CHAPTER 5
HOW LEGISLATION IS INTERPRETED

5.1 Introduction

* 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 legal interpretation.

* One of the reasons for the dismal state of statutory interpretation in SA is the lack of a sound theoretical basis for the discipline.

* The aim of this chapter is to provide a brief survey of the theoretical basis of statutory interpretation in SA.

5.2 Theories of interpretation

* Only two main approaches will be discussed: the literal (text based) approach and the purposive (text-in-context) approach, followed by an inclusive methodology based on the five techniques of interpretation suggested by Du Plessis and Corder.

* The difference between the two main approaches to statutory interpretation in SA can largely be reduced to the respective views on the relationship between the text and the context of legislation.
5.2.1 THE ORTHODOX TEXT-BASED (LITERAL) APPROACH

* According to this approach, the interpreter should concentrate primarily on the literal meaning of the provision to be interpreted.

* The interpretation process should proceed along the following lines:

- **Primary rule of interpretation:** if the meaning of the word is clear, it should be put into effect; it must be equated with the legislator’s intention.

- If the ‘plain meaning’ of the word
  - 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.
- This is also known as the ‘golden rule’ of interpretation.

- Then the court will turn to secondary aids of interpretation to find the intention of the legislature eg
  - the long title of the statute;
  - headings to chapters and sections;
  - the text in the other official language;
  - etc.

- Should these ‘secondary aids’ to interpretation prove insufficient to ascertain the intention, then the courts will have recourse to ‘tertiary aids’ to construction
  - it is the common law presumptions.
• The literal approach was popular in legal systems influenced by English law. Four factors led to the adoption of the textual approach in England:

(i) Misconceptions about 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.

The will of the legislature is only to be found in the words of the legislation.

(ii) The *doctrine of legal positivism* influenced the literal approach in England.
  • The positivist idea is based on the validity of the decree: that which is decreed by the state is law.
  • The role of the court is limited to the *analysis of the law* as it is, not as it ought to be.
  • A strict distinction is made between the ‘black letter law’ and morality, because value judgements by the courts would lead to the justiciability of policy issues.

(iii) England has a *common law tradition*, in which the courts traditionally played a very creative role in regard to common law principles.
  • Legislation was viewed as the *exception to the rule*, altering the common law as little as possible.
(iv) English legislation was drafted to be as precise and detailed as possible, for the sake of legal certainty.

- The well known maxim that ‘the legislator has prescribed everything it wishes to prescribe is derived from this approach.

* The ‘plain meaning’ approach and the ‘golden rule’ were introduced into the South African legal system in a roundabout way from English law.
- In De Villiers v Cape Divisional Council (1875) CJ De Villiers interpreted the legal rules in accordance with the English rules of legal interpretation.
- Thus the Roman-Dutch approach was replaced by the literal (textual) approach of English law.
- This was a strange decision: its English law, a conquered territory continued to apply its own legal system (in this case Roman-Dutch law).
- Roman-Dutch rules of interpretation hold that the purpose of the legislation (ratio legis) should prevail.
- The Roman-Dutch approach was replaced by the literal approach of English law.
- Traditionally, the Roman-Dutch rules of statutory interpretation are based on a purpose orientated approach, but after the British occupation of the Cape the English rules on interpretation started to play an ever increasing role.

* The literal or ‘plain meaning’ view generally means that the particular words to be interpreted are taken out of the enactment and accorded a literal or grammatical meaning.
- The courts came to regard the literal meaning as analogous with what the ‘legislature intended’.
- In *Union Government v Mack* and *Farrar's Estate v CIR*: held that the intention of the legislature should be deduced from the **particular words or phrases** used in the legislation: in other words, the plain meaning of the text in an intentional disguise.

- If the legislature had a specific intention, it would be reflected in the clear and unambiguous words of the text.  
  > *Ensor v Rensco Motors (Pty) Ltd.*

- As a result, the **extraordinary, grammatical meaning of the text** determined the intention decisively.

