courts). The discussion in this paragraph combines (i) the history of the textual and contextual approaches in South Africa before 1994, and (ii) the nature of the two approaches. Make sure that you clearly separate these two issues. Make sure you understand the differences between the two approaches first. This is why we also refer you to the discussions in paragraphs 6.1 and 8.2. Once you understand the theoretical differences between the two approaches, you can turn to the history of their application and reception in South Africa. Pay special attention to the present constitutional position.

5.2.1 The orthodox text-based (literal) approach

Botha starts by listing the various rules of interpretation that apply under the textual approach. The primary rule of textual interpreta-

tion states that if the ordinary or plain meaning of the words in a legislative provision is clear, that meaning must be applied. Because ordinary citizens may rely on the everyday meaning of legislation, the courts may not proceed beyond the plain meaning of the text. Interpretive questions must first, and as far as possible, be settled by the dictionary.

The golden rule of textual interpretation states that only if the wording of the legislative provision is ambiguous (there is more than one dictionary meaning of the words in question), or if the ordinary meaning leads to such obviously absurd results that no legislature could have intended that the ordinary meaning should be applied in the circumstances, can the court deviate from the ordinary meaning of the words in the legislation. What should a court do where it cannot simply apply the plain meaning of the words?

In these circumstances, the court may turn to a number of secondary aids. These aids are found both in other parts of the legislative text beyond the wording of the specific section in question (the so-called internal aids) and outside the legislative text as a whole (so-called external aids). The internal aids are further discussed in paragraph 7.2 and the external aids in paragraphs 7.3 and 7.4. Only when it is not clear from the wording of the legislative provision itself what the legislature intended, should the court look at the internal aids contained in the rest of the legislation (the title, long title, preamble, chapter headings etc) to determine what the intention of the legislature was. Only where the legislation as a whole still does not provide an answer can the court consult the external aids (commission reports, parliamentary debates, memorandums).

Only in cases where the language (the primary indicator of legislative meaning) is unclear or absurd, and the internal and external aids (the secondary indicators of legislative meaning) cannot resolve the uncertainty or absurdity, then the court can turn to a set of common law presumptions (the tertiary aids or indicators of legislative meaning) in order to resolve the uncertainty. In these cases, the court in effect concedes that it cannot determine what the legislature actually intended, and that it will therefore make an assumption about what the legislature intended. These assumptions are discussed by Botha in various instances in the textbook. The assumptions are common law ideals of the good legislature that we simply ascribe to our actual legislature in cases of doubt. We assume that a good legislature would not exclude the jurisdiction of the courts (paragraph 7.5.2), nor would it attempt to change the existing law more than is necessary (paragraph 4.6).

In order to deepen your understanding of the textual approach as it applied in South Africa in the last years of the apartheid era, com-

plete the following activity. Remember, your first aim is to understand WHAT textualists do when they interpret legislation.



ACTIVITY 1

(The textual approach)

You work as a judge's clerk and are confronted with the following set of facts: A portion of the N3 between Johannesburg and Durban was declared a toll road in terms of section 9(1) of the National Roads Act 54 of 1971. 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 79 kilometres, 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 kilometres 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.

The judge has asked you to help him prepare a judgment. What should the court decide here? How should the phrase "an alternative road" be interpreted? Perhaps it would help to use a dictionary to look up what the words "road" and "alternative" mean? The judge has asked you to do so. Write down the ordinary language meanings of "road" and "alternative". Are you any closer to resolving the legal dispute?

FEEDBACK

The case in question is *Public Carriers Association v Toll Road Concessionaries Pty (Ltd)* 1990 (1) SA 925 (AD). Botha refers to this case 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 as a last resort when the textual approach could not (ie when the language, the secondary aids and the common law presumptions could not resolve the uncertainty or absurdity). 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. Nevertheless, it also serves as a good example of the textual 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 did not provide any solution to the problem. What next?

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. At the time this was a controversial step to take. The court therefore made the statement quoted in the textbook in paragraph 5.2.1 in order to justify its approach. However, the court then continued as follows: “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 s 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 s 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.

It turns out that the attempt to resolve the interpretation problem by appealing to the dictionary was not very successful. Critics of the textual approach argue that this will be so in most cases, because most words are open to different meanings in different contexts. This point is also made by Botha in paragraph 5.2.1. Botha continues to list and discuss a large number of other points of criticism against the textual approach (these include the basic philosophical assumptions about the role of the legislature (parliamentary sovereignty), the role of the court (legal positivism), and the nature of language (essentialism)) that originally gave rise to the textual approach. You must study these points in detail. Your aim is to establish WHY we should no longer follow the textual approach, in spite of its long and established history. To develop a clear understanding of this debate, complete the following activity.



ACTIVITY 2

(Criticism of the textual approach)

Read paragraph 5.2.1 and identify at least 12 points of criticism of the textual approach (including the way in which this approach was introduced into our law). Make a list of these 12 points and briefly explain the meaning and significance of each.

FEEDBACK

Botha himself lists many of these points in bullet form. However, he also adds to the list in the general discussion. Make sure that you include all the bulleted points and that you add the points mentioned in

the general discussion to the list (eg, that the textual approach leaves little room for judicial creativity). In order to make sure that your list is as comprehensive as possible, it might be fruitful to include the criticisms levelled against the textual approach in paragraphs 5.2.2 and 5.2.3 and in chapters 6, 7, and 8. You might want to return to your list and add to it as you work through these paragraphs and chapters later.

5.2.2 The purposive (text-in-context) approach

Even before 1994, the purposive approach was applied by the courts from time to time. This approach dates back to 16th century English law (see paragraph 7.3.3(i)) and has resulted in a number of important minority judgments. However, it has always been overshadowed by the textual approach. Botha is a defender of the contextual approach. He describes at various points how the contextual or purposive approach works and how it differs from the textual approach (see paragraphs 5.2.2; 5.2.3; 5.2.4; 6.1.4; 7.1 and 8.2). Study these paragraphs together. It is essential that you develop a proper and in-depth understanding of WHAT contextualists do when they interpret legislation. However, these paragraphs also explain WHY we should follow the contextual approach in post-apartheid South Africa. The WHAT question of contextual interpretation dominates paragraph 5.2.2 and the WHY question of contextual interpretation dominates paragraph 5.2.3.

In order to deepen your understanding of the differences between the textual and the contextual approaches, work through the following activity. The activity takes you back to the *Jaga v Dönges* case with which this section started. Your primary aim is to understand WHAT textualists and contextualists do when they interpret legislation. However, the question WHY the contextualist approach is preferable also features in the case.



ACTIVITY 3

(The contextual approach (before 1994))

During the early 1950s, Jaga was caught selling unwrought gold. He was sentenced to “three months imprisonment suspended for three years”. Section 22 of Act 22 of 1913 read as follows: “Any person who has been sentenced to imprisonment for any offence commit-

ted 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 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 had not been sentenced to imprisonment. The Minister argued that a suspended sentence of imprisonment is still a sentence of "imprisonment" within the ordinary meaning of section 22. Jaga argued that "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 he was not (his sentence was merely suspended and he was allowed to go home).

Assume that you are one of the judges in the case. There is a debate among the judges in the tearoom on whether the textual or contextual approach should be followed. Explain to your colleagues how the textual approach would be applied, how the contextual approach would be applied, and which should in your view be adopted.

FEEDBACK

Regardless of what the judges who were discussing the case over tea might have thought, the majority of the court decided to adopt a textual approach (as was common in 1950 when the case was heard). The court held that the words "sentenced to imprisonment" were not further defined or qualified by the legislature. The plain meaning should therefore be determined and applied. "Imprisonment", in plain language, meant that the sentence imposed on the offender contained a period of imprisonment (suspended or not) as an element. The warrant was thus legally issued as Jaga did receive a sentence of imprisonment.

In a minority judgment, Schreiner JA (to whom Botha refers in the textbook), by contrast adopted a contextual or purposive approach. He came to the opposite conclusion. His judgment is extremely important and has been cited with approval by the Constitutional Court on more than one occasion.

Schreiner JA described the contextual approach 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 used here, is not limited to the language of the rest of the statute and is regarded as throwing light of a dic-

tionary 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 to 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 be given such an exaggerated importance that the language used in the legislation becomes strained, or otherwise the text may be given such an exaggerated importance that verbalism and consequent failure to further the aims of the legislation might result.

The real impact of Schreiner’s judgment and his contextual approach lies in his willingness to accept that the phrase “sentenced to imprisonment” did have 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 who should be removed from society by deportation. However, the suspension of prison sentences has the opposite aim. A suspended sentence 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 not serve the purpose of the legislative provision (to remove an offender from society). The deportation warrant was thus illegally issued as Jaga had not been sentenced to imprisonment for the purposes of section 22.

Schreiner JA held that even the textual approach, if it was correctly applied, should have led to the same conclusion. It is worthwhile to consider this criticism of the majority approach as it sheds valuable light on the inner working and limits of the textual approach. According to Schreiner JA, the ordinary meaning of the expression “sentenced to imprisonment” is ambiguous, since the expression could

mean both “being physically removed to prison” or “being sentenced where the sentence includes imprisonment”. Because of this ambiguity, the secondary aids had to be applied. Since there were no secondary aids available in the case which could resolve the choice between the two meanings, the tertiary aids had to be applied. One common law presumption is that legislative provisions must be interpreted in favour of individual freedom. It must therefore be presumed that the legislature intended the deportation of persons only where these persons were unconditionally sentenced to imprisonment. To hold otherwise, as the majority did, would subject an unnecessarily large range of offenders to the very drastic measure of deportation. It would thus fail to protect the value of individual freedom.

It is worthwhile to reflect on the implications of Schreiner’s critique. 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 in favour of individual freedom any role in its judgment. They simply resolved the case with an appeal to the apparent clarity of the words that were used by the legislator (Botha’s first point of criticism). However, the meaning of the words used was not so clear to the other members of the court (Botha’s fourth and fifth points of criticism).

