



<u>PROGRAM</u>	:	LLB
<u>MODULE</u>	:	INTERPRETATION THEORY INTERPRETATION OF STATUTES
<u>CODE</u>	:	ULL0024 ITH41B0
<u>DATE</u>	:	Examination
<u>DURATION</u>	:	3 hours
<u>TOTAL MARKS</u>	:	60

Marking guidelines

- Note that marks can be subtracted for also including irrelevant principles/concepts/ideas within an answer.
- Students can explain principles/concepts/ideas in their own words but it has to be a correct and full reflection thereof.

Question 1

Explain the difference between the following concepts:

Only give two marks if the difference between the two concepts are clear – if not 0.

1.1 Teleological interpretation and purposivism.

(2)

Teleological interpretation – legislative provisions must be interpreted to give effect to the (objective) purpose (not intent) which it has been designed to achieve **in light of constitutional values**.

Purposive interpretation - legislative provisions must be interpreted to give effect to the purpose which it has been designed to achieve

1.2 Subsecuta observatio and contemporanea expositio.

(2)

A *contemporaneae expositiones* is an explanation of “the meaning of an Act implicitly offered by public officials more or less **simultaneously with or shortly after** its commencement”, a *subsecuta observatio*, on the other hand, “is a custom or continuous practice which emerges **after an Act has commenced** and which *inter alia* derives its authority from long duration”.

1.3 Literalism and grammatical interpretation.

(2) [L]
[SEP]

Literalism – the idea that the meaning of a provision must be deduced from the text and only from the text (do not consider any other information or materials)

Grammatical interpretation – idea that interpretation starts with the text, but does not end there. Cautions the interpreter to take the meaning0generative function of language seriously.

1.4 Intentionalism and literalism-cum-intentionalism.

(2) [L]
[SEP]

Intentionalism – claims that the paramount rule of statutory interpretation is to discern and give effect to the real (subjective) intention of the **legislature/Parliament** (not legislation).

Literalism-cum-intentionalism - assumed that the legislature couches or encodes its intention in the language of the statutory provision to be construed. (Not good enough for students to say its a “combination of literalism and intentionalism”).

(Real difference lies in the fact that intentionalism seeks the real/subjective intention of Parliament whilst literalism-cum0intentionalism doesn’t seek the “real intention” as it is believed to be codified in the text 0 actually just literalism).

1.5 Dis-integration and hyper-integration.

(2) [L]
[SEP]

On the one hand, *dis-integration* turns a blind eye to the systematic interconnectedness of text-components and tries to understand them in splendid isolation from one another. *Hyper-integration*, on the other hand, links text-components which, according to the scheme of the text, are not inherently coherent.

[10]

Question 2

On 1 July 2019, an amended version of Rule 32 of the Uniform Rules of Court came into effect. This altered the procedure in relation to summary judgment applications. Under the previous Rule, a plaintiff was permitted to initiate summary judgment proceedings after the defendant delivered a notice of intention to defend. The new Rule changed this procedure, in that a plaintiff may only bring a summary judgment application after the delivery of the defendant’s plea. Write a considered opinion in which you consider if the amended Rule could apply retrospectively to pending summary judgment applications that were instituted prior to the commencement of the new Rule? Motivate your answer with reference to authority.

- Yes
- There exists a presumption of statutory interpretation that legislation does not operate retrospectively/that legislation applies prospectively to future matters.
- Legislation is regarded as retrospective “in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past”.
- In **Veldman v Director of Public Prosecutions, Witwatersrand Local Division** the Constitutional Court held that the principle “[t]hat legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the **rule of law**, a foundational principle of our Constitution. Also central to the rule of law is the **principle of legality** which requires that law must be certain, clear and stable.”
- The courts will tend to allow the retrospectivity of legislation if the statute is procedural in nature.
 - In this case, the statute is procedural in nature. In this case, the validity of acts or transactions entered into prior to the commencement of a new procedure is challenged, the matter will be adjudicated in terms of the new procedure if the action was instituted after the adoption thereof. ^[L]_[SEP]
 - However, this exception will not be allowed if it has the effect of affecting the substantive rights or obligations of any of the parties.
- The courts will tend to allow the retrospectivity of legislation where a statute expressly states or it is so by necessary implication that the statute applies retrospectively. ^[L]_[SEP]
 - ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ also ☐ ☐ ☐ ☐ the legislation clearly requires retrospective application.
- The courts will tend to allow the retrospectivity of legislation if the statute is intended to operate to a benefit of (all) the persons subject to the provisions of a statute. ^[L]_[SEP]
 - ☐ ☐ ☐ ☐ ☐ ☐ ☐ ☐ also ☐ ☐ ☐ ☐ the legislation clearly is intended to operate to a benefit of (all) the persons subject to the provisions of a statute. ^[L]_[SEP]
- Give ☐ if answer is logically cohesive.

Any 10 marks.

[10]

Question 3

Read the following extract from *DBT Technologies (Pty) Limited t/a DB Thermal v Garnevska* (JS581/15) [2018] ZALCJHB 447 (8 June 2018) and critically analyse the interpretive approach of the Court with reference to authority. What theory of statutory interpretation did the court utilise? Motivate your answer.

