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LEGAL THEORY 2 LEGAL INTERPRETATION STUDY GUIDE

2013



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Room F5c – Faculty of Law

PREFACE

2013 COURSE OUTLINE

1 INTRODUCTION

Overview

Legal interpretation is a self-standing semester course that counts as a credit in the Faculty of Law LLB2, as well as comprising one of the four component courses in Legal Theory 2 in the Faculties of Humanities, Science and Commerce. Students who pass Legal Interpretation as part of Legal Theory 2 are exempted from the course in the LLB curriculum. The purpose of the course is to provide insight into the nature and function on the process of legal interpretation in South Africa. More particularly:

- To introduce students to the nature of legal reasoning by studying case law
- To provide students with the ability to be able to read, interpret and understand enacted law and case law
- To provide students with a thorough understanding of the various principles, theories and techniques relevant to the interpretation of enacted law and case law
- To provide students with the ability to understand the nature of constitutional interpretation
- To provide the students with the ability to understand and apply the principles of judicial precedent
- To assist students in being able to identify and solve authentic legal problems with regard to the interpretation of enacted law and judgments
- To assist students in extracting principles from statutes, law reports and other sources
- To familiarise students with legal concepts and terminology commonly encountered in statutes and law reports

Credit Value

7.5 Credits

Assumptions of Prior Learning

In order to complete this course successfully students need to:

- Be capable of writing and communicating in coherent English
- Know where and how to access resources such as text books, law reports and statutes in the law library
- Have a working knowledge of basic legal concepts and terminology
- Be capable of independent learning
- Be able to read, analyse and extract principles from legal resources
- Have a basic understanding of problem-solving techniques
- Have working knowledge of legal referencing conventions and to be able to apply these to their written work
- Have a basic understanding of the layout of court judgments

2 OUTCOMES

Critical Outcomes

At the end of this course students will be able to:

- Understand the general structure of statutes
- Extract issues specifically related to the interpretation of statutes
- Extract issues specifically related to the analysis and interpretation of court judgments
- Apply the various theories of interpretation
- Understand the meaning of concepts such as *ratio decidendi*, *obiter dictum*, *stare decisis*
- Identify the *ratio decidendi* in court judgments and distinguish it from *obiter dicta*
- Know when and why particular court judgments can be used as precedents
- Organise and manage their work load
- Communicate effectively in class debate and in written assignments
- Know and apply the basic requirements for academic writing
- Use technology effectively in legal research

Intended Specific Outcomes

The legal interpretation course is designed so that students who successfully complete this course should be able to:

- Understand, explain and critically analyse the various principles, theories and techniques relevant to the process of legal interpretation
- Apply the different methods of interpretation to the interpretation of legislation and court judgments
- Understand the nature of constitutional interpretation and particularly the way in which constitutional interpretation impacts on the interpretation of ordinary legislation and court judgments
- Understand and explain the principles of judicial precedent
- Understand how precedents may be used in legal argument and to apply this understanding to the solution of practical problems

3 TEACHING METHOD

Students will be expected to assume responsibility of their own learning. Students will experience much difficulty in this course if they do not keep up right from the beginning. The extent of their knowledge at the end of the course will depend on the effort they put into the course. Students will be provided with a study guide which contains guidelines and exercise questions according to which they *must* prepare for lectures. Students are thus required to work through the material relevant for each contact session *before* they attend the contact session.

The course will start with a discussion of the theoretical aspects of legal interpretation. Thereafter, case law and excerpts from statutes will serve as the basis for discussing various trends of legal interpretation. All discussion materials will be made available on *RUconnected*. Lectures during which the case law and statutory examples are discussed will be interactive classes and students will be expected to participate in discussions on the application of legal interpretation methods.

There will be two to three compulsory tutorials during the course of the semester. Details regarding tutorial times and groups will be communicated to students in due course. Students will be required to prepare typed assignments (not exceeding two typed pages) for each tutorial. Tutorials are *discussion* classes where the students can assess their understanding of the prescribed case law and the application of the different methods of legal interpretation. The tutors will meet with the lecturer before each tutorial for an in-depth discussion of the tutorial work in order to ensure that students receive sufficient guidance in the tutorial classes.