- *Engels v Allied Chemical Manufacturers (Pty) Ltd*: held that the rules of construction of Acts of Parliament ... clearly state that they must be construed according to the intention of the legislature expressed in the Acts themselves.

- One consequence of this rule is that a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made.

**Criticism against this text based (literal) approach:**

* The central role played by the common law presumptions during the interpretation process is reduced to a mere ‘last resort’, to be applied only if the 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 intention.
• *R v Hildick-Smith:* “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.”

This means that other internal and external aids to interpretation which are applied to establish **contextual meaning** are ignored.
- It should be borne in mind that the text serves only as the medium through which meaning is communicated.

* The liberal (textual) approach is **inherently subjective,** since the court will deviate from the so-called ‘plain meaning’ of the text only if it is unclear or ambiguous. As a result the ‘intention of the legislature’ is ultimately dependent on the court’s decision on the clarity of the particular legislative text!

* The view that a legislative text can be clear and unambiguous must be questioned.
  - Few texts are so clear that only one interpretation is possible.

* The textual or literal approach leaves very little room for judicial law making and the courts are seen as mere **mechanical interpreters** of the law.
  - This view creates the impression that once the legislature has spoken, the courts cease to have any law-making function.
  - The legislature creates the legislation, and the courts have no law-making capacity with regard to legislation.
Only in very exceptional cases may the courts deviate from the ‘literal meaning’ of the legislation to apply so-called modification of the text.

- The principle that nothing should be added to or subtracted from the text of legislation has a very inhibiting influence on the law-making discretion of the courts.

Two well known maxims form the basis of this principle:

(i)  *ludicis est ius dicere sed non facere*  
It is the function of the court (= judge) to interpret and not to make the law.  
-  *Harris v Law Society of the Cape of Good Hope.*

(ii) The well known *casus omissus rule* (the courts may not supply an omission in a law, as this is the function of the legislature) is derived from the principle that the function of the courts is to interpret the law and not to make it.  
-  *Ex parte Slater, Walker Securities (SA) Ltd.*

Regrettably, most of the courts still follow the traditional plain meaning approach.

- In *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 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.
The Appellate Division in *Swanepoel v Johannesburg City Council* again referred with approval to the orthodox plain meaning approach to statutory interpretation:

The 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 expressly or by necessary implication the assistance of these rules need not be sought.

**QUESTION 1**

**What does the purposive (text-in-context) approach entail? Make use of case law where applicable.** [10]

* The legislative function is a purposive activity. To the purpose-oriented (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 factors and political policy directions, are also taken into account to establish the purpose of the legislation.
  
* In contrast to the exaggerated emphasis on the legislative text, the mischief rule is regarded as the forerunner of a purposive, contextual approach to interpretation.

* The mischief rule acknowledges:
• the application of external aids including the common law prior to the enactment of the legislation.
• defects in the law not provided for by the common law,
• what new remedies (solutions) did the legislature provide;
• 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 purpose orientated approach provides a balance between grammatical and overall contextual meaning.
  - The interpretation process cannot be complete until the object and scope of the legislation are taken into account.
  - In this way the flexibilities and peculiarities of language, and all the internal and external factors are accommodated in the continuing time-frame within which legislation operates.

* Jaga v Dönges: Schreiner JA in his famous minority decision set out the following guidelines for the 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 must be taken into account.

  • Sometimes the wider context may even be more important than the legislative text.

  • Once the meaning of the text and the 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.
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- This was one of the first concrete efforts in SA case 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.

* However, simply by analysing decisions of the Appellate Division during the last two decades, it becomes clear that the courts swung like a pendulum between the two main approaches to statutory interpretation.

- **Mjuqu v Johannesburg City Council:**

This decision can almost be regarded as a model of the contextual approach, since the court utilised the entire spectrum of available aids and surrounding circumstances to determine the purpose and scope of the legislation in question.

