JUTA

STATUTORY INTERPRETATION

AN INTRODUCTION FOR STUDENTS

FIFTH EDITION



CHRISTO BOTHA

Statutory Interpretation An Introduction for Students

Fifth edition

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Preface

Teaching interpretation of statutes to the so-called Y-generation—armed with the newest tablet computers, smart phones and other electronic gadgets, and well-trained in social-media interaction—at South African law schools is not for the faint-hearted. Since the preface to the fourth edition of this book was written in 2005 nothing has changed. If anything, students' reading and writing skills are worse, and they know (and care) less and less about time and space. For many students Wikipedia, Blackberry, Twitter and Facebook represent the extreme limits of their contextual world.

One of the current education-speak issues workshopped by South African legal academics is whether or not we 'over-teach' law students (other buzz phrases are 'closing the curriculum gap', 'blended learning', 'enquiry-led teaching', 'expectancy zones' and 'scaffolding of threshold concepts'); a lecturer should not be a 'sage on the stage', but rather a 'guide on the side'; et cetera and so on and so forth. However valuable these profound deliberations may turn out to be in the future, in the meantime fewer law lecturers at understaffed faculties have to teach more and more hopelessly under-taught and over-confident students who enter universities straight out of a collapsing school system. According to modern educationists, lecturers just have to accept this situation as an unfortunate given. Get used to it, get over it and get on with it, because (according to those in the know) if you are not part of the solution, you are part of the problem. After all, to quote from one of the many anonymous parodies of Rudyard Kipling's *If*, lecturers are

supposed to be quite adaptable:

> If you can write, and not be tired of writing
> Or being laughed at, aren't reduced to tears;
> Or if ignored, do not indulge in hating,
> Or being fought, do not give way to sneers;
> If you can talk with fools and keep your virtue;
> If you can read until your eyes are gone,
> Yours are the Clouds and nothing else, you fool you
> and which is less—you'll be a lecturer, my son!

Mind you, since beleaguered lecturers are struggling in the trenches, Alfred Lord Tennyson's *Charge of the Light Brigade* may be more apt!

On the other hand the Y-generation law students will have to accept that, like toll roads and rock 'n roll, interpretation of statutes is here to stay. During recent discussions between the Council for Higher Education, members of the South African Law Deans' association, law teachers and members of the professions, one of the required core skills of South African law graduates was identified as having 'the ability to read and interpret statutes and legal documents'. So: as the Americans are fond of saying, let's cut to the chase. Law students may consider interpretation of statutes boring, confusing and instantly forgettable, but the legislation and *Government Gazettes* and Green Papers will still be waiting out there, and the principles, rules and maxims needed to interpret legislation will accompany all lawyers for the rest of their careers.

Because this book is aimed at the next generation of lawyers, allow me a number of explanatory clauses and disclaimers:

- It is largely based on my own re-interpretation and personal adaptation of Lourens du Plessis's suggested

practical and inclusive approach to interpretation. However, while I accept that there may be different viewpoints about my categorisation of certain presumptions and rules within the suggested inclusive approach, it should be borne in mind that this book is, first and foremost, a teaching tool.

- Furthermore, this is an introductory textbook for undergraduate students—a basic and 'student-friendly' introduction to the fundamental principles of the interpretation of legislation. It is not intended as an exhaustive reference work or complete compendium. After all, this year's landmark case is next year's overturned decision, and today's draft Bill is tomorrow's repealed Act . . .
- Let us be frank about it: it is impossible to teach every rule, maxim, principle, theory and presumption of interpretation to a large group of students in a single semester (paradoxically, those perceived dangers of 'over-teaching' are sometimes counterbalanced by sheer numbers and lack of time). This introduction for students does not cover every aspect of the discipline, and it cannot teach students how to interpret legislation. It is merely an attempt to teach

students the most important rules and principles of the interpretation of legislation, as well as some of the necessary skills required to find solutions to future problems. In a way it is similar to teaching a novice the basic principles of golf: it is impossible to teach every possible shot in just a few coaching sessions. However, a player who has mastered the fundamentals of the golf swing should have the basic skills to deal with a plugged lie in the bunker, to play a high fade into the wind or to take on a bump-and-run chip from a tight lie. This also means that the golfer has to hone those skills on the course, not only on the practice range. But

then again, interpretation of legislation and golf are not exact sciences: from time to time there will be bad drafting or out-of-bounds shots to deal with!

- It is suggested that this book be used as part of an integrated teaching methodology. The rules of statutory interpretation cannot be taught in isolation, and should be continually linked to other law subjects (preferably in the same year of study), with suitable practical examples and references to relevant legislation. Practical examples and hypothetical scenarios will not only enable the students to link the rules and principles of interpretation to the 'real' world, but will also emphasise the interrelatedness of statutory interpretation and the rest of the law. Needless to say, such an approach will necessarily require more problem-based examples during lectures and contact sessions.

This fifth edition is not only the product of more than three decades' efforts (including misguided visions and mistakes) to teach interpretation of statutes to undergraduate students, but it has also been influenced by lectures to the association of Regional Magistrates of Southern Africa and by my certificate course in legislative drafting (offered by the University of Pretoria). I also have to acknowledge the positive criticism, innovative ideas, comments and suggestions of a number of my friends: Rassie Malherbe, Isabeau Southwood, Bernard Bekink, Pieter Carstens, Jakkie Wessels, Mike van Heerden, Koos Malan, Werner Krull and all the other usual suspects. However, all the mistakes, shortcuts and wrong interpretations will inevitably be deemed to be mine. of course, since my personal mantra is 'Why procrastinate if you can do it tomorrow', Linda van de Vijver of Juta deserves a medal for her infinite patience.

Finally, this fifth edition includes supplementary material containing the Constitution of the Republic of South Africa,

1996 and the Interpretation Act 33 of 1957

CHRISTO BOTHA
PRETORIA
2012

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Chapter 1
General Introduction

1.1 Legislation as source of law

In order to understand and apply the rules, principles and canons required to interpret legislation (Part 2), lawyers need to be proficient in the technical 'black letter' or 'nuts and bolts' aspects of legislation explained in Part 1. These aspects include the various types and categories of legislation, the structural parts or components of legislation, and the sometimes confusing 'codes' used in legislative texts, as well as the challenging interrelationship between existing old order legislation and new post-1994 laws.

The law consists of all forms of law (common law, statute law, indigenous (customary) law, case law), while **a law** is a written statute enacted by those legislative bodies which have the authority to make laws.

- Legislation ('enacted law-texts' or statute law) comprises all the different types of enacted legislation, such as Acts of Parliament, provincial legislation, municipal by-laws, proclamations and regulations. An **Act** (upper case) refers to a parliamentary statute or the legislation of a provincial legislature (*wet*). An **act** (lower case) refers to conduct or action (*optrede* or *handeling*) such as the act of a government official or an organ of state.
- The common law is composed of the rules of law which were not originally written down, but came to be accepted as the law of the land. The common law is made up of the underlying original or basic legal principles. South African common law is known as Roman-Dutch law and most of it originated during the seventeenth century in the erstwhile

province of Holland.

- Common law needs to be distinguished from codifications, which are statutory compilations of all the legal principles

relating to a particular branch of the law (eg a criminal code). The common law may be changed by original legislation, but if there is no statutory law on the subject, the common law applies.

- Indigenous law refers to the traditional law of the indigenous black people of South Africa. This may either be unwritten customary law, or codified (statutory compilations).
- Case law (also referred to as 'judicial precedent') is the law as various courts in specific cases before them have decided on it. (For law students, the term 'case law' usually refers to those cases they had to read, but did not, and had to discuss in the examination, and could not!) The precedent system (also known as *stare decisis*) means that judgments of higher courts bind lower courts and courts of equal status.

Statute law (legislation) plays an ever-increasing role in common-law legal systems. In the past, legislation may have been viewed as exceptions to the common law, but the rapid changes in modern society have stretched the adaptability of common-law rules to their limits. Since the common law cannot deal with the regulation of new technological and scientific developments such as electronic funds transfers, stem cell research and cross-border human trafficking (to name only a few), more and more legislative intervention is necessary and inevitable. As a result, legislation is the most important source of new law in most modern societies.

In South Africa there is, of course, a more fundamental reason for a thorough understanding of the technical aspects

of legislation. In a strictly legalistic sense apartheid was an ideologically underpinned and public-law driven system, based on a web of interlocking legislation. The dismantling of this legal edifice not only requires an excellent knowledge of statute law, but a great deal of new legislation is needed to remedy the situation in the new constitutional dispensation.

1.2 What is interpretation of statutes?

Interpretation of statutes, or perhaps more precisely, the juridical understanding of legislation, deals with those rules and principles which are used to construct the correct meaning of legislative provisions to be applied in practical situations. Du Plessis (2002: 18) explains it as follows:

> [S]tatutory (and constitutional) interpretation is about construing enacted law-texts with reference to and reliance

> on other law-texts, concretising the text to be construed so as to cater for the exigencies of an actual or hypothesised concrete situation.

In other words, it is about making sense of the total relevant legislative scheme applicable to the situation at hand.

But why do we need special rules of interpretation? Lawyers all have (or should have!) the necessary language skills to read and understand legislation. You just read the legislation carefully and apply it to the situation at hand. How difficult can it be? Should you encounter an ambiguity in the text, you can always use a dictionary. However, it is not that simple. Interpretation of legislation requires more than a mere reading of the provisions. It is not a mechanical sequence of *join-the-dots* or *painting-by-numbers*.

For example:

During the 1950s Professor Lon Fuller (1958: 664)

provided a very interesting hypothetical example to illustrate the inherent difficulties of language (words) in legislation. At the same time he asked uncomfortable questions about issues such as morality, poverty and power (in other words, value judgements). Suppose a law is passed that states that it is a criminal offence to sleep in any railway station. Common sense tells us that the law is intended to prevent homeless people (vagrants or squatters or tramps) from using railway stations as shelters. Two men appear in court on a charge of contravening the law in question. One man is a regular commuter who sat upright, but dozed off while waiting for the train; the other man, who brought a blanket to the station and settled down for the night on one of the benches, was arrested while still fully awake. How should the court interpret and apply the legislation? Surely the court cannot read the legislation in a literal sense. If not, why not? After all, the words are clear—or are they? What about the historical background and other surrounding circumstances? How much of these may the court take into consideration? All of a sudden interpretation of statutes is not that simple and straightforward any more.

Another example, closer to home:

Take s 11 of the Bill of Rights in the Constitution as an example. It reads: 'Everyone has the right to life.' Does the supreme Constitution guarantee

immortality? That is absurd, since we all know that it a biological impossibility. But, then, what does s 11 mean? Since 'the right to life' forms part of an 'enacted law-text' (the Constitution), how do the courts interpret it? In *S v Makwanyane* 1995 (3) SA 391 (CC) the Constitutional Court held that the right to life means that the state may not take a person's life in retribution, and the death penalty was declared unconstitutional. Does this decision mean that a person may not be killed in self-defence? Not at all: In *Makwanyane* and *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC) the Constitutional Court held that the existing right to kill a person in self-defence was not abolished by the Constitution. On the other hand, the decision of the Constitutional Court in *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) effectively means that the constitutional right to life does not mean the state has a duty to keep all terminal patients alive in all circumstances. Furthermore, in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) the Constitutional Court linked the constitutional rights to life and the freedom and security of the person to the constitutional duty imposed on the state and all of its organs not to perform any act that infringes these rights. Now the phrase 'Everyone has the right to life' does not seem so simple and unambiguous anymore! This simple example makes it clear that there is more to interpretation of legislation than reading and spelling skills, and words, phrases and grammar. The supreme Constitution, the context of legislation, and competing human rights and fundamental values also form part of this process: a

very intricate, nuanced and multi-faceted process. Du Plessis (1999: 230) explains this aspect very well:

> One cannot understand a legal text merely by concentrating on its language. You must also understand how law works and what it seeks to achieve in order to understand how it communicates with you and what it wants to tell you.

In the British case of *Corocraft Ltd v Pan American Airways Inc*. [1968] 3 WLR 714 732 Donaldson J explained interpretation of legislation as follows:

> In the performance of this duty the judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from which issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.

The interpretation of legislation is not a mechanical exercise during which predetermined formulae, well-known maxims and careful reading will reveal the meaning of the legislative provision. Technical aspects (eg the structure of the legislation and language rules) must be applied in conjunction with substantive aspects (eg constitutional values and fundamental rights). Apart from the inherent difficulties of language and meaning, the interpreter has to keep a number of other related issues in mind:

- The provision must be read, understood and applied within the framework of the supreme Constitution and the Bill of Rights.
- What is the impact of other legislation (eg the Promotion of Access to Information Act 2 of 2000, the Promotion of Administrative Justice Act 3 of 2000 and the Promotion of Equality and Prevention of Unfair

Discrimination Act 4 of 2000)?

- Is the legislation that must be interpreted still in force? If still in force, has it been amended since?
- If, for instance, a provision in an Act of Parliament is to be interpreted, it must be read with the rest of the Act, including its definition section and possibly its schedules as well. Regulations may have been issued in terms of the particular provision, which have to read with the enabling legislation. Are those regulations valid?
- What is the context (general background or surrounding circumstances) of the legislative text?
- Other external aids (eg dictionaries or commission reports) may be used to establish the meaning of the legislation.
- Sometimes the interpreter will be confronted by the results of poor drafting, conflicting provisions or a lack of resources to research the current law.

Make no mistake: interpretation of legislation is not easy, quick or mechanical. It not only requires excellent language skills, but the interpreter must also have a very good knowledge of the law and where to find it. This means research: reading reported cases (lots of them!), finding and analysing the latest Acts and regulations, and keeping up to date with new developments in the law.

Practical example:

As has been pointed out, interpretation of statutes is not easy. Take a look at the definition of a 'firearm' in s 1 of the Firearms Control Act 60 of 2000:

> In this Act, unless the context indicates otherwise—

. . .

'firearm' means any—

(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);

. . .

What is muzzle energy of 8 joules (6 ft-lbs)? Muzzle energy is the kinetic energy of the bullet when it exits the barrel. To know the muzzle energy, you need to know the muzzle velocity (the speed of the bullet when it exits the barrel), the mass of the bullet, and a lot of mathematics! Muzzle energy (in ft-lbs) is calculated as follows: Muzzle velocity (in feet per second)^2 d 450240 x bullet weight in grains. One grain = .064789 gram, and one ft-lb muzzle energy = 1.356 joule. Did the legislative drafters know or understand this definition? Do you think the prosecutors, legal practitioners and the judiciary understand the definition? To cut a long story short—there is more to interpretation of legislation than merely glancing through the words in the text!

Legalese

Bad drafting and legalese is another problem. 'Legalese' refers to the perplexing and specialised language (or social dialect) used by lawyers in legal documents, incomprehensible to the non-lawyer. Somebody once defined it as 'the language of lawyers that they would not use in ordinary communications but for the fact that they are lawyers'. It is characterised by wordiness, Latin expressions, passive verbs, lengthy sentences

and legal doublets (stringing together two words to convey a single legal concept such as *null and void, fit and proper, perform and discharge* and *terms and conditions*). Why do drafters use verbose language? Maybe it is part of a professional mystique, compelling lawyers to write in a complicated and learned style in order to maintain an aura of profound importance. Lord Radcliffe (1950: 368) explained the use of legalese as follows:

> It seems to me that a sort of hieratic language has developed by which the priests incant the commandments. I seem to see the ordinary citizen today standing before the law like the laity in a medieval church: at the far end the lights glow, the priestly figures move to and fro, but it is in an unknown tongue that the great mysteries of right and wrong are proclaimed.

Yet despite the efforts of the advocates of more understandable plain language in legal drafting, interpreters still have to deal with convoluted language in legislation. Just imagine you have to interpret the following provisions:

Section 1 of the Orange Free State Civil Protection Ordinance 10 of 1977 was a somewhat ridiculous attempt to define a 'disaster':

> In this Ordinance, unless the context otherwise indicates—'disaster' means a disaster or a state which is not a state of emergency or a state of disaster and which, in the opinion of the Administrator or of the local authority concerned, is a disaster, as defined in section 1 of the Act, or is likely to develop into such a disaster;

Or even worse, another potential tongue-twister was s 1(4) of the previous Labour Relations Act 28 of 1956:

> The definition of 'unfair labour practice' referred to in subsection (1), shall not be interpreted either to include or exclude a labour practice which in terms of the said definition is an unfair labour practice, merely because it was or was not an unfair labour practice, as the case may be, in terms of the definition of 'unfair labour practice', which definition was substituted by section 1*(a)* of the Labour Relations Amendment Act, 1991: provided that a strike or lock-out shall not be regarded as an unfair labour practice.

In an almost desperate attempt to make sense of s 22(1)*(d)* and 22(1)*(bb)* of the Compulsory Motor Vehicle Insurance Act 56 of 1972 (as amended several times), Botha JA in *Santam*

Insurance Ltd v Taylor 1985 (1) SA 514 (A) 523B and 526E expressed himself as follows on the confusion:

> In an attempt to escape from the prolixity which disgraces this piece of legislation I shall take a number of short cuts when referring to its provisions . . . In my opinion the man in the street would be at least as perplexed by the language used by the legislature as is the man on the Bench who is writing this judgment.

Clearly the judge was not impressed with the standard of drafting and the legalese used in the legislation which it had to interpret. As Botha & Bekink (2007: 34) point out, it is not always easy to use so-called 'plain language drafting' in legislation and other legal documents. However, even in South Africa legislative drafters, legislatures and lawyers are becoming more aware of the need to draft legal documents in more understandable language.

Practical example:

Section 3(1)*(b)*(iv) of the Consumer Protection Act 68 of 2008 is a good example of an express legislative acknowledgement of the link between understandable language and access to justice:

> **3 Purpose and policy of Act**
>
> (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—
>
> . . .
>
> *(b)* reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—
>
> . . .
>
> (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;

What is in a name: purpose or intention?

As explained earlier, interpretation of statutes is about the juridical understanding of legislation. The interpreter has to determine what the legislation has to accomplish in the legal order. Case law and most of the older sources refer to this as

the 'intention of the legislature'. Other sources prefer the terms 'purpose of the legislation' or the legislative scheme, and so on.

The term 'intention of the legislature' is closely linked to the principle of sovereignty of parliament. Parliament was the sovereign lawmaker in the Republic and legislation reflected a parliamentary legislative intention. As one of the influential proponents of the intention theory, Steyn (1980: 1) defined statutory interpretation as the process during which the will or thoughts of the legislature are ascertained from the words used by the legislature to convey that will or thoughts.

But it is difficult to picture such a collective intention exercised by all the members of a legislative body:

- The legislature is composed of a large number of persons, all of whom take part in the legislative process.
- As part of the democratic legislative process some members of the legislature may oppose the legislation for various reasons, with the result that the adopted legislation ultimately reflects the 'intention' of only the majority of the legislature.
- Some members will support legislation for the sake of party unity, though they may be personally opposed to a Bill. This means that the 'intention' of the legislature is subject to what the individual members of the legislative body, under

pressure from their party caucus, 'had to' intend!

- Parliamentarians are elected politicians, and they do not necessarily understand the complex and technical legislation which they adopt.
- A Bill introduced in the legislature is not drafted by the public representatives, but by legislative drafters and law advisers acting on the advice of bureaucrats from various state departments.
- Some members of the legislative body may even be absent when voting on draft legislation takes place.

To put it another way: the intention of the legislature refers to the fictional collective intent of the majority of the legislative body present at the time when the vote took place, expressing their will within the constraints of the voting guidelines laid down by the caucus of the ruling party in the legislature, and voting for draft legislation—formulated by legal drafters on the advice of bureaucrats from a government department—which had been approved earlier by the state law advisors!

In the final analysis the correct interpretation of legislation does not depend on which term is used. What is important,

though, is **how** that purpose (or intention or legislative scheme or aim of legislation) is ascertained and construed. The correct way to interpret legislation is discussed in greater detail in Part 2 of this book.

1.3 The new constitutional order

For many years statutory interpretation was the Cinderella of South African jurisprudence. During the late 1970s and the 1980s in particular, the unsystematic application of the rules

and principles of statutory interpretation was criticised by academics. Traditionally, interpretation of statutes in South Africa was saddled with unnecessary (and unacceptable) baggage: a confusing system of maxims and canons of interpretation, tentative principles, a golden rule, overriding principles, so-called primary, secondary and tertiary rules, manifest and clear meanings, rules of Roman-Dutch law influenced by English law, misconceptions about the structure and meaning of language, exceptions to the rule, as well as differences of opinion about how the so-called intention of the legislature should be ascertained. The acceptance and legitimacy of the new supreme Constitution may have been compromised if the application of the fundamental rights was hampered by the orthodox interpretation of 'ordinary' legislation.

A supreme constitution is the highest law (*lex fundamentalis*) in the land. Although parliament remains the highest legislative body in a system of government with a supreme constitution, any legislation or act of any government body (including parliament) which is in conflict with the constitution will be invalid. However, constitutional supremacy does not imply judicial supremacy. The courts are also subject to the constitution and merely act as the final guardians of the values and principles embodied in the constitution.

Traditionally, the South African rules of statutory interpretation were based on the sovereignty of Parliament. In such a system, Parliament is not only the highest legislative body, capable of enacting any laws it wishes, but no court may test the substance of parliamentary Acts against standards such as fairness or equality. This was the system of government which operated in South Africa before the interim Constitution took effect. In 1992 Devenish (1992: 290-291) articulated the need for a new method of statutory interpretation in a constitutional democracy as

follows (emphasis added):

> The constitutional doctrine of parliamentary sovereignty, the jurisprudence of positivism, and the political hegemony of Afrikaner Nationalism have greatly influenced the methodology and theory of interpretation in South Africa. Steyn's advocacy of the subjective or intention theory of interpretation facilitated a sympathetic interpretation of apartheid and draconian security legislation . . . *[T]he demise of the apartheid state and the emergence of a new political and legal order involving a negotiated and legitimate constitution with a entrenched and justiciable bill of rights must of necessity influence the process and theory of interpretation*. The courts will be able, in the new constitutional and political dispensation, (which will of necessity be cleansed of all race discrimination laws) to exercise their powers to test and invalidate legislation. In order to do this all statute law will have to be interpreted to be compatible with the letter and the spirit of the constitution. This means that a value-coherent theory of interpretation should become increasingly prevalent. *In effect the introduction of a justiciable bill of rights is likely to herald a new methodology and theory of interpretation of statutes*.

On 27 April 1994 the Constitution of the Republic of South Africa 200 of 1993 (hereafter 'the interim Constitution') came into operation. Apart from its constitutional implications and political ramifications, it also changed the interpretation of statutes as we knew it. Not only was the principle of parliamentary sovereignty replaced by constitutional supremacy, but the interpretation clause stated that the spirit and purport of the fundamental rights had to be taken into account during the interpretation of statutes. In other words, the courts can no longer ignore value judgements. Since the commencement of the interim Constitution, even the rules of statutory interpretation have been influenced by the new constitutional order. The critical questions asked by academics were no longer theoretical reflections. Suddenly the correct method of statutory and constitutional interpretation formed the centre of the debate about the protection of fundamental human rights!

On 4 February 1997 the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution') came into

operation. Those principles of the interim Constitution which transformed statutory interpretation were retained in the Constitution of 1996. Apart from the constitutional values, the interpretation of statutes was transformed by six provisions of the Constitution in particular: s 1 (the foundational provision); s 2 (the

supremacy clause); s 7 (the obligation clause); s 8 (the application clause); s 36 (the limitation clause) and s 39 (the interpretation clause). These provisions, as well as the constitutional values, are discussed fully in later chapters.

Chapter 2
The term 'legislation'

2.1 What is legislation?

It is important to distinguish legislation from other sources of law, because the rules and principles of statutory interpretation apply only to legislation. Legislation (also called 'statute law') is written law enacted by a body or person authorised to do so by the Constitution or other legislation. Du Plessis (2002: 1) refers to legislation as 'enacted law-texts'.

What does 'enacted law-text' mean?

- 'Enacted' means it was adopted/issued/promulgated in terms of the prescribed legal requirements (for instance, the Constitution and the Interpretation Act 33 of 1957 ('the Interpretation Act')).
- 'Law' means it has the force of law.
- 'Text' means it is written law.

The term 'legislation' (statute law or *enacted law-texts*) comprises a number of sometimes confusing names and concepts, for instance, Acts, statutes, ordinances, regulations, proclamations, rules, notices and by-laws. Apart from the fact that the various types of legislation are categorised in terms of both a chronological timeline and a hierarchical power structure (discussed in 2.2 below), some of these names have different meanings, depending on the context in which they are used.

Please note:

Generally a statute is an Act of Parliament, but sometimes a statute may refer to the set of subordinate legislation regulating the internal organisation of a university. A notice may be a specific type of subordinate legislation issued by a competent functionary, but a notice in an official *Gazette* could also be just that—an official notification of facts or situations that must be brought to the attention of the public.

In order to determine the legal meaning of 'legislation', let us start with the definitions in the Interpretation Act. Section 1 of the Interpretation Act provides:

> **1 Application of Act**
>
> The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act, in the Republic or any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.

'Law' in this context does not include the common law. In other words, the rules of statutory interpretation apply only to legislation. But how does legislation define itself? Section 2 of the Interpretation Act defines 'law' as follows:

> **'law'** means any law, proclamation, ordinance, Act of Parliament or other enactment having the force of the law.

According to the Interpretation Act (ss 1 and 2 read together) legislation consists of:

- any law, proclamation, ordinance, Act of Parliament, all by-laws, rules, regulations or orders; and
- any other enactment having the force of the law.

So far, so good: if these different types of legislation seem

confusing, it gets worse! Section 239 of the Constitution also defines legislation:

> In the Constitution, unless the context indicates otherwise—
>
> **'national legislation'** includes—
>
> *(a)* subordinate legislation made in terms of an Act of Parliament; and
>
> *(b)* legislation that was in force when the Constitution took effect and that is administered by the national government;

> . . .
>
> **'provincial legislation'** includes—
>
> *(a)* subordinate legislation made in terms of a provincial Act; and
>
> *(b)* legislation that was in force when the Constitution took effect and that is administered by a provincial government.

Furthermore, ss 101(3) and 140(3) of the Constitution refer to subordinate legislation as proclamations, regulations and other instruments of subordinate legislation, item 1 of Schedule 6 of the Constitution distinguishes between old order legislation and legislation since 1994, and ss 44, 104 and 156 of the Constitution mention assigned legislation. Finally, s 156(2) of the Constitution empowers local governments (municipalities) to make by-laws as mentioned in the Interpretation Act.

According to the Constitution the legislative menu consists of the following:

- national and provincial legislation;
- proclamations, regulations and other instruments of subordinate legislation;
- assigned legislation;
- old order legislation (defined in item 1 of Schedule 6 of the Constitution as any legislation enacted before the interim Constitution took effect on 27 April 1994);
- legislation in the new constitutional order since 1994; and
- municipal by-laws.

All of these will be explained in the sections to follow. It

should now be clear that the Interpretation Act and the Constitution refer not only to legislation emanating from certain geographical areas (national, provincial and local authorities), but also to a time-line (old order and post-1994 legislation) as well as to a hierarchical distinction (for instance, 'instruments of subordinate legislation'). This means that the term 'legislation' needs to be understood, interpreted and applied in terms of a horizontal timeline, geographical space and vertical hierarchical authority. Now things get interesting: fasten your seatbelts, or as William Shakespeare (*Julius Caesar*: Act 3 scene 1) put it: 'Cry "Havoc!" and let slip the dogs of war . . .'

2.2 Categories of legislation

In this part of the chapter the various categories and types of legislation will be explained. These categories relate to the historical origins of legislation (chronological categories) as well as to the status of the various types of legislation in the

legal order (hierarchical categories). Students may think that all types of legislation (statute law or enacted law texts) are essentially the same. Unfortunately this is not the case. The various hierarchical categories of legislation differ fundamentally from each other. These differences have an impact on the commencement and demise of legislation, and play an important role in all the other branches of the law (more specifically administrative law, human rights law and constitutional law).

2.2.1 Chronological categories

This classification explains all forms of existing legislation according to their historical origins. This part is fairly simple: it is a little bit of history, and the legislation is merely

categorised in terms of a chronological time-line.

(a) Legislation before 1806

Some statutes of the *Staten-Generaal* of the Netherlands and *placaaten* (statutes) of Holland may still be in force. Although technically classed as legislation, these became part of South African common law with no formal procedures required for their demise, and they may be abrogated by disuse. This means that neither the various definitions of legislation (statute law) nor the rules of statutory interpretation will apply to them.

(b) Old order legislation

Old order legislation is defined in item 2 of Schedule 6 of the 1996 Constitution as being any legislation in force before the interim Constitution took effect (just after midnight) on 27 April 1994. However, to understand the potential complexities of existing old order legislation, a few important historical highlights of South Africa's constitutional development since 1910 are necessary.

Constitutional highlights:

On 31 May 1910 the four erstwhile British colonies (Transvaal, Cape, Orange River Colony, and Natal) united in terms of the South Africa Act, 1909 (adopted by the British Parliament) to form the Union of South Africa. The Union of South Africa became an independent state within the British Commonwealth after the Statute of Westminster was adopted by Britain in 1931. In 1955 the Freedom Charter was adopted in Kliptown (outside Johannesburg) by the Congress of the People, a

loose alliance of extra-parliamentary opposition groups. After the Republic of South Africa Constitution Act 32 of 1961 commenced on 31 May 1961, South Africa became a republic (and simultaneously left the British Commonwealth). In 1983 the Republic of South Africa Constitution Act 110 of 1983 resulted in a so-called tricameral parliament for South Africa. In 1994 the era of constitutionalism and supreme constitutions started with the Constitution of the Republic of South Africa Act 200 of 1993 (referred to as the 'interim Constitution', negotiated by various parties and stakeholders, and adopted by the Parliament of the previous regime), which took effect on 27 April 1994 and later culminated in the Constitution of the Republic of South Africa, 1996 (referred to as 'the Constitution', adopted by the Constitutional Assembly and certified by the Constitutional Court), which entered into force on 4 February 1997.

Back to the categories of legislation—old order legislation is divided into the following two historical eras:

Pre-Union legislation (1806-1910)

This category refers to the legislation adopted between the British annexation of the Cape in 1806 and the creation of the Union of South Africa in 1910. It consists of legislation of the British colonies and the Boer Republics. Most of these had been either repealed or incorporated into legislation of the Union (1910-1961), and the Republic (since 1961) with legislation such as the Pre-Union Statute Laws Revision Act 24 of 1979. However, according to the Department of Justice and Constitutional Development, on 30 March 2007 some examples of pre-Union legislation still in force (and probably

in conflict

with the Constitution and other more recent legislation) include the Lord's Day Observance Act 19 of 1895 (Cape Province), the Sunday Act 28 of 1896 (Transvaal) and the Police Offences Ordinance 21 of 1902 (Free State).

Legislation between Union and the democratic era (1910-1994)

In view of the constitutional changes since 1994, this legislation is known as 'old order legislation' and would include most of the existing South African legislation: Acts of Parliament, legislation of the so-called 'independent homelands' or TBVC states (Transkei, Bophuthatswana, Venda and Ciskei), legislation of the former self-governing territories or homelands (Kangwane, Gazankulu, Lebowa, KwaZulu, Kwandebele and QwaQwa), provincial ordinances enacted by the provincial councils of the four 'white-controlled' provinces (Transvaal, Cape, Orange Free State and Natal from 1910 to 1986), proclamations issued by the administrators of the four 'white-controlled' provinces after the provincial councils were abolished (1986-1994), by-laws enacted by local authorities (town councils and municipalities), as well as other existing delegated (subordinate) legislation.

(c) Legislation in the new constitutional order since 1994

This category refers to all legislation enacted after the start of constitutional democracy in 1994. It includes the interim Constitution (since repealed); the 1996 Constitution; national legislation (Acts of Parliament and delegated legislation issued in terms thereof); provincial legislation (Acts of the nine provincial legislatures and delegated

legislation issued in terms thereof); other regulations and proclamations; and legislation by the new local authorities created since 1994.

2.2.2 Hierarchical categories

The historical distinction was fairly easy. However, the hierarchical categories deal with the status of legislation, and this is where things become difficult. Before 1994 the Constitution was not supreme, and the classification of legislation was simple and straightforward: original legislation (such as Acts of Parliament) and subordinate legislation (such as regulations and proclamations).

The post-1994 era is more complicated. Now we have a supreme Constitution, old order legislation and new post-1994

legislation, and three spheres of government (national, provincial and local). The Constitution is supreme, and all legislation is now subject to it. It may now be argued that legislation issued by the administration (also known as subordinate or secondary legislation) should be referred to as delegated legislation to avoid confusion. However, the Constitution itself expressly refers to subordinate legislation (ss 101, 140 and 239 of the Constitution).

(a) The Constitution

The Constitution is the supreme law of the Republic, any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled (s 2). The courts may now test all legislation (including new and old order Acts of Parliament) and government action in the light of the Constitution.

Initially the Constitution was known as the Republic of

South Africa Constitution Act 108 of 1996. However, the Constitution cannot merely be Act 108 of 1996. It is the highest law in the land, and incorporates the rights, aspirations and values of its people. It is degrading to number such an exalted document (the birth certificate of a new constitutional order) as merely the next statute on the legislative list. Furthermore, the Constitution was not adopted by Parliament but drafted by the Constitutional Assembly and certified by the Constitutional Court. This mistake has been corrected by the Citation of Constitutional Laws Act 5 of 2005. From the date of commencement of the Citation of Constitutional Laws Act, no Act number is associated with the Constitution. Any reference to the Constitution of the Republic of South Africa Act 108 of 1996 in any law in force immediately prior to the commencement of this Act, must be construed as a reference to the Constitution of the Republic of South Africa, 1996.

Some people refer to the Constitution of 1996 as the final Constitution or FC. Since nothing is final except death and taxes, and although the Constitution refers to itself as the new Constitution (item 1 of Schedule 6), this book will refer to the Constitution of the Republic of South Africa, 1996 as 'the Constitution'.

(b) Original legislation

Original (primary) legislation derives from the complete and comprehensive legislative capacity of an authorised legislative

body. The hierarchical status of original legislation in South Africa is based on two interrelated principles:

Firstly, it is enacted by democratically elected, deliberative, law-making bodies. In *Middelburg Municipality v*

Gertzen 1914 AD 544 the Appellate Division stressed that the status of legislation is to a large extent determined by the deliberation (discussions) during the law-making process. Please note that in certain cases the Constitution also requires the additional measure of public participation as part of the law-making process of original legislation.

Secondly, the original law-making powers of the elected deliberative legislatures are always founded in the Constitution, but are derived in two different ways:

- **directly** from the Constitution—Parliament (ss 43*(a)* and 44), provincial legislatures (ss 43*(b)* and 104(1)) and municipalities (ss 43*(c)* and 156(1)*(a)*); and
- **indirectly** from the Constitution (assigned by another Act of Parliament or a provincial legislature)—Provincial legislatures (additional legislative powers assigned by Acts of Parliament (ss 44(1)*(a)*(iii) and 104(1)*(b)*(iii))); and municipalities (additional legislative powers assigned by Acts of Parliament (ss 44(1)*(a)*(iii) and 156(1)*(b)*) and additional legislative powers assigned by provincial Acts (ss 104(1)*(c)* and 156(1)*(b)*).

Acts of Parliament

These include all Acts of Parliament since 1910. Between 1910 and 1983 Parliament consisted of the House of Assembly and Senate; between 1983 and 1994 it comprised the House of Assembly, the House of Representatives, the House of Delegates and the President's Council; and since 1994 Parliament has consisted of the National Assembly and the National Council of Provinces.

The legislative authority of the current Parliament is derived directly from the Constitution. Parliament is the highest legislative body in South Africa and it may, subject to the Constitution, pass legislation on any matter. This means the courts may review (test) Acts of Parliament against the Constitution.

Although the Constitution is the supreme law, some Acts of Parliament have a higher status than other original legislation. The Promotion of Access to Information Act, the Promotion of

Administrative Justice Act and the Promotion of Equality and Prevention of Unfair Discrimination Act (the so-called 'constitutional Acts') were enacted to give effect to specific and express legislative measures required by the Constitution (ss 32, 33(1) and 9 read with item 23(1) of Schedule 6 of the Constitution, respectively). A good example of this specific superior status is found in s 5 of the Promotion of Access to Information Act:

> **Application of other legislation prohibiting or restricting disclosure**
>
> This Act applies to the exclusion of any provision of other legislation that—
>
> *(a)* prohibits or restricts the disclosure of a record of a public body or private body; and
>
> *(b)* is materially inconsistent with an object, or a specific provision, of this Act.

Other examples of original legislation also contain provisions stating that it will prevail over any other law in a particular field of law (for example s 70 of the Higher Education Act 101 of 1997):

> **Application of Act when in conflict with other laws**
>
> This Act prevails over any other law dealing with higher education other than the Constitution.

Obviously provisions such as these have to be read in conjunction with the supreme Constitution as well as with the constitutional Acts (for instance, the Promotion of Administrative Justice Act).

New provincial Acts (1994-)

This category comprises the legislation enacted by the nine new provincial legislatures. Their legislative power is also

derived directly from the Constitution or assigned to them by Acts of Parliament. The courts also have the power to review provincial Acts in the light of the Bill of Rights in the Constitution.

The Constitution confers original legislative powers directly on provincial legislatures to pass legislation for their provinces on matters referred to in Schedules 4 and 5 to the Constitution and, in addition, provides for additional legislative powers to be *assigned* to them by Acts of Parliament on matters outside the Schedules.

Case law example:

In *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government* 2011 (6) SA 396 (CC) the court held that a provincial legislature cannot enact legislation dealing with its own financial management because the Constitution does not directly authorise that in Schedules 4 and 5, nor has it been assigned to them by the Financial Management of Parliament Act 10 of 2009.

Provincial ordinances (1961-1986)

The Provincial Government Act 32 of 1961 empowered the four provincial councils of the time (Transvaal, Orange Free State, Natal and Cape Province) to enact provincial ordinances on matters concerning their respective provinces.

These provincial councils were abolished on 1 July 1986 by the Provincial Government Act 69 of 1986. Since these ordinances were enacted by an elected body, could alter the common law and could even have retroactive force, they

represent a category of original legislation. A particular ordinance applies only in the 'old' geographical area of the former province.

Legislation of the former homelands

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

Legislation of the former TBVC states

Although the legislation of former so-called 'independent' homelands did not form part of South African legislation, it remains valid as part of South African law in the area where it previously applied, because these territories have been

reincorporated into the Republic. It will have the same force of law as provincial Acts, provincial ordinances and legislation of the former self-governing territories in their areas of operation. Although the legislation of the TBVC states is original legislation, the High Court has the jurisdiction to test its constitutionality against the provisions of the supreme Constitution like that of any Act of Parliament (*Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC)).

New municipal legislation

In terms of the Constitution, municipal councils may enact by-laws in respect of local government matters for their areas. Because municipal councils are representative and deliberative legislative bodies, new municipal by-laws (after 1994) constitute original legislation (*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC)).

Municipal councils now have original legislative powers, and may pass by-laws for their areas on matters referred to in Schedules 4B and 5B of the Constitution without the need for enabling parliamentary or provincial Acts. Additional legislative powers may also be assigned to them by either national or provincial legislation. Municipalities cannot delegate the making of a by-law. As a result, there is no 'subordinate legislation' category for the local sphere.

(c) Subordinate (delegated or secondary) legislation

In principle, subordinate legislation is a violation of the separation of powers principle because unelected (appointed) persons, sometimes members of the executive, obtain law-making powers. However, the reason for subordinate legislation is not as sinister as it seems.

Acts of Parliament and other forms of original legislation are sometimes drafted in broad terms (skeleton form); subordinate (delegated) legislation then 'adds the flesh' (Hahlo & Kahn (1973: 163)). Because the respective elected deliberative legislative bodies are not continuously in session so as to deal with every possible detail in a changing society, they may find it necessary to delegate some of their powers to other persons (eg the President or a Minister) or bodies (eg the Rules Board or the Council of a university). These are then vested with delegated legislative powers under enabling legislation. Since Parliament can amend an Act of

Parliament only by means of

another (amending) Act of Parliament (a long, expensive and cumbersome process), something that must be changed frequently and quickly needs to be dealt with in terms of subordinate legislation.

Practical example:

The fuel price in South Africa is determined by a number of constantly changing factors such as the price of imported crude oil, the exchange rate, and so on. But who may adjust the petrol price? If the prescribed price of petrol is controlled by an Act of Parliament it would be very difficult for Parliament constantly to adjust such a price, because to amend an Act of Parliament another Act (an amendment Act) is required. Such a process is too cumbersome, expensive and drawn-out: Parliament cannot be recalled once a month to adjust the fuel price. So Parliament delegates some of these law-making powers (to deal with issues that must be dealt with often and quickly outside the normal democratic parliamentary legislative process) to a designated person or body.

In terms of s 2 of the Petroleum Products Act 120 of 1977, the Minister may prescribe the price of petrol in South Africa:

> **2 Powers of Minister and others with regard to petroleum products**
>
> (1) The Minister may by regulation or by notice . . .
>
> . . .
>
> *(c)* prescribe the price, or a maximum or minimum price, or a maximum and minimum price, at which any

petroleum product may be sold or bought by any person, and conditions under which the selling or buying of petroleum products other than in accordance with the prescribed, maximum or minimum price may take place;

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But who is 'the Minister'? Section 1 of the Petroleum Products Act defines 'Minister' as the Minister of Energy. Although the definition section of the Act defines 'Minister' as the 'Minister of Minerals and Energy', this designation was changed by the President with Proclamation 44 in *Government Gazette* 32367 of 1 July 2009 (transfer of administration and powers and functions entrusted by legislation to certain Cabinet members) in terms of s 97 of the Constitution.

Such subordinate (delegated) legislative enactments are known as legislative administrative acts whose validity may be reviewed by the courts. In each case the scope of the subordinate legislation will depend on the provisions of the particular enabling (authorising) legislation.

Subordinate legislation in terms of national legislation

The 1996 Constitution and an Act of Parliament may confer delegated legislative powers on certain persons or bodies, for example—

- In terms of s 89 of the Defence Act 42 of 2002, the President is authorised, subject to s 203 of the Constitution, to declare a state of national defence by proclamation.
- A Minister is authorised to promulgate certain

regulations in accordance with the prescription of the particular enabling Act (eg s 75 of the National Road Traffic Act 93 of 1996, which empowers the Minister of Transport to issue regulations dealing with—amongst others—the use of any vehicle on public roads; or s 69 of the Higher Education Act 101 of 1997, which empowers the Minister of Higher Education and Training to issue regulations on a number of higher education-related matters).

- A statutory body or a person may be empowered to make regulations (eg s 32 (read with s 33) of the Higher Education Act 101 of 1997, which authorises the Council of a university, subject to the approval of the Minister of Higher Education and Training, to issue an institutional statute for the university dealing with the general management of such a university; or s 6 of the Rules Board for Courts of Law Act 107 of 1985, which empowers the Rules Board for Courts of Law—subject to the approval of the Minister of Justice—to make, amend or repeal the rules for the Supreme Court of Appeal, the High Courts and the lower courts).

New and existing provincial proclamations and regulations

Before the provincial councils were abolished in 1986, certain ordinances enabled members of the various provincial executive committees to issue regulations and proclamations. The Provincial Government Act 69 of 1986 abolished provincial councils and therefore any elected legislative bodies for the provinces and its accompanying original legislative competency. The legislative authority for the provinces was transferred to the Administrator of each province. The Administrator enacted or amended or repealed provincial legislation by proclamation and could issue regulations under existing or new parliamentary Acts, provincial ordinances or new proclamations. As a result, old order provincial legislation consists of both original and

delegated legislation, which may have to be read together.

The new provincial legislatures will, like their parliamentary counterparts, be able to empower other functionaries, such as the Premier or members of a provincial Cabinet, to 'add the flesh' to provincial Acts through proclamations or regulations. These will also have to satisfy the requirements and limits set by the enabling Act.

Finally, a few general aspects of subordinate (delegated) legislation must be borne in mind:

- Subordinate legislation may not be in conflict with original legislation. The persons or bodies authorised to issue delegated legislation may do so only within the framework of the authority specifically bestowed on them by the enabling legislation. If not, they have acted *ultra vires* (outside the scope of their powers) and the subordinate legislation in question could be invalidated by a court of law.
- Delegated (subordinate) legislation owes both its existence and its authority to its enabling original legislation. If the enabling Act is declared unconstitutional by a court, the subordinate legislation issued in terms of such an invalidated Act will also cease to exist unless the court orders otherwise (*Moseneke v Master of the High Court* 2001 (2) SA 18 (CC)). If the enabling Act is repealed, all the subordinate legislation issued in terms of the repealed Act will also cease to exist (*Hatch v Koopoomal* 1936 AD 197; *Pharmaceutical Manufacturers Association of SA; In re: Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC)), unless the repealing Act

expressly provides otherwise. For example, item 24(3) of Schedule 6 of the Constitution expressly provides that although the interim Constitution has been repealed, the regulations made in terms of s 237(3) of

the interim Constitution remain in force.

- Parliament cannot confer a power on a delegated legislative body to amend or repeal an Act of Parliament (*Executive Council Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC)).
- Although subordinate legislation must be read and interpreted together with its enabling Act, the enabling Act may not be interpreted on the basis of the subordinate legislation made under it (*Freedom of Expression Institute v Chair, Complaints and Compliance Committee* (unreported case 2009/51933) [2011] ZAGPJHC 2 (24 January 2011)).

2.2.3 Old wine in new bags: Applying old order legislation in the new constitutional order

As was explained earlier, the Constitution defines old order legislation as any legislation enacted before the interim Constitution took effect. In terms of item 2 of Schedule 6 of the Constitution, all legislation that was in force when the Constitution took effect continues to be in force, subject to any amendment or repeal, and consistency with the Constitution. Old order legislation that remains in force does not have wider application that it had before, and continues to be administered by the authorities that administered it when the Constitution took effect, unless the Constitution stipulates otherwise. Item 2 of Schedule 6 ensures an orderly transition, because this process was not yet complete when the 1996 Constitution was enacted.

This means that the vast majority of legislative enactments (including those of the previous four former provinces, the large number of racially segregated local government structures, and even certain legislation of the six self-governing territories and four 'independent' homelands) remain on the statute book.

However, these were replaced by nine provinces and (at

the time of writing) 283 municipalities. Each of the new provinces has its own provincial legislature and executive, generating new original and delegated legislation. Often the new provincial boundaries overlap with old ones, and sometimes neighbouring local authorities have been amalgamated. To cloud the issue even further, it must also be borne in mind that during the

apartheid era local government was structured on a racial basis. Black local authorities were controlled by general affairs legislation, while the white, Indian and coloured local authorities derived their powers from own affairs legislation. The new authorities at national, provincial and local level have to contend with both existing and new legislation, applicable to old and new areas of jurisdiction. Some of the old order legislation has been repealed fully and some merely in part, while the greater part of existing legislation remains in force to enable the new structures and authorities to govern, and services to continue. New Acts of Parliament have to be read together with other existing original legislation as well as a vast amount of subordinate legislation to keep the system going (for example, officials and administrative bodies derive their powers and authority from existing enabling legislation). Also note that in *Ynuico Ltd v Minister of Trade and Industry* 1996 (3) SA 989 (CC) the Constitutional Court held that the reference to 'laws' in s 229 of the interim Constitution (which also provided for old order legislation to remain in force until it was amended, repealed or invalidated) is not limited to primary legislation, but includes subordinate legislation.

Existing old order legislation cannot simply disappear. Legislation has to be repealed or declared unconstitutional by a competent authority. This means that a new province, for instance, North West, will still administer existing Transvaal

ordinances in those North West areas which were part of the Transvaal before 1994. So: try to picture the territory of North West (mostly old Transvaal, bits of Bophuthatswana, and a tiny bit of the old Cape Province). The challenge is to determine in which areas the Transvaal ordinances will still apply by using old legislation to find out what used to be the former Transvaal territory (maps, magisterial districts, and so on). However, remember that the North West legislature is authorised to repeal existing old order legislation at provincial level (provincial ordinances and homeland legislation) for North West only. Those ordinances and homeland legislation will remain in force in other provinces until their respective legislatures repeal them.

Practical example:

North West province consists of parts of the former Transvaal and Cape Province, and bits and pieces of the former Bophuthatswana, inheriting legislation from those territories in so far as those applied to the province (Schedule 1A ('Geographical areas of provinces') mentioned in the Constitution, inserted by s 4 of the Constitution Twelfth Amendment Act of 2005). Let us pretend that a family intends to exhume the body of a family member buried 20 years ago in what is now the North West province, and rebury it somewhere else. The issue of the exhumation and reburial of bodies in North West is governed by three sets of old order legislation:

- the Transvaal Removal of Graves and Dead Bodies Ordinance 7 of 1925;
- the Cape Province Exhumations Ordinance 12 of 1980; and

- the Bophuthatswana Traditional Authorities Act 23 of 1978.

In terms of Proclamation 110 of 17 June, 1994, the administration of the two provincial ordinances and the Bophuthatswana Act have been assigned to the North West province. In terms of the two ordinances, permission to exhume a body has to be obtained from the Administrator of the province; and in terms of the Bophuthatswana Act, permission for an exhumation has to be obtained from the local tribal authority. So when a body is to be exhumed, the permission necessary to do so will depend on where the grave is located. But who is the Administrator of the province (according to the old order ordinance)? 'Administrators' of provinces were abolished after the new constitutional dispensation took effect. In general, item 3 of Schedule 6 of the Constitution ('Interpretation of existing legislation') deals with old order terminology: a reference to 'the Administrator' in existing legislation allocated to a province should be construed as 'the Premier' of that province. However, in terms of s 1 of the now-repealed Local Government Transition Act 209 of 1993 'Administrator' is substituted by 'Member of the Executive Council' of the relevant province.

Of course, the story does not end here. The exhumed human remains have to be reburied somewhere else, but by law permission for reburials

is required. ‘Cemeteries, funeral parlours and crematoria’ fall within Schedule 5B of the Constitution (read with s 13 of the Local Government: Municipal Systems Act 32 of 2000), which means that municipalities administer burials and funerals. So: in this case, permission to exhume is given by the relevant provincial government (in terms of three possible sets of old order legislation), and permission to rebury is granted by the municipality in whose area of jurisdiction the reburial will take place (for instance, the Drakenstein Municipality Cemeteries and Crematoria By-Law 2 of 2007). But there is more! Let us assume the remains were exhumed in the North West province, and the reburial will take place in Limpopo. This means that the human remains may have to be transported from North West through Gauteng into Limpopo. Depending on the location earmarked for the reburial there might, in theory, be a number of different sets of national and provincial legislation regulating the transportation of human remains (eg regulations made by the Minister of Health in terms of s 68 of the National Health Act 61 of 2003; s 6(2)*(d*A*)* of the Extension of Security of Tenure Act 62 of 1997; the Births and Deaths Registration Act 51 of 1992; the Transvaal Cemetery Ordinance 8 of 1932 for burials outside municipalities; the Transvaal Local Government Ordinance 17 of 1939 (repealed for Gauteng by the Gauteng Local Government Laws Amendment Act 1 of 2006)), and so on and so forth. This is merely a hypothetical example—apart from the cultural and emotional issues involved in an exhumation and subsequent reburial, this example tries to emphasise that in the process

there might be a multitude of possible primary and subordinate legal rules (both old and new) emanating from all three spheres of government in a number of different geographical areas.

Another practical example

The Transkei Penal Code Act 9 of 1983 was promulgated by the former Transkei for the territory then known as the Republic of Transkei. In 1994 the Transkei once again became part of South Africa. In terms of s 229 of the interim Constitution and item 2 of Schedule 6 of the Constitution, the Transkei Penal Code remains in force in the geographical area that used to be Transkei. It has been amended a number of times since: by the Justice Laws Rationalisation Act 18 of 1996 (which repealed Part 9 of the Transkei Penal Code, which dealt with sexual offences), the Criminal Law Amendment Act 105 of 1997 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

2.2.4 'Law of general application'

In terms of s 36 of the Constitution (the general limitation clause), a fundamental right in the Bill of Rights may be limited in terms of the law of general application. What is 'law of general application'? Is it all law, or only statute law (legislation)? For the purpose of this book it is sufficient to

note that the term 'law of general application' in s 36 of the Constitution includes all forms of legislation, as well as common law and indigenous law (*Du Plessis v De Klerk* 1996 (3) SA 850 (CC)).

2.3 What is not legislation?

By now you should have a pretty good idea of what legislation is. Legislation is written law enacted by a body or person with the authority to do so. As will be explained in Chapter 3, legislation must be published in an official *Gazette* before in order to take effect. However, not everything published in an official *Gazette* is legislation! Before any document can be classified as legislation, it needs to comply with all the constitutional and other legal requirements dealing with authority, adoption and publication.

Using the term 'enacted law-text' it is also possible to determine which texts (including other law-texts) are not classified as legislation:

- Common-law rules and rules of indigenous law also constitute law (and can in most instances be found in texts). However, these rules are not enacted as legislation by an authorised lawmaker.

- Case law is also binding law (dealing with interpretation, development and application of legal rules) and is found in texts, but since this judge-made law is not issued by lawmakers it does not constitute legislation.
- Policy documents such as Green and White Papers, interpretation notes, explanatory memoranda and practice notes also constitute law texts (practical applications of legal rules), but as they were not enacted by lawmakers, they do not constitute legislation. A wide range of policy documents

issued by government departments in the process of formulating public policy are published to elicit public comment as part of a process of public participation. In *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) the court explained that laws, regulations and rules are legislative instruments, but policy determinations are not. Policy determinations cannot override, amend or be in conflict with legislation, otherwise the separation between legislature and executive will disappear.

Paradoxically, some of these legal texts (explanatory memoranda, commission reports and practice notes)—although not legislation—may be used during the interpretation of legislation (as will be explained in Chapter 6), or may even be part of legislation in the future (Green and White Papers and draft Bills).

Internal departmental memos and policy guidelines on how government departments apply legislation are circulated on a regular basis. These and other official documents are not legislation. Legislation (especially subordinate legislation) should be distinguished from what Baxter (1984: 200) refers to as 'administrative quasi-legislation'. This consists of departmental memos and directives, which, although enforceable in some instances, do not constitute subordinate legislation. Legal notices and even advertisements are regularly published in the *Gazette*, but these texts are not even close to being legislation.

2.4 Legislative structure and 'codes'

To start the interpretation process, the legislation must be read and analysed. Legislation is drafted in a particular form and structure, according to the drafting conventions and rules used by the state law advisors and other legislative drafters.

Although the language and structure of the legislative text are not the only aspects that are considered during statutory interpretation, students must understand the structure of legislation and how these structural components interact. How and when the different components, as well as the structural interrelatedness of legislation, may be used during the interpretation process will be explained in Chapter 6.

Unless otherwise indicated, the Labour Relations Act 66 of 1995 will be used to illustrate legislative structure:

LABOUR RELATIONS ACT 66 OF 1995

[Assented To 29 November 1995] [Date of Commencement: 11 November 1996]

(Unless otherwise indicated)

(English text signed by the President)

List of amendments

If applicable, before the long title an Act will include a list of Acts that have amended it since:

as amended by

Labour Relations Amendment Act 42 of 1996

Basic Conditions of Employment Act 75 of 1997

Labour Relations Amendment Act 127 of 1998

Labour Relations Amendment Act 12 of 2002

Intelligence Services Act 65 of 2002

Electronic Communications Security (Pty) Ltd Act 68 of 2002

General Intelligence Laws Amendment Act 52 of 2003

Prevention and Combating of Corrupt Activities Act 12 of 2004

Public Service Amendment Act 30 of 2007

List of regulations

If applicable, after the list of amendments an Act will include a list of regulations issued in terms of the Act:

Regulations under this Act

BARGAINING COUNCILS ACCREDITED BY THE CCMA, 2009 (1) (GenN 195 in *GG* 31925 of 27 February 2009)

BARGAINING COUNCILS ACCREDITED BY THE CCMA, 2009 (2) (GenN 863 in *GG* 32298 of 12 June 2009)

. . .

RULES FOR THE CONDUCT OF PROCEEDINGS IN THE LABOUR COURT (GN 1665 in *GG* 17495 of 14 October 1996)

RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE LABOUR APPEAL COURT (GN 1666 of 14 October 1996)

TARIFF OF FEES: COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (GN 231 in *GG* 34107 of 18 March 2011)

Preamble

The preamble (if there is one) states the circumstances of, the background to and the reasons for the legislation. Unlike private Acts, where a preamble is always used, its use in ordinary Acts is usually restricted to legislation of constitutional or national importance. It is usually placed after the long title and is an integral part of the legislation. The following is the preamble to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998:

Preamble

WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;

AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances;

AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of landowners to apply to a court for an eviction order in appropriate circumstances;

AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered; . . .

Long title

An Act always has a long title. It is not really a title, but rather a short descriptive summary of the subject matter of the Act. The long title is a part of the statute tabled for adoption by Parliament, and always ends with an open-ended phrase such as '. . . and matters incidental thereto'.

ACT

To change the law governing labour relations and, for that purpose—

to give effect to section 27 of the Constitution; to regulate the organisational rights of trade unions; to promote and facilitate collective bargaining at the workplace and at sectoral level; to regulate the right to strike and the recourse to lock-out in conformity with the Constitution; to promote employee participation in decision-making through the establishment of

workplace forums; to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose; to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act; to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control; to give effect to the public international law obligations of the Republic relating to labour relations; to amend and repeal certain laws relating to labour relations; and to provide for incidental matters.

Enacting provision

This acknowledges the constitutional authority of the body that is enacting the primary legislation (the national legislative authority is vested in Parliament; the provincial legislative authority is vested in the provincial legislatures; and the municipal legislative authority is vested in the municipal councils):

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

Table of contents

The table of contents is the 'road map' of the Act. It not only provides a quick reference to the reader as to where to find particular provisions, but it also gives an initial overview of the legislative scheme:

Contents of Act

Chapter I
Purpose, Application and Interpretation

1. Purpose of this Act
2. Exclusion from application of this Act
3. Interpretation of this Act

. . .

As a 'road map' the table of contents of the Income Tax Act 58 of 1962 (which is amended very frequently) is a confusing reflection of the continuous stream of amendments (including the numbering of repealed provisions retained as placeholders).

Definitions

The definitions serve as an 'internal dictionary' for the particular legislation. Definitions are usually found at the beginning of an Act, but in the case of the Labour Relations Act they are placed at the end of the Act:

213 Definitions

In this Act, unless the context otherwise indicates—

'area' includes any number of areas, whether or not contiguous;

'auditor' means any person who is registered to practise in the Republic as a public accountant and auditor;

'bargaining council' means a bargaining council referred to in section 27 and includes, in relation to the public service, the bargaining councils referred to in section 35;

. . .

But in the Labour Relations Act there are also definitions in other parts of the Act, for example:

CHAPTER V
WORKPLACE FORUMS (ss 78-94)

78 Definitions in this Chapter

In this Chapter—

(a) **'employee'** means any person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to do any of the following in the workplace —

(i) . . .