4 SOURCES

Prescribed Textbook:

Christo Botha *Statutory Interpretation: An Introduction for Students* 5th ed (2012) (Juta)

Recommended Additional Reading:

LM Du Plessis *Re-Interpretation of Statutes* (2002) (Butterworths)

GE Devenish *The Interpretation of Statutes* (1992) (Juta)

Kellaway *Principles of Legal Interpretation* (1995) (Butterworths)

5 LECTURE AND TUTORIAL ATTENDANCE

Attendance of lectures and tutorials is compulsory. The Law Faculty regards attendance at lectures as an inherent part of the course, similar to obtaining a pass mark in an examination. Therefore, register will be taken during these contact sessions in order to gauge student involvement in the course for DP purposes. Students will not be granted DP certificates if they miss more than 6 lectures. This rule stands **regardless** of whether students have approved Leave of Absence (LOA), unless there are exceptional circumstances that caused the students to miss the lectures. Refer to the Survival Guide for more information on DP requirements.

If students miss lectures or tutorials due to a valid reason, they must fill out a Leave of Absence (LOA) request form at the Law Faculty's administrative office. Supporting documents (such as doctors' certificates) must be attached to and submitted with the LOA request. Supporting documents serve as proof of valid reasons for absence and it will aid in establishing whether exceptional circumstances exist. Refer to the Survival Guide for information on requirements and procedure for LOA's.

6 ASSESSMENT

		Maximum
Course Work:	Test and Assignment	25
	Tutorial Assignment	5
Examination		70
Total		100

In order to pass this course, students must obtain a final performance mark of 50 out of 100. The final performance mark is made up of the **Course Work** mark out of **30** (25 + 5) and the **Examination** mark out of **70**.

The **Course Work** component is made up of one **test**, one **assignment** and one **tutorial assignment**. The test and assignment each count a total of 25 marks. The marks for the **tutorial assignment** will be discounted to a mark out of 5. The average of the test and assignment marks, plus the mark out of 5 for the tutorial assignment, will constitute the Course Work component.

EXAMINATION:

Students will write a 2-hour examination paper in June counting 70 marks. Students can expect multiple choice questions, problem-type questions and/or essay-type questions in the examination.

Students who fail Legal Interpretation may be granted supplementary examinations subject to the policy of the university. For more information regarding **requirements** for being granted the opportunity to write **supplementary and rewrite examinations**, see **the Survival Guide**.

Table of Outcomes and Assessment Criteria:

SPECIFIC OUTCOMES:	ASSESSMENT CRITERIA:	ASSESSMENT TASKS:
To understand, explain and critically analyse the various principles, theories and techniques relevant to the process of statutory interpretation.	<ul style="list-style-type: none"> ✓ Describe the content of the various principles, theories and methods relevant to the process of statutory interpretation. ✓ Evaluate critically the advantages of the various theories and methods of statutory interpretation ✓ Compare and contrast the different theories and techniques of statutory interpretation. ✓ Demonstrate an understanding of terminology relevant to interpretation of statutes. 	<ul style="list-style-type: none"> ✓ Write short essays (whether for tutorials, test, assignment or examination) supported by authority, in which the various principles, theories and methods of statutory interpretation are explained. ✓ Write short essays in which the advantages and disadvantages of particular principles, theories and methods of interpretation are discussed. ✓ Write short essays in which the different theories of interpretation are compared and contrasted.
To apply the different approaches and methods in the interpretation of enacted law.	<ul style="list-style-type: none"> ✓ Identify the relevant legal issue of statutory interpretation that needs to be resolved. ✓ State the relevant law and discuss the relevant legal precedents with regard to that issue. ✓ Apply the law to the facts in order to come to a reasoned conclusion about the problem. 	Write judgments or opinions in which a practical problem of statutory interpretation is analysed and solved on the basis of the relevant law and precedents.
To understand the nature of constitutional interpretation and the way in which the Constitution impacts on the interpretation of ordinary legislation.	<ul style="list-style-type: none"> ✓ Describe and explain the principles of constitutional interpretation. ✓ Apply the principles of constitutional interpretation to assist in resolving problems of statutory interpretation, 	<ul style="list-style-type: none"> ✓ Write an essay, supported by authority in which the principles of constitutional interpretation are discussed and explained. ✓ Write case notes on selected leading precedents on constitutional