5.2.3 The influence of the supreme Constitution (wrongly numbered 5.2.4 in the textbook)

TIP

This paragraph is extremely important as it contains the most important reason WHY we should follow the contextual approach and not the textual approach. Study it very carefully.

The most important reason WHY we should follow the contextual approach is that the Constitution prescribes the contextual or purposive approach in sections 39(2) and section 233 respectively. However, it does not do so in explicit terms. The contextual or purposive approach is implied in these provisions. It is very important to understand why Botha insists that the contextual approach is by implication prescribed by the Constitution.

Botha argues that the interpretation provisions of the Constitution (sections 39 and 233), read with the supremacy provisions (sections

2, 7, 8 and 237), in effect prescribe a contextual, purposive or text-in-context approach to statutory interpretation. Study his argument and discussion of these provisions carefully.

TIP

Study this paragraph of the textbook in combination with chapter 10 in general and paragraph 10.3 in particular.



ACTIVITY 4

(The contextualist approach after 1994)

Botha relies in his argument on two cases in which the Constitutional Court has clarified the implications of section 39(2) for statutory interpretation. Identify those cases and summarise the principles that are apparent in the quotations included by Botha.

FEEDBACK

The two cases in question are *Bato Star Fishing v Minister of Environmental Affairs and Tourism and Investigating Directorate: Serious Economic Offences v Hyundai* (note that *S v Makwanyane* does not deal with statutory interpretation or section 39(1) but rather with the interpretation of the Constitution itself and therefore section 39(1)). Bato Star confirms that the primary and golden rules of textual interpretation do not apply in our law any more. Section 39(2) implies that even where the ordinary meaning of the legislation is clear and unambiguous, the interpreter must still try to ascribe the meaning to those words that will best promote at least one identifiable value enshrined in the Bill of Rights. The context in which legislation operates is thus decisive for its meaning. In the Hyundai case, the court made it clear that the “context” to which Bato Star refers is the Bill of Rights. However, this purposive reading of the words is limited to cases where the words of the statute are capable of such an extraordinary interpretation.

In order to understand these principles properly, it is best to look more carefully at the facts of the Bato Star case. 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. The quota which each trawler is allowed to catch is determined by the Minister of Environmental Affairs and Tourism in terms of the Marine Living Resources Act 18 of 1998. Section 2 of the Act is headed “Objectives and principles” and lists the objec-

tives 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.

The Bato Star fishing company was allocated a quota for the year. However, it 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. How should the phrase “have regard to” be interpreted and understood in this case?

The Supreme Court of Appeal answered the question by asking, in a textualist fashion, what the ordinary meaning of the words “have regard to” was. 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 in terms of section 18(5), the Minister had to take the principle of equity mentioned in section 2 into consideration, but did not have to make it his special concern. It was clear from the facts that the Minister did take the need to transform the fishing industry into account when quotas were allocated. The quotas were therefore validly allocated.

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

In his judgment, Ngcobo J expressed concern about the textual method of interpretation followed in the Supreme Court of Appeal. 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 judgment in *Jaga v Dönges* (see above) 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 in 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 a more detailed attempt to implement constitutional rights. However, the spirit of the Bill of Rights is contained in the foundational provisions of the Constitution. This point is discussed in detail by Botha in paragraphs 5.2.4(i), 5.2.4(iii) and 10.3 of the textbook. To gain a better understanding of the last-mentioned paragraphs, complete the following activity.

ACTIVITY 5

(The Constitution and statutory interpretation)

Section 39(1) of the Constitution deals with the interpretation of the Bill of Rights. Write an essay of about one page in which you discuss whether this section is also relevant to the interpretation of ordinary legislation. Make sure you explain your opinion in detail. Remember: your opinion must be based on the provisions of the Bill of Rights (included in the back of your textbook).

FEEDBACK

Section 39(1) deals with the interpretation of the Bill of Rights and says, in effect, that the Bill of Rights should be interpreted in the light

of the foundational provisions of our open and democratic constitutional order. Those democratic values are found in the preamble to the Constitution and paragraph 1 of the Constitution. One could say that these democratic values reflect the spirit of the Bill of Rights. Note, however, that section 39(1) says nothing directly about the interpretation of ordinary legislation. However, section 39(2) says that the spirit of the Bill of Rights must be promoted when ordinary legislation is interpreted. In order to understand what the spirit of the Bill of Rights is, we thus have to turn to section 39(1) when interpreting ordinary legislation. The point is that when the two sections are read together, a purposive or contextual approach to ordinary legislation is required. The letter of the law must now, in all cases, be subject to the (democratic) spirit of the law.

Food for thought

(Democratic politics as power or as open and free dialogue)

This section is intended to stimulate further thinking. You do not need to study it for the examination.

There is a close link between the nature of the democratic legislative process (which was discussed above) and the interpretation process. Since legislation is the outcome of a broader political process, the way in which the court perceives that process will influence the way it perceives legislation and proceeds to interpret legislative provisions.

For example: where politics is perceived as a winner-takes-all power struggle between competing interest groups and parties, most political decisions will be perceived as an expression of power (even where those decisions contain compromises). Most political decisions will be a question of strategy. This perception of politics is usually known as the strategic or pluralist or liberal or instrumental conception of politics and democracy. Because politics is nothing but a power game, the agreements that are reached between political parties and translated into legislation should be regarded as if they were hard-fought bargains between businessmen. This means that legislation should be strictly and narrowly interpreted as there is nothing beyond the carefully chosen words of the legislative bargain to rely on. It is not the place of the court, essentially an outside observer, to intervene in the often very delicately crafted balances of political power.

The strategic conception of politics is frequently contrasted with a different perception of democratic politics, usually known as the republican or deliberative or constitutional conception of politics. Politics is here perceived as a collective dialogue between all the members of the political community about the meaning of the foundational values which they share and the best way to further those values through legislation. This dialogical perception of politics is implied in the idea of the supremacy of the Constitution. It is not the most powerful party or parties in parliament that are sovereign but the Constitution. The supremacy of the Constitution means that the politics of power has been replaced by the politics of human rights. Because legislation is seen as the outcome of a collective pursuit of certain shared values and fundamental rights (and not as strategic bargaining), the adopted text of the legislation is no longer of conclusive importance. The court is also no longer an outside onlooker but a main partner in the constitutional dialogue about the meaning of our constitutional values and rights. The court has the task of deciding whether, or how best, legislation serves, or could serve, the spirit, purport and objects of the Bill of Rights. Only legislation which advances at least one identifiable constitutional value is recognised as valid. Where legislation ceases to advance the constitutional values and rights (ie where it has again become the expression of political power), it will be declared unconstitutional. To put it differently, where legislation ceases to further the public or common good, but merely expresses the private or sectional interests of the majority or a single party, it plunges us back into power politics and will be declared unconstitutional. The task of the court is to ensure that the political process remains true to its highest or constitutional aspirations.

The important point is that a strategic perception of the legislative process or democratic politics will tend to encourage the adoption of a literalist or textualist method of statutory interpretation. On the other hand, a constitutional or dialogical perception of the legislative process and democratic politics will tend to encourage the adoption of a purposive or contextual method of statutory interpretation. The theoretical difference between power politics and value politics is therefore decisive for the theory and practice of statutory interpretation. Our assumptions about politics are likely to influence our assumptions about the best method of statutory interpretation.

If this argument is correct, then the contextual approach to statutory interpretation and the activist role ascribed to courts during the interpretive process rest on the assumption that politics in post-apartheid South Africa is indeed dialogical politics and not power politics. Does your perception of the political process in South Africa support or undermine the purposive theory of statutory interpretation that Botha

and the Constitution prescribe? Has the new theory of statutory interpretation lost touch with political reality and is it merely a new form of romanticism without any critical potential?

5.2.4 Practical inclusive method of interpretation

In this paragraph, Botha finally identifies and discusses the five aspects of the contextual or purposive approach to statutory interpretation. These are not alternative methods of interpretation, nor do they form any hierarchical order. The context that is celebrated by the contextual method of interpretation includes the specific text of the legislative provision, the structure and purpose of the legislation as a whole, the transformative spirit of the Constitution, the historical background of the legislation and the globalisation of legislative responses. All these aspects of the greater context must be taken into account whenever a piece of legislation is interpreted. You need to be able to identify the various aspects of the interpretive context and explain in one or two sentences what each entails.

As was mentioned above, some textbooks on statutory interpretation proceed by discussing the various rules and principles of interpretation that allow each of these aspects to be given due weight. These textbooks therefore list and discuss all the rules relevant to historical interpretation, and so forth. Botha does not follow this approach but describes how the interpretive process has unfolded in various phases over time. The first of these phases, the so-called “initial phase”, is the topic of the next chapter.



TEST YOURSELF

- (1) List ten criticisms of the textual approach and briefly explain each.
- (2) Explain why the following judgments are important for the theory and practice of statutory interpretation:
 - (i) *Public Carriers Association v Toll Road Concessionaries Pty (Ltd)*;
 - (ii) *Jaga v Dönges*;
 - (iii) *Bato Star Fishing Pty (Ltd) v Minister of Environmental Affairs and Tourism*;
 - (iv) *Heydon's case*.
- (3) Write a note on the influence of the 1996 Constitution on statutory interpretation (including a detailed discussion of the supremacy, foundational and interpretation clauses of the Constitution).

- (4) Name and discuss the various dimensions of the “practical inclusive method of interpretation” favoured by Botha.

CHAPTER 6

Basic principles

What will we study in this chapter?

After having worked through this chapter you should be able to

- (1) explain the difference between the “intention of the legislature” and the “purpose of legislation” and indicate which one of the two concepts should form the main focus of the interpretation process
- (2) set out and explain the rules and principles that apply to the initial or first reading of the legislative text.