- **University of Cape Town v Cape Town Bar Council:**

Rabie CJ held correctly that the court has to examine all the contextual factors in ascertaining the intention of the legislature, irrespective of whether or not the words of the legislation are clear and unambiguous.

* According to the text-in-context approach, the court 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 more flexible, and is not limited to mere textual analysis and mechanical application of the legislation.
The contextualists hold the view that the judiciary has inherent law-making discretion during statutory interpretation. 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 are absolutely clear, and also supports such a modification.

This 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.

Consequently, the application and utilisation of the presumptions and the various aids to interpretation are very important tools for the contextualists in the quest for the scope and purpose of legislation.
5.2.2 THE INFLUENCE OF THE SUPREME CONSTITUTION

(i) The supremacy clause

* Although S 1(c) of the Constitution refers to the supremacy of the Constitution and the rule of law, S 2 is the constitutional supremacy clause.

* Section 2 of the Constitution reads:
  - The 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.
* S 2 must be read with the following sections:

- S 7 which could be termed the ‘obligation clause’, which states *inter alia* that the B/R is the cornerstone of the SA democracy, and that the state must *respect, protect, promote and fulfil* the rights in the B/R.

- S 8(1) states that the B/R applies to all law and binds the **legislative**, the **executive**, the **judiciary** and **all organs of state**.

- S 8(2) provides that the B/R applies to both natural and juristic persons.

- S 237 states that all constitutional obligations must be performed diligently and without delay.

* If all these provisions are read together, one principle is indisputable: the CON is supreme, and everything and everybody is subject to it.

* This means that the CON cannot be interpreted in the light of:
  - the Interpretation Act or
  - the Roman-Dutch common law or
  - the traditional customary law.

* Thus we see that:
  - everything and everybody,
  - all law and conduct,
  - all traditions, dogmas and perceptions;
  - rules and procedures, and
  - all theories, canons and maxims
    of interpretation are influenced and qualified by the
Constitution.

* Judge Cameron summarized this principle very well in *Holomisa v Argus Newspapers Ltd*:
  “The Constitution has changed the ‘context’ of all legal thought and decision-making in South Africa”.

* The traditional SA approach to statutory interpretation was characterised by
  - a strict devotion to the legislative text, and
  - sovereignty of parliament.

* Now the supreme CON, underpinned by universally accepted values and norms, it is the fundamental law of the land.
  - It is the ultimate yardstick against which everything is viewed and reviewed.

• Mokgoro J in *S v Makwanyane*:
  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 the 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.

* Although S 2 is officially known as the supremacy clause it may be argued that S 1 is possibly the most important provision in the supreme Constitution, at least with regard to entrenchment.
* S 1 (just as S 74(1) itself) may only be amended if:
  - 75% of the members of the National Assembly; and
  - six of the nine provinces agree to the amendment.

* No other provision in the Constitution is as strongly entrenched (protected).
  - It therefore may be argued that S 1 is possibly the most important provision in the Supreme Constitution.

S 1 Republic of South Africa.
This section must be studied.

(ii) The interpretation provisions

* S 39(2) of the Constitution 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 B/R’.

* The Constitution does not express expressly prescribe a contextual and 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 specific legislative text is read, S 39(2) forces the interpreter to have one foot in the Bill of Rights of the Constitution to promote the values and objects in the B/R.
  - 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!*

**Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism.** The quotation on page 54 must be studied.

**Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd v Smit.** The quotation on page 55 must be studied.

- S 39(2) cannot be merely window dressing or hollow rhetoric.
- In *Holomisa v Argus Newspapers Ltd* the court referred to S 35(3) of the Int/CON that the interpretation clause in the CON is ‘…. Not merely an interpretive directive, but a force that informs all legal institutions and decisions with the new power of constitutional values’.

