CHAPTER 4

DEMISE AND AMENDMENT OF LEGISLATION

4.1 General

- In this chapter, the ways in which legislation maybe changed or come to an end will be explained.
  - Question: is the legislation still in force?

- Common law rules can become abrogated by disuse; legislation not:
  - It must be repealed by a competent body or
  - or declared invalid by a court.

- Before 1994 parliament was sovereign, and the courts could only invalidate delegated legislation which did not comply with common law rules of administrative law.
  - After 1994 the courts could test all legislation, including Acts of parliament, against the supreme Constitution.

- All legislation in force when the CON took effect remain in force
  - until amended or
  - repealed or
  - declared unconstitutional.

- The CON is not self-executing.
  - Although the CON (S 2) expressly states that legislation which is in conflict with the CON is invalid, this merely means that legislation is potentially unconstitutional.
  - Such legislation will not automatically be unconstitutional and invalid.
• To remove potentially unconstitutional legislation, a competent body must either amend or repeal it,
  - or a competent court must declare it unconstitutional.

4.2 Changes to legislation

4.2.1 Amendment of legislation (by a competent legislature)

• Legislation may be amended by a competent legislature:
  - parliament may amend an Act of parliament and
  - provincial legislature may amend provincial ordinances and provincial Acts.

• If a number of Acts are amended at the same time, it will be done with a General Laws Amendment Act.
  - Specific legislation will usually be amended by specific amending legislation.

4.2.2 Modificative interpretation (by the courts)

• Sometimes (although not very often) the courts may;
  - change legislation; or
  - change its meaning.

• According to the doctrine of separation of powers the various legislatures create legislation, and the courts interpret legislation and dispense justice.

• Courts may also make law, and under certain circumstances they may modify the meaning of the legislation.
(i) ‘Reading down’, ‘reading in’ and severance during constitutional review.

- If a court declares legislation unconstitutional and invalidates it, the legislation cannot be applied anymore. This could create a vacuum in the legal order and to avoid this the courts will try, if possible, to modify or adapt the legislation to keep it constitutional and ‘alive’.

- S 35(2) and 232(2) of the i/C provided that if legislation is, on the face of it, unconstitutional, but it is reasonable capable of a more restricted interpretation which will be constitutional and valid, such restricted interpretation should be followed (ie ‘reading down’).

- These provisions have not been repeated in the 1996 CON, 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.

- This principle is similar to the common law presumption that legislation does not contain futile or meaningless provisions.

- ‘Reading in’ is a more drastic remedy used by the courts to change legislation in order to keep it constitutional.
  - In exceptional circumstances the court will ‘read’ something into a provision in order to rescue that provision, or a part of it.

* ‘Reading in’ should be applied with caution, since the court then changes the legislation. In National Coalition for Gay and Lesbian Equality v Minister of Home Affairs the Constitutional Court laid down a number of principles to be
considered and followed before ‘reading in’ or severance is applied:

- the results of reading in / severance must be consistent with the Constitution and its values;

- the result achieved must 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 (aim / purpose) within the constraints of the Constitution; and

- the remedy of reading in ought not to be granted where this would result in an unsupportable budgetary intrusion.

- In practical terms severance is the opposite of ‘reading in’. Here the court will try to rescue a provision from unconstitutionality by cutting out the offending part of the provision to keep the remainder constitutional and valid.

(i) **Modification of the legislative meaning during interpretation**

Courts may under exceptional circumstances modify (change or adapt) the initial meaning of the legislative text to ensure that it reflects the purpose and objectives of the legislation.
4.1 Invalidation of legislation

4.1.1 Unconstitutional provisions

- S 172 of the CON: the High Court, the Supreme Court of Appeal or the Constitutional Court (CC) may declare legislation unconstitutional.
- Such declaration may have immediate effect, or may be suspended to give the relevant legislature the opportunity to correct the defect.
- In every instance the declaration of the High Court or the Appeal Court must be confirmed by the CC.
- If an enabling Act is declared unconstitutional by a court, the delegated legislation issued to such an invalid Act will also cease to exist unless the court orders otherwise.
  - *Mosenoke v Master of the High Court.*

4.1.2 Invalid delegated legislation

- Delegated legislation may be invalidated by a court (not repealed) if it does not comply with the requirements of administrative law (if it is vague or ultra vires).