Although a recurring theme in Botha’s textbook is that the Constitution prescribes a “contextual approach” to interpretation, this does not mean that the legislative text is not the starting point of interpretation. It only means that the text is no longer the point where interpretation ends. The process of interpretation begins with the reading of the text to establish its initial meaning. A number of basic rules and principles apply to the initial or first reading of the legislative text. These rules and principles are studied in this chapter. The chapter also includes a discussion of the methodological debate between the textualists and the contextualists (paragraph 6.1.1). If you followed our tip in chapter 5, you will already be familiar with this paragraph of the chapter.

What are the central questions to be answered?

We are all familiar with a large range of texts in everyday life. We regularly read newspapers, magazines, e-mails, SMS messages, advertisements, contracts and so forth. Without thinking about it, we apply a number of rules and principles to the reading of texts in everyday life. We know that we must “be aware of the fine print” in a contract, that we must often “read between the lines” when we receive personal e-mail or SMS messages, or that we must “look for the catch” in special holiday offers. Lawyers also read everyday texts and apply everyday principles of interpretation. However, they spend a great deal of their time reading and talking about legislative texts.

How does the reading of a legislative text differ from the reading of everyday texts? What are the specific rules and principles that lawyers apply when they read a piece of legislation for the first time? For example, when a piece of legislation dating back to the 17th century refers to a “vehicle”, must that term be given the very limited meaning that it had in the 17th century (as we do when we read a Shakespearean play) or must it be given its modern, updated meaning? Similarly, can one read only that part of an Act in which the specific provision you are interested in appears, without also reading the rest of the Act (as we frequently do with newspapers)? Lastly, must we assume that legislation always remains applicable in spite of changed circumstances, or can we accept that it has a limited time-span, just as everyday advertisements do?

6.1 THE PURPOSE OF THE LEGISLATION

TIP

Study this paragraph 6.1.1 and 6.1.2 together, and then as part of the larger debate between textualists and contextualists about the proper method of statutory interpretation (see chapter 5 above).

6.1.1 The constitutional demands

Study this paragraph together with paragraph 6.1.2.

6.1.2 Why not the intention of the legislature?

“Do not seek to follow in the footsteps of the men of old, seek what they sought”.

Matsuo Basho

These two paragraphs explain WHY the textualist focus on the (original) intention of the legislature can no longer play a role in a post-apartheid approach to statutory interpretation. The idea that the “original intention” of the legislature is the decisive factor in interpretation cannot be reconciled with the idea of constitutional supremacy (paragraph 6.1.1) and the idea of an “original intention” is a fiction that has been exposed by a number of academic writers (paragraph 6.1.2). You must formulate a short argument about both points. One can also add a third argument. The application of legislation that dates from the years of apartheid cannot be restricted by what the apartheid and racist parliament originally intended, but must be directed by the question of what function that legislation plays in to-

day's constitutional democracy and human rights culture (without any reference to the intention of the apartheid legislators). For all these reasons it is better to speak of the purpose of legislation.

The primary rule of interpretation is therefore to determine the purpose of legislation and to give effect to that purpose.

In order to deepen your understanding of the difference between the "original intention of the legislature" and the "present purpose of legislation", complete the following activity:



ACTIVITY 1

(Original intention or contemporary purpose?)

The Marriage Act 25 of 1961 was promulgated at the height of apartheid. The (original) intention of the apartheid legislature back in 1961 (assuming that such an intention existed) was to allow heterosexual couples of the same race and of a Christian or secular disposition to get married. Thus the marriage formula spoke only of "husbands and wives". It surely was not the (original) intention of the apartheid legislature of 1961 to allow gay couples to get married (at that stage it was a crime to live a gay life). When apartheid formally came to an end in 1994, the Marriage Act continued to apply. However, in terms of the new human rights culture of South Africa, it amounts to unfair discrimination to restrict officially recognised marriages to heterosexual couples of the same race and of a Christian or secular disposition. The right to equality requires that gay couples should also be allowed to marry. Can the existing Marriage Act of 1961 be used to conclude marriages between gay couples? How should courts deal with this interpretive question, a typical problem in transitional societies like post-apartheid South Africa? Does it matter whether the courts understand their interpretive task in a textualist or a contextualist manner? Read through the discussion in paragraph 6.1.1 and formulate a short answer to this question.

FEEDBACK

The case of gay marriages illustrates that it matters a great deal whether post-apartheid courts adopt a textualist or a contextualist approach to the interpretation of the Marriage Act of 1961. From the textualist perspective, the task of the court is to establish the (original) intention of the legislature from the ordinary meaning of the language in the Act. In everyday language the word "husband" refers to a man and the word "wife" refers to a woman. The original intention of the legislature was to allow heterosexual couples to get married.

From this textualist perspective, the Marriage Act and formula cannot be used to conclude marriages between gay couples.

From the contextualist perspective, by contrast, the task of the court is to establish the present purpose of legislation and to further that purpose. In *Fourie v Minister of Home Affairs* 2005 3 BCLR 241 (SCA), Farlam JA held that the purpose of the Marriage Act is to allow people who are eligible to marry to get married. (The Act itself does not prescribe who are eligible but merely creates the formula for such persons to get married.) Gay couples have the constitutional right to get married and have thus become eligible to marry in post-apartheid South Africa. The purpose of the Marriage Act is also to allow them to do so. In order to achieve this purpose, the text and wording of the marriage formula must be updated to allow gay couples to get married. In this context, it is irrelevant what the (original) intention of the legislature was. The crucial question is what the present purpose of the legislation is. Many pieces of apartheid legislation, like the Marriage Act, continue to operate in post-apartheid society. These Acts can do so only because the interpretation of these Acts is no longer tied down to the (original) intention of the apartheid legislature. A contextualist approach to statutory interpretation is required by the transitional nature of our society.

You have now completed the WHY section of this chapter. In the rest of the chapter Botha explains WHAT rules and principles apply to the initial or first reading of the legislative text.

6.1.3 The meaning of the text

Botha identifies four rules or principles applicable to the first reading of the legislative text (some of these principles have one or two subprinciples). Summarise and study these principles and subprinciples in one or two sentences each. (For example: every word must be given a meaning, words must be given their ordinary meaning, technical words must be given their technical meaning, and so forth).

6.1.4 Balance between the text and context

TIP

Study this paragraph in conjunction with chapter 5. Botha essentially continues and repeats here what he said earlier during the discussion of the contextual and textual approaches.

Also note that it is not entirely correct to argue that, prior to 1994, the courts subscribed only to the literal approach to interpretation. In *Jaga v Dönges* (see above) Schreiner JA emphasised the importance of the contextual framework during interpretation. Of course, as Botha argues, this does not mean that the legislative text is no longer significant. The text has to be anchored to the context in question. The judgment of the Constitutional Court in *S v Zuma* confirms that the text of the Constitution is of paramount importance, in spite of the fact that section 39(1) prescribes a purposive or contextual approach to constitutional interpretation. The same applies to statutory interpretation.

6.2 OTHER BASIC PRINCIPLES

Complete the list that you started compiling above by adding the following two principles applicable to the initial reading of the legislative text.

6.2.1 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* (literally, from the insides of the Act).

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

This important presumption can also be stated as follows: the court must avoid an interpretation that negates part of the legislative text or leaves part of the text without a meaning or purpose. Remember the rule that every word must be given a meaning? This basic principle is further bolstered by the common-law presumption that legislation does not contain invalid or purposeless provisions.



ACTIVITY 2

(The initial reading)

Read through paragraph 6.2.2 again and then consider the following application of this presumption or principle.

The interim Constitution contained the following transitional provision in section 241(8): "All proceedings which immediately before the commencement of this Constitution were pending before any

court of law [...], exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed.”

When the Constitution came into operation on 27 April 1994, the criminal trial of Mhlungu was pending. Mhlungu argued that he was entitled to the protection offered by the constitutional right to a fair trial (which meant that certain evidence against him was no longer admissible). The state rejected this suggestion, as the case was already under way and should thus be “dealt with as if the Constitution had not been passed”. The judges of the Constitutional Court were sharply divided on the issue (see *S v Mhlungu* 1995 (3) SA 867 (CC)). The majority held that section 241(8) only meant that the old apartheid courts should complete cases before them. It did not mean that the substantive law that had to be applied in these court cases after 27 April 1994 remained unaffected by the Constitution. The Constitution had to be applied to the *Mhlungu* case and the evidence had to be excluded. A strong minority (led by Kentridge J) held that the section meant that apartheid courts should complete cases before them under apartheid law “as if the Constitution had not been passed”. The Constitution thus did not apply to the *Mhlungu* case and the evidence had to be allowed as under apartheid law.

FEEDBACK

The majority rejected the minority’s interpretation because it violated the principle that every word and clause must be given a meaning or serve a purpose. This is what the majority had to say at paragraphs 12–13:

“On the interpretation favoured by Kentridge AJ the reference in section 241(8) to – ‘any court of law, exercising jurisdiction in accordance with the law then in force’ is quite incongruous and difficult to understand. If the intention of the section was simply that all proceedings which were pending before the commencement of the Constitution before a Court of law should be dealt with as if the whole of the Constitution had not been passed, the qualification that such a Court of law had to be ‘exercising jurisdiction in accordance with the law then in force’ would appear to be quite unnecessary. [...] On the interpretation favoured by Kentridge AJ the relevant phrase therefore serves no purpose. On the interpretation which I favour, it does serve an important purpose: it serves to emphasise that the object of the section is to preserve the authority of Courts dealing with pending matters to continue to discharge their functions as such Courts.”

Note that the majority accepted that the phrase “exercising jurisdiction in accordance with the law then in force” had been inserted into

the section for a purpose. They understood that their interpretive task was to find an interpretation that would reveal and give effect to that purpose. In their view, the purpose was precisely to stress that the section deals only with jurisdictional issues and not with the substantive law. The interpretation of the minority must not be followed, because it only focused on one part of the section, and left the qualification in the section without any purpose.