		<p>interpretation where you critically analyse the judgments in these precedents.</p> <p>✓ Explain and apply any relevant principles of constitutional interpretation during the course of writing a judgment or opinion on a problem of statutory interpretation.</p>
<p>To be able to analyse court judgments by identifying the material facts and the ratio decidendi.</p>	<p>✓ Systematic exposition of the court's rationale in light of the material facts.</p> <p>✓ Distinguish between the ratio decidendi and non-binding or persuasive <i>dicta</i>.</p>	<p>✓ Discuss and/or compare case law by applying the principles of the doctrine of precedent.</p>

7 COURSE EVALUATION

The course is evaluated on a three-year cycle instituted by the Faculty. The Rhodes University Web-based Evaluation Assistant is used to conduct the evaluation. The students evaluate the course by filling in a questionnaire that requires them to respond to specific questions, as well as giving them an opportunity to make handwritten comments about good and bad aspects of the course. A member of staff who is not involved in teaching the course administers the evaluation in class. The responses are then sent to the Evaluation Assistant which compiles a computerised report, detailing statistically and graphically how the students responded to the specific questions. The documentation is then passed on to an Academic Development Specialist in the Centre for Higher Education, Research, Teaching and Learning (CHERTL), who incorporates the freeform responses of the students in a global report on the evaluation of the course. The evaluation is usually conducted towards the end of the course and if time permits, a review of the results is conveyed to the students.

An external examiner assesses the quality of the examination paper. The external examiner must complete a report on the course as required by University policy.

8 COURSE CONTENT

GENERAL INTRODUCTION:

- 8.1 Legislation as a source of law
- 8.2 What is interpretation of statute? See the author's explanation of pp 4-5 where interpretation of statutes is referred to as judicial understanding of legislation and that it 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:

“Statutory (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”

Why do we need special rules of interpretation? See the explanation at page 6 of the 5th ed relating to S 11 of the Bill of Rights interpreted in *S v Makwanyane* 1995 (3) SA 391 (CC); *Ex parte Minister of Safety and Security*; in re *S v Watters* 2002 (4) SA613(CC) and *Camichele v Minister of Safety and Security* 2001 (4) SA938(CC). See also Donaldson J's pronouncement in the British case of *Corocraft Ltd v Pan American Airways Inc* [1968] 3WLR 714.

Students should also note that interpretation of statutes is not easy: see the practical examples given by the author at pages 8-10.

Students should also familiarise themselves with the following concepts.

- I. purpose or intention, i.e the intention of the legislature.
 - II. textual/literal (text based) approach and the purposive (text-in-context) approach.
 - III. The teleological or value-coherent theory
 - IV. the new constitutional order
-
- 8.3 the term legislation
 - 8.3.1 what is legislation
 - 8.3.2 categories of legislation

CHRONOLOGICAL CATEGORIES

- (a) legislation before 1806
- (b) old order legislation
- (c) legislation in the new constitutional order since 1994

8.3.3 HIERACHICAL CATEGORIES

- (a) the Constitution
- (b) original legislation
- (c) subordinate legislation

8.3.4 What is not legislation

8.3.5 Commencement, amendment and demise of legislation

8.3.6 HOW LEGISLATION IS INTERPRETED.

- theoretical foundations
- the general principles of hermeneutics

8.3.7 SOUTH AFRICAN THEORIES OF INTERPRETATION .

- the orthodox text based approach
- the text-in-context approach
- the influence of the Supreme Constitution
- A practical inclusive method of interpretation
- The five interrelated dimensions of interpretaion

The latter includes the language dimension, the internal language aids to interpretation, external language aids to interpretation, the holistic contextual and structural dimension, the value-laden (teleological) dimension, historical dimension and the comparative dimension. Students are expected to read chapter 6 of the book.