[Sub-para. (i) deleted by s. 23 of Act 42 of 1996.]

(ii) represent the employer in dealings with the workplace forum; or

(iii) determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace;

. . .

Purpose and interpretation

Purpose and interpretation clauses are frequently included in post-1994 legislation. These clauses give an immediate overall picture of what the Act wants to achieve, and they help to explain the purpose of the Act and how it should be interpreted, for instance:

1. Purpose of this Act

The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act . . .

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. . .

Regulations & ministerial powers

207 Ministers empowered to add and change to Schedules

(1) The Minister, after consulting NEDLAC, by notice in the *Government Gazette* may change, replace or add to Schedules 2 and 4 to this Act and the Schedule envisaged in subsection (3).

[Sub-s. (1) substituted by s. 50*(a)* of Act 42 of 1996 and by s. 26*(a)* of Act 127 of 1998.]

. . . .

[Date of commencement of s. 207: 1 January 1996.]

208 Regulations

The Minister, after consulting NEDLAC and when appropriate, the Commission, may make regulations not inconsistent with this Act relating to —

(a) any matter that in terms of this Act may or must be prescribed; and

(b) any matter that the Minister considers necessary or expedient to prescribe or have governed by regulation in order to achieve the primary objects of this Act.

[Date of commencement of s. 208: 1 January 1996.]

Repeal/amendment of legislation

Repeals and amendments of an Act are made by means of another Act. When a new Act is passed, other existing Acts may need to be amended or repealed. The new Act must contain a section that provides for amendments and/or repeals. The conventional way of dealing with repealed or amended Acts is with a schedule at the end of the Act.

211 Amendment of laws

Each of the laws referred to in items 1 and 2 of Schedule 5 is hereby amended to the extent specified in those items.

212 Repeal of laws, and transitional arrangements

(1) Each of the laws referred to in the first two columns of Schedule 6 is hereby repealed to the extent specified opposite that law in the third column of that Schedule.

(2) The repeal of those laws does not affect any transitional arrangements made in Schedule 7.

(3) The transitional arrangements in Schedule 7 must be read and applied as substantive provisions of this Act.

Short title and commencement

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

214 Short title and commencement

(1) *This Act* is called the Labour Relations Act, 1995.

(2) *This Ac*t will come into operation on a date to be determined by the President by proclamation in the *Government Gazette*, except in the case of

any provision in relation to which some other arrangement regarding commencement is made elsewhere in *this Act*.

[Sub-s. (2) substituted by s. 53 of Act 42 of 1996.]

Schedules

These are used to deal with technical detail that will otherwise clog up the main body of an Act (eg Schedule 1 of the Constitution, which contains a description of the national flag). Schedules are also used when several Acts or parts of Acts are repealed, or for a large number of amendments.

Numbering in legislation

The following is the traditional numbering system used in primary legislation:

Section 1—Arabic figures

Subsection (1)—Arabic figures in brackets

Paragraph *(a)*—italicised lowercase letter in italicised brackets

Subparagraph (i)—Roman figures in brackets

Item *(aa)*—italicised lowercase letters in italicised brackets

Subitem *(AA)*—italicised uppercase letters in italicised brackets

Where an additional section is inserted into an Act through an amendment Act, the section to be inserted takes the number of the section after which it is to be inserted and gets a capital letter after it. If, for example, you need to insert a new section between the current ss 66 and 67, you will insert s 66A. This system of numbering is necessary, otherwise the whole Act would have to be re-numbered, and such renumbering will have to be done by means of an amendment Act. However, in practical terms renumbering is impossible: every cross-reference in other legislation would have to be amended as well, but references to the previous

numbering in case law and text books cannot be changed. In older legislation the inserted sections were numbered *bis*, *ter*, *quat*, and so on.

For example:

> **200A Presumption as to who is employee**
>
> (1) Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
>
> *(a)* the manner in which the person works is subject to the control or direction of another person;
>
> . . .
>
> [S. 200A inserted by s. 51 of Act 12 of 2002.]

When a part of legislation (be it a chapter, section, paragraph, and so on) is repealed, the number of the repealed provision remains as a placeholder to avoid wholesale renumbering. For example, in the Income Tax Act, where a number of provisions of the Act were repealed, the original numbers remain as placeholders:

> **49 ...**
>
> [S. 49 repealed by s. 31(1) of Act 101 of 1990.]
>
> **50 ...**
>
> [S. 50 repealed by s. 32(1) of Act 101 of 1990.]
>
> **51 ...**
>
> [S. 51 repealed by s. 33(1) of Act 101 of 1990.]
>
> **52 ...**
>
> [S. 52 repealed by s. 34(1) of Act 101 of 1990.]
>
> **53 ...**
>
> [S. 53 repealed by s. 35(1) of Act 101 of 1990.]

General Explanatory Note

When an amendment Bill is published in the official *Gazette* for public comment, there is usually a General Explanatory Note included on the second page, with the following explanation:

[ ]	Words in bold type and in square brackets indicate deletions from existing enactments; and
____	Words underlined with a solid line indicate insertions in existing enactments.

Legislative 'codes'

Amendments (including insertions and deletions) are also indicated clearly in square brackets after the relevant provisions in the amended version of an Act. These indicators help the interpreter of the Act in a number of ways, for example:

- It may indicate a particular date of commencement for the provision.
- It will serve as a historical paper trail should a lawyer have to use the previous versions of the legislation (for pending cases or as an aid to interpreting the amended provisions). Please bear in mind that although an amendment Act is a separately enacted law-text in its own right, the amendments in an amending Act will later be incorporated into the initial Act. The legislative 'codes' serve as a route map or cross-reference to the amending Acts. In other words, the 'codes', the list of amending Acts at the beginning of the Act and the amending Acts themselves should correlate.

The following are examples of such 'codes':

- Where a section was amended:

[S. 1 amended by s. 1 of Act 45 of 1961.]

- Where a definition in the definition section was first amended, then substituted and then finally deleted:

'dependant' . . .

[Definition of 'dependant' substituted by s.4 (1)*(b)* of Act 88 of 1971 and by s. 4(1)*(d)* of Act 85 of 1974, amended by s. 3(1)*(a)* of Act 104 of 1979 and by s. 2(1)*(c)* of Act 104 of 1980 and deleted by s. 2*(b)* of Act 90 of 1988.]

- Where a subsection was inserted without the need for renumbering:

[Sub-s. (7) added by s. 4*(b)* of Act 16 of 2004.]

- Where a paragraph was inserted without the need for renumbering:

[Para. *(c)* added by s. 4*(b)* of Act 201 of 1993.]

- Where a section was amended and later repealed in full:

9 ...

[S. 9 substituted by s. 3 of Act 45 of 1961 and repealed by s. 344 (1) of Act 51 of 1977.]

- Where a new section was inserted between ss 16 and 17:

[S. 16A inserted by s. 13 of Act 102 of 1967.]

- Where a new section was inserted between ss 5 and 6, amended several times and later repealed in full:

5A ...

[S. 5A inserted by s. 6 of Act 88 of 1971, amended by s. 5(1) of Act 85 of 1974, by s. 5 of Act 69 of 1975, by s. 6 of Act 103 of 1976, by s. 6 of Act 113 of 1977 and by s. 5 of Act 104 of 1979 and repealed by s. 4 of Act 104 of 1980.]

2.5 Relationship between legislation and common law

The Roman-Dutch common law is not sacrosanct, untouchable or protected from constitutional scrutiny, although some lawyers still believe otherwise. The Constitution is the highest law in the land, and any law (including the common law) inconsistent with the Constitution is invalid (s 2), and in terms of s 39(2), the courts must promote the spirit, purport and objects of the Bill of Rights when they develop the common law. In *Carmichele v Minister of Safety and Security* (above) the Constitutional Court stressed that a court is obliged to develop the common

law in view of the Constitution. In *Pharmaceutical Manufacturers Association of SA; In re: Ex parte Application of the President of the Republic of South Africa* (above) para 44 Chaskalson P very clearly placed the common law in a constitutional framework:

> I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

This does not mean that the different legal traditions have been abolished. We still have Roman-Dutch common law, African customary law, legislation and all the various sources of law and legal cultures. However, since 1994, both legislation and the common law are trumped (overruled) by the supreme Constitution. The Constitution is the highest law of the land, and trumps both common law and legislation. Although it is presumed that the legislature does not intend to alter the common law more than is necessary, common law may expressly be trumped by legislation. It is important to note that common law is not 'repealed' by legislation, but 'trumped' or overruled. This means that if legislation trumps a rule of common law, and that legislation itself is later repealed, the common-law rule will revive again (*Rand Bank Ltd v De Jager* 1982 (3) SA 418 (C)).

Legislation trumps common law . . . most of the time. Of course it is possible for new legislation to provide expressly that it will operate side-by-side with existing common-law rules (for example, s 2(10) of the Consumer Protection Act):

> (10) No provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law.
> [Date of commencement of s. 2: 24 April 2010.]

However, just to make things really interesting, certain common-law rules (such as presumptions) are used to interpret legislation. The courts and other interpreters may still rely on these common-law maxims and presumptions in so far as they are not in conflict with the values of the Constitution. In the past, the common-law presumptions of interpretation should have played a more important role during the interpretation process. These presumptions may be described as preliminary assumptions as to the meaning of the legislation. In other words, it is assumed that legislation has a particular purpose, which should accomplish an ideal, predefined result. In the absence of a judicially enforceable Bill of Rights in South Africa before 27 April 1994, one could have referred to the presumptions as a rebuttable 'common-law bill of rights'. The principles of justice, fairness and individual rights were always part of our law. Unfortunately those values were rebutted, ousted, debased and ignored during the era of parliamentary sovereignty.

The role and character of the presumptions of statutory interpretation have been fundamentally changed by the new Constitution. If one compares these presumptions with the fundamental rights in the Bill of Rights, it appears that many of the values underpinning the presumptions of interpretation are now to a large extent subsumed in the Bill of Rights. Although these presumptions have not been 'abrogated' by the Constitution, most of the underlying principles of the rebuttable common-law presumptions are reflected in the Constitution. Because the fundamental rights are entrenched in the Constitution, it must be accepted that some of the presumptions will be applied to an increasingly lesser extent in the future, possibly even disappearing as a result of disuse. Some of the more important presumptions will be discussed in the following chapters.

Chapter 3
Is it in force? The commencement of legislation

In the previous chapter the question was: Is it legislation, and if so, what type of legislation is it? Now the question is whether the legislation is in operation; in other words, can it be applied? Before the process of interpretation of legislation can start, the interpreter has to determine whether the legislation is actually in force. It goes without saying that legislation which is not in force cannot be applied; however, as will be shown below, not to apply legislation which has commenced may be just as costly. This chapter deals with when and how legislation commences and takes effect.

3.1 Adoption and promulgation of legislation

It is important to distinguish between the adoption (passage) of legislation and its promulgation. The adoption of legislation by the relevant legislative body refers to the constitutionally prescribed and other legal processes and procedures required for the draft legislation to become law, including preparation of a draft Bill, introduction of the Bill in the legislature, and public participation (if required), as well as the committee stages, voting and assent. (The constitutional procedures to be followed in adopting Acts of Parliament and provincial Acts are found in Chapters 4 and 6 of the Constitution.) Once Parliament has passed (adopted) a Bill, the Act then has to be assented to and signed by the President. In the case of a Bill passed by a provincial

legislature, the Premier of that province has to sign the Act. Once assented to and signed, such an Act (parliamentary or provincial) becomes law (ss 81 and 123 of the Constitution).

However, although such an Act is now legally enacted legislation, it is not yet in operation. For legislation to become operational, it needs to be promulgated. Promulgation refers to the process of putting legislation officially and legally into operation (the commencement or taking effect of the law). In other words: somebody has to 'pull the trigger'. In the case of subordinate legislation, the adoption and promulgation will, in practical terms, happen nearly simultaneously, because the adoption process is designed to be reasonably quick and easy.

3.2 Hear Ye, hear Ye! The requirement of publication

Legislation is promulgated by publication in the *Gazette*. In terms of ss 81 and 123 of the Constitution (and s 13 of the Interpretation Act), Acts of Parliament and provincial Acts take effect when published in the *Gazette*, or on a date determined in terms of those Acts. In terms of s 162 of the Constitution municipal by-laws may be enforced after they have been published in the *Gazette* of the relevant province. The Constitution does not expressly require the publication of subordinate legislation to commence, but s 101(3) of the Constitution provides that 'proclamations, regulations and other instruments of subordinate legislation must be accessible to the public'. However, both ss 13 and 16 of the Interpretation Act require that subordinate legislation be published in order to commence.

Section 2 of the Interpretation Act defines a *Gazette* as

the *Government Gazette* of the Colony wherein that law was in force in the case of legislation published before 31 May 1910, and in the case of legislation published after 31 May 1910 it is either the *Government Gazette* of the Republic (for national legislation) or the relevant *Provincial Gazette* (for provincial legislation).

It was pointed out earlier that not everything published in the *Government Gazette* is legislation. However, be warned: as will be explained shortly, not all legislation published in a *Government Gazette* will necessarily be in operation.

The principle underlying the requirement that legislation commences only upon publication is that it should be made known to the population to whom it applies. But what if the relevant *Gazette* only appears days after publication in most of the remote areas of the country? Does the particular legislation commence on the date of publication, or at the time when it

actually becomes known throughout the country? In *Queen v Jizwa* 11 SC 387 it was held that legislation commences on the date of publication, irrespective of whether it has come to the knowledge of everybody in the remote areas. Steyn (1981: 180-181) criticises this as an arbitrary application of the rule, and suggests that there should be a period (eg eight days) between the *de facto* (actual) publication in the *Gazette* and the *de iure* (legal) promulgation and taking effect of the legislation.

But why is accessibility of the law an issue? In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 102 the Constitutional Court addressed this question as follows:

> It can be seen then that several concerns underlie the interpretation of 'prescribed by law'. The need for accessibility, precision and general application, flow from the concept of the rule of law. A person should be able

to know of the law, and be able to conform his or her conduct to the law.

Two other aspects of the publication requirement must be noted:

- If, for some reason beyond its control, the Government Printer is unable to print the *Gazette*, the President may by proclamation prescribe alternative procedures for the promulgation of legislation (s 16A of the Interpretation Act).
- When the President, a Minister, a Premier or a member of the executive committee of a province has the power to issue delegated legislation, a list of proclamations and notices under which such types of delegated legislation were published must to be tabled in Parliament (s 17 of the Interpretation Act). Certain new legislation (eg the Promotion of Equality and Prevention of Unfair Discrimination Act) also requires regulations made in terms of the particular Act to be furnished to Parliament before publication.

3.3 Pulling the trigger: Commencement of legislation

3.3.1 Who promulgates?

It was explained earlier that the enacting clause of legislation affirms the legislative authority of the particular lawmaker. For example, an Act of Parliament will proclaim 'BE IT ENACTED by the Parliament of the Republic of South Africa, as follows . . .'; or a ministerial regulation will state that 'The Minister of Justice

has made the regulations . . .'. Since it is the lawmaker who 'speaks', the resulting legislation is promulgated by the lawmaker in question. For a number of practical reasons, in the case of Acts of Parliament or of a provincial legislature,

this is not always possible. The authority will then be delegated by the legislature to a member of the executive branch (eg the President or Premier), who will later put the original legislation into operation by means of a proclamation. This is not a general legislative authority to enact subordinate legislation, but rather specific delegated authority to put the legislation into operation on behalf of the particular legislature. In *Ex Parte Minister of Safety and Security: In re S v Walters* (above) the court explained that the power conferred by the legislature on the President to fix a date for commencement is a public power and has to be exercised lawfully for the purpose of such a power. However, the power could not lawfully be used to block or veto the implementation of the new law.

Case law example:

In 1998 the danger of 'being too early out of the starting blocks' (prematurely putting legislation into operation) was illustrated by the *Pharmaceuticals* saga. Parliament repealed the Medicines and Related Substances Control Act 101 of 1965 (the 1965 Act) and replaced it with the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998 (the 1998 Act); the commencement of the 1998 Act and the repeal of the 1965 Act happened simultaneously. After the new 1998 Act was put into operation—by a presidential proclamation in terms of section 55 of the Act—it became clear that the schedules for the new 1998 Act (to regulate certain controlled medicines) had not been enacted to replace the schedules which were repealed with the 1965 Act. This meant that there was now lack of a regulatory framework for certain controlled medicines.

The President is answerable to Parliament, and Parliament has the power to correct the decision. But Parliament was not in session at the time.

The President's authority to put the Act into effect was not conferred by the Constitution (eg s 97) but by Parliament and for a specific purpose. The Act was incomplete and would enter into force when the President so determined.

Although the administrative arrangements to be made and practical requirements to be met to bring the Act into operation are determined by the President, the President cannot retract his proclamation to undo the commencement of the new Act—only Parliament has that authority.

In *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* (above) the Constitutional Court invalidated the presidential proclamation because it lacked a rational basis. It was clear that the President had been wrongly advised and mistakenly thought it was appropriate to bring the Act into force. As a result of the court's invalidation of the President's proclamation, the 1998 Act was never put into operation, and the 1965 Act was still in force. The 1998 Act was subsequently repealed by the Medicines and Related Substances Amendment Act 59 of 2002, and the 1965 Act continued in force as the (renamed) Medicines and Related Substances Act 101 of 1965.

3.3.2 When is it in force?

(a) The default setting: on the date of publication

Section 13(1) of the Interpretation Act, as well as ss 81 and 123 of the Constitution, provide that if the legislation does not prescribe a date of commencement, it automatically commences on the day of its publication in the *Gazette*. Under normal circumstances the date of publication will coincide with the day of commencement provided for in the legislation.

(b) Delayed commencement: on a future specified date

In terms of s 13(1) of the Interpretation Act (and ss 81 and 123 of the Constitution) the legislation as published in the *Gazette* may provide for another fixed date (other than the date of publication) for its commencement. Since the legislation need not be published again on the future commencement date, it will automatically commence on that specified date.

For example:

Citation of Constitutional Laws Act 5 of 2005

[ASSENTED TO 23 JUNE 2005]

[DATE OF COMMENCEMENT: 27 JUNE 2005]

Another danger is 'not hearing the gun going off', ie not realising that new legislation has in fact commenced.

Practical example:

In 2009 a failure by City of Johannesburg

Metropolitan Municipality officials to take note that s 17 of the Administrative Adjudication of Traffic Offences Act 46 of 1998 had commenced in Johannesburg was widely reported in the press. The change in the law now meant that, instead of issuing a notice to pay a fine for certain traffic offences in terms of ss 56 or 341 of the Criminal Procedure Act 55 of 1977, the notice had to be issued in terms of s 17 of the Administrative Adjudication of Road Traffic Offences Act (AARTO). The prescribed date of commencement of s 17 of AARTO for the City of Tshwane Metropolitan Municipality was 1 July 2008, and in respect of the area of the City of Johannesburg Metropolitan Municipality it was 1 November 2008. However, Johannesburg Metro officials failed to implement AARTO in time: between 1 November 2008 and 11 February 2009 thousands of traffic fines were incorrectly issued by the Metro police in terms of the Criminal Procedure Act. This meant that the fines were invalid, because they had been issued in terms of the wrong legislation. Unpaid fines had to be withdrawn, and paid fines had to be refunded, resulting in massive financial losses for the Johannesburg Metro.

(c) Delayed commencement: on an unspecified future date still to be proclaimed

Where an Act is to commence on a date to be determined by, for example, the President, the President's proclamation is all that is required. The Act need not (and will not) be published again, and will commence on the date indicated in the proclamation. This means that since lawyers will not know in advance when that proclamation will be published, every

Gazette has to be scrutinised. Section 13(3) of the Interpretation Act provides that if any Act provides for commencement on a date to be proclaimed by the President or the Premier of a province, there may be different commencement dates for different provisions of that Act.

(d) Retroactive commencement

Retroactive commencement refers to publication on a specific date, but the legislation is deemed to have commenced earlier on a date prior to the publication. As will be explained in 3.4 (below), constitutional and common-law rules (eg due process and fairness) make the application of legislation with a retro-effect very difficult, which means that this type of commencement is the exception rather than the rule.

For example:

Repeal of Volkstaat Council Provisions Act 30 of 2001

[ASSENTED TO 12 NOVEMBER 2001

[DATE OF COMMENCEMENT: 30 APRIL 2001]

(e) A combination of the above

When it is published, there may be a confusing combination of possible commencement options (specified or unspecified future dates) for various parts of the legislation. This means that interpreters have to be very careful as to whether a particular provision is in force.

For example—a specific commencement date (with proviso):

Most of the Act will commence on a fixed date, except for a number of provisions (as indicated in the Act itself) which may commence at a later specified date and/or later unspecified dates still to be proclaimed.

Promotion of Access to Information Act 2 of 2000

[ASSENTED TO 2 FEBRUARY 2000]

[DATE OF COMMENCEMENT: 9 MARCH 2001]
(Unless otherwise indicated)

Another example—unspecified commencement date in the future (with proviso):

Some provisions of the Act will commence at later unspecified dates still to be proclaimed, while most of the provisions will commence on specified dates (as indicated in the Act itself). This was the way the Children's Act 38 of 2005 was published initially, with the majority of the provisions commencing on 1 July 2007:

Children's Act 38 of 2005
[ASSENTED TO 8 JUNE 2006]
[DATE OF COMMENCEMENT: TO BE PROCLAIMED]
(Unless otherwise indicated)

However, after it was amended by the Children's Amendment Act 41 of 2007, the date of commencement was changed:

Children's Act 38 of 2005
[ASSENTED TO 8 JUNE 2006]
[DATE OF COMMENCEMENT: 1 APRIL 2010]
(Unless otherwise indicated)

In practical terms this meant that the major part of the Act actually commenced on 1 July 2007, and the remainder took effect on 1 April 2010.

An example from the Constitution:

Early in 1997 the Constitution provided an interesting mix of commencement dates for itself. In terms of s 243 ('Short title and commencement') of the Constitution, the Constitution was to come into effect as soon as possible on a date set by the

President by proclamation, which could not be a date later than 1 July 1997. However, the President could set different dates before 1 July 1997 for different provisions of the Constitution. Most of the Constitution was then put into operation by presidential proclamation, after which the heading of the Constitution stated that it would commence on 4 February 1997, unless otherwise indicated. The 'otherwise indicated' was expressly provided for in s 243(5) of the Constitution, which provided that ten sections of the Constitution would become operational only on 1 January 1998.

(f) When does a 'day' start?

In terms of s 13(2) of the Interpretation Act 'day' begins immediately at the end of the previous day (ie immediately after midnight, at 00:01). This effectively means retroactive commencement, because by the time the *Gazette* is published, the legislation could already have been in force for a few hours.

3.3.3 Jumping the gun? Section 14 of the Interpretation Act

Two interesting aspects of the commencement of legislation are dealt with in s 14 of the Interpretation Act.

Section 315 ('Short title and commencement') of the Children's Act provides that the Act will commence on a date to be fixed by the President by proclamation. The Act also provides that s 315 commences on 1 July 2007, which means that Parliament itself promulgated the provision which authorises the President to put those remaining provisions into force. But

what if the entire Act has to be put into operation by a presidential proclamation? After all, subordinate legislation obtains its validity from original legislation. How can the President issue a proclamation authorised by an enabling Act that itself is not operational yet? To avoid the possibility of an endless circle of invalidity, s 14 of the Interpretation Act provides that if a person has the power to put legislation into operation, that power may be exercised at any time after the legislation was passed with a view to putting it into effect.

Section 14 also deals with another practical dilemma. Sometimes the practical application and enforcement of an Act depends on a regulatory framework and structures being in place when that Act commences. However, the subordinate legislation to support the enabling Act cannot take effect before the Act is operational. Section 14 solves that problem by providing for the making of appointments and subordinate legislation by the relevant functionaries, provided that the appointments or subordinate legislation cannot be effective before the Act is in force. This means that the necessary preparations can be made and structures provisionally put in place—even before the enabling Act is operational—to ensure that the total legislative scheme is in place and ready to be implemented when the Act enters into force. This is exactly what the health officials should have done to avoid the embarrassing *Pharmaceuticals* fiasco (explained above). Had the necessary regulatory framework been prepared in advance, it would have been ready to be put into operation at the same time the President put the Act into effect by proclamation.

Case law example:

The application of s 14 of the Interpretation Act was

considered in *Cats Entertainment CC v Minister of Justice; Van der Merwe v Minister of Justice; Lucksters CC v Minister of Justice* 1995 (1) SA 869 (T). The Minister of Justice, acting in terms of the Lotteries and Gambling Board Act 210 of 1993, invited nominations for candidates for the Lotteries and Gambling Board (to be established in terms of the Act). The question was whether this could be done prior to the commencement of the Act. Were the Minister's actions premature and unlawful, or necessary to bring the Lotteries and Gambling Board Act into operation, and therefore

lawful? The court held that the purpose of the Act was to establish the Board which was be to responsible for the activities set out in the Act. It was clear from the Act, that without the Board, the Act could not come into operation. The court held that in terms of s 14 the Minister could only exercise his powers between the passage of the Act and its promulgation in so far as it might be necessary to put the enactment into operation at the date of commencement.

It is important to note that in *R v Magana* 1961 (2) SA 654 (T) the court correctly pointed out that the 'bringing the law into operation' in s 14 of the Interpretation Act also includes 'rendering it operative', in other words, making it possible for the Act to be applied fully.

Practical example:

The Jurisdiction of Regional Courts Amendment Act 31 of 2008 was published on 5 November 2008, and the Act authorised the Minister of Justice and Constitutional Development to put it into operation at a later date. The Minister then determined that the Act would come into operation on 9 August 2010. The Act furthermore provided that the Minister could enact subordinate legislation to determine the areas of jurisdiction of the Regional Civil Courts, the places where the courts would sit, as well as the monetary jurisdiction of the courts. It goes without saying that these issues were crucial for the operation of the courts when the Act eventually commenced. On 29 July 2010 the Minister published subordinate legislation (a notice) in which these matters were dealt with. Of course, this led to a number of arguments and opinions in legal circles: it was incorrectly argued by a number of lawyers that the Minister's notice was invalid because it was published before the enabling Act took effect. However, in the process two important aspects were missed. Firstly, s 14 of the Interpretation Act does in fact make provision for that kind of legislative preparation pending the commencement of the enabling Act. The second (and crucial) fact is that the Minister's notice very clearly stated that it would commence

on 9 August 2010, which of course was simultaneous with the commencement date of the enabling Act!

3.4 Back in the time warp: The presumption that legislation applies only to the future

3.4.1 General principle: Let bygones be bygones

The time-honoured principle (*Transnet Ltd v Chairman National Transport Commission* 1999 (4) SA 1 (SCA)) that legislation should only apply to the future is one of the basic foundations of a legal system based on the rule of law. In fact, in the old English case of *Gardner v Lucas* (1878) 3 App Cas 582 it was described as a 'general rule of every civilised country'. This principle is reflected in the common-law presumption that the legislature intends to regulate future matters only, and not the past (*Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A)).

According to case law, this rule is based on the prevention of unfair and unreasonable results, and to ensure predictability and legality: individuals must be able to know what the law is and to adapt their conduct accordingly. It is therefore presumed that the legislation applies only to cases or transactions occurring after the coming into operation of the Act in question (*Principal Immigration Officer v Purshotam* 1928 AD 435), so that vested rights are not taken away (*Curtis v Johannesburg Municipality* 1906 TS 308). In *S v Mhlungu* 1995 (3) SA 867 (CC) the court explained that

the presumption was not intended to exclude the benefits of rights sanctioned by new legislation, but rather to prevent the invasion of rights. In *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) the well-established common-law principle was given express constitutional backing. The court affirmed that unless otherwise provided, legislation was not to be interpreted to take away existing rights and obligations, because this principle was basic to the notions of fairness and justice that are integral to the rule of law, a foundational principle (s 1) of the Constitution.

3.4.2 The difference between retroactive and retrospective

In practical terms the rule that legislation only applies to the future means that legislation should not have a retro-effect. In *National Director of Public Prosecutions v Carolus* 1999 (2)

SACR 607 (SCA) paras 33-34 the court explained the difference between the two types of retro-effect of legislation.

Retroactivity ('true or strong' retro-effect)

In this case the legislation operates as of a time prior to its enactment, in other words, it operates backwards in time and changes the law from what it was.

> ***For example:***
>
> The Terrorism Act 83 of 1967 was published on 27 June 1967, but s 9(1) of the Act provided that, with the exception of a few provisions, the Act was deemed to have come into operation on 27 June

1962. This means the Act was deemed to have been in force five years before it was adopted and published.

Retrospectivity ('weak' retro-effect)

In this case the legislation operates for the future only, in line with the basic principle. The legislation is prospective, but could impose new results in respect of a past event. It operates forwards, but it 'looks backwards' in that it attaches new consequences for the future to an event that took place before the legislation was enacted. In other words, it changes the law from what it otherwise would be with respect to a prior event. The legislation commences for the future from a particular date, but could apply to new cases and processes (that will start after the commencement), based on earlier facts and circumstances (that arose prior to the commencement). Bear in mind that there is no express retroactivity involved here, because there is no commencement and application of the legislation 'backwards in time'. However, the problem is that there could be future application of the new legislation to new cases (with facts and circumstances that originated before the commencement): in other words, there could be a practical retro-effect. Although retrospectivity is not as drastic as retroactivity, the most important consideration is still whether the future application of the legislation to events from the past will be unfair, take away vested (existing) rights or violate substantive rights.

For example:

Section 7 of the Children's Act of 2005 provides as follows:

17 Age of majority

A child, whether male or female, becomes a major upon reaching the age of 18 years.

[Date of commencement of s. 17: 1 July 2007.]

When s 7 of the Children's Act commenced, it also repealed the Age of Majority Act 57 of 1972, which provided that a person reached the age of majority upon reaching the age of 21 years. After 1 July 2007 a person becomes a major immediately upon reaching the age of 18. This is normal—the Act operates into the future as expected. However, what if on 1 July 2007 the person is 19 years old and no longer a 'child' (in other words, already older than 18, but not yet 21)? The person cannot become a major in terms of the Age of Majority Act (because it had been repealed when s 17 of the Children's Act became operational), but the person was already older than 18 when s 17 became operational. In this case the Act has retrospective effect: as soon as the 19-year-old person moves into the ambit of s 17 after 1 July 2007, that person will automatically become a major. The Act is not retroactive: persons who reached the 'previous' age of majority of 21 before 1 July 2007 will not be affected, and the effects of their age of majority will not be 'adjusted' retroactively to that of 18 somewhere in the past.

Enter the deeming clause

The difference between retroactivity and retrospectivity lies

in the commencement date of the legislation in question. In the case of retroactive legislation the commencement date is before the date of publication. This means that the legislation operates backwards in time, or history is rewound. Because this kind of 'legislative time travel' is physically impossible, the legislation uses a deeming clause: the legislation is deemed to have commenced on a date prior to publication date. But what is a deeming clause?

- In the case of retroactive commencement it is a legislative exercise in 'virtual reality' (or legal make-believe).
- Since a commencement date before the enactment of the legislation is impossible in real physical terms, the legislation creates a legal fiction: the legislation does not change the fact; it makes-believe that the facts (reality) are otherwise.

- In other words, the deeming clause creates a presumption, in this case by providing that something is 'deemed' to have happened.

3.4.3 What prevents legislation from applying with retro-effect?

This time-honoured principle is not an absolute rule. In terms of South African law three legal 'obstacles' need to be removed before legislation may apply with retro-effect (ie either retroactive or retrospective).

(a) The common-law presumption

Before the advent of constitutionalism and a supreme Constitution, the common-law presumption that legislation applies only to the future was the only legal obstacle that stood in the way of laws with a retro-effect. However, as was explained earlier, legislation trumps common law, which

means that the legislature could trump the presumption either expressly (eg the Terrorism Act of 1967), or by necessary implication. Remember, the presumption states that legislation only applies in respect of the future, unless the legislation provides otherwise.

'By necessary implication' means that the legislature actually wanted to rebut the presumption, but failed to express that intention clearly in the legislation. Although not expressly provided in the legislation, it is the only reasonable conclusion that can be reached—the presumption was rebutted by necessary implication. But if the rebuttal of the presumption is not expressly stated in the legislation, how will the courts determine whether it is done by necessary implication? Such a conclusion will depend on the court's interpretation of the legislation in question, but remember, this principle is all about considerations of fairness and vested rights. This means that a court needs to be convinced that the legislation by implication should have a retro-effect. Although each case will depend on the legislation as a whole, as well as the surrounding circumstances, the courts have laid down a few guidelines which may help to determine whether the presumption is rebutted by necessary (reasonable) implication, for instance:

- Such a necessary implication could be inferred if the legislation would result in absurd or unfair results should it not have retro-effect (*Lek v Estate Agents Board* 1978 (3) SA 160 (C)).

- In *Kruger v President Insurance Co Ltd* 1994 (2) SA 495 (D) 503G the court held that it was easier to decide (by necessary implication) that legislation did not apply to the future only when vested rights would not be affected by the retro-effect of the legislation; or the purpose of the legislation is to grant a benefit or to effect even-handedness

in the operation of the law.

> ***Case law example:***
>
> In *R v Mazibuko* 1958 (4) SA 353 (A) the court heard an appeal against the death sentence imposed for robbery. The Criminal Procedure Act 56 of 1955 was amended after the crime had been committed but before sentence was passed. In terms of the amended Act, the death sentence could be imposed after a conviction for robbery with aggravating circumstances. The court applied the presumption that legislation only applies in respect of the future, and found that the legislature had not intended that the increased penalty should apply retroactively. The earlier, more lenient penalty was imposed. The increased penalty could have been imposed only in respect of crimes committed after the Amendment Act came into effect. The court relied on the common-law rule that if there is a difference in penalties between the date of the crime and the date of the trial, the date of the crime will be decisive.

(b) New offences and higher penalties

The second 'obstacle' is the prohibition of new offences and higher penalties with retro-effect in s 35 of the Constitution ('Arrested, detained and accused persons'). Section 35(3)*(l)* of the Constitution provides that a person may not be convicted for an act that was not an offence at the time it was committed. In other words, it is a basic human right that a new offence may not be created with retro-effect. Furthermore, s 35(3)*(n)* of the Constitution provides that an

accused person has a right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing. The effect of these two provisions in the Bill of Rights is that new offences cannot be created, and existing punishment may not be increased, either retrospectively or retroactively.

(c) Other constitutional rights

Should the first 'obstacle' (the common-law presumption) and the second 'obstacle' (new offences and higher penalties) have been circumvented successfully, the retroactive or retrospective application of the legislation may still be prevented by other provisions in the supreme Constitution (the third 'obstacle'). Aspects such as the right to property, the right to fair administrative justice, the right to access to information, et cetera, may also play a role in determining whether the legislation only applies to the future or not. Whether or not the legislation passes general constitutional scrutiny in order to have retroactive or retrospective application will depend on the facts and rights involved in each case.

For example, let us assume a state of emergency is declared with express retroactive application. Such express retroactivity will trump the first 'obstacle' (the common-law presumption), and since there do not seem to be any new offences or increased penalties, the second 'obstacle' (s 35(3)) may also be bypassed. But the third 'obstacle' cannot be breached: in terms of s 37(2)*(a)* of the Constitution a state of emergency may never be retroactive, but can only be prospective.

Case law example:

In *S v Ndiki* 2008 (2) SACR 252 (Ck) counsel for the accused argued that the Electronic Communications and Transactions Act 25 of 2002 (ECT Act) did not retrospectively apply to his client, because it came into operation after he had committed the offences. This was a good example of possible retrospective application of the new ECT Act: the Act was clearly intended for the future and the trial of the accused only started after the Act had commenced, but the alleged offence was committed before the Act became operational. On a timeline the events progressed from when the offences were committed past the commencement date into the ambit of the 'forward-looking' Act. One of the arguments raised by the state was that the new rules of evidence were procedural in nature and that it was one of the exceptions to the presumption against the retroactive or retrospective application of legislation (see also 3.4.4 below). Although the court in the end did not have to rule on the retrospective application of the Act (for other technical reasons), it did,

however, venture an opinion on the issue. One of the strong considerations against retrospective operation (in this case) of a statute is that unfair consequences might result, or that it might interfere with existing rights. The court pointed out

that the new legislation had to be read in the light of the Constitution to give effect to its fundamental values. To the extent that the retrospective application of the ECT Act allows the admission of evidence that would otherwise not constitute legal evidence, there is merit in the argument that it affects the substantive right of an accused to a fair trial in general and should not operate retrospectively.

3.4.4 No harm done: Exceptions to the rule

There are two instances when the principle that legislation only applies to the future will not apply: where the legislation changes procedure or where it grants benefits. At first glance, procedure is red tape or a set of neutral administrative arrangements, and of course, nobody will argue that the retroactive granting of benefits is unfair!

(a) If the enactment deals with procedure

As a general rule, the presumption will not apply if the legislation deals with procedure. Although procedure may seem to be neutral and harmless, the courts have indicated the there is a fine line between 'neutral' procedure (formalities) and substantive rights. If substantive rights and obligations remain unimpaired and capable of enforcement by using the newly prescribed procedure, then the general principle does not apply (*Minister of Public Works v Haffejee* 1996 (3) SA 745 (A)). However, if new procedure violates substantive rights, the general principle against legislation with retro-effect will apply and the three 'obstacles' come into play.

In *Euromarine International of Mauren v The Ship Berg* 1986 (2) SA 700 (A) the court held that a provision in the

relevant Act not only created a new remedy, but also imposed a new obligation on persons who had no legal obligations in the past. This is an example where substantive (and not merely procedural) rights are involved, and the presumption that legislation only applies in respect of the future will apply.

(b) If the retro-effect favours the individual

If the retrospective operation of legislation would benefit the individual, the presumption also does not apply. Remember, the

reason for the principle is to avoid unfair results. If a person would be receiving a benefit, and no vested rights are taken away, the retroactive or retrospective application of the legislation will be beneficial and the presumption becomes unnecessary.

Case law example:

In *R v Sillas* 1959 (4) SA 305 (A) an amending Act reduced the existing penalty after the accused had committed the crime, but before sentence was passed. The court found that the presumption that legislation only applies in respect of the future had been rebutted by 'other considerations'. The amendment was applied retroactively and the new, more lenient penalty was imposed. (One of the 'other considerations' might well have been the presumption that the legislature intends to burden its subjects as little as possible.) The court also found that the rule that the penalty in force when the crime was committed had to apply, only applied

to amendments which increased the penalty. Where new legislation reduces the penalty, the time when sentence is passed is decisive in determining whether amended penalties apply to an accused or not.

3.4.5 Retroactivity and other constitutional issues

The principle that legislation should only be prospective also applies to the Constitution. This means that the Constitution itself is also not retroactive:

- As was explained earlier, all law in force when the Constitution took effect remains in force subject to amendment or repeal, and subject to consistency with the Constitution (item 2 Schedule 6 of the Constitution).
- All proceedings pending before a court when the new Constitution took effect must be finalised as if the new Constitution had not been enacted, unless the interests of justice require otherwise (item 17 Schedule 6 of the Constitution).
- However, any legislative process started in terms of the interim Constitution, but not yet finalised when the 1996 Constitution took effect, must be finalised in terms of the 1996 Constitution (item 5 Schedule 6 of the Constitution).

Chapter 4
Is it still in force? Changes to and the demise of legislation

4.1 General

In the previous chapter the commencement of legislation was discussed, and the question was: Is it in force yet? Now the question is: Is it still in force, and if so, has it since been amended? In this chapter the ways in which legislation may be changed or come to end will be explained.

Common-law rules can be abrogated by disuse, but this cannot happen to legislation (*R v Detody* 1926 AD 168). It cannot simply disappear; it needs to be repealed by a competent body or declared invalid by a court. Before 1994 Parliament was sovereign, and the courts could only invalidate delegated legislation which did not comply with the rules of administrative law. After 1994 the courts could test all legislation, including Acts of Parliament, against the supreme Constitution.

Who may amend and repeal legislation?

It is important to understand that the Constitution is not self-executing. Although s 2 of the Constitution expressly states that legislation which is in conflict with the Constitution is invalid, it merely means that legislation is potentially unconstitutional. Legislation that is inconsistent with the Constitution will not automatically be unconstitutional and invalid. All legislation in force when the Constitution took effect remains in force until it is amended or repealed, or is declared

unconstitutional (item 2(1) Schedule 6 of the Constitution). To remove potentially unconstitutional legislation, a competent body must either amend or repeal it, or a competent court must declare it unconstitutional.

As was pointed out earlier, legislation cannot fall away through disuse or simply disappear; it remains in force until amended or repealed. But amended or repealed by whom? Legislation—enacted law-texts—is amended or repealed by the relevant competent lawmakers, in other words, those bodies or persons with the legislative authority to do so.

For original legislation the legislative authority of the relevant legislatures includes the power to pass or amend any legislation before them, subject of course to the hierarchical and territorial competencies prescribed by the Constitution (ss 44 and 55 read with s 68, in the case of Parliament; ss 104 and 114 in the case of provincial legislatures; and s 156 in the case of municipalities).

In the case of subordinate legislation the enabling Act may in some cases expressly state that the power to enact subordinate legislation includes the power to amend or repeal it (eg the Rules Board for Courts of Law Act, which empowers the Rules Board for Courts of Law to make, amend or repeal the rules for the Supreme Court of Appeal, the High Courts and the lower courts). In the absence of such an express provision that the subordinate lawmaker may also amend or repeal the subordinate legislation, the common-law principle of implied powers will come into play: if a delegated lawmaker gets the power to enact subordinate legislation, it is assumed that such a power to make laws also by implication includes the power to amend or repeal (revoke, rescind or retract) such subordinate legislation. However, to avoid legal arguments about implied delegated legislative powers, s 10 of the Interpretation Act expressly deals with

such a situation:

> **10 Construction of provisions as to exercise of powers and performance of duties**
>
> (1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.
>
> . . .
>
> (3) Where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and

> subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws.
>
> . . .

4.2 Changes to legislation

4.2.1 Formal amendment of legislation by a competent legislature

Legislation may be amended (changed) by a competent legislature. That means that Parliament may amend an Act of Parliament by means of another Act of Parliament, a provincial legislature may amend provincial ordinances and provincial Acts, and so on and so forth. This means that in the case of primary (original) legislation the amendment of legislation is a lengthy and expensive process.

In practice there are two types of amending legislation: the non-textual (indirect) amendment and the textual (direct) amendment. A non-textual amendment occurs where there are no direct changes to the actual wording of the principal (initial) legislation, but the 'amending' legislation merely describes the extent of the changes in the law with reference to the provisions that will be affected. For example (as was explained earlier), item 3(2)*(b)* of Schedule 6 of the

Constitution provides that a reference in old order legislation to—amongst other things—'Administrator' must be interpreted as referring to the Premier of a province, and so on. A textual amendment, on the other hand, occurs where the actual wording of principal (initial) legislation is changed with additions, changes to the wording, et cetera.

If a number of Acts are amended at the same time, this will usually be done by means of a General Laws Amendment Act. Specific legislation will be amended by means of specific amending legislation (eg the Births and Deaths Registration Amendment Act 1 of 2002 amended only the Births and Deaths Registration Act 51 of 1992). Some legislation is amended continuously—as is illustrated by the long list of amendments for the Income Tax Act, which is amended annually. The Taxation Laws Amendment Act 24 of 2011 is a very good example of a typical amendment Act: it consists of a bewildering array of legislative codes, insertions, additions and deletions.

4.2.2 Modificative interpretation by the courts

Although the courts are primarily involved in the application of the law, they also have a secondary, law-making function. This

involves the development of the common law to adapt to modern circumstances, as well as giving form, substance and meaning to particular legislative provisions in concrete situations. This also means that the judiciary may modify (change or adapt) the initial meaning of a legislative provision in such a way that it conforms to the purpose or aim of the legislation. Although judicial law-making involves a creative judicial discretion, it must always be based on legal rules and principles. However, this is the exception to

the rule; according to the doctrine of separation of powers, the various legislatures make legislation, and the courts interpret legislation and dispense justice.

(a) Attempts to save legislation during constitutional review

Testing legislation (also known as constitutional review) refers to the process whereby legislation which is alleged to be in conflict with the Constitution is reviewed or tested by the court. The court therefore measures the legislation against the provisions of the Constitution and decides whether the legislation is valid or invalid.

If a court does declare legislation unconstitutional (invalidating it), the legislation cannot be applied anymore. This could create a vacuum in the legal order. Competent courts involved in constitutional review (the testing of legislation against the Constitution) may try, if reasonably possible, to modify or adapt the legislation to keep it constitutional and alive. As will be explained in Chapter 9 ('Constitutional interpretation'), the court may then employ a number of corrective techniques or remedial correction of legislation (so-called reading-down, reading-up, reading-in and severance) in an attempt to keep the legislation in question constitutional and valid.

(b) Modification of the legislative meaning during interpretation

As will be explained in Chapter 7, courts may under exceptional circumstances modify (change or adapt) the initial meaning of the legislative text to ensure that it reflects the purpose and object of the legislation.

4.3 The demise of legislation

In terms of the doctrine of separation of powers, it is

important to distinguish between the terms ‘repeal’ and ‘invalidation’ of

legislation, and to establish who is authorised to do it. *Repeal* refers to the process whereby the legislation is deleted, in other words, removed from the statute book. On the other hand, *invalidation* happens when the legislation is declared to be legally unacceptable. The legislation may no longer be applied, but remains on the statute book until removed by a competent lawmaker. Courts may not and do not repeal legislation—they invalidate legislation. Elected legislatures and persons or other bodies so enabled by primary legislation are competent lawmakers, and they repeal legislation. Courts invalidate legislation on constitutional grounds (the legislation is declared unconstitutional because it violates some or other constitutional principle) or because the legislation does not comply with administrative law requirements.

Practical example:

In *S v Makwanyane* (above) the Constitutional Court held that the death penalty was unconstitutional. However, since a court cannot repeal legislation, the invalidated legislation which provided for the death sentence remained on the statute books, albeit unenforceable. Parliament subsequently repealed all legislation relating to the death penalty with the Criminal Law Amendment Act 105 of 1997.

4.3.1 Invalidation of legislation by the courts

(a) Unconstitutional provisions

In terms of s 172 of the Constitution, the High Court, Supreme Court of Appeal or the Constitutional Court may declare legislation unconstitutional. Legislation may be declared unconstitutional if it violates a fundamental right in the Bill of Rights, or if it is in conflict with another constitutional requirement.

Case law examples:

In *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) regulation 2(1)*(c)* of the regulations issued in terms of the Road Accident Fund Act 56 of 1996 was declared unconstitutional. The regulation provided that a claimant against the fund had 14 days to submit a supporting

affidavit to the police, but the Constitutional Court held that this was too little time to give the claimant a fair opportunity to exercise the right of access to the courts (s 34 of the Bill of Rights in the Constitution). In *Matatiele Municipality v President of the RSA* 2006 (5) SA 47 (CC) the Constitutional Court held that part of the Constitution Twelfth Amendment Act of 2005 and part of the Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005 were invalid, because the adoption process did not comply with the requirement of public participation in s 118 of the Constitution ('Public access to and involvement in

provincial legislatures').

When deciding a constitutional matter within its power, the High Court, Supreme Court of Appeal or Constitutional Court has to declare legislation which is inconsistent with the Constitution to be unconstitutional (s 172(1) of the Constitution). However, in terms of s 167(5) read with s 172(2) of the Constitution, a declaration of unconstitutionality of legislation by a High Court or the Supreme Court of Appeal has no force until such a declaration is confirmed by the Constitutional Court, but a High Court or the Supreme Court of Appeal may make an order which is just and equitable (including appropriate interim relief). Local government legislation and delegated legislation may also be declared unconstitutional by the High Court or Supreme Court of Appeal, but such invalidation need not be confirmed by the Constitutional Court.

As was pointed out earlier, if an enabling Act is declared unconstitutional by a competent court, the subordinate legislation issued in terms of such an invalidated Act will also cease to exist, unless the court orders otherwise.

(b) Invalid subordinate legislation

Delegated legislation may be invalidated by a court if it does not comply with the requirements of administrative law (eg it is vague, *ultra vires*, etc). Before 1994 this was the only real possible review of legislation by the courts.

Case law example:

But how vague does subordinate legislation need to

be before it will be invalidated? In *MEC for Public Works, Roads and Transport, Free State v Morning Star Minibus Hiring Services* 2003 (4) SA 429 (O) the court provided a number of guidelines for determining 'vagueness'. The law required reasonable, not perfect, clarity—the legislation had to be understandable to the reasonable person, not to the fool. What is important is the mischief which the legislation intended to curtail, as well the fact that it could be applied with reasonable certainty in many cases. The mere fact that some words are vague does not necessarily lead to the whole provision being declared void. The court will try to uphold the general tenure of the regulation and to separate the bad from the good.

4.3.2 Repeal of legislation by a competent lawmaker

(a) Substitution (repeal and replace)

When a lawmaker substitutes (repeals and replaces) legislation with another enactment, there might be a possibility that the replacing law is not in force when the other legislation departs from the scene. In order to prevent this type of 'legislative short circuit' or gap in the law, the repealing legislation could expressly provide for a suitable transitional measure. In this regard item 9 Schedule 5 ('Transitional Arrangements') of the Companies Act 71 of 2008 provides as follows:

> **9 Continued application of previous Act to winding-up and liquidation**
>
> (1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).

. . .

(4) The Minister, by notice in the *Gazette*, may—

(a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and

(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the

repealed Act, to the provisions of the alternative legislation contemplated in paragraph *(a)*.

However, for those cases where the legislation in question does not provide for express transitional arrangements, s 11 of the Interpretation Act was enacted to deal with those unfortunate gaps in the law if the one enactment is repealed, but the replacement enactment has not yet become operational:

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

This means that if an enactment has been repealed and is replaced by another, but the replacement is not yet operational (for whatever reason), the repealed provision will remain in force—although repealed—until the replacement is in force.

Case law example:

In *S v Koopman* 1991 (1) SA 474 (NC) the accused was found guilty in the magistrate's court of a contravention of the Road Traffic Act 29 of 1989 and sentenced to a fine, as well as to an endorsement of his driver's licence. On review his lawyer argued that the endorsement was invalid, because the Cape Province Road Traffic Ordinance

21 of 1966 had been repealed by the Road Traffic Act 29 of 1989. The provisions in the Act which authorised the suspension, endorsement or rescission of driver's licences had not yet come into operation. However, the court held that in terms of s 11 of the Interpretation Act the provision in the repealed ordinance providing for such endorsement was still in operation. The endorsement of the licence by magistrate's court was then confirmed.

Practical examples:

The Child Care Act 74 of 1983 had been repealed in total by the new Children's Act 38 of 2005 (s 313 read with Schedule 4). The major part of the Children's Act commenced on 1 July 2007, and the remainder took effect on 1 April 2010. This meant that a number of provisions in the 1983

Child Care Act (although repealed) remained in force until the corresponding replacements in the new 2005 Children's Act finally entered into force on 1 April 2010.

The Human Tissue Act 65 of 1983 was repealed and replaced by the National Health Act 61 of 2003. The National Health Act commenced on 2 May 2005, unless otherwise indicated. One of the parts of the National Health Act that did not commence

on 2 May 2005 was Chapter 8 ('CONTROL OF USE OF BLOOD, BLOOD PRODUCTS, TISSUE AND GAMETES IN HUMANS'), which meant that the corresponding Chapter 2 of the repealed Human Tissue Act ('TISSUE, BLOOD AND GAMETES OF LIVING PERSONS, AND BLOOD PRODUCTS') remained in operation until Chapter 8 of the National Health Act was finally put into operation. The remainder of the National Health Act took effect on 1 March 2012, with the exception of s 53 (which had commenced on 30 June 2008), and ss 55, 56 and 68 (which had commenced on 17 May 2010). Consequently Chapter 2 of the Human Tissue Act (which in some form or another remained operational through the intervention of s 11 of the Interpretation Act) was finally put to rest on 1 March 2012, nearly seven years after the rest of the National Health Act had commenced.

(b) Repeal (deletion)

Repeal is the revocation of legislation by the relevant competent lawmaker. The legislation is not changed or substituted (replaced); it is deleted (removed) from the statute book. In the case of individual provisions of original legislation, all that remains will be the numbering (as placeholders) and the legislative codes. However, what is the effect of the repeal of legislation on pending cases? Will the repeal revive anything previously repealed? Section 12 of the Interpretation Act deals with the consequences when legislation is repealed.

Section 12(1) of the Interpretation Act

> Where a law repeals and re-enacts, with or without modifications, any provision of a former law, references in any other law to the provisions so repealed shall, unless the contrary intention appears, be construed as

references to the provisions so re-enacted.

If a provision X is repealed and later re-enacted as Y, all references to X in other existing legislation must be interpreted as being references to Y.

Section 12(2) of the Interpretation Act

> Where a law repeals any other law, then, unless the contrary intention appears, the repeal shall not—
>
> *(a)* revive anything not in force or existing at the time at which the repeal takes effect; or
>
> *(b)* affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
>
> *(c)* affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any law so repealed; or
>
> *(d)* affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any law so repealed; or
>
> *(e)* affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, forfeiture, or punishment as is in this sub-section mentioned;
>
> and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, any such penalty, forfeiture, or punishment may be imposed, as if the repealing law has not been passed.

Section 12(2) is a typical transitional provision. Section 12(2)*(a)* means that a repealed Act does not regain the force of law if the repealing Act itself is repealed. If an Act, which declared a particular action illegal, is repealed, the repeal does not have retroactive effect, declaring legal that which was illegal before the repeal; and if an amendment Act is subsequently repealed, the amendment does not lapse with the repeal (*R v Maluma* 1949 (3) SA 856 (T)).

Paragraphs *(b)* to *(e)* of s 12(2) are similar in principle: all actions, transactions, processes, prosecutions, enforcement of rights and remedies, et cetera, which have been started, but not yet completed, in terms of legislation which has meanwhile been repealed, must be completed as if the legislation has not been repealed. This also means the following:

- It forms a bridge between pending actions and the repealed legislation; the current position is preserved until the pending case is finished (*Transnet Ltd v Ngcezula* (above)).
- Actions executed legally and properly in accordance with legislation, before that legislation is repealed, remain valid and in force after the repeal.
- This provision deals with rights derived from legislation only, and not with those stemming from common law (*Garydale Estate and Investment Co (Pty) Ltd v Johannesburg Western Rent Board* 1957 (2) SA 466 (T)).

- The right or privilege in question needs to have been acquired or accrued in terms of the repealed legislation before the repeal (*Mahomed v Union Government* 1911 AD 1).

Case law examples:

An excellent example is found in *Estate Crosby v Wynberg Municipality* 1912 CPD 1026. A valuation list was drawn up and an appraiser sworn in for the intended session of a valuation court. All this was properly done, but before the session of the court could take place, the authorising Act was repealed and replaced by an ordinance. The court decided that the valuation process had to be completed in terms of the repealed legislation as if it was not repealed.

Another case which dealt with s 12(2)*(c)* and *(d)* was *Keagile v Attorney-General, Transvaal* 1984 (2) SA 816 (T). The accused appeared in court in June 1982 on a charge of contravening the Internal

Security Act 44 of 1950. He was refused bail on 29 July 1982 on the grounds of a statement by the Attorney-General of the Transvaal. Act 44 of 1950 was repealed on 2 July 1982, however, and replaced by the Internal Security Act 74 of 1982. The defence argued that the Attorney-General could not issue his declaration for the refusal of bail in terms of Act 44 of 1950, as this Act had been repealed before the declaration was made. Furthermore, the declaration could not be issued by virtue of the new Act 74 of 1982, as the accused had not committed the offence in terms of the new Act. The court held that, in terms of s 12(2)*(d)* of the Interpretation Act, the accused should still be tried under Act 44 of 1950. Moreover, s 12(2)*(c)* of the Interpretation Act had the effect that the Attorney-General's power (under Act 44 of 1950) to issue a statement with regard to the refusal of bail remained effective, in spite of the fact that Act 44 of 1950 had been repealed in the interim. The court therefore refused the application for review of the refusal of bail.

Another case law example:

Nourse v Van Heerden 1999 (2) SACR 198 (W) is a very good example of the application of the demise of legislation, s 12(2) of the Interpretation Act, as well as of retroactivity. During 1992 a gynaecologist and obstetrician from Durban was charged in terms of the Abortion and Sterilization Act 2 of 1975 with the performance of illegal abortions. His trial

commenced on 27 November 1992, but was not yet finished by 1997. On 1 July 1997 his legal representative brought an application to have the charges against his client dropped, since at that stage abortions were not illegal anymore and as a result his client's actions no longer constituted crimes. The legal representative of the physician based his application on the following arguments:

- The provisions of the Abortion and Sterilization Act governing illegal abortions have not been applied since the mid-1990s and as a result those provisions were abrogated by disuse.
- The Abortion and Sterilization Act was repealed by the Choice on Termination of Pregnancy Act 92 of 1996 in so far as it relates to abortion (the Choice on Termination of Pregnancy Act entered into force on 1 February 1997).
- In terms of the fundamental values referred to in s 1 of the Constitution, as well as the Bill of Rights (especially s 9 (the right to equality), s 12(2) *(a)* and *(b)* (the right to make decisions concerning reproduction and security in and control over one's body), s 14 (right to privacy) and s 27(1)*(a)* (the right to reproductive health care)), the prohibition of abortions is in any event retroactively unconstitutional.

The court found that legislation could not be abrogated by disuse, and had to be repealed by a competent legislature. Existing legislation remained in force until repealed or declared unconstitutional. The trial started before the repeal of the Abortion Act, and in terms of s 12(2) of the Interpretation Act the trial had to be completed as if the Abortion Act had not been repealed. Furthermore, the trial started before either the interim Constitution or

the 1996 Constitution

commenced. Since none of the Constitutions was retroactive, the trial had to be completed in terms of the law existing at the start of the trial. Finally, legislation is not automatically unconstitutional, and the Abortion Act was never declared unconstitutional by any court of law.

Repeal of legislation incorporated by reference

When A repeals B, but some of the provisions of B were also incorporated into other legislation by reference, those incorporated provisions in the other legislation will not automatically be repealed by A as well, unless A contains express or implied provisions to that effect. In *Solicitor-General v Malgas* 1918 AD 489 the court held that if the provisions of earlier legislation are incorporated into subsequent legislation, the incorporated provisions are not affected when the earlier legislation is repealed. These provisions were, in effect, adopted twice as legislation, and the repeal of the earlier legislation did not automatically repeal the incorporated provisions as well—the repealing Act must indicate clearly that specific incorporated provisions will also be repealed. In terms of s 76 of the National Road Traffic Act 93 of 1996 certain external standards incorporated by reference are deemed to be regulations issued under the Act:

76 Incorporation of standards by reference

(1) The Minister may by notice in the *Gazette* incorporate in the regulations any standard without stating the text thereof, by mere reference

to the number, title and year of issue of that standard or to any particulars by which that standard is sufficiently identified.