TEST YOURSELF

- (1) Formulate the most important or golden rule of statutory interpretation according to
 - (i) textualists
 - (ii) contextualists.
- (2) Does the notion of ascertaining the “intention of the legislature” apply in a system based on the supremacy of the Constitution? Refer to at least one case as authority.
- (3) List the main grounds (at least five) on which the notion of the “intention of the legislature” may be criticised.
- (4) Explain the principle that the court must try to achieve a balance between the legislative text and its context.
- (5) Discuss how courts should interpret words in old legislation. Provide an example from case law.
- (6) Discuss the presumption that legislation does not contain futile or meaningless provisions. Give an example from case law in which this principle was applied.

CHAPTER 7

Research: ascertaining the legislative scheme

What will we study in this chapter?

After having worked through this chapter you should be able to

- (1) identify all the internal and external aids to statutory interpretation
- (2) explain how each of the internal and external aids to interpretation can be used to determine the purpose of legislation
- (3) explain and apply the basic provisions of the Interpretation Act dealing with the computation of time
- (4) discuss common law presumptions as an external aid to interpretation.

Botha concluded the previous chapter by stating that the text must be balanced against its context. The purpose of legislation in society forms an essential part of that context. One of the matters we study in this chapter is when the purpose of legislation must be consulted in the interpretive process (paragraph 7.1). We also study which internal aids (paragraph 7.2), external aids (paragraph 7.3), provisions of the Interpretation Act 33 of 1957 (paragraph 7.4) and common law presumptions (paragraph 7.5) must be used to establish the purpose of legislation.

What is the central question to be answered?

Even if the meaning of a legislative provision seems obvious and clear after the first reading of the legislative text, the purpose behind the words must still be determined.

The interpreter must establish whether the plain meaning of the text in fact reflects the actual purpose of the legislation (or, as our courts still frequently say, the real intention of the legislature). We encounter the same situation in everyday conversation when somebody says "I did not mean it that way". The person is suggesting that the plain meaning of the words does not reflect her actual intention. Many

misunderstandings result from the assumption that the plain meaning of words reflects the intended meaning of the words. In everyday life, we can clear up misunderstandings of this sort by engaging in conversation with the speaker and asking for further explanation. When we are dealing with legislation, we cannot go back to the legislature and ask for clarification. So how should we determine what the legislature intended or what the purpose of the legislation is? This crucial question is answered in chapter 7.

TIP

Before proceeding with the chapter, study paragraphs 6.1.1 and 6.1.2 again. The debate between the textualists and the contextualists spills over into this chapter. While contextualists believe that a variety of internal and external aids must be used from the start to determine the purpose of legislation, textualists restrict the use of these aids to exceptional circumstances. Botha highlights these differences throughout the chapter. You must therefore keep the bigger debate in mind all the time.

7.1 GENERAL INTRODUCTION

The purpose of legislation is established through research. This is also known as the contextualisation of the text (as opposed to the concretisation or application of the text, which is discussed in chapter 8). There are two categories of material that can be consulted to determine the purpose of the legislation. The first category is called internal aids because it contains things that we find inside the text of the legislation as a whole (such as its title, its preamble and its chapter headings). The second category is called external aids because it contains things that we find outside the legislative text itself (such as the parliamentary debate about the legislation, the surrounding circumstances at the time the legislation was adopted, and other legislation like the Interpretation Act).

Textualists refer to these internal and external aids as “secondary aids” and allow interpreters access to these aids **only** when the text of the legislative provision itself is unclear, or when its plain meaning leads to absurd consequences in the circumstances. Contextualists encourage the use of all these aids in all circumstances as their aim is to achieve a proper balance between the text and its purpose. Prior to 1994 the courts were not consistent in their approach to the use of internal aids. The difference of opinion between the literalists and the contextualists as to when the interpreter may invoke these aids has finally been settled by section 39(2) of the Constitution. This provision prescribes a contextual approach to statutory interpreta-

tion. This means that the interpreter should use all the available aids at his/her disposal to ascertain the purpose of legislation.

Most of the aids are self-explanatory and not much needs to be added to what Botha says about them.

7.2 INTERNAL AIDS

Legislation comprises different components (look at the example in chapter 2 to refresh your memory). These are: the same legislative text in another official language, the preamble, the long title, the definition clause, legislative purpose statements and interpretation guidelines, headings to chapters and sections, paragraphing and punctuation, and schedules. Botha discusses each of these components in turn. You must be able to identify, list and discuss the value of each of these components during the interpretive process.

To help you develop a deeper understanding of the internal aids, complete the following activity.



ACTIVITY 1

(Internal aids to interpretation)

Look at the following extract from legislation again. Assume that there is a dispute about the meaning of section 14(1)(b). Identify as many internal aids to the interpretation of section 14(1)(b) as you can, and discuss how these aids may support the interpretation of the section.

LOCAL GOVERNMENT: MUNICIPAL ELECTORAL ACT 27 OF 2000

[Assented to 6 July 2000]

[Date of commencement
11 July 2000]

(English text signed by the President)

To regulate municipal elections; to amend certain laws; and to provide for matters connected therewith.

CHAPTER 1

INTERPRETATION, APPLICATION AND ADMINISTRATION OF ACT (ss 1–4)

(1) Definitions

(2) Interpretation of this Act

Any person interpreting or applying this Act must –

- (a) do so in a manner that gives effect to the constitutional declarations, guarantees and responsibilities contained in the Constitution; and
- (b) take into account any applicable Code.

CHAPTER 3**PREPARATIONS FOR ELECTION (ss 11–40)****14 Requirements for parties contesting election by way of party lists**

- (1) A party may contest an election in terms of section 13(1)(a) or (c) only if the party by not later than a date stated in the timetable for the election has submitted to the office of the Commission's local representative –
 - (a) in the prescribed format –
 - (i) a notice of its intention to contest the election; and
 - (ii) a party list; and
 - (b) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission.

CHAPTER 7**GENERAL PROVISIONS (ss 66–96)****72 Prohibitions concerning placards and billboards during election**

- (1) No person may deface or unlawfully remove any billboard, placard or poster published by a party or candidate for the purpose of an election.
- (2) On the voting day, no party or candidate or supporter of a party or candidate may within the boundaries of a voting station put up, display or distribute any billboard, placard, pamphlet or poster or any other item intended to affect the outcome of the election.

89 Regulations

- (1) The Commission must make regulations regarding any matter that must be prescribed in terms of this Act.

- (2) The Commission may make regulations regarding any matter –
 - (a) that may be prescribed under this Act, or
 - (b) that it considers necessary or expedient in order to achieve the objects of this Act.

96 Short title

This Act is called the Local Government: Municipal Electoral Act, 2000.

FEEDBACK

The punctuation of the section, the section heading (“Requirements for parties contesting election by way of party lists”), the chapter heading (“Preparations for elections”), the interpretation provision (section 2), the defined terms (section 1), the long title (“To regulate municipal elections; to amend certain laws; and to provide for matters connected therewith”), and the title of the Act (“Local Government: Municipal Electoral Act”) may all be considered. Not all of these aids are equally valuable in this case (some, like the long title, add little or nothing to the interpretation of section 13(1)(b)). The most important internal aid in this case is section 2, the interpretation guideline provided by the legislature itself.

7.3 EXTERNAL AIDS

The interpreter, when construing a statute, could also use external aids to interpretation. These are the Constitution, preceding discussions, surrounding circumstances, dictionaries and linguistic evidence, the source of a provision, the Interpretation Act and other common-law presumptions.

7.3.1 The Constitution

Section 39(2) of the Constitution contains a provision dealing with ordinary statutory interpretation. When interpreting any legislation, therefore, the Constitution, as the supreme law of the land, should be consulted. The Constitution in general and the Bill of Rights in particular is the most important external aid to statutory interpretation.

7.3.2 Preceding discussions

Note that, before the advent of the new constitutional dispensation, the courts were reluctant to seek guidance in the debates which preceded the passing of the 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.

7.3.3 Surrounding circumstances

Some courts have held that the historical background to the adoption of a particular statute is equally important during the process of interpretation. This approach made its first appearance in the Heydon case. South African courts have also looked at the surrounding circumstances when interpreting legislation. For example, in *Santam* the court took into account the historical background which led to the adoption of the Act in question. Study 7.3.3 as a whole.

7.3.4 Dictionaries and linguistic evidence

As stated, most statutes contain a definition clause or section in which the words used in the statute are defined. In cases where the words used in legislation are not defined, it is permissible for the courts to seek guidance in dictionaries.

7.3.5 The source of a provision

Legislative drafters sometimes borrow extensively from other jurisdictions. For example, the Promotion of Administrative Justice Act 3 of 2000 includes concepts that were taken verbatim from the Australian Administrative Decisions (Judicial Review) Act, 1977, and the German Law on Administrative Proceedings of 1976. The question which arises is: how should South African courts interpret these provisions? Should the courts follow Australian and German jurisprudence when interpreting the Promotion of Administrative Justice Act? Botha suggests that, in a case of this kind, the courts could use the jurisprudence developed in other jurisdictions as a guideline.

7.3.6 Explanatory memoranda, examples and footnotes

As argued, the interpreter should be able to use these aids when interpreting legislation right from the outset. Study this paragraph as a whole.

7.4 THE INTERPRETATION ACT 33 OF 1957

The Interpretation Act 33 of 1957 is often invoked by the courts, especially when dealing with the computation of time. You have already come across this Act in previous sections of the textbook. Remember that this Act applies to the interpretation of all original and subordinate legislation in South Africa. Study the meaning of the term “month” carefully. Also study the different statutory and common law methods for the calculation of time periods.

7.5 OTHER COMMON LAW PRESUMPTIONS

Common law presumptions are also external aids to interpretation. You have already come across a few common law presumptions in previous sections of the textbook. Refer back to those presumptions again.

7.5.1 Government bodies are not bound by their own legislation

Botha argues that this presumption no longer applies in our law. You do not need to study this paragraph.

7.5.2 Legislation does not oust or restrict the jurisdiction of the courts

Study this presumption carefully. Note how the common law principle has become enshrined in the Constitution in sections 33, 34, and 35.