- S 233 of the CON is another interpretation clause:

  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. It states that a court must prefer a reasonable interpretation that is not in conflict with international law:
i) Any interpretation of S 233 is subject to
   - S 1 (supremacy clause);
   - S 2 (CON is the supreme law of the Republic and law inconsistent with it is invalid);
   - S 8(1) (the B/R applies to all law; as well as
   - all references to the SA democracy and democratic values.

ii) It is a confirmation of the principle that legislation must, as far as possible, be interpreted constitutionally.
   - In *Prinsloo v Van der Linde* the CC pointed out (with reference to the so-called ‘reading down’ clause in the i/C that legislation must be ‘kept alive’ if more than one reasonable construction is possible.
   - S 233 is also qualified by the two preceding provisions dealing with international law in the CC (ss 231 and 232); ito these provisions the application international law in SA is in any event subject to the CON.

* Finally, it may be argued that it strengthens S 39(2) of the CON: any reasonable construction which is consistent with international law (international human rights law in particular), will promote the spirit, purport and objects of the B/R.

(iii) **The values underpinning the Constitution**

* Preamble to 1993 Constitution stated RSA is a constitutional state.
- Constitution of 1996 does not refer to a constitutional state, but there are a number of provisions in the Constitution which imply a constitutional state.

* Preamble refers to society based on:
  - democratic values;
  - social justice; and
  - fundamental human rights.

* S 1 states that SA is *inter alia* a democratic state founded on:
  - the supremacy of the Constitution,
  - the *rule of law* and
  - S 7 entrenches the *Bill of Rights* as a cornerstone of democracy.

* As the supreme law of the land the Constitution:
  - deals with institutional structures of the 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 ideals to which South African society has committed itself, but
  - they form the material guidelines which must regulate all state activities.

* The *spirit of the B/R* is the reflection of these fundamental principles.

* Apart from the Constitution itself, these values are found in various sources etc.
  - principles of international human rights law and
foreign case law dealing with similar constitutions;
- the African concept of *Ubuntu* and
- our common law heritage.

**Which values?**

* The preamble of the CON 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;
  - the achievement of equality;
  - advancement of human rights and freedoms;
  - non-racialism; and
  - non-sexism.

* S 36(1) and 39(1) refer to an open and democratic society based on **freedom, equality, and human dignity.**
These are the core values on which the Constitution rests.

* The **spirit, purport and objects** of the Bill of Rights must be interpreted:
  - The courts are the guardians and therefore enforces the values underlying the Constitution.
  - I.t.o. the officials' oaths of judicial officers in the Constitution, courts must uphold and protect the:
    > Constitution, and
    > the human rights in it.
* This means that courts will have to make certain value judgement during the interpretation and application of all legislation.

* The spirit of the i/C lives on in the 1996 CON.
  
  - S 71 i/C: the so-called final CON had to comply with a number of constitutional principles, which were contained in Schedule 4 in the i/ C.
  
  - In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA* (the first certification case, In which the CC refused to certify the ‘final’ CON and referred it back to the Constitutional Assembly), it was held that the constitutional principles in the i/C are *broad constitutional strokes on the canvas of constitution making of the future*.
  
  - Schedule 4 was repealed with the rest of the i/C, but the constitutional principles live on in the 1966 CON.
  
  - The preamble of the i/C stated that the new CON had to be adopted in accordance with constitutional principles.

  Froneman J explained the demands of the supreme CON on statutory interpretation in *Qozeleni v Minister of Law and Order*.

  Study this quotation on p.57 in your textbook.

* In *Daniels v Campbell* the court referred to the

....'new' method of interpreting statutory provisions ushered in by the enactment of first the i/C and, later, of the Constitution of
the RSA 108 of 1996.

* However, not all the courts in SA hold this view, and continue to follow a literalist approach to interpretation, without reference to the supreme CON and its values.

