CHAPTER 10
CONSTITUTIONAL INTERPRETATION

10.1 Introduction

* Why has constitutional interpretation become such an issue? S 35(3) of the i/C blurred the traditional difference between the interpretation of ‘ordinary’ interpretation and constitutional interpretation.
  - S 39(2) of the 1996 CON reaffirmed this.
  - SA courts now have to interpret all legislation in the light of the fundamental rights enumerated in the B/R.
  - Every court, tribunal and forum will have to become involved in constitutional interpretation to some degree.

10.1.1 Constitutional interpretation and ‘ordinary’ statutory interpretation

- S 39(2) of the CON prescribes the ‘filtering’ of legislation through the fundamental rights during the ‘ordinary’ interpretation process.
- Constitutional interpretation refers to the authoritative interpretation of the supreme CON by the judiciary during judicial review of the constitutionality of legislation and government action.
- Du Plessis and Corder: The differences between constitutional and ‘ordinary’ interpretation must not be over emphasised. Both deal with interpretation of legislation; both are members of the same broad interpretive family.
- S 39(2) ensures that, generally speaking, ‘ordinary’ statutory interpretation should be based on a purposive method similar to that used in constitutional interpretation.

- De Ville states:
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.

- The difference between constitutional and ‘ordinary’ interpretation was explained by Froneman in *Matiso v Commanding Officer, Port Elizabeth Prison*:

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 in the Constitution.

### 10.1.2 A 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 the *lex fundamentalis* of the South African legal order.
  - The CON is the prism through which everything and everybody must be viewed.

* The CON is the *lex fundamentalis* of the SA legal order and embodies the values of society, as well as the aspirations, dreams and fears of the nation.
  - It should be the most important national symbol.

### 10.2 Why is the supreme constitution different?
To be able to answer this question, various aspects and many court cases (case law) must be studied. In the first instance one must take notice of how Karpen describes the formal and substantive components of a constitutional state.

It is not merely another legislative document, but the supreme law of the land. A constitutional state 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).

- a **material or substantive one** which refers to
  > a state bound by a system of fundamental values such as justice and equality.

Karpen describes the formal and substantive components of a constitutional state as

> the value-orientated, concerned with intensely human and humane aspirations of personality, conscience and freedom: the structure-orientated, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements.

10.2.1 A constitution as a formal power map

Any CON of a country has a formal ‘power map.’ It deals with:
- institutional and organisational structures and procedures of the state;
- the type of state and government (federal state, democracy or one-party state) in the country;
- the powers and functions of the various persons and the institutions;
- the different branches and tiers of government (separation of powers);
- the electoral system;
- symbols of the country (flags and national anthems);
- elections;
- financial arrangements;
- the judicial system;
- security forces etc.

* The SA 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”.
  - For further information consult p.116 in the textbook.

10.2.2 Substantive constitutionalism

* A constitution also contains a material or substantive foundation, which includes a justiciable bill of rights. The CON 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 i/C expressly referred to SA as a constitutional state.

* In a constitutional state the CON reigns supreme. This means that the government may only govern to the prescribed structural limitations and procedural guarantees entrenched in the CON.

- In *S v Makwanyane* Mahomed J explained the formal and substantive foundations of a constitutional state, and a supreme constitution.

Study the quotation on pp. 116-117.
10.2.3 Constitutional symbolism

* The SA CON is rich in symbolism. The supreme CON has a special status in a number of symbolic references.

* Mureinik: the CON 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 CON).

* In S v Acheson the former Chief Justice Mahomed referred to a supreme CON as a mirror:

> 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 process of judicial interpretation and judicial discretion.

* Du Plessis: the CON is both a monument which celebrates and a memorial which commemorates.

* The CON is more than symbolic window-dressing.
  - It is also a transformative document and a commitment to positive action (eg the inclusion of socio-economic rights in the B/R).
  - The preamble to the CON sets the scene for the programme of action. (Pp. 117-118).

* S 7(2) of the CON obliges the state to engage in positive action.
  - The state must respect, protect, promote and fulfil the rights in the B/R.
  - In other words the CON is both a shield against abuse 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 it has a dimension of futurity.

* *Nortje v Attorney-General of the Cape* Marais J amongst others pointed out that a supreme CON

      ...... is not a specifically identified rule of 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.

10.3 **How to interpret the Constitution**

* Study the case of *Nortje v Attorney-General of the Cape* (p. 118 of the textbook) where Judge Marais questioned the categorisation of theories and canons of constitutional interpretation.

10.3.1 **Constitutional guidelines**
* What does the CON say about its interpretation? Section 39 of the Constitution provides the following with regard to interpretation of the B/R:

When interpreting the B/R, 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; a court, tribunal or forum must make value-judgments (promote human dignity, equality and freedom), and must have regard to international law.
  - This is a set of universal rules and norms dealing with the protection of fundamental human rights.