TEST YOURSELF

- (1) List and briefly discuss all the internal aids (at least eight) that may be consulted during the process of interpretation.
- (2) Briefly criticise the rule that, in the case of irreconcilable conflict, the signed version of the text prevails.
- (3) Explain whether it is permissible in our law to have regard to the preamble when interpreting a statute.
- (4) What is the “long title” of an Act? Does it play any role in the interpretation process?
- (5) May a court consult parliamentary debates preceding the adoption of legislation during the interpretation process? If so, for what reason may a court consult these debates?
- (6) Explain the “mischief rule”. Refer to relevant case law.
- (7) Explain the meaning of “month” in terms of section 2 of the Interpretation Act 33 of 1957.

- (8) Explain the statutory method for the computation of time. When does this method apply?
- (9) Discuss the presumption that legislation does not oust or restrict the jurisdiction of the courts. In your answer, explain the effect of the Constitution on this presumption. Refer to case law.

CHAPTER 8

Concretisation: correlation of text and purpose in the light of the Constitution

What will we study in this chapter?

After having worked through this chapter you should be able to:

- (1) explain what the concretisation of legislation entails by discussing examples from case law
- (2) discuss how the textualists and contextualists defend opposing views about the law-making function of the courts
- (3) explain how courts modify the initial meaning of the legislative text in order to give better effect to the purpose of the legislation
- (4) explain and apply the rules of restrictive interpretation
- (5) explain and apply the rules of extensive interpretation.

What is the central question to be answered?

At the best of times, language is an imperfect medium for the expression of our thoughts and intentions. In the case of legislation, the problem is compounded by the fact that the legislature must achieve its aims through the use of language that is general enough to cover a rich variety of conceivable cases in the future. While the legislature can anticipate typical cases, it cannot always anticipate the extraordinary cases that might arise. In these cases, the general language of the statute might lead to absurd consequences; or it might simply include cases that need not be included under the legislation, or exclude cases that should be included. Consider the following example.

A quiet neighbourhood park is disturbed every Sunday afternoon by a group of residents who park their cars and motorcycles there and listen to music. To prevent the park from being abused in this manner, the local government decides to issue a new set of regulations dealing with access to public parks. They enact a regulation that they believe will cover all possible cases. It reads as follows: "No vehicle is allowed in any public park within the boundaries of this municipality."

Within the first week after the regulations have been adopted, the following incident makes the headlines. A father pushing his baby daughter in a pram was prevented from entering the park by the newly appointed security guard. The guard claimed that the regulation stated that no vehicles may enter the park. As a pram is also a type of vehicle, it could not be allowed to enter the park.

The problem is caused by the fact that the ordinary or literal meaning of the provision clearly includes prams, while the purpose of the legislation is only to prevent noisy motor vehicles from entering parks. There is thus tension between the purpose of the legislation and the over-inclusive initial meaning of the legislation. How should the problem be resolved? In this chapter we study the rules and principles that regulate how the text (chapter 6) and the purpose (chapter 7) of the legislation should be correlated in the light of a given set of facts. This task forms the heart of the interpretive process.

TIP

This is an extremely important chapter of the textbook. It is divided into two parts: The first part deals with the theoretical nature or WHY questions of the interpretation process (yet again). It consists of paragraphs 8.1 and 8.2. The second part deals with the more practical aspects or WHAT questions of the application (or concretisation) of legislation. It consists of paragraph 8.3. Study the theoretical part of the chapter (ie the first part) in conjunction with the theoretical discussions contained in paragraphs 5.2 (the theories of interpretation), 6.1 (the difference between the intention of the legislature and the purpose of legislation), and paragraph 7.3.3(i) (the mischief rule).

8.1 WHAT IS CONCRETISATION?

In the concretisation phase all the hard and difficult thinking is done during the interpretation process. All the data collected during the interpretation process (the text of the legislation, the purpose of the legislation, the values of the Constitution) are brought together and applied to the specific facts at hand. The act of application is not a logical subsumption of the new facts under existing universal categories. For this reason, Botha uses a number of terms to describe the nature of the process (correlation, harmonisation, realisation, and actualisation). However the process is characterised, the process is a creative one that involves the court's exercise of its own interpretive discretion.

This point is further discussed in paragraph 8.2.2 and paragraph 8.2.4(i). These paragraphs should be studied together. The crucial

point which Botha seeks to make, and which he repeats many times, is that concretisation is not an “arbitrary expression of personal preferences” but “a discretion within the boundaries and parameters of the purpose of the legislation” (paragraph 8.2.2). In short, that a “flexible and purposive method of interpretation does not imply a free-floating and unbridled application of legislation” (paragraph 8.2.4).

8.2 THE LAW-MAKING FUNCTION OF THE COURTS

It is misleading to describe this creative discretion as a law-making function. The court is not making new law, but merely realising or giving effect to the existing law in new circumstances. However, Botha speaks of the “law-making function” of the courts and we will stick to this term in this module.

This paragraph returns us to the debate between the textual and the contextual approaches to statutory interpretation (study that debate again to refresh your memory – see paragraph 5.2 above). Botha clearly favours the contextual approach. He sets out the two viewpoints and presents a critique of the textualist position.

8.2.1 The orthodox viewpoint

Little needs to be added at this point to Botha’s exposition. This approach rests on the assumption that the meaning of legislation is fixed and fully developed when it is promulgated. The subsequent application of the legislation does not, therefore, add anything to the meaning of the legislation. The assumption here is that meaning is not created through interpretation.

8.2.2 The purposive viewpoint

Du Plessis claims that it is not sufficient to establish the plain meaning of the legislation or the purpose of the legislation without reference to the set of facts or concrete situation to which the legislation must be applied. The meaning of legislation does not exist in a fixed and fully developed form before that legislation is applied. In other words, it is NOT a question of establishing the meaning of the legislation (step 1) and then applying it to the facts (step 2). What the legislation means only becomes clear when it is applied. The act of application or concretisation of legislation creates, in effect, the meaning of the legislative text.

Labuschagne makes the same theoretical point. He distinguishes between the abstract text of the legislation (the structural statute) and

the concrete realisation of the legislation (the functional statute). The court does not create a new statute when it gives the abstract structure a concrete or functional (ie working) meaning. It merely completes the legislative process.

There are two reasons why courts must necessarily play this role in the law-making process. The first is that 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. The second reason is that legislation is drafted in the form of general rules that can apply to many different cases. However, there is an inherent problem with all general rules. General rules frequently tend to be either over-inclusive (covering more than they were supposed to) or under-inclusive (covering less than they were supposed to). It is the task of the court to neutralise these effects and to ensure that the purpose of the rule is achieved. Sometimes this 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. 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.

8.2.3 The myth that courts merely interpret the law

Botha identifies three false assumptions that textualists make about the so-called law-making function of the courts: (i) They confuse the modification of the meaning of legislation with the literal modification of the text or language of the legislation. (ii) They are willing to accept a literal interpretation of a statute which goes beyond the purpose of the legislation. (iii) They rely on the doctrine of parliamentary supremacy which has been replaced by the Constitution.

These points have all been discussed in chapter 5 and need not be repeated here. You should be familiar with them by now. If not, return to chapter 5 and study the debate between the textualists and the contextualists once more.

8.2.4 Factors that support and limit judicial law-making during statutory interpretation

8.2.4.1 Restrictions on the law-making powers of the courts

Botha wants to underline the fact that the so-called law-making function of the court is not unbounded. For this reason he lists six factors which serve to restrict the creative discretion of the courts when abstract legislation is applied to concrete facts. Make sure that you understand and can discuss each of these factors.

8.2.4.2 *Factors which support modificative interpretation*

Read this paragraph. You do not have to study it.

You have now worked through the theoretical or WHY part of this chapter. We hope that you understand the creative and flexible nature of the concretisation or application of legislation to any given set of facts. The rest of the chapter is essentially devoted to circumstances where the purpose of the legislation can only be realised or implemented if the initial meaning of the legislative text is modified. The chapter explains WHAT is done when legislation is concretised or applied.

8.3 POSSIBILITIES DURING CONCRETISATION

Because you will be studying the different forms that modificative interpretation can take, it is not necessary to concentrate too much on paragraphs 8.3.1 and 8.3.3. We shall therefore turn directly to paragraph 8.3.2.

8.3.1 **Modification of the meaning is necessary**

Modification of the initial meaning of the legislation will only take place where:

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

In order to ensure that the purpose of the legislation is not frustrated by the language of the legislation, the meaning of the words used in the legislation must either be restricted (where the language is over-inclusive) or extended (where the language is under-inclusive). In the first case we speak of restrictive interpretation and in the second of extensive interpretation. Both are forms of modificative interpretation.

8.3.1.1 *Restrictive interpretation*

Botha discusses two forms of restrictive interpretation. Both are known by established Latin phrases. You must learn these Latin phrases, since they are part of the everyday jargon of practising lawyers in South Africa and the rest of the world.

The ***cessante ratione*** rule (literally, “when the reason ceases to exist” rule)

If the purpose behind legislation falls away, the interpretive process cannot proceed (the aim of statutory interpretation is to give effect to the purpose of legislation). However, this does not mean that the legislation is no longer in force. What should a court do in such circumstances? To answer this question, study the two sets of cases Botha refers to (the court must suspend the operation of the legislation).

The *eiusdem generis* rule (literally, “of the same kind” rule)

In this paragraph, we return to the problem that legislatures cannot foresee every possible circumstance that might arise and are therefore forced to make use of broad and all-inclusive terms and formulations. To understand this problem and the interpretive solution to it better, complete the following activity.



ACTIVITY 1

(Restrictive interpretation)

Return to the quiet neighbourhood park that is disturbed, every Sunday afternoon, by a group of residents who park their cars and motorcycles there and listen to music. Recall that the local government decided to issue a new set of regulations dealing with access to public parks. In response to the pram incident, the municipality re-enacts the regulation in the following terms: “No motorcycle, car, bakkie, quad-bike or other vehicle is allowed in any public park within the boundaries of this municipality.”