4.4 Repeal and substitution

* S 11 of the Interpretation Act deals with this aspect.

Rule 1

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.

S v Koopman:

- The accused was found guilty in the MC of a contravention of the Road Traffic Act and sentenced to a fine and an endorsement of his drivers licence.

- On review the question was asked whether the endorsement was valid, as the Road Traffic Ordinance (1966) had been repealed by the Road Traffic Act (1989).

- The provision in the Act providing for the suspension, endorsement or rescission of driver’s licences had not yet come into operation.

- The court held that in S 11 of the Int. Act the provision in the particular ordinance providing for such endorsement was still in operation. The endorsement of the licence by the magistrate’s court was confirmed.

- The court also applied the presumption against futile results.
Rule 2

Solicitor-General v Malgas:

The court held that if the provisions of the 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 does not repeal the incorporated provisions.

Rule 3

Morake v Dubedube:

In this case the problem was that a law has been partially repealed. The remaining provisions then had to be interpreted in their context, which *included* the repealed provisions.

4.5 Effect of repeal

* Section 12 of the Int. Act deals with the effect of the repeal of legislation.

Section 12(1) and (2) in the grey block must be studied.

4.5.1 Section 12(1)

If a provision X is repealed and re-enacted as Y, all references to X must be construed as references to Y.
Section 12(2)

* This is a typical transitional provision. All actions, transactions, processes, prosecutions, etc, which were instituted but not yet completed ito legislation which has meanwhile been repealed, must be completed as if the legislation has not been repealed.

* It forms a bridge between pending actions and the repealed legislation: the current position is preserved until the pending case is finished.

* All court proceedings which were pending when the 1996 CON took effect, must be finished ito the repealed interim Constitution, unless the interests of justice require otherwise.

* On the other hand, any unfinished parliamentary matters which were started ito the repealed interim CON, must be finished ito the 1996 CON.

* If an enabling Act is repealed, all the deligated legislation issued ito the repealed Act will also cease to exist, unless the new Act expressly provides otherwise.

* (Item 24(3) of Schedule 6 of the CON expressly provides that although the interim Constitution has been repealed, the regulation made ito S 237(3) of the i/CON remain in force.)

Section 12(2)(a)

* This provision means that if an Act, which declared a particular action illegal, the repeal does not have retroactive effect, declaring legal that which was illegal before the repeal.
* It also means that a repealed Act does not regain the force of law if the repealing Act should itself be repealed.
  - If an Act proclaims that a contract has lapsed, that contract does not come into effect again when that Act is repealed.
  - *Pietermaritzburg Corporation v Union Government*
  - If the repealed Act has amended another Act, the amendment does not lapse with the repeal.
  - *R v Maluma*

**Section 12(2)(b)**

Actions executed legally and properly in accordance with legislation before that legislation is repealed, remain valid and in force after the repeal.
  - Proclamations, regulations, by-laws or administrative directives made under the repealed legislation lapse when the legislation from which they derive their validity is repealed.)

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**Estate Crosby v Wynberg Municipality**

  - 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 list and the oath of the appraiser would remain valid to S 13(2)(b) of the
Int./Act of 1910 (which is identical to S 12(2)(b) of the present Act).

Section 12(2)(c)

This provision deals with rights derived from legislation only, and not those stemming from common law.

- The right or privilege in question must have been acquired or accrued to the repealed legislation before the repeal.

Barlows Manufacturing Co Ltd v Metal and Allied Worker’s Union:

- The appellants appealed to a Provincial Division of the Supreme Court before the commencement of legislation repealing their right of appeal.

- The Appellate Division held that the right of appeal to the repealed legislation was a material right and not merely a procedural matter, and as such still applied.

Section 12(2)(d)

In R v Sutherland the accused was convicted of a contravention of the regulations under the 1960 state of emergency, although these regulations were repealed before the trial took place.

Application of sub-sections 12(2)(c) and (d):

Keagile v Attorney-General, Transvaal: only to be read.

Section 12(2)(e)
In *S v Erasmus* it was held that an enquiry under an Act must continue, even if the particular Act is repealed before the enquiry can be completed.

*Nourse v Van Heerden:*

This case is a very good example of the application of the demise of legislation, S 12(2) of the Interpretation Act, as well as retrospectivity.