* Furthermore, a court, tribunal or forum may also refer to foreign law when interpreting the B/R. The rules of foreign law applicable here are those legal principles which do not conflict with the SA legal order; those legal principles applied in a democratic legal order based on constitutionalism.

* The interpretation clause of the B/R must be read with the supremacy clause, as well as S 1. S 1 is one of the most important provisions in the Constitution:

The RSA 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.
* 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 SA courts:

- A supreme constitution must be given a generous and purposive interpretation:
  - *Shabalala v The Attorney-General of Transvaal*

- *Nyamakazi v President of Bophuthatswana:* It was held that a purposive interpretation of the CON is necessary, since it enables the court to take into account more than legal rules: study quotation at the top of p.120.

- Case law refers to a ‘liberal’ interpretation of the CON.
  - A ‘liberal’ interpretation does not have a political connotation, but refer to ‘flexibility’ and ‘generosity’.
  - ‘Generous’ and ‘purposive’ are not necessarily identical. Case law also refers to a liberal interpretation; this refers to ‘flexibility’ and ‘generosity’.
  - The ordinary rules of statutory interpretation must give way to this more adaptable and flexible method.

- During the interpretation of the CON, its spirit and tenor must be adhered to: *S v Acheson.*
  - This means that the values and moral standards underpinning the CON must be taken into account throughout the entire interpretation process.

- A provision in the CON 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 CON in general, and the fundamental rights in particular.
  - *S v Makwanyane.*

- 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.

- Historical context and comparative interpretation can never reflect a purpose that is not supported by the constitutional text as a legal instrument.

- In *Nyamakasi v President of Bophuthatswana* 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 in relation to the whole context.’

□ In *S v Juvenile* the court remarked that the Constitution, as supreme law of the land, has bestowed on the court the sacred trust of protecting human rights.

- *Khala v The Minister of Safety and Security:* 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.

- 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.*

□ Some die-hard supporters of the orthodox literal theory who do not understand a system of constitutional supremacy refer to constitutional interpretation as a ‘free-floating’ exercise.
  - Constitutional interpretation is a question of law.
  - If the particular legislation is consistent with the Constitution, it is valid and in force.
  - It 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.
- Allowance must be made for changing circumstances.
- *Nortje v Attorney-General of the Cape.*

The principles of international human rights law and foreign law must be applied with due regard for the SA context.
- *S v Zuma.*

- In other words, CON interpretation must start and end with the SA Constitution.
  *S v Makwanyane.*

All judges and judicial officers are obliged to continuously interpret and apply legislation to give effect to the fundamental values and rights in the supreme CON.

- This role is not a mechanical reiteration of the mythical intent of the lawgiver, but is rather an ongoing value-based ‘struggle’ with competing rights and values.

- This ‘struggle’ with the constitutional text, context, law and society in transformation is succinctly described by Sachs J in *Prince v Caoe Law Society.*

The quotation on pp. 121-122 must be summarised and studied for tests and exams.

10.3.2 A comprehensive methodology
* How do we concretise these principles and guidelines? How do we make it practical in the ‘real’ world of politics and poverty and crime and aspirations and so on?

* There are numerous methods of and theories about constitutional interpretation.
  - Du Plessis and Corder identify five general methods of constitutional interpretation.
  - These traditional methods are complimentary and should be applied in conjunction with one another.
  - Thus they are in a continuous interaction:

(i) Grammatical interpretation

- It acknowledges the importance of the role of the language of the constitutional text.
- 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 a jigsaw puzzle of constitutional interpretation.
- According to Du Plessis:

  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 inclusiveness.

(ii) Systematic interpretation
This method is concerned with the clarification of the meaning of a particular constitutional provision in conjunction with the Constitution as a whole.

Known as an holistic approach.

The emphasis on the ‘wholeness’ is not restricted to the other provisions and parts of the CON, but also takes into account
- extra-textual factors such as the social and political environments in which the CON operates.

In *Ferreira v Levin* the CC used the structure of the i/C, as well as the formulation of other fundamental rights to interpret the right to freedom of the person.

(iii) Teleological interpretation

This method deals with the aim and purpose of the provisions and
the values embodied in a constitution are also taken into consideration.

The fundamental values in the CON form the foundation of a normative constitutional jurisprudence during which legislation and actions are evaluated against (and filtered through) those constitutional values.

Sachs J explained the teleological dimension of constitutional interpretation in the following cases:
- *Coetzee v The Government of the Republic of South Africa &*
- *Matiso v The Commanding Officer, Port Elizabeth Prison.*

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 ... We 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 circumstances of the particular case.

(iv) Historical interpretation

- This method refers to the use of the ‘historical’ context in the Constitution.
- It includes factors such as
  > the circumstances which gave rise to the adoption of the Constitution;
  > preceding discussions and negotiations (the so-called travaux préparatoires) and
  > the ‘original intent’ of the drafters of the constitutional text.
- The preceding discussions and the ‘original intent of the framers’, however, cannot determine the final meaning of the Constitution.
- If original intent is decisive, such a construction will ignore the continuing time frame within which the CON is to operate as a ‘living tree’.
- Future generations will be bound by a single stroke of constitution-making, with no growth, dialogue, discourse, changes and flexibility possible.