A week later the same father, with the same pram, is stopped outside the gate by the same security guard. The guard explains that the Act still prohibits “any other vehicle” from entering the park and that the pram may not be taken into the park but should be left at the gate. The father is furious. He approaches you as his lawyer for advice. Explain to him whether, on a proper interpretation of the regulation, he is allowed to take his pram into the park.

FEEDBACK

The all-inclusive formulation adopted by the municipality when they re-enacted the regulation is frequently encountered in legislation. Through the use of this formulation the legislature makes it clear what the purpose of the provision is (by listing a number of specific vehicles) but tries to avoid gaps and loop-holes (by including all other vehicles of the same sort in the provision – see below). It is then left to the courts to give meaning to the regulation in problem-

atic situations. How does this work? From the nature of the specific words that are used (motorised vehicles, motor cycles) and the scope and object of the legislation as a whole (the mischief it wants to redress), the court will establish that the purpose of the regulation is to protect parks as a places of quiet reflection. It is clear that prams do not need to be excluded in order to achieve this purpose, and that prams do not belong to the same class or type of vehicles as those specified in the regulation.

The initial textual meaning of the provision (the meaning that the security guard attaches to the regulation) should thus be modified to exclude prams from its scope. The *eiusdem generis* rule regulates how and when this can be done. The general words (ie “any other vehicle”) must be restricted to the same category as the specific words in the provision (ie “motorcycle, car, bakkie, quad-bike”).

This can only be done if 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 (as it does in the circumstances). Note also that the order of the specific words is irrelevant and that one specific word might be enough to establish the relevant category.

We return to our example. The specific words refer to a definite category (motorised vehicles). The specific words have not exhausted that category (one also gets trucks, buses, etc within the category of motorised vehicles). The purpose of the legislation requires a restrictive interpretation. In other words, the general phrase “or any other vehicle” must be read to mean “or any other motorised vehicle similar to a motorcycle, car, bakkie and quad-bike”. The legislation therefore does not apply to prams and the father can take his pram into the park on Sunday afternoons.

If you experienced difficulties in completing this activity, read through the paragraph in Botha again and then complete the following activity.



ACTIVITY 2

(Restrictive interpretation 2)

Botha refers to the case of *S v Kohler* in paragraph 8.3.2. Read the discussion of the case and then consider the following change in the facts. What would the situation have been if the accused had not kept a peacock without a licence, but a cage bird such as a budg-

ie or a cockatiel? Would the budgie or cockatiel be included under the phrase “any other bird” or would the principles of the *eiusdem generis* rule apply to restrict the wide scope of the provision?

FEEDBACK

Botha does not state what the purpose of the regulation is. To determine the purpose we will have to undertake the research that was set out in chapter 7. However, if we accept that all the specific words in the list refer to the same category (poultry), then a case could be made that budgies and cockatiels are cage birds and not poultry. On the basis of the *eiusdem generis* rule, this would mean that the provision would not apply to the keeping of such birds (in spite of the broad and inclusive language used in the regulation).

8.3.1.2 Extensive interpretation

Botha discusses two types of extensive interpretation. Of these types, only the first (interpretation by implication), needs to be studied. The principle remains the same.

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.

The first example is interpretation based on the principle of opposites (the *ex contrariis* rule or the *inclusio unius* rule).

The second example is interpretation based on the principle of necessary relationships (eg 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 are also prescribed).



TEST YOURSELF

- (1) Write a one-page note on the so-called “law making function of the courts”. Discuss the matter from (i) a textualist, and (ii) a contextualist perspective.
- (2) Explain why concretisation is neither a logical nor a purely arbitrary activity (with specific reference to factors that support and limit law-making during the interpretation of statutes).
- (3) Explain the principles applicable to restrictive interpretation in the case of

- (a) the *cessante ratione* rule
 - (b) the *eiusdem generis* rule.
- (4) In the *Matiso* case (paragraph 8.2.3) the court held that the judicial interpreters of statutes can no longer deny their own creative role in the process, but neither can they claim an unrestricted power of creative judicial law-making. If a judge is neither a passive agent for the legislature, nor an active law-maker in his or her own right, how should the relationship between the court and the legislature be described?
- (5) List and discuss the factors that limit judicial law-making during statutory interpretation.
- (6) Explain what each of the following rules of statutory interpretation entails. Refer to case law where possible:
- (a) the *ex contrariis* rule
 - (b) the *eiusdem generis* rule
 - (c) the *cessante ratione* rule
 - (d) the *inclusio unius* rule
 - (e) the *iudices est ius dicere* rule.

SECTION D

Noncompliance with legislation

(Chapter 9)

So far in the course you have explored how legislation is created (Section B) and how to determine what legislation means or prescribes (Section C). In this section we explore what the legal position is when legislative provisions and requirements are not complied with.

CHAPTER 9

Peremptory and directory provisions

What will we study in this chapter?

After having worked through this chapter you should be able to

- (1) identify directory and peremptory provisions in legislation
- (2) explain the differences between directory and peremptory provisions and the different consequences of each
- (3) discuss and apply the rules and principles that are used to determine whether a legislative provision is a directory or a peremptory provision.

What is the central problem to be answered?

As an introduction to this subject, consider the following problem: 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, that is to say, it did not take place in a “private dwelling-house”. Section 29(2) of the Act states that “[a] marriage officer shall solemnize any marriage in a church or other building used for religious service, or in a public office or private dwelling-house, with open doors and in the presence of the parties themselves and at least two competent witnesses”. The “marriage” subsequently turned sour, and the “husband” approached the court with an application to have the purported marriage declared null and void from the start (null and void *ab initio*). He claimed that no marriage came into being as the requirements of the Act were not complied with. The question is, then, what the consequences are of the fact that the marriage took place in the garden.

The argument of the “husband” sounds convincing enough, but this was not what the court decided (see *Ex parte Dow* 1987 3 SA 829 (D)). 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 did not in any way affect the validity of the marriage. How can this be the case? The answer to this question is what you will be exploring in this chapter.

9.1 GENERAL INTRODUCTION

Legislation which contains the formal or procedural requirements that have to be followed before a legal privilege is obtained, or status achieved, often stipulates what the consequences will be if these requirements are ignored. These consequences could range from criminal punishment to the nullity of the privilege granted or status achieved. However, legislation just as often fails to specify what the consequences are where statutory requirements are ignored. These are the problem cases that interest us in this section.

The failure to adhere to statutory requirements sometimes results in the nullity of the subsequent conduct. In such cases we say that the statutory provision is peremptory. However, the failure to adhere to statutory requirements does not always affect the validity of the subsequent conduct (see the example of *Ex parte Dow* mentioned above). We say that a statutory provision is directory when substantial compliance with the provision is sufficient to render the subsequent conduct valid. Whether a statutory provision is directory or peremptory is therefore a crucial question. The same can be said of the question whether what was done was sufficient to qualify as substantial compliance.



ACTIVITY 1

(Strict compliance, substantial compliance and noncompliance)

Section 34 of the Constitution of Transkania reads as follows: "(1) Any citizen can be elected as State President by the National Assembly. (2) To be elected as State President a person must be 35 years of age." Gibson Mbatha was recently elected as State President. All the statutory requirements for the election were complied with, except for the age requirement. How would you describe the situation where, at the date of his election, Mr Mbatha was (a) 43 years old; (b) 18 years old; and (c) 34 years and 11 months old.

FEEDBACK

In situation (a) we can speak about strict or exact compliance because the statutory age requirement was adhered to in the minutest

detail. In situation (b) we can speak about noncompliance as the statutory age requirement was completely ignored. In situation (c) we can speak about substantial compliance, as the statutory age requirement was substantially, or practically, complied with.

However, it remains to be asked whether substantial compliance is sufficient (i.e. whether the age provision is directory (the validity of the Presidency is not affected) or peremptory (the Presidency is void and invalid). How do we answer this question?

Over the years many tests and guidelines have been suggested to determine whether a statutory requirement is directory or peremptory. Initially it was claimed that the language of the provision held the key (where “must” or “shall” were used, it was said that the requirement was peremptory, and where “may” was used it was said that the requirement was directory). However, it soon became clear that the question could not be decided on the basis of grammatical interpretation or semantics alone. A number of additional guidelines were accordingly developed. These guidelines are discussed by Botha in paragraph 9.2.

9.2 SOME GUIDELINES

The textbook contains three sets of guidelines which have, in the past, been used by the courts as starting points for their investigation into compliance with legislation. While you must summarise and know these guidelines, it is also important to realise that the application of these guidelines will not provide clear-cut answers to the question involved. Whether a statutory provision is directory or peremptory cannot be deduced from the provision itself, but depends on what is fair, just and practical in the circumstances of each case, given the purpose of the statutory requirement.

In order to illustrate the application of this master-principle, we briefly discuss two cases from the textbook in more detail and we also refer you to the Constitutional Court’s approach to the issue. These cases form part of your prescribed study material and must be carefully studied.



ACTIVITY 2

(Peremptory or directory?)

Botha refers to *Weenen Transitional Local Council v Van Dyk* 2000 (3) SA 435 (NPD). In this case a dispute arose about the procedure 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 their districts. 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, two 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 publication of the last of these notices. The municipality, however, had published only one notice in which the final rates and taxes were set out and a period for inspection stipulated.

Formulate arguments for the municipality and for Van Dyk respectively (Van Dyk argues that the statutory requirements are peremptory, while the municipality argues that they are only directory). Make use of the guidelines mentioned by Botha but also remember to ask what the purpose of the publication requirement is and what would be fair, just and practical in the circumstances, given this purpose.

FEEDBACK

The judgment of the court was in favour of Van Dyk. Can you anticipate the reasons for the judgment? Here is a summary of the court's judgment.

The imperative language of the provision ("shall publish") had to be considered but had also to be balanced against the object and importance of the provision as a whole (namely, to establish a democratic system of "checks and balances" and to render the municipality accountable to the ratepayers). These objectives could not be met by condensing the three required notices into one. To achieve the objectives of the provision, strict adherence to the publication requirements was required. This requirement was peremptory and the taxes were thus not due.