During 1992, a gynaecologist and obstetrician from Durban was charged into the Abortion and Sterilization Act of 1975 with the performance of illegal abortions. His trial commenced on 27 November 1992, but was not yet finished in 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 no longer illegal and as a result his client’s actions did not constitute a crime anymore. The physician’s legal representative 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-nineties and as a result those provisions had become abrogated by disuse;
- the Abortion and Sterilization Act was repealed by the Choice on Termination of Pregnancy Act of 1996 in so far as it relates to abortion (the * Act entered into force on 1 February 1997); and
- into the fundamental values referred to in S 1 of the CON, as well as the Bill of Rights, the prohibition on abortions is in any event retrospectively unconstitutional.
* The court found that legislation cannot be abrogated by disuse, and must be repealed by competent legislature. Existing legislation remains in force until repealed or declared unconstitutional. The trial started before the repeal of the Abortion Act, and ito S 12(2) of the Interpretation Act, the trial must be completed as if the Abortion Act had not been repealed.

* Furthermore, the trial started either before the i/CON or 1996 CON commenced. Since neither the i/CON was nor the 1996 CON is retrospective, the trial must be completed ito the law existing at the start of the trial

* (The 1996 CON entered into force on 4 February 1997.) The Abortion Act was never declared unconstitutional.

### 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;
  - customary law; and
  - public international law or changes it as little as possible.

### 4.6.1 Common law

* This presumption reflects an inherent respect and esteem for our common law heritage.

* *Johannesburg Municipality v Cohen’s Trustees:* Solomon J 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’.

* Seluka v Suskin and Sulkow: The court pointed out that although it is presumed that legislation does not alter the common law, this presumption is rebutted if the legislation in question clearly provides that the common law is being altered.

* Gordon v Standard Merchant Bank: If the legislator expressly alters the common law, the presumption does not arise and the changes must be implemented. This principle was reaffirmed in this Gordon case.

4.6.2 Legislation

* With regard to legislation, the presumption means that in interpreting a subsequent (following) Act it is assumed that the legislator did not intend to repeal or modify the earlier Act.
  - Any repeal or amendment must be effected expressly or by necessary implication.
  - These principles also apply to individual provisions of the legislation.

* Wendywood Development (Pty) v Rieger: An attempt should be made to read the earlier and the subsequent legislation together and to reconcile them.

* Shozi v Minister of Justice, Kwazulu:
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 latter of the two provisions prevails, resulting in the amendment or repeal of the earlier one.

* Obviously this rule only applies if the objects of the two conflicting provisions are in pari materia (essentially the same).

* Legislative appeal by implication will be accepted by the court only if the subsequent legislation manifestly contradicts the earlier legislation.

* This presumption has another aspect. In terms of the rule Generalia specialibus non derogant, it is presumed that a provision in a subsequent general Act does not repeal an earlier specific provision.

An interesting example of the repeal of an earlier Act by necessary implication concerned the Ingwavuma/KwaZulu land issue.

- By means of proclamation, the State President stipulated that the Ingwavuma territory, which had belonged to KwaZulu, would be no longer part of the KwaZulu territory.
- The question arose whether the State President should have consulted the KwaZulu government or not.
- The proclamation had been issued ito S 1(2) of the Self-Governing Territories Constitution Act, which provided that the territory of a self governing territory could be altered only after consultation with the self-governing territory.
In *Government of the Republic of South Africa v Government of KwaZulu* the Appellate Division heard the appeal against a decision of the Natal Provincial Division in which the proclamation taking away the Ingwavuma territory had been declared null and void.

The appellants averred that the proclamation had been promulgated *ito* the Black Administration Act (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 Act 21 of 1971.

As the two provisions could not be reconciled, it was presumed that the unrestricted powers conferred by the 1927 Act had, by necessary implication, been repealed by the specific provisions of the 1971 Act.

### 4.6.3 Constitutional influences

The constitution also has an impact on this presumption and implied repeal of legislation.

- S 149 of the CON provided that if subsequent parliamentary legislation seems to be in conflict with prior provincial legislation,

- and a court declares that the later legislation prevails, the prior legislation is not ‘repealed’, but merely suspended until the conflict is resolved by the relevant legislatures.
- The aim of S 149 is to facilitate co-operative government between the three spheres of government.

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