(2) Any standard incorporated in the regulations under subsection (1) shall for the purposes of this Act, in so far as it is not inconsistent with it, be deemed to be a regulation.

(3) A notice under subsection (1) shall come into operation on a date specified in the notice, but not before the expiry of 30 days after the date of publication of the notice.

(4) If any standard incorporated in the regulations is amended or replaced, such standard shall remain in force until such time that the Minister by notice in the *Gazette* re-incorporate the amended or replaced standard.

[Sub-s. (4) substituted by s. 21 of Act 64 of 2008.]

. . .

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Sunset clauses

A sunset clause is a provision in legislation which terminates (repeals) all or portions of the law after a specific date, unless further legislative action is taken to extend it. Most laws do not have sunset clauses; under normal circumstances legislation remains in force indefinitely until repealed at some unknown date in the future. A sunset clause is a date-bound repeal for the future: the legislature has determined a date in the future when the legislation will automatically lapse. In effect this means that the legislature has adopted and repealed the same legislation at the same time. This can only happen if the legislation has a very specific expiry date. Sunset clauses have a limited lifespan and their continued existence is dependent on parliamentary action, as was illustrated by s 48(6) of the Customs and Excise Act 91 of 1964:

> Any amendment, withdrawal or insertion made [by the Minister] under this section in any calendar year shall, unless Parliament otherwise provides, lapse on the last day of the next calendar year, but without detracting from the validity of such amendment, withdrawal or insertion before it has so lapsed.

Practical example:

The Revenue Laws Amendment Act 20 of 2006 created tax-free 'bubbles' around FIFA-designated sites so that profits on certain goods sold within these areas would be subject neither to income tax nor to value-added tax. The periods for these exemptions began one week before the kick-off of the Confederations Cup and the Soccer World Cup and automatically ended immediately after the closing ceremonies.

Implied repeal

Where two different enactments dealing with the same matter clash, it is presumed (by the judiciary) that the relevant legislature by implication intended that the later enactment repeals the earlier enactment (see 4.5.2 below) The two enactments both have to be on the same hierarchical level and also on the same level of generality. The legislation is not repealed by the court, but it is assumed that the legislature implicitly repealed the earlier legislation; the court is merely the 'messenger' that breaks the deadlock.

4.4 Suspension of legislation already in force

Legislation can also be temporarily suspended; in other words, it remains in force, but its operation is halted for the time being until some or other condition is met or requirement complied with.

An example of legislation temporarily halted is suspension

by a court. The system of co-operative government is one of the unique features of the South African constitutional structure. In terms of ss 40 and 41 of the Constitution this system consists of three distinct but interrelated and interdependent spheres of government. Schedule 4 of the Constitution sets out the matters in which national and provincial legislatures have concurrent law-making powers; in other words, both Parliament and the provincial legislatures may enact legislation on Schedule 4 matters. Where there are conflicts, the national legislation will sometimes prevail over the provincial legislation, but in other cases the provincial legislation may actually trump the national legislation. Sections 146-150 of the Constitution provide for the intricate process of conflict resolution within this system of co-operative government. Section 149 of the Constitution provides for an interesting variation on the demise of legislation:

> **149 Status of legislation that does not prevail**
>
> A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.

So: when legislation X conflicts with legislation Y, the operation of legislation X is suspended until the relevant legislature deals with the conflict. Legislation X is not invalidated, but merely suspended for the duration of the legislative standoff.

Another example of suspension is the application of the rule *cessante ratione legis, cessat et ipsa lex* by the South African courts (see 7.3.2 below for a full discussion of the rule). This is the case where a court will exercise its discretion to suspend the application of legislation because it has already been complied with in another way.

It goes without saying that a competent lawmaker may also suspend legislation for a period of time with a formal legislative amendment, probably containing a sunset clause.

Furthermore, an administrative agency involved with the application and administration of legislation may also place its application of legislation on hold, in the process effectively suspending the legislation in question.

Practical example:

An interesting combination of legislative and administrative suspension occurred during 2011. On 2 June 2011 the National Treasury published the Draft Taxation Amendment Bills. Amongst other things, these draft Bills proposed the suspension of s 45 of the Income Tax Act in order to investigate interest deductions from excessive debt, but on 3 June 2011 the National Treasury in any event decided to go ahead with a temporary suspension of the operation of s 45 for 18 months. The proposed legislative suspension of s 45 of the Income Tax Act was never introduced and adopted, and in October 2011 the Minister of Finance lifted this administrative suspension. Following this, the Taxation Laws Amendment Act 24 of 2011 inserted s 23K into the Income Tax Act in order to deal with those issues which were subject to investigation during the administrative suspension. To cover the conduct of the Treasury, s 23K was retroactively deemed to have commenced on 3 June 2011, the date on which the Treasury's administrative suspension started.

4.5 The presumption that legislation

does not intend to change the existing law more than is necessary

This presumption means that legislation should be interpreted in such a way that it is in accordance with existing law (legislation, common law and customary law) and changes it as little as possible.

4.5.1 Common law

This presumption reflects an inherent respect and esteem for our common law heritage. Solomon J in *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 823 put it as follows:

> It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law.

It is presumed that legislation does not alter the common law, but this presumption is rebutted if legislation clearly provides that the common law (on a particular point) is being altered (*Gordon v Standard Merchant Bank* 1983 (3) SA 68 (A)).

4.5.2 Legislation

With regard to legislation, the presumption means that in interpreting a subsequent Act it is assumed that the legislature did not intend to repeal or modify the earlier Act (*Kent v SA Railways and Harbours* 1946 AD 405). Any repeal or amendment has to be indicated expressly or by necessary implication. An attempt should be made to read the earlier and subsequent legislation together in an effort to reconcile them (*Wendywood Development (Pty) Ltd v Rieger* 1971 (3) SA 28 (A)). In *Shozi v Minister of Justice, Kwazulu* 1992 (2) SA 338 (NPD) 343B the court stated that-

> if two apparently contradictory provisions are capable of a sensible interpretation which would reconcile the apparent contradiction, that interpretation should be preferred.

If such reconciliation is impossible, it has to be presumed by necessary implication that the later of the two provisions prevails, resulting in the amendment or repeal of the earlier one (*Entabeni Hospital Ltd v Van der Linde; First National Bank of SA v Puckriah* 1994 (2) SA 422 (N)).

Case law example:

An interesting example of the repeal of an earlier Act by necessary implication concerned the Ingwavuma/KwaZulu land issue during the apartheid era. The State President proclaimed that the Ingwavuma territory, which had belonged to the KwaZulu homeland, would no longer be part of that territory. The question arose whether the State President should have consulted the KwaZulu government or not. In *Government of the Republic of South Africa v Government of KwaZulu* 1983 (1) SA 164 (A) the Appellate Division heard the appeal against a decision of the Supreme Court which invalidated the proclamation, because the South African government had not consulted the KwaZulu homeland authorities. The appellants argued that the proclamation had been promulgated correctly in terms of the Black Administration Act 38 of 1927, which did not require consultation prior to the alteration of the territories of the national states. However, the court found that s 25(1)

of Act 38 of 1927 conflicted with s 1(2) of the Self-Governing Territories Constitution Act 21 of 1971, which provided that the territory of a homeland could only be altered after consultation with that particular homeland. As the two provisions could not be reconciled, it was presumed that the earlier provisions in the 1927 Act had, by necessary implication, been repealed by the later provisions of the 1971 Act.

Obviously this rule only applies if the objects of the two conflicting provisions are *in pari materia* (essentially the same). Legislative repeal, by implication, will only be accepted by the court if the subsequent legislation manifestly contradicts the earlier legislation (*Minister of Police v Haunawa* 1991 (2) SA 542 (Nm)). Furthermore, according to the rule *generalia specialibus non derogant*, it is presumed that a provision in a subsequent general Act does not repeal an earlier specific provision (*Sappi Fine Papers (Pty) Ltd v ICI Canada Inc* 1992 (3) SA 306 (A)).

Part 2
How legislation is interpreted

5 Theoretical foundations
6 A practical, inclusive methodology: The five interrelated dimensions of interpretation

Chapter 5
Theoretical foundations

5.1 Introduction

Most law students dislike profound philosophical discourses about the theoretical foundations of any legal subject. Unfortunately, the theoretical background of statutory interpretation cannot simply be ignored or wished away. A basic understanding of theory is essential for a perspective on and understanding of the subject. The aim of this chapter is to provide a very brief introduction to the theoretical basis of statutory interpretation in general, and in South Africa in particular. This chapter deals with what Eskridge (2001: 200) refers to as 'legisprudence': the jurisprudence of interpreting legislation.

5.2 Jurisprudential perspectives on statutory interpretation

5.2.1 The general principles of hermeneutics

Lategan (1980: 107) defines hermeneutics as the science of understanding, or more specifically, as the theory of the interpretation of texts. Baxter (1984: 315) describes it as the understanding and explanation of texts to reveal their inherent meaning. It is the art of understanding the techniques, methods or approaches used to interpret texts. In its broader sense, hermeneutics applies to all forms of written or spoken communication. Every day, each one of us has to interpret symbols; not only texts, but also facial expressions, films, traffic signs, et cetera. In fact,

interpretation is one of the most basic human activities. We are constantly trying to 'read between the lines'.

The word 'hermeneutics' is derived from the Greek word *hermeneuein* which means 'to interpret'. *Hermeneuein* is in

turn derived from the name Hermes, the messenger god of ancient Greece, who had to explain the messages of the gods to the mortals on earth. This means that hermeneutics is a very old discipline, used by the Greeks of antiquity—Aristotle addressed the science of interpretation in his discourses. Throughout history it became an important and useful tool in both Christian theology and jurisprudence. Biblical hermeneutics (scriptural exegesis) and legal hermeneutics (interpretation of statutes) developed as separate fields, although they had a great deal in common, since both had very strong normative characteristics. In the case of Biblical hermeneutics (especially after the Reformation), the message of the Scriptures has to be constantly reinterpreted to adapt to changing circumstances and to retain its relevance for the modern believer. Likewise, the legislature cannot provide a set of exhaustive descriptions and regulations for all possible concrete situations. Therefore, it is the task of the courts to concretise the general precepts of the legislature through interpretation of legislation. Lategan (1980: 108-110) points out a number of similarities and differences between Christian theological and legal hermeneutics. Some of the similarities are the following:

- Both disciplines aim to interpret established authoritative texts with regard to current concrete situations.
- Both have an existential urgency: it is the purpose of interpretation of the Scriptures to offer a liberating message of salvation to sinners, while statutory interpretation is aimed at legal certainty and order.
- In both disciplines the interpreter has to deal with the

demands of changing situations and circumstances.

- The interpretation of both the Scriptures and legislation are influenced by history.

However, there are also a number of distinct differences:

- Legislation is a distinct style, with its own rules, which is aimed at the legal regulation of society.
- The biblical text is closed (ie the text is complete); legislation, on the other hand, is characterised by continuous development and change.

Labuschagne (1986: 370) distinguishes between exegesis (that which the author originally wanted to say to the readers), and hermeneutics (that which the author wants to say to present-day readers).

It was only during the second half of the nineteenth century that hermeneutics as a general method of understanding for the human sciences gained prominence. In this regard the work of the German philosopher Dilthey was of decisive importance. In contemporary hermeneutics the German philosophers Hans-Georg Gadamer, Ricoeur and Schleiermacher and the Italian Betti are the leading figures. Gadamer's hermeneutics emphasised the importance of the socio-historical situation or context of the interpreter, and is closer to a contextual approach to texts than to a literal one. Scholars of hermeneutics emphasised that words and phrases do not have inherent meaning, but that meaning is derived from the total structure of language, including the context in which it is used. Perhaps the greatest contribution made by the hermeneutical theory is its emphasis of the role of the interpreter during the interpretation process, and that the science of understanding is not a mechanical exercise, but also involves value judgements. Baxter (1984: 319) argues that this supports the argument that interpreters of

legislation inevitably have to exercise a judicial discretion.

But what is the practical relevance of hermeneutics for the interpretation of legislation? Du Plessis (1980: 29) explains it with the so-called 'hermeneutical circle'—every part of a text must be understood in terms of the whole, and in turn, the whole in terms of its parts. This is a continuous process during which both the whole and the parts are progressively explained. This part-whole approach underlines the importance of the context of a specific phrase or sentence.

Context and interpretation

According to the well-known saying, every picture tells a story, and that is true. Famous photographs and paintings have been telling stories for centuries. Assume that a painting is a unique type of text, with the brush strokes on the canvas like words on paper. However, to make sense of the picture and what it wants to say, its context (background) needs to be considered as well.

Practical example:

Picasso's famous painting *Guernica* (now in the Museum of Modern Art, New York) consists of a disturbing mix of violent images. Amongst other things we see a screaming woman; a horse, pierced by a spear, collapsing to its knees; a dead fighter; a woman with a senseless child in her arms; a burning house; and so on. To understand the images, some research about the painting's context is necessary. On a time line the painting is situated in 1937, during the Spanish civil war. It is named after the Basque town Guernica which, while under Republican control, was totally destroyed by

Franco's Nationalist fascist forces (supported by the German and Italian air forces) during the indiscriminate aerial bombing of the town. With other more conventional anti-war texts (for instance, the poetry of Siegfried Sassoon and Wilfred Owen, or the protest music of Bob Dylan) it has since become a universal symbol of the horrors and atrocities of war. To cut a long story short: text (painting) plus context (background) equals understanding (or at least the beginning of a process of understanding).

5.2.2 The influence of certain modern critical theories

As was pointed out by Botha (1996: 60-79), Devenish (1992: 25-55) and Du Plessis (2002: vii-xviii, 89-119), to name only a few, there are numerous, sometimes overlapping theoretical approaches to statutory interpretation (eg textualism, purposivism, intentionalism or original-intent theory, et cetera), as well as the ever-increasing number of contemporary schools of legal thought (such as critical race and gender, law and literature, feminist jurisprudence, law and economics, and Marxist theory of law), all of which have an influence on modern 'legisprudence'. An in-depth discussion of all these theories, schools and approaches is best left to courses in legal theory, jurisprudence and legal philosophy, but a brief introduction to a number of modern critical (or progressive) theories will suffice.

Critical legal scholars reject the formalist position that law is rational, objective and neutral. They argue that not all law is rational: it is subjective and ideological. Many modern discourses about interpretation of statutes, as well as the

knowledge and understanding of texts, involve the usual debates about either literal or contextual interpretation.

However, critical scholars argue that these last mentioned approaches are characterised by formalism, which believes that the law is autonomous: all the answers to legal questions and problems are to be found in the law.

Modern theoretical schools of thought study and examine the law together with other disciplines such as economics, political science, linguistics, philosophy, literature, and so on. These modern theoretical schools must be understood in the spirit of postmodernism. What is postmodernism? It is not a school of thought, but rather an intellectual style or a condition or a spirit of the times. Postmodernism accepts that everything is relative, and in the process it welcomes problems, paradoxes and contradictions. As a result, it defies a complete definition, because postmodernism rejects preconceived ideas, definitions and categories.

- Postmodernism argues that the utopian promises of the modern world-view came to nothing. The modernists tried to explain and order the world with macro-arguments such as liberalism, Marxism and fascism. These macro-arguments (the so-called 'big picture') could not solve global problems, because the problems (questions) were too big, too wide, and too abstract. These macro-arguments were based on a naive humanism, a mistaken belief in science and technology, and a false optimism about the ability of language to compile, disseminate and interpret information.
- Postmodernism rejects the idea that classifications and categories can be correct and final, and the notions of both objectivity and subjectivity are questioned; ultimately everything (including knowledge) is relative, temporary and incomplete. Therefore any argument, no matter how logical it may seem, is only as good as its preconceptions and

presuppositions.

Two postmodern theories will be discussed very briefly. However, these are not the only modern critical schools of thought. Theories such as critical race theory, feminism, law and literature, and law and economics are not even touched upon.

(a) The Critical Legal Studies movement (CLS)

The Critical Legal Studies movement (CLS) originated in reaction to the inability of liberalism to solve social problems such as poverty, racism, pluralism and oppression. In the process, the outcasts and disadvantaged of society are pushed further and further to the 'margins'. Admittedly, CLS does not

have an alternative programme of action to solve the problems, but is rather an attempt to unmask the liberal argument that the law is objective and neutral. According to CLS, the Western liberal legal tradition is an instrument of social and economic oppression; existing power structures are merely reinforced by the legal system. These power relationships are reinforced by rights rhetoric (hollow promises about human rights), which conceals the political role of the legal system. The courts play an important part in this political role, since the existing order (*status quo*) is maintained by a mechanical 'his master's voice' method of statutory interpretation. As a result, law and politics have merged, and power is disguised by the legal system.

The CLS movement has raised the following criticism of the existing legal order:

- Within the liberal legal tradition the determination of legal rules is based on hidden political and ideological considerations. Rules and principles only change as a result

of changes in the political arena.

- The liberal legal tradition is based on individual autonomy, which does not take communitarianism and community involvement into account. Existing rights favour the individual. The liberal jurisprudence entrenches the position of the individual and reinforces the unequal distribution of power in society. Ultimately the entire world-view is 'encoded' and interpreted in terms of the liberal legal tradition.
- With regard to interpretation of statutes in particular, CLS argues that legal theories and legal reasoning are supported by political considerations, and the existing political and social balance of power is consolidated.

(b) Deconstruction

Deconstruction should be understood as a reaction against structuralism. Structuralism argues that the meaning of language can be ascertained and pinned down from its grammatical structure. Structuralism supports literal interpretation and legal positivism: rules acquire legal value and meaning as a result of their position within the legal system as well as their relationship with other rules. Deconstruction, on the other hand, challenges the modern person to consider and reconsider, and ultimately to reformulate, dominant theories and opinions about society.

Generally it focuses on those forgotten aspects of humanity which were pushed aside and marginalised by the dominance of certain conceptions of law.

The fundamentals (deconstructionists would immediately counter 'if something like that exists at all!') of deconstruction can be summarised as follows:

- It is impossible to obtain knowledge of the real

objective world. All meaning takes place within the framework of language (symbols). The meaning of each symbol (word) depends on the differences from, as well as the similarities between, other symbols in the system: meaning depends not only on the differences between symbols, but also on the continuous reference to other symbols in the system. No symbol is ever complete but it acquires meaning from this never-ending circle of mutual difference and dependence. Meaning is indefinitely deferred, because inherently each symbol refers to other symbols as well. A text is never closed or finished, but consists of a network of interlinked symbols which infinitely refer to each other.

- The meaning of a text is not determined by its author, but by the relationship between texts, and between text and reader. The fact that the text is liberated from the author (the so-called 'death of the author'), enables the reader to read the symbols in the text (as well as other texts) in an unbiased and impartial manner.
- A text can never acquire one fixed and final meaning, because each text refers to another text. Meaning depends on a set of codes (eg social, cultural and political) inherent in each text and each reader. Each reader will have different texts interacting with one another. Consequently, any valid meaning depends on the social, cultural and political circumstances of each reader. Meaning is not inherently embedded in the text, and consequently a text may lead to any number of subjective interpretations and meanings. In other words, what we did not say is just as important as that which we did say. By definition the interpretation of a text is subjective. According to deconstruction theory, meaning is always disputable. The reading of a text does not end with the fixing of a final meaning, but it ends merely with a temporary undecidability, which in turn is open to reinterpretations.

- During the interpretation of statutes, different texts are simultaneously in interaction with each other: other legislative texts, the common law, case law, and so on. The

  interpreter is informed not only by the interacting texts, but also by other extra-legal factors (codes) such as cultural and ideological background. Thus interpretation of statutes has to do with the relationship between the interpreter and the text. The legislature cannot control the manner in which the interpreter will interpret the legislative text. The text-based methods of statutory interpretation (literal interpretation and the intention theory) cannot explain the nature of the interpretation process. Statutory interpretation requires an ongoing reinterpretation of the past, as well as a continuous open-mindedness about future reinterpretations of the legislative text.
- Contextual interpretation is also criticised. A text can only acquire a fixed meaning through its context if the context has a fixed content. Context does not have boundaries, and there is no limit to what is necessarily relevant for the context.
- Deconstruction shifts the focus to judicial choices and accountability; interpretation is not neutral and value-free. The interpreter is in a sense controlled by personal, cultural and ideological value systems. During statutory interpretation the interpreter makes certain 'choices' which are explicit and conscious. Each interpreter has to accept personal responsibility for the choices that are made. Even if the choice is in favour of the *status quo* (the existing order), it is still a conscious choice, one that should not be disguised by references to clear texts and the intention of the legislature. The interpreter cannot hide behind value-free and mechanical methods of interpretation, and is responsible

for the ideological values underlying each interpretation.

(c) The linguistic turn

Students inevitably ask what the relevance of these critical theories is for the practical application of legislation in concrete situations. This is not the forum for a discourse about theory and reality (that could be dealt with in courses in Legal Philosophy or Jurisprudence), but law students (and lawyers) must be exposed to critical reflections about the law. Only by questioning existing dogmas, beliefs and orthodoxies will the law be able to adapt and change. This applies to statutory interpretation as well. Du Plessis (2002: 7-9) refers to this critical thinking about language, meaning and interpretation as the 'linguistic turn', and summarises it as follows (at 8):

> The linguistic turn—in legal interpretation, at any rate—amounts to this: meaning is not discovered in a text, but is made in dealing with the text . . . [M]eaning is never, at any given point in time, a fixed and stable presence . . . [T]he possibilities for meaning are boundless. Language is the hyper-complex, boundlessly open system that makes such a proliferation of meaning possible.

5.3 South African theories of interpretation

For the purpose of this part the various theories and approaches to interpretation in South Africa will be condensed into two main approaches to (or schools of thought about) interpretation of legislation: the text-based approach and the text-in-context approach; next the influence of the supreme Constitution and the new constitutional order on interpretation of legislation will be explained; and finally an inclusive methodology based on the five aspects of interpretation will be suggested for a practical interpretation methodology.

5.3.1 The orthodox text-based approach

In terms of this approach the interpreter should concentrate primarily on the literal meaning of the provision to be interpreted, and the interpretation process should proceed along the following lines:

- It is the primary rule of interpretation that, if the meaning of the text is clear (the plain meaning), it should be applied, and, indeed, equated with the legislature's intention (*Principal Immigration Officer v Hawabu* 1936 AD 26).
- If the 'plain meaning' of the words is ambiguous, vague or misleading, or if a strict literal interpretation would result in absurd results, then the court may deviate from the literal meaning to avoid such an absurdity (*Venter v R* 1907 TS 910 914). This is also known as the 'golden rule' of interpretation. Then the court will turn to the so-called 'secondary aids' to interpretation to find the intention of the legislature (eg the long title of the statute, headings of chapters and sections, the text in the other official language, etc).
- Only when these 'secondary aids' to interpretation prove insufficient to ascertain the intention, will the courts have recourse to the so-called 'tertiary aids' to construction (ie the common-law presumptions).

This approach was popular in legal systems influenced by

English law. Generally speaking, four factors led to the adoption of the textual approach in England:

- Misconceptions about the doctrines of the separation of powers (the *trias politica* doctrine) and sovereignty of Parliament resulted in acceptance of the idea that the court's function should be limited to the interpretation and application of the will of the legislature, as recorded in the

text of the particular legislation. In other words, the will of the legislature is to be found in the words of the legislation.

- The doctrine of legal positivism influenced the literal approach in England. The positivist idea is based on the validity of the decree (command): that which is decreed by the state is law, and consequently the essence of the law is to be found in the command or decree. The role of the court is limited to the analysis of the law as it is and to find the intention of the legislature, and should not be a speculation about what the law ought to be. A strict distinction is made between 'black-letter law' and morality, because value judgements by the courts would lead to the justiciability of policy issues.
- England has a common-law tradition, in which the courts have traditionally played a very creative role in regard to common-law principles. Legislation was viewed as the exception to the rule, altering the traditional common law as little as possible.
- English legislation was drafted to be as precise and as detailed as possible, for the sake of legal certainty and to cover any number of possible future cases. The well-known maxim that the legislature has prescribed everything it wishes to prescribe is derived from this approach.

This text-based approach was introduced into the South African legal system in a roundabout way from English law. In *De Villiers v Cape Divisional Council* 1875 Buch 50, Chief Justice De Villiers decided that legislation that had been adopted after the British had taken over the Cape should be interpreted in accordance with the English rules of statutory interpretation. This was a strange decision: in terms of English law, a conquered territory continued to apply its own legal system (in this case, Roman-Dutch law). Traditionally, the Roman-Dutch rules of statutory interpretation were based on a functional or purpose-oriented approach, but after the British occupation of the Cape, the English law rules

of interpretation started to play an increasingly important role.

The text-based methodology is based on the 'predominance of the word', and the intention of the legislature is demoted to the status of the literal meaning of the text. Over the years the courts came to regard the clear, literal meaning as identical to what the legislature intended. In cases such as *Union Government v Mack* 1917 AD 731 and *Farrar's Estate v CIR* 1926 TPD 501 it was held that the intention of the legislature should be deduced from the words used in the legislation; in other words, the plain meaning of the text in an intentional disguise. As a result, only lip-service was paid to the principle of legislative intent, because the courts automatically elevated the so-called 'clear and unambiguous meaning of the words' to the status of the will and intention of the legislature: if the legislature had a specific intention, it would be reflected in the clear and unambiguous words of the text (eg *Ensor v Rensco Motors (Pty) Ltd* 1981 (1) SA 815 (A)).

Case law examples:

The following *dictum* of Stratford JA in *Bhyat v Commissioner for Immigration* 1932 AD 125 129 is probably the classic formulation of the orthodox text-based method of interpretation employed by South African courts:

> The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment . . . in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature

could not have intended.

The Appellate Division in *Swanepoel v Johannesburg City Council* 1994 (3) SA 789 (A) 794B again referred with approval to the orthodox 'plain meaning' approach to statutory interpretation:

> [T]he rules of statutory [exegesis] are intended as aids in resolving any doubts as to the Legislature's true intention. Where this intention is proclaimed in clear terms either expressly or by necessary implication the assistance of these rules need not be sought.

More recently in *Commissioner, SARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) 273 the Supreme Court of Appeal reiterated the well-known traditional rule of interpretation:

> The primary rule in construction of a statutory provision is (as is well established) to ascertain the intention of the legislator and (as is equally well established) one seeks to achieve this, in the first instance, by giving the words 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.

These three judgments have two things in common: all three emanate from the Appellate Division/Supreme Court of Appeal, and all three were based on a formalistic and text-based view of statutory interpretation. The foundations of a text-based (literal) method of interpretation are many: legal positivism (the essence of law is in the decree, and law and morality should be separated), sovereignty of Parliament (the will of Parliament is expressed in the legislation), as well

as certain formalistic ideas about law, language and understanding. *Bhyat* is understandable: it was decided during the era of sovereignty of Parliament, sixty-odd years before the commencement of a new constitutional order under a supreme and justiciable constitution. Perhaps we can condone *Swanepoel* as well, since judgment was given on 27 May 1994, exactly one month after the interim Constitution took effect. However, *Frith's Estate* was decided four years after the 1996 Constitution took effect, or roughly seven years into the new constitutional era: after *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) and *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE) and *S v Makwanyane* (above) and a host of other influential decisions by the High Courts and the Constitutional Court.

Criticism of the text-based (literal) approach to statutory interpretation may be summarised as follows:

- In the first instance, the normative role of the common-law presumptions during the interpretation process is reduced to a mere 'last resort', to be applied only if the legislative text is ambiguous.
- Another point of criticism of this narrow approach is that words (their literal meaning) are regarded as the primary

index to legislative meaning. According to the court in *R v Hildick-Smith* 1924 TPD 68 81—

> there is only one kind of interpretation with one definite object, and that is to ascertain the true intention of the legislature as expressed in the Act.

- Other important internal and external aids to interpretation, which could be applied to establish the meaning of text-in-context, are ignored. The context of the legislation is only used if the text is not clear. Unless the

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

- As a result, the 'intention of the legislature' is ultimately dependent on how clear the language used in the legislation may be to the particular court!
- Very few texts are so clear that only one final interpretation is possible. The mere fact that a discipline such as interpretation of statutes exists would, by implication, suggest that legislation is seldom clear and unambiguous.
- The text-based approach leaves very little room for judicial law-making, and the courts are seen as mere mechanical interpreters of the law (the so-called 'his master's voice' role). This view creates the impression that once the legislature has spoken, the courts cease to have any law-making function. According to the text-based approach, the legislature has enacted everything it wanted to, and is aware of the existing law. As a result of a slavish and rigid adherence to the doctrine of the separation of powers, the courts may only interpret the law, not make it. The legislature creates the legislation, and the courts have no law-making capacity with regard to legislation, except in very exceptional cases, where the courts deviate from 'the literal meaning' of the legislation to apply some sort of corrective interpretation. Generally speaking, it is the function of the legislature to correct omissions and bad drafting in legislation. The well-known maxims (*iudicis est ius dicere sed non dare* and the *casus omissus* rule) form the basis of the general principle that no addition to or subtraction from the legislative text is possible. According to the maxim *iudicis est ius dicere sed non dare* it is the function of the court to interpret and not to make the law (*Harris v Law Society of the Cape of Good Hope* 1917 CPD 449). A rigid obsession with this rule is the result of a misunderstanding of the separation of powers doctrine, with

the result that this principle was conveniently used to justify the text-based approach to statutory interpretation. The *casus omissus* rule (courts may not supply omissions in legislation) is also derived from the principle that the function of the courts is to interpret law and not to make it (*Ex Parte Slater, Walker Securities (SA) Ltd* 1974 (4) SA 657 (W)).

Case law examples:

Within the confines of sovereignty of Parliament prior to 1994, which resulted in a blinkered 'his master's voice' role of the judiciary, the application of an orthodox text-based approach had another, darker side. In the absence of a justiciable bill of rights under apartheid rule, the clear, plain meaning of obnoxious legislation not only became the justification for executive-minded decisions by the courts, but was also used as a convenient excuse for avoiding inconvenient moral dilemmas, as two (in)famous cases dealing with the Group Areas Act 36 of 1966 illustrate.

The following remark of King J in *S v Adams* 1979 (4) SA 793 (T) 801 illustrates the moral dilemma of a judge trapped in the 'black-letter' confines of parliamentary sovereignty, and confronted by the harsh effects of the letter of the law:

> An Act of Parliament creates law but not necessarily equity. As a Judge in a Court of law I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a court of equity, I would have come to the assistance of the appellant. Unfortunately, and on an intellectually honest approach, I am compelled to conclude that

the appeal must fail.

On the other hand, Holmes JA in *Minister of the Interior v Lockhat* 1961 (2) SA 587 (A) 602 clearly did not experience the same ethical soul-searching in deciding whether to follow the 'plain meaning' of the legislation (emphasis added):

> *The Group Areas Act represents a colossal social experiment and a long term policy*. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities.
>
> *Whether all this will ultimately prove to be for the common weal of all the inhabitants, is not for the Court to decide* . . . *the question before this Court is the purely legal one* whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view . . . it manifestly does.

This text-based approach was the predominant approach to interpretation in South Africa prior to 1994, and regrettably many of the courts still follow the traditional plain meaning approach. In *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 (1) SA 925 (A) 934J

Smalberger JA came to the conclusion that although the intention of the legislature is the primary rule of interpretation,

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

5.3.2 The text-in-context approach

The legislative function is a purposive activity. In terms of the text-in-context approach, the purpose or object of the legislation (the legislative scheme) is the prevailing factor in interpretation. The context of the legislation, including social and political policy directions, is also taken into account to establish the purpose of the legislation.

In contrast to the exaggerated emphasis on the legislative text, the mischief rule (see 6.4.4 below) is regarded as the forerunner of a text-in-context approach to interpretation (Du Plessis 2002: 96). The mischief rule acknowledges the application of external aids: the common law prior to the enactment of the legislation, defects in the law not provided for by the common law, whatever new remedies (solutions) the legislature provides, and the true reason for the remedies. The search for the purpose of legislation requires a purpose-orientated approach which recognises the contextual framework of the legislation right from the outset, and not only

in cases where a literal, text-based approach has failed. The text-in-context approach provides a balance between grammatical and overall contextual meaning. The interpretation process cannot be complete until the object and scope of the legislation (ie its contextual environment) are taken into account. In this way the flexibilities and peculiarities of language, and all the intra-textual and extra-textual factors, are accommodated in the continuing time-

frame within which legislation operates.

Case law example:

In his famous minority decision in *Jaga v Dönges* 1950 (4) SA 653 (A), Schreiner JA identified the following guidelines for interpretation of statutes:

- Right from the outset the interpreter may take the wider context of provision (eg its ambit and purpose) into consideration with the legislative text in question.
- Irrespective of how clear or unambiguous the grammatical meaning of the legislative text may seem to be, the relevant contextual factors (eg the practical effects of different interpretations, as well as the background of the provision) must be taken into account.
- Sometimes this wider context may even be more important than the legislative text.
- Once the meaning of the text and context (language in context) is determined, it must be applied, irrespective of whether the interpreter is of the opinion that the legislature intended something else.

This was one of the first concrete efforts in South African law to utilise the wider context to move beyond the plain grammatical meaning to ascertain the legislative purpose. After that, a few courts were more prepared to interpret the text of legislation in the light of the wider contextual framework.

During the 1970s Cowen (1976 and 1980) started to question the theoretical foundations of literalism and the

'intention of the legislature'. Unfortunately, this process of change proved slow, with progression alternating with regression. In *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (A) Rabie CJ held that the court had to examine all the contextual factors in ascertaining the intention of the

legislature, irrespective of whether or not the words of the legislation were clear and unambiguous.

According to the text-in-context approach, the judiciary has inherent law-making discretion during statutory interpretation; although an exception to the rule, the courts may modify or adapt the initial meaning of the text to harmonise it with the purpose of the legislation. The role of the courts is therefore far more flexible, and is not limited to mere textual analysis and mechanical application of the legislation. However, this discretion is qualified by the prerequisite that modification of the meaning of the text is possible (and admissible) only if and when the scope and purpose of the legislation is clear and supports such a modification. Such a law-making function of the judiciary is not an infringement of the legislature's legislative function, but merely a logical extension of the powers of the court during the interpretation and application of the relevant legislation in each practical instance. For the text-in-context approach the use of the common-law presumptions, as well as all the various aids to interpretation, are very important tools in the quest for the scope and purpose of legislation.

5.3.3 The influence of the supreme Constitution

Although most academics in South Africa before 1994 propagated a text-in-context (purposive) method of statutory interpretation that recognised the vital importance of the

legislative context, few of the courts actually adopted a less formalistic approach to interpretation. However, since 27 April 1994 the (largely academic) debate about a text-based approach versus a text-in-context approach to statutory interpretation has become irrelevant. Since both the interim Constitution (s 35(3)) and the 1996 Constitution (s 39(2)) included an express and mandatory interpretation provision, statutory interpretation (like all law in South Africa) now has to be conducted within the value-laden framework of the supreme Constitution which is the highest law of the land. Apart from the constitutional values, the interpretation of statutes was transformed by six provisions of the Constitution, in particular: s 1 (the foundational provision); s 2 (supremacy of the Constitution); s 7 (the obligation clause); s 8 (the application clause); s 36 (the limitation clause) and s 39 (the interpretation clause).

Constitutional supremacy

Section 1 of the Constitution is the foundational clause:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> *(a)* Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> *(b)* Non-racialism and non-sexism.
>
> *(c)* Supremacy of the constitution and the rule of law.
>
> *(d)* Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Section 2 is the constitutional supremacy clause. According to Du Plessis (1997: 812) s 1*(c)* (referring to the supremacy of the Constitution and the rule of law) merely anticipates the supremacy of the Constitution; s 2 unambiguously confirms it:

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

fulfilled.

Section 2 must be read with s 7 of the Constitution, which states that the Bill of Rights is the cornerstone of the South African democracy, and that the state must respect, protect, promote and fulfil the rights in the Bill of Rights, s 8(1), which states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state, as well as s 8(2), which provides that the Bill of Rights applies to both natural and juristic persons; and s 237, which states that all constitutional obligations must be performed diligently and without delay. If all these provisions are read together, one principle is indisputable: the Constitution is supreme, and everything and everybody are subject to it. This means that the Constitution cannot be interpreted in the light of the Interpretation Act or the Roman-Dutch common law or traditional customary law. Everything and everybody, all law and conduct, all cultural traditions and legal dogmas and religious perceptions, all rules and procedures, and all theories, canons and maxims of interpretation are influenced and ultimately qualified by the Constitution. In *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) 618 Cameron J summarised this principle very well:

> The Constitution has changed the 'context' of all legal thought and decision-making in South Africa.

The interpretation clause

Section 39(2) of the Constitution (the interpretation of statutes in general) provides:

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

Section 39(2) deals with the interpretation of legislation other than the Bill of Rights. The Constitution does not

expressly prescribe a contextual (purposive) approach to statutory interpretation. However, s 39(2) is a peremptory provision, which means that all courts, tribunals or forums must review the aim and purpose of legislation in the light of the Bill of Rights: *plain meanings* and so-called clear, unambiguous texts are no longer sufficient. Even before a particular legislative text is read, s 39(2) 'forces' the interpreter to promote the values and objects of the Bill of Rights. This inevitably means that the interpreter is consulting extra-textual factors before the legislative text is even considered. Factors and circumstances outside the legislative text are immediately involved in the interpretation process. In short, interpretation of statutes starts with the Constitution and not with the legislative text! Is this a typical academic flight of fancy? No, I am merely quoting the Constitutional Court: Ngcobo J said the following in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) paras 72, 80 and 90 (emphasis added):

> The Constitution is . . . the starting point in interpreting *any* legislation. . . . first, the interpretation that is placed upon a statute must, where possible, be one that would advance *at least an identifiable value enshrined in the Bill of Rights*; and, second, the statute must be capable of such interpretation . . . The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) para 21 Langa DP explained the constitutional foundation of this 'new' interpretation methodology as follows (emphasis added):

> Section 39(2) of the Constitution . . . means that *all statutes must be interpreted through the prism of the Bill of Rights*. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of

governance. As such, the process of

> interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

Constitutional values

As was explained earlier, the traditional South African approach to statutory interpretation was characterised by a strict devotion to the legislative text, and by the sovereignty of Parliament. Now the supreme Constitution, underpinned by universally accepted values and norms, is the fundamental law of the land. It is the ultimate value-laden yardstick against which nearly everything is viewed and reviewed. To quote Mokgoro J in *S v Makwanyane* (above) 498H-I:

> With the entrenchment of the Bill of Fundamental Rights and Freedoms in a supreme Constitution, however, the interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself, where these principles constitute the historical context in which the text was adopted and which help to explain the meaning of the text. The Constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end common values of human rights protection the world over and foreign precedent may be instructive.

The preamble to the Constitution refers to a society based on democratic values, social justice and fundamental human rights. What are these democratic values? They are, amongst others, freedom, equality and human dignity (s 7(1)), the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism. Sections 36(1) and 39(1) refer to an open and democratic society based on freedom, equality and human dignity. It appears as if these are the three core values on which the Constitution rests:

freedom, equality and human dignity. The spirit, purport and objects of the Bill of Rights have to be promoted during the process of statutory interpretation. In other words, the courts are the guardians and enforcers of the values underlying the Constitution. As a matter of fact, in terms of the official oath of judicial officers (item 6(1) of Schedule 2 of the Constitution)

the courts have to uphold and protect the Constitution and the human rights in it. This means that the courts will have to make certain value judgements during the interpretation and application of all legislation. Since the values underlying the Constitution are not absolute, the interpretation of legislation is also an exercise in the balancing of conflicting values and rights. Consequently, the interpretation of statutes can no longer be a mechanical reiteration of what was supposedly 'intended' by Parliament, but is rather what is permitted by the Constitution.

The impact of constitutionalism

A supreme constitution is not merely another legislative document, but the supreme law (*lex fundamentalis*) of the land. A constitutional state (which has a supreme constitution) is underpinned by two foundations: a formal one (which includes aspects such as the separation of powers, checks and balances on the government, and the principle of legality: in other words, the institutional power map of the country); and a material or substantive one (which refers to a state bound by a system of fundamental values such as justice and equality). In *S v Makwanyane* (above) para 262 the late Mahomed J referred to a supreme constitution in the following ringing tones (emphasis added):

> All constitutions seek to articulate, with differing degrees of intensity and detail, the shared *aspirations of a nation*; the *values* which bind its people, and which discipline its government and its national institutions; the basic

> premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the *national ethos* which defines and regulates that ethos; and the *moral and ethical direction* which that nation has identified for its future. In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it *retains from the past* only what is defensible and represents a decisive break from, and a *ringing rejection* of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a *vigorous identification* of and commitment to a *democratic, universalistic, caring and aspirationally egalitarian ethos*, expressly articulated in the Constitution.

The preamble to the interim Constitution stated that the Republic of South Africa is a constitutional state (*regstaat*), but

the Constitution of 1996 does not expressly refer to a constitutional state. Nevertheless, there are a number of provisions in the Constitution which imply a constitutional state: the preamble refers to a society based on democratic values, social justice and fundamental human rights; s 1 states that South Africa is, amongst other things, a democratic state founded on the supremacy of the Constitution and the rule of law; and s 7 entrenches the Bill of Rights as the cornerstone of the democracy. As the supreme law of the land, the Constitution not only deals with the institutional structures of government and formal checks on state power, but is first and foremost a value-laden document. It is underpinned by a number of express and implied values and norms. These fundamental principles are not only the ideals to which the South African society has committed itself, but they form the material (substantive) guidelines which must regulate all the activities of the state. The spirit of the Bill of Rights (s 39(2)) is a reflection of these fundamental principles. Apart from in the Constitution itself, these values are found in various sources: eg the

principles of international human rights law and foreign case law dealing with similar constitutions (s 39(1)), the African concept of *ubuntu* (see also 6.3.2 below) and our common-law heritage.

Froneman J explained the demands of the supreme Constitution on statutory interpretation as follows in *Qozeleni v Minister of Law and Order* (above) at 635 and 637:

> The only material difference between that common-law approach and the present approach is the recognition that the previous constitutional system of this country was the fundamental 'mischief' to be remedied by the application of the new Constitution. That Rubicon needs to be crossed not only intellectually, but also emotionally, before the interpretation and application of the present Constitution is fully to come into its own right . . . For the Constitution, and particularly chapter 3 thereof, however, to fulfil its purpose it needs to become, as far as possible, a living document, and its contents a way of thinking, for all citizens of this country. The establishment of a culture of constitutionality can hardly succeed if the Constitution is not applied daily in our courts, from the highest to the lowest.

Unfortunately, not all the courts in South Africa hold this view, and some continue to follow a literalist approach to interpretation, without reference to the supreme Constitution and its values. In *Kalla v The Master* 1995 (1) SA 261 (T) 269C-G the court held that the traditional rules of statutory

interpretation still formed part of the law of the land and that they were not affected by the interim Constitution. Consequently, the orthodox plain meaning rule was applied: if the text is ambiguous, the traditional rules of interpretation of statutes may be applied to find the 'intention of the legislature'. In other words, the traditional common-law rules of statutory interpretation trumped the supreme Constitution! Other courts still follow judgments such as this, which means that for many courts statutory interpretation is still a mechanical and formalistic exercise. In *Geyser v Msunduzi Municipality* 2003 (5) SA 19 (N) 32D-E

the court still emphasised the orthodox primary rule of interpretation is that the courts must give effect to the literal or grammatical meaning of the legislation, and that deviation from this rule will be allowed only in exceptional circumstances. In similar vein the court in *Mateis v Ngwathe Plaaslike Munisipaliteit* 2003 (4) SA 361 (SCA) held that in the light of the clear wording of the Act, the word 'state' in ss 1 and 3 of State Liability Act 20 of 1957 does not include a municipality. An interpretation otherwise would mean that the court will not interpret the Act, but rather amend it. The court reasoned that it did not have such powers in cases where the constitutionality of the relevant statutory provision was not in dispute, or—in typical orthodox text-based tradition—where the meaning of the Act under consideration was clear.

5.3.4 Practical, inclusive method of interpretation

Interpretation of statutes is a process, but it is not a predetermined mechanical process consisting of mutually exclusive steps based on aspects such the clarity of the text (eg the text-based contention that context becomes important only if and when the text seems unclear, and so on). Examples of such incremental 'only if' mind-sets are still doing the rounds. Kellaway (1995: 187) suggests a so-called 'triple-synthesis' of literalism, intentionalism and purposivism, calling for a 'careful appraisement of each of these determining factors or guides.' The problem with this approach is that the foundations of the three factors are so irreconcilable that the synthesis (amalgamation) will necessarily result in the usual text-based, formalistic, step-by-step method of legal reasoning; only if the literal meaning of the text is not clear may the interpreter embark on a search for the legislature's intention and the legislative purpose.

Case law example:

A text-based, hybrid approach was used by the Western Cape High Court in *Shackleton Credit Management (Pty) Ltd v Scholtz* (unreported case 12611/2010, Western Cape High Court). The court had to decide whether a close corporation was to be regarded as a company within the meaning of s 13(1)*(g)* of the Prescription Act 68 of 1969, and considered three interpretation approaches:

- the golden rule (the plain meaning of the text must be followed unless it leads to an absurdity or a result not intended by the legislature);
- the purposive approach (the words must be read in context); and
- reading-in in an attempt to make sense of the legislation (the creative role of the court).

There are two problems with this reasoning: first, it is also based on a mutually exclusive way of thinking: if method A does not work the court will try method B, and so on; and second, to argue that a court will use 'reading in' (a form of corrective interpretation) as a method to make sense of the legislation is to put the cart before the horse. After all (as will be discussed in Chapter 7 below), the legislative purpose must be clear before a court may apply corrective interpretation; it is ludicrous to suggest that a court may read words into the legislation in order to understand it (make sense of it)!

In *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) the court acknowledged that interpretation of legislation under the Constitution requires a new mind-set: the court has to sail between the dangers of the Scylla of the old-style literalism and the Charybdis of judicial law-making. It would seem that the court was trying to suggest that interpretation involves a journey between an orthodox text-based approach and free-floating judicial law-making, and that the correct course is to be plotted somewhere between the two. However, it is not entirely clear whether the court was in actual fact trying to propagate a particular approach to interpretation—the phrase 'between Scylla and Charybdis' does not refer to avoiding both possible dangers by trying to find some safe middle ground, but rather to having to choose the lesser of two evils.

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Please note:

In Greek mythology, Scylla and Charybdis were two monsters who lurked on opposite sides of the Strait of Messina (between Italy and Sicily). Scylla was a six-headed monster and Charybdis was a dangerous whirlpool, and a ship sailing the strait was bound to be destroyed by one of the monsters. The legend of the monsters gave rise to a number of phrases: 'between Scylla and Charybdis'; 'between the devil and the deep blue sea'; and 'between a rock and a hard place'—meaning a situation where one has to choose between two equally unattractive options.

Fortunately there is a practical, sensible and theoretically correct alternative. Du Plessis & Corder (1994: 73-74)

originally suggested five practical interrelated techniques for constitutional interpretation. However, Du Plessis (2002: 197-274) has applied this practical and inclusive method for statutory interpretation as well. These suggested techniques form the basis of a practical, inclusive method of interpretation which is used in the following chapter of this book. These components of a practical methodology are complementary and interrelated, and should be applied in conjunction with one another.

Eskridge (2001: 207) also describes a pragmatic approach to interpretation which is based on a—

> grab bag of different techniques, including not just textual analysis, but also sophisticated appreciation of the goals underlying the legal text and the consequences of adopting different interpretations. Law involves a balance between form and substance, tradition and innovation, text and context.

However, the Du Plessis model is much more than that. As a result of the influence of the Constitution and the constitutional values, this suggested practical, inclusive method of interpretation also includes a strong normative component. This practical and inclusive method consists of the following components:

Words and phrases: the language aspect

This aspect acknowledges the importance of the role of the language of the legislative text. It focuses on the linguistic and grammatical meaning of the words, phrases, punctuation,

sentences and other structural components of the text, and on the rules of syntax (the rules dealing with the order of words in a sentence). However, this does not imply a return to literalism and the orthodox text-based interpretation. It merely acknowledges the importance of the legislative text in the complex process of interpretation.

Structure and context: the systematic aspect

This method is concerned with the clarification of the meaning of a particular legislative provision in relation the legislative text as a whole. This is also known as a holistic approach, and refers to the principle that words, phrases and provisions cannot be read in isolation. The emphasis on the 'wholeness' is not restricted to the other provisions and parts of the legislation, but also takes into account all other contextual considerations (eg the social and political environments) in which the legislation operates.

Teleological interpretation: the value-based aspect

This aspect emphasises fundamental constitutional values and value-coherent interpretation. The aim and purpose of the legislation must be ascertained against the fundamental constitutional values; in other words, s 39(2) of the Constitution. The fundamental values in the Constitution form the foundation of a normative, value-laden jurisprudence during which legislation and actions are evaluated against (and filtered through) those constitutional values.

Historical aspect

This method refers to the use of the historical context of the legislation. The historical context includes factors such as the circumstances which gave rise to the adoption of the legislation (mischief rule) and the legislative history (prior legislation and preceding discussions). Although it is an important aspect of interpretation, the historical perspective cannot be decisive on its own.

Comparative aspect

This aspect refers to the process (if possible and necessary) during which the court examines the interpretation of similar legislation by foreign courts, as well as international law.

This inclusive method of interpretation is not really new or radical. It merely brings together all the different aspects or

techniques necessary for interpretation: the enacted law-text with all the linguistic complexities of grammar, syntax and spelling; the context of the text, including the relationship of different parts of the text with another, other texts outside the legislation (such as the Constitution, other legislation as well as relevant surrounding circumstances); the purpose (legislative scheme) of the legislation, as well the important substantive element of fundamental constitutional values; the historical context of the legislation such as the discussions and deliberations preceding the passing of the legislation, the mischief rule, explanatory memoranda and policy documents; and the comparative dimension (foreign case law and international law). It is not just another template for a mechanical application of words and phrases with passing reference to values and context. It is a total, integrated framework with which (and within which) interpretation of statutes as a process should take place; a practical, all-encompassing methodology to deal with the complexities and nuances of statutory interpretation.

Case law example:

These techniques are not merely academic exercises. Although the courts do not expressly apply this inclusive method of interpretation, some (or most) of these components could be identified in certain judgments. For instance, with the exception of comparative interpretation, the other components may be identified in the following *dictum from Minister v Land Affairs v Slamdien* 1999

(4) BCLR 413 (LCC) 422 para 17 (emphasis added):

> The purposive approach as elucidated in the decisions of the Constitutional Court and this Court requires that one must:
> (i) in general terms, ascertain the meaning of the provision to be interpreted by an *analysis of its purpose* and, in doing so;
> (ii) have regard to the context of the provision in the sense of its *historical origins*;
> (iii) have regard to its context in the sense of the *statute as a whole*, the subject matter and *broad objects of the statute and the values which underlie it*;

> (iv) have regard to its immediate context in the sense of the *particular part of the statute in which the provision appears or those provisions with which it is interrelated*;
> (v) have regard to the *precise wording of the provision* . . .

Chapter 6
A practical, inclusive methodology: The five interrelated dimensions of interpretation

6.1 The language dimension

6.1.1 Basic principles

(a) The initial meaning of the text

The text-based approach no longer has any place in statutory interpretation. Of course the reading of the text is necessary, but, as has been pointed out, the legislation as a whole and its context play an equally important role in the interpretation process. It also has to be borne in mind that the purpose of the legislation will still qualify the meaning of the text. The basic language principles about the meaning of the text may therefore be regarded as, at best, initial and merely tentative rules. In the final instance, it is the purpose of the legislation, viewed against the fundamental rights contained in the Constitution, which will qualify the meaning of the text.

The interpretation process begins with the reading of the legislation concerned. The ordinary meaning must be attached to the words (*Union Government v Mack* (above)). Most readers will agree that this is a pretty standard starting point for reading a text. Unfortunately, what was once a basic principle of language was subsequently elevated to the primary

rule of interpretation. For example, in *Volschenk v Volschenk* 1946 TPD 486, it was held that the most important rule of interpretation was to give words their ordinary, literal meaning. In *Sigcau v Sigcau* 1941 CPD 334 the court argued that 'ordinary meaning' includes the ordinary grammatical meaning. Furthermore, in *Association of Amusement and Novelty Machine Operators v Minister of Justice* 1980 (2) SA 636 (A) the court held that 'ordinary meaning' means colloquial (everyday conversational) speech.

Remember, the principle that the ordinary meaning should be given to the words of the legislation is only the starting point of the interpretation process. It means that the interpreter should not attach an artificial (strained or unnatural) meaning to the text. However, the context of the legislation, including all the factors both inside and outside the text, which could influence and qualify the initial meaning of the provision, has to be taken into account right from the outset. In the case of technical legislation dealing with a specific trade or profession, words that have a specific technical meaning in that field which is different from the ordinary colloquial meaning have to be given that specialised meaning (*Kommissaris van Doeane en Aksyns v Mincer Motors* 1959 (1) SA 114 (A)).

(b) Every word is important

The principle that a meaning has to be assigned to every word derives from the rule that words are to be understood according to their ordinary meaning. Strictly speaking, this is a principle which applies when any text is read. Legislation should be interpreted in such a way that no word or sentence is regarded as redundant (superfluous or unnecessary). In *Keyter v Minister of Agriculture* 1908 NLR 522, it was pointed out that the court's function is to give effect to every word,

unless it is absolutely essential to regard it as unwritten. In practice, however, a court will not easily decide that words contained in legislation are superfluous (*Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A)).

Sometimes, however, it is impossible to assign a meaning to every word in a statute, as tautological (unnecessarily repetitive) provisions are often added as a result of excessive caution (*ex abundanti cautela*). Overlapping and repetition often occur, because the drafters of legislation are overcautious in guarding against anything important being omitted. The resulting redundancy may be ignored in the interpretation of a clause (*R v Herman* 1937 AD 168). Steyn (1981: 20) points out

that if superfluous words help to ascertain the meaning of other words, they are not really unwanted and the provision should be read as a whole in order to obtain the meaning. In *Secretary for Inland Revenue v Somers Vine* 1968 (2) SA 138 (A), the court stated clearly that the principle that a meaning should be assigned to every word is not absolute. This is correct, because the purpose of the legislation should be the deciding factor in determining whether a word is superfluous or not. This principle is also related to the presumption that legislation does not contain futile or nugatory provisions (see 6.2.4 below).

(c) No addition or subtraction

It is a basic rule of interpretation that there may be no additions to or subtractions from the words used in the legislation. This is a default setting, based on the separation of powers principle. However, this is only a basic default principle, because in the final analysis, the purpose of the

legislation is the qualifier of the meaning of the text. Unfortunately, the courts have elevated this principle to another so-called 'primary rule'. For all practical purposes, it is sufficient to know that the courts may not supply omissions in legislation at will. If, however, the purpose of the legislation is clear, the court is the last link in the legislative process, and should (according to Labuschagne (1985: 60)) ensure that the legislative process reaches a just and meaningful conclusion. (This aspect of interpretation will be discussed in greater detail in Chapter 7 below.)

(d) The continuing time-frame of legislation: the law is always speaking

If words bear their ordinary meaning—initially at least—the question is whether words in existing legislation should interpreted according to their present-day meaning, or whether they should retain the meaning they had when the legislation was passed. Cowen (1980: 391) questioned the principle that words should retain their original meaning: it indicates a tendency to glance over one's shoulder, based on an incorrect reconstruction of an historical legislature's thoughts (the original intent principle), and negates the future-oriented frame of reference of legislation.

Initially the courts followed the general rule. In *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 (4) SA 773 (A), the Appellate Division held that unless later legislation expressly provided otherwise, words in legislation

had to be construed according to their meaning on the day on which the legislation was adopted. This judgment was confirmed in *Minister of Water Affairs and Forestry v Swissborough Diamond Mines (Pty) Ltd* 1999 (2) SA 345 (T): the intention of the legislature had to be determined in view

of the meaning of the provision at the time when it was enacted.

However, it would seem that the courts might in future be less rigid. In *Golden China TV Game Centre v Nintendo Co Ltd* 1997 (1) SA 405 (A) it was held that the general scheme (purpose) of an Act suggested that the definitions in that Act were to be interpreted flexibly in order to deal with new technologies on a continuous basis, rather than to interpret the provisions narrowly, forcing the legislature periodically to update the Act. In *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) paras 136-137 Farlam JA (albeit in a minority judgment) refers to a presumption of updating interpretation: an updated interpretation should be given to 'ongoing Acts' (legislation that will continue to apply in the future), except in the case of those rare statutes intended to be of unchanging effect (so-called 'fixed-time Acts').

When considering this continuing time-frame of legislation it must be borne in mind that all legislation has to be interpreted so as to promote the spirit and scope of the Bill of Rights, but that a supreme constitution is not a static document, nor are the values underpinning it static. In *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (BGD) 567H Friedman J stated that a supreme constitution must be interpreted in the context and setting existing at the time when a case is heard, and not when the legislation was passed, otherwise the growth of society will not be taken into account:

> These are the objectives of the rights contained therein, the circumstances operating at the time when the interpretation has to be determined, the future implications of the construction, the impact of the said construction on future generations, the taking into account of new developments and changes in society.

In *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B) 241B Friedman J once again explained this constitutional dynamic (emphasis added):

> This Constitution has a dynamic tension because its aims and purport are to

> metamorphose South African society in accordance with the aims and objects of the Constitution. In this regard it cannot be viewed as an inert and stagnant

> document. It has its own inner dynamism, and the Courts are charged with effecting and generating changes.

However, an enactment cannot automatically be reinterpreted to keep up with the winds of change in society. The rule of law principle means that courts will always need to balance the dimension of futurity with legality issues such as offences, penalties and vested rights, as well with legal certainty.

6.1.2 Internal language aids to interpretation

(a) The legislative text in another official language

Prior to the commencement of the interim Constitution, legislation in South Africa was drafted in two official languages, and the text in the other language was used to clarify obscurities. Devenish (1992: 144) refers to this as 'statutory bilingualism'.

Original legislation

The signing of legislation is part of the prescribed procedure during the passing of original legislation. Old order legislative texts were signed alternately (in turn) in the languages in which they were drafted, and the signed text was enrolled for record at the Appellate Division. In case of an irreconcilable conflict between the various legislative texts, the signed one prevailed. This principle was expressly included in the 1961 and 1983 Constitutions, as well as in the interim Constitution. The 1996 Constitution does not refer to irreconcilable conflicts between texts of other legislation. In *Du Plessis v De Klerk* (above) para 44 the Constitutional Court referred, with apparent approval, to the existing legal

position regarding conflicting versions of the same legislative text. In terms of item 27 of Schedule 6, these provisions do not affect the safekeeping of legislation passed before the 1996 Constitution came into operation. It should also be noted that s 126 of the Constitution ('Publication of municipal by-laws') does not mention the signing of new municipal legislation.