If you had trouble completing this activity, study the paragraph from Botha again and then complete the following activity:



ACTIVITY 3

(A textual or purposive approach)

According to Botha the debate between the purposive and the textual approaches to statutory interpretation took an interesting turn when it came to the issue of statutory compliance. While the courts generally adopted a textual approach, they openly embraced a purposive approach when called upon to decide whether a statutory provision should be treated as directory or peremptory. Botha refers to *Commercial Union Assurance v Clarke* 1972 (3) SA 508 (AD) as an example of this interesting historical fact.

In this case, 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. The court rejected the company’s argument and held that the provision was directory. Do you agree that the outcome of the case confirms Botha’s claim about the application of the purposive approach? Write a short note in which you list the main points of your agreement (or disagreement) with Botha.

FEEDBACK

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. Botha is correct.

The court took the following into account:

- (1) the imperative use of the language in the section
- (2) 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
- (3) that if a claimant decided not to register the letter, he forfeited this protection himself and took the risk upon himself
- (4) 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, as Botha correctly suggests.

In *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC) 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 the *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.

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.



ACTIVITY 4

(Peremptory or directory? Valid or invalid?)

After working through the cases mentioned above, return to the case of the wedding ceremony in the garden. Formulate an argument on behalf of the wife (respondent) in reply to the argument cited above on behalf of the husband (the applicant). Make sure that you give sufficient prominence to the question whether the object and purpose of the Act had been achieved in spite of the failure to comply strictly with its provisions.

FEEDBACK

Compare your argument with the following summary of the judgment that was actually delivered by the court:

“What is required is a comparison between what the position is and

what, according to the requirements of the section, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is [is] not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction, the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance. The object or purpose of section 29(2) of the Act is essentially to ensure that marriages take place in public, that the public are informed of intended marriage so that any objections can be raised, and that a register to which the public has access is kept. The constant reference to open doors is an indication that interested parties must be permitted access to every marriage ceremony, the mischief being clandestine marriages. I have not been able to ascertain the basis for, or object of, the requirement that a marriage must be solemnized in a private dwelling as opposed to at, or in the precincts of, a private dwelling. As I say, it seems to me that the object of these provisions is to avoid clandestine marriages. Furthermore, s 24 of the Act provides that no marriage officer shall solemnize a marriage to which a minor is party unless the necessary consent is obtained, but s 24A then provides that the marriage shall not be void, but may be dissolved by a court. The point I am attempting to make is that in cases where there would seem to me to be far more compelling reason to treat a marriage as void ab initio the statute does not do so. I treat this as an indication that the legislature did not intend strict compliance with the provision that a marriage be solemnized in a private dwelling house, and that where, as in this case, the parties were competent to marry, that is there was not legal impediment to their marriage, the ceremony was performed by a marriage officer and all concerned bona fide intended and believed it to be a valid marriage, the objects of the Act have been achieved despite the fact that the marriage was solemnized in the garden outside the house and not inside the house with open doors. The application is dismissed."



TEST YOURSELF

- (1) Distinguish between strict compliance, substantial compliance and noncompliance with a legislative provision. Also indicate the consequences of each.
- (2) What role do the semantic guidelines play when a court has to determine whether a statutory provision is directory or peremptory?

(3) Restate, in your own words, the facts and the reasoning of the court in the following judgments:

- (a) *Weenen Transitional Local Council v Van Dyk*
- (b) *Commercial Union Assurance v Clarke*
- (c) *Ex parte Dow*
- (d) *ACDP v Electoral Commission*

SECTION E

Constitutional interpretation

(Chapter 10)

In the previous sections of this study guide, we explored various issues relating to the creation, promulgation, interpretation and application of original and subordinate legislation. In this final section of the course, we turn our attention to the interpretation of the Constitution and especially to the Bill of Rights (chapter 2 of the Constitution).

CHAPTER 10

Constitutional Interpretation

What will we study in this chapter?

After having worked through this chapter you should be able to:

- (1) explain what the Constitution itself says about its own interpretation
- (2) discuss what the courts have said about the interpretation of the Constitution
- (3) explain the close relationship between constitutional and statutory interpretation
- (4) list and discuss the most important guidelines on constitutional interpretation
- (5) list and discuss the most important methods of constitutional interpretation.

What is the basic question that must be answered?

When the Bill of Rights was first introduced into South Africa law, a number of legal scholars claimed that the historic event signalled the end of legal science in South Africa. These scholars argued that the language of the Bill of Rights was so vague and morally loaded that it was impossible to decide constitutional disputes in an objective and neutral manner. The interpretation and application of the Bill of Rights was a purely subjective and political matter. In the light of these claims, consider the following problem:

Before its abolition, section 3(1) of the Abortion and Sterilization Act 1975, like most legislative provisions, contained a fairly detailed description of the circumstances in which an abortion could be performed legally (eg one such circumstance was where the pregnancy endangered the life of the woman and two medical doctors attested to that fact in writing). Similarly, section 20A of the Sexual Offences Act 1957 contained a detailed prohibition of the public expression of homosexual affection (hugging, kissing etc). By applying the principles of statutory interpretation, we could determine with a high degree of certainty what these two statutory provisions meant and prohibited.

However, when the question of the constitutionality of these two criminal offences was raised, the inquiry suddenly involved section 14 of the Bill of Rights. The section simply states that “everyone has the right to privacy”. Does the criminalisation of abortion and of homosexual intimacy violate the right to privacy? These questions can seemingly not be answered in the same deductive manner as the question whether an abortion had been performed without the necessary medical approval. How do we determine what the “right to privacy” means? How should the constitutional provisions in the Bill of Rights be interpreted? Is it true that the judges of the Constitutional Court merely decide matters such as these on the basis of their personal politics? How else can one explain the different ways in which the right to privacy has been interpreted in modern constitutional democracies?

In the United States of America, for example, it was held in *Roe v Wade* that the prohibition on abortion violated a woman’s right to privacy, yet in *Bowers v Hardwick* the same court held that the criminalisation of homosexual anal sexual intercourse in the privacy of one’s bedroom did not violate the right to privacy. In South Africa, by contrast, it was held in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) that the prohibition on public and private expressions of homosexual intimacy violated the right to privacy. However, it was also held in *S v Jordan* 2002 (6) SA 642 (CC) that the prohibition of commercial sexual intercourse (prostitution) in the privacy of one’s bedroom did not violate the right to privacy.

These seemingly inconsistent judgments raise the question whether there is any method available for the rational, objective and legal interpretation of the open-ended provisions of the Bill of Rights. Are there any principles or methods that guide the interpretation of the Bill of Rights? Why, in any case, are we concerned with constitutional interpretation in a course on statutory interpretation? These questions are discussed and answered in chapter 10 of the textbook.

10.1 INTRODUCTION

Botha begins the chapter by explaining the similarities and differences between statutory and constitutional interpretation. In the process he answers the question why we should study constitutional interpretation as part of statutory interpretation.

The Constitution is not a piece of legislation. It was not adopted by any of the recognised legislative bodies in the Republic, but by a specially constituted Constituent Assembly. It is therefore not an Act of Parliament. The Bill of Rights also differs from ordinary legislation

in the style in which it is drafted. The Bill of Rights contains many broadly formulated value statements and few provisions of technical detail. Legislation, by contrast, contains many technical details and few general value statements (the category of quasi-constitutional legislation might fall somewhere in between). The Bill of Rights is applicable to all legislation, while legislation is frequently designed to apply only to one narrowly defined problem area. These differences are captured in the quotes from the *Matiso* and *Nortje* cases in paragraphs 10.1.1 and 10.2.3 respectively.

In spite of these differences, it is essential for two reasons to study constitutional interpretation as an integral part of statutory interpretation. Section 39(2) of the Constitution prescribes that the Bill of Rights should be promoted every time legislation is interpreted (refer back to the discussion above in paragraph 5.2). In order to promote a right in the Bill of Rights, one must first interpret that right to determine its content. The Constitution prescribes in section 39(1) how the Bill of Rights should be interpreted. In order to meet the obligation in section 39(2) to promote the Bill of Rights, we must therefore inevitably turn to section 39(1) of the Constitution. Secondly, because of the close relationship between statutory and constitutional interpretation, most legal scholars believe that it is best if the same purposive approach is followed in the interpretation of statutes and the Constitution.

10.2 WHY IS A SUPREME CONSTITUTION DIFFERENT?

Botha explains that there are many reasons why the text of the Constitution is different from the text of ordinary legislation. It is the supreme text of the legal order (see also paragraph 10.1.2). It sets out the organisational structures and procedures of the State (it is a formal power map). However, the Constitution also sets out the foundational values of the State (it contains a substantive ethos or moral and ethical map). It also sets out the aspirations of the nation (it contains language which is rich in symbolism). Ordinary legislation typically lacks the organisational, ethical and symbolic breadth of the Constitution. However, during the past decade, a number of Acts have been passed by Parliament that all contain a highly symbolic, aspirational and ethical message. These acts are known as quasi-constitutional legislation. A good example is the Employment Equity Act.

Food for thought

(Constitutional patriotism or nationalism)

This section is intended to stimulate further thinking. You do not need to study it for the examination.

Botha says that the Constitution should be the most important national symbol and continues to discuss a number of metaphors that have been used to describe this central symbol (paragraph 10.1.2; paragraph 10.2.3, and especially paragraph 10.4.3). This is known as “constitutional patriotism”. Citizens of a constitutional democracy are patriotic about their constitution and its human rights culture, as opposed to a shared language, or history, or race, or leader (a good example of this kind of “constitutional patriotism” is the United States of America). Constitutional patriotism is what distinguishes modern constitutional democracies from older forms of nationalism and the nation states of 19th century Europe and their colonial empires. It is also what distinguishes the post-apartheid state from the apartheid state. The latter was grounded on Afrikaner nationalism, and tried to reserve citizenship for a small section of the population on the basis of their patriotic allegiance to a shared history, language, religion and race. The post-apartheid state grants citizenship to all South Africans on the basis of their patriotism and commitment to the Constitution and the new human rights culture. Do you believe that this “constitutional patriotism” is strong enough to resist the rise of new forms of exclusive nationalism in our society? Discuss this question with fellow students.