(v) Comparative interpretation

- This refers to the process (such as prescribed by S 39(1) of the CON) during which the court examines
  - international human rights 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 pointed out by Chaskalson P in *S v Makwanyane*:

In dealing with comparative law we must bear in mind that we are required to construe the SA 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 CC, as illustrated by Mahomed J in *S v Makwanyane*. 
10.4 Whose Constitution is it anyway?

* After ten years of ‘rainbow democracy’ and constitutionalism, three questions must be asked:
  (i) Has the question of constitutional interpretation and application been sorted out?
  (ii) Do the Constitution and the Bill of Rights require a purposive interpretation, with due regard to the values and aspirations expressed in the constitutional text?
  (iii) Can we concentrate on ‘real’ issues now that the philosophical issue has been addressed?

* 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.
  - The CON 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 the danger of falling back into another rigid orthodoxy: not sovereignly of parliament, but pronouncements of the Constitutional Court in Braamfontein instead.

* In *S v Mhlungu* 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 definite 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.

10.4.1 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?

* On the one hand the CON is also the product of a negotiated settlement involving the people. The CON must serve, amongst others, as a shield to protect the fundamental rights of the people and to promote the values expressed in the Constitution.

* According to Michelman 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 has to walk a very fine and sometimes precarious line.
  - Suddenly, policy issues seem to be justiciable.
  - Du Plessis and De Ville 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 B/R. This in turn calls for political skills on the part of the ‘referee itself’ – a politicisation of the judiciary in other words.

* What are the boundaries of constitutional review?
  - The courts may have a ‘sacred duty’ to protect the rights in the CON, but is the CON 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 during interpretation and application is one of the vexing questions still facing the courts in a constitutional state.

10.4.2 Constitutional values

* With establishment of a new constitutional order on 27 April 1994, SA underwent a number of fundamental changes. SA made the choice in favour of a constitutional state underpinned by
  - express fundamental values
  - such as human dignity, freedom and equality.
- The judiciary must also consider, respect, protect, promote and fulfill these fundamental values.
- These fundamental values must be applied.

* Question: what is to be done with these values? Are these values merely high-sounding and impressive references to human dignity, justice (etc) which are used as moral embroidery for case law?
  - Critical Legal Studies movement criticises these hollow promises about rights.
  - Therefore 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 active and positive promotion of the fundamental constitutional values.
  - Not only the rights and values of the individual must be emphasised, but those of the community as a whole.

* The CON is a value-laden document, and these values (or the spirit of the B/R) 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 eg: different cultures and ethnic groups have very different ideas about non-sexism and the place of women in society.
- Put in another way, there is a diverse community of constitutional interpreters involved in the constitutional discourse in SA.

* 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 practise, would to some degree depend on who the interpreters are.
  - For eg, if the interpreters in a given situation are only men, the concretised meaning of ‘non-sexism’ will inevitably be biased by culture, pre-understanding and preconceived ideas about sex and gender.

* The question during interpretation is not only ‘who are the others?’, but also ‘who speaks for the others’?
  - Will weak and marginalised groups be given the opportunity to take part in the interpretive discourse?
  - Will they be heard? In our diverse society, with a history of oppression and discrimination, this issue cannot be ignored.

10.4.3 Fostering a rights culture

* The promotion and implementation of a rights culture in SA is another cricial constitutional function of the judiciary. It is all very well to refer to SA as a constitutional state, and to emphasise fundamental values.
  - But it is a very young democracy, and the discourse about concepts such as openness and transparency, human dignity and substantive justice also needs to grow.
* What role should the judiciary and the CON play during the transformation process in SA?
  - One function should be the establishment of the CON 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.

10.4.4 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 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.

* Can 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 B/R will become just another piece of paper.

* The modern democratic state has changed considerably: from the liberal democratic state to
  - the welfare state;
  - the benefactor state; and
  - the post industrial state as agent of empowerment.
* The rise of the welfare state and the empowering state 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 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.
  - Preventing people from enjoying opportunities and benefits may be a more serious infringement of fundamental rights than government abuse of power.
  - A Bill of Rights is not only a shield against government intervention, but a positive guide to opportunities, services, resources and empowerment.

* The Constitution is the driving force that serves to create a society based on
  - democratic values;
  - social justice; and
  - fundamental human rights.

* The Constitution must also
  - improve the quality of life of all citizens and
  - free the potential of every person.
  - For the poor and illiterate sectors of society, the legitimacy of the new constitutional order is inextricably linked to socio-economic rights.
  - Herein lies the new challenge for constitutional interpretation (and for ordinary interpretation as well) : to activate and animate the fundamental constitutional values, and to concretise social justice in particular.
* All those who were pushed to the margins of society (the poor, the disempowered and the disadvantaged) must also be in a position to enjoy the benefits of a Bill of Rights!