8.3.8 Judicial law making during interpretation and peremptory and directory provisions. Concretisation

8.3.9 CONSTITUTIONAL INTERPRETATION

- constitutional interpretation and ordinary statutory interpretation.
- how to interprete the Constitution (guidelines)
- grammatical interpretation
- systematical (contextual) interpretation
- teological interpretation
- historical interpretation
- comparative interpretation

9 **AVOIDING UNCONSTITUTIONAL LEGISLATION**

- The limits of corrective interpretation during constitutional review
- reading down
- reading up
- reading in
- severance

10 Doctrine of Precedent:

see Du Plessis (2002: pp 128-129)

LEGAL INTERPRETATION TUTORIAL ASSIGNMENT

Read the following provision of section 39(2) of the new Constitution and state whether in your opinion the section was correctly applied in the cases listed hereunder.

- (a) Section 39(2) 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”

The cases include: South African Police Service v Public Servants Association 2007(3) SA521(CC), Chirwa vs Transnet Ltd and others 2008 (4) SA367(CC)m, Bertie van Zyl (Pty) Ltd v Minister of Safety and Security 2010(2) SA181(CC) and Van Vuuren v Minister of Correctional Services 2012(1) SACR103(CC).

(10)

- (b) Comment briefly on the dangers inherent in an interpretive approach that ignores the “text”.

(5)

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LEGAL INTERPRETATION ASSIGNMENT.

Please note that the length of the assignment should not exceed 1000 words. The date of submission will be announced in class.

Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 provides: “A husband of a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriage.

- Comment whether in your opinion the provisions of the section are peremptory or directory.
- Comment fully on how this section was interpreted in the following cases:

MM v MN 2010 (4) SA286 (GNP), MG v BM and others 2012 (2) SA253 (GSJ) and in Ngwenyama v Mayelane and another (474/11) [2012] SASCA 94 (1 June 2012). The emphasis should be on whether the court in each case adopted a textual approach or the so-called text-in-context approach.

[25]

LECTURE DISTRIBUTION

WEEK ONE

- I. **WHAT IS INTERPRETATION?** See how the Constitutional Court interpreted the meaning of Section 11 of the Bill Rights which guarantees the right to life in the following cases. S V Makwanyane 1995 (3) SA 391 (CC); Soobramoney v Minister of Health, KwaZulu Natal 1998 1 SA 765 (CC) and Carmichelle v Minister of Safety and Security 2001 4 SA 938 (CC)
- Also relevant to the process of interpretation is the Supreme Constitution, context of legislation and the competing human rights and fundamental values
 - The approach of the British Court decision in Corocraft Ltd v Pan American Airways Inc. [1968] 3WLR714 where the judge described the interpretation of statute as a craft as well as science
 - Problem about rules, see page 7-8
 - Interpretation and language skills
 - The new Constitutional order and the principles that transformed statutory interpretation

II. GLOSSARY OF DEFINITIONS AND TERMS

- Act
- Concretisation
- Constitutionalism
- Constitutional state (Rechtsstaat)
- Context
- Contextualisation
- Entrenched provision
- Judicial law-making
- Parliamentary sovereignty

III. WHAT IS LEGISLATION

- legislation and other types of law
- meaning of law in the Interpretation Act 33 of 1957
- different types of legislation
- categories of legislation
- chronological categories and Hierarchical categories
- Delegated legislation

A brief outline of legislative process (from Bill to an Act): ss73, 74,75,76,77 and 79 of the Constitution.