With regard to the 1996 Constitution itself, s 240 of the Constitution states that the English text will prevail in the event of any inconsistency between the different texts. The Constitution also provides (ss 82 and 124) that the versions of all new national and provincial legislation which have been signed by the President or a provincial premier respectively, has to be entrusted to the Constitutional Court for safekeeping. The signed version will be conclusive evidence of the provisions of that legislation.

The signed version of the legislative text does not carry more weight simply because that is the one which was signed:

- The signed version is conclusive only when there is an irreconcilable conflict between the versions (*Handel v R* 1933 SWA 37). In other words, the signed version is used as a last resort to avoid a stalemate.
- If the one version of the text is wider than the other (eg one version prescribes a penalty of imprisonment and a fine, and the other only a fine), then the common-denominator rule is followed, and only a fine will be imposed. The texts are read together to establish the common denominator (*Jaffer v Parow Village Management Board* 1920 CPD 267).
- If the versions differ but there is no conflict, the versions complement one another and they have to be read together. An attempt should be made to reconcile the texts

with reference to the context and the purpose of the legislation (*Zulu v Van Rensburg* 1996 (4) SA 1236 (LC)).

- Even the unsigned version of the legislative text may be used to determine the intention of the legislature (*Commissioner of Inland Revenue v Witwatersrand Association of Racing Clubs* 1960 (3) SA 291 (A) 302A–B).
- Because statutes are signed using alternate languages, amendment Acts may create a problem. Suppose the Afrikaans version of a statute was signed but the English version of the amendment Act was signed. Which one of the signed versions of the amendment Act will prevail in case of an irreconcilable conflict? There are conflicting answers to this question, but the most acceptable solution was put forward in *R v Silinga* 1957 (3) SA 354 (A). The court suggested that the amendment Act be regarded as part of the original statute. The version of the statute signed originally will prevail in the case of an irreconcilable conflict.

Subordinate legislation

There are no statutory or constitutional rules about conflicting language versions of subordinate legislation. In practice all the versions of subordinate legislation will be signed, and the signed text cannot be relied on to resolve conflicts between texts. If the texts do differ, they must be read together (*Du Plessis v Southern Zululand Rural Licensing Board* 1964 (4) SA 168 (D)). If there is an irreconcilable conflict between the various texts, the court will give preference to the one that benefits the person concerned (*Bolnik v Chairman of the Board appointed by the SA Council of Architects* 1982 (2) SA 397 (C)).

This approach is based on the presumption that the legislature does not intend legislation that is futile or nugatory (*R v Shoolman* 1937 CPD 183). If the irreconcilable

conflict leads to subordinate legislation that is vague and unclear, the court may declare it invalid (*Kock v Scottburgh Town Council* 1957 (1) SA 213 (D)).

Criticism

All versions of the legislative text should be read together from the outset, as they all are part of the structure of the same enacted law-text. The arbitrary manner of conflict resolution (ie that the signed version automatically prevails) is merely a statutory confirmation of a text-based approach, because the purpose of the legislation is ignored if there is an irreconcilable conflict between the two versions of the legislative text. It could well be that the unsigned version reflects the true purpose of the provision, and that the signed text is the incorrect one. In following the signed version 'blindly', the purpose of the legislation could be defeated by the court! In the light of the interpretation clause in the Constitution (s 39(2)), as well as of the principle that legislation should as far as possible be interpreted to render it constitutional, the following solution is suggested: in the case of an irreconcilable conflict between versions of the same legislative text, the text which best reflects the spirit and purport of the Bill of Rights must prevail.

Of course, the rules explained above will apply to old order legislation. If the existing Act was published in, say, Afrikaans and English, all future amendment Acts will still have to be adopted and published in Afrikaans and English (because those amendments will eventually be incorporated

into the Act). Furthermore, in theory at least, subordinate legislation issued in terms of an enabling Act originally published in Afrikaans and English will also need to be in Afrikaans and English.

However, South Africa now has 11 official languages. For a number of practical reasons the legislation cannot be promulgated in all 11 languages. Since 1998 new Acts of Parliament have been promulgated only in English. Section 59(1)*(a)* of the Constitution obliges Parliament to 'facilitate public involvement in the legislative and other processes'. One way of doing that is to publish translations of Bills introduced in

Parliament. In addition, the Joint Rules of Parliament require that a translated version of a Bill that has been adopted must be submitted together with the Bill to be signed into law. In practical terms this means that new Acts of Parliament are promulgated only in English.

(b) The preamble

Although old order legislation with a preamble is rare, some private Acts, the new generation public Acts (eg the South African Schools Act 84 of 1996) and the Constitution have preambles. The preamble usually contains a programme of action or a declaration of intent with regard to the broad principles contained in the particular statute. Preambles tend to be programmatic and couched in general terms, but they may be used during interpretation of legislation since the text as a whole should be read in its context. Although a preamble on its own can never provide the final meaning of the legislative text, post-1994 preambles should provide the interpreter with a starting point—it is the key that unlocks the first door in the process of statutory interpretation.

In *Jaga v Dönges* (above) Schreiner JA considered the preamble to be part of the context of the statute. In a number of recent cases (eg *Qozeleni v Minister of Law and Order* (above) 79D-E and *Khala v The Minister of Safety and Security* 1994 (4) SA 218 (W) 221) the courts acknowledged the unqualified application of the Constitution's preamble. In *National Director of Public Prosecutions v Seevnarayan* 2003 (2) SA 178 (C) 194 the court rejected the argument that a preamble may be considered only if the text of the legislation is not clear and ambiguous as an outdated approach to interpretation.

(c) The long title

The long title provides a short description of the subject matter of the legislation (see also the example of an Act in Chapter 2). It forms part of the statute considered by the legislature during the legislative process. The role played by the long title in helping to ascertain the purpose of the legislation will in each case depend on the information it contains. The courts are entitled to refer to the long title of a statute to establish the purpose of the legislation (*Bhyat v Commissioner for Immigration* (above)).

(d) The definition clause

Almost all statutes contain a definition clause. This is an explanatory list of terms in which certain words or phrases used in the legislation are defined (see also the example of an Act in Chapter 2 (above)). A definition section is an internal dictionary for that Act only—the definition section always starts with the phrase 'In this Act, unless the context indicates otherwise . . .'

A definition in the definition section is conclusive, unless the context in which the word appears in the legislation

indicates another meaning. In that case, the court will follow the ordinary meaning of the word (*Brown v Cape Divisional Council* 1979 (1) SA 589 (A)). In *Kanhym Bpk v Oudtshoorn Municipality* 1990 (3) SA 252 (C) it was held that a deviation from the meaning in the definition clause will be justified only if the defined meaning is not the correct interpretation within the context of the particular provision.

Practical example:

Let us assume a 17-year-old person applies to be funded for adult education and training in terms of the Adult Basic Education and Training Act 52 of 2000. Section 1 of the Act provides the following definition of 'adult':

> In this Act, unless the context indicates otherwise—
>
> **"adult"** means a person who is sixteen years or older;

But how can it be that a person of 17 is considered to be an 'adult'? After all, s 1 of the Children's Act 38 of 2005 defines a child as a person under the age of 18 years, and in terms of s 17 a person only becomes a major (adult) at the age of 18; furthermore, in terms of s 28 of the supreme Constitution a person under the age of 18 is still a child.

However, it should be remembered that a definition in legislation only applies for that particular legislation. Definitions in other legislation do not apply, and the definitions in the Children's Act and Constitution will apply only to the Children's Act and the Constitution respectively—not to the Adult Basic Education and Training Act. The aim of the Adult Basic Education and Training Act is

very specific, as it deals with basic education for older learners; on the other hand, the Children's Act deals with (amongst other things) the age of majority, while s 28 of the Constitution focuses on the protection of children's rights.

(e) Express purpose clauses and interpretation guidelines

While a preamble is formulated in wide and general terms, and the long title is nothing more than a summary of the contents of an Act, the express purpose clause and interpretation guidelines contain more detail and are more focused, and should be more valuable during the interpretation process. However, by itself none of them can be decisive. To take such a view would merely create a new and sophisticated version of text-based interpretation. The interpreter must still analyse the legislative text (as a whole) together with all internal and external aids.

Examples of a purpose clause and interpretation guidelines are ss 1 and 3 of the Labour Relations Act:

> **1 Purpose of this Act.**
>
> The purpose of *this Act* is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of *this Act*, which are—
>
> *(a)* to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
>
> *(b)* to give effect to obligations incurred by the *Republic* as a member state of the International Labour Organisation;
>
> *(c)* to provide a framework within which *employees* and their *trade unions*, employers and *employers' organisations* can—
>
> (i) collectively bargain to determine wages, terms and

conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote—

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes.

3 Interpretation of this Act

Any person applying *this Act* must interpret its provisions—

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the *Republic*.

(f) Headings to chapters and sections

Headings to chapters or sections may be regarded as introductions to those chapters or sections. Within the framework of text-in-context, headings may be used to determine the purpose of the legislation. In the past the courts held the literal viewpoint that headings may be used by the courts to establish the purpose of the legislation only when the rest of the provision is not clear (*Chotabhai v Union Government* 1911 AD 24). In *Turffontein Estates v Mining Commissioner Johannesburg* 1917 AD 419 the court pointed out that the value attached to headings will depend on the circumstances of each case.

Practical example:

The value of headings to sections and chapters will differ from one to the other, depending on the information they contain. A heading stating 'Regulations' merely states that the following section is the enabling clause which authorises a

subordinate lawmaker to issue subordinate legislation—what you see is what you get. But headings are also pieces in the bigger jigsaw puzzle, and they could possibly provide some important information an interpreter will need. For example, take Chapter 2 and ss 18 and 19 of the (since repealed) Human Tissue Act 65 of 1983. The chapter heading reads 'TISSUE, BLOOD AND GAMETES OF LIVING PERSONS, AND BLOOD PRODUCTS', and the section headings provide 'Consent to removal of tissue, blood or gametes from bodies of living persons' and 'Purposes for which tissue, blood or gametes of bodies of living persons may be used'. The chapter clearly deals with the donation of three different things: blood, tissue and gametes. Now the warning bells should start to ring: What is the difference

between these three, and what are gametes? Back to the definition section we go. A 'gamete' is defined as either of the two generative cells essential for human reproduction, and 'tissue' means any human tissue, including any flesh, bone, organ, gland or body fluid, but excluding any blood or gamete. In practical terms the headings would have alerted the interpreter to be aware of the difference between blood, tissue and gametes—important, since they are very different as regards both the legal requirements and consequences associated with the donation of blood, tissue and gametes respectively.

(g) Schedules

Schedules serve to shorten and simplify the content matter of sections in legislation. The value of a schedule during interpretation depends on the nature of the schedule, its relation to the rest of the legislation, and the language in which the legislation refers to it. The general rule is that schedules, which expound sections of an Act, should have the same force of law as a section in the main Act. An example of a schedule is Schedule 1 of the Constitution (which contains the description of the national flag). It should be clear that schedules have to be consulted when interpreting provisions in the main part of the Act.

In the case of conflict between the schedule and a section in the main legislation, the section prevails (*African and European Investment Co v Warren* 1924 AD 360). One notable exception to this rule was s 232(4) of the 1993 Constitution, which stated that for all purposes the schedules were deemed to form part of the substance of the 1993 Constitution. In certain cases the particular schedule will state that it is not part of the Act and that it does not have the force of law, in which case it is an external aid and it may be considered as part of the context. An example of this is Schedule 4 of the Labour Relations Act, which consists of flow diagrams which explain the procedures for dispute resolution set out in the Act.

As was pointed out in Chapter 2, the names and types of legislation can be confusing. Sometimes a schedule is a type of subordinate legislation, and not a part of the Act (as primary legislation). For example, s 207 of the Labour Relations Act empowers the Minister of Labour—after consultation with NEDLAC—to change, add to or replace certain schedules in the Act by notice in the *Government Gazette*.

6.1.3 External language aids to interpretation

(a) Dictionaries and linguistic evidence

In an era in which legislation is becoming ever more technical and highly specialised, courts often use dictionaries during interpretation. In *Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council* 1972 (1) SA 88 (W) 94G the court used dictionaries in a contextual framework:

> Dictionary definitions serve to mark out the scope of the meanings available for a word, but the task remains of ascertaining the particular meaning and sense of the language intended in the context of the statute under consideration.

In *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 (T) the court reiterated that the meaning of a word cannot be determined conclusively by its dictionary meaning. The dictionary meaning is only a guideline. A dictionary cannot prescribe which of several possible meanings of a particular word should prevail—the context in which a word is used should be the decisive factor. In *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) the court reiterated that the use of authoritative dictionaries is a permissible and helpful method available to the courts during interpretation of statutes. However, interpretation of statutes cannot be done by 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene'. After all, the interpreter has to ascertain the meaning of words or expressions in the particular context of the statute in which it appears.

Case law example:

In *S v Makhubela* 1981 (4) SA 210 (B), the accused was charged with being behind the wheel of a

vehicle that was being pushed by a group of people on a public road, without having a driver's licence. He was found guilty of driving a vehicle on a public road without a valid driver's licence. On review, the court decided that the definition of the word 'drive', as found in the Road Traffic Act 7 of 1973, was inadequate, and it consulted a dictionary as well. The court held that the word 'drive' should not be construed only according to its dictionary meaning, but should be

understood within the context of the Act as a whole. The legislature had meant that a person driving a vehicle driven by its own mechanical power should be in possession of a driver's licence. The conviction and sentence were set aside.

In *Association of Amusement and Novelty Machine Operators v Minister of Justice* (above) the meaning of the word 'pin-tables' was in dispute. The court held that the testimony of language experts was not admissible as an aid in construing legislation. In the same vein, in *Metro Transport (Pty) Ltd v National Transport Commission* 1981 (3) SA 114 (W) the court decided that supplementary linguistic evidence to interpret a statutory provision was not admissible.

(b) Examples and footnotes

The use of footnotes in legislation is a new trend, used to facilitate better and more streamlined cross-references (eg

the Labour Relations Act). Although the Acts in which footnotes are used expressly state that they do not form part of the Act, they may be used as external aids during the interpretation process.

(c) Definitions in the Constitution and the Interpretation Act

There is a large number of definitions in other legislation that expressly have a wider application. For instance, when interpreting old order legislation the definitions in item 3 Schedule 6 of the Constitution will be indispensable. Furthermore, the definitions in s 2 of the Interpretation Act will apply to all other legislation unless expressly provided otherwise.

(d) The clock is ticking: computation of time

Lawyers and courts like 'clear lines to be drawn in the sand'. One of those 'lines in the sand' is time limits. Legal documents must be filed within a certain time; a debt has to be settled or a fine must be paid before a certain date, and so on. The matter of the computation of time is very important, because a large number of statutory enactments and contractual provisions prescribe a time or period in which or after which certain actions are to begin, or be executed, abandoned or completed. The failure to discharge obligations within a prescribed period may have dire consequences. How do we construe time clauses? What is a month, or a week? So, when does the 'legal

clock' start ticking and when does it stop? Although s 4 of the Interpretation Act deals with computation of time, it is more complicated than that. There are also common-law methods of computation of time, as well as time clauses in other legislation (eg the Rules of the High Court and the

Magistrate's Court).

The meaning of time units

Year:

A year consists of a cycle of 365 days (366 days every fourth or leap year), and is based on the Gregorian calendar. Every year commences on 1 January and ends on 31 December.

Month:

The term 'month' could have three possible meanings:

- according to s 2 of the Interpretation Act 'month' means a calendar month (not a lunar month); in other words, the twelve unequal named periods which make up a year on the calendar (s 1 of the Value-Added Tax Act 89 of 1991 defines a month as 'any of the twelve portions into which a calendar year is divided'); or
- a lunar month of 28 days; or
- a period of time stretching between two corresponding dates in succeeding months of the year (eg 9 June to 9 July).

The last meaning is the one used the most frequently in law. However, it would be more appropriate to use the term 'calendar month' for the first alternative and 'month' for the last one.

Day:

Normally a day will be one of the 24-hour units of a week stretching from midnight to midnight, or it could be the hours of daylight (s 1 of the Criminal Procedure Act 51 of 1977 defines a day as the space of time between sunrise and sunset).

Week:

Traditionally a week as a part of a calendar runs from midnight on a Saturday to midnight on the next Saturday. For the purpose of computation of time the courts regard a

week as any period of seven successive days.

Computation of time

The statutory method (s 4 of the Interpretation Act):

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

Section 4 refers to days and not to periods of months or years. So the default method of calculation for days (and weeks as units of days) is the statutory method. The first day is excluded (the counting starts on the next day) and the last day is included, unless the last day falls on a Sunday or a public holiday, in which case the period will move on to the next day. Please note that Sundays and public holidays falling within the time period will be counted. Section 1 of the Interpretation Act provides that s 4 will apply unless the contrary intention is clear from the particular legislation (*Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A)).

In two instances the general principle of 'first day excluded, last day included' for days will not apply (only if the intention to deviate from the default principle is clear): first, the rules of court provide that where a number of 'court days' are referred to in a contract or legislation, the computation will not include Saturdays, Sundays and public holidays, nor can the period end on those days; and second, where there is a reference to a number of 'clear days' or 'at least' a number of days between two events, those days will be calculated with the exclusion of both the first and the last days (eg if it is a statutory requirement that notice of eight clear days be given for a meeting, both the day the notice is delivered and the day of the meeting are not counted as part

of the eight days).

Off course, legislation may at any time change the default time calculation methods. For instance, the Income Tax Act: both s 83(23) (referring to Part III of the Act dealing with objections and appeals) and s 89*sex*(1) expressly provide that a Saturday will also not be counted during the calculation of prescribed time periods:

> (23) Any reference in this Part and the rules to **"day"** means any day other than a Saturday, Sunday or public holiday: Provided that the days between 16 December of a year and 15 January of the

> following year, both inclusive, shall not be taken into account in determining days or the period allowed for complying with any provision in this Part or the rules.
>
> **89*sex*. Determination of day and time for payment of tax, interest or penalties.**
>
> (1) Where any day specified for any payment to be made under the provisions of this Act, or the last day of any period within which payment under any provision of this Act shall be made, falls on a Saturday, Sunday or a public holiday, such payment shall be made not later than the last business day falling prior to such Saturday, Sunday or public holiday.

Common-law methods

Three common-law methods of computation of time will be discussed briefly. Although part of common law, these methods complement s 4 of the Interpretation Act (the statutory method):

- Ordinary civil method (*computatio civilis*): Unless clearly indicated otherwise, this method is the default method for the calculation of months and years and is the opposite of the statutory method (used for days). The first day of the prescribed period is included and the last day excluded. The last day is regarded as ending at the very moment it begins, as it were (at midnight of the previous day).

Case law examples:

A very interesting example of the ordinary civil method is *Minister van Polisie v De Beer* 1970 (2) SA 712 (T). The case dealt with a claim for damages after a police vehicle had collided with a private motor-car. In terms of s 32 of the Police Act 7 of 1958, a claim for damages against the police as a result of an action executed in terms of the Police Act had to be instituted within six months. The collision took place on 5 August 1967. The summons was served on 5 February 1968. On appeal the Supreme Court found that the ordinary civil method should be used to calculate the time. The last day was therefore excluded and the summons was therefore served one day too late. As a result the action was refused.

However, in *Pivot Point SA (Pty) Ltd v Registrar of Companies* 1980 (4) SA 74 (T) the issue was the time period prescribed in s 45 of the Companies Act 61 of 1973, which provided that the Registrar may 'within one month after the date of such decision or order, apply to the Court for relief'. The court held that the language of the Act clearly indicated that the ordinary civil method of calculating time was not to be used, because the provision stated 'after the *date* of such decision'. If time is to run 'after' a day or date, then clearly that day or date must be excluded from the reckoning of time.

- Natural method (*computatio naturalis*): Where this method is used, the prescribed period is calculated from the hour (or even minute) of an occurrence to the corresponding hour or minute on the last day of the period in question.
- Extraordinary civil method (*computatio extraordinaria*): Both the first and the last day of the period concerned are included. This method of time calculation is obsolete and is no longer used by the courts.

> ***An important note:***
>
> The issue of time limits and computation of time is far more complicated than it may seem from the brief introduction above. The large number of cases, legislation and exceptions to rules cannot be dealt with fully in this book. Remember: whichever method of computation of time is used, the purpose of the legislation will remain the decisive factor.

6.2 The holistic (contextual and structural) dimension: Don't miss the wood for the trees

6.2.1 Legislation must be construed within the total legal picture

As was pointed out in Chapter 1, the interpretation of legislation involves more than analysing the particular provision in question. To interpret a text in its context includes the intra-textual context (the enactment as a whole, including its unique structure and legislative 'codes'), as well as the extra-textual context (the rest of the existing law and

other

contextual considerations that might be applicable). Currently one of the more serious practical problems is arguably the fact that many practitioners fail to see the bigger legal picture when they interpret legislation.

The interpreter has to study the legislation as a whole. In *Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport (Edms) Bpk* 1983 (4) SA 344 (A), the court pointed out that when interpreting certain provisions, a statute must be studied in its entirety.

Practical example:

Let us assume Bela-Bela (one of the local municipalities within the Waterberg district municipality) intends to pass a by-law on a particular subject (say, abattoirs). The question is whether the municipal council has the authority to enact a by-law about abattoirs. Their lawyer only consults the Constitution (Schedule 4B and 5B), and it seems straightforward—abattoirs clearly fall within the legislative competencies of a municipality. However, it turns out to be much more complicated. The Constitution cannot be read in isolation.

Chapter 6 of the Local Government: Municipal Structures Act 117 of 1998 provides for the division of powers and functions between district municipalities and local municipalities. Section 84(1) of the Municipal Structures Act provides for all the powers and functions of a district municipality, and in terms of s 84(2), a local

municipality would only have the powers and functions provided for by the Constitution *minus* the s 84(1) powers and functions of the district municipality. Consequently the Bela-Bela local municipality may only adopt by-laws (in terms of ss 155, 156 and 229 of the Constitution, read with Schedules 4B and 5B of the Constitution, as well as with ss 83 and 84(1) and (2) of the Local Government: Municipal Structures Act of 1998) on those topics left after the Waterberg district municipality has exercised its choice.

A part from the legislation to be construed, the bigger picture includes the Constitution and all other relevant law (including old order legislation and the common law). Du Plessis (1986:

127-128) refers to this principle as the 'structural wholeness of the enactment', and Devenish (1992: 101) describes it as follows:

> Interpretation should be *ex visceribus actus*, ie from the bowels of the Act or, to paraphrase, 'within the four corners of the Act'.

Practical example:

The term 'organ of state' is used throughout the Constitution. Section 8(1) (application clause) provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state; s 195(2)*(c)* provides that the principles of basic values and principles governing public administration contained

in s 195(1) also apply to all organs of state; in terms of s 55(2)*(b)*(ii) the National Assembly must provide for mechanisms to maintain oversight of any organ of state; s 41(1)*(d)* states that all organs of state within each sphere of government must be loyal to the Constitution; and so on. However, who and what is an organ of state?

That should not be too difficult to determine. Section 239 of the Constitution defines it as follows:

> **'organ of state'** means—
>
> *(a)* any department of state or administration in the national, provincial or local sphere of government; or
>
> *(b)* any other functionary or institution—
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation,
>
> but does not include a court or a judicial officer;

So far, so good. But what about higher education institutions such as universities, or state enterprises such as Eskom and Transnet? Other legislation also refers to an organ of state: s 1 of the Promotion of Administrative Justice Act defines an administrator as (amongst other things) an organ of state taking administrative action; and the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 offers yet another definition. So no clarity yet . . .

There is also a lot of case law on what an organ of

state is. For example, in *Van Rooyen v The State* 2001 (4) SA 396 (T) the court held that to all intents and purposes the Magistrates Commission is an organ of state; *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W) held that

> Transnet performs a public function in terms of legislation, and it is an organ of state; in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) the court decided that Transnet is a statutory body, under the control of the state, which has public powers and performs public functions in the public interest. It is well known that South African Airways is a business unit of Transnet, which means that SAA is an organ of state and bound by the provisions of the Bill of Rights; according to *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) a Cabinet Minister is an organ of state; in *Directory Advertising v Minister for Posts and Telecoms* 1996 (3) SA 800 (TPD) it was held that Telkom is an organ of state; and so on. Bekink (2012: 548—551) explains that s 239 refers to all departments and administrations, their agencies, divisions and officials; the President, Cabinet, Parliament, Premiers, municipal councils, the South African Human Rights Commission, the Public Protector, the Auditor-General and the Electoral Commission. Just to complicate matters even more, in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) the court defined the Independent Electoral Commission as an organ of state (as defined in s 239 of the Constitution), but stated that it was not an organ of state within the national sphere of government (for the purposes of the dispute resolution requirements of s 41(3) of the Constitution). The term 'organ of

state' may have different meanings, depending on the context; clearly there is more to interpretation of legislation than meets the eye!

6.2.2 Balance between text and context

As was explained earlier, the courts had long held the view that if the text of the legislation was clear and unambiguous, effect should be given to it. The context of the legislation was only taken into account if the language of the legislation was deemed to be ambiguous. In *Jaga v Dönges* (above) Schreiner JA rejected this narrow view and stated that the interpreter could examine the broader context even when the text was

quite clear. As Kruger (1991: 251) points out, legislation cannot be construed properly if text and context are separated. The meaning of the words of the text should be weighed up against the context of the legislation. From the outset the legislation as a whole, the surrounding circumstances, constitutional values and the text have to be considered to ascertain the purpose of the legislation. Quoting from the Schreiner decision, Wessels JA in *Stellenbosch Farmers' Winery v Distillers Corporation (SA) Ltd* 1962 (1) SA 458 (A) 476E-F described this balancing process as follows:

> In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly, ie with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the 'matter of the statute, its apparent scope and purpose, and, within limits, its background'. In the ultimate result the Court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference

to the facts of the particular case which is before it.

In *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1994 (3) SA 336 (A) the court recognised the importance of legislative context. It held that it is permissible to interpret the provisions of legislation against the background of the dismantling of apartheid. These political developments were sufficiently well known for the court to take judicial notice of them.

Supporters of the orthodox text-based approach to interpretation frequently accuse supporters of a text-in-context approach that they indulge in 'free-floating' methods of interpretation, which ignore the text of the legislation. That is simply not true. The fact that there needs to be a balance between the text and context does not mean that the legislative text may be ignored. After all, the context has to be anchored to the particular text in question.

6.2.3 Structure of legislation

Structural aspects such as the table of contents, paragraphing, layout of the text and punctuation could play a meaningful role during the interpretation process.

It is a grammatical fact that punctuation can affect the meaning of the text. In *R v Njiwa* 1957 (2) SA 5 (N) the court

stated that punctuation must be considered during interpretation. In *S v Yolelo* 1981 (1) SA 1002 (A) the Appellate Division held that an interpretation based on the purpose of the legislation prevails over an interpretation based only on the division into paragraphs. Finally, in *Skipper International v SA Textile and Allied Workers' Union* 1989 (2) SA 612 (W) a court held that since the punctuation was considered by the legislature during the passing of the

legislation, it had to be used during interpretation.

6.2.4 Conflicting legislation

(a) Legislation has a purpose: the presumption that legislation does not contain futile or nugatory provisions

Unless the contrary is clear, it is presumed that the legislature does not intend legislation which is futile or nugatory. Hahlo & Kahn (1973: 210) call it the principle of 'effectual and purposeful legislation'. In a sense this presumption encapsulates the basis of the most important principle of interpretation: the court has to determine the purpose of the legislation and give effect to it. Since statutory interpretation is a purpose-seeking activity, this presumption is an acknowledgement that legislation has a functional purpose and object. In other words, if reasonably possible, try to keep the system running smoothly!

In *Ex parte the Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 the court held that if the intention of the legislature is clear, it should not be defeated merely because of vague or obscure language. The court must, as far as possible, attach a meaning to the words which will promote the aim of the provision. In *SA Medical Council v Maytham* 1931 TPD 45 the court emphasised that futile (useless) legislation must be avoided and that an attempt should be made to promote the 'business efficacy' of a provision, and in *Prokureur-Generaal v Van Zyl* 1961 (1) SA 729 (C) the court favoured a practical, purposive interpretation. So: if there are two possible interpretations, the court must try, if it is reasonably possible, to adopt an interpretation that will render the legislation effective. In *Esselman v Administrateur SWA* 1974 (2) SA 597 (SWA) the court emphasised an 'effective and purposive' interpretation over one which would defeat the provision, leaving it useless. In *South African*

Transport Services v Olgar 1986 (2) SA 684 (A) the Appellate Division held that if a

provision is capable of two meanings, the meaning which is more consistent with the purpose of the legislation should be accepted:

> [T]he second interpretation . . . is more consistent with the smooth working of the system which the Act has been designed to regulate than the first interpretation.

Case law example:

A notorious example of the application of this presumption is *R v Forlee* 1917 TPD 52. Forlee was found guilty of contravening Act 4 of 1909 for selling opium. On appeal his lawyer argued that Forlee had not committed an offence since the Act in question prescribed no punishment. The court relied on the presumption against futility, finding that a specific offence had been created by the legislature. The court then argued that the absence of a prescribed penal clause did not render the Act ineffective, since the court had discretion in imposing such a suitable form of punishment as it deemed fit. This decision gave rise to widespread criticism, because the rule *nulla poena sine lege* (if there is no penalty, there is no crime) was not adhered to. Although both the presumption and the *nulla poena sine lege* rule applied in this case, the *nulla poena sine lege* rule forms an essential part of the principle of legality. The principle of legality aims, as far as the criminal law is concerned, to prevent the arbitrary punishment of people and to ensure that criminal liability and the imposition of

punishment are in line with existing and clear rules of law. This rule should have trumped the presumption against futile results. Devenish (1992: 80) is of the opinion that this was a case where the court should have applied the *casus omissus* rule. The *nulla poena sine lege* principle has since been reaffirmed in *S v Dodo* 2001 (3) SA 382 (CC) para 13.

Another recent case law example:

The issue of statutory crimes without prescribed penalties recently came to the fore again. A certain Mr Prins was charged in the Regional Court with contravening s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He objected to the charge,

arguing that neither s 5(1) itself, nor any other provision of the Act, provides for a penalty for the offence created by s 5(1). The Regional Court upheld the objection. The Director of Public Prosecutions, Western Cape then appealed to the Western Cape High Court against the decision of the Regional Court. The Western Cape High Court held that, since the Act did not specify a penalty clause, s 5(1) of the Act did not create an offence and dismissed the appeal. The Director of Public

Prosecutions, Western Cape thereupon appealed to the Supreme Court of Appeal. In *Director of Public Prosecutions, Western Cape v Prins* (2012 (2) SACR 183 (SCA)) the Supreme Court of Appeal upheld the appeal, arguing that s 276 of the Criminal Procedure Act 51 of 1977 is a general empowering provision authorising courts to impose sentences in all cases, whether in terms of the common law or legislation, where no other provision governs the imposition of sentence. Consequently the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 did not violate the principle of legality by not prescribing the penalties for those offences. Two other aspects of this decision must be noted:

- The common-law presumption against futile and nugatory legislation was never raised.
- It is a good example of reading different sets of legislation together in order to solve an interpretation problem.

This decision has since been confirmed by the legislature. Parliament has passed the Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012, which expressly provides that the powers of courts with regard to sentences for the offences in Chapters 2, 3 and 4 of the Act are the same as those specified in s 276 of the Criminal Procedure Act.

In *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Edms) Bpk* 1966 (4) SA 434 (A) the court held that if possible the interpretation that avoids uncertainty, confusion and conflict must be adopted. Furthermore, the presumption enables courts to try to interpret legislation in such a

manner that evasion of its provisions is prevented (*Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530). In *Dhanabakium v Subramanian* 1943 AD 160, the court found that as far as possible, legislation should be interpreted in such a way that a

casus omissus (omission) is avoided. As will be discussed later (Chapter 7 below), the courts may indeed modify (adapt) the initial meaning of the legislation (in the light of the presumption against futile provisions and within the framework of the purpose of the legislation). However, this presumption applies only if there is more than one possible interpretation, and cannot be used by a court to reinterpret legislation at will. In other words, this presumption cannot be used to hammer a square peg into a round hole.

The presumption also applies to subordinate legislation. Here, the maxim *ut res magis valeat quam pereat* applies. This means that an interpretation which will not leave the subordinate legislation *ultra vires* (and invalid), but rather *intra vires* and valid must be preferred (*R v Vayi* 1946 NPD 792). The *ut res magis valeat quam pereat* rule applies only where two interpretations of a provision are possible. The presumption cannot be used to rescue an administrative act (conduct) which is defective and invalid from the outset (*Mamogalie v Minister van Naturellesake* 1961 (1) SA 467 (A)). Consequently, any subordinate legislation in conflict with the enabling Act (or any other original legislation, for that matter) will also be invalidated.

(b) Conflicts with other legislation

Legislation which is in conflict with the Constitution is arguably the ultimate example of conflicting legislation. However, in an attempt to avoid unconstitutionality,

competent courts involved in constitutional review may try, if reasonably possible, to employ a number of corrective techniques or remedial correction of legislation (so-called reading-down, reading-up, reading-in and severance) in an attempt to keep the legislation in question constitutional and 'alive' (see Chapter 9 below). If such efforts at remedial interpretation are unsuccessful, unconstitutionality (invalidity) is the only alternative.

As was explained earlier (see 4.4 above) if there is a conflict between legislation and the system of co-operative government, the national legislation will generally prevail over the provincial legislation, but in some cases the provincial legislation may actually trump the national legislation. Sections 146-150 of the Constitution provide for the intricate process of conflict resolution within this system of co-operative government.

If two different pieces of legislation are in conflict, they must be read together in an effort to solve the problem. If the conflict

cannot be resolved and both enactments deal with the same issue, the earlier one will be repealed by implication by the later one (see 4.3 above). Where conflicting sets of legislation do not deal with the same topics, they will have to be read and applied (co-exist) together. If they cannot be reconciled in one way or another, the inevitable result is a 'legislative short circuit', since original legislation cannot be invalidated because it is vague or confusing (as is the case with subordinate legislation). This means that there could be a gap in the law. One solution—albeit drastic and the exception to the rule—could be the application of modificative interpretation, if the purpose of the respective legislation permits it (see Chapter 7 below). If that cannot be

done, another possibility is to apply s 39(2) of the Constitution to ensure that the enactment which best promotes the spirit and purport of the Bill of Rights prevails.

Case law example:

In *Maccsand (Pty) Ltd v City of Cape Town, Minister for Water Affairs and Environment, MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province, Minister for Rural Development and Land Reform, and Minister for Mineral Resources* 2012 (4) SA 181 (CC) the issue was the potential conflict and interplay between different sets of legislation in the mining sector: the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) on the one hand and, on the other, the Land Use Planning Ordinance (Cape) 15 of 1985 (LUPO).

The MPRDA empowers the Minister for Mineral Resources to grant mineral rights if certain requirements are met. LUPO is an old order provincial ordinance still in force in the Western Cape. LUPO authorises the provincial government to make scheme regulations which determine the use of land in accordance with the applicable zoning of the land. Therefore in terms of LUPO, mining may only be undertaken on land if the zoning scheme permits it. If it does not, rezoning of the land must be conducted before the commencement of mining operations. However, the zoning that permits that land to be used for mining does not license mining nor does it determine mining rights; the MPRDA governs mining, and LUPO regulates the use of land.

Maccsand obtained a mining permit in terms of the MPRDA and started mining in 2008. In 2009 the City of Cape Town sought an interdict to stop Maccsand's mining activities, because it had not obtained the necessary rezoning permission as required by LUPO. Which legislation should prevail, MPRDA (national legislation) or LUPO (provincial legislation)? The Constitutional Court ruled that the conflict resolution mechanism in ss 146-150 of the Constitution did not apply, because there was no conflict between LUPO and the MPRDA. Each was concerned with different subject matter, and the the two laws had to continue to operate alongside each other. This means that although a mining right must be granted in terms of the MPRDA, the exercise of such a mining right is subject to the required rezoning of the land in terms of LUPO. In other words, although Maccsand obtained a valid mining licence in terms of the MPRDA, it still had to apply for the rezoning of the land (where the mining takes) in terms of LUPO. Off course, if that rezoning application in terms of LUPO should fail, the validly obtained mining licence (in terms of the MPRDA) will not mean a thing.

Some legislation will expressly provide for potential future conflicts with other legislation. For example, s 2(8) of the Consumer Protection Act 68 of 2008 provides as follows:

> (8) If there is an inconsistency between any provision of Chapter 5 of this Act and a provision of the Public Finance Management Act, 1999 (Act 1 of

> 1999), or the Public Service Act, 1994 (Proclamation 103 of 1994), the provisions of the Public Finance Management Act, 1999, or of the Public Service Act, 1994, as the case may be, prevail.

As was explained in Chapter 2 (above), some legislation—such as the so-called 'constitutional Acts'—contain clauses proclaiming their superiority over other legislation (except the Constitution), which should avoid most legislative conflicts.

6.2.5 The King can do no wrong: The presumption that government bodies are not bound by their own legislation

As a general rule it is presumed that government bodies are not bound by their own legislation, unless the legislation

expressly or by necessary implication provides otherwise (eg s 24 of the Interpretation Act). The presumption is trumped not only by the wording of the legislation, but also by the surrounding circumstances and other indications (*Union Government v Tonkin* 1918 AD 533). Hahlo & Kahn (1973: 204) describe the presumption as follows:

> An enactment does not apply to the state or its executive arm or to a provincial council, local authority or other public body from which it emanates.

Students usually associate this presumption with unbridled lawlessness by government agencies similar to the old English-law principle *The King can do no wrong*. However, it does not mean that the state operates above the law, but is rather a principle of effectiveness to ensure that the state is not hampered in its government functions. According to Du Plessis (1986: 79):

> The presumption is first and foremost a functional means to the end of ensuring that the execution of the typical functions of government—in as far as they are aimed at enhancing the public good and welfare—is not unduly hampered. Proper care should therefore also be exercised in order to ensure that the presumption is invoked in such a way that it serves the purpose of

> maintaining a public order of law, in contradistinction to personal whims and fancies or sectional interests.

This explanation still does not remove or dispel fears of abuse of power by the government. Wiechers (1985: 332) suggested that the state should rather always be bound by its own legislation, except in those instances where it would be hindered in the performance of its government functions. In *S v De Bruin* 1975 (3) SA 56 (T) the court rejected this viewpoint in the light of earlier precedents. The application of this presumption was later confirmed by the Appellate Division in *Administrator, Cape v Raats Rontgen & Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A)—the purpose of the presumption is to ensure that execution of the typical functions of government (those aimed at enhancing the public good and welfare) is not unduly hampered.

In *Evans v Schoeman* 1949 (1) SA 571 (A) the court mentioned the following indicators when the state will not be bound:

- if the state would be rendered subject to the authority of or interference by its own officials; and

- if the state would be affected by penal provisions (as in *S v Huyser* 1968 (3) SA 490 (GW) (see below)).

The question whether the state is bound depends on the particular legislation and specific circumstances, and each case has to be judged on its own merits. The following are examples of the practical application of the presumption:

- Government bodies and state-controlled agencies are bound by town planning schemes (*Drakensberg Administration Board v Town Planning Appeals Board* 1983 (4) SA 42 (N) and *Boiler Efficiency Services CC v Coalcor (Cape)(Pty) Ltd* 1989 (3) SA 460 (C)).
- A security official who contravenes a statutory

provision when acting outside the scope of his duties cannot rely on the presumption against the state being bound (*S v Reed* 1972 (2) SA 34 (RA)).

- The driver of a fire engine may disregard a red traffic light while fire-fighting (*S v Labuschagne* 1979 (3) SA 1320 (T)).
- An agricultural official who combats stock diseases and from time to time has to cull animals is not bound by statutory requirements regarding hunting permits (*S v Huyser* (above)).

> ***Case law example:***
>
> *S v De Bruin* (above) is a rather interesting case, to put it mildly. The accused was charged with and convicted of exceeding the statutory speed limit. On appeal, De Bruin (a state prosecutor) claimed that he was a public servant who, on the day in question, had been running late for an on-site inspection on the state's behalf. If he had arrived late at the inspection premises, this could have been detrimental to the state's case. The court found that being bound by the provisions in question could have obstructed essential state services and jeopardised state security. The court found that De Bruin's decision to exceed the speed limit was reasonable, and set aside the conviction.

Steyn (1981: 77) correctly points out that this presumption applies to both original and subordinate legislation. Furthermore Labuschagne (1978: 54) indicates, with reference to *R v Thomas* 1954 (1) SA 185 (SWA), that strictly speaking

this presumption deals with the state being bound by particular provisions; the state might be bound by one provision of the legislation, but not by another.

Another distinction is necessary. Not being bound by legislation (as a result of the presumption) does not mean that state liability is also automatically excluded. If police officers in hot pursuit of criminals ignore a red traffic light (on the face of it quite lawfully), but they do so at break-neck speeds, not slowing down at intersections and without taking pedestrians and other motorists into consideration during the chase, they cannot rely on this presumption to escape any possible delictual liability resulting from their actions.

Criticism:

Since s 39(2) of the Constitution clearly stipulates that rules of common law have to be developed in the light of the fundamental rights in the Constitution, it is submitted that this particular presumption should in future no longer apply under the new constitutional order:

- Section 8(1) of the Constitution expressly provides that government organs at all levels are bound by the Bill of Rights. The Constitution is the supreme law of the Republic, and all law and government conduct must be tested against the spirit, purport and objects of the fundamental rights entrenched in the Bill of Rights. In a system based on constitutionalism it would not make sense that government bodies are bound by the Constitution (as the supreme law), but at the same time are presumed not to be bound by their own legislation,

which legislation is also subject to the supreme Constitution.

- The Constitution abounds with references to principles such as accountability and openness (the preamble and s 1*(d)*); supremacy of the Constitution (ss 1*(a)* and 2); the values underlying an open and democratic society based on freedom, equality and human dignity (ss 7(1) and 39(2)); the state being bound by the Constitution

(ss 2 and 8(1)); the requirement that the state must respect, protect, promote and fulfil the Constitution and the Bill of Rights (s 7(2); and the official oath of judicial officers (item 6 of Schedule 2)). All of these support the argument that this presumption should no longer be applied.

As Du Plessis (2002: 177) points out, the view of Wiechers that this presumption should be applied the other way round has now been vindicated after all these years:

> In short, a state defined by its own constitution as a 'democratic state founded on the . . . values' of '[s]upremacy of the Constitution and the rule of law' most certainly is a constitutional state (*Rechtsstaat*) heedful of the principle of legality. This observation is confirmed by the constitutional demand for the accountability of the public administration. The moment for what Wiechers foresaw more than a decade and a half ago, has probably come.

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* (above) para 58 the Constitutional Court explained the principle of legality in the

new constitutional order as follows:

> It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.

Since the constitutionality of this common-law presumption has not yet been tested in court, it still applies in South Africa. However, the correct legal position in future should rather be as follows: government agencies and organs of state should always be bound by their own legislation, unless they can prove that they would be hampered in the execution of their duties and functions if bound by the legislation. Admittedly such a new principle will have to be prospective only, since retroactively undoing the vested rights and interests obtained by the state as a result of the application of this presumption in the past could prove to be impossible.

6.3 The value-laden (teleological) dimension: The ghost in the machine

6.3.1 The new constitutional approach to statutory interpretation, or, moving from bumper stickers to substantive interpretation

In *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 149 Sachs J described the constitutional values as follows (emphasis added):

> The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the

> values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. *Text and values work together in integral fashion to provide the protections promised by the Constitution*.

However, the value-based dimension of statutory interpretation is not easy to implement. Since 1994 the South African legal fraternity has had to face the dreaded V-word: values. These lawyers, judges and law teachers were schooled in and indoctrinated by a positivist idea of the law: *iudicis est ius dicere sed non dare*; Parliament knows best and has spoken; lawyers are not philosophers; plain meanings, clear texts and black letter law; formalism and his master's voice; and so on.

Indeed, we now have a supreme Constitution, brimming with references to fundamental values: freedom (including religious freedom, freedom of speech, and so on), equality (both formal and substantive), human dignity, all the trimmings of a multi-party democracy, good governance (s 195 of the Constitution), openness, transparency, non-racism, non-sexism, tolerance, and so on and so forth. These values form the basis of a more mature society (*S v Makwanyane* (above)) trying to be the better society alluded to by former Chief Justice Mahomed in *S v Acheson* 1991 (2) SA 805 (Nm) 813, when he said that a supreme Constitution is the mirror reflecting the national soul. But what are we doing in practical terms to animate those values through, amongst other things, the interpretation of legislation? Is s 39(2) of the Constitution nothing more than an empty gesture, mere hollow rhetoric?

The value-based dimension of interpretation is more than simply paying lip-service, but involves making those values real; animating them through the making, interpretation,

and application of the law, as well as ensuring that the law is respected and adhered to. It involves a willingness to keep those values in mind, right from the outset; a mind shift that law comprises more than ideologies, power structures, politics, policies and the meaning of the words on paper.

As was pointed out earlier, s 39(2) of the Constitution ensures that interpretation of statutes also occurs within the value-laden (teleological and normative) constitutional framework. But s 39(2) cannot be merely window-dressing or hollow rhetoric. In *Holomisa v Argus Newspaper Ltd* (above) 844 the court referred to s 35(3) of the interim Constitution (the forerunner of s 39(2) of the 1996 Constitution), stating that the interpretation clause in the Constitution is

> [not] merely an interpretive directive, but a force that informs all legal institutions and decisions with the new power of constitutional values.

In *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) para 46 Sachs J explained the teleological dimension of interpretation even better (emphasis added):

> The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus *not merely aspirational or decorative*, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct . . . [W]e should not engage in purely formal or academic analysis, nor simply restrict ourselves to *ad hoc* technicism, but rather focus on what has been called *the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case*.

This means that the constitutional values are not there to be used as fridge magnets or bumper stickers, or to be quoted and insisted on when it suits you, but instantly forgotten when it does not. In *Harksen v President of The RSA* 2000 (5) SA 478 (CC) para 18 the court emphasised that since the Constitution is the supreme law of the land and that all legislation must be

read subject to it, it is unnecessary for legislation expressly to incorporate terms of the Constitution, and as a result constitutional provisions or values or principles are part of the *implied contents* of statutes. But by the same token these values should not be used as a show of smoke and mirrors as a cover-up for bad governance, like hiding a badly baked cake under layers of nice-looking icing.

Maybe it should be said: if we choose to ignore the V-word; if these values are not taken seriously and borne in mind constantly during (amongst other things) interpretation of legislation; and if we are not prepared to succumb to constitutionalism, we might as well get rid of the supreme Constitution, the justiciable Bill of Rights and rights rhetoric, and return to the former bad old days of sovereignty of Parliament and executive-minded interpretation of legislation. Otherwise we need to become serious about the rights and values in the Constitution—including a new 'constitutional' approach to statutory interpretation—in other words, moving from bumper stickers to substantive justice.

But how do we animate and concretise those values? How does freedom influence no-parking signs? What is the link between having to pay your income tax before the due date and human dignity? How can values influence the black letter of the law? A starting point for that is always using the Constitution as a point of departure for legal analysis, interpretation and application, something which was not done by the court in the following example:

Case law example:

In *S v F* 1999 (1) SACR 571 (C) the court had to decide whether the 17-year-old rape victim could

testify from a room adjoining the court. This required an interpretation of s 158(3) of the Criminal Procedure Act 51 of 1977:

> **158 Criminal proceedings to take place in presence of accused**
>
> . . .
>
> (3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would. . .
>
> (*a*) prevent unreasonable delay;
>
> (*b*) save costs;

> *(c)* be convenient;
>
> *(d)* be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
>
> *(e)* prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

The court held that s 158(3) cannot be read disjunctively (paras *(a)*, *(b)*, *(c)*, *(d)* or *(e)*), but it should rather be read conjunctively, in other words, in order to testify via CCTV, the applicant had to comply with the requirements set forth in paragraphs *(a)*, *(b)* and *(c)*, as well as any of the requirements set forth in either paragraph *(d)* or *(e)* of s 158(3). This was a poor decision based on an incorrect interpretation of the law, which meant that all the lower courts in the Western Cape had to apply the ridiculously strict requirements. In practical terms the decision meant that it was virtually impossible for a witness to be allowed not to testify in the presence of the alleged rapist (even six-year-old rape victims).

But why was this a bad interpretation? It was a purely text-based analysis of s 158(3), dealing with semi-colons and other rules of punctuation. The judge referred to the common-law presumption that legislature does not intend harsh or unreasonable results; since the victim would not be in court (if allowed to testify via CCTV) the accused's right to cross-examination would be infringed; the court relied on a 1920 case (*Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530), as well as English-law textbooks on interpretation and procedure (R K Soonavala *Advocacy: Its Principles and Practice*, and Maxwell *Interpretation of Statutes*).

This was a 1999 decision—at least two years after the 1996 Constitution took effect. However, there is no reference to the Constitution, which means there is no reference to human dignity (s 10); no reference to s 39(2); since the victim was 17 years old, no reference to s 28 (rights of the child); no critical discussion about the struggle between competing rights (in this case the s 28 children's rights versus the s 35 rights of the accused); no fundamental

values—just a text-based analysis based on a conjunctive grammatical reading of the provision (*plain meaning approach*). This is a striking example of what may happen if the value-based dimension of statutory interpretation is ignored. This decision was eventually held to be incorrect (*S v Staggie*

2003 (1) SACR 232 (C)).

In fact, *S v F* was not the last case in the Western Cape that failed to get to grips with the new 'constitutional approach' to interpretation. In *Winckler v Minister of Correctional Services* 2001 (2) SA 747 (C) the court still followed the discredited text-based approach:

> The golden rule governing the interpretation of a statute is to determine the intention of the Legislature. Such intention is established, in the first place, by the plain language of the statute before resorting to other canons of construction. The primary supposition is that the Legislature intends what it says.

Fortunately there are examples of substantive interpretation of statutes. In *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E) Froneman J was aware of the changes brought about by the new constitutional order. The case dealt with a flexible and generous approach to the issue of *locus standi* (including a class action under s 38 of the Constitution) to make it easier for disadvantaged and poor people to approach courts on public issues to ensure that public administration adheres to fundamental principle of legality in exercising public power. His substantive approach to statutory interpretation and legal reasoning is clear from the following excerpts from the judgment (at 619):

> There is a broader social context in which law is applied to particular facts in any given case. Where that terrain is familiar and the law to be applied is not new that context is often assumed and not articulated. Here the position is different. The law is new and the social setting has changed. [T]he starting place to determine our assumptions is the Constitution . . . it is necessary in this case, because of the relatively new legal position and the changed social context in which it is to be applied, to be open about one's own views of that context. The reality is that the outcome of this case is not dictated by precedent or deductive legal reasoning alone: my interpretation of s 38 of the Constitution is inevitably also influenced by my own views of the context in which it is to be

interpreted and applied. This is a truth that, I think, is now generally accepted by legal theorists.

6.3.2 *Ubuntu*

The postamble of the English text of the 1993 Constitution referred to *ubuntu*:

> There is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation . . .

Ubuntu is an indigenous African concept and refers to a practical humanist disposition towards the world, including compassion, tolerance and fairness. (It is interesting to note that the *African Charter on Human and Peoples' Rights* also includes a positive duty to tolerate.) The concept was applied and explained by the Constitutional Court in *S v Makwanyane* (above) 501D-E:

> Generally, *ubuntu* translates as 'humaneness'. In its most fundamental sense, it translates as 'personhood' and 'morality' . . . While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

The concept of *ubuntu* is not expressly mentioned in the Constitution of 1996. That does not mean that *ubuntu* will disappear from the South African legal stage. Since *ubuntu* was used in the *Makwanyane* case (above), it forms part of the new South African constitutional jurisprudence. It may also be argued that *ubuntu* lives on in the numerous references to human dignity in the Constitution. It forms an important bridge between the communal African traditions and Western traditions, which focus on the individual, and could be a very useful extra-textual aid to statutory and constitutional interpretation.

6.4 The historical dimension: Lest we forget

6.4.1 Preamble to the Constitution

In *S v Mhlungu* (above) para 112 the constitutional preamble was described as follows:

> The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows.

In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC) the court stressed the fact that the Constitution is a document committed to social transformation. In other words, it is a key that may help to unlock the secrets of other legislative texts. The preamble to the Constitution reads:

PREAMBLE

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

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

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrica. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

6.4.2 Prior legislation

In *Morake v Dubedube* 1928 TPD 632 it was held that if legislation had been partially repealed, the remaining provisions had to be interpreted in their context, which included the repealed provisions. Although the repealed provisions can no longer be applied, they may be used as part of the context of the remaining legislation.

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6.4.3 Preceding discussions

Debates about a Bill before Parliament, the debates and reports of the various committees which form part of the legislative process, and the reports of commissions of inquiry constitute preceding discussions. The question as to whether the courts may use such preceding discussions in construing legislation, and to what extent, has been the subject of lively debate in recent years. One should distinguish between debates during the legislative process on the one hand and the reports of commissions of inquiry which preceded the passing of legislation on the other.

(a) Debates during the legislative process

Steyn (1981: 134) refers to the common-law writer Eckhard, who believed that the debates preceding the acceptance of a Bill are important in establishing the intention of the legislature, especially when this is not evident from the wording of the legislation. However, in the past the use of debates was not accepted by the courts. In *Bok v Allen* 1884 SAR 137 and *Mathiba v Moschke* 1920 AD 354, the use of preceding discussions in the interpretation process was rejected outright, although the court *a quo* in the *Moschke* case had, in fact, taken preceding debates into account.

The opposition to these debates may be disappearing. In *Ngcobo v Van Rensburg* 1999 (2) SA 525 (LCC) para 27 the court referred to the use of explanatory memoranda during the interpretation of statutes:

> The weight of authority is very much against allowing such documents to be called in [to] aid in the interpretation of a statute. This authority has received considerable academic criticism. There are also a few authorities which seem to suggest a softening of attitudes by South African Courts to certain of the documents which precede the passing of an Act.

For instance, in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 389 (W) the court used parliamentary debates, reports of task teams and the views of academics when it had to interpret the Films and Publications Act 65 of 1996; in *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd* 2001 (1) SA 500 (CC) the Constitutional Court used parliamentary debates during interpretation; in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC)

the Constitutional Court referred to the speech by a Minister during the second reading of a Bill; and in *S v Dzukuda; S v Tilly; S v Tshilo* 2000 (3) SA 229 (W) 233 the court referred to a report of the South African Law Commission and a ministerial speech in Parliament during the interpretation of a statute.

(b) Commission reports

In *Hopkinson v Bloemfontein District Creamery* 1966 (1) SA 159 (O) the court held that the prevailing law prevented the use of a commission report about the Companies Act. However, in *Rand Bank Ltd v De Jager* 1982 (3) SA 418 (C) the court decided that the report of the commission of enquiry, which later resulted in the Prescription Act 68 of 1969, was an admissible aid in construing the Act. In

Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) the Appellate Division held that the report of a commission of enquiry which preceded the passing of an Act may be used to establish the purpose of the Act, if a clear link exists between on the one hand the subject matter of the inquiry and recommendations of the report, and on the other, the legislation under consideration.

In *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (A) the court had to decide whether or not to use a report of a member of the Standing Committee, which did not table an official report. The court found that the evidence of a single member of the committee was inadmissible, since it merely represented his own subjective opinion of the deliberations.

The reasons given by the courts for not admitting such material are not very convincing (eg not all debates might be relevant or useful during the interpretation of legislation). After all, the courts are expected to use their discretion in imposing punishment, and to reach conclusions amidst conflicting evidence. During statutory interpretation the judiciary should be able to separate the good and bad in parliamentary debates. A speech by the Minister during the second reading of a Bill, as well as the explanatory memoranda provided to members of Parliament may be useful in aiding understanding. If readily available, the deliberations and reports of the large number of standing, *ad hoc*, joint and portfolio committees of legislative bodies (which play an important role during the legislative process) could be used to help ascertain the purpose of the resulting legislation.

6.4.4 The mischief rule

The historical context of the particular legislation is used to place the provision in question in its proper perspective. This historical context is also known as the mischief rule. The mischief rule was laid down in the 16th century by Lord Coke in the famous *Heydon's Case* (1584) 3 Co Rep 7a (76 ER 637) and forms one of the cornerstones of a text-in-context approach to interpretation. It poses four questions that will help to establish the meaning of legislation:

- What was the existing law (the legal position) before the legislation in question was adopted?
- Which problem (mischief or defect) was not adequately addressed by the existing law before the new legislation was adopted?
- What remedy (solution) is proposed by the new legislation to solve this problem?
- What is the true reason for the proposed remedy?

The aim of the rule is to examine the circumstances that lead to the adoption of the legislation in question. The mischief rule has been applied on numerous occasions by the courts. For example, as a result of the incomprehensible language used in the Compulsory Motor Vehicle Insurance Act 56 of 1972, the court in *Santam Insurance Ltd v Taylor* (above) examined the historical background of the Act in order to ascertain its purpose.

6.4.5 *Contemporanea expositio*

This is an explanation of the legislation which is given by persons in some or other way involved in the adoption of the legislation, or shortly afterwards during its first application. Explanatory memoranda issued by government departments and state law advisors, as well as the first application of the new legislation are all examples of *contemporanea expositio*.

The publication of a Bill is often accompanied by the

publication of an explanatory memorandum from its drafters. Such a memorandum may help to determine the purpose of statutory provisions of the Act resulting from the Bill. In *National Union of Mineworkers of SA v Driveline Technologies* 2002 (4) SA 645 (LAC) and *Shoprite Checkers (Pty) Ltd v Ramdaw* 2001 (3) SA 68 (LC) the courts used the explanatory memorandum to interpret the Labour Relations Act.

6.4.6 *Subsecuta observatio*

This category of external aids to interpretation refers to established administrative usage (or custom) over a period of time. The way legislation has been applied in practice—by the very agencies and departments entrusted with its administration—may be a very good indication of its aim and purpose. Although the long-term use of legislation cannot dictate a particular interpretation to the courts, it may just be the deciding factor where two interpretations are possible. Typical examples of administrative usage are interpretation notes, circulars and explanatory notes issued by the South African Revenue Service or the Registrar of Pension Funds.

Case law example:

In *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA) court had to decide on the possible use of commission reports and *subsecuta observatio*. The plaintiff, a manufacturer, distributor and exporter of motor vehicles, relied on the exemption afforded by s 10(1)*(z*A*)* of the Income Tax Act 58 of 1962 (as amended). The plaintiff relied on reports of commissions of inquiry and administrative practice

(reports of the Board of Trade and Industry and the way in which the provision had been interpreted by the Department of Internal Revenue). The court ruled that it could not be taken into account: the reports did not show which of the Board's findings had been accepted, and the Commissioner's interpretation had been discarded too quickly to be used as part of *subsecuta observatio and contemporanea expositio*.

The purpose of the Interpretation Notes is to provide guidelines to SARS employees and taxpayers regarding the interpretation and application of the provisions of the various laws administered by SARS. These Notes will ultimately replace all the existing Practice Notes and internal Circular Minutes, to the extent that they relate to the interpretation of the various laws. The Notes will be amended from time to time in line with policy developments and changes in the legislation.