* In *Kalla v The Master* 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 i/C. 
  - Consequently the orthodox plain meaning rule was applied: if the text is ambiguous, the traditional rules of interpretation may be applied to find ‘the intention of the legislature’.
  - So, the traditional common law rules of statutory interpretation trumped the supreme CON!

    - In *Commissioner, SARS v Executor, Frith’s Estate* the supreme Court of Appeal reiterated the well-known traditional rule of interpretation:

      The primary rule in construction of a statutory provision is to ascertain the intention of the legislature and 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.

* Even after years of democracy other courts still follow judgments like these, which means that statutory interpretation is still largely a mechanical exercise.

* In *Geyser v Msunduzi Municipality* the court still emphasized the orthodox primary rule of interpretation: that the courts must give effect to the literal or grammatical meaning of the
legislation, and that deviation from this rule will only be allowed in exceptional circumstances.

5.2.4 Practical inclusive method of interpretation

* 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 interrelated, and should be applied in conjunction with one another.
  - Thus they are in a continuous interaction:

- **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.
  - This does not imply a return to literalism and the orthodox tex-based interpretation.
  - It merely acknowledges the importance of the legislative text in the complex process of interpretation.

- **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. 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 contextual considerations such as the social and political environments in which the legislation operates.

- **Teleological interpretation**

  • This aspect emphasises fundamental constitutional values.
  • The aim and purpose of the legislation must be ascertained against the fundamental constitutional values: ie S 39(2) of the CON.
  • The fundamental values in the CON form the foundation of a normative, value-laden jurisprudence during which legislation and actions are evaluated against (and foltered through) those constitutional values.

- **Comparative interpretation**

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

It 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 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.

* This inclusive method of interpretation is not really new or radical. It 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 CON,
  - other legislation as well as surrounding circumstances;
  - the purpose (legislative scheme) of the legislation, as well as 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 mechanical application of words and phrases with passing reference to values and context.
  - It's a total framework with which (and within which) the interpretation process should take place.

* These techniques are not merely academic exercises. All these techniques can be identified in the following *dictum* from *Minister of Land Affairs v Slamdien*:

The purposive approach as elucidated in the decisions of the CC 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.

5.3 Jurisprudential perspectives on statutory interpretation

5.3.1 The general principles of hermeneutics

- Definitions:
- **Lategan:** Hermeneutics is the science of understanding or more specifically ‘the theory of the interpretation of texts’.

- **Baxter:** Hermeneutics is the understanding and explanation of texts to reveal their inherent meaning. It is the art of ‘understanding’: the technique, method or approach by which one interprets texts.

- In its broader sense hermeneutics applies to all forms of written or spoken communication.

- Every day each of us has to interpret symbols (! 3 8.), facial expressions, films, traffic signs (80), etc.

- We are constantly trying to ‘read between the lines’.

- The word ‘hermeneutics’ is derived from the Greek word ‘hermeneuin’ which means ‘to interpret’. Hermeneutics is a very old discipline which was used by the Greeks.

- Throughout history it became an important and useful tool in 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 reinterpreted constantly 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.

- It is the task of the courts to concretise the general precepts of the legislature through interpretation of legislation.

- **Lategan** points out a number of similarities and differences between theological and legal hermeneutics.

  □ **Similarities:**

  - Both disciplines aim to interpret established authoritative texts with regard to current concrete situations.
  - Both have existential urgency: it is the purpose of statutory interpretation to aim 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.

  □ **Distinct differences**
• **Legislation** is a distinct style, with its own rules, which is aimed at the legal ordering of society.
• The **Biblical text** is closed; the text is complete. **Legislation**, on the other hand, is characterised by continuous development and change.

* 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** points out that this supports the argument that interpreters inevitably have to exercise a judicial discretion.