10.3 HOW TO INTERPRET THE CONSTITUTION

This section forms the heart of this chapter and needs to be studied carefully.

10.3.1 Constitutional guidelines

Botha discusses two sets of guidelines for the interpretation of the Constitution. The first is what the Constitution itself says in section 39(1) about the way in which the

Constitution should be interpreted; the second is what judges have said about the way in which the Constitution should be interpreted.

(i) Section 39(1) read with the preamble and section 1 of the Constitution

You must know the wording and meaning of section 39(1) in detail.

Note that the values mentioned in section 39(1)(a) can be found in the Preamble to the Constitution and in section 1 of the Constitution. This means, in effect, that the Bill of Rights should be interpreted as if its purpose is to give more detailed content or effect to the Preamble and foundational provisions of section 1. In fact, it has been suggested that these provisions form the core of the Constitution and can therefore never be amended. The Bill of Rights, on the other hand, can be amended with the support of a special majority.

(ii) Principles formulated by the courts

Botha mentions and discusses a number of principles which have been laid down by the courts over the past decade. Summarise each of these principles and compile a list with the name of the case in which each principle was first laid down in brackets (eg the Constitution must be interpreted generously and purposefully (*Shabalala*); the Constitution must be interpreted liberally and flexibly; the values underlying the constitutional order must be considered in the interpretive process (*Acheson*), and so forth).

Please note that the list in section 10.2 should be supplemented with the principles discussed in section 10.4. The principles from section 10.4 include the following: there are no absolute, definite and final answers in constitutional interpretation (*Mhlungu*), constitutional interpretation involves an ongoing but principled judicial dialogue with society, in this dialogue marginalised groups must be empowered to participate in the dialogue and to be heard (*Mhlungu*); constitutional values must be actively promoted in the interpretation of the Bill of Rights; the separation of powers must be respected when the Bill of Rights is interpreted; and the Constitution must be used as an instrument for social and economic empowerment.

A comprehensive methodology

The many principles set out in sections 10.3.1 and 10.4 can be reduced to a smaller number of methods or approaches (but not, please note, to one single and unquestionable approach). These approaches are listed and discussed in paragraph 10.3.2. This comprehensive methodology is set out in the quotation from *S v Makwanyane*. The various considerations which are mentioned there, and which must be judiciously weighed up against each other, are grouped into five different methodologies by Botha (in this, he says, he has followed Du Plessis and Corder). You need to be able to list and discuss each of these techniques or methods of constitutional interpretation as explained by Botha.

Make use of the following activities in order to deepen your understanding:



ACTIVITY 1

(The comprehensive nature of constitutional interpretation)

Take a piece of paper and make a list on the left-hand side of the five techniques of interpretation mentioned by Botha. Then make a list on the right hand-side of the same piece of paper of the factors that influence the interpretation process according to Mahomed J (in the quote from *Makwanyane* in section 10.3.2). Connect each factor on the right-hand side to a technique mentioned on the left-hand side. Now repeat the exercise, but first write down the factors mentioned in section 39(1) of the Constitution on the left-hand side.

FEEDBACK

The factors can be linked to the techniques of interpretation as follows: the text of the Constitution (grammatical interpretation); the interplay between the different provisions of the Constitution (systematic interpretation); local precedents (historical interpretation); international precedents (comparative interpretation); public international law (comparative interpretation); common law (historical interpretation); the history of the provisions (historical interpretation); the meaning of the language used (grammatical interpretation); and the ethos or spirit of the Constitution (teleological interpretation).

Section 39(1)(a) implicitly prescribes a teleological interpretation of the constitutional Bill of Rights (the Bill must be read against the foundational provisions of the Preamble and section 1 in an effort to promote the foundational values or spirit of the Constitution). Section 39(1)(b) and (c) explicitly prescribes a comparative interpretation of the constitutional Bill of Rights (the Bill must be read against the background of the growing international human rights discourse and may be read against the background of similar rights in other democratic countries).

The open-ended and ongoing nature of constitutional interpretation is summarised in *Prince v Cape Law Society* (section 10.3.1). Study this quotation carefully and make sure that you understand the difference between “formal or categorical” reasoning and “principled yet nuanced and flexible case-by-case” reasoning. Use the activity below to deepen your understanding.



ACTIVITY 2

(Categorical and flexible constitutional interpretation)

Apply the distinction between “categorical” and “flexible” reasoning or interpretation to the case of the death penalty. Formulate a categorical constitutional argument against the death penalty. Now formulate a flexible, case-by-case constitutional argument against the death sentence. Which did you find more challenging? Why is it said that the first type of argument is incompatible with the spirit of democracy? Do you agree with this statement?

FEEDBACK

A formal or categorical argument against the death sentence might take the following form: in terms of section 11 of the Constitution, everyone has the right to life. The death sentence violates that right, because it terminates life. This violation cannot be justified in terms of section 36, on the basis of the high crime rate (for example), because the death sentence does not limit the right to life, but completely terminates or destroys it. It follows logically that the death sentence is unconstitutional.

A flexible case-by-case argument might take the following form: the death sentence has a long history in South Africa. It was misused by the apartheid government to kill many political opponents of apartheid. Nelson Mandela himself faced the death sentence but was, fortunately, sentenced to life imprisonment. Other leaders of the struggle, however, were not spared. What would the course of history have been if Mandela had also been executed? It is understandable in the light of this abuse of the death sentence that the transformation from apartheid to democracy should have been accompanied by the highly symbolic abolition of the death sentence. It was the first case before the Constitutional Court and the first opportunity to show the nation that the old political order and its abuse of the law has been replaced by a new democratic order. The fact that leading democratic states such as the United States of America still regard the death sentence as a constitutionally valid form of punishment is, in our context, not of decisive importance. In the United States the imposition of the death sentence has never been employed as a strategy to combat what in effect amounted to, a civil war against the government. South Africa’s political history and the stigma attached to the death sentence also mean that the issue of the death sentence cannot, at this time, be approached purely as an issue of crime and punishment. It is possible that the position will change as the new democratic order becomes symbolically entrenched in the minds and

realities of daily life in South Africa. Should the rate of violent crime increase at the same time, we might reach a point where the symbolic message encapsulated in the abolition of the death sentence will become less important and the role of the death sentence in the fight against crime will have to be reconsidered. However, today, we have not reached that critical point and the death sentence should be declared an unconstitutional violation of the right to life.

One could say that the second type of argument reflects the spirit of democracy because (unlike the first type of argument) it does not make any absolute or categorical statements that cannot be challenged or reviewed. Note that “democracy”, in this context, does not simply mean majority rule. Democracy means that all issues in the State are settled by argument and debate (as opposed to power and force). The democratic spirit is a celebration of the questionability of all established truths. The first line of argument is undemocratic in this sense because it tries to present the case against the death sentence in terms of the unquestionable rules of formal logic.

If you had trouble completing this activity, study the paragraph from Botha again and then complete the following activity.

ACTIVITY 3

(The principles and comprehensive methods of constitutional interpretation)

Take the list that you compiled about the principals of constitutional interpretation (see section 10.3.1 above). Sort each of the principles on your list into the five methods that combine to form the comprehensive methods of constitutional interpretation.

FEEDBACK

Many of the principles encapsulate more than one method. Here are a few examples:

Grammatical interpretation: respect the text and language of the Constitution.

Systematic/contextual interpretation: read every word and section in relation to the whole context; do not interpret sections or rights in isolation.

Teleological interpretation: adopt a generous and purposive interpre-

tation; adopt a liberal interpretation; promote the spirit and values of the whole constitutional order; promote the fundamental rights.

Historical interpretation: consider the historical contexts under which the Constitution was adopted; interpret the Constitution in the light of the present and the future; use the Constitution for social and economic empowerment and to undo the legacy of apartheid.

Comparative interpretation: apply international and foreign law in the light of South African laws and conditions.

10.4 WHOSE CONSTITUTION IS IT ANYWAY?

In this section Botha raises important questions about judicial activism and restraint, especially in the context of socioeconomic rights. In the process he addresses many of the challenges and unanswered questions about constitutionalism and constitutional interpretation in post-apartheid South Africa. Except for the principles mentioned above under section 10.3, the issues that are discussed in section 10.4 fall outside the scope of this introductory course and need not be studied.



TEST YOURSELF

- (1) Explain the provisions of section 39(1) and how these provisions are related to section 39(2) of the Constitution.
- (2) List ten guidelines for constitutional interpretation.
- (3) Why can it be said that the Constitutional Court laid down a “comprehensive and inclusive” method of constitutional interpretation in *S v Makwanyane*? Explain by relating each of the methods of constitutional interpretation to the judgment in question.

SECTION F

Conclusion

The textbook concludes with Appendices 1 and 2. Botha includes the text of the Bill of Rights of the Constitution (Appendix 1), and the Interpretation Act 33 of 1957 (Appendix 2). Reference was made in the textbook to these two basic documents. Please consult them when necessary.

We have now come to the end of the textbook and our course. We trust that you are finding the course challenging and feel rewarded as you master the material. It is unlikely that you will have mastered all the important aspects of the course on the first reading of the prescribed study material. We therefore urge you to return to the beginning of the course and work through the prescribed material again. You will be surprised how much your grasp of the overall structure and content of the course will help you to understand issues which might have been obscure before. As you go through the course again, you must also begin to pay attention to the compulsory assignments (see Tutorial Letter 101). Working through these assignments will give you a good indication of how well you have grasped the prescribed study material.

By now you must also have many questions to ask us or comments to make. Please do not hesitate to contact us and to share these questions and comments with us. We look forward to hearing from you. (Our contact details can be found in Tutorial Letter 101).

Good luck with your studies.

Kind regards

YOUR LECTURERS