Pension Fund Circulars constitute best practice with regard to retirement funds as prescribed by the Registrar of Pension Funds from time to time and reflect the Registrar's interpretation, discretion or requirements in respect of various issues. Although the provisions of these circulars are adhered

to by the industry 'by agreement' with the Financial Services Board, they do not necessarily have any legal status as such and are not enforceable in any formal manner.

The following is an abbreviated example of a typical SARS interpretation note:

GENERAL NOTE GN 37

GENERAL SUBJECT: SECOND SCHEDULE TO THE INCOME TAX ACT, NO 58 OF 1962

SPECIFIC ASPECT: MAINTENANCE AWARDS

STATUS: OPINION

PURPOSE: To convey the view of the South African Revenue Service regarding the tax treatment of a retirement fund maintenance order of court.

. . .

ISSUED BY—

LEGAL AND POLICY DIVISION

SOUTH AFRICAN REVENUE SERVICE

Date: 31 October 2008

6.5 The comparative dimension

6.5.1 Foreign law

In the past, South African courts could refer to foreign law and foreign case law during the interpretation of legislation. For instance, sometimes the courts have to interpret a section of an English statute that has been incorporated word-for-word into South African legislation. The question is whether the South African courts may follow the interpretation given to the English legislation by the English courts. South African courts may use the interpretation of the English courts as a guideline—if the South African legislation is identical to the original English legislation and the interpretation of the English courts is not in conflict with South African common-law principles, the South African courts may take cognisance of the English decided cases. This is now further qualified by the Constitution. Section 39(2) provides that, when our common law is developed by any court, tribunal or forum, the spirit, purport and objects of the Bill of Rights must be promoted. Now it is not only the rules of common law that determine whether our courts refer to foreign law, but the supreme Constitution as well. Since the interpretation of legislation begins and ends with the

Constitution, foreign law and comparable case law from other jurisdictions should be applied with circumspection (*S v Zuma* 1995 (2) SA 642 (CC)).

6.5.2 International law

Section 233 of the Constitution is another interpretation clause, but also deals with the relationship between the Constitution (and all South African law) and public international law:

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Section 233 is a peremptory provision, and is the constitutional confirmation of the common-law presumption that legislation does not violate international law. It states that a court must prefer a reasonable interpretation that is not in conflict with international law. Any interpretation of s 233 is subject to s 1*(c)* (the foundation clause); s 2 (the supremacy clause); and s 8(1) (the application clause). Of course, it could be argued that s 233 in effect strengthens s 39(2) of the Constitution; any reasonable construction which is consistent with international law (international human rights law in particular), will promote the spirit, purport and objects of the Bill of Rights.

Section 233 is qualified by the two provisions which also deal with international law: in terms of s 231 an international agreement (a treaty) becomes law in the Republic when it is enacted into law by national legislation; and s 232 provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Practical examples:

In terms of s 3 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (which commenced on 16 August 2002), the objects of the Act are to create a framework to ensure that the Statute is effectively implemented in the Republic, and that anything done in terms of the Act conforms with the obligations of the Republic in terms of the Statute, and to provide for the crimes of genocide, crimes against humanity and war crimes.

Section 3*(c)* of the Labour Relations Act 66 of 1995 provides that the Act must be interpreted in such a way that it is in compliance with the public international law obligations incumbent on the Republic.

Part 3
Some practical issues and tricks of the trade: Judicial law-making during interpretation, and peremptory and directory provisions

7 Judicial law-making during concretisation
8 Peremptory and directory provisions

Chapter 7
Judicial law-making during concretisation

7.1 What is concretisation?

According to Du Plessis (1986: 149) concretisation is the final stage in the interpretation process. The legislation is realised (becomes a reality). During concretisation the legislative text and purpose, as well as the facts of a particular situation are brought together to reach a conclusion. Synonyms for concretisation are correlation, harmonisation, and actualisation.

Concretisation is the process through which the interpreter moves from the abstract to the practical reality to apply the particular legislation. After the text has been studied and all the presumptions, aids and principles to contextualise and to determine the aim and purpose of the legislation employed, the result is applied to the facts of the case to reach the correct solution. All the loose threads are gathered together to finalise the process. The concretisation phase always takes place, irrespective of the approach to interpretation employed by the interpreter. However, the text-in-context supporters argue that contextualisation provides more data to the interpreter with which to exercise a better discretion during the interpretation and application of the legislation. In other words, the interpreter is better equipped to concretise accurately. Two commentators provide more insight into the process of concretisation:

- Du Toit (1977: 11) points out that the essence of successful interpretation lies in the current realisation of the

possible meanings of the original legislation. The meaning of the text is tantamount to its application in a given concrete situation.

- Lategan (1980: 107) defines interpretation as the concretisation of the meaning of a text in a concrete, present situation during the last stage of the interpretation process. Such a process is not simply the application of the provisions of the legislation, but rather the process of transition from interpretation to application.
- During concretisation the abstract text of the legislation and the purpose of the legislation (which was determined earlier in the process) are correlated with the concrete facts of the case within the framework of the prescribed constitutional principles and guidelines.

7.2 The law-making function of the courts

Not only do the supporters of the text-based and text-in-context approaches have different viewpoints about the use of text and context during interpretation, but the law-making role of the courts during statutory interpretation is another bone of contention between them.

7.2.1 The text-based viewpoint

The classic formulation of literalism insists that the clear and unambiguous text of legislation is equated with the intention of the legislature, as per Kotzé J in *Bulawayo Municipality v Bulawayo Waterworks Ltd* 1915 CPD 435 445:

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

Only if the words seem ambiguous and inconsistent may the

court use the secondary and tertiary aids to interpretation. The court should interpret legislation only within the framework of the words used by the legislature. Any modifications, corrections or additions should be left to the relevant legislature (the *iudicis est ius dicere sed non dare* principle). This orthodox viewpoint was explained by Hannah J in *Engels v Allied Chemical Manufacturers (Pty) Ltd* 1993 (4) SA 45 (Nm) 54A-B:

> The basic reasoning behind this approach is that by remedying a defect which the Legislature could have remedied, the court is usurping the function of the Legislature and making law, not interpreting it.

7.2.2 The text-in-context viewpoint

The text-in-context school claims that the court does have a creative law-making function during statutory interpretation.

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Such a creative role by the courts does not mean that they take over the legislative powers of the legislature. Du Plessis (1986: 143) explains this as follows:

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

Labuschagne explains the theoretical foundations of this sometimes inevitable (but limited) law-making role of the judiciary follows:

- He points out (1978: 62) that the court has a peripheral and subordinate law-making function and inevitably forms part of the legislative process in concrete cases, aimed at the fulfilment of needs in society (the reason for the legislation).

- Later he states (1985: 60) that the court is the final link in the legislative chain and that it should be its task to ensure that the legislative process has a meaningful and just end.
- Furthermore, he also explains (1983: 422) and (1982: 402) that the legislation contained in the document is incomplete and only represents the initial structure of the statute. Only when the court applies the legislation does it become real and completely functional. The legislation is situation-bound and the process passes through stages—from the generality of the structural statute to the particularity of the functional statute. It is an ongoing case-to-case process. So, in reality legislation is not interpreted, but shaped or moulded. The legislative process invariably begins with a need for legal order and ends every time with the fulfilment of that need by the court. The purpose of the legislation is the directing principle throughout the process.

7.2.3 The myth that courts merely interpret the law

Modification or adaptation of the initial meaning of the text involves the exercise of a creative judicial discretion. This discretion is nothing more than the authoritative application of legal principles: not an arbitrary expression of personal preferences, but the exercise of a legal discretion within the

boundaries and parameters of the purpose of the legislation. The courts are confronted with the exercise of discretions on a daily basis when they have to deal with criminal jurisdiction and the evaluation of evidence, as well as with judge-made law as a result of the ongoing development of the common law.

Because of the limitations inherent in language, statutory

interpretation necessarily involves a type of delegation by the legislature to the judiciary about the final, specific application of a general rule. Although the legislature has the main legislative powers, those powers are not exclusive, since the courts play a supporting role—the legislature and judiciary are partners in the law-making process. This principle was explained very well in *Zimnat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZSC) 832H-I:

> It sometimes happens that the goal of social and economic changes is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.

When referring to the modification of the meaning during interpretation (corrective interpretation), some of the older sources and case law refer to it as 'modification of the language' (*woordwysigende uitleg*). However, this is incorrect. As will be explained below, it is not the language of legislation that is physically modified, but the meaning of the legislation which is adapted (reconstructed) during interpretation to give effect to the legislative purpose. The provision is not amended and repromulgated by the court, because that may be done only by the competent legislative body. The particular provision remains as it was originally promulgated by the legislative body; the meaning of the particular legislation is modified only for that specific, concrete situation. Devenish (1992: 96) puts it as follows:

> Such modification does not amount to a usurpation of the legislator's function, but to the legitimate exercise of judicial law-making of a complementary nature in order to give effect to intention or the presumed intention of the legislature.

Furthermore, Du Plessis (1986: 37) points out that the orthodox (text-based) viewpoint prohibiting any form of

modification could result in an incorrect and unjustifiable form of judicial law-making. When the court adopts an interpretation that does not give effect to the purpose of the legislation, legislation is concretised (ie law is made) that is in conflict with the legislative purpose.

The Constitution should bring about more flexibility in this regard. The principle of parliamentary sovereignty has been replaced by that of constitutional supremacy. The aim and purpose of the legislation within the framework of the Constitution is the paramount rule of statutory interpretation. In *Matiso v Commanding Officer, Port Elizabeth Prison* (above) 597 and 598 the court dealt with the contentious issue of judicial law-making:

> In terms of the Constitution the Courts bear the responsibility of giving specific content to those values and principles in any given situation. In doing so, Judges will invariably 'create' law . . . This does not mean that Judges should now suddenly enter into an orgy of judicial law-making, but that they should recognise that their function of judicial review, based on the supremacy of the Constitution, should not be hidden under the guise of simply seeking and giving expression to the will of the majority in Parliament.

7.2.4 Factors which support and limit judicial law-making during statutory interpretation

When the issue of judicial law-making is raised, the next inevitable question is: Where do you draw the line? Of course, another interesting question—maybe better suited for a course in critical jurisprudence—should be: Who is drawing the lines? The law-making powers of the judiciary are neither based on personal whims, guess-work or gut feelings, nor do they imply a free-floating and unbridled 'remodelling' of legislation. There are a number of important factors that both support and restrict the law-making discretion of the courts. These factors should ensure that courts apply their law-making function within the boundaries set by the core principle underlying modificative interpretation; the aim and purpose of the legislation

(intention of the legislature or legislative scheme) must support the modification within the framework of the Constitution.

(a) Restrictions on the law-making discretion of the courts

The judicial law-making discretion of the judiciary is the exception to the rule, and is based on a number of fundamental principles:

- The principle of democracy (the preamble and s 1 of the Constitution) reminds us that democracy is one of the fundamental constitutional values. As a matter of fact, the preamble of the Constitution refers to a democratic and open society in which government is based on the will of the people. Although the courts are the guardians of the constitutional values, they are not allowed to take over the constitutional role of the legislature. Sachs J explained this complex constitutional balance between court and legislature in *Du Plessis v De Klerk* (above) para 18:

> The function of the courts, I believe, is, in the first place, to ensure that legislation does not violate fundamental rights, secondly, to interpret legislation in a manner that furthers the values expressed in the Constitution, and thirdly, to ensure that common law and custom outside of the legislative sphere is developed in such a manner as to harmonise with the Constitution.

- The important principle of separation of powers ensures that state power is shared between the three branches of government, resulting in formal built-in checks and balances to curb abuse of power by the government (eg s 43 of the Constitution deals with the legislative authority in the RSA).
- A common-law presumption holds that the legislature does not intend to change the existing law more than is necessary.
- The rule of law principle, including the principle of legality, should apply throughout.

• Froneman (1996: 15–22) points out that judicial law-making is not unbridled. Judicial officers are accountable and responsible for their actions on three levels: firstly, personal responsibility, because they have to take personal moral responsibility for their decisions; secondly, formal responsibility, consisting of the formal constitutional and other legislative controls over the judiciary; and thirdly, substantive accountability, in that judicial decisions are open to public debate and academic criticism (with reference to the constitutional values of accountability, responsiveness and openness expressed in s 1*(d)* of the Constitution);
• Penal provisions or restrictive provisions in the legislation,

as well as the presumption against infringement of existing rights, are also factors which limit the discretion of the courts to modify the initial meaning of the text.

(b) Factors which support judicial law-making

A number of factors (constitutional and otherwise) support the law-making discretion of the courts during the interpretation of legislation. Some of these are the following:
• The reading-down principle: ss 35(3) and 232(3) of the interim Constitution (the so-called 'reading down' clauses) provided that if legislation is on the face of it unconstitutional (because it conflicts with the fundamental rights and the rest of the Constitution respectively) but is reasonably capable of a more restricted interpretation which would be constitutional and valid, such restricted interpretation should be followed. These provisions have not been repeated in the Constitution of 1996. However, the principle that courts should, as far as possible, try to keep legislation constitutional (and therefore valid) is a well-

known principle of constitutional interpretation.

- Section 39(2) of the Constitution states that during interpretation the courts must try to reconcile the aim and purpose of the legislation with the spirit and purport of the Bill of Rights in particular.
- The Bill of Rights is the cornerstone of the South African democracy and the state must respect, protect, promote and fulfil the rights in the Bill of Rights (s 7 of the Constitution), and it applies to all law and binds the judiciary as well (s 8(1) of the Constitution).
- The Constitution is the supreme law of the land (s 2 of the Constitution), which means the end of sovereignty of Parliament and the slavish 'his master's voice' role of the courts.
- The common-law presumption is that the legislature does not intend futile, meaningless and nugatory legislation.
- The independence of the judiciary (s 165(2) of the Constitution) also strengthens the argument in favour of judicial law-making during interpretation.

7.3 Possibilities during concretisation

Concretisation is the last stage in the interpretation process, when the facts of the case and the relevant legislation are harmonised (correlated) with the purpose of the legislation.

The various possibilities during the concretisation phase of interpretation may also be influenced by the Constitution, because the final 'result' or outcome of the interpretation process may not be in conflict with the Constitution. In other words, the concretisation has to be constitutional. Modificative interpretation (restrictive or extensive interpretation) may be applied only if it is permitted by the purpose of the legislation. That legislative purpose, however,

may not be in conflict with the Constitution.

7.3.1 No problems with correlation

There are no difficulties applying the provision to the facts within the framework of the purpose and the prescribed constitutional guidelines, and the process is completed. This is what happens in practice in the majority of cases. Interpretation and application appear to occur unconsciously and automatically. These cases in fact create the wrong impression that interpretation comes into play only if the so-called 'plain meaning' of the text is ambiguous or obscure.

7.3.2 Modification of the meaning is necessary

Modificative interpretation (modification of the meaning) occurs when the initial meaning of the text does not correspond fully to the purpose of the legislation; in other words, when the text provides either more or less than its purpose, or when the initial meaning of the text is in conflict with the Constitution. So: if the purpose indicates that modification is necessary (and possible), there are only two possibilities—either the initial meaning of the text is reduced (restrictive interpretation) or the initial meaning of the text is extended (extensive interpretation). These, in turn, may be subdivided into various forms of modification to be discussed below in detail.

When and why may the courts modify the initial meaning of the text? The sources cite various grounds such as ambiguity and absurdity, which may be combined in a single principle: if it appears that the initial meaning of the text will not give effect to the aim and purpose of the legislation. For example, in 6.2.4 (above) modification of the meaning was mentioned as one possible solution to conflicting provisions. Ambiguity, vagueness and absurdity are the *indicators* that the initial textual meaning should probably be modified. However, the purpose of the legislation (within the

framework of the Constitution) constitutes the *qualifier*. In other words, the purpose of the

legislation in question must be determined in each case, even if the initial meaning of the text at first glance seems to be clear. The initial textual meaning must always be compared with the purpose of the legislation to ensure that effect will be given to the aim of the legislation concerned (Cowen 1980: 394). Only if there can be no doubt about the purpose of the legislation and if the text, context and Constitution are compatible with the modified meaning, will the court be entitled to deviate from the initial textual meaning. Ultimately these factors boil down to one thing: judicial law-making, in the guise of modificative (corrective) interpretation, is the exception to the rule.

(a) Restrictive interpretation

As has been mentioned, restrictive interpretation is applied when the words of the particular legislation embrace more than its purpose. The meaning of the provision is then modified to give effect to the true purpose. Restrictive interpretation in general, as well as two specific forms of restrictive interpretation, will be discussed below.

Restrictive interpretation in general

Although the courts traditionally refer to two specific forms of restrictive interpretation, it is not limited to *eiusdem generis* and *cessante ratione legis, cessat et ipsa lex* (see below). Any interpretation which reduces (limits) a wider initial meaning of the text to the narrower purpose of the legislation, is by definition restrictive interpretation. In *Skinner v Palmer* 1919 WLD 39 the court substituted 'fifty-eight' for 'fifty-nine', thus restricting the scope of the provision. A more fundamental change was effected in *Trivett*

& Co (Pty) Ltd v W M Brandt's Sons & Co 1975 (3) SA 423 (A), when the court restricted the meaning of the phrase 'every court of law in a British possession' in s 2(1) of the 1890 Colonial Courts of Admiralty Act to read 'every court of the Republic of South Africa'.

Case law example:

A very interesting example of restrictive interpretation in general occurred in *Klipriviersoog Properties (Edms) Bpk v Gemeenskapsontwikkelingsraad* 1984 (3) SA 768 (T). The plaintiff claimed compensation for properties expropriated by the defendant in terms of the Expropriation Act 63 of

1975. The expropriation was not the issue, but the court had to determine the date on which interest became payable on the amount of compensation. Section 12(3) of the Expropriation Act provides that interest on the amount of compensation is

> **. . . [p]ayable from the date on which the state takes possession of the property in question in terms of section 8(3) or (5).**

The plaintiff argued that the words 'takes possession' in s 12(3) referred to 'being able to take possession', but the defendant countered that the provision clearly refers to actual physical possession. The court held that it could never have been the intention of the legislature to allow the

state to evade its liability to pay interest in a case such as this by simply not taking possession of the expropriated properties. The court decided that, in the light of the intention of the legislature, it could 'read' the words 'is able to' into the meaning of the Act. Section 12(3) would then in effect have the following meaning:

> **Interest on the amount of compensation is payable from the date on which the state is able to take possession of the property in question.**

The plaintiff's claim was upheld by the court. Although the court supplied an omission, in effect the ambit of the particular provision was restricted, because the nearly unlimited options available to the state were reduced.

Cessante ratione legis, cessa et ipsa lex

This maxim literally means that if the reason for the law ceases (falls away), the law itself also falls away. Since legislation cannot be abolished by custom or altered circumstances, this rule is not applied in South African law in its original form. Legislation remains in force until repealed by the legislature concerned (*R v Detody* (above)). On the other hand, abrogation of common law by disuse is possible. In *Green v Fitzgerald* 1914 AD 88, the court found that the common-law rule that adultery is a crime no longer applies in South Africa. In this case the *cessante ratione* rule was not applicable, because it dealt with common law, not statute law.

The courts have from time to time applied the *cessante ratione* rule in an adapted form. In these cases the provisions

were merely suspended as the purpose of the legislation had already been complied with in some or another way. Under the circumstances it would have been futile or unnecessary to apply the legislation.

> ***Case law example:***
>
> A few examples of the application of this rule have occurred in respect of s 10(1) of the previous Stock Theft Act 26 of 1923, which provided for a compensatory fine in addition to the other penalty. In some cases the courts were faced with the problem of whether the compensatory fine still had to be paid even when the stolen stock had been returned to its owner. In *R v Maleka* 1929 OPD 171 the court found that the object of the Act (ie compensation) had been complied with, and that the compensatory fine was unnecessary. This decision was followed in *R v Nteto* 1940 EDL 304, where the court held that since the complainant had already been compensated, the purpose of the provision had been achieved in a different way, and a compensatory fine was unnecessary.

In fact, the court merely suspends the operation (application) of the legislation—it is not invalidated (there is nothing wrong with the legislation), nor is it repealed (courts cannot repeal legislation). The legislation remains on the statute book, and will provide for future application where the purpose has not yet been complied with. However, this rule must be distinguished from, for instance, the case where someone did pay a traffic fine, but is wrongly accused of failing to pay the fine; here the *cessante ratione* rule will not apply. The legislation was correctly complied with, and the

correct defence will simply be to submit the proof of payment in court.

Case law example:

Another interesting example of the cessante ratione rule occurred in *S v Mujee* 1981 (3) SA 800 (Z). In terms of a court order (issued in terms of a maintenance Act) the accused had to pay a monthly maintenance fee for his child in an institution. The child was discharged from the

institution before the order lapsed. The accused promptly stopped the payment of maintenance, and was charged with violation of the court order. The court held that the *cessante ratione* rule also applies to a court order in terms of an Act, since it cannot be said that it is the intention of the legislature to keep an order in force if the reason for it has fallen away. The accused was acquitted.

Eiusdem generis

The term *eiusdem generis* literally means 'of the same kind' and is based on the principle *noscitur a sociis* (words are known by those with which they are associated, or, more colloquially, 'birds of a feather flock together'). This means that the meaning of words is qualified by their relationship to other words—the meaning of general words is determined

when they are used together with specific words.

Apart from the general requirements to be met before the initial meaning of the text may be modified, other prerequisites for the application of this rule must also be satisfied:

- The *eiusdem generis* rule can only be applied if the specific words refer to a definite *genus* or category. In *Colonial Treasurer v Rand Water Board* 1907 TS 479 the court referred to such a *genus* as a 'common quality' or 'common denominator'.

Case law example:

In *Skotnes v South African Library* 1997 (2) SA 770 (SCA) the court had to interpret s 2(1)*(b)* of the Legal Deposit of Publications Act 17 of 1982 which required that a copy of every publication published in the Republic be supplied free of charge to every legal deposit library if copies of such a publication are intended to be sold to members of the public. The definition of 'publication' in the Act included 'a printed book, newspaper, magazine, periodical, journal, pamphlet, brochure, sheet, card or portion thereof or any other similar printed matter'.

The appellant refused to supply a free copy of a publication to the respondent, a legal deposit library, arguing that it was not a 'printed book' as defined in the Act. Counsel for the appellant argued that the words following 'printed book' in the

definition restrict its meaning. Since these items were all mass produced, inexpensive, machinery-produced publications involving essentially commercial printing, it created a distinct category (genus). As a result of the distinct category, the *eiusdem generis* rule applies, the Skotnes book falls outside that category and the Act does not apply to it.

However, the court took the other view. It pointed out that unless there is a distinct category formed by the specific words the *eiusdem generis* rule cannot be applied. The court held that the words following 'printed book' in the definition section did not clearly indicate a genus of printed material which would—through the application of the *eiusdem generis* rule—restrict the meaning of 'printed book' to some species of that genus. The intention of the legislature with the Act was to build up a national collection of books providing a record of cultural and scientific activities. The scope and purpose of the Act did not support such a restrictive interpretation, and the *eiusdem generis* rule did not apply.

- The specific words must not have exhausted the *genus* (*Carlis v Oldfield* 4 HCG 379). In such a case, it is assumed that the general words refer to a broader *genus* and therefore cannot be interpreted restrictively.
- The rule can be applied even when a single specific word precedes the general words. In *Director of Education, Transvaal v McCagie* 1918 AD 616, the court found that the general words 'other evidence' in the provision 'a university degree or other evidence of the necessary qualifications' had to be interpreted *eiusdem generis*. 'Other evidence' refers to

something else in the same category as a university degree.

- In *Bugler's Post (Pty) Ltd v Secretary for Inland Revenue* 1974 (3) SA 28 (A) it was held that the order in which the words occur is not important: the general words may precede, appear amongst or follow the specific words.
- In *PMB Armature Winders v Pietermaritzburg City Council* 1981 (2) SA 129 (A), the Appellate Division stressed the

requirement that the *eiusdem generis* rule should be applied only if the 'legislature's intention' supports such a restrictive interpretation. As a result the courts apply this rule with circumspection.

Case law example:

In *S v Kohler* 1979 (1) SA 861 (T), the court heard an appeal against the decision of a magistrate's court. Kohler was found guilty of contravening a municipal by-law because he kept a peacock within the municipal boundaries without the required licence. The by-law required a licence for keeping any fowl, duck, goose, turkey, guinea fowl, partridge, pheasant, pigeon or the chickens thereof, or any other bird on municipal premises. Read in its literal sense the words 'any other bird' in the by-law would have meant that even a budgie or parakeet required a licence. The defence argued that the specific words in the by-law created the category of poultry. Therefore *eiusdem generis* had to apply, and since a peacock was not a species of poultry, the municipal by-law did not apply to peacocks.

The court agreed that the specific words did

indeed form the category of poultry, but the dictionaries consulted by the court referred to peacocks as 'chicken-like decorative birds'. Since there was a definite *genus* (ie poultry), the general words 'any other bird' were restricted to that *genus*. A peacock is a species of that *genus*, and Kohler's appeal against his conviction was dismissed by the court.

(b) Extensive interpretation

Extensive interpretation is the opposite of restrictive interpretation. What we have here are those instances where the purpose is broader than the initial textual meaning of the legislation. The meaning of the text is then extended (stretched or widened) to give effect to the purpose of the enactment. Du Plessis (2002: 237) points out that traditionally the courts were wary of extending the initial meaning of the text, because the conventional common-law tradition of legislative drafting was aimed at exhaustive and comprehensive enactments, without loopholes, to cater for as many future situations as possible. The two main categories of extensive interpretation are discussed below.

Interpretation by implication

Interpretation by implication involves extending the textual meaning on the ground of a reasonable and essential implication which is evident from the legislation. Express provisions are therefore extended by implied provisions. There are various grounds on which the provisions of the legislation may be extended by implication. However, they remain no more than indications; the legislation in its entirety and its purpose continue to be the decisive test as to

whether provisions may be extended. These grounds overlap, and largely deal with powers and authority, and are not always easy to prove:

- *Ex contrariis*: Here the implications arise from opposites. If the legislation provides for a particular circumstance, by implication it provides the contrary provision for the opposite circumstance. This overlaps with the principle 'expression of the one thing by implication means the exclusion of the other' (*expressio unius est exclusio alterius*), which is not a hard and fast rule but merely a *prima facie* indicator of meaning.
- *Ex consequentibus*: If legislation demands or allows a certain result or consequence, everything which is reasonably necessary to bring about that result or consequence may be implied (in other words, instances where additional powers or authority are implied as a result of the initial express power or authority). The test is not usefulness or convenience, but necessity.

> ***Case law example:***
>
> In *Bloemfontein Town Council v Richter* 1938 AD 195 the court found that where a municipality has a statutory right to contain a river for the purposes of water supply, it also, by implication, has a right to remove washed-up silt from the dam. In each instance the underlying principle is whether the conferred power can be exercised effectively.

- *Ex accessorio eius de quo verba loquuntur*: If a principal thing is forbidden or permitted, the accessory thing is also forbidden or permitted.
- *Anatura ipsius rei*: This refers to implied inherent relationships—for example, the power to issue a regulation

implies the power to withdraw it.

- *Ex correlativis*: This arises from mutual or reciprocal relationships (eg prohibiting the purchase of certain things includes the prohibition of the sale of such goods).

Interpretation by analogy

This method of interpretation involves extending legislative provisions expressly applicable to particular circumstances to other analogous cases not expressly mentioned. In other words, if legislation applies to certain mentioned instances and its purpose can apply equally to other unspecified instances, the legislation may be extended to such other instances on the basis of sameness of reason. Interpretation by analogy is seldom applied by the courts and as such is of mere academic interest. In *Joint Liquidators of Glen Anil Development Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103 (A), the court confirmed that an omission may not be supplied through interpretation by analogy.

7.3.3 No modification of the meaning is possible

Clearly the discretion of the judiciary to modify or adapt the initial ordinary meaning of the text is limited. If the purpose of the legislation is not sufficiently clear or if it does not support a modification or adaptation of the initial meaning of the text, the legislature has to rectify errors or to supply omissions in the legislation. If no modification of the meaning is possible, the court will have to apply the legislation as it reads. In such a case concretisation would inevitably be defective, because the text, purpose and the particular facts would not be fully harmonised. The law-making discretion of the judiciary is limited to the frame of

reference of the purpose and no further. If the court cannot supply an omission in the particular legislation, the common law may, if necessary, be used to complete the concretisation process.

Chapter 8
Peremptory and directory provisions

8.1 General introduction

In many cases legislation prohibits an act (conduct) or prescribes the manner in which it must be performed. If the legislation in question expressly prescribes what the consequences will be if the legislative requirements are not followed, there is no problem. Difficulties arise, however, if the legislation fails to spell out what the consequences will be of a failure to comply with the prescribed formal requirements.

Hypothetical example:

You are in the process of renewing your driver's licence, and you have complied with all the prescribed statutory requirements: two recent photographs, application forms completed in triplicate, compulsory eye test results, and proof of payment of the prescribed fees. However, instead of the application forms being completed with a black pen, it is done in blue. If complete (exact) compliance with the prescribed requirements is rigidly enforced, your application could be thrown out, with the result that the process has to be started right from the beginning. However, if substantial compliance is sufficient, the fact that application forms were completed in blue instead of in black might be condoned, leaving your

application process intact and on course.

A statutory provision that requires exact compliance is peremptory (obligatory or mandatory). Failure to comply with a peremptory provision will leave the ensuing act (action or

conduct) null and void. A statutory provision requiring substantial compliance only is merely directory. Non-compliance (or defective or partial compliance) with a directory provision will not result in the ensuing act being null and void; in other words, exact compliance is not a prerequisite

Case law example:

In terms of the Motor Vehicle Insurance Act 29 of 1942 a claim for compensation, accompanied by a medical certificate, had to be sent by registered post or delivered by hand. What would the position be if a claim were sent by ordinary post? In *Commercial Union Assurance Co v Clarke* 1972 (3) SA 508 (A) the court found that there was substantial compliance with the provision. It was not necessary to follow the requirements to the finest detail—as long as the purpose of the provision has been complied with.

Strictly speaking it is incorrect to refer to peremptory and directory provisions. As Wiechers (1985: 198) points out, in principle all legislative provisions are peremptory. If this

were not the case, they would not be binding legal rules, but merely 'non-obligatory suggestions for desirable conduct'. The question is rather whether the prescribed formal requirements were complied with exactly or merely substantially. Unfortunately, the distinction between peremptory and directory has become firmly entrenched in practice.

However, in *Weenen Transitional Council v Van Dyk* 2002 (4) SA 653 (SCA) para [13] the court emphasised that these categories are merely guidelines: what is important is the purpose of the provisions in question, as well as the consequences if the statutory requirements are not strictly adhered to. The question is not whether mechanical (formal) compliance with the statutory requirements is required, but rather substantial compliance. Full compliance is not necessarily literal compliance (*Comrie v Liquor Licensing Board for Area 31* 1975 (2) SA 494 (N) 496E-F), but substantial compliance (*Commercial Union Co of SA v Clarke* (above)). In other words, substance over form: compliance with the aim and purpose of the legislation within the context of the legislation as a whole. In *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22 the court pointed out that—

> it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved.

It is also interesting to compare the courts' approach to the interpretation of peremptory and directory provisions with the approach adopted in other cases. The courts generally follow a text-in-context (purposive) approach to the interpretation of peremptory and directory provisions. The language of the provision is read in its context, and all intra-

and extra-textual aids are used to determine the purpose of the legislation. As Devenish (1992: 327-328) points out, in the process the courts also draw on interpretative factors such as the principles of justice, fair play, convenience, logic, effectiveness and morality.

8.2 Some guidelines

Although the purpose of the relevant legislation remains the deciding factor, the courts have developed a series of guidelines as initial tests or indicators of the purpose, almost like mini-presumptions. As a matter of fact, Devenish (1992: 234-237) does refer to some of these guidelines as presumptions. As Wiechers (1985: 198) points out, these guidelines are not binding legal rules but merely pragmatic solutions with persuasive force. Any guideline, test or indication will only be tentative. In *Nkisimane v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) the court held that the intention of the legislature is always the decisive factor. In *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) it was stressed that the form in which a requirement is set out will not necessarily be decisive. The context of the words and other relevant considerations also play a part when it is to be determined whether an apparently peremptory provision is, in fact, peremptory.

The examples listed below are not binding rules but merely guidelines. The purpose of the legislation will always be the decisive factor in establishing whether a requirement is peremptory or directory. The general outline used by Devenish (1992: 229-237) is followed in the rest of this chapter.

8.2.1 Semantic guidelines

The courts have formulated a number of semantic guidelines.

These are based on the grammatical meaning of the language used in the provision:

- A word or words with an imperative or affirmative character indicate a peremptory provision (eg the words 'shall' or 'must') (*Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A)). In *Bezuidenhout v AA Mutual Insurance Association Ltd* 1978 (1) SA 703 (A), for example, the court found that 'shall' is a strong indication that the provision is peremptory. In *S v Takaendesa* 1972 (4) SA 72 (RAD) 78C–D this principle was explained as follows:

> Where a statute prohibits the doing of something *unless* something else is done as a precedent to doing the thing prescribed, it is a general rule of interpretation that the provisions of the Act are obligatory and not directory.

  On the other hand, in *Motorvoertuigassuransiefonds v Gcwabe* 1979 (4) SA 986 (A) the court held that 'shall' does not necessarily indicate a peremptory meaning.
- Permissive words (such as 'may') indicate a discretion and will be interpreted as being directory, unless the purpose of the provision indicates otherwise (*Amalgamated Packaging Industries v Hutt* 1975 (4) SA 943 (A)).
- Words in negative form indicate a peremptory connotation (*Samuel Thomas Meyers v Pretorius & Etc* 1944 OPD 144).
- Positive language suggests that the provision is merely directory (*R v Sopete* 1950 (3) SA 796 (E)).
- If the provision is formulated in flexible or vague terms, it is an indication that it is directory (*Leibrandt v SA Railways* 1941 AD 9).

8.2.2 Jurisprudential guidelines

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

Sutter v Scheepers 1932 AD 165 and *Pio v Franklin* 1949 (3) SA 442 (C), certain tests or guidelines were proposed to determine whether provisions are peremptory or directory. These guidelines are more influential than the semantic guidelines and involve an examination of the consequences, one way or another, of the interpretation of the provisions:

- If the wording of the provision is in positive terms, and no penal sanction (punishment) is included for non-compliance with the requirements, it is an indication that the provision in question should be regarded as being merely directory (ie in favour of validity of the ensuing act). Steyn (1981: 197) questions this 'test', because without a penalty, the only sanction to prevent the defeat of the legislative scheme is to declare the act null and void.

- If strict compliance with the provisions would lead to injustice and even fraud (and the legislation contains neither an express provision as to whether the action would be null and void nor a penalty), it is presumed that the provision is directory (*Johannesburg City Council v Arumugan* 1961 (3) SA 748 (W)).
- In some instances, the historical context of the legislation (in other words, the mischief rule) will provide a reliable indication as to whether the provision is peremptory or merely directory.
- Adding a penalty to a prescription or prohibition is a strong indication that the provision is peremptory (*Rooiberg Minerals and Development Co Ltd v Du Toit* 1953 (2) SA 505 (T)). Nevertheless, this *prima facie* presumption was rebutted by the purpose of the legislation in *Standard Bank v Estate van Rhyn* 1925 AD 266. On the other hand, the addition of a penal clause may be an indication that the legislature intended the penalty to be sufficient and that the act should not be declared null and void as well (*Eland Boerdery (Edms)*

Bpk v Anderson 1966 (4) SA 400 (T)).

- If the validity of the act would defeat the purpose of the legislation, this is an indication that the act (conduct) should be null and void (*R v Lewinsohn* 1922 TPD 336).

8.2.3 Presumptions about specific circumstances

The courts have also developed a number of mini-presumptions relating to specific practical circumstances. Like the guidelines mentioned above, these are nothing more than initial assumptions—the purpose of the legislation may well prove otherwise:

- Where legislation protects the public revenue (ie rates, taxes and levies due to the state), a presumption against nullity exists, even if a penal clause has been added (*McLoughlin v Turner* 1921 AD 537).
- Where legislation confers a right, privilege or immunity, the requirements are peremptory and the right, privilege or immunity cannot be validly obtained unless the prescribed formalities are fully complied with (*Orpen v Cilliers* 20 SC 264). Where the freedom of an individual is at stake, the court will stress the peremptory nature of a requirement.
- If other provisions in the legislation could become superfluous (meaningless) when non-compliance with prescribed requirements results in the nullity of the act, there is a presumption that the requirements are merely

directory. In *Hurwitz v SA Mining and General Insurance Co Ltd* 1958 (4) SA 136 (W) the court found that s 3(2) of the Motor Vehicle Insurance Act 29 of 1942 was merely directory, since ss 24 and 31 would otherwise be superfluous.

- If a provision requires that a certain act must be

performed within a prescribed time, and the court has not been empowered to grant an extension of the time limit, the requirement is presumed to be peremptory (*Le Roux v Grigg-Spall* 1946 AD 244).

The courts have developed a large number of guidelines to assist them to determine whether exact compliance or merely substantive compliance with prescribed statutory requirements is necessary. However, the supreme Constitution as well as specific requirements in important legislation (such as the Promotion of Access to Information and the Promotion of Administrative Justice Act) must always be borne in mind when the issue of exact compliance or substantive compliance is considered during statutory interpretation. The Constitution itself also contains a number of peremptory provisions. Some of the most important of these are s 2 ('This Constitution is the supreme law of the Republic . . . and the obligations imposed by it must be fulfilled'), s 7(2) ('The state must respect, protect, promote and fulfil the rights in the Bill of Rights') and s 39(2) ('every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights').

Part 4
Constitutional interpretation

9 Constitutional interpretation

Chapter 9
Constitutional interpretation

9.1 Introduction

Why is constitutional interpretation an issue? Interpretation is interpretation is interpretation, is it not? You just read the text, follow the well-known rules of statutory interpretation and apply the maxims. However, it is not that simple: by now it should be clear that interpretation of legislation (including a constitution), is not mechanical and formalistic, but a comprehensive analysis of the text-in-context.

9.1.1 Constitutional interpretation and 'ordinary' statutory interpretation

Section 39(2) of the Constitution prescribes the filtering of legislation through the fundamental rights during the ordinary (run of the mill or conventional) interpretation process. Constitutional interpretation refers to the authoritative interpretation of the supreme Constitution by the judiciary during judicial review of the constitutionality of legislation and government action in terms of s 172 of the Constitution. This difference between constitutional and ordinary interpretation was explained by Froneman J in *Matiso v Commanding Officer, Port Elizabeth Prison* (above) 597G-H:

> The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution.

Du Plessis & Corder (1994: 88) point out that the differences

between constitutional and ordinary interpretation must not be over-emphasised. Both deal with the interpretation of

legislative instruments. Because both forms of legislative interpretation are interrelated, it is preferable that both are members of the same broad interpretive family. In other words, it would be problematic to reconcile a text-in-context (purposive) method of constitutional interpretation with a text-based method of ordinary interpretation. Section 39(2) ensures that, generally speaking, ordinary statutory interpretation should also be based on a text-in-context method similar to that used in constitutional interpretation. De Ville (2000: 60) puts it as follows:

> The constitutional theory which inspires the interpretation of the Constitution should . . . also inform statutory interpretation. The principles for the interpretation of statutes are to be derived from the Constitution.

Some commentators (for instance, Le Roux 2005: 526) argue that the distinction between the ordinary interpretation of legislation (in terms of s 39(2) of the Constitution) and the remedial correction of legislation (during constitutional review in terms of s 172 of the Constitution) will reinforce the traditional text-based approach to interpretation in South Africa. In essence this view is correct, but since the argument for a text-in-context approach for all forms of statutory interpretation in South Africa is made strongly in this book, the distinction between ordinary interpretation and constitutional interpretation will be retained, at least for the purpose of a basic and initial understanding of interpretation of legislation.

9.1.2 The supreme Constitution and ordinary legislation

The status of the supreme Constitution in the legal order is the main reason for the difference between constitutional

interpretation and 'ordinary' interpretation. The old system of parliamentary sovereignty is no more. The Constitution is now the frame of reference within which everything must function, and against which all actions must be tested. It is the prism through which everything and everybody must be viewed (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* (above)). The Constitution is the *lex fundamentalis* (fundamental law) of the South African legal order. As such, it embodies the values of society, as well as the aspirations, dreams and fears of the nation, and should in fact be the most important national symbol. It does more than describe the institutional framework of government.

9.2 Why is a supreme Constitution different?

A supreme constitution is not merely another legislative document, but the supreme law (*lex fundamentalis*) of the land. A constitutional state (which has a supreme constitution) is underpinned by two foundations, namely, a formal one (which includes aspects such as the separation of powers, checks and balances on the government, and the principle of legality; in other words, the institutional power map of the country) and a material or substantive one (which refers to a state bound by a system of fundamental values such as justice and equality). Karpen (1988: 173) describes the formal and substantive components of a constitutional state as—

> the value-oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements.

9.2.1 A constitution as a formal power map

Any constitution of a country has a formal power map. It deals with the institutional and organisational structures and procedures of the state: the type of state and government (eg unitary or federal state, democracy or one-party state, and so on) in the country; the powers and functions of the various persons and institutions; the different branches and tiers of government (separation of powers); checks and balances on the government (if any); the electoral system; symbols of the country (flags and national anthems); elections and appointments; financial arrangements; the judicial system; security forces, etc. These formal and institutional aspects of a constitution are dealt with in subjects such as constitutional law, administrative law and local government law. The South African constitutions prior to 1994 were formal 'power maps', because they did not provide for a system of constitutional review by which the courts could test legislation and government conduct against a set of constitutional principles. The 1996 Constitution also contains an extensive 'power map'. As a matter of fact, most of the Constitution deals with practical institutional arrangements of government; for instance, co-operative government (Chapter 3), Parliament (Chapter 4), the President and the executive (Chapter 5), the provinces (Chapter 6), local government (Chapter 7), the judicial system (Chapter 8), institutions supporting democracy (Chapter 9), public administration (Chapter 10), security services (Chapter

11), traditional leaders (Chapter 12) and finance (Chapter 13). It also includes a number of schedules dealing with aspects such as national symbols, elections and (concurrent and exclusive) areas of national and provincial powers.

9.2.2 Substantive constitutionalism

A supreme constitution contains more than a formal power map. It also contains a material or substantive foundation, which includes a justiciable bill of rights. The Constitution is the supreme law, and the state (including the government) is bound by a system of fundamental values such as justice and equality. The preamble of the interim Constitution expressly referred to South Africa as a constitutional state.

In a constitutional state (*Rechtsstaat* in German, *regstaat* in Afrikaans) the Constitution reigns supreme. This means that the government may only govern in terms of the prescribed structural limitations and procedural guarantees entrenched in the Constitution. These formal characteristics of the constitutional state are supplemented by the fact that the legal order must be substantively just. In other words, the state authority is bound by a set of higher, substantive legal norms (*Ex parte Attorney-General, Namibia: In re The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS) 1078H-I and 1086H-I).

In *S v Makwanyane* (above) para 262 Mahomed J explained the formal and substantive foundations of a constitutional state, and a supreme constitution, in the following ringing tones:

> All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that ethos; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist,

> authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.

However, not all public law academics agreed that the new South Africa was a complete constitutional state, both formally and substantively. Strydom (1996: 1) questions the reference to post-apartheid South Africa as a constitutional state. He argues that what is missing is the very nature of a constitutional state: the implication of the state being bound to an inherent substantive juridically qualified limitation. He argued that this substantive qualification—

> [m]anifests itself in the primary (and limited) function of the constitutional state . . . namely to realise the equal status of its citizens in both the public and private law spheres regardless of race, culture, origin, religion, gender or political persuasion. This is the essence of the principle of constitutional justice and requires governance in the interests of all, underpinned by constitutional safeguards for human rights and freedoms.

He bases his argument (that the post-apartheid state does not fully comply with the substantive notion of a constitutional state) on the absence of (at least) three core issues: administration of justice, legal certainty and personal security of the person.

9.2.3 Constitutional symbolism

The South African Constitution is rich in symbolism, and a number of commentators have explained the special status of the supreme Constitution in a number of symbolic references.

According to Mureinik (1994: 32) the Constitution forms a *bridge* in a divided society, a bridge from a culture of authority (based on sovereignty of Parliament) to a culture of justification (based on a supreme constitution). Du Plessis (2000: 385-394) points out that the Constitution is both a *monument* which celebrates and a *memorial* which commemorates. In *S v Acheson* (above) 813A-C former Chief

Justice Mahomed referred to a supreme constitution as a *mirror*:

> [T]he Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the

> values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.

However, the Constitution is more than symbolic window-dressing. It is also a transformative document, a commitment to positive action (eg the inclusion of the socio-economic rights in the Bill of Rights). Furthermore, s 7(2) of the Constitution obliges the state to engage in positive action:

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

In other words, the Constitution is both a shield against abuse (the classic first-generation 'negative' rights), and a positive instrument to transform society in view of the fundamental rights and values. Furthermore, a supreme constitution has the following characteristics: it is open-ended, value-laden and has a dimension of futurity. In *Nortje v Attorney General of the Cape* 1995 (2) SA 460 (C) the supreme Constitution was described as—

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

9.3 How to interpret the constitution

In *Nortje v Attorney-General of the Cape* (above) 472F-G, Marais J questioned the categorisation of theories and canons of constitutional interpretation:

> [T]he approaches adopted by other Courts and constitutional lawyers to the interpretation, limitation and application of constitutionally entrenched rights are undoubtedly a valuable aid to understanding what is entailed in those processes. Logically structured and systematic approaches have an inherent appeal for lawyers. However, they remain what they are, not holy writ, but simply methodological approaches which are not necessarily the only legitimate approaches to the task . . . I regard it as unwise to settle too dogmatically now upon one methodology at this very early and embryonic stage

> of applying our newly devised Constitution to concrete situations. Indeed, it is questionable whether it would be wise to do so at any stage.

9.3.1 Constitutional guidelines

What does the Constitution say about its interpretation? Section 39(1) of the Constitution provides the following with regard to interpretation of the Bill of Rights:

> When interpreting the Bill of Rights, a court, tribunal or forum—
>
> *(a)* Must promote the values which underlie an open and democratic society based on human dignity, equality and freedom;
>
> *(b)* Must consider international law; and
>
> *(c)* May consider foreign law.

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

Furthermore, a court, tribunal or forum may also refer to foreign law when interpreting the Bill of Rights. The rules of foreign law applicable here are those legal principles (in particular case law) which do not conflict with the South African legal order (s 35(1) of the interim Constitution

referred to 'comparable foreign case law'); in other words, those legal principles applied in a democratic legal order based on constitutionalism.

The interpretation clause of the Bill of Rights must be read with the supremacy clause, as well as with s 1. Section 1 is arguably one of the most important provisions in the supreme Constitution:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> *(a)* Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> *(b)* Non-racialism and non-sexism.
>
> *(c)* Universal adult suffrage, a national common voters roll,

> regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

An in-depth discussion of all the rules and principles of constitutional interpretation is a subject on its own. The following are some of the general principles formulated by Southern African courts:

- A supreme constitution must be given a generous and purposive interpretation (*Shabalala v The Attorney-General of Transvaal* 1996 (1) SA 725 (CC) 740 para 26). In *Nyamakazi v President of Bophuthatswana* (above) 567H it was held that a purposive interpretation of the Constitution is necessary, since it enables the court to take into account more than legal rules:

> These are the objectives of the rights contained therein, the circumstances operating at the time when the interpretation has to be determined, the future implications of the construction, the impact of the said construction on future generations, the taking into account of new developments and changes in society.

- Case law also refers to a liberal interpretation of the Constitution. A liberal interpretation does not have a political connotation, but refers to flexibility and generosity. The Constitution must be liberally construed, taking into account

its terms and spirit, the intention of the framers and the objectives of and reasons for the legislation. In the process, the ordinary rules of statutory interpretation must give way to this more adaptable and flexible method.

- During the interpretation of the Constitution, its spirit and tenor must be adhered to (*S v Acheson* (above)). This means that the values and moral standards underpinning the Constitution must be taken into account throughout the entire interpretation process.
- A provision in the Constitution cannot be interpreted in isolation, but must be read in the context as a whole. The context includes the historical factors that led to the adoption of the Constitution in general, and the fundamental rights in particular (*S v Makwanyane* (above)).
- Respect must be paid to the language employed in the Constitution. Although the text is balanced and qualified by various contextual factors, the context is anchored to the particular constitutional text. In other words, historical context and comparative interpretation can never reflect a

purpose that is not supported by the constitutional text as a legal instrument. However, this does not imply a mechanical adherence to the strict austerity of literal legalism (*Shabalala v The Attorney-General of Transvaal* (above) 740 para 27). In *Nyamakazi v President of Bophuthatswana* (above) 566G this method was referred to as an open-ended process of elucidation and commentary which explores, reads into, derives and attaches significance to every word, section or clause in relation to the whole context.

- In *S v A Juvenile* 1990 (4) SA 151 (ZSC) 176B, the court stressed the fact that the Constitution, as the supreme law of the land, has bestowed on the court the sacred trust of protecting human rights.

- The Constitution was drafted with a view to the future, providing a continuing framework for the legitimate exercise of government power and the protection of individual rights and freedoms (*Khala v The Minister of Safety and Security* (above) 122D–E). The Constitution has to be interpreted in the context and setting existing at the time when the case is heard, and not when it was passed, otherwise the growth of society will not be taken into account. The Constitution must be interpreted so that it gives clear expression to the values the Constitution intends to nurture for the future (*Qozoleni v Minister of Law and Order* (above)).
- Some die-hard supporters of the orthodox text-based approach who do not understand a system of constitutional supremacy refer to constitutional interpretation as a free-floating exercise. This is simply not correct. Ultimately, constitutional interpretation is a question of law: if the particular legislation is consistent with the Constitution, it is valid and in force; if not, the court which exercises a judicial check in terms of the Constitution will declare it unconstitutional and strike it down. Constitutional interpretation is an exercise in the balancing of various societal interests and values.
- These methods and principles of constitutional interpretation do not constitute a closed set of hard and fast rules. Constitutional interpretation is an inherently flexible process. It is not a dogmatic and mechanical application of predefined approaches and rules. Allowance must be made for changing circumstances (*Nortje v Attorney-General of the Cape* (above) 472F–473C).

- The principles of international human rights law and foreign law must be applied with due regard for the South African context (*S v Zuma* 1995 (2) SA 642 (CC) 651H–I)*. In other words, constitutional interpretation must start and end*

with the South African Constitution (*S v Makwanyane* (above) 406E–407C, *Du Plessis v De Klerk* (above) para 123).

- All judges and judicial officers are obliged to interpret and apply legislation so as to give effect to the fundamental values and rights in the supreme Constitution. This role is not a mechanical reiteration of the mythical intent of the lawgiver, but is rather an ongoing, value-based struggle between competing rights and values. This struggle (engagement) with the constitutional text, context, law and society in transformation is eloquently described (with reference to the limitation of rights) by Sachs J in *Prince v Cape Law Society* 2002 (2) SA 794 (CC) para 155:

> What it requires is the maximum harmonisation of all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution. In achieving this balance, this Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the Legislature and the Executive, and what falls squarely to be determined by the Judiciary.

9.3.2 A comprehensive methodology

But how do we concretise these principles and guidelines? How do we make it practical in the real world of racism and politics and poverty and crime and aspirations and so on? As was pointed out earlier (Chapter 5), Du Plessis & Corder (1994: 73-74) discuss five techniques of interpretation. These complementary techniques apply to constitutional interpretation as well.

(a) Grammatical interpretation

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

includes the rules of syntax, which are the rules dealing with the order of words in a sentence. However, this does not imply a return to

literalism and the orthodox 'plain meaning rule'. It merely accepts the authoritative constitutional text as a very important piece in the jigsaw puzzle of constitutional interpretation. According to Du Plessis (1996: 223):

> The completed [constitutional] text posits, with great authority, a starting point for interpretation, and eventually application, but it invites, with equal authority, improvisation, thereby recognising its own inconclusiveness.

(b) Systematic (or contextual) interpretation

This method is concerned with the clarification of the meaning of a particular constitutional provision in conjunction with the Constitution as a whole. The emphasis on the 'wholeness' is not restricted to the other provisions and parts of the Constitution, but also takes into account all contextual considerations such as the social and political environments in which the Constitution operates. In *Ferreira v Levin* 1996 (2) SA 984 (CC), the Constitutional Court used the structure of the interim Constitution, as well as the formulation of other fundamental rights, to interpret the right to freedom of the person.

(c) Teleological (value-based) interpretation

This entails a value-coherent construction—the aim and purpose of the provision must be ascertained against the fundamental constitutional values. The fundamental values in the Constitution form the foundation of a normative constitutional jurisprudence during which legislation and actions are evaluated against (and filtered through) those constitutional values. In *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port*

Elizabeth Prison (above) para 46 Sachs J explained the teleological dimension of constitutional interpretation:

> The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct . . . [W]e should not engage in purely formal or academic analysis, nor simply restrict ourselves to *ad hoc* technicism, but rather focus on what has been called the synergetic relation between the values

> underlying the guarantees of fundamental rights and the circumstances of the particular case.

(d) Historical interpretation

The term *travaux préparatoires* refers to the discussions during the drafting of an international treaty, but it is also increasingly used with regard to the deliberations of the drafters of a supreme constitution. A supreme constitution, which includes a bill of fundamental rights, has been described as a 'living tree'. It is a dynamic document, which must be interpreted in the light of ever-changing circumstances, values and perceptions. However, if the deliberations of the constitutional drafters (the so-called 'original intent') become the deciding factor during the interpretation of such a constitution, there will be no development and adaptability. The result will be that future generations will be bound by a single stroke of constitution-making, with no growth, dialogue, discourse, changes or flexibility possible.

This means that the *travaux préparatoires* of the Constitution may be consulted as an external aid, but they cannot be the deciding factor. In *S v Makwanyane* (above) para 17 the court explained that the Multi-Party Negotiating

Process was advised by technical committees, and the reports of those committees on the drafts are the equivalent of the *travaux préparatoires* relied upon by international tribunals. Such background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, it may be used.

(e) Comparative interpretation

This refers to the process (such as that prescribed by s 39(1) of the Constitution) during which the court examines international law and the constitutional decisions of foreign courts. This must be done with due regard to the unique domestic context of the Constitution under consideration, as was pointed out by Chaskalson P in *S v Makwanyane* (above) para 39:

> In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

These five aspects of constitutional interpretation are not mere theoretical reflections, but all of them can be identified in judgments of the Constitutional Court, as illustrated by Mahomed J para 266 of *S v Makwanyane* (above) [emphasis added]:

> What . . . is required to do in order to resolve an issue is to examine the relevant provisions of the Constitution, their *text and their context*; the *interplay between the different provisions; legal precedent* relevant to the resolution of the problem both in South Africa and abroad; the *domestic common-law and public international law* impacting on its possible solution; *factual and historical considerations* bearing on the problem; the significance and *meaning of the language* used in the relevant provisions; the content and sweep of *the ethos* expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text; and by *a judicious interpretation and*

assessment of all these factors to determine what the Constitution permits and what it prohibits.

9.4 Avoiding unconstitutional legislation

As was pointed out in Chapter 4, when a court declares legislation unconstitutional and invalidates it, the legislation can no longer be applied. This could create a vacuum in the legal order. Competent courts involved in constitutional review (the testing of legislation against the Constitution) may try, if reasonably possible, to modify or adapt the legislation to keep it constitutional and alive. The court may then employ a number of corrective techniques (so-called 'reading-down', 'reading-up', 'reading-in' and severance) in an attempt to keep the legislation in question constitutional and valid.

9.4.1 The limits of corrective interpretation during constitutional review

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) the Constitutional Court laid down a number of principles to be considered and followed before 'reading-in' is applied. However, these factors will also apply to severance:

- The results of reading-in/severance/reading-up must be consistent with the Constitution and its values.
- The result achieved should interfere with the existing law as little as possible.

- The courts must be able to define with sufficient precision how the legislative meaning ought to be modified to comply with the Constitution.
- The court should endeavour to be as faithful as possible

to the legislative scheme (ie aim/purpose) within the constraints of the Constitution.

- The remedy of reading-in ought not to be granted where this would result in an unsupportable budgetary intrusion.

9.4.2 Reading-down

Sections 35(2) and 232(2) of the interim Constitution provided that if legislation is on the face of it unconstitutional (because it conflicts with the fundamental rights and the rest of the Constitution respectively), but is reasonably capable of a more restricted interpretation which would be constitutional and valid, such restricted interpretation should be followed (ie 'reading-down'). These provisions have not been repeated in the Constitution of 1996, but the principle that courts should as far as possible try to keep legislation constitutional—and therefore valid—is a well-known principle of constitutional interpretation (in Germany it is called *Verfassungskonforme Auslegung*). This principle is similar to the common law presumption that the legislation does not contain futile or meaningless provisions (see Chapter 6 above).

9.4.3 Reading-up

Reading-up takes place when there is more than one possible reading of the legislative text, and a more extensive reading is adopted in order to keep the legislation in question constitutional.

> ***Case law example:***
>
> In *Daniels v Campbell* 2004 (5) SA 331 (CC) the court held that a person who is party to a monogamous Muslim marriage is not included under

the terms ‘spouse’ and ‘spouses’ in the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990. In order to avoid unconstitutionality of the legislation, the court interpreted the words in a broad and inclusive way to include persons married according to Muslim rites.

9.4.4 Reading-in

Reading-in is a more drastic remedy used by the courts in order to change legislation in order to keep it constitutional. In exceptional circumstances the court will ‘read’ something into the meaning of a provision in order to rescue a provision, or a part of it. Reading-in should be applied with caution, since the court will change the meaning of the legislation, and after all, the legislative function is entrusted to bodies and persons authorised to enact legislation.

Case law example:

In *Gory v Kolver (Starke and Others Intervening)* 2007 (4) SA 97 (CC) the court found that the provisions of s 1(1) of the Intestate Succession Act 81 of 1987 were unconstitutional, and it was reasonably possible to interpret the provision as if the words ‘or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support’ appeared after the word ‘spouse’ in the section.

9.4.5 Severance

In practical terms 'severance' is the opposite of 'reading-in'. Here the court will try to rescue a provision from the fate of unconstitutionality by 'cutting out' a part of the provision from the rest of the text to keep the remainder constitutional and valid. Before severance can be applied, the two requirements must be met: First, it must be possible to separate (sever or cut out) the unconstitutional (bad) part of the provision from the rest (the good). Secondly, what remains of the provision must still be able to give effect to the purpose of the legislation (*Coetzee v Government of the Republic of South Africa* (above)).

9.5 Contemporary challenges, or, whose Constitution is it anyway?

So: after nearly two decades of rainbow democracy and constitutionalism, the question of constitutional interpretation and application has been sorted out, right? The Constitution and the Bill of Rights require a purposive interpretation, with due regard to the values and aspirations expressed in the constitutional text, right? Now that the philosophical issues

have been addressed, we can concentrate on real issues, right?