* Hermeneutics as a general method of understanding for the human sciences gained prominence during the second half of the 19th century.
  - The work of the German philosopher, Dilthey, was of decisive importance.
  - Other German philosophers were Hans-Georg Gadamer, Ricoeur and Schleiermacher and the Italian, Betti.
  - Gadamer’s hermeneutics emphasised the importance of the socio-historical situation or context of the interpreter, and is closer to a contextual approach than to a literal one.
  - Scholars of hermeneutics emphasised 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 on the role of the interpreter during the interpretation process **and** the fact that
the science of understanding is not a mechanical exercise but also involves value judgements.

* What is the practical relevance of hermeneutics for the interpretation of legislation?
 - Du Plessis illustrates the use of the so-called *hermeneutical circle*. According to this approach every part of a text must be understood i.t.o. 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 elucidated*.
 - The part-whole approach underlines the importance of the **context** of a specific phrase or sentence.

5.3.1 The influence of certain modern critical theories

* Interpretation of statutes deals with the interpretation (explanation) of texts.
 - Literal and contextual approaches are characterised by a certain formalism.
 - This means that it is believed 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 in conjunction with other disciplines such as economics, political science, linguistics, philosophy, literature, etc.
 - This method must be understood in the spirit of postmodernism.

1 What is **postmoderism**? It is not a school of thought, but rather
* an intellectual style; or
* a condition; or
* spirit of the times.

2 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.

3 Postmodernism argues that the utopian promises of the modern world-view came to naught.
- The macro-arguments such as liberalism, Marxism and facism could not solve global problems, because the problems were too 'big', too wide, too abstract:
- these macro-arguments were, amongst others, based on a false optimism about the ability of language to compile and disseminate information.

4 Postmodernism ejects 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.

(i) 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 CLS is rather an attempt to unmask the liberal argument that the law is objective and neutral.

According to CLS, the Western 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 with rights rhetoric (hollow promises about human rights), which masks 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 against 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.
  - 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 movement argues that legal theories and legal reasoning are supported by political considerations, and the existing political and social balance of power is consolidated.

(ii) Deconstruction

* Deconstruction should be understood as a reaction against structuralism.

* Structuralism: the meaning of language can be ascertained and pinned down from its grammatical structure.
  - It 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** challenges the modern person to consider and to 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** (deconstructivists would immediately counter ‘if there is something like that 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).*
  - No symbol is ever complete, but acquires meaning from this never-ending circle of mutual difference and dependence.
  - A text is never closed and 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 case is liberated from the author (the so-called ‘death of the author’) enables the reader to read the symbols in the text 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 to each text and each reader.*
Each reader will have different texts interact with one another. Therefore 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, that which we did not intend to say, is just as important as that which we did intend to say.
- By definition the interpretation of a text is subjective.
- According to the deconstruction theory, meaning is always disputable.

* During the interpretation of statutes, different texts are simultaneously in interaction with each other: other legislative texts, the common law, case law, etc.
- The interpreter is not only informed by the interacting texts, but also by other extra-legal factors (codes) such as cultural and ideological background. Interpretation of statutes has to do with the relationship between the interpreter and the text.
- The legislator cannot control the manner in which the interpreter will interpret the legislative text.
- Statutory interpretation requires an ongoing reinterpretation of the past, as well as a continuous openmindedness about future reinterpretation 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 on 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 led 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 which should not be disguised by references
    (i) to ‘clear texts’ and
    (ii) 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.

* What is the relevance of these critical theories for the practical application of legislation in concrete situations? Law students and lawyers must be exposed to critical reflections about the law. Only by questioning existing dogmas, belief and orthodoxies will the law be able to adapt and change.

* This applies to statutory interpretation as well. Du Plessis refers to this critical thinking about language, meaning and interpretation as the ‘linguistic turn’, and summarises it as follows:

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. ... Meaning is never, at any given point in time, a fixed and stable presence ... The possibilities for meaning are boundless.
Language is the hyper-complex, boundlessly open system that makes such a proliferation of meaning possible.