WEEK 2

- What is not legislation
- Structure of legislation
 - Long title
 - Preamble
 - Definition section
 - purpose and interpretation
 - repeal and amendment
 - short title and comment

SCHEDULES AND NUMBERING

- Relationship between legislation and Common law
- Commencement of legislation
- Distinction between adoption of legislation and its promulgation
- The power to promulgate: Ex Parte Minister of Safety and Security in re S v Walters 2002 (4) SA 613 (CC)
- Requirement of publication: sections 81 and 123 of the Constitution

WEEK 3

Commencement: Section 13 of the Interpretation Act 33 of 1957

- Commencement on an unsuspected date still to be proclaimed (Delayed Commencement).
- Retroactive commencement: see examples given at page 51 of the prescribed book
- Section 14 of the Interpretation Act considered in *Cats Entertainment CC v Minister of Justice*; *Van der Merwe v Minister of Justice* 1995 (1) SA 869(T)
- Presumption that legislation applies only to the future: *Transnet Ltd v Chairman National Transport Commission* 1999 4 SA 1(SCA).
- the difference between retroactive and retrospective legislation: *National Director of Public Prosecutions v Carolus* 1999 2 SACR 607 (SCA); *Curtis v Johannesburg Municipality* 1906 TS 308
- express retrospective applications
- common law presumptions
- new offences and higher penalties

WEEK 4

Demise of legislation

- Who may amend and repeal legislation?
- formal amendment of legislation
- modificative interpretation by the courts
- demise of legislation - Invalidation of legislation by the courts: *Engelbrecht v Rood Acudent Fund* 2007 (6) SA (6) (CC)

Invalid subordinate legislation: *MEC for Public Works, Roads and Transport, Free State v Morning Star Minibus Hiring Services* 2003 (4) SA 429(0)

- repeal of legislation by a competent law maker
 - Substitution
 - Repeal (deletion): Section 12 (2) of the Interpretation Act
- Repeal of legislation incorporated by reference.
- sunset clauses
- implied repeal

Presumption that legislation does not intend to change the existing law more than is necessary; see the examples given at pp. 78-79 of the prescribed text.

WEEK 5

How legislation is interpreted

- Theoretical foundations. The general principles of hermeneutics.
- context and interpretation
- the notion of deconstruction
- the text based approach
 - literal meaning
- deviation from the plain meaning : *Venter v R* 1907 TS 910
 - Golden rule
 - Secondary aids to interpretation
 - Tertiary aids to construction: factors that lead to the adoption of the textual approach in England include:
 - misconceptions about the separation of powers
 - the doctrine of legal positivism
 - the role of the legislation in English law. The reception of the English approach in South Africa; see the following cases: *Bhyat v Commissioner for Immigration* 1932 AD 125 and *Swanepoel v Johannesburg City Council* 1994 3 SA 789(4) and *Commissioner, SARS v Executor, British Estate* 2001 (2) SA 261 (SCA)
- Criticism of the text based approach, pp. 94-95.

WEEK 6

Text-in-context approach- its advantages

- The influence of the supreme constitution
- Interpretation clause (S 39)
- Constitutional values
- Impact of the constitution
- Practical inclusive method of interpretation

WEEK 7

Practical Inclusive methodology: the five interrelated dimensions of interpretation

- The language dimension
 - Basic principles
 - Internal language aids to interpretation
 - External language aids to interpretation
- The Holistic (contextual and structural) dimension
 - Legislation must be construed within the total legal picture
 - Balance between text and context
 - Structure of legislation
 - Conflicting legislations
 - Presumptions that government bodies are bound by their own legislation
 - Value laden dimension: the new constitutional approach to statutory interpretation
- Historical dimension
- The comparative dimension

WEEK 8

Judicial law making during interpretation and peremptory and directory provisions: See generally Part 3 of the prescribed book

WEEK 9

Peremptory and directory provisions

- General introduction
- Some guidelines

CONSTITUTIONAL INTERPRETATION

- Constitutional interpretation and ordinary statutory interpretation (section 39 (2) of the Constitution)
- Supremacy of the constitution
- How to interpret
- constitutional guidelines
- Avoiding unconstitutional legislation
- The notion of precedent