It is not that simple and final. Constitutional interpretation is a dynamic process which can never be finished, since circumstances and perceptions and values will change. There can never be one final interpretation which is cast in stone. No understanding of the Constitution is holy writ, and there are many unanswered questions and unsolved problems that need to be addressed. After all, the Constitution is supposed

to be a living document, and unless we understand and accept the indeterminacy and evolving nature of constitutional interpretation and constitutional jurisprudence, there is a danger of falling back into other new rigid orthodoxies: not sovereignty of Parliament ('Parliament has spoken'), but maybe this time series of executive-minded pronouncements by the Constitutional Court (the Oracle of Braamfontein), or government's oligarchical obstinacy in Pretoria. In *S v Mhlungu* 1995 (3) SA 867 (CC) para 129, Sachs J explained this ever-changing process of interpretation as follows:

> I regard the question of interpretation to be one to which there can never be an absolute and definitive answer and that, in particular . . . how to balance out competing provisions, will always take the form of a principled judicial dialogue, in the first place between members of this Court, then between our Court and other Courts, the legal profession, law schools, parliament, and indirectly, with the public at large.

9.5.1 The counter-majoritarian difficulty

There is still a lingering tension between the testing right of the judiciary and the will of the people: Is it acceptable and legitimate for an unelected court to thwart the democratic wishes of the majority (as expressed in the measures taken by the elected government)? On the one hand the Constitution is also the product of a negotiated settlement involving the people. This Constitution (including a Bill of Rights) must serve, amongst other things, as a shield to protect the fundamental rights of the people and to promote the values expressed in the Constitution. According to Michelman (1988: 1537) the judiciary has a 'situational advantage over the people at large in listening to the voices from the margins'. On the other hand, however, the principles of democracy and the separation of powers are also some of the fundamental values underlying a constitutional state. Any court involved in constitutional review (the so-called testing right of the judiciary) has to walk

a very fine and sometimes precarious line. Suddenly, policy issues seem to be justiciable. Du Plessis & De Ville (1993: 81) explain:

> [A] bill of rights judicialises politics because it requires the judiciary to act as an independent referee who keeps (party) political actors to the basic 'rules of the (political) game' enshrined in the bill of rights. This in turn calls for political skills on the part of the 'referee itself'—a politicisation of the judiciary in other words.

But what are the boundaries of constitutional review? The courts may have a 'sacred duty' to protect the rights in the Constitution, but is the Constitution what the judges say it is? What about the inputs of civil society and the other participants in the democratic process? The court is the guardian of constitutional rights and values, but it is not a super legislature. Where to draw the line, and who draws that line during interpretation and application, are some of the vexing questions still facing the courts in a constitutional state.

9.5.2 The constitutional values

With the establishment of the new constitutional order on 27 April 1994, South Africa underwent a number of fundamental changes. In the process, South Africans made the choice in favour of a constitutional state, underpinned by express fundamental values (including human dignity, freedom and equality). The Constitution enjoins the judiciary to consider, respect, protect, promote and fulfil these constitutional values (ss 2, 7(2) and 39(2)). In short, these fundamental values are in the Constitution and have to be applied.

However, the question is: What is to be done with these values? Are these constitutional values merely high-sounding and impressive references to human dignity, justice, and so on, which are only used from time to time as moral embroidery for case law? It has already been mentioned that

the Critical Legal Studies movement criticises these hollow promises and empty rhetoric about rights. If supporters of the constitutional state do not wish to be guilty of the accusations by CLS that only lip service is paid to fundamental rights, the judiciary must adopt a more 'activist' role with regard to the fundamental values during constitutional interpretation.

What is activist constitutional interpretation? It deals primarily with the active and positive promotion and strengthening of the fundamental constitutional values. The

substantive (value-laden) component of the constitutional state must be activated and concretised by the courts. Not only the rights and values of the individual must be emphasised, but those of the community (including the marginalised and disadvantaged) as well.

The Constitution is a value-laden document, and these values (or the spirit of the Bill of Rights) must be promoted and nurtured and applied. But whose values are we talking about? From whose point of view are these values identified and interpreted? What about cultural relativism? For example: different cultures and ethnic groups have very different ideas about non-sexism and the place of women in society. Put another way, there is a diverse community of constitutional interpreters involved in the constitutional discourse in South Africa. Linked to this challenge is the role of dominant cultures and groups in the interpretation process. How open-ended concepts such as open and democratic society or non-sexism or human dignity are concretised in practice, would to some degree depend on who the interpreters are. For example, if the interpreters in a given situation are only men, the concretised meaning of non-sexism will inevitably be biased, influenced by culture,

pre-understanding and preconceived ideas about sex and gender.

Hypothetical example:

As was pointed out in Chapter 5 above, the consideration of fundamental values during interpretation is not easy, but by the same token it cannot be ignored. However, as the Critical Legal Studies scholars point out, we all have preconceived ideas and perceptions based on our culture, history, religion and other factors. We all have our personal baggage; a monkey on our backs. We should not deny it but be aware of it during the interpretation process. But that begs the question: When will whose personal perceptions about race and gender and rights and values prevail? For instance, take the following hypothetical scenario. An illiterate black woman lives in a poverty-stricken rural area. She cannot read, does not know a thing about a supreme constitution and equality and all the wonderful rights guaranteed in the Bill of Rights. She lives the typical life of a

black woman in a traditional patriarchal and male-dominated society, governed by the age-old tribal customs, culture and rules of an indigenous people. She is also constantly abused by her often-drunk husband—both sexually and physically. During one vicious attack, she kills her husband (probably in

self-defence). Nonetheless, she is accused of murder, and on a particular day she appears in court. She cannot read, and does not understand the strange and frightening surroundings. And guess who the presiding officer is? None other than a middle-aged white man. Whose values and which values will be considered? Yes, of course, the fundamental values in the supreme Constitution must be applied. But in the process the clash of languages, traditions, cultures, and all the other baggage of all the role-players will have to be dealt with. The values must be used, but how that is to be accomplished during interpretation and application of the law is not as easy as it may seem.

The question during interpretation is not only who the 'others' are, but also who speaks for the 'others'. In other words, will weak and marginalised groups be given the opportunity to take part in the interpretive discourse? Will they be heard? Will they be taken seriously? In a diverse society (such as South Africa), with a history of oppression, racism, sexism and discrimination, this issue cannot be ignored. Tully (1995: 34) explains the problems as follows:

> To respond to the strange multiplicity of culturally diverse voices that have come forward . . . to demand a hearing . . . it is necessary to call into question and amend a number of unexamined conventions . . . that continue to inform the language of constitutionalism in which the demands are taken up and adjudicated.

9.5.3 Fostering a rights culture

The promotion and implementation of a rights culture in South Africa is another crucial constitutional function of the judiciary. It is all very well to refer to South Africa as a constitutional state, and to emphasise fundamental values. But we are a very young (and fragile) democracy, and the

discourse about concepts such as openness and transparency and human dignity and substantive justice also needs to grow. What role should the judiciary and the Constitution play during the transformation process in South Africa? One function should be

the establishment of the Constitution as a revered symbol of nationhood, cutting across racial, cultural, language, gender and ethnic barriers, and to foster a respect for constitutionalism, the rule of law and a rights culture.

During the inauguration of a new president of the United States of America, the taking of the official oath is a very poignant moment:

> I do solemnly swear that I will faithfully execute the Office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.

According to Miller (1985: 24), the American Constitution is more than the supreme law of the United States:

> For many Americans, the Document has a mystical significance; it is an object of awe and reverence that projects a religious fervour to secular life, a unifying symbol around which Americans can rally.

In fact, the American Constitution is more than a constitutional document—it had been elevated to something similar to a religious symbol, as pointed out by Grey (1984: 3):

> Beyond that, Americans have never regarded the United States Constitution simply as a hierarchically superior statute, which is, by and large, how they view their state constitutions. Rather, it has been, virtually from the moment of its ratification, a sacred symbol, the most potent emblem (along with the flag) of the nation itself.

However, South Africans have not reached that stage yet. It would seem that our supreme Constitution is used and abused by all and sundry when it suits them, just to be ignored when it does not. The old joke comes to mind: a liberal is a right-winger who has just been arrested, and a

right-winger is a liberal who has just been hijacked. The Constitution cannot become a handy little book of instant quotes selectively applied to support sectional interests.

There is another danger in South Africa: reality seems to indicate that while the constitutional values form the substantive 'window-dressing' of this new constitutional state, the crucial centre is imploding in a formal sense of the word—the absence of accountability, lack of respect for the rule of law, the collapse of essential services and the lack of a vibrant, active and vocal civil society, all seem to indicate an erosion of the central tenets of the constitutional state and

democracy. In the process the following comment by Griffin (1996: 43-44) about the American Constitution has an eerily South African relevance:

> Lawyers intend to regard the Constitution as a set of ultimate normative standards appropriate for judging any political practice. The Constitution occupies so much normative space that it is hard to see anything else.

The apartheid regime of yesteryear operated in a public law system devoid of substantive higher-law norms, but it tried very hard to comply with the positivist (formal) aspects of the law. Paradoxically, we might now have the situation where the post-apartheid government seems to be ignoring certain formal aspects of the constitutional power map under the convenient cloak of pseudo-substantive constitutionalism and constitutional supremacy. Are we now slowly moving towards just another authoritarian and centralised *de facto* one-party oligarchy conveniently operating as a democracy under the smokescreen of the supreme Constitution and constitutional values?

9.5.4 Constitutional interpretation and social justice

The challenges relating to socio-economic rights need to be pointed out in relation to the interpretation of fundamental rights. Should socio-economic rights be interpreted differently from the other rights? It is an effort to strike a balance between judicial activism and self-restraint. However, in very difficult and 'hard' socio-economic cases before a court, a person in an affluent neighbourhood may prefer judicial self-restraint, but the poorest of the poor in a squatter settlement will no doubt prefer a more activist and generous interpretation. True, there is a fine line between reviewing law and influencing policy, but in the final analysis the problem is not only about application, but fundamentally about interpretation.

Should a court second-guess the legislature on policy issues? A court of law is not equipped to decide such matters, and it should never usurp the role of the legislature. But by the same token, courts in a constitutional democracy may not become the rubber stamps of the legislature. If the legislature and the executive are allowed to impair constitutional rights in a manner which goes too far, or, in the case of socio-economic rights, not far enough, our Bill of Rights would become just another piece of paper.

The modern democratic state has changed considerably during this century: from the liberal democratic state (the night

watchman or non-interfering state), to the administrative (regulating) state, to the welfare state, to the benefactor state, and finally, to the post-industrial state as agent of empowerment. The rise of the welfare state and the empowering state means that the constitutional state is not only involved in upholding and protecting the traditional individual rights and values, but it also has to establish and

reaffirm community rights and values. The modern constitutional state cannot only take, but has to give as well —the state as protector of the individual and provider of the community. This means that the judiciary not only has to protect the traditional liberal rights of the individual against encroachment by the state, but also has to ensure that the state meets its positive obligations with regard to the social advancement of the community. The state must act as the agent of empowerment to ensure that people do not remain helpless and disempowered. In the modern state, preventing people from enjoying opportunities and benefits may be a more serious infringement of fundamental rights than governmental abuse of power. A bill of rights is not only a shield against government intervention, but also a positive guide to opportunities, services, resources and empowerment.

In terms of its preamble the Constitution is the driving force that serves to create a society based on democratic values, social justice and fundamental human rights, as well as to improve the quality of life of all citizens and free the potential of every person. In other words, the Constitution is also an instrument of reconstruction and transformation. For the poor and illiterate sectors of society, the legitimacy of the new constitutional order is inextricably linked to socio-economic rights, rather than to high-sounding theoretical explanations and intricate interpretations. Herein lies the new challenge for constitutional interpretation—to activate and animate the fundamental constitutional values in general, and to concretise social justice in particular. A fundamental rights dispensation is not only about the entrenchment of certain rights, but also involves the maintenance and strengthening of the necessary prerequisites for the proper (and dignified) exercise of those rights. In other words, all those who were pushed to the margins of society (the poor, the disempowered and the

disadvantaged) must also be in the position to enjoy the benefits of a Bill of Rights.

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Abbreviations

LJ	Law Journal
LR	Law Review
CILSA	The Comparative and International Law Journal of South Africa
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPR/PL	SA Publiekreg/Public Law
SAYIL	South African Yearbook of International Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TRW	Tydskrif vir Regswetenskap
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

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Supplementary material

Constitution of the Republic of South Africa, 1996

Interpretation Act 33 of 1957

Constitution of the Republic of South Africa, 1996 [1]

[Manner of reference to Act, previously 'Constitution of the Republic of South Africa, Act 108 of 1996', substituted by s. 1 (1) of Act 5 of 2005.]

[ASSENTED TO 16 DECEMBER 1996] [DATE OF COMMENCEMENT: 4 FEBRUARY 1997]
(Unless otherwise indicated - *see also* s. 243 (5))

(English text signed by the President)

as amended by

Constitution of the Republic of South Africa, 1996
Constitution First Amendment Act of 1997
Constitution Second Amendment Act of 1998
Constitution Third Amendment Act of 1998
Constitution Fourth Amendment Act of 1999
Constitution Fifth Amendment Act of 1999
Constitution Sixth Amendment Act of 2001
Constitution Seventh Amendment Act of 2001
Constitution Eighth Amendment Act of 2002
Constitution Ninth Amendment Act of 2002
Constitution Tenth Amendment Act of 2003
Constitution Eleventh Amendment Act of 2003
Constitution Twelfth Amendment Act of 2005
Citation of Constitutional Laws Act 5 of 2005
Constitution Thirteenth Amendment Act of 2007
Constitution Fourteenth Amendment Act of 2008
Constitution Fifteenth Amendment Act of 2008
Constitution Sixteenth Amendment Act of 2009
South African Police Service Amendment Act 10 of 2012

Constitution Seventeenth Amendment Act of 2012

ACT

To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.

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[Schedule 6A inserted by s. 6 of the Constitution Tenth Amendment Act of 2003 and repealed by s. 6 of the Constitution Fourteenth Amendment Act of 2008.]

Schedule 6B

[Schedule 6B, previously Schedule 6A, inserted by s. 2 of the Constitution Eighth Amendment Act of 2002, renumbered by s. 6 of the Constitution Tenth Amendment Act of 2003 and repealed by s. 5 of the Constitution Fifteenth Amendment Act of 2008.]

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Preamble

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

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

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

Chapter 1
Founding Provisions (ss 1-6)

1 Republic of South Africa

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

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

2 Supremacy of Constitution

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

3 Citizenship

(1) There is a common South African citizenship.

(2) All citizens are-

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.

4 National anthem

The national anthem of the Republic is determined by the President by proclamation.

5 National flag

The national flag of the Republic is black, gold, green, white, red and blue, as described and sketched in Schedule 1.

6 Languages

(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

(2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(3) *(a)* The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

(b) Municipalities must take into account the language usage and preferences of their residents.

(4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages

must enjoy parity of esteem and must be treated equitably.

(5) A Pan South African Language Board established by national legislation must-

(a) promote, and create conditions for, the development and use of-

(i) all official languages;

(ii) the Khoi, Nama and San languages; and

(iii) sign language; and

(b) promote and ensure respect for-

(i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and

(ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

Chapter 2
Bill of Rights (ss 7-39)

7 Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

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

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

8 Application

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

9 Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

10 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

11 Life

Everyone has the right to life.

12 Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right-

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent.

13 Slavery, servitude and forced labour

No one may be subjected to slavery, servitude or forced labour.

14 Privacy

Everyone has the right to privacy, which includes the right

not to have-

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed.

15 Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that-

(a) those observances follow rules made by the appropriate public authorities;

(b) they are conducted on an equitable basis; and

(c) attendance at them is free and voluntary.

(3) *(a)* This section does not prevent legislation recognising-

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph *(a)* must be consistent with this section and the other provisions of the Constitution.

16 Freedom of expression

(1) Everyone has the right to freedom of expression, which includes-

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to-

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

17 Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

18 Freedom of association

Everyone has the right to freedom of association.

19 Political rights

(1) Every citizen is free to make political choices, which includes the right-

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right-

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office.

20 Citizenship

No citizen may be deprived of citizenship.

21 Freedom of movement and residence

(1) Everyone has the right to freedom of movement.

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport.

22 Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

23 Labour relations

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right-

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right-

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section

36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

24 Environment

Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant

circumstances, including-

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section-

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions

of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).

26 Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27 Health care, food, water and social security

(1) Everyone has the right to have access to-

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

28 Children

(1) Every child has the right-

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that-

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section **'child'** means a person under the age of 18 years.

29 Education

(1) Everyone has the right-

(a) to a basic education, including adult basic

education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

30 Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31 Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

32 Access to information

(1) Everyone has the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

35 Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent;

(b) to be informed promptly-

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(d) to be brought before a court as soon as reasonably possible, but not later than-

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right-

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if

substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's-

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right-

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its

purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

37 States of emergency

(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when-

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only-

(a) prospectively; and

(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of-

(a) a declaration of a state of emergency;

(b) any extension of a declaration of a state of emergency; or

(c) any legislation enacted, or other action taken, in

consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that-

(a) the derogation is strictly required by the emergency; and

(b) the legislation-

(i) is consistent with the Republic's obligations under international law applicable to states of emergency;

(ii) conforms to subsection (5); and

(iii) is published in the national *Government Gazette* as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise-

(a) indemnifying the state, or any person, in respect of any unlawful act;

(b) any derogation from this section; or

(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 Section number	2 Section title	3 Extent to which the right is non-derogable
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language
10	Human dignity	Entirely
11	Life	Entirely

12	Freedom and security of the person	With respect to subsections (1) *(d)* and *(e)* and (2) *(c)*
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: - subsection (1) *(d)* and *(e)*; - the rights in subparagraphs (i) and (ii) of subsection (1) *(g)*; and - subsection (1) *(i)* in respect of children of 15 years and younger.
35	Arrested, detained and accused persons	With respect to: - subsections (1) *(a)*, *(b)* and *(c)* and (2) *(d)*; - the rights in paragraphs *(a)* to *(o)* of subsection (3), excluding paragraph *(d)*; - subsection (4); and - subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

(a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

(b) A notice must be published in the national *Government Gazette* within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal

representative.

(e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(f) A detainee who is not released in terms of a review under paragraph *(e)*, or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.

(g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

(h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

39 Interpretation of Bill of Rights

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

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

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

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

Chapter 3
Co-operative Government (ss 40-41)

40 Government of the Republic

(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

41 Principles of co-operative government and intergovernmental relations

(1) All spheres of government and all organs of state within each sphere must-

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic and its people;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by-

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation

with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must-

(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and

(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

Chapter 4
Parliament (ss 42-82)

42 Composition of Parliament

(1) Parliament consists of-

(a) the National Assembly; and

(b) the National Council of Provinces.

(2) The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.

(3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues,

by passing legislation and by scrutinizing and overseeing executive action.

(4) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.

(5) The President may summon Parliament to an extraordinary sitting at any time to conduct special business.

(6) The seat of Parliament is Cape Town, but an Act of Parliament enacted in accordance with section 76 (1) and (5) may determine that the seat of Parliament is elsewhere.

43 Legislative authority of the Republic

In the Republic, the legislative authority-

(a) of the national sphere of government is vested in Parliament, as set out in section 44;

(b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and

(c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

44 National legislative authority

(1) The national legislative authority as vested in Parliament-

(a) confers on the National Assembly the power-

(i) to amend the Constitution;

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

(iii) to assign any of its legislative powers,

except the power to amend the Constitution, to any legislative body in another sphere of government; and

(b) confers on the National Council of Provinces the power-

(i) to participate in amending the Constitution in accordance with section 74;

(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and

(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary-

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority; Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

45 Joint rules and orders and joint committees

(1) The National Assembly and the National Council of Provinces must establish a joint rules committee to make rules and orders concerning the joint business of the Assembly and Council, including rules and orders-

(a) to determine procedures to facilitate the legislative process, including setting a time limit for completing any step in the process;

(b) to establish joint committees composed of representatives from both the Assembly and the Council to consider and report on Bills envisaged in sections 74 and 75 that are referred to such a committee;

(c) to establish a joint committee to review the Constitution at least annually; and

(d) to regulate the business of-

(i) the joint rules committee;

(ii) the Mediation Committee;

(iii) the constitutional review committee; and

(iv) any joint committees established in terms of paragraph *(b)*.

(2) Cabinet members, members of the National Assembly and delegates to the National Council of Provinces have the same privileges and immunities before a joint committee of the Assembly and the Council as they have before the Assembly or the Council.

The National Assembly (ss 46-59)

46 Composition and election

(1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that-

(a) is prescribed by national legislation;

(b) is based on the national common voters roll;

(c) provides for a minimum voting age of 18 years; and

(d) results, in general, in proportional representation.

[Sub-s. (1) amended by s. 1 of the Constitution Tenth Amendment Act of 2003 and by s. 1 of the Constitution Fifteenth Amendment Act of 2008.]

(2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly.

47 Membership

(1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except-

(a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than-

(i) the President, Deputy President, Ministers and Deputy Ministers; and

(ii) other office-bearers whose functions are compatible with the functions of a member of the Assembly, and have been declared compatible with those functions by national legislation;

(b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council;

(c) unrehabilitated insolvents;

(d) anyone declared to be of unsound mind by a court of the Republic; or

(e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification

under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of the National Assembly in terms of subsection (1) *(a)* or *(b)* may be a candidate for the Assembly, subject to any limits or conditions established by national legislation.

(3) A person loses membership of the National Assembly if that person-

(a) ceases to be eligible;

(b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or

(c) ceases to be a member of the party that nominated that person as a member of the Assembly.

[Sub-s. (3) substituted by s. 2 of the Constitution Tenth Amendment Act of 2003 and by s. 2 of the Constitution Fifteenth Amendment Act of 2008.]

(4) Vacancies in the National Assembly must be filled in terms of national legislation.

48 Oath or affirmation

Before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

49 Duration of National Assembly

(1) The National Assembly is elected for a term of five years.

(2) If the National Assembly is dissolved in terms of section 50, or when its term expires, the President, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the Assembly was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after

the expiry of the term of the National Assembly.

[Sub-s. (2) substituted by s. 1 of the Constitution Fifth Amendment Act of 1999.]

(3) If the result of an election of the National Assembly is not declared within the period established in terms of section 190, or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.

(4) The National Assembly remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next Assembly.

50 Dissolution of National Assembly before expiry of its term

(1) The President must dissolve the National Assembly if-

(a) the Assembly has adopted a resolution to dissolve with a supporting vote of a majority of its members; and

(b) three years have passed since the Assembly was elected.

(2) The Acting President must dissolve the National Assembly if-

(a) there is a vacancy in the office of President; and

(b) the Assembly fails to elect a new President within 30 days after the vacancy occurred.

51 Sittings and recess periods

(1) After an election, the first sitting of the National Assembly must take place at a time and on a date determined by the Chief Justice, but not more than 14 days after the election result has been declared. The Assembly may determine the time and duration of its other sittings and its recess periods.

[Sub-s. (1) substituted by s. 1 of the Constitution Sixth Amendment Act of 2001.]

(2) The President may summon the National Assembly to an extraordinary sitting at any time to conduct special business.

(3) Sittings of the National Assembly are permitted at places other than the seat of Parliament only on the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Assembly.

52 Speaker and Deputy Speaker

(1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.

(2) The Chief Justice must preside over the election of a Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.

[Sub-s. (2) substituted by s. 2 of the Constitution Sixth Amendment Act of 2001.]

(3) The procedure set out in Part A of Schedule 3 applies to the election of the Speaker and the Deputy Speaker.

(4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution. A majority of the members of the Assembly must be present when the resolution is adopted.

(5) In terms of its rules and orders, the National Assembly may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

53 Decisions

(1) Except where the Constitution provides otherwise-

(a) a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;

(b) at least one third of the members must be present before a vote may be taken on any other question

before the Assembly; and

(c) all questions before the Assembly are decided by a majority of the votes cast.

(2) The member of the National Assembly presiding at a meeting of the Assembly has no deliberative vote, but-

(a) must cast a deciding vote when there is an equal number of votes on each side of a question; and

(b) may cast a deliberative vote when a question must be decided with a supporting vote of at least two thirds of the members of the Assembly.

54 Rights of certain Cabinet members and Deputy Ministers in the National Assembly

The President and any member of the Cabinet or any Deputy Minister who is not a member of the National Assembly may, subject to the rules and orders of the Assembly, attend and speak in the Assembly, but may not vote.

[S. 54 substituted by s. 3 of the Constitution Sixth Amendment Act of 2001.]

55 Powers of National Assembly

(1) In exercising its legislative power, the National Assembly may-

(a) consider, pass, amend or reject any legislation before the Assembly; and

(b) initiate or prepare legislation, except money Bills.

(2) The National Assembly must provide for mechanisms-

(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and

(b) to maintain oversight of-

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of state.

56 Evidence or information before National Assembly

The National Assembly or any of its committees may-

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) require any person or institution to report to it;

(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph *(a)* or *(b)*; and

(d) receive petitions, representations or submissions from any interested persons or institutions.

57 Internal arrangements, proceedings and procedures of National Assembly

(1) The National Assembly may-

(a) determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of the National Assembly must provide for-

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy;

(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively; and

(d) the recognition of the leader of the largest

opposition party in the Assembly as the Leader of the Opposition.

58 Privilege

(1) Cabinet members, Deputy Ministers and members of the National Assembly-

(a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and

(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-

(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.

[Sub-s. (1) amended by s. 4 of the Constitution Sixth Amendment Act of 2001.]

(2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to members of the National Assembly are a direct charge against the National Revenue Fund.

59 Public access to and involvement in National Assembly

(1) The National Assembly must-

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-

(i) to regulate public access, including access of the media, to the Assembly and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

National Council of Provinces (ss 60-72)

60 Composition of National Council

(1) The National Council of Provinces is composed of a single delegation from each province consisting of ten delegates.

(2) The ten delegates are-

(a) four special delegates consisting of-

(i) the Premier of the province or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council of Provinces; and

(ii) three other special delegates; and

(b) six permanent delegates appointed in terms of section 61 (2).

(3) The Premier of a province, or if the Premier is not available, a member of the province's delegation designated by the Premier, heads the delegation.

61 Allocation of delegates

(1) Parties represented in a provincial legislature are entitled to delegates in the province's delegation in accordance with the formula set out in Part B of Schedule 3.

(2) *(a)* A provincial legislature must, within 30 days after the result of an election of that legislature is declared-

(i) determine, in accordance with national legislation, how many of each party's delegates are to be permanent delegates and how many are to be special delegates; and

(ii) appoint the permanent delegates in accordance with the nominations of the parties.

(b) . . . . . .

[Para. *(b)* omitted by s. 1 of the Constitution Fourteenth Amendment Act of 2008.]

[Sub-s. (2) substituted by s. 1 of the Constitution Ninth Amendment Act of 2002 and by s. 1 of the Constitution Fourteenth Amendment Act of 2008.]

(3) The national legislation envisaged in subsection (2) *(a)* must ensure the participation of minority parties in both the permanent and special delegates' components of the delegation in a manner consistent with democracy.

(4) The legislature, with the concurrence of the Premier and the leaders of the parties entitled to special delegates in the province's delegation, must designate special delegates, as required from time to time, from among the members of the legislature.

62 Permanent delegates

(1) A person nominated as a permanent delegate must be eligible to be a member of the provincial legislature.

(2) If a person who is a member of a provincial legislature is appointed as a permanent delegate, that person ceases to be a member of the legislature.

(3) Permanent delegates are appointed for a term that expires-

(a) immediately before the first sitting of the provincial legislature after its next election.

(b) . . . . . .

[Para. *(b)* omitted by s. 2 of the Constitution Fourteenth Amendment Act of 2008.]
[Sub-s. (3) substituted by s. 2 of the Constitution Ninth Amendment Act of 2002 and by s. 2 of the Constitution Fourteenth Amendment Act of 2008.]

(4) A person ceases to be a permanent delegate if that person-

(a) ceases to be eligible to be a member of the provincial legislature for any reason other than being appointed as a permanent delegate;

(b) becomes a member of the Cabinet;

(c) has lost the confidence of the provincial legislature and is recalled by the party that nominated that person;

(d) ceases to be a member of the party that nominated that person and is recalled by that party; or

(e) is absent from the National Council of Provinces without permission in circumstances for which the rules and orders of the Council prescribe loss of office as a permanent delegate.

(5) Vacancies among the permanent delegates must be filled in terms of national legislation.

(6) Before permanent delegates begin to perform their functions in the National Council of Provinces, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

63 Sittings of National Council

(1) The National Council of Provinces may determine the time and duration of its sittings and its recess periods.

(2) The President may summon the National Council of Provinces to an extraordinary sitting at any time to conduct special business.

(3) Sittings of the National Council of Provinces are permitted at places other than the seat of Parliament only on

the grounds of public interest, security or convenience, and if provided for in the rules and orders of the Council.

64 Chairperson and Deputy Chairpersons

(1) The National Council of Provinces must elect a Chairperson and two Deputy Chairpersons from among the delegates.

(2) The Chairperson and one of the Deputy Chairpersons are elected from among the permanent delegates for five years unless their terms as delegates expire earlier.

(3) The other Deputy Chairperson is elected for a term of one year, and must be succeeded by a delegate from another province, so that every province is represented in turn.

(4) The Chief Justice must preside over the election of the Chairperson, or designate another judge to do so. The Chairperson presides over the election of the Deputy Chairpersons.

[Sub-s. (4) substituted by s. 5 of the Constitution Sixth Amendment Act of 2001.]

(5) The procedure set out in Part A of Schedule 3 applies to the election of the Chairperson and the Deputy Chairpersons.

(6) The National Council of Provinces may remove the Chairperson or a Deputy Chairperson from office.

(7) In terms of its rules and orders, the National Council of Provinces may elect from among the delegates other presiding officers to assist the Chairperson and Deputy Chairpersons.

65 Decisions

(1) Except where the Constitution provides otherwise-

(a) each province has one vote, which is cast on behalf of the province by the head of its delegation; and

(b) all questions before the National Council of Provinces are agreed when at least five provinces vote in favour of the question.

(2) An Act of Parliament, enacted in accordance with the procedure established by either subsection (1) or subsection (2) of section 76, must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf.

66 Participation by members of national executive

(1) Cabinet members and Deputy Ministers may attend, and may speak in, the National Council of Provinces, but may not vote.

(2) The National Council of Provinces may require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council.

67 Participation by local government representatives

Not more than ten part-time representatives designated by organised local government in terms of section 163, to represent the different categories of municipalities, may participate when necessary in the proceedings of the National Council of Provinces, but may not vote.

68 Powers of National Council

In exercising its legislative power, the National Council of Provinces may-

(a) consider, pass, amend, propose amendments to or reject any legislation before the Council, in accordance with this Chapter; and

(b) initiate or prepare legislation falling within a functional area listed in Schedule 4 or other legislation referred to in section 76 (3), but may not initiate or prepare money Bills.

69 Evidence or information before National Council

The National Council of Provinces or any of its committees may-

(a) summon any person to appear before it to give evidence on oath or affirmation or to produce documents;

(b) require any institution or person to report to it;

(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph *(a)* or *(b)*; and

(d) receive petitions, representations or submissions from any interested persons or institutions.

70 Internal arrangements, proceedings and procedures of National Council

(1) The National Council of Provinces may-

(a) determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of the National Council of Provinces must provide for-

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation of all the provinces in its proceedings in a manner consistent with democracy; and

(c) the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy, whenever a matter is to be decided in accordance with section 75.

71 Privilege

(1) Delegates to the National Council of Provinces and the persons referred to in sections 66 and 67-

(a) have freedom of speech in the Council and in its committees, subject to its rules and orders; and

(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-

(i) anything that they have said in, produced before or submitted to the Council or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Council or any of its committees.

(2) Other privileges and immunities of the National Council of Provinces, delegates to the Council and persons referred to in sections 66 and 67 may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to permanent members of the National Council of Provinces are a direct charge against the National Revenue Fund.

72 Public access to and involvement in National Council

(1) The National Council of Provinces must-

(a) facilitate public involvement in the legislative and other processes of the Council and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-

(i) to regulate public access, including access of the media, to the Council and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Council of Provinces may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

National Legislative Process (ss 73-82)

73 All Bills

(1) Any Bill may be introduced in the National Assembly.

(2) Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly, but only the Cabinet member responsible for national financial matters may introduce the following Bills in the Assembly:

(a) a money Bill; or

(b) a Bill which provides for legislation envisaged in section 214.

[Sub-s. (2) substituted by s. 1 *(a)* of the Constitution Seventh Amendment Act of 2001.]

(3) A Bill referred to in section 76 (3), except a Bill referred to in subsection (2) *(a)* or *(b)* of this section, may be introduced in the National Council of Provinces.

[Sub-s. (3) substituted by s. 1 *(b)* of the Constitution Seventh Amendment Act of 2001.]

(4) Only a member or committee of the National Council of Provinces may introduce a Bill in the Council.

(5) A Bill passed by the National Assembly must be referred to the National Council of Provinces if it must be considered by the Council. A Bill passed by the Council must be referred to the Assembly.

74 Bills amending the Constitution

(1) Section 1 and this subsection may be amended by a Bill passed by-

(a) the National Assembly, with a supporting vote of at least 75 per cent of its members; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(2) Chapter 2 may be amended by a Bill passed by-

(a) the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) the National Council of Provinces, with a supporting vote of at least six provinces.

(3) Any other provision of the Constitution may be amended by a Bill passed-

(a) by the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment-

(i) relates to a matter that affects the Council;

(ii) alters provincial boundaries, powers, functions or institutions; or

(iii) amends a provision that deals specifically with a provincial matter.

(4) A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

(5) At least 30 days before a Bill amending the Constitution is introduced in terms of section 73 (2), the person or committee intending to introduce the Bill must-

(a) publish in the national *Government Gazette*, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;

(b) submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and

(c) submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to

the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures-

(a) to the Speaker for tabling in the National Assembly; and

(b) in respect of amendments referred to in subsection (1), (2) or (3) *(b)*, to the Chairperson of the National Council of Provinces for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of-

(a) its introduction, if the Assembly is sitting when the Bill is introduced; or

(b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.

(8) If a Bill referred to in subsection (3) *(b)*, or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.

(9) A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.

75 Ordinary Bills not affecting provinces

(1) When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:

(a) The Council must-

(i) pass the Bill;

(ii) pass the Bill subject to amendments proposed by it; or

(iii) reject the Bill.

(b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.

(c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may-

(i) pass the Bill again, either with or without amendments; or

(ii) decide not to proceed with the Bill.

(d) A Bill passed by the Assembly in terms of paragraph *(c)* must be submitted to the President for assent.

(2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead-

(a) each delegate in a provincial delegation has one vote;

(b) at least one third of the delegates must be present before a vote may be taken on the question; and

(c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote.

76 Ordinary Bills affecting provinces

(1) When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance

with the following procedure:

(a) The Council must-

(i) pass the Bill;

(ii) pass an amended Bill; or

(iii) reject the Bill.

(b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.

(c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.

(d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph *(c)*, the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on-

(i) the Bill as passed by the Assembly;

(ii) the amended Bill as passed by the Council; or

(iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.

(f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if the Council passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be

referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.

(i) If a Bill referred to the Council in terms of paragraph *(f)* or *(h)* is not passed by the Council, the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.

(j) If a Bill referred to the Assembly in terms of paragraph *(g)* or *(h)* is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.

(k) A Bill passed by the Assembly in terms of paragraph *(e)*, *(i)* or *(j)* must be submitted to the President for assent.

(2) When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure:

(a) The Assembly must-

(i) pass the Bill;

(ii) pass an amended Bill; or

(iii) reject the Bill.

(b) A Bill passed by the Assembly in terms of paragraph *(a)* (i) must be submitted to the President for assent.

(c) If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.

(d) If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph *(c)*, the Bill and, where applicable, also the amended Bill must be referred to the Mediation

Committee, which may agree on-

(i) the Bill as passed by the Council;

(ii) the amended Bill as passed by the Assembly; or

(iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses.

(f) If the Mediation Committee agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.

(i) If a Bill referred to the Assembly in terms of paragraph *(f)* or *(h)* is not passed by the Assembly, the Bill lapses.

(3) A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:

(a) Section 65 (2);

(b) section 163;

(c) section 182;

(d) section 195 (3) and (4);

(e) section 196; and

(f) section 197.

(4) A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation-

(a) envisaged in section 44 (2) or 220 (3); or

(b) envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.

[Para. *(b)* substituted by s. 1 of the Constitution Eleventh Amendment Act of 2003.]

(5) A Bill envisaged in section 42 (6) must be dealt with in accordance with the procedure established by subsection (1), except that-

(a) when the National Assembly votes on the Bill, the provisions of section 53 (1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and

(b) if the Bill is referred to the Mediation Committee, the following rules apply:

(i) If the National Assembly considers a Bill envisaged in subsection (1) *(g)* or *(h)*, that Bill may be passed only if a majority of the members of the Assembly vote in favour of it.

(ii) If the National Assembly considers or reconsiders a Bill envisaged in subsection (1) *(e)*, *(i)* or *(j)*, that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.

(6) This section does not apply to money Bills.

77 Money Bills

(1) A Bill is a money Bill if it-

(a) appropriates money;

(b) imposes national taxes, levies, duties or surcharges;

(c) abolishes or reduces, or grants exemptions from,

any national taxes, levies, duties or surcharges; or

(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except-

(a) a subordinate matter incidental to the appropriation of money;

(b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;

(c) the granting of exemption from national taxes, levies, duties or surcharges; or

(d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.

[S. 77 substituted by s. 2 of the Constitution Seventh Amendment Act of 2001.]

78 Mediation Committee

(1) The Mediation Committee consists of-

(a) nine members of the National Assembly elected by the Assembly in accordance with a procedure that is prescribed by the rules and orders of the Assembly and results in the representation of parties in substantially the same proportion that the parties are represented in the Assembly; and

(b) one delegate from each provincial delegation in the National Council of Provinces, designated by the delegation.

(2) The Mediation Committee has agreed on a version of a Bill, or decided a question, when that version, or one side of the question, is supported by-

(a) at least five of the representatives of the National Assembly; and

(b) at least five of the representatives of the National Council of Provinces.

79 Assent to Bills

(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

(2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.

(3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if-

(a) the President's reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or

(b) section 74 (1), (2) or (3) *(b)* or 76 was applicable in the passing of the Bill.

(4) If, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either-

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.

80 Application by members of National Assembly to Constitutional Court

(1) Members of the National Assembly may apply to the

Constitutional Court for an order declaring that all or part of an Act of Parliament is unconstitutional.

(2) An application-

(a) must be supported by at least one third of the members of the National Assembly; and

(b) must be made within 30 days of the date on which the President assented to and signed the Act.

(3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if-

(a) the interests of justice require this; and

(b) the application has a reasonable prospect of success.

(4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

81 Publication of Acts

A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.

82 Safekeeping of Acts of Parliament

The signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.

Chapter 5
The President and National Executive (ss 83-102)

83 The President

The President-

(a) is the Head of State and head of the national executive;
(b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
(c) promotes the unity of the nation and that which will advance the Republic.

84 Powers and functions of President

(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for-
(a) assenting to and signing Bills;
(b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;
(c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
(d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
(e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
(f) appointing commissions of inquiry;
(g) calling a national referendum in terms of an Act of Parliament;
(h) receiving and recognising foreign diplomatic and consular representatives;
(i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and
(k) conferring honours.

85 Executive authority of the Republic

(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by-

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation.

86 Election of President

(1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President.

(2) The Chief Justice must preside over the election of the President, or designate another judge to do so. The procedure set out in Part A of Schedule 3 applies to the election of the President.

[Sub-s. (2) substituted by s. 6 of the Constitution Sixth Amendment Act of 2001.]

(3) An election to fill a vacancy in the office of President must be held at a time and on a date determined by the Chief Justice, but not more than 30 days after the vacancy occurs.

[Sub-s. (3) substituted by s. 6 of the Constitution Sixth Amendment Act of 2001.]

87 Assumption of office by President

When elected President, a person ceases to be a member of the National Assembly and, within five days, must assume office by swearing or affirming faithfulness to the Republic

and obedience to the Constitution, in accordance with Schedule 2.

88 Term of office of President

(1) The President's term of office begins on assuming office and ends upon a vacancy occurring or when the person next elected President assumes office.

(2) No person may hold office as President for more than two terms, but when a person is elected to fill a vacancy in the office of President, the period between that election and the next election of a President is not regarded as a term.

89 Removal of President

(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of-

(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office.

(2) Anyone who has been removed from the office of President in terms of subsection (1) *(a)* or *(b)* may not receive any benefits of that office, and may not serve in any public office.

90 Acting President

(1) When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President:

(a) The Deputy President.

(b) A Minister designated by the President.

(c) A Minister designated by the other members of the Cabinet.

(d) The Speaker, until the National Assembly designates one of its other members.

(2) An Acting President has the responsibilities, powers and functions of the President.

(3) Before assuming the responsibilities, powers and functions of the President, the Acting President must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

(4) A person who as Acting President has sworn or affirmed faithfulness to the Republic need not repeat the swearing or affirming procedure for any subsequent term as acting President during the period ending when the person next elected President assumes office.

[Sub-s. (4) added by s. 1 of the Constitution First Amendment Act of 1997.]

91 Cabinet

(1) The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.

(2) The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.

(3) The President-

(a) must select the Deputy President from among the members of the National Assembly;

(b) may select any number of Ministers from among the members of the National Assembly; and

(c) may select no more than two Ministers from outside the Assembly.

(4) The President must appoint a member of the Cabinet to be the leader of government business in the National Assembly.

(5) The Deputy President must assist the President in the execution of the functions of government.

92 Accountability and responsibilities

(1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.

(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

(3) Members of the Cabinet must-

(a) act in accordance with the Constitution; and

(b) provide Parliament with full and regular reports concerning matters under their control.

93 Deputy Ministers

(1) The President may appoint-

(a) any number of Deputy Ministers from among the members of the National Assembly; and

(b) no more than two Deputy Ministers from outside the Assembly,

to assist the members of the Cabinet, and may dismiss them.

(2) Deputy Ministers appointed in terms of subsection (1) *(b)* are accountable to Parliament for the exercise of their powers and the performance of their functions.

[S. 93 substituted by s. 7 of the Constitution Sixth Amendment Act of 2001.]

94 Continuation of Cabinet after elections

When an election of the National Assembly is held, the Cabinet, the Deputy President, Ministers and any Deputy Ministers remain competent to function until the person elected President by the next Assembly assumes office.

95 Oath or affirmation

Before the Deputy President, Ministers and any Deputy Ministers begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

96 Conduct of Cabinet members and Deputy Ministers

(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not-

(a) undertake any other paid work;

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

97 Transfer of functions

The President by proclamation may transfer to a member of the Cabinet-

(a) the administration of any legislation entrusted to another member; or

(b) any power or function entrusted by legislation to another member.

98 Temporary assignment of functions

The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

99 Assignment of functions

A Cabinet member may assign any power or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. An assignment-

(a) must be in terms of an agreement between the relevant Cabinet member and the Executive Council member or Municipal Council;

(b) must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed; and

(c) takes effect upon proclamation by the President.

100 National intervention in provincial administration

(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-

(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

(b) assuming responsibility for the relevant obligation in that province to the extent necessary to-

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) maintain economic unity;

(iii) maintain national security; or

(iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

[Sub-s. (1) amended by s. 2 *(b)* of the Constitution Eleventh Amendment Act of 2003.]

(2) If the national executive intervenes in a province in terms of subsection (1) *(b)*-

(a) it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;

(b) the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.

[Sub-s. (2) substituted by s. 2 *(c)* of the Constitution Eleventh Amendment Act of 2003.]

(3) National legislation may regulate the process established by this section.

[S. 100 amended by s. 2 *(a)* of the Constitution Eleventh Amendment Act of 2003.]

101 Executive decisions

(1) A decision by the President must be in writing if it-

(a) is taken in terms of legislation; or

(b) has legal consequences.

(2) A written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member.

(3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public.

(4) National legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be-

(a) tabled in Parliament; and

(b) approved by Parliament.

102 Motions of no confidence

(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.

(2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.

Chapter 6
Provinces (ss 103-150)

103 Provinces

(1) The Republic has the following provinces:

(a) Eastern Cape;
(b) Free State;
(c) Gauteng;
(d) KwaZulu-Natal;
(e) Limpopo;
(f) Mpumalanga;
(g) Northern Cape;
(h) North West;
(i) Western Cape.

[Sub-s. (1) amended by s. 3 of the Constitution Eleventh Amendment Act of 2003 and substituted by s. 1 of the Constitution Twelfth Amendment Act of 2005.]

(2) The geographical areas of the respective provinces comprise the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A.

[Sub-s. (2) substituted by s. 1 of the Constitution Twelfth Amendment Act of 2005.]

(3) *(a)* Whenever the geographical area of a province is re-determined by an amendment to the Constitution, an Act of Parliament may provide for measures to regulate, within a reasonable time, the legal, practical and any other consequences of the re-determination.

(b) An Act of Parliament envisaged in paragraph *(a)* may be enacted and implemented before such amendment to the Constitution takes effect, but any provincial functions, assets, rights, obligations, duties or liabilities may only be transferred in terms of that Act after that amendment to the Constitution takes effect.

[Sub-s. (3) added by s. 1 of the Constitution Twelfth Amendment Act of 2005.]

[Date of commencement of s. 103 (3): 23 December 2005.]

Provincial Legislatures (ss 104-124)

104 Legislative authority of provinces

(1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power-

(a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;

(b) to pass legislation for its province with regard to-

(i) any matter within a functional area listed in Schedule 4;

(ii) any matter within a functional area listed in Schedule 5;

(iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and

(iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and

(c) to assign any of its legislative powers to a Municipal Council in that province.

(2) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members, may request Parliament to change the name of that province.

(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.

(4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule

4, is for all purposes legislation with regard to a matter listed in Schedule 4.

(5) A provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law.

105 Composition and election of provincial legislatures

(1) A provincial legislature consists of women and men elected as members in terms of an electoral system that-

(a) is prescribed by national legislation;

(b) is based on that province's segment of the national common voters roll;

(c) provides for a minimum voting age of 18 years; and

(d) results, in general, in proportional representation.

[Sub-s. (1) amended by s. 3 of the Constitution Tenth Amendment Act of 2003 and by s. 3 of the Constitution Fourteenth Amendment Act of 2008.]

(2) A provincial legislature consists of between 30 and 80 members. The number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation.

106 Membership

(1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of a provincial legislature, except-

(a) anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service, other than-

(i) the Premier and other members of the Executive Council of a province; and

(ii) other office-bearers whose functions are compatible with the functions of a member of a

provincial legislature, and have been declared compatible with those functions by national legislation;

(b) members of the National Assembly, permanent delegates to the National Council of Provinces or members of a Municipal Council;

(c) unrehabilitated insolvents;

(d) anyone declared to be of unsound mind by a court of the Republic; or

(e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

(2) A person who is not eligible to be a member of a provincial legislature in terms of subsection (1) *(a)* or *(b)* may be a candidate for the legislature, subject to any limits or conditions established by national legislation.

(3) A person loses membership of a provincial legislature if that person-

(a) ceases to be eligible;

(b) is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership; or

(c) ceases to be a member of the party that nominated that person as a member of the legislature.

[Sub-s. (3) substituted by s. 4 of the Constitution Tenth Amendment Act of 2003 and by s. 4 of the Constitution Fourteenth Amendment Act of 2008.]

(4) Vacancies in a provincial legislature must be filled in terms of national legislation.

107 Oath or affirmation

Before members of a provincial legislature begin to perform their functions in the legislature, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

108 Duration of provincial legislatures

(1) A provincial legislature is elected for a term of five years.

(2) If a provincial legislature is dissolved in terms of section 109, or when its term expires, the Premier of the province, by proclamation, must call and set dates for an election, which must be held within 90 days of the date the legislature was dissolved or its term expired. A proclamation calling and setting dates for an election may be issued before or after the expiry of the term of a provincial legislature.

[Sub-s. (2) substituted by s. 1 of the Constitution Fourth Amendment Act of 1999.]

(3) If the result of an election of a provincial legislature is not declared within the period referred to in section 190, or if an election is set aside by a court, the President, by proclamation, must call and set dates for another election, which must be held within 90 days of the expiry of that period or of the date on which the election was set aside.

(4) A provincial legislature remains competent to function from the time it is dissolved or its term expires, until the day before the first day of polling for the next legislature.

109 Dissolution of provincial legislatures before expiry of term

(1) The Premier of a province must dissolve the provincial legislature if-

(a) the legislature has adopted a resolution to dissolve with a supporting vote of a majority of its members; and

(b) three years have passed since the legislature was elected.

(2) An Acting Premier must dissolve the provincial legislature if-

(a) there is a vacancy in the office of Premier; and

(b) the legislature fails to elect a new Premier within 30 days after the vacancy occurred.

110 Sittings and recess periods

(1) After an election, the first sitting of a provincial legislature must take place at a time and on a date determined by a judge designated by the Chief Justice, but not more than 14 days after the election result has been declared. A provincial legislature may determine the time and duration of its other sittings and its recess periods.

[Sub-s. (1) substituted by s. 8 of the Constitution Sixth Amendment Act of 2001.]

(2) The Premier of a province may summon the provincial legislature to an extraordinary sitting at any time to conduct special business.

(3) A provincial legislature may determine where it ordinarily will sit.

111 Speakers and Deputy Speakers

(1) At the first sitting after its election, or when necessary to fill a vacancy, a provincial legislature must elect a Speaker and a Deputy Speaker from among its members.

(2) A judge designated by the Chief Justice must preside over the election of a Speaker. The Speaker presides over the election of a Deputy Speaker.

[Sub-s. (2) substituted by s. 9 of the Constitution Sixth Amendment Act of 2001.]

(3) The procedure set out in Part A of Schedule 3 applies to the election of Speakers and Deputy Speakers.

(4) A provincial legislature may remove its Speaker or Deputy Speaker from office by resolution. A majority of the members of the legislature must be present when the resolution is adopted.

(5) In terms of its rules and orders, a provincial legislature may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

112 Decisions

(1) Except where the Constitution provides otherwise-

(a) a majority of the members of a provincial legislature must be present before a vote may be taken on a Bill or an amendment to a Bill;

(b) at least one third of the members must be present before a vote may be taken on any other question before the legislature; and

(c) all questions before a provincial legislature are decided by a majority of the votes cast.

(2) The member presiding at a meeting of a provincial legislature has no deliberative vote, but-

(a) must cast a deciding vote when there is an equal number of votes on each side of a question; and

(b) may cast a deliberative vote when a question must be decided with a supporting vote of at least two thirds of the members of the legislature.

113 Permanent delegates' rights in provincial legislatures

A province's permanent delegates to the National Council of Provinces may attend, and may speak in, their provincial legislature and its committees, but may not vote. The legislature may require a permanent delegate to attend the legislature or its committees.

114 Powers of provincial legislatures

(1) In exercising its legislative power, a provincial legislature may-

(a) consider, pass, amend or reject any Bill before the legislature; and

(b) initiate or prepare legislation, except money Bills.

(2) A provincial legislature must provide for mechanisms-

(a) to ensure that all provincial executive organs of state in the province are accountable to it; and

(b) to maintain oversight of-

(i) the exercise of provincial executive authority in the province, including the implementation of legislation; and

(ii) any provincial organ of state.

115 Evidence or information before provincial legislatures

A provincial legislature or any of its committees may-

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) require any person or provincial institution to report to it;

(c) compel, in terms of provincial legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph *(a)* or *(b)*; and

(d) receive petitions, representations or submissions from any interested persons or institutions.

116 Internal arrangements, proceedings and procedures of provincial legislatures

(1) A provincial legislature may-

(a) determine and control its internal arrangements, proceedings and procedures; and

(b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

(2) The rules and orders of a provincial legislature must provide for-

(a) the establishment, composition, powers, functions, procedures and duration of its committees;

(b) the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy;

(c) financial and administrative assistance to each party represented in the legislature, in proportion to its representation, to enable the party and its leader to perform their functions in the legislature effectively; and

(d) the recognition of the leader of the largest opposition party in the legislature, as the Leader of the Opposition.

117 Privilege

(1) Members of a provincial legislature and the province's permanent delegates to the National Council of Provinces-

(a) have freedom of speech in the legislature and in its committees, subject to its rules and orders; and

(b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-

(i) anything that they have said in, produced before or submitted to the legislature or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the legislature or any of its committees.

(2) Other privileges and immunities of a provincial legislature and its members may be prescribed by national legislation.

(3) Salaries, allowances and benefits payable to members of a provincial legislature are a direct charge against the Provincial Revenue Fund.

118 Public access to and involvement in provincial legislatures

(1) A provincial legislature must-

(a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken-

(i) to regulate public access, including access of the media, to the legislature and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

119 Introduction of Bills

Only members of the Executive Council of a province or a committee or member of a provincial legislature may introduce a Bill in the legislature; but only the member of the Executive Council who is responsible for financial matters in the province may introduce a money Bill in the legislature.

120 Money Bills

(1) A Bill is a money Bill if it-

(a) appropriates money;

(b) imposes provincial taxes, levies, duties or surcharges;

(c) abolishes or reduces, or grants exemptions from, any provincial taxes, levies, duties or surcharges; or

(d) authorises direct charges against a Provincial Revenue Fund.

(2) A money Bill may not deal with any other matter except-

(a) a subordinate matter incidental to the appropriation of money;

(b) the imposition, abolition or reduction of provincial taxes, levies, duties or surcharges;

(c) the granting of exemption from provincial taxes, levies, duties or surcharges; or

(d) the authorisation of direct charges against a Provincial Revenue Fund.

(3) A provincial Act must provide for a procedure by which the province's legislature may amend a money Bill.

[S. 120 substituted by s. 3 of the Constitution Seventh Amendment Act of 2001.]

121 Assent to Bills

(1) The Premier of a province must either assent to and sign a Bill passed by the provincial legislature in terms of this Chapter or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration.

(2) If, after reconsideration, a Bill fully accommodates the Premier's reservations, the Premier must assent to and sign the Bill; if not, the Premier must either-

(a) assent to and sign the Bill; or

(b) refer it to the Constitutional Court for a decision on its constitutionality.

(3) If the Constitutional Court decides that the Bill is constitutional, the Premier must assent to and; sign it.

122 Application by members to Constitutional Court

(1) Members of a provincial legislature may apply to the Constitutional Court for an order declaring that all or part of a provincial Act is unconstitutional.

(2) An application-

(a) must be supported by at least 20 per cent of the members of the legislature; and

(b) must be made within 30 days of the date on which the Premier assented to and signed the Act.

(3) The Constitutional Court may order that all or part of an Act that is the subject of an application in terms of subsection (1) has no force until the Court has decided the application if-

(a) the interests of justice require this; and

(b) the application has a reasonable prospect of success.

(4) If an application is unsuccessful, and did not have a reasonable prospect of success, the Constitutional Court may order the applicants to pay costs.

123 Publication of provincial Acts

A Bill assented to and signed by the Premier of a province becomes a provincial Act, must be published promptly and takes effect when published or on a date determined in terms of the Act.

124 Safekeeping of provincial Acts

The signed copy of a provincial Act is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping.

125 Executive authority of provinces

(1) The executive authority of a province is vested in the Premier of that province.

(2) The Premier exercises the executive authority, together with the other members of the Executive Council, by-

(a) implementing provincial legislation in the province;

(b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;

(c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;

(d) developing and implementing provincial policy;

(e) co-ordinating the functions of the provincial administration and its departments;

(f) preparing and initiating provincial legislation; and

(g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.

(3) A province has executive authority in terms of subsection (2) *(b)* only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2).

(4) Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.

(5) Subject to section 100, the implementation of provincial legislation in a province is an exclusive provincial executive power.

(6) The provincial executive must act in accordance with-

(a) the Constitution; and

(b) the provincial constitution, if a constitution has been passed for the province.

126 Assignment of functions

A member of the Executive Council of a province may assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council. An assignment-

(a) must be in terms of an agreement between the relevant Executive Council member and the Municipal Council;

(b) must be consistent with the Act in terms of which the relevant power or function is exercised or performed; and

(c) takes effect upon proclamation by the Premier.

127 Powers and functions of Premiers

(1) The Premier of a province has the powers and functions entrusted to that office by the Constitution and any legislation.

(2) The Premier of a province is responsible for-

(a) assenting to and signing Bills;

(b) referring a Bill back to the provincial legislature for reconsideration of the Bill's constitutionality;

(c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;

(d) summoning the legislature to an extraordinary sitting to conduct special business;

(e) appointing commissions of inquiry; and

(f) calling a referendum in the province in

accordance with national legislation.

128 Election of Premiers

(1) At its first sitting after its election, and whenever necessary to fill a vacancy, a provincial legislature must elect a woman or a man from among its members to be the Premier of the province.

(2) A judge designated by the Chief Justice must preside over the election of the Premier. The procedure set out in Part A of Schedule 3 applies to the election of the Premier.

[Sub-s. (2) substituted by s. 10 of the Constitution Sixth Amendment Act of 2001.]

(3) An election to fill a vacancy in the office of Premier must be held at a time and on a date determined by the Chief Justice, but not later than 30 days after the vacancy occurs.

[Sub-s. (3) substituted by s. 10 of the Constitution Sixth Amendment Act of 2001.]

129 Assumption of office by Premiers

A Premier-elect must assume office within five days of being elected, by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

130 Term of office and removal of Premiers

(1) A Premier's term of office begins when the Premier assumes office and ends upon a vacancy occurring or when the person next elected Premier assumes office.

(2) No person may hold office as Premier for more than two terms, but when a person is elected to fill a vacancy in the office of Premier, the period between that election and the next election of a Premier is not regarded as a term.

(3) The legislature of a province, by a resolution adopted with a supporting vote of at least two thirds of its members,

may remove the Premier from office only on the grounds of-

(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office.

(4) Anyone who has been removed from the office of Premier in terms of subsection (3) *(a)* or *(b)* may not receive any benefits of that office, and may not serve in any public office.

131 Acting Premiers

(1) When the Premier is absent or otherwise unable to fulfil the duties of the office of Premier, or during a vacancy in the office of Premier, an office-bearer in the order below acts as the Premier:

(a) A member of the Executive Council designated by the Premier.

(b) A member of the Executive Council designated by the other members of the Council.

(c) The Speaker, until the legislature designates one of its other members.

(2) An Acting Premier has the responsibilities, powers and functions of the Premier.

(3) Before assuming the responsibilities, powers and functions of the Premier, the Acting Premier must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

132 Executive Councils

(1) The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.

(2) The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and

may dismiss them.

133 Accountability and responsibilities

(1) The members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier.

(2) Members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.