“During argument, we were referred to the decision of the Labour Court in *Mackay v Absa Group and another (Mackay)* holding that the exercise of a right to lodge a grievance conferred by a private agreement between the employer and the employee falls within the ambit of section 187(1)(d) of the LRA. The Labour Court, in that case, accepted that the LRA does not make explicit provision protecting an employee who lodges a grievance against his employer in terms of an internally agreed document such as a grievance procedure or code. It

[5]

- ### Question 4

As a general rule the courts should not “interfere” with the legislative authority of Parliament as it is Parliament who is supposed to create law and not the courts. □□□□□□□□, the courts can alter the words in the following circumstances□

- When constitutional remedies are made to “fix” the unconstitutionality of a legislative provision , specifically “reading in” (words/provisions are added to the text to resolve the unconstitutionality) “severance” (words/provisions are removed to resolve the unconstitutionality)

- Reading in conformity with the Constitution, specifically “reading down”.
- Cessante ratione legis cessat et ipsa lex A provision ceases to have effect in situations where the reason for its existence falls away in that, for example, provision has already been made, in some way or another, for that which the legislative measure in question was supposed to cater.

- The *eiusdem-generis* rule, can be applied to the construction of provisions made up of a phrase of general application preceded by a class or genus of words of a limited or particular meaning. The semantic possibilities of the general phrase are then restricted to the narrower, generic semantic possibilities of the preceding words, the interpreter all the while keeping in mind the scheme of the provision in question. The more inclusive linguistic signifier usually, but not invariably, *follows after* (and *relates to*) generic signifiers of a more limited or specific scope.

Extensive interpretation:

- Reading in conformity with the Constitution, specifically “reading up”
- Analogical interpretation is premised on a “for the same reason” argumentation: provisions applicable to an expressly mentioned instance can, *ex identitate rationis*, be extended to other similar instances that have not expressly been mentioned.
- Inclusive interpretation is interpretation by implication, and the implication may follow from one or more of the following considerations:
 - *Other provisions of the legislative instrument as a whole* provided that the implication is a necessary one.
 - *Ex contrariis* Where a provision expressly caters for certain circumstances, it is inferred that, for opposite circumstances, the contrary holds. The same reasoning, in a more restricted sense, is also expressed as *expressio unius est exclusio alterius*— a maxim invoked with circumspection and held to be not a final but only a *prima facie* indicator of meaning and, therefore, no hard and fast rule.
 - *Ex consequentibus* Where a provision proscribes a certain consequence, it proscribes, by implication, everything that may occasion such a consequence. Positively framed: where a provision permits a certain consequence, it permits, by implication, everything reasonably necessary for – and, at the same time, proscribes obstructions to – the achievement of the authorised consequence.
 - *Ex accessorio eius, de quo verba loquuntur* ‘if the principal thing is prohibited or permitted, the accessory thing is likewise prohibited or permitted’.
 - *A natura ipsius rei* An implication a *natura ipsius rei* follows by inherent relationship. The power to make a regulation, for instance, implies the power to withdraw it.
 - *Ex correlativis* An implication *ex correlativis* arises from mutual or reciprocal relationship. A prohibition to purchase includes a prohibition on sale; a prohibition to let implies a prohibition to hire, et cetera.

[Giving of the latin terms is not enough and not always necessary – students must explain the concepts.]

Question 5

5.1 According to Le Roux the theory of statutory interpretation favoured by the Constitutional Court in *African Christian Democratic Party v The Electoral Commission and Others* 2006 3 SA 305 (CC) includes 4 distinct steps. List these steps. (4)

1. Establish the central purpose of the provision in question;
2. Establish whether that purpose would be obstructed by a literal interpretation of the provision; if so,
3. Adopt an alternative interpretation of the provision that 'understands' [read promotes] its central purpose; and
4. Ensure that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights.

5.2 There exists a difference of opinion between the writers Le Roux and Devenish as to the interpretive approach utilised by the minority of the court (dissenting judgment) in *African Christian Democratic Party v The Electoral Commission and Others* 2006 3 SA 305 (CC). Discuss. In your answer you must consider the importance of text within the interpretive approach favoured by the Constitutional Court.

- Skweyiya J: In casu, legislative provisions requires exact compliance. Because of the wording of the provision, there is no discretion to condone non-compliance in respect of the legislative provision(s). Deviations from the letter of the law relating to voting procedures would 'have an impact on the fairness of the election' and could not, therefore, be sanctioned.
- Devenish: describes the minority judgment of Skweyiya J in ACDP as 'jurisprudentially superficial', 'dogmatic' and grounded in a 'literal style of interpretation'.
- Le Roux:
 - Devenish is too quick to do so. Both judgments adopt a purposive/teleological reading.
 - What the judgment of Skweyiya J also points out is that the purposive/teleological interpretation of a statutory provision sometimes mandates a narrow reading of its wording.
 - A textual threshold is implied in section 39(2) of the Constitution.
 - This means that the purposive/teleological interpretation of a legislative provision remains subject to what the words of that provision are 'capable of' meaning.
 - The "textual threshold" was read into section 39(2) of the Constitution precisely in order to prevent courts in the absence of a finding of unconstitutionality, to interpretively change or disregard the text of legislation in the name of the purpose or spirit of the legislation and the Bill of Rights.

Give if answer is logically cohesive.

(10)
[14]

Question 6

List and explain the three modes of comparative interpretation.

[6]

- **Universalist interpretation** holds that constitutional guarantees are cut from a universal cloth, and, hence, that all constitutional courts are engaged in the identification, interpretation, and application of the same set of norms. Those norms are comprehended as transcendent legal principles that are logically prior to positive rules of law and legal doctrines,
- **Genealogical interpretation** holds that constitutions are often tied together by complicated relationships of descent and history, and that those relationships are sufficient justification to import and apply entire areas of constitutional doctrine.
- **Dialogical interpretation** holds that courts identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions.

Total: [60]