(3) Members of the Executive Council of a province must-

(a) act in accordance with the Constitution and, if a provincial constitution has been passed for the province, also that constitution; and

(b) provide the legislature with full and regular reports concerning matters under their control.

134 Continuation of Executive Councils after elections

When an election of a provincial legislature is held, the Executive Council and its members remain competent to function until the person elected Premier by the next legislature assumes office.

135 Oath or affirmation

Before members of the Executive Council of a province begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

136 Conduct of members of Executive Councils

(1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Executive Council of a province may not-

(a) undertake any other paid work;

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

137 Transfer of functions

The Premier by proclamation may transfer to a member of the Executive Council-

(a) the administration of any legislation entrusted to another member; or

(b) any power or function entrusted by legislation to another member.

138 Temporary assignment of functions

The Premier of a province may assign to a member of the Executive Council any power or function of another member who is absent from office or is unable to exercise that power or perform that function.

139 Provincial intervention in local government

(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-

(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;

(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to-

(i) maintain essential national standards or

meet established minimum standards for the rendering of a service;

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii) maintain economic unity; or

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

(2) If a provincial executive intervenes in a municipality in terms of subsection (1) *(b)*-

(a) it must submit a written notice of the intervention to-

(i) the Cabinet member responsible for local government affairs; and

(ii) the relevant provincial legislature and the National Council of Provinces,

within 14 days after the intervention began;

(b) the intervention must end if-

(i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or

(ii) the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

(c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.

(3) If a Municipal Council is dissolved in terms of

subsection (1) *(c)*-

(a) the provincial executive must immediately submit a written notice of the dissolution to-

(i) the Cabinet member responsible for local government affairs; and

(ii) the relevant provincial legislature and the National Council of Provinces; and

(b) the dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.

(4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and-

(a) appointing an administrator until a newly elected Municipal Council has been declared elected; and

(b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.

(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must-

(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which-

(i) is to be prepared in accordance with national legislation; and

(ii) binds the municipality in the exercise of its

legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and-

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph *(b)*, assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

(6) If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to-

(a) the Cabinet member responsible for local government affairs; and

(b) the relevant provincial legislature and the National Council of Provinces,

within seven days after the intervention began.

(7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.

(8) National legislation may regulate the implementation of this section, including the processes established by this

section.

[S. 139 substituted by s. 4 of the Constitution Eleventh Amendment Act of 2003.]

140 Executive decisions

(1) A decision by the Premier of a province must be in writing if it-

(a) is taken in terms of legislation; or

(b) has legal consequences.

(2) A written decision by the Premier must be countersigned by another Executive Council member if that decision concerns a function assigned to that other member.

(3) Proclamations, regulations and other instruments of subordinate legislation of a province must be accessible to the public.

(4) Provincial legislation may specify the manner in which, and the extent to which, instruments mentioned in subsection (3) must be-

(a) tabled in the provincial legislature; and

(b) approved by the provincial legislature.

141 Motions of no confidence

(1) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the province's Executive Council excluding the Premier, the Premier must reconstitute the Council.

(2) If a provincial legislature, by a vote supported by a majority of its members, passes a motion of no confidence in the Premier, the Premier and the other members of the Executive Council must resign.

Provincial Constitutions (ss 142-145)

142 Adoption of provincial constitutions

A provincial legislature may pass a constitution for the

province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill.

143 Contents of provincial constitutions

(1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for-

(a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or

(b) the institution, role, authority and status of a traditional monarch, where applicable.

(2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraph *(a)* or *(b)* of subsection (1)-

(a) must comply with the values in section 1 and with Chapter 3; and

(b) may not confer on the province any power or function that falls-

(i) outside the area of provincial competence in terms of Schedules 4 and 5; or

(ii) outside the powers and functions conferred on the province by other sections of the Constitution.

144 Certification of provincial constitutions

(1) If a provincial legislature has passed or amended a constitution, the Speaker of the legislature must submit the text of the constitution or constitutional amendment to the Constitutional Court for certification.

(2) No text of a provincial constitution or constitutional amendment becomes law until the Constitutional Court has certified-

(a) that the text has been passed in accordance with section 142; and

(b) that the whole text complies with section 143.

145 Signing, publication and safekeeping of provincial constitutions

(1) The Premier of a province must assent to and sign the text of a provincial constitution or constitutional amendment that has been certified by the Constitutional Court.

(2) The text assented to and signed by the Premier must be published in the national *Government Gazette* and takes effect on publication or on a later date determined in terms of that constitution or amendment.

(3) The signed text of a provincial constitution or constitutional amendment is conclusive evidence of its provisions and, after publication, must be entrusted to the Constitutional Court for safekeeping.

Conflicting Laws (ss 146-150)

146 Conflicts between national and provincial legislation

(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing-

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for-

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that-

(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) *(c)* and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.

(7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to

have been approved by the Council.

(8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.

147 Other conflicts

(1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to-

(a) a matter concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution;

(b) national legislative intervention in terms of section 44 (2), the national legislation prevails over the provision of the provincial constitution; or

(c) a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.

(2) National legislation referred to in section 44 (2) prevails over provincial legislation in respect of matters within the functional areas listed in Schedule 5.

148 Conflicts that cannot be resolved

If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution.

149 Status of legislation that does not prevail

A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation becomes inoperative for as long as the conflict remains.

150 Interpretation of conflicts

When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.

Chapter 7
Local Government (ss 151-164)

151 Status of municipalities

(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

152 Objects of local government

(1) The objects of local government are-

(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and

community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

153 Developmental duties of municipalities

A municipality must-

(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and

(b) participate in national and provincial development programmes.

154 Municipalities in co-operative government

(1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

(2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

155 Establishment of municipalities

(1) There are the following categories of municipality:

(a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.

(b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.

(c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.

(2) National legislation must define the different types of municipality that may be established within each category.

(3) National legislation must-

(a) establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;

(b) establish criteria and procedures for the determination of municipal boundaries by an independent authority; and

(c) subject to section 229, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers and functions between another category B municipality and that category C municipality.

(4) The legislation referred to in subsection (3) must take into account the need to provide municipal services in an equitable and sustainable manner.

(5) Provincial legislation must determine the different types of municipality to be established in the province.

(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must-

(a) provide for the monitoring and support of local

government in the province; and

(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

(6A) . . . . . .

[Sub-s. (6A) inserted by s. 1 of the Constitution Third Amendment Act of 1998 and deleted by s. 2 of the Constitution Twelfth Amendment Act of 2005.]

(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).

156 Powers and functions of municipalities

(1) A municipality has executive authority in respect of, and has the right to administer-

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

(3) Subject to section 151 (4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A

of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-

(a) that matter would most effectively be administered locally; and

(b) the municipality has the capacity to administer it.

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

157 Composition and election of Municipal Councils

(1) A Municipal Council consists of-

(a) members elected in accordance with subsections (2) and (3); or

(b) if provided for by national legislation-

(i) members appointed by other Municipal Councils to represent those other Councils; or

(ii) both members elected in accordance with paragraph *(a)* and members appointed in accordance with subparagraph (i) of this paragraph.

[Sub-s. (1) substituted by s. 1 *(a)* of the Constitution Eighth Amendment Act of 2002 and amended by s. 3 of the Constitution Fifteenth Amendment Act of 2008.]

(2) The election of members to a Municipal Council as anticipated in subsection (1) *(a)* must be in accordance with national legislation, which must prescribe a system-

(a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or

(b) of proportional representation as described in paragraph *(a)* combined with a system of ward representation based on that municipality's segment of the national common voters roll.

(3) An electoral system in terms of subsection (2) must result, in general, in proportional representation.

[Sub-s. (3) substituted by s. 1 *(b)* of the Constitution Eighth Amendment Act of 2002.]

(4) *(a)* If the electoral system includes ward representation, the delimitation of wards must be done by an independent authority appointed in terms of, and operating according to, procedures and criteria prescribed by national legislation.

(b) . . . . . .

[Para. *(b)* deleted by s. 3 of the Constitution Twelfth Amendment Act of 2005.]

[Sub-s. (4) substituted by s. 2 of the Constitution Third Amendment Act of 1998.]

(5) A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll.

(6) The national legislation referred to in subsection (1) *(b)* must establish a system that allows for parties and interests reflected within the Municipal Council making the appointment, to be fairly represented in the Municipal Council to which the appointment is made.

158 Membership of Municipal Councils

(1) Every citizen who is qualified to vote for a Municipal Council is eligible to be a member of that Council, except-

(a) anyone who is appointed by, or is in the service of, the municipality and receives remuneration for that appointment or service, and who has not been exempted from this disqualification in terms of national legislation;

(b) anyone who is appointed by, or is in the service of, the state in another sphere, and receives remuneration for that appointment or service, and who has been disqualified from membership of a Municipal Council in terms of national legislation;

(c) anyone who is disqualified from voting for the National Assembly or is disqualified in terms of section 47 (1) *(c)*, *(d)* or *(e)* from being a member of the Assembly;

(d) a member of the National Assembly, a delegate to the National Council of Provinces or a member of a provincial legislature; but this disqualification does not apply to a member of a Municipal Council representing local government in the National Council; or

(e) a member of another Municipal Council; but this disqualification does not apply to a member of a Municipal Council representing that Council in another Municipal Council of a different category.

(2) A person who is not eligible to be a member of a Municipal Council in terms of subsection (1) *(a)*, *(b)*, *(d)* or *(e)* may be a candidate for the Council, subject to any limits or conditions established by national legislation.

(3) Vacancies in a Municipal Council must be filled in terms of national legislation.

[Sub-s. (3) added by s. 4 of the Constitution Fifteenth Amendment Act of 2008.]

159 Terms of Municipal Councils

(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.

(2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.

(3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.

[S. 159 substituted by s. 1 of the Constitution Second Amendment Act of

160 Internal procedures

(1) A Municipal Council-

(a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;

(b) must elect its chairperson;

[Date of commencement of para. *(b)*: 30 June 1997.]

(c) may elect an executive committee and other committees, subject to national legislation; and

(d) may employ personnel that are necessary for the effective performance of its functions.

(2) The following functions may not be delegated by a Municipal Council:

(a) The passing of by-laws;

(b) the approval of budgets;

(c) the imposition of rates and other taxes, levies and duties; and

(d) the raising of loans.

(3) *(a)* A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.

(b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.

(c) All other questions before a Municipal Council are decided by a majority of the votes cast.

(4) No by-law may be passed by a Municipal Council unless-

(a) all the members of the Council have been given reasonable notice; and

(b) the proposed by-law has been published for public comment.

(5) National legislation may provide criteria for determining-

(a) the size of a Municipal Council;

(b) whether Municipal Councils may elect an executive committee or any other committee; or

(c) the size of the executive committee or any other committee of a Municipal Council.

(6) A Municipal Council may make by-laws which prescribe rules and orders for-

(a) its internal arrangements;

(b) its business and proceedings; and

(c) the establishment, composition, procedures, powers and functions of its committees.

(7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.

(8) Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that-

(a) allows parties and interests reflected within the Council to be fairly represented;

(b) is consistent with democracy; and

(c) may be regulated by national legislation.

161 Privilege

Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members.

162 Publication of municipal by-laws

(1) A municipal by-law may be enforced only after it has been published in the official gazette of the relevant province.

(2) A provincial *Official Gazette* must publish a municipal by-law upon request by the municipality.

(3) Municipal by-laws must be accessible to the public.

163 Organised local government

An Act of Parliament enacted in accordance with the procedure established by section 76 must-

(a) provide for the recognition of national and provincial organisations representing municipalities; and

(b) determine procedures by which local government may-

(i) consult with the national or a provincial government;

(ii) designate representatives to participate in the National Council of Provinces; and

(iii) participate in the process prescribed in the national legislation envisaged in section 221 (1) *(c)*.

[Para. *(b)* substituted by s. 4 of the Constitution Seventh Amendment Act of 2001.]

164 Other matters

Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

Chapter 8
Courts and Administration of Justice (ss 165-180)

165 Judicial authority

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially

and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

[Sub-s. (6) added by s. 1 of the Constitution Seventeenth Amendment Act of 2012.]

166 Judicial system

The courts are-

(a) the Constitutional Court;

(b) the Supreme Court of Appeal;

(c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;

[Para. *(c)* substituted by s. 2 *(a)* of the Constitution Seventeenth Amendment Act of 2012.]

(d) the Magistrates' Courts; and

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

[Para. *(e)* substituted by s. 2 *(b)* of the Constitution Seventeenth Amendment Act of 2012.]

167 Constitutional Court

(1) The Constitutional Court consists of the Chief Justice of

South Africa, the Deputy Chief Justice and nine other judges.

[Sub-s. (1) substituted by s. 11 of the Constitution Sixth Amendment Act of 2001.]

(2) A matter before the Constitutional Court must be heard by at least eight judges.

(3) The Constitutional Court-

(a) is the highest court of the Republic; and

(b) may decide-

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) makes the final decision whether a matter is within its jurisdiction.

[Sub-s. (3) substituted by s. 3 *(a)* of the Constitution Seventeenth Amendment Act of 2012.]

(4) Only the constitutional Court may-

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or

(f) certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision

whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.

[Sub-s. (5) substituted by s. 3 *(b)* of the Constitution Seventeenth Amendment Act of 2012.]

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court-

(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

168 Supreme Court of Appeal

(1) The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms an Act of Parliament.

[Sub-s. (1) substituted by s. 12 of the Constitution Sixth Amendment Act of 2001.]

(2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.

[Sub-s. (2) substituted by s. 12 of the Constitution Sixth Amendment Act of 2001.]

(3) *(a)* The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.

(b) The Supreme Court of Appeal may decide only-

(i) appeals;
(ii) issues connected with appeals; and
(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

[Sub-s. (3) substituted by s. 4 of the Constitution Seventeenth Amendment Act of 2012.]

169 High Court of South Africa

(1) The High Court of South Africa may decide-

(a) any constitutional matter except a matter that-

(i) the Constitutional Court has agreed to hear directly in terms of section 167 (6) *(a)*; or

(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and

(b) any other matter not assigned to another court by an Act of Parliament.

(2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for-

(a) the establishing of Divisions, with one or more seats in a Division; and

(b) the assigning of jurisdiction to a Division or a seat within a Division.

(3) Each Division of the High Court of South Africa-

(a) has a Judge President;

(b) may have one or more Deputy Judges President; and

(c) has the number of other judges determined in terms of national legislation.

[S. 169 substituted by s. 5 of the Constitution Seventeenth Amendment Act of 2012.]

170 Other courts

All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of

Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

[S. 170 substituted by s. 6 of the Constitution Seventeenth Amendment Act of 2012.]

171 Court procedures

All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

172 Powers of courts in constitutional matters

(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) *(a)* The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[Para. *(a)* substituted by s. 7 of the Constitution Seventeenth Amendment Act of 2012.]

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other

temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

173 Inherent power

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

[S. 173 substituted by s. 8 of the Constitution Seventeenth Amendment Act of 2012.]

174 Appointment of judicial officers

(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

(3) The President as head of the national executive, after consulting the Judicial Service Commission and the leader of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.

[Sub-s. (3) substituted by s. 13 of the Constitution Sixth Amendment Act of 2001.]

(4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:

(a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.

(b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.

(c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

[Sub-s. (4) substituted by s. 13 of the Constitution Sixth Amendment Act of 2001.]

(5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.

(6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.

(7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

(8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.

175 Appointment of acting judges

(1) The President may appoint a woman or man to serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges who had been appointed to the Constitutional Court in terms of section 174 (4).

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.

[S. 175 amended by s. 14 of the Constitution Sixth Amendment Act of 2001 and substituted by s. 9 of the Constitution Seventeenth Amendment Act of 2012.]

176 Terms of office and remuneration

(1) A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.

[Sub-s. (1) substituted by s. 15 of the Constitution Sixth Amendment Act of 2001.]

(2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.

(3) The salaries, allowances and benefits of judges may not be reduced.

177 Removal

(1) A judge may be removed from office only if-

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent

or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

178 Judicial Service Commission

(1) There is a Judicial Service Commission consisting of-

(a) the Chief Justice, who presides at meetings of the Commission;

(b) the President of the Supreme Court of Appeal;

[Para. *(b)* substituted by s. 16 *(a)* of the Constitution Sixth Amendment Act of 2001.]

(c) one Judge President designated by the Judges President;

(d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;

(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;

(g) one teacher of law designated by teachers of law at South African universities;

(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;

(i) four permanent delegates to the National Council

of Provinces designated together by the Council with a supporting vote of at least six provinces;

(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them.

[Para. *(k)* substituted by s. 2 of the Constitution Second Amendment Act of 1998, by s. 16 *(b)* of the Constitution Sixth Amendment Act of 2001 and by s. 10 of the Constitution Seventeenth Amendment Act of 2012.]

(2) If the number of persons nominated from within the advocates' or attorneys' profession in terms of subsection (1) *(e)* or *(f)* equals the number of vacancies to be filled, the President must appoint them. If the number of persons nominated exceeds the number of vacancies to be filled, the President, after consulting the relevant profession, must appoint sufficient of the nominees to fill the vacancies, taking into account the need to ensure that those appointed represent the profession as a whole.

(3) Members of the Commission designated by the National Council of Provinces serve until they are replaced together, or until any vacancy occurs in their number. Other members who were designated or nominated to the Commission serve until they are replaced by those who designated or nominated them.

(4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.

(5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers any matter except the appointment of a judge, it must sit without

the members designated in terms of subsection (1) *(h)* and *(i)*.

(6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.

(7) If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.

[Sub-s. (7) added by s. 2 *(b)* of the Constitution Second Amendment Act of 1998 and substituted by s. 16 *(c)* of the Constitution Sixth Amendment Act of 2001.]

(8) The President and the persons who appoint, nominate or designate the members of the Commission in terms of subsection (1) *(c)*, *(e)*, *(f)* and *(g)*, may, in the same manner appoint, nominate or designate an alternate for each of those members, to serve on the Commission whenever the member concerned is temporarily unable to do so by reason of his or her incapacity or absence from the Republic or for any other sufficient reason.

[Sub-s. (8) added by s. 2 *(b)* of the Constitution Second Amendment Act of 1998.]

179 Prosecuting authority

(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute

criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions-

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions-

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority

must be determined by national legislation.

180 Other matters concerning administration of justice

National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including-

(a) training programmes for judicial officers;

(b) procedures for dealing with complaints about judicial officers; and

(c) the participation of people other than judicial officers in court decisions.

Chapter 9
State Institutions Supporting Constitutional Democracy (ss 181-194)

181 Establishment and governing principles

(1) The following state institutions strengthen constitutional democracy in the Republic:

(a) The Public Protector.

(b) The South African Human Rights Commission.

[Para. *(b)* amended by s. 4 of the Constitution Second Amendment Act of 1998.]

(c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

(d) The Commission for Gender Equality.

(e) The Auditor-General.

(f) The Electoral Commission.

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other

measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

Public Protector (ss 182-183)

182 Functions of Public Protector

(1) The Public Protector has the power, as regulated by national legislation-

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) An report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

183 Tenure

The Public Protector is appointed for a non-renewable

period of seven years.

South African Human Rights Commission (s 184)

184 Functions of South African Human Rights Commission

(1) The South African Human Rights Commission must-

(a) promote respect for human rights and a culture of human rights;

(b) promote the protection, development and attainment of human rights; and

(c) monitor and assess the observance of human rights in the Republic.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power-

(a) to investigate and to report on the observance of human rights;

(b) to take steps to secure appropriate redress where human rights have been violated;

(c) to carry out research; and

(d) to educate.

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

(4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

[S. 184 amended by s. 4 of the Constitution Second Amendment Act of 1998.]

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (ss 185-186)

185 Functions of Commission

(1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are-

(a) to promote respect for the rights of cultural, religious and linguistic communities;

(b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and

(c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

(2) The Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.

(3) The Commission may report any matter which falls within its powers and functions to the South African Human Rights Commission for investigation.

[Sub-s. (3) amended by s. 4 of the Constitution Second Amendment Act of 1998.]

(4) The Commission has the additional powers and functions prescribed by national legislation.

186 Composition of Commission

(1) The number of members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and their appointment and terms of office must be prescribed by national legislation.

(2) The composition of the Commission must-

(a) be broadly representative of the main cultural,

religious and linguistic communities in South Africa; and

(b) broadly reflect the gender composition of South Africa.

Commission for Gender Equality (s 187)

187 Functions of Commission for Gender Equality

(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.

(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

(3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

Auditor-General (ss 188-189)

188 Functions of Auditor-General

(1) The Auditor-General must audit and report on the accounts, financial statements and financial management of-

(a) all national and provincial state departments and administrations;

(b) all municipalities; and

(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of-

(a) any institution funded from the National Revenue

Fund or a Provincial Revenue Fund or by a municipality; or

(b) any institution that is authorised in terms of any law to receive money for a public purpose.

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation.

189 Tenure

The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years.

Electoral Commission (ss 190-191)

190 Functions of Electoral Commission

(1) The Electoral Commission must-

(a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;

(b) ensure that those elections are free and fair; and

(c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

(2) The Electoral Commission has the additional powers and functions prescribed by national legislation.

191 Composition of Electoral Commission

The Electoral Commission must be composed of at least three persons. The number of members and their terms of office must be prescribed by national legislation.

Independent Authority to Regulate Broadcasting (s 192)

192 Broadcasting Authority

National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

General Provisions (ss 193-194)

193 Appointments

(1) The Public Protector and the members of any Commission established by this Chapter must be women or men who-

(a) are South African citizens;

(b) are fit and proper persons to hold the particular office; and

(c) comply with any other requirements prescribed by national legislation.

(2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

(3) The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

(4) The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of-

(a) the South African Human Rights Commission;

[Para. *(a)* amended by s. 4 of the Constitution Second Amendment Act of 1998.]

(b) the Commission for Gender Equality; and

(c) the Electoral Commission.

(5) The National Assembly must recommend persons-

(a) nominated by a committee of the Assembly

proportionally composed of members of all parties represented in the Assembly; and

(b) approved by the Assembly by a resolution adopted with a supporting vote-

(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or

(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

(6) The involvement of civil society in the recommendation process may be provided for as envisaged in section 59 (1) *(a)*.

194 Removal from office

(1) The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on-

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly; and

(c) the adoption by the Assembly of a resolution calling for that person's removal from office

(2) A resolution of the National Assembly concerning the removal from office of-

(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

(b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President-

(a) may suspend a person from office at any time

after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

(b) must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

Chapter 10
Public Administration (ss 195-197)

195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad

representation.

(2) The above principles apply to-

(a) administration in every sphere of government;

(b) organs of state; and

(c) public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.

196 Public Service Commission

(1) There is a single Public Service Commission for the Republic.

(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.

(3) Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere

with the functioning of the Commission.

(4) The powers and functions of the Commission are-

(a) to promote the values and principles set out in section 195, throughout the public service;

(b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;

(c) to propose measures to ensure effective and efficient performance within the public service;

(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;

(e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and

(f) either of its own accord or on receipt of any complaint-

(i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;

(ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;

(iii) to monitor and investigate adherence to applicable procedures in the public service; and

(iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the

public service;

(g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament.

[Para. *(g)* added by s. 3 of the Constitution Second Amendment Act of 1998.]

(5) The Commission is accountable to the National Assembly.

(6) The Commission must report at least once a year in terms of subsection (4) *(e)*-

(a) to the National Assembly; and

(b) in respect of its activities in a province, to the legislature of that province.

(7) The Commission has the following 14 commissioners appointed by the President:

(a) Five commissioners approved by the National Assembly in accordance with subsection (8) *(a)*; and

(b) one commissioner for each province nominated by the Premier of the province in accordance with subsection (8) *(b)*.

(8) *(a)* A commissioner appointed in terms of subsection (7) *(a)* must be-

(i) recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and

(ii) approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members.

(b) A commissioner nominated by the Premier of a province must be-

(i) recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the legislature; and

(ii) approved by the legislature by a resolution

adopted with a supporting vote of a majority of its members.

(9) An Act of Parliament must regulate the procedure for the appointment of commissioners.

(10) A commissioner is appointed for a term of five years, which is renewable for one additional term only, and must be a woman or a man who is-

(a) a South African citizen; and

(b) a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services.

(11) A commissioner may be removed from office only on-

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and

(c) the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office.

(12) The President must remove the relevant commissioner from office upon-

(a) the adoption by the Assembly of a resolution calling for that commissioner's removal; or

(b) written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner's removal.

(13) Commissioners referred to in subsection (7) *(b)* may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation.

197 Public Service

(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

(4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.

Chapter 11
Security Services (ss 198-210)

198 Governing principles

The following principles govern national security in the Republic:

(a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.

(b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.

(c) National security must be pursued in compliance

with the law, including international law.

(d) National security is subject to the authority of Parliament and the national executive.

199 Establishment, structuring and conduct of security services

(1) The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

(2) The defence force is the only lawful military force in the Republic.

(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

(4) The security services must be structured and regulated by national legislation.

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.

(6) No member of any security service may obey a manifestly illegal order.

(7) Neither the security services, nor any of their members, may, in the performance of their functions-

(a) prejudice a political party interest that is legitimate in terms of the Constitution; or

(b) further, in a partisan manner, any interest of a political party.

(8) To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.

200 Defence force

(1) The defence force must be structured and managed as a disciplined military force.

(2) The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

201 Political responsibility

(1) A member of the Cabinet must be responsible for defence.

(2) Only the President, as head of the national executive, may authorise the employment of the defence force-

(a) in co-operation with the police service;

(b) in defence of the Republic; or

(c) in fulfilment of an international obligation.

(3) When the defence force is employed for any purpose mentioned in subsection (2), the President must inform Parliament, promptly and in appropriate detail, of-

(a) the reasons for the employment of the defence force;

(b) any place where the force is being employed;

(c) the number of people involved; and

(d) the period for which the force is expected to be employed.

(4) If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the information required in subsection (3) to the appropriate oversight committee.

202 Command of defence force

(1) The President as head of the national executive is Commander-in-Chief of the defence force, and must appoint the Military Command of the defence force.

(2) Command of the defence force must be exercised in accordance with the directions of the Cabinet member responsible for defence, under the authority of the President.

203 State of national defence

(1) The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of-

(a) the reasons for the declaration;

(b) any place where the defence force is being employed; and

(c) the number of people involved.

(2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration.

(3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.

204 Defence civilian secretariat

A civilian secretariat for defence must be established by national legislation to function under the direction of the Cabinet member responsible for defence.

Police (ss 205-208)

205 Police service

(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.

(2) National legislation must establish the powers and

functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

206 Political responsibility

(1) A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.

(2) The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.

(3) Each province is entitled-

(a) to monitor police conduct;

(b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;

(c) to promote good relations between the police and the community;

(d) to assess the effectiveness of visible policing; and

(e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.

(4) A provincial executive is responsible for policing functions-

(a) vested in it by this Chapter;

(b) assigned to it in terms of national legislation; and

(c) allocated to it in the national policing policy.

(5) In order to perform the functions set out in subsection (3), a province-

(a) may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and

(b) must make recommendations to the Cabinet member responsible for policing.

(6) On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

(7) National legislation must provide a framework for the establishment, powers, functions and control of municipal police services.

(8) A committee composed of the Cabinet member and the members of the Executive Councils responsible for policing must be established to ensure effective co-ordination of the police service and effective co-operation among the spheres of government.

(9) A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions.

207 Control of police service

(1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

(3) The National Commissioner, with the concurrence of

the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.

(4) The provincial commissioners are responsible for policing in their respective provinces-

(a) as prescribed by national legislation; and

(b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).

(5) The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.

(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of, or disciplinary action against, that commissioner, in accordance with national legislation.

208 Police civilian secretariat

A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing.

Intelligence (ss 209-210)

209 Establishment and control of intelligence services

(1) Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive, and only in terms of national legislation.

(2) The President as head of the national executive must appoint a woman or a man as head of each intelligence

service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility.

210 Powers, functions and monitoring

National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for-

(a) the co-ordination of all intelligence services; and

(b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.

Chapter 12
Traditional Leaders (ss 211-212)

211 Recognition

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

212 Role of traditional leaders

(1) National legislation may provide for a role for traditional leadership as an institution at local level on

matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.

Chapter 13
Finance (ss 213-230A)

General Financial Matters (ss 213-219)

213 National Revenue Fund

(1) There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from the National Revenue Fund only-

(a) in terms of an appropriation by an Act of Parliament; or

(b) as a direct charge against the National Revenue Fund, when it is provided for in the Constitution or an Act of Parliament.

(3) A province's equitable share of revenue raised nationally is a direct charge against the National Revenue Fund.

[Date of commencement of s. 213: 1 January 1998.]

214 Equitable shares and allocations of revenue

(1) An Act of Parliament must provide for-

(a) the equitable division of revenue raised nationally among the national, provincial and local spheres of

government;

(b) the determination of each province's equitable share of the provincial share of that revenue; and

(c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

(2) The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account-

(a) the national interest;

(b) any provision that must be made in respect of the national debt and other national obligations;

(c) the needs and interests of the national government, determined by objective criteria;

(d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;

(e) the fiscal capacity and efficiency of the provinces and municipalities;

(f) developmental and other needs of provinces, local government and municipalities;

(g) economic disparities within and among the provinces;

(h) obligations of the provinces and municipalities in terms of national legislation;

(i) the desirability of stable and predictable allocations of revenue shares; and

(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

[Date of commencement of s. 214: 1 January 1998.]

215 National, provincial and municipal budgets

(1) National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and the public sector.

(2) National legislation must prescribe-

(a) the form of national, provincial and municipal budgets;

(b) when national and provincial budgets must be tabled; and

(c) that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.

(3) Budgets in each sphere of government must contain-

(a) estimates of revenue and expenditure, differentiating between capital and current expenditure;

(b) proposals for financing any anticipated deficit for the period to which they apply; and

(c) an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year.

[Date of commencement of s. 215: 1 January 1998.]

216 Treasury control

(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing-

(a) generally recognised accounting practice;

(b) uniform expenditure classifications; and

(c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with

the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

[Sub-s. (2) substituted by s. 5 *(a)* of the Constitution Seventh Amendment Act of 2001.]

(3) A decision to stop the transfer of funds due to a province in terms of section 214 (1) *(b)* may be taken only in the circumstances mentioned in subsection (2) and-

(a) may not stop the transfer of funds for more than 120 days; and

(b) may be enforced immediately, but will lapse retrospectively unless Parliament approves it following a process substantially the same as that established in terms of section 76 (1) and prescribed by the joint rules and orders of Parliament. This process must be completed within 30 days of the decision by the national treasury.

[Sub-s. (3) amended by s. 5 *(b)* of the Constitution Seventh Amendment Act of 2001.]

(4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time, following the process established in terms of subsection (3).

(5) Before Parliament may approve or renew a decision to stop the transfer of funds to a province-

(a) the Auditor-General must report to Parliament; and

(b) the province must be given an opportunity to answer the allegations against it, and to state its case, before a committee.

[Date of commencement of s. 216: 1 January 1998.]

217 Procurement

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or

services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

[Sub-s. (3) substituted by s. 6 of the Constitution Seventh Amendment Act of 2001.]

218 Government guarantees

(1) The national government, a provincial government or a municipality may guarantee a loan only if the guarantee complies with any conditions set out in national legislation.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

(3) Each year, every government must publish a report on the guarantees it has granted.

[Date of commencement of s. 218: 1 January 1998.]

219 Remuneration of persons holding public office

(1) An Act of Parliament must establish a framework for determining-

(a) the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders; and

(b) the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories.

(2) National legislation must establish an independent commission to make recommendations concerning the salaries, allowances and benefits referred to in subsection (1).

(3) Parliament may pass the legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(4) The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).

(5) National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192.

Financial and Fiscal Commission (ss 220-222)

220 Establishment and functions

(1) There is a Financial and Fiscal Commission for the Republic which makes recommendations envisaged in this Chapter, or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.

(2) The Commission is independent and subject only to the Constitution and the law, and must be impartial.

(3) The Commission must function in terms of an Act of Parliament and, in performing its functions, must consider all

relevant factors, including those listed in section 214 (2).

221 Appointment and tenure of members

(1) The Commission consists of the following women and men appointed by the President, as head of the national executive:

(a) A chairperson and deputy chairperson;

(b) three persons selected, after consulting the Premiers, from a list compiled in accordance with a process prescribed by national legislation;

(c) two persons selected, after consulting organised local government, from a list compiled in accordance with a process prescribed by national legislation; and

(d) two other persons.

[Sub-s. (1) amended by s. 2 of the Constitution Fifth Amendment Act of 1999 and substituted by s. 7 *(a)* of the Constitution Seventh Amendment Act of 2001.]

(1A) National legislation referred to in subsection (1) must provide for the participation of-

(a) the Premiers in the compilation of a list envisaged in subsection (1) *(b)*; and

(b) organised local government in the compilation of a list envisaged in subsection (1) *(c)*.

[Sub-s. (1A) inserted by 7 *(b)* of the Constitution Seventh Amendment Act of 2001.]

(2) Members of the Commission must have appropriate expertise.

(3) Members serve for a term established in terms of national legislation. The President may remove a member from office on the ground of misconduct, incapacity or incompetence.

222 Reports

The Commission must report regularly both to Parliament and to the provincial legislatures.

Central Bank (ss 223-225)

223 Establishment

The South African Reserve Bank is the central bank of the Republic and is regulated in terms of an Act of Parliament.

224 Primary object

(1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.

(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

225 Powers and functions

The powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, which powers and functions must be determined by an Act of Parliament and must be exercised or performed subject to the conditions prescribed in terms of that Act.

Provincial and Local Financial Matters (ss 226-230A)

226 Provincial Revenue Funds

(1) There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from a Provincial Revenue Fund only-

(a) in terms of an appropriation by a provincial Act; or

(b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.

(3) Revenue allocated through a province to local government in that province in terms of section 214 (1), is a direct charge against that province's Revenue Fund.

(4) National legislation may determine a framework within which-

(a) a provincial Act may in terms of subsection (2) *(b)* authorise the withdrawal of money as a direct charge against a Provincial Revenue Fund; and

(b) revenue allocated through a province to local government in that province in terms of subsection (3) must be paid to municipalities in the province.

[Sub-s. (4) added by s. 8 of the Constitution Seventh Amendment Act of 2001.]

[Date of commencement of s. 226: 1 January 1998.]

227 National sources of provincial and local government funding

(1) Local government and each province-

(a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and

(b) may receive other allocations from national government revenue, either conditionally or unconditionally.

(2) Additional revenue raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.

(3) A province's equitable share of revenue raised

nationally must be transferred to the province promptly and without deduction, except when the transfer has been stopped in terms of section 216.

(4) A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution.

[Date of commencement of s. 227: 1 January 1998.]

228 Provincial taxes

(1) A provincial legislature may impose-

(a) taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and

(b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.

[Para. *(b)* substituted by s. 9 of the Constitution Seventh Amendment Act of 2001.]

(2) The power of a provincial legislature to impose taxes, levies, duties and surcharges-

(a) may not be exercised in way that materially and unreasonably prejudices national economic policies, economic activities across provincial boundaries, or the national mobility of goods, services, capital or labour; and

(b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

[Date of commencement of s. 228: 1 January 1998.]

229 Municipal fiscal powers and functions

(1) Subject to subsections (2), (3) and (4), a municipality may impose-

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

(b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.

(2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties-

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and

(b) may be regulated by national legislation.

(3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:

(a) The need to comply with sound principles of taxation.

(b) The powers and functions performed by each municipality.

(c) The fiscal capacity of each municipality.

(d) The effectiveness and efficiency of raising taxes, levies and duties.

(e) Equity.

(4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.

(5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.

[Date of commencement of s. 229: 1 January 1998.]

230 Provincial loans

(1) A province may raise loans for capital or current expenditure in accordance with national legislation, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

[S. 230 substituted by s. 10 of the Constitution Seventh Amendment Act of 2001.]

[Date of commencement of s. 230: 1 January 1998.]

230A Municipal loans

(1) A Municipal Council may, in accordance with national legislation-

(a) raise loans for capital or current expenditure for the municipality, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year; and

(b) bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality.

(2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

[S. 230A inserted by s. 17 of the Constitution Sixth Amendment Act of 2001.]

Chapter 14

General Provisions (ss 231-243)

International Law (ss 231-233)

231 International agreements

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

232 Customary international law

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

233 Application of international law

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is

consistent with international law over any alternative interpretation that is inconsistent with international law.

Other Matters (ss 234-243)

234 Charters of Rights

In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

235 Self-determination

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.

236 Funding for political parties

To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.

237 Diligent performance of obligations

All constitutional obligations must be performed diligently and without delay.

238 Agency and delegation

An executive organ of state in any sphere of government may-

(a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the

power is exercised or the function is performed; or

(b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

239 Definitions

In the Constitution, unless the context indicates otherwise-

'national legislation' includes-

(a) subordinate legislation made in terms of an Act of Parliament; and

(b) legislation that was in force when the Constitution took effect and that is administered by the national government;

'organ of state' means-

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer;

'provincial legislation' includes-

(a) subordinate legislation made in terms of a provincial Act; and

(b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.

240 Inconsistencies between different texts

In the event of an inconsistency between different texts of the Constitution, the English text prevails.

241 Transitional arrangements

Schedule 6 applies to the transition to the new constitutional order established by this Constitution, and any matter incidental to that transition.

242 Repeal of laws

The laws mentioned in Schedule 7 are repealed, subject to section 243 and Schedule 6.

243 Short title and commencement

(1) This Act is called the Constitution of the Republic of South Africa, 1996, and comes into effect as soon as possible on a date set by the President by proclamation, which may not be a date later than 1 July 1997.

(2) The President may set different dates before the date mentioned in subsection (1) in respect of different provisions of the Constitution.

(3) Unless the context otherwise indicates, a reference in a provision of the Constitution to a time when the Constitution took effect must be construed as a reference to the time when that provision took effect.

(4) If a different date is set for any particular provision of the Constitution in terms of subsection (2), any corresponding provision of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), mentioned in the proclamation, is repealed with effect from the same date.

(5) Sections 213, 214, 215, 216, 218, 226, 227, 228, 229 and 230 come into effect on 1 January 1998, but this does not preclude the enactment in terms of this Constitution of legislation envisaged in any of these provisions before that date. Until that date any corresponding and incidental provisions of the Constitution of the Republic of South Africa, 1993, remain in force.

Schedule 1
National flag

(1) The national flag is rectangular; it is one and a half times longer than it is wide.

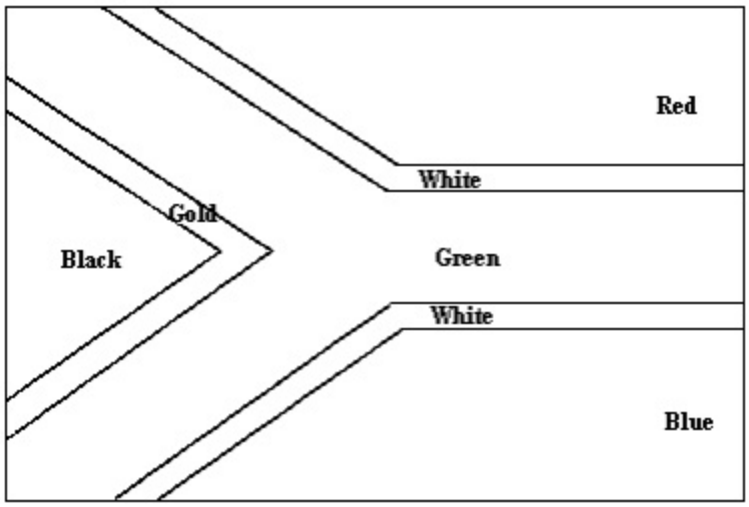
(2) It is black, gold, green, white, chilli red and blue.

(3) It has a green Y-shaped band that is one fifth as wide as the flag. The centre lines of the band start in the top and bottom corners next to the flag post, converge in the centre of the flag, and continue horizontally to the middle of the free edge.

(4) The green band is edged, above and below in white, and towards the flag post end, in gold. Each edging is one fifteenth as wide as the flag.

(5) The triangle next to the flag post is black.

(6) The upper horizontal band is chilli red and the lower horizontal band is blue. These bands are each one third as wide as the flag.



Schedule 1A
Geographical areas of provinces

[Schedule 1A inserted by s. 4 of the Constitution Twelfth Amendment Act of 2005 and amended by s. 12 of the Constitution Thirteenth Amendment Act of 2007 and by s. 1 of the Constitution Sixteenth

Amendment Act of 2009.]

The Province of the Eastern Cape

[Demarcation of the Province of the Eastern Cape substituted by the Constitution Thirteenth Amendment Act of 2007.]

Map No. 3 of Schedule 1 to Notice 1998 of 2005

Map No. 6 of Schedule 2 to Notice 1998 of 2005

Map No. 7 of Schedule 2 to Notice 1998 of 2005

Map No. 8 of Schedule 2 to Notice 1998 of 2005

Map No. 9 of Schedule 2 to Notice 1998 of 2005

Map No. 10 of Schedule 2 to Notice 1998 of 2005

Map No. 11 of Schedule 2 to Notice 1998 of 2005

The Province of the Free State

Map No. 12 of Schedule 2 to Notice 1998 of 2005

Map No. 13 of Schedule 2 to Notice 1998 of 2005

Map No. 14 of Schedule 2 to Notice 1998 of 2005

Map No. 15 of Schedule 2 to Notice 1998 of 2005

Map No. 16 of Schedule 2 to Notice 1998 of 2005

The Province of Gauteng

[Demarcation of the Province of Gauteng amended by the Constitution Sixteenth Amendment Act of 2009.]

Map No. 4 in Notice 1490 of 2008

[Reference to Map No. 4 substituted by s. 1 *(a)* of the Constitution Sixteenth Amendment Act of 2009.]

Map No. 17 of Schedule 2 to Notice 1998 of 2005

Map No. 18 of Schedule 2 to Notice 1998 of 2005

Map No. 19 of Schedule 2 to Notice 1998 of 2005

Map No. 20 of Schedule 2 to Notice 1998 of 2005

Map No. 21 of Schedule 2 to Notice 1998 of 2005

The Province of KwaZulu-Natal

[Demarcation of the Province of KwaZulu-Natal substituted by the Constitution Thirteenth Amendment Act of 2007.]

Map No. 22 of Schedule 2 to Notice 1998 of 2005

Map No. 23 of Schedule 2 to Notice 1998 of 2005

Map No. 24 of Schedule 2 to Notice 1998 of 2005

Map No. 25 of Schedule 2 to Notice 1998 of 2005

Map No. 26 of Schedule 2 to Notice 1998 of 2005

Map No. 27 of Schedule 2 to Notice 1998 of 2005

Map No. 28 of Schedule 2 to Notice 1998 of 2005

Map No. 29 of Schedule 2 to Notice 1998 of 2005

Map No. 30 of Schedule 2 to Notice 1998 of 2005

Map No. 31 of Schedule 2 to Notice 1998 of 2005

Map No. 32 of Schedule 2 to Notice 1998 of 2005

The Province of Limpopo

Map No. 33 of Schedule 2 to Notice 1998 of 2005

Map No. 34 of Schedule 2 to Notice 1998 of 2005

Map No. 35 of Schedule 2 to Notice 1998 of 2005

Map No. 36 of Schedule 2 to Notice 1998 of 2005

Map No. 37 of Schedule 2 to Notice 1998 of 2005

The Province of Mpumalanga

Map No. 38 of Schedule 2 to Notice 1998 of 2005

Map No. 39 of Schedule 2 to Notice 1998 of 2005

Map No. 40 of Schedule 2 to Notice 1998 of 2005

The Province of the Northern Cape

Map No. 41 of Schedule 2 to Notice 1998 of 2005

Map No. 42 of Schedule 2 to Notice 1998 of 2005

Map No. 43 of Schedule 2 to Notice 1998 of 2005

Map No. 44 of Schedule 2 to Notice 1998 of 2005

Map No. 45 of Schedule 2 to Notice 1998 of 2005

The Province of North West

[Demarcation of the Province of North West amended by the Constitution Sixteenth Amendment Act of 2009.]

Map No. 5 in Notice 1490 of 2008

[Reference to Map No. 5 substituted by s. 1 *(b)* of the Constitution Sixteenth Amendment Act of 2009.]

Map No. 46 of Schedule 2 to Notice 1998 of 2005

Map No. 47 of Schedule 2 to Notice 1998 of 2005

Map No. 48 of Schedule 2 to Notice 1998 of 2005

The Province of the Western Cape

Map No. 49 of Schedule 2 to Notice 1998 of 2005

Map No. 50 of Schedule 2 to Notice 1998 of 2005

Map No. 51 of Schedule 2 to Notice 1998 of 2005

Map No. 52 of Schedule 2 to Notice 1998 of 2005

Map No. 53 of Schedule 2 to Notice 1998 of 2005

Map No. 54 of Schedule 2 to Notice 1998 of 2005

Schedule 2
Oaths and solemn affirmations

[Schedule 2 amended by s. 2 of the Constitution First Amendment Act of 1997 and substituted by s. 18 of the Constitution Sixth Amendment Act of 2001.]

1 Oath or solemn affirmation of President and Acting President

The President or Acting President, before the Chief Justice, or another judge designated by the Chief Justice, must swear/affirm as follows:

In the presence of everyone assembled here, and in full realisation of the high calling I assume as President/Acting President of the Republic of South Africa, I, A.B., swear/ solemnly affirm that I will be faithful to the Republic of South Africa, and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always-

- promote all that will advance the Republic, and oppose all that may harm it;
- protect and promote the rights of all South Africans;
- discharge my duties with all my strength and talents to the best of my knowledge and ability and true to the dictates of my conscience;
- do justice to all; and
- devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

2 Oath or solemn affirmation of Deputy President

The Deputy President, before the Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows:

In the presence of everyone assembled here, and in full realisation of the high calling I assume as Deputy President of the Republic of South Africa, I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, observe, uphold and maintain the Constitution and all other law of the Republic; and I solemnly and sincerely promise that I will always-

- promote all that will advance the Republic, and oppose all that may harm it;
- be a true and faithful counsellor;
- discharge my duties with all my strength and

talents to the best of my knowledge and ability and true to the dictates of my conscience;

- do justice to all; and
- devote myself to the well-being of the Republic and all of its people.

(In the case of an oath: So help me God.)

3 Oath or solemn affirmation of Ministers and Deputy Ministers

Each Minister and Deputy Minister, before the Chief Justice or another judge designated by the Chief Justice, must swear/affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Minister/Deputy Minister with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.

(In the case of an oath: So help me God.)

4 Oath or solemn affirmation of members of the National Assembly, permanent delegates to the National Council of Provinces and members of the provincial legislatures

(1) Members of the National Assembly, permanent delegates to the National Council of Provinces and members of provincial legislatures, before the Chief Justice or a judge designated by the Chief Justice, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I

solemnly promise to perform my functions as a member of the National Assembly/ permanent delegate to the National Council of Provinces/member of the legislature of the province of C.D. to the best of my ability.

(In the case of an oath: So help me God.)

(2) Persons filling a vacancy in the National Assembly, a permanent delegation to the National Council of Provinces or a provincial legislature may swear or affirm in terms of subitem (1) before the presiding officer of the Assembly, Council or legislature, as the case may be.

5 Oath or solemn affirmation of Premiers, Acting Premiers and members of provincial Executive Councils

The Premier or Acting Premier of a province, and each member of the Executive Council of a province, before the Chief Justice or a judge designated by the Chief Justice, must swear/affirm as follows:

I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I undertake to hold my office as Premier/Acting Premier/ member of the Executive Council of the province of C.D. with honour and dignity; to be a true and faithful counsellor; not to divulge directly or indirectly any secret matter entrusted to me; and to perform the functions of my office conscientiously and to the best of my ability.

(In the case of an oath: So help me God.)

6 Oath or solemn affirmation of Judicial Officers

(1) Each judge or acting judge, before the Chief Justice or another judge designated by the Chief Justice, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/

E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.

(In the case of an oath: So help me God.)

(2) A person appointed to the office of Chief Justice who is not already a judge at the time of that appointment must swear or affirm before the Deputy Chief Justice, or failing that judge, the next most senior available judge of the Constitutional Court.

(3) Judicial officers, and acting judicial officers, other than judges, must swear/affirm in terms of national legislation.

Schedule 3
Election procedures

[Schedule 3 amended by s. 19 of the Constitution Sixth Amendment Act of 2001, by s. 3 of the Constitution Ninth Amendment Act of 2002 and by s. 5 of the Constitution Fourteenth Amendment Act of 2008.]

Part A - Election procedures for constitutional office-bearers

1 Application

The procedure see out in this Schedule applies whenever-

(a) the National Assembly meets to elect the President, or the Speaker or Deputy Speaker of the Assembly;

(b) the National Council of Provinces meets to elect its Chairperson or a Deputy Chairperson; or

(c) a provincial legislature meets to elect the Premier of the province or the Speaker or Deputy Speaker of the legislature.

2 Nominations

The person presiding at a meeting to which this Schedule applies must call for the nomination of candidates at the

meeting.

3 Formal requirements

(1) A nomination must be made on the form prescribed by the rules mentioned in item 9.

(2) The form on which a nomination is made must be signed-

(a) by two members of the National Assembly, if the President or the Speaker or Deputy Speaker of the Assembly is to be elected;

(b) on behalf of two provincial delegations, if the Chairperson or a Deputy Chairperson of the National Council of Provinces is to be elected; or

(c) by two members of the relevant provincial legislature, if the Premier of the province or the Speaker or Deputy Speaker of the legislature is to be elected.

(3) A person who is nominated must indicate acceptance of the nomination by signing either the nomination form or any other form of written confirmation.

4 Announcement of names of candidates

At a meeting to which this Schedule applies, the person presiding must announce the names of the persons who have been nominated as candidates, but may not permit any debate.

5 Single candidate

If only one candidate is nominated, the person presiding must declare that candidate elected.

6 Election procedure

If more the one candidate is nominated-

(a) a vote must be taken at the meeting by secret ballot;

(b) each member present, or if it is a meeting of the National Council of Provinces each province represented, at the meeting may cast one vote; and

(c) the person presiding must declare elected the candidate who receives a majority of the votes.

7 Elimination procedure

(1) If no candidate receives a majority of the votes, the candidate who receives the lowest number of votes must be eliminated and a further vote taken on the remaining candidates in accordance with item 6. This procedure must be repeated until a candidate receives a majority of the votes.

(2) When applying subitem (1), if two or more candidates each have the lowest number of votes, a separate vote must be taken on those candidates, and repeated as often as may be necessary to determine which candidate is to be eliminated.

8 Further meetings

(1) If only two candidates are nominated, or if only two candidates remain after an elimination procedure has been applied, and those two candidates receive the same number of votes, a further meeting must be held within seven days, at a time determined by the person presiding.

(2) If a further meeting is held in terms of subitem (1), the procedure prescribed in this Schedule must be applied at that meeting as if it were the first meeting for the election in question.

9 Rules

(1) The Chief Justice must make rules prescribing-

(a) the procedure for meetings to which this Schedule applies;

(b) the duties of any person presiding at a meeting,

and of any person assisting the person presiding;

(c) the form on which nominations must be submitted; and

(d) the manner in which voting is to be conducted.

(2) These Rules must be made known in the way that the Chief Justice determines.

[Item 9 substituted by s. 19 of the Constitution Sixth Amendment Act of 2001.]

Part B - Formula to determine party participation in provincial delegations to the National Council of Provinces

1. The number of delegates in a provincial delegation to the National Council of Provinces to which a party is entitled, must be determined by multiplying the number of seats the party holds in the provincial legislature by ten and dividing the result by the number of seats in the legislature plus one.

2. If a calculation in terms of item 1 yields a surplus not absorbed by the delegates allocated to a party in terms of that item, the surplus must compete with similar surpluses accruing to any other party or parties, and any undistributed delegates in the delegation must be allocated to the party or parties in the sequence of the highest surplus.

3. If the competing surpluses envisaged in item 2 are equal, the undistributed delegates in the delegation must be allocated to the party or parties with the same surplus in the sequence from the highest to the lowest number of votes that have been recorded for those parties during the last election for the provincial legislature concerned.

[Item 3 added by s. 2 of the Constitution Fourth Amendment Act of 1999 and substituted by s. 3 of the Constitution Ninth Amendment Act of 2002 and by s. 5 *(a)* of the Constitution Fourteenth Amendment Act of 2008.]

4. If more than one party with the same surplus recorded the same number of votes during the last election for the provincial legislature concerned, the legislature concerned most allocate the undistributed delegates in the delegation to

the party or parties with the same surplus in a manner which is consistent with democracy.

[Item 4 added by s. 5 *(b)* of the Constitution Fourteenth Amendment Act of 2008.]

Schedule 4
Functional areas of concurrent national and provincial legislative competence

Part A

Administration of indigenous forests

Agriculture

Airports other than international and national airports

Animal control and diseases

Casinos, racing, gambling and wagering, excluding lotteries and sports pools

Consumer protection

Cultural matters

Disaster management

Education at all levels, excluding tertiary education

Environment

Health services

Housing

Indigenous law and customary law, subject to Chapter 12 of the Constitution

Industrial promotion

Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence

Media services directly controlled or provided by the

provincial government, subject to section 192

Nature conservation, excluding national parks, national botanical gardens and marine resources

Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence

Pollution control

Population development

Property transfer fees

Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5

Public transport

Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law

Regional planning and development

Road traffic regulation

Soil conservation

Tourism

Trade

Traditional leadership, subject to Chapter 12 of the Constitution

Urban and rural development

Vehicle licensing

Welfare services

Part B

The following local government matters to the extent set out in section 155 (6) *(a)* and (7):

Air pollution

Building regulations

Child care facilities

Electricity and gas reticulation

Firefighting services

Local tourism

Municipal airports

Municipal planning

Municipal health services

Municipal public transport

Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law

Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto

Stormwater management systems in built-up areas

Trading regulations

Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Schedule 5
Functional areas of exclusive provincial legislative competence

Part A

Abattoirs

Ambulance services

Archives other than national archives

Libraries other than national libraries

Liquor licences

Museums other than national museums

Provincial planning

Provincial cultural matters

Provincial recreation and amenities

Provincial sport

Provincial roads and traffic

Veterinary services, excluding regulation of the profession

Part B

The following local government matters to the extent set out for provinces in section 155 (6) *(a)* and (7):

Beaches and amusement facilities

Billboards and the display of advertisements in public places

Cemeteries, funeral parlours and crematoria

Cleansing

Control of public nuisances

Control of undertakings that sell liquor to the public

Facilities for the accommodation, care and burial of animals

Fencing and fences

Licensing of dogs

Licensing and control of undertakings that sell food to the public

Local amenities

Local sport facilities

Markets

Municipal abattoirs

Municipal parks and recreation

Municipal roads

Noise pollution

Pounds

Public places

Refuse removal, refuse dumps and solid waste disposal

Street trading

Street lighting

Traffic and parking

Schedule 6
Transitional arrangements

[Schedule 6 amended by s. 3 of the Constitution First Amendment Act of 1997, by s. 5 *(a)* of the Constitution Second Amendment Act of 1998, by s. 20 of the Constitution Sixth Amendment Act of 2001 and by s. 21 of Act 10 of 2012.]

1 Definitions

In this Schedule, unless inconsistent with the context-

'homeland' means a part of the Republic which, before the previous Constitution took effect, was dealt with in South African legislation as an independent or a self-governing territory;

'new Constitution' means the Constitution of the Republic of South Africa, 1996;

'old order legislation' means legislation enacted before the previous Constitution took effect;

'previous Constitution' means the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

2 Continuation of existing law

(1) All law that was in force when the new Constitution

took effect, continues in force, subject to-

(a) any amendment or repeal; and

(b) consistency with the new Constitution.

(2) Old order legislation that continues in force in terms of subitem (1)-

(a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and

(b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.

3 Interpretation of existing legislation

(1) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation that existed when the new Constitution took effect-

(a) to the Republic of South Africa or a homeland (except when it refers to a territorial area), must be construed as a reference to the Republic of South Africa under the new Constitution;

(b) to Parliament, the National Assembly or the Senate, must be construed as a reference to Parliament, the National Assembly or the National Council of Provinces under the new Constitution;

(c) to the President, an Executive Deputy President, a Minister, a Deputy Minister or the Cabinet, must be construed as a reference to the President, the Deputy President, a Minister, a Deputy Minister or the Cabinet under the new Constitution, subject to item 9 of this Schedule;

(d) to the President of the Senate, must be construed as a reference to the Chairperson of the National Council of Provinces;

(e) to a provincial legislature, Premier, Executive

Council or member of an Executive Council of a province, must be construed as a reference to a provincial legislature, Premier, Executive Council or member of an Executive Council under the new Constitution, subject to item 12 of this Schedule; or

(f) to an official language or languages, must be construed as a reference to any of the official languages under the new Constitution.

(2) Unless inconsistent with the context or clearly inappropriate, a reference in any remaining old order legislation-

(a) to a Parliament, a House of a Parliament or a legislative assembly or body of the Republic or of a homeland, must be construed as a reference to-

(i) Parliament under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or

(ii) the provincial legislature of a province, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive; or

(b) to a State President, Chief Minister, Administrator or other chief executive, Cabinet, Ministers' Council or executive council of the Republic or of a homeland, must be construed as a reference to-

(i) the President under the new Constitution, if the administration of that legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to the national executive; or

(ii) the Premier of a province under the new Constitution, if the administration of that

legislation has been allocated or assigned in terms of the previous Constitution or this Schedule to a provincial executive.

4 National Assembly

(1) Anyone who was a member or office-bearer of the National Assembly when the new Constitution took effect, becomes a member or office-bearer of the National Assembly under the new Constitution, and holds office as a member or office-bearer in terms of the new Constitution.

(2) The National Assembly as constituted in terms of subitem (1) must be regarded as having been elected under the new Constitution for a term that expires on 30 April 1999.

(3) The National Assembly consists of 400 members for the duration of its term that expires on 30 April 1999, subject to section 49 (4) of the new Constitution.

(4) The rules and orders of the National Assembly in force when the new Constitution took effect, continue in force, subject to any amendment or repeal.

5 Unfinished business before Parliament

(1) Any unfinished business before the National Assembly when the new Constitution takes effect must be proceeded with in terms of the new Constitution.

(2) Any unfinished business before the Senate when the new Constitution takes effect must be referred to the National Council of Provinces, and the Council must proceed with that business in terms of the new Constitution.

6 Elections of National Assembly

(1) No election of the National Assembly may be held before 30 April 1999 unless the Assembly is dissolved in terms of section 50 (2) after a motion of no confidence in the

President in terms of section 102 (2) of the new Constitution.

(2) Section 50 (1) of the new Constitution is suspended until 30 April 1999.

(3) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies-

(a) to the first election of the National Assembly under the new Constitution;

(b) to the loss of membership of the Assembly in circumstances other than those provided for in section 47 (3) of the new Constitution; and

(c) to the filling of vacancies in the Assembly, and the supplementation, review and use of party lists for the filling of vacancies, until the second election of the Assembly under the new Constitution.

(4) Section 47 (4) of the new Constitution is suspended until the second election of the National Assembly under the new Constitution.

7 National Council of Provinces

(1) For the period which ends immediately before the first sitting of a provincial legislature held after its first election under the new Constitution-

(a) the proportion of party representation in the province's delegation to the National Council of Provinces must be the same as the proportion in which the province's 10 senators were nominated in terms of section 48 of the previous Constitution; and

(b) the allocation of permanent delegates and special delegates to the parties represented in the provincial legislature, is as follows:

PROVINCE	PERMANENT DELEGATES	SPECIAL DELEGATES
1. Eastern Cape	ANC 5 NP 1	ANC 4

2. Free State	ANC 4 FF1 NP 1	ANC 4
3. Gauteng	ANC 3 DP 1 FF 1 NP 1	ANC 3 NP 1
4. KwaZulu-Natal	ANC 1 DP 1 IFP 3 NP 1	ANC 2 IFP 2
5. Mpumalanga	ANC 4 FF 1 NP 1	ANC 4
6. Northern Cape	ANC 3 FF 1 NP 2	ANC 2 NP 2
7. Northern Province	ANC 6	ANC 4
8. North West	ANC 4 FF 1 NP 1	ANC 4
9. Western Cape	ANC 2 DP 1 NP 3	ANC 1 NP 3

(2) A party represented in a provincial legislature-

(a) must nominate its permanent delegates from among the persons who were senators when the new Constitution took effect and are available to serve as permanent delegates; and

(b) may nominate other persons as permanent delegates only if none or an insufficient number of its former senators are available.

(3) A provincial legislature must appoint its permanent

delegates in accordance with the nominations of the parties.

(4) Subitems (2) and (3) apply only to the first appointment of permanent delegates to the National Council of Provinces.

(5) Section 62 (1) of the new Constitution does not apply to the nomination and appointment of former senators as permanent delegates in terms of this item.

(6) The rules and orders of the Senate in force when the new Constitution took effect, must be applied in respect of the business of the National Council to the extent that they can be applied, subject to any amendment or repeal.

8 Former senators

(1) A former senator who is not appointed as a permanent delegate to the National Council of Provinces is entitled to become a full voting member of the legislature of the province from which that person was nominated as a senator in terms of section 48 of the previous Constitution.

(2) If a former senator elects not to become a member of a provincial legislature that person is regarded as having resigned as a senator the day before the new Constitution took effect.

(3) The salary, allowances and benefits of a former senator appointed as a permanent delegate or as a member of a provincial legislature may not be reduced by reason only of that appointment.

9 National executive

(1) Anyone who was the President, an Executive Deputy President, a Minister or a Deputy Minister under the previous Constitution when the new Constitution took effect, continues in and holds that office in terms of the new Constitution, but subject to subitem (2).

(2) Until 30 April 1999, sections 84, 89, 90, 91, 93 and 96

of the new Constitution must be regarded to read as set out in Annexure B to this Schedule.

(3) Subitem (2) does not prevent a Minister who was a senator when the new Constitution took effect, from continuing as a Minister referred to in section 91 (1) *(a)* of the new Constitution, as that section reads in Annexure B.

10 Provincial legislatures

(1) Anyone who was a member or office-bearer of a province's legislature when the new Constitution took effect, becomes a member or office-bearer of the legislature for that province under the new Constitution, and holds office as a member or office-bearer in terms of the new Constitution and any provincial constitution that may be enacted.

(2) A provincial legislature as constituted in terms of subitem (1) must be regarded as having been elected under the new Constitution for a term that expires on 30 April 1999.

(3) For the duration of its term that expires on 30 April 1999, and subject to section 108 (4), a provincial legislature consists of the number of members determined for that legislature under the previous Constitution plus the number of former senators who became members of the legislature in terms of item 8 of this Schedule.

(4) The rules and orders of a provincial legislature in force when the new Constitution took effect, continue in force, subject to any amendment or repeal.

11 Elections of provincial legislatures

(1) Despite the repeal of the previous Constitution, Schedule 2 to that Constitution, as amended by Annexure A to this Schedule, applies-

(a) to the first election of a provincial legislature under the new Constitution;

(b) to the loss of membership of a legislature in circumstances other than those provided for in section 106 (3) of the new Constitution; and

(c) to the filling of vacancies in a legislature, and the supplementation, review and use of party lists far the filling of vacancies, until the second election of the legislature under the new Constitution.

(2) Section 106 (4) of the new Constitution is suspended in respect of a provincial legislature until the second election of the legislature under the new Constitution.

12 Provincial executives

(1) Anyone who was the Premier or a member of the Executive Council of a province when the new Constitution took effect, continues in and holds that office in terms of the new Constitution and any provincial constitution that may be enacted, but subject to subitem (2).

(2) Until the Premier elected after the first election of a province's legislature under the new Constitution assumes office, or the province enacts its constitution, whichever occurs first, sections 132 and 136 of the new Constitution must be regarded to read as set out in Annexure C to this Schedule.

13 Provincial constitutions

A provincial constitution passed before the new Constitution took effect must comply with section 143 of the new Constitution.

14 Assignment of legislation to provinces

(1) Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation, to an

authority within a provincial executive designated by the Executive Council of the province.

(2) To the extent that it is necessary for an assignment of legislation under subitem (1) to be effectively carried out, the President, by proclamation, may-

(a) amend or adapt the legislation to regulate its interpretation or application;

(b) where the assignment does not apply to the whole of any piece of legislation, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph *(a)*, those provisions to which the assignment applies or to the extent that the assignment applies to them; or

(c) regulate any other matter necessary as a result of the assignment, including the transfer or secondment of staff, or the transfer of assets, liabilities, rights and obligations, to or from the national or a provincial executive or any department of state, administration, security service or other institution.

(3) *(a)* A copy of each proclamation issued in terms of subitem (1) or (2) must be submitted to the National Assembly and the National Council of Provinces within 10 days of the publication of the proclamation.

(b) If both the National Assembly and the National Council by resolution disapprove the proclamation or any provision of it, the proclamation or provision lapses, but without affecting-

(i) the validity of anything done in terms of the proclamation or provision before it lapsed; or

(ii) a right or privilege acquired or an obligation or liability incurred before it lapsed.

(4) When legislation is assigned under subitem (1), any reference in the legislation to an authority administering it, must be construed as a reference to the authority to which it

has been assigned.

(5) Any assignment of legislation under section 235 (8) of the previous Constitution, including any amendment, adaptation or repeal and re-enactment of any legislation and any other action taken under that section, is regarded as having been done under this item.

15 Existing legislation outside Parliament's legislative power

(1) An authority within the national executive that administers any legislation falling outside Parliament's legislative power when the new Constitution takes effect, remains competent to administer that legislation until it is assigned to an authority within a provincial executive in terms of item 14 of this Schedule.

(2) Subitem (1) lapses two years after the new Constitution took effect.

16 Courts

(1) Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to-

(a) any amendment or repeal of that legislation; and

(b) consistency with the new Constitution.

(2) *(a)* The Constitutional Court established by the previous Constitution becomes the Constitutional Court under the new Constitution.

(b) . . . . . .

[Subitem *(b)* deleted by s. 20 *(a)* of the Constitution Sixth Amendment Act of 2001.]

(3) *(a)* The Appellate Division of the Supreme Court of

South Africa becomes the Supreme Court of Appeal under the new Constitution.

(b) . . . . . .

[Subitem *(b)* deleted by s. 20 *(a)* of the Constitution Sixth Amendment Act of 2001.]

(4) *(a)* A provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or a general division of such a court, becomes a High Court under the new Constitution without any alteration in its area of jurisdiction, subject to any rationalisation contemplated in subitem (6).

(b) Anyone holding office or deemed to hold office as the Judge President, the Deputy Judge President or a judge of a court referred to in paragraph *(a)* when the new Constitution takes effect, becomes the Judge President, the Deputy Judge President or a judge of such a court under the new Constitution, subject to any rationalisation contemplated in subitem (6).

(5) Unless inconsistent with the context or clearly inappropriate, a reference in any legislation or process to-

(a) the Constitutional Court under the previous Constitution, must be construed as a reference to the Constitutional Court under the new Constitution;

(b) the Appellate Division of the Supreme Court of South Africa, must be construed as a reference to the Supreme Court of Appeal; and

(c) a provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or general division of that court, must be construed as a reference to a High Court.

(6) *(a)* As soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system

suited to the requirements of the new Constitution.

(b) The Cabinet member responsible for the administration of justice, acting after consultation with the Judicial Service Commission, must manage the rationalisation envisaged in paragraph *(a)*.

(7) *(a)* Anyone holding office, when the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, as-

(i) the President of the Constitutional Court, becomes the Chief Justice as contemplated in section 167 (1) of the new Constitution;

(ii) the Deputy President of the Constitutional Court, becomes the Deputy Chief Justice as contemplated in section 167 (1) of the new Constitution;

(iii) the Chief Justice, becomes the President of the Supreme Court of Appeal as contemplated in section 168 (1) of the new Constitution; and

(iv) the Deputy Chief Justice, becomes the Deputy President of the Supreme Court of Appeal as contemplated in section 168 (1) of the new Constitution.

(b) All rules, regulations or directions made by the President of the Constitutional Court or the Chief Justice in force immediately before the Constitution of the Republic of South Africa Amendment Act, 2001, takes effect, continue in force until repealed or amended.

(c) Unless inconsistent with the context or clearly inappropriate, a reference in any law or process to the Chief Justice or to the President of the Constitutional Court, must be construed as a reference to the Chief Justice as contemplated in section 167 (1) of the new Constitution.

[Subitem (7) added by s. 20 *(b)* of the Constitution Sixth Amendment Act of 2001.]

17 Cases pending before courts

All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise.

18 Prosecuting authority

(1) Section 108 of the previous Constitution continues in force until the Act of Parliament envisaged in section 179 of the new Constitution takes effect. This subitem does not affect the appointment of the National Director of Public Prosecutions in terms of section 179.

(2) An attorney-general holding office when the new Constitution takes effect, continues to function in terms of the legislation applicable to that office, subject to subitem (1).

19 Oaths and affirmations

A person who continues in office in terms of this Schedule and who has taken the oath of office or has made a solemn affirmation under the previous Constitution, is not obliged to repeat the oath of office or solemn affirmation under the new Constitution.

20 Other constitutional institutions

(1) In this section **'constitutional institution'** means-

(a) the Public Protector;

(b) the South African Human Rights Commission;

[Para. *(b)* amended by s. 4 of the Constitution Second Amendment Act of 1998.]

(c) the Commission on Gender Equality;

(d) the Auditor-General;

(e) the South African Reserve Bank;

(f) the Financial and Fiscal Commission;

(g) the Judicial Service Commission; or

(h) the Pan South African Language Board.

(2) A constitutional institution established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a commission member, a member of the board of the Reserve Bank or the Pan South African Language Board, the Public Protector or the Auditor-General when the new Constitution takes effect, continues to hold office in terms of the legislation applicable to that office, subject to-

(a) any amendment or repeal of that legislation; and

(b) consistency with the new Constitution.

(3) Sections 199 (1), 200 (1), (3) and (5) to (11) and 201 to 206 of the previous Constitution continue in force until repealed by an Act of Parliament passed in terms of section 75 of the new Constitution.

(4) The members of the Judicial Service Commission referred to in section 105 (1) *(h)* of the previous Constitution cease to be members of the Commission when the members referred to in section 178 (1) *(i)* of the new Constitution are appointed.

(5) *(a)* The Volkstaat Council established in terms of the previous Constitution continues to function in terms of the legislation applicable to it, and anyone holding office as a member of the Council when the new Constitution takes effect, continues to hold office in terms of the legislation applicable to that office, subject to-

(i) any amendment or repeal of that legislation; and

(ii) consistency with the new Constitution.

(b) Sections 184A and 184B (1) *(a)*, *(b)* and *(d)* of the previous Constitution continue in force until repealed by an Act of Parliament passed in terms of section 75 of the new Constitution.

21 Enactment of legislation required by new Constitution

(1) Where the new Constitution requires the enactment of national or provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date the new Constitution took effect.

(2) Section 198 *(b)* of the new Constitution may not be enforced until the legislation envisaged in that section has been enacted.

(3) Section 199 (3) *(a)* of the new Constitution may not be enforced before the expiry of three months after the legislation envisaged in that section has been enacted.

(4) National legislation envisaged in section 217 (3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect, but the absence of this legislation during this period does not prevent the implementation of the policy referred to in section 217 (2).

(5) Until the Act of Parliament referred to in section 65 (2) of the new Constitution is enacted each provincial legislature may determine its own procedure in terms of which authority is conferred on its delegation to cast votes on its behalf in the National Council of Provinces.

(6) Until the legislation envisaged in section 229 (1) *(b)* of the new Constitution is enacted, a municipality remains competent to impose any tax, levy or duty which it was authorised to impose when the Constitution took effect.

22 National unity and reconciliation

(1) Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading 'National Unity and Reconciliation' are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as

amended, including for the purposes of its validity.

(2) For the purposes of subitem (1), the date '6 December 1993' where it appears in the provisions of the previous Constitution under the heading 'National Unity and Reconciliation', must be read as '11 May 1994'.

[Subitem (2) added by s. 3 of the Constitution First Amendment Act of 1997.]

23 Bill of Rights

(1) National legislation envisaged in sections 9 (4), 32 (2) and 33 (3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

(2) Until the legislation envisaged in sections 32 (2) and 33 (3) of the new Constitution is enacted-

(a) section 32 (1) must be regarded to read as follows:

'(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.'; and

(b) section 33 (1) and (2) must be regarded to read as follows:

'Every person has the right to-

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'.

(3) Sections 32 (2) and 33 (3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.

24 Public administration and security services

(1) Sections 82 (4) *(b)*, 215, 218 (1), 219 (1), 224 to 228, 236 (1), (2), (3), (6), (7) *(b)* and (8), 237 (1) and (2) *(a)* and 239 (4) and (5) of the previous Constitution continue in force as if the previous Constitution had not been repealed, subject to-

(a) the amendments to those sections as set out in Annexure D;

(b) any further amendment or any repeal of those sections by an Act of Parliament passed in terms of section 75 of the new Constitution; and

(c) consistency with the new Constitution.

(2) The Public Service Commission and the provincial service commissions referred to in Chapter 13 of the previous Constitution continue to function in terms of that Chapter and the legislation applicable to it as if that Chapter had not been repealed, until the Commission and the provincial service commissions are abolished by an Act of Parliament passed in terms of section 75 of the new Constitution.

(3) The repeal of the previous Constitution does not affect any proclamation issued under section 237 (3) of the previous Constitution, and any such proclamation continues in force, subject to-

(a) any amendment or repeal; and

(b) consistency with the new Constitution

25 Additional disqualification for legislatures

(1) Anyone who, when the new Constitution took effect, was serving a sentence in the Republic of more than 12 months' imprisonment without the option of a fine, is not eligible to be a member of the National Assembly or a provincial legislature.

(2) The disqualification of a person in terms of subitem

(1)-

(a) lapses if the conviction is set aside on appeal, or the sentence is reduced on appeal to a sentence that does not disqualify that person; and

(b) ends five years after the sentence has been completed.

26 Local government

(1) Notwithstanding the provisions of sections 151, 155, 156 and 157 of the new Constitution-

(a) the provisions of the Local Government Transition Act, 1993 (Act 209 of 1993), as may be amended from time to time by national legislation consistent with the new Constitution, remain in force in respect of a Municipal Council until a Municipal Council replacing that Council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution; and

[Subitem *(a)* substituted by s. 5 *(a)* of the Constitution Second Amendment Act of 1998.]

(b) a traditional leader of a community observing a system of indigenous law and residing on land within the area of a transitional local council, transitional rural council or transitional representative council, referred to in the Local Government Transition Act, 1993, and who has been identified as set out in section 182 of the previous Constitution, is *ex officio* entitled to be a member of that council until a Municipal Council replacing that council has been declared elected as a result of the first general election of Municipal Councils after the commencement of the new Constitution.

[Subitem *(b)* substituted by s. 5 *(a)* of the Constitution Second Amendment Act of 1998.]

(2) Section 245 (4) of the previous Constitution continues in force until the application of that section lapses. Section 16 (5) and (6) of the Local Government Transition Act, 1993,

may not be repealed before 30 April 2000.

[Item (2) amended by s. 5 *(b)* of the Constitution Second Amendment Act of 1998.]

27 Safekeeping of Acts of Parliament and provincial Acts

Sections 82 and 124 of the new Constitution do not affect the safekeeping of Acts of Parliament or provincial Acts passed before the new Constitution took effect.

28 Registration of immovable property owned by the state

(1) On the production of a certificate by a competent authority that immovable property owned by the state is vested in a particular government in terms of section 239 of the previous Constitution, a registrar of deeds must make such entries or endorsements in or on any relevant register, title deed or other document to register that immovable property in the name of that government.

(2) No duty, fee or other charge is payable in respect of a registration in terms of subitem (1).

Annexure A
Amendments to schedule 2 to the previous Constitution

1. The replacement of item 1 with the following item:

'1. Parties registered in terms of national legislation and contesting an election of the National Assembly, shall nominate candidates for such election on lists of candidates prepared in accordance with this Schedule and national legislation.'.

2. The replacement of item 2 with the following item:

'2. The seats in the National Assembly as determined in terms of section 46 of the new Constitution, shall be filled as follows:

(a) One half of the seats from regional lists submitted by the respective parties, with a fixed number of seats reserved for each region as determined by the Commission for the next election of the Assembly, taking into account available scientifically based data in

respect of voters, and representations by interested parties.

(b) The other half of the seats from national lists submitted by the respective parties, or from regional lists where national lists were not submitted.'.

3. The replacement of item 3 with the following item:

'3. The lists of candidates submitted by a party, shall in total contain the names of not more than a number of candidates equal to the number of seats in the National Assembly, and each such list shall denote such names in such fixed order of preference as the party may determine.'.

4. The amendment of item 5 by replacing the words preceding paragraph *(a)* with the following words:

'5. The seats referred to in item 2 *(a)* shall be allocated per region to the parties contesting an election, as follows:'.

5. The amendment of item 6-

(a) by replacing the words preceding paragraph *(a)* with the following words:

'6. The seats referred to in item 2 *(b)* shall be allocated to the parties contesting an election, as follows:'; and

(b) by replacing paragraph *(a)* with the following paragraph:

'*(a)* A quota of votes per seat shall be determined by dividing the total number of votes cast nationally by the number of seats in the National Assembly, plus one, and the result plus one, disregarding fractions, shall be the quota of votes per seat.'.

6. The amendment of item 7 (3) by replacing paragraph *(b)* with the following paragraph:

'*(b)* An amended quota of votes per seat shall be determined by dividing the total number of votes cast nationally, minus the number of votes cast nationally in favour of the party referred to in paragraph *(a)*, by the number of seats in the Assembly, plus one, minus the number of seats finally allocated to the said party in terms of paragraph *(a)*.'.

7. The replacement of item 10 with the following item:

'10. The number of seats in each provincial legislature shall be as determined in terms of section 105 of the new Constitution.'.

8. The replacement of item 11 with the following item:

'11. Parties registered in terms of national legislation and contesting an election of a provincial legislature, shall nominate candidates for election to such provincial legislature on provincial lists prepared in accordance with this Schedule and national legislation.'.

9. The replacement of item 16 with the following item:

'**Designation of representatives**

16 (1) After the counting of votes has been concluded, the number of representatives of each party has been determined and the election result has been declared in terms of section 190 of the new Constitution, the Commission shall, within two days after such declaration, designate from each list of candidates, published in terms of national legislation, the representatives of each party in the legislature.

(2) Following the designation in terms of subitem (1), if a candidate's name appears on more than one list for the National Assembly or on lists for both the National Assembly and a provincial legislature (if an election of the Assembly and a provincial legislature is held at the same time), and such candidate is due for designation as a representative in more than one case, the party which submitted such lists shall, within two days after the said declaration, indicate to the Commission from which list such candidate will be designated or in which legislature the candidate will serve, as the case may be, in which event the candidate's name shall be deleted from the other lists.

(3) The Commission shall forthwith publish the list of names of representatives in the legislature or legislatures.'.

10. The amendment of item 18 by replacing paragraph *(b)* with the following paragraph:

'*(b)* a representative is appointed as a permanent delegate to the National Council of Provinces;'.

11. The replacement of item 19 with the following item:

'19. Lists of candidates of a party referred to in item 16 (1) may be supplemented on one occasion only at any time during the first 12 months following the date on which the designation of representatives in terms of item 16 has been concluded, in order to fill casual vacancies: Provided that any such supplementation shall be made at the end of the list.'.

12. The replacement of item 23 with the following item:

'**Vacancies**

23 (1) In the event of a vacancy in a legislature to which this Schedule applies, the party which nominated the vacating member shall fill the vacancy by nominating a person-

(a) whose name appears on the list of candidates from which the vacating member was originally nominated; and

(b) who is the next qualified and available person on the list.

(2) A nomination to fill a vacancy shall be submitted to the Speaker in writing.

(3) If a party represented in a legislature dissolves or ceases to exist and the members in question vacate their seats in consequence of item 23A (1),

the seats in question shall be allocated to the remaining parties *mutatis mutandis* as if such seats were forfeited seats in terms of item 7 or 14, as the case may be.'.

13. The insertion of the following item after item 23:

'**Additional ground for loss of membership of legislatures**

23A (1) A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

(2) Despite subitem (1) any existing political party may at any time change its name.

(3) An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed in accordance with section 76 (1) of the new Constitution to amend this item and item 23 to provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature.

(4) An Act of Parliament referred to in subitem (3) may also provide for-

(a) any existing party to merge with another party; or

(b) any party to subdivide into more than one party.'.

14. The deletion of item 24.

15. The amendment of item 25-

(a) by replacing the definition of 'Commission' with the following definition:

'**"Commission"** means the Electoral Commission referred to in section 190 of the new Constitution;'; and

(b) by inserting the following definition after the definition of 'national list':

'**"new Constitution"** means the Constitution of the Republic of South Africa, 1996;'.

16. The deletion of item 26.

Annexure B
Government of National Unity: National Sphere

1. Section 84 of the new Constitution is deemed to contain the following additional subsection:

'(3) The President must consult the Executive Deputy Presidents-

(a) in the development and execution of the policies of the national government;

(b) in all matters relating to the management of the Cabinet and the performance of Cabinet business;

(c) in the assignment of functions to the Executive Deputy Presidents;

(d) before making any appointment under the Constitution or any legislation, including the appointment of ambassadors or other diplomatic representatives;

(e) before appointing commissions of inquiry;

(f) before calling a referendum; and

(g) before pardoning or reprieving offenders.'.

2. Section 89 of the new Constitution is deemed to contain the following additional subsection:

'(3) Subsections (1) and (2) apply also to an Executive Deputy President.'.

3. Paragraph *(a)* of section 90 (1) of the new Constitution is deemed to read as follows:

'*(a)* an Executive Deputy President designated by the President;'.

4. Section 91 of the new Constitution is deemed to read as follows:

'**Cabinet**

91 (1) The Cabinet consists of the President, the Executive Deputy Presidents and-

(a) not more than 27 Ministers who are members of the National Assembly and appointed in terms of subsections (8) to (12); and

(b) not more than one Minister who is not a member of the National Assembly and appointed in terms of subsection (13), provided the President, acting in consultation with the Executive Deputy Presidents and the leaders of the participating parties, deems the appointment of such a Minister expedient.

(2) Each party holding at least 80 seats in the National Assembly is entitled to designate an Executive Deputy President from among the members of the Assembly.

(3) If no party or only one party holds 80 or more seats in the Assembly, the party holding the largest number of seats and the party holding the second largest number of seats are each entitled to designate one Executive Deputy President from among the members of the Assembly.

(4) On being designated, an Executive Deputy President may elect to remain or cease to be a member of the Assembly.

(5) An Executive Deputy President may exercise the powers and must perform the functions vested in the office of Executive Deputy President by the Constitution or assigned to that office by the President.

(6) An Executive Deputy President holds office-

(a) until 30 April 1999 unless replaced or recalled by the party entitled to make the designation in terms of subsections (2) and (3); or

(b) until the person elected President after any election of the National Assembly held before 30 April 1999, assumes office.

(7) A vacancy in the office of an Executive Deputy President may be filled by the party which designated that Deputy President.

(8) A party holding at least 20 seats in the National Assembly and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Cabinet portfolios in respect of which Ministers referred to in subsection (1) *(a)* are to be appointed, in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other participating parties.

(9) Cabinet portfolios must be allocated to the respective participating parties in accordance with the following formula:

(a) A quota of seats per portfolio must be determined by dividing the total number of seats in the National Assembly held jointly by the participating parties by the number of portfolios in respect of which Ministers referred to in subsection (1) *(a)* are to be appointed, plus one.

(b) The result, disregarding third and subsequent decimals, if any, is the quota of seats per portfolio.

(c) The number of portfolios to be allocated to a participating party is determined by dividing the total number of seats held by that party in the National Assembly by the quota referred to in paragraph *(b)*.

(d) The result, subject to paragraph *(e)*, indicates the number of portfolios to be allocated to that party.

(e) Where the application of the above formula yields a surplus not absorbed by the number of portfolios allocated to a party, the surplus competes with other similar surpluses accruing to another party or parties, and any portfolio or portfolios which remain unallocated must be allocated to the party or parties concerned in sequence of the highest surplus.

(10) The President after consultation with the Executive Deputy Presidents and the leaders of the participating parties must-

(a) determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (9);

(b) appoint in respect of each such portfolio a member of the National Assembly who is a member of the party to which that portfolio was allocated under paragraph *(a)*, as the Minister responsible for that portfolio;

(c) if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph *(a)*, subject to subsection (9);

(d) terminate any appointment under paragraph *(b)*-

(i) if the President is requested to do so by the leader of the

party of which the Minister in question is a member; or

(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government; or

(e) fill, when necessary, subject to paragraph *(b)*, a vacancy in the office of Minister.

(11) Subsection (10) must be implemented in the spirit embodied in the concept of a government of national unity, and the President and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on-

(a) the exercise of a power referred to in paragraph *(a)*, *(c)* or *(d)* (ii) of that subsection, the President's decision prevails;

(b) the exercise of a power referred to in paragraph *(b)*, *(d)* (i) or *(e)* of that subsection affecting a person who is not a member of the President's party, the decision of the leader of the party of which that person is a member prevails; and

(c) the exercise of a power referred to in paragraph *(b)* or *(e)* of that subsection affecting a person who is a member of the President's party, the President's decision prevails.

(12) If any determination of portfolio allocations is varied under subsection (10) *(c)*, the affected Ministers must vacate their portfolios but are eligible, where applicable, for reappointment to other portfolios allocated to their respective parties in terms of the varied determination.

(13) The President-

(a) in consultation with the Executive Deputy Presidents and the leaders of the participating parties, must-

(i) determine a specific portfolio for a Minister referred to in subsection (1) *(b)* should it become necessary pursuant to a decision of the President under that subsection;

(ii) appoint in respect of that portfolio a person who is not a member of the National Assembly, as the Minister responsible for that portfolio; and

(iii) fill, if necessary, a vacancy in respect of that portfolio; or

(b) after consultation with the Executive Deputy Presidents and the leaders of the participating parties, must terminate any appointment under paragraph *(a)* if it becomes necessary for the purposes of the Constitution or in the interest of good government.

(14) Meetings of the Cabinet must be presided over by the President, or, if the President so instructs, by an Executive Deputy President: Provided that the Executive Deputy Presidents preside over meetings of the Cabinet in turn unless the exigencies of government and the spirit embodied in the concept of a government of national unity otherwise demand.

(15) The Cabinet must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity as well as the need for effective government.'.

5. Section 93 of the new Constitution is deemed to read as follows:

'**Appointment of Deputy Ministers**

93 (1) The President may, after consultation with the Executive Deputy Presidents and the leaders of the parties participating in the Cabinet, establish deputy ministerial posts.

(2) A party is entitled to be allocated one or more of the deputy ministerial posts in the same proportion and according to the same formula that portfolios in the Cabinet are allocated.

(3) The provisions of section 91 (10) to (12) apply, with the necessary changes, in respect of Deputy Ministers, and in such application a reference in that section to a Minister or a portfolio must be read as a reference to a Deputy Minister or a deputy ministerial post, respectively.

(4) If a person is appointed as the Deputy Minister of any portfolio entrusted to a Minister-

(a) that Deputy Minister must exercise and perform on behalf of the relevant Minister any of the powers and functions assigned to that Minister in terms of any legislation or otherwise which may, subject to the directions of the President, be assigned to that Deputy Minister by that Minister; and

(b) any reference in any legislation to that Minister must be construed as including a reference to the Deputy Minister acting in terms of an assignment under paragraph *(a)* by the Minister for whom that Deputy Minister acts.

(5) Whenever a Deputy Minister is absent or for any reason unable to exercise or perform any of the powers or functions of office, the President may appoint any other Deputy Minister or any other person to act in the said Deputy Minister's stead, either generally or in the exercise or performance of any specific power or function.'.

6. Section 96 of the new Constitution is deemed to contain the following additional subsections:

'(3) Ministers are accountable individually to the President and to the National Assembly for the administration of their portfolios, and all members of the Cabinet are correspondingly accountable collectively for the performance of the functions of the national government and for its policies.

(4) Ministers must administer their portfolios in accordance with the policy determined by the Cabinet.

(5) If a Minister fails to administer the portfolio in accordance with the policy of the Cabinet, the President may require the Minister concerned to bring the administration of the portfolio into conformity with that policy.

(6) If the Minister concerned fails to comply with a requirement of the President under subsection (5), the President may remove the Minister from

office-

(a) if it is a Minister referred to in section 91 (1) *(a)*, after consultation with the Minister and, if the Minister is not a member of the President's party or is not the leader of a participating party, also after consultation with the leader of that Minister's party; or

(b) if it is a Minister referred to in section 91 (1) *(b)*, after consultation with the Executive Deputy Presidents and the leaders of the participating parties.'.

Annexure C
Government of National Unity: Provincial Sphere

1. Section 132 of the new Constitution is deemed to read as follows:

'**Executive Councils**

132 (1) The Executive Council of a province consists of the Premier and not more than 10 members appointed by the Premier in accordance with this section.

(2) A party holding at least 10 per cent of the seats in a provincial legislature and which has decided to participate in the government of national unity, is entitled to be allocated one or more of the Executive Council portfolios in proportion to the number of seats held by it in the legislature relative to the number of seats held by the other participating parties.

(3) Executive Council portfolios must be allocated to the respective participating parties according to the same formula set out in section 91 (9), and in applying that formula a reference in that section to-

(a) the Cabinet, must be read as a reference to an Executive Council;

(b) a Minister, must be read as a reference to a member of an Executive Council; and

(c) the National Assembly, must be read as a reference to the provincial legislature.

(4) The Premier of a province after consultation with the leaders of the participating parties must-

(a) determine the specific portfolios to be allocated to the respective participating parties in accordance with the number of portfolios allocated to them in terms of subsection (3);

(b) appoint in respect of each such portfolio a member of the provincial legislature who is a member of the party to which that portfolio was allocated under paragraph *(a)*, as the member of the Executive Council responsible for that portfolio;

(c) if it becomes necessary for the purposes of the Constitution or in the interest of good government, vary any determination under paragraph *(a)*, subject to subsection (3);

(d) terminate any appointment under paragraph *(b)*-

(i) if the Premier is requested to do so by the leader of the party of which the Executive Council member in question is a member; or

(ii) if it becomes necessary for the purposes of the Constitution or in the interest of good government;

(e) fill, when necessary, subject to paragraph *(b)*, a vacancy in the office of a member of the Executive Council.

(5) Subsection (4) must be implemented in the spirit embodied in the concept of a government of national unity, and the Premier and the other functionaries concerned must in the implementation of that subsection seek to achieve consensus at all times: Provided that if consensus cannot be achieved on-

(a) the exercise of a power referred to in paragraph *(a)*, *(c)* or *(d)* (ii) of that subsection, the Premier's decision prevails;

(b) the exercise of a power referred to in paragraph *(b)*, *(d)* (i) or *(e)* of that subsection affecting a person who is not a member of the Premier's party, the decision of the leader of the party of which such person is a member prevails; and

(c) the exercise of a power referred to in paragraph *(b)* or *(e)* of that subsection affecting a person who is a member of the Premier's party, the Premier's decision prevails.

(6) If any determination of portfolio allocations is varied under subsection (4) *(c)*, the affected members must vacate their portfolios but are eligible, where applicable, for reappointment to other portfolios allocated to their respective parties in terms of the varied determination.

(7) Meetings of an Executive Council must be presided over by the Premier of the province.

(8) An Executive Council must function in a manner which gives consideration to the consensus-seeking spirit embodied in the concept of a government of national unity, as well as the need for effective government.'.

2. Section 136 of the new Constitution is deemed to contain the following additional subsections:

'(3) Members of Executive Councils are accountable individually to the Premier and to the provincial legislature for the administration of their portfolios, and all members of the Executive Council are correspondingly accountable collectively for the performance of the functions of the provincial government and for its policies.

(4) Members of Executive Councils must administer their portfolios in accordance with the policy determined by the Council.

(5) If a member of an Executive Council fails to administer the portfolio in accordance with the policy of the Council, the Premier may require the member concerned to bring the administration of the portfolio into conformity with that policy.

(6) If the member concerned fails to comply with a requirement of the Premier under subsection (5), the Premier may remove the member from office after consultation with the member, and if the member is not a member of the Premier's party or is not the leader of a participating party, also after consultation with the leader of that member's party.'.

Annexure D
Public Administration and Security Services: Amendments to sections of the previous Constitution

1. The amendment of section 218 of the previous Constitution-

(a) by replacing in subsection (1) the words preceding paragraph *(a)* with the following words:

'(1) Subject to the directions of the Minister of Safety and Security, the National Commissioner shall be responsible for-';

(b) by replacing paragraph *(b)* of subsection (1) with the following paragraph:

'*(b)* the appointment of provincial commissioners;'; and

(c) . . . . . .

[Item *(c)* repealed by s. 21 of Act 10 of 2012.]

(d) by replacing paragraph *(k)* of subsection (1) with the following paragraph:

'*(k)* the establishment and maintenance of a national public order policing unit to be deployed in support of and at the request of the Provincial Commissioner;'.

2. The amendment of section 219 of the previous Constitution by replacing in subsection (1) the words preceding paragraph *(a)* with the following words:

'(1) Subject to section 218 (1), a Provincial Commissioner shall be responsible for-'.

3. The amendment of section 224 of the previous Constitution by replacing the proviso to subsection (2) with the following proviso:

'Provided that this subsection shall also apply to members of any armed force which submitted its personnel list after the commencement of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), but before the adoption of the new constitutional text as envisaged in section 73 of that Constitution, if the political organisation under whose authority and control it stands or with which it is associated and whose objectives it

promotes did participate in the Transitional Executive Council or did take part in the first election of the National Assembly and the provincial legislatures under the said Constitution.'.

4. The amendment of section 227 of the previous Constitution by replacing subsection (2) with the following subsection:

'(2) The National Defence Force shall exercise its powers and perform its functions solely in the national interest in terms of Chapter 11 of the Constitution of the Republic of South Africa, 1996.'.

5. The amendment of section 236 of the previous Constitution-

(a) by replacing subsection (1) with the following subsection:

'(1) A public service, department of state, administration or security service which immediately before the commencement of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as 'the new Constitution'), performed governmental functions, continues to function in terms of the legislation applicable to it until it is abolished or incorporated or integrated into any appropriate institution or is rationalised or consolidated with any other institution.';

(b) by replacing subsection (6) with the following subsection:

'(6) *(a)* The President may appoint a commission to review the conclusion or amendment of a contract, the appointment or promotion, or the award of a term or condition of service or other benefit, which occurred between 27 April 1993 and 30 September 1994 in respect of any person referred to in subsection (2) or any class of such persons.

(b) The commission may reverse or alter a contract, appointment, promotion or award if not proper or justifiable in the circumstances of the case.'; and

(c) by replacing 'this Constitution', wherever this occurs in section 236, with 'the new Constitution'.

6. The amendment of section 237 of the previous Constitution-

(a) by replacing paragraph *(a)* of subsection (1) with the following paragraph:

'*(a)* The rationalisation of all institutions referred to in section 236 (1), excluding military forces referred to in section 224 (2), shall

after the commencement of the Constitution of the Republic of South Africa, 1996, continue, with a view to establishing-

(i) an effective administration in the national sphere of government to deal with matters within the jurisdiction of the national sphere; and

(ii) an effective administration for each province to deal with matters within the jurisdiction of each provincial government.'; and

(b) by replacing subparagraph (i) of subsection (2) *(a)* with the following subparagraph:

'(i) institutions referred to in section 236 (1), excluding military forces, shall rest with the national government, which shall exercise such responsibility in co-operation with the provincial governments;'.

7. The amendment of section 239 of the previous Constitution by replacing subsection (4) with the following subsection:

'(4) Subject to and in accordance with any applicable law, the assets, rights, duties and liabilities of all forces referred to in section 224 (2) shall devolve upon the National Defence Force in accordance with the directions of the Minister of Defence.'.

Schedule 6A

[Schedule 6A inserted by s. 6 of the Constitution Tenth Amendment Act of 2003 and repealed by s. 6 of the Constitution Fourteenth Amendment Act of 2008.]

Schedule 6B

[Schedule 6B, previously Schedule 6A, inserted by s. 2 of the Constitution Eighth Amendment Act of 2002, amended by s. 5 of the Constitution Tenth Amendment Act of 2003, renumbered by s. 6 of the Constitution Tenth Amendment Act of 2003 and repealed by s. 5 of the Constitution Fifteenth Amendment Act of 2008.]

Schedule 7
Laws repealed

Number and year of law	Title
Act 200 of 1993	Constitution of the Republic of South Africa, 1993
Act 2 of 1994	Constitution of the Republic of South Africa Amendment Act, 1994
Act 3 of 1994	Constitution of the Republic of South Africa Second Amendment Act, 1994

Act 13 of 1994	Constitution of the Republic of South Africa Third Amendment Act, 1994
Act 14 of 1994	Constitution of the Republic of South Africa Fourth Amendment Act, 1994
Act 24 of 1994	Constitution of the Republic of South Africa Sixth Amendment Act, 1994
Act 29 of 1994	Constitution of the Republic of South Africa Fifth Amendment Act, 1994
Act 20 of 1995	Constitution of the Republic of South Africa Amendment Act, 1995
Act 44 of 1995	Constitution of the Republic of South Africa Second Amendment Act, 1995
Act 7 of 1996	Constitution of the Republic of South Africa Amendment Act, 1996
Act 26 of 1996	Constitution of the Republic of South Africa Third Amendment Act, 1996

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[1] Administration of this Act transferred to the Minister of Justice and Constitutional Development (Proc 26 in *GG* 22231 of 26 April 2001) and the administration and the powers or functions entrusted by legislation to the Minister of Justice and Constitutional Development transferred to the Minister of Justice and Correctional Services (Proc 47 in *GG* 37839 of 15 July 2014)

Interpretation Act 33 of 1957

[ASSENTED TO 16 MAY 1957] [DATE OF COMMENCEMENT: 24 MAY 1957]

(English text signed by the Governor-General)

as amended by

Interpretation Amendment Act 7 of 1959

Interpretation Amendment Act 45 of 1961

General Law Amendment Act 102 of 1967

General Law Amendment Act 62 of 1973

Interpretation Amendment Act 42 of 1977

Criminal Procedure Act 51 of 1977

Republic of South Africa Constitution Second Amendment Act 101 of 1981

Republic of South Africa Constitution Act 110 of 1983

Provincial Government Act 69 of 1986

General Law Third Amendment Act 129 of 1993

Constitution Consequential Amendments Act 201 of 1993

also amended by

Magistrates' Courts Amendment Act 120 of 1993
[with effect from a date to be proclaimed - see PENDLEX]

ACT

To consolidate the laws relating to the interpretation and the shortening of the language of statutes.

Part I
General (ss 1-17)

1 Application of Act

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

[S. 1 amended by s. 1 of Act 45 of 1961.]

2 Definitions

The following words and expressions shall, unless the context otherwise requires or unless in the case of any law it is otherwise provided therein, have the meanings hereby assigned to them respectively, namely-

'administrator' . . . . . .

[Definition of 'administrator', previously definition of 'Administrator', amended by s. 2 *(a)* of Act 45 of 1961, substituted by s. 22 *(a)* of Act 69 of 1986 and deleted by s. 4 *(a)* of Act 201 of 1993.]

'Christian name' means any name prefixed to the surname, whether received at Christian baptism or not;

'district' means the area subject to the jurisdiction of the court of any magistrate;

[NB: The definition of **'district'** has been substituted by s. 74 of the Magistrates' Courts Amendment Act 120 of 1993, a provision which will be put into operation by proclamation. See PENDLEX.**]**

'*Gazette*'-

(a) in the case of laws, proclamations, regulations, notices or other documents published prior to the thirty-first day of May, 1910, and required under a law in force prior to that day to be published in the *Gazette*, means the *Government Gazette* of the Colony wherein that law was in force; and

(b) in the case of laws, proclamations, regulations, notices or other documents published after the thirty-

first day of May, 1010, and required under any law to be published in the *Gazette*, means the *Government Gazette* of the Republic or, if the matter is one entrusted to a provincial council under the Republic of South Africa Constitution Act 1961, means the *Official Gazette* of the province concerned;

(c) in the case of laws, proclamations, regulations, notices or other documents published after the date of commencement of the Constitution and required under any law to be published in the *Gazette* or the *Provincial Gazette* or any other official *Gazette*, means the *Government Gazette* of the Republic or the relevant *Provincial Gazette*, according to whether the administration of the law concerned or, as the case may be, the law conferring the power to make or issue such a proclamation, regulation, notice or other document, vests in, or in a functionary of, the national government or a provincial government;

[Para. *(c)* added by s. 4 *(b)* of Act 201 of 1993.]

[Definition of '*Gazette*' amended by s. 2 *(b)* of Act 45 of 1961.]

'Governor-General' means the State President as defined in this section;

[Definition of 'Governor-General' amended by s. 2 *(c)* of Act 45 of 1961 and substituted by s. 4 *(c)* of Act 201 of 1993.]

'law' means any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law;

'month' means a calendar month;

'oath' and **'affidavit'**, in the case of persons allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and **'swear'**; in such case, includes **'affirm'** and **'declare'**;

'Parliament' means the Parliament of the Republic;

[Definition of 'Parliament' amended by s. 2 *(d)* of Act 45 of 1961.]

'person' includes-

(a) any divisional council, municipal council, village

management board, or like authority;

(b) any company incorporated or registered as such under any law;

(c) any body of persons corporate or unincorporate;

'Premier', with reference to a province, means the Premier of that province, including any acting Premier, acting in terms of the Constitution;

[Definition of 'Premier' inserted by s. 4 *(d)* of Act 201 of 1993.]

'President' means the President of the Republic, including any acting President, acting in terms of the Constitution;

[Definition of 'President' inserted by s. 4 *(d)* of Act 201 of 1993.]

'province'-

(a) in the case of a law referred to in section 229 of the Constitution, means a province of the Republic as it existed immediately before the commencement of the Constitution;

(b) in the case of a law passed or made after the commencement of the Constitution, or passed or made before such commencement, but with reference to the Constitution, means a province of the Republic referred to in section 124 (1) of the Constitution;

[Definition of 'province' amended by s. 2 *(e)* of Act 45 of 1961 and substituted by s. 4 *(e)* of Act 201 of 1993.]

'provincial council' . . . . . .

[Definition of 'provincial council' amended by s. 2 *(f)* of Act 45 of 1961 and deleted by s. 4 *(f)* of Act 201 of 1993.]

'State President' means, subject to section 232 (1) *(c)* of the Constitution, the President or the Premier of a province;

[Definition of 'State President' inserted by s. 2 *(g)* of Act 45 of 1961 and substituted by s. 4 *(g)* of Act 201 of 1993.]

'the Constitution' means the Constitution of the Republic of South Africa, 1993;

[Definition of 'the Constitution' inserted by s. 4 *(h)* of Act 201 of 1993.]

'the Republic' means, subject to section 232 (1) *(a)* of the Constitution, the territorial limits of the Republic of South Africa referred to in section 1 of the Constitution;

[Definition of 'the Republic' inserted by s. 2 *(h)* of Act 45 of 1961 and substituted by s. 4 *(i)* of Act 201 of 1993.]

'the Union' means the Republic.

[Definition of 'the Union' amended by s. 2 *(i)* of Act 45 of 1961.]

3 Interpretation of expressions relating to writing

In every law expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in visible form.

4 Reckoning of number of days

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

5 Measurement of distance

In the measurement of any distance for the purpose of any law, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane.

6 Gender and number

In every law, unless the contrary intention appears-

(a) words importing the masculine gender include females; and

(b) words in the singular number include the plural, and words in the plural number include the singular.

7 Meaning of service by post

Where any law authorizes or requires any document to be served by post, whether the expression 'serve', or 'give', or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a registered letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

8 Meaning of rules of court

(1) In every law, unless the contrary intention appears, the expression 'rules of the court', when used in relation to any court, means rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of that court.

(2) The powers of the said authority to make rules of the court, as defined in subsection (1), shall include a power to make rules of court for the purpose of any law directing or authorizing anything to be done by rules of court.

9 . . . . . .

[S. 9 substituted by s. 3 of Act 45 of 1961 and repealed by s. 344 (1) of Act 51 of 1977.]

10 Construction of provisions as to exercise of powers and performance of duties

(1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where a law confers a power, jurisdiction or right, or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power, jurisdiction

or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder.

(3) Where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws.

(4) . . . . . .

[Sub-s. (4) amended by s. 4 of Act 45 of 1961 and deleted by s. 8 *(a)* of Act 101 of 1981.]

(5) Whenever the administration of any law or any provision of any law which confers a power or imposes a duty upon or entrusts a function to any Minister of State, member of the Executive Council of a province or other authority has under the Constitution been assigned by the President or the Premier of a province to any other Minister, member of such Executive Council or authority, as the case may be, that power may be exercised by such other Minister, member of the Executive Council or authority and that duty shall and that function may be performed by him, and-

(a) any reference in that law or provision to a department, including any division of any department or administration, administered by such firstmentioned Minister, member of the Executive Council or authority shall be construed as a reference to the department administered by such lastmentioned Minister, member of the Executive Council or authority;

[Para. *(a)* substituted by s. 5 *(b)* of Act 201 of 1993.]

(b) any reference in that law or provision to an officer in the public service attached to such firstmentioned department or to any such officer holding a specified office in that department, shall be construed as a

reference to an officer in the public service attached to such lastmentioned department or, as the case may be, as a reference to such an officer holding a corresponding office in that department;

(c) any power, duty or function vested in or imposed upon or entrusted to-

(i) an officer of such firstmentioned department who is then an officer of such lastmentioned department; or

(ii) the holder of a specified office in that department,

by or under that law or provision, shall be deemed to have been duly vested in or imposed upon or entrusted to the officer concerned in his capacity as an officer of such lastmentioned department or, as the case may be, to the holder of a corresponding office in that department;

(d) any regulation made or any notice, direction or order issued or any appointment made or any action taken under that law or provision prior to the date on which the administration thereof was so assigned, shall remain in full force and effect as if it had been made, issued or taken by the person who on that date was, by virtue of the assignment of the administration of that law or provision or the provisions of this subsection, competent to make such regulation or to issue such notice, direction or order or to make such appointment or to take such action.

[Sub-s. (5) added by s. 1 of Act 7 of 1959 and amended by s. 4 of Act 45 of 1961, by s. 8 *(b)* of Act 101 of 1981, by s. 101 (1) of Act 110 of 1983 and by s. 5 *(a)* of Act 201 of 1993.]

(5A) The provisions of subsection (5) shall apply in so far as the President or the Premier of a province does not determine otherwise in the assignment concerned and, if the administration of any law or a provision of any law has been assigned to any other Minister, member of the Executive

Council of a province or authority as contemplated in that subsection, but in relation to a matter specified in the assignment, the provisions of that subsection shall apply accordingly.

[Sub-s. (5A) inserted by s. 8 *(c)* of Act 101 of 1981 and substituted by s. 101 (1) of Act 110 of 1983 and by s. 5 *(c)* of Act 201 of 1993.]

(5B) . . . . . .

[Sub-s. (5B) inserted by s. 101 (1) of Act 110 of 1983 and deleted by s. 5 *(d)* of Act 201 of 1993.]

(6) Where any provision in any law confers a power or imposes a duty or entrusts a function to any Minister of State or other authority and authorizes such Minister of State or authority to delegate the exercise or performance of such power, duty or function to the holder of an office as such or to any particular person, and if the exercise or performance of such power, duty or function is delegated to the holder of any office, that power, duty or function may or shall, unless the contrary intention appears, be exercised or performed by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder.

[Sub-s. (6) added by s. 1 of Act 42 of 1977.]

11 Repeal and substitution

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

12 Effect of repeal of a law

(1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.

(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

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

13 Commencement of laws

(1) The expression 'commencement' when used in any law and with reference thereto, means the day on which that law comes or came into operation, and that day shall, subject to the provisions of subsection (2) and unless some other day is fixed by or under the law for the coming into operation thereof, be the day when the law was first published in the *Gazette* as a law.

(2) Where any law, or any order, warrant, scheme, letters patent, rules, regulations or by-laws made, granted or issued under the authority of a law, is expressed to come into operation on a particular day, it shall be construed as coming into operation immediately on the expiration of the previous day.

(3) If any Act provides that that Act shall come into

operation on a date fixed by the President or the Premier of a province by proclamation in the *Gazette*, it shall be deemed that different dates may be so fixed in respect of different provisions of that Act.

[Sub-s. (3) added by s. 10 of Act 129 of 1993 and amended by s. 6 of Act 201 of 1993.]

14 Exercise of conferred powers between passing and commencement of a law

Where a law confers a power-

(a) to make any appointment; or

(b) to make, grant or issue any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws; or

(c) to give notices; or

(d) to prescribe forms; or

(e) to do any other act or thing for the purpose of the law,

that power may, unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof: Provided that any instrument, order, warrant, scheme, letters patent, rules, regulations or by-laws made, granted or issued under such power shall not, unless the contrary intention appears in the law or the contrary is necessary for bringing the law into operation, come into operation until the law comes into operation.

15 Notification in *Gazette* of official acts under authority of law

When any act, matter or thing is by any law directed or authorized to be done by the President or the Premier of a province, or by any Minister, or by any public officer, the notification that such act, matter or thing has been done may, unless a specified instrument or method is by that law

prescribed for the notification, be by notice in the *Gazette*.

[S. 15 amended by s. 5 of Act 45 of 1961 and by s. 7 of Act 201 of 1993.]

16 Certain enactments to be published in *Gazette*

When any by-law, regulation, rule or order is authorized by any law to be made by the President or a Minister or by the Premier of a province or a member of the Executive Council of a province or by any local authority, public body or person, with the approval of the President or a Minister, or of the Premier of a province or a member of the Executive Council of a province, such by-law, regulation, rule or order shall, subject to the provisions relative to the force and effect thereof in any law, be published in the *Gazette*.

[S. 16 amended by s. 5 of Act 45 of 1961 and substituted by s. 8 of Act 201 of 1993.]

16A Promulgation and commencement of laws and publication of certain notices when publication of the *Gazette* impracticable

(1) If the President is satisfied that the publication of the *Gazette* cannot be effected or is likely to be seriously delayed as a result of circumstances beyond the control of the Government Printer, he may by proclamation published in the manner directed by him, make such rules as he may deem fit for the publication, during any period specified in the proclamation, of laws or notices required or authorized by law to be published in the *Gazette*.

[Sub-s. (1) amended by s. 9 *(a)* of Act 201 of 1993.]

(2) Any law or notice published in accordance with any rules so made, shall be deemed to have been published in the *Gazette*, and any law so published shall be deemed to have come into operation on the day on which it was first so published as a law, unless some other day is fixed by or under that law for the commencement thereof.

(3) The President of a province may at any time vary or

withdraw any proclamation referred to in subsection (1) by like proclamation.

[Sub-s. (3) amended by s. 9 *(a)* of Act 201 of 1993.]

(4) Any law or notice published in accordance with any rule made under subsection (1) shall, if it is then still in force, be published in the *Gazette* for general information as soon as publication of the *Gazette* can be effected.

(5) The provisions of subsection (4) shall not affect the validity of anything done under any rules made under subsection (1).

(6) The Premier of a province may exercise the President's powers in terms of this section with reference to such province.

[Sub-s. (6) added by s. 9 *(b)* of Act 201 of 1993.]
[S. 16A inserted by s. 13 of Act 102 of 1967.]

17 List of certain proclamations and notices to be submitted to Parliament and provincial legislatures

When the President, a Minister or the Premier or a member of the Executive Council of a province is by any law authorized to make rules or regulations for any purpose in such law stated, notwithstanding the provisions of any law to the contrary, a list of the proclamations, government notices and provincial notices under which such rules or regulations were published in the *Gazette* during the period covered in the list, stating in each case the number, date and title of the proclamation, government notice or provincial notice and the number and date of the *Gazette* in which it was published, shall be submitted to Parliament or the provincial legislature concerned, as the case may be, within fourteen days after the publication of the rules or regulations in the *Gazette*.

[S. 17 amended by s. 5 of Act 45 of 1961 and substituted by s. 13 of Act 62 of 1973, by s. 22 *(a)* of Act 69 of 1986 and by s. 10 of Act 201 of 1993.]

Part II

Special provisions applicable only to the province of the Cape of Good Hope
(s 18)

18 Meaning of certain expressions in laws of colony of Cape of Good Hope

In the interpretation of any Act of Parliament, government notice, government advertisement, ordinance, placaat, proclamation, regulation or by-law made under the authority of any law, rule of court, or any enactment having the force of law, which came into operation in the colony of the Cape of Good Hope prior to the thirty-first day of May, 1910, the following expressions shall, unless the context otherwise requires and subject to the provisions of the Republic of South Africa Constitution Act 1961, have the meanings hereby assigned to them respectively, namely-

'Charter of Justice' means the Royal Letters Patent of His Majesty King William the Fourth, dated the fourth day of May, 1832, for the better and more effectual administration of justice;

'Constitution Ordinance' means the ordinance enacted on the third day of April, 1852, by His Excellency the Governor of the Cape of Good Hope with the advice and consent of the Legislative Council thereof, for constituting a Parliament for the said colony;

'division' or **'fiscal division'** means the area under the administration of a civil commissioner within the meaning of the relevant act, notice, advertisement, ordinance, placaat, proclamation, regulation, by-law, rule of court or enactment;

'Governor' includes the officer who for the time being administered the Government of the colony of the Cape of Good Hope acting by and with the advice of the Executive Council thereof;

'Order-in-Council' means any order made by the Governor (as in this section defined) with the advice of the Executive Council;

'solemn declaration' means a declaration made under and by virtue of the provisions of the Oaths and Declarations Act 1891, of the colony of the Cape of Good Hope.

[S. 18 amended by s. 6 of Act 45 of 1961.]

Part III
Special provisions applicable only to the province of the Transvaal
(ss 19-20)

19 Meaning of certain expressions in laws of the South African Republic

In the interpretation of any law or resolution of the Volksraad of the late South African Republic the following expression shall, unless otherwise expressly provided and subject to the provisions of the Republic of South Africa Constitution Act 1961, or of any other law, have the meanings hereby assigned to them respectively, namely-

'landdrost' means magistrate;

'Publieke Aanklager' means the Attorney-General of the Transvaal or any person appointed to prosecute for or on behalf of the State;

'Staats Courant' means the *Gazette*;

'Staats President' or any expression denoting the Head of the late South African Republic means the State President of the Republic;

'Staats Procureur' means the Attorney-General of the Transvaal;

'Staats Sekretaris' means the Minister of the Interior;

'Zuid Afrikaansche Republiek', **'Republiek'**, **'Staat'**

or any like expression means the Transvaal,

and when any act is required or authorized to be done by any such law or resolution or whenever any process is required to be taken out in the name and on behalf of the people of the South African Republic it shall be deemed to be required or authorized to be done or taken out in the name and on behalf of the State.

[S. 19 amended by s. 7 of Act 45 of 1961.]

20 Meaning of expression Governor or Lieutenant-Governor in laws of the colony of Transvaal

In the interpretation of any law which came into operation in the colony of the Transvaal prior to the establishment of the Union, the expression 'Governor' or 'Lieutenant-Governor' includes the officer who for the time being administered the government of the said colony, acting (when by law required) by and with the advice of the Executive Council thereof.

Part IV
Special provisions applicable only to the province of the Orange Free State
(ss 21-22)

21 Meaning of certain expressions in laws of the Orange Free State

Where, in any law of the late Orange Free State, the following expressions occur they shall, unless otherwise expressly provided and subject to the provisions of the South Africa Act 1909, or of any other law, have the meanings hereby assigned to them respectively, namely-

'Goevernements Sekretaris' means the Minister of the Interior;

'landdrost' means magistrate;

'Oranje Vrijstaat' or **'Staat'** means the province of the

Orange Free State;

'President' or **'Staatspresident'** means the State President of the Republic;

'Raad' or **'Volksraad'** means Parliament;

'Staatsprocureur' means the Attorney-General of the Orange Free State;

'Thesaurier-generaal' means the Minister of Finance;

'Weesheer' means the Master of the Supreme Court (Orange Free State Provincial Division);

'Wet boek' means the Law Book of the Orange Free State of 1891;

'Zuid Afrikaansche Republiek' means the Transvaal.

[S. 21 amended by s. 8 of Act 45 of 1961.]

22 Meaning of expression Governor or Lieutenant-Governor in laws of Orange River Colony

In the interpretation of any law which came into operation in the Orange River Colony prior to the establishment of the Union, the expression 'Governor' or 'Lieutenant-Governor' includes the officer who for the time being administered the government of the said colony, acting (when by law required) by and with the advice of the Executive Council thereof.

Part V
Special provisions applicable only to the province of Natal (s 23)

23 Meaning of expression Governor or Lieutenant-Governor in laws of Natal

In the interpretation of any law which came into operation in the Colony of Natal prior to the establishment of the Union, the expression 'Governor' or 'Lieutenant-Governor' includes the officer who for the time being administered the government of the said colony, acting (when by law required)

by and with the advice of the Executive Council thereof.

Part VI
Supplementary (ss 24-26)

24 Application to State

This Act shall bind the State.

25 Repeal of Act 5 of 1910 and Act 5 of 1944

(1) Subject to the provisions of subsection (2), the Interpretation Act 1910, and the Interpretation Amendment Act 1944, are hereby repealed.

(2) Any action taken under any provision of a law repealed by subsection (1) shall be deemed to have been taken under the corresponding provision of this Act.

26 Short title

This Act shall be called the Interpretation Act, 1957.

Pendlex: Interpretation Act 33 of 1957 after amendment by the Magistrates' Courts Amendment Act 120 of 1993

Section 2 - definition

'district' means the area subject to the jurisdiction of a magistrate's court;