CHAPTER 7

RESEARCH : ASCERTAINING THE LEGISLATIVE SCHEME (THE PURPOSE OF LEGISLATION)

7.1 General introduction

* Fundamental principle: purpose of legislation must be determined in the light of the spirit, purpose and objects of the Bill of Rights in the Constitution.

* Interpreter may use wide range of aids; he will have to research these factors.

* Du Plessis refers to this research process as contextualisation. The aids fall into two categories:

  - **Internal aids** (the legislation and all its parts); and
  - **External aids** (aids outside the text eg other legislation, dictionaries, commission reports etc).

* Difference between textualists and proponents of the purposive (text-in-context) approach as to when some of these aids must be used:
  - Textualists: only when the relevant words are **ambiguous** and **unclear**.
  - Purposive supporters: all the external and internal aids must be taken into account right from the outset.

* Another difference of opinion between the two approaches will be highlighted: that is, **which** of these aids to interpretation may be used, and to **what extent** may the
interpreter use them to ascertain the purpose of the legislation.

* When interpreting any legislation, the interpreter must take into account the spirit, purport and objects of the B/R (S 39(2) of the CON).
  - The CON thus supports a purposive approach to the interpretation of statutes.
  - Courts must be able to use all the available data (internal and external aids) at their disposal to ascertain the aim and purpose of the legislation.
  - In principle, the range of various aids should be restricted as little as possible.
  - The courts should have the discretion to decide on the importance and relevance of a particular aid to interpretation.

* Must be emphasised that the interpreter must study the legislation as a consistent whole.
  - Matiso v Commanding Officer, P E Prison: this is known as interpretation ex visceribus actus, “all the parts of the particular legislation have to be studied”.

7.2 Internal aids

7.2.1 The legislative text in another official language

* Prior to the commencement of the i/C, legislation in SA was drafted in two official languages, and the text in the other language was used to clarify obscurities.
  - Devenish refers to this as ‘statutory bilingualism’.
  - 1993 Constitution extended official languages to 11; may have influence on statutory interpretation in future.
(i) **Original legislation**

* During passing of original legislation draft must be signed, alternatively in Afr. and Eng. Signed text was enrolled for record in the Appellate Division. In case of **irreconcilable conflict** the signed text prevailed.
  - This principle was expressly included in the 1961 and 1983 Constitutions, as well as in the i/C.

* With regard to the 1996 CON, S 240 provides that the English text will prevail in the event of any inconsistency between the different texts.
  - Ito the CON, the texts of all new national and provincial legislation which have been signed by the president or a provincial premier, must be entrusted to the CC for safekeeping.
  - The signed text will be conclusive evidence of the provisions of that legislation.

* The CON does not refer to irreconcilable conflicts between texts of other legislation. In *Du Plessis v De Klerk* the CC referred to the existing legal position regarding conflicting versions of the same legislative text.
  - Ito Item 27 of Schedule 6, these provisions do not affect the safekeeping of legislation passed before the 1996 CON came into operation.

* The signed version of the legislative text does not carry more weight simply because it is signed:

  (i) **Handel v R**: Signed version is conclusive only when:
  - Conflict arises between versions; and
  - irreconcilable discrepancy between them.
  - Signed version only used as a last resort to avoid stalemate.
(ii) *Jaffer v Parow Village Management Board*:  
- May happen that meaning of one version of the text is wider than the other (e.g. penalty of imprisonment and a fine, and the other only a fine).  
- Then **common denominator** rule is followed: only fine will be imposed.

(iii) *Janse van Rensburg v Minister of Defence (2000)*:  
- Supreme Court of Appeal ruled that the **common denominator rule** is not a rule of general application.  
- One would rather give preference to the rule that an individual has to be given the most preferential treatment.

(iv) *Zulu v Van Rensburg (1996)*:  
- If there is a conflict, the versions compliment one another and must be read together. An attempt must be made to reconcile the texts with reference to the context and purpose of the legislation.

(iv) *Commissioner of Inland Revenue v Witwatersrand Association og Racing Clubs (1960)*:  
- Even an unsigned version of the text may be referred to in order to determine the intention of the legislator.

(v) Since acts are signed alternately in different languages, amendment Acts create a problem if those Amendment Acts are then also amended. Suppose the amendment Acts of a particular Act are signed alternately in Eng. and Afr. Which one will prevail in case of an irreconcilable conflict?

- Conflicting answers to this question:  
- The most acceptable solution was put forward in *R v Silinga*: The court suggested that the amendment Act be regarded as part of the original
statute. The version of the originally signed statute will prevail in the case of irreconcilable conflicts between the texts of the Amendment Acts.

(ii) Subordinate legislation

* Past:
  No constitutional guidelines will regard to conflicting texts of subordinate legislation.
  - In practice all subordinate legislation are signed.
  - If texts do differ, they are read together to find the true meaning.

* Irreconcilable conflict between the various texts:
  Court will give preference to the one that benefits the person concerned.
  - This approach is based on the presumption that the legislator does no intend legislation to be futile.
  - If the irreconcilable conflict results in delegated legislation that is vague and unclear, the court may declare it invalid.

(iii) Criticism

* All legislative texts should be read together right from the outset; they are all part of the structural wholeness of the same ‘enacted law-text’. Legislators in SA have the benefit of two versions of the same legislative text available for comparison.
  - Nevertheless the fact that the signed version automatically prevails is merely a statutory confirmation of the textual approach, because the purpose of the legislation is ignored if there is a irreconcilable conflict between the two versions.
- It could well be that the unsigned version reflects the true purpose of the provision, and that the signed text is the incorrect one.
- In following the signed version blindly, the purpose of the legislation could be defeated by the court.

* In the light of
  - the interpretation clauses in the CON (SS 39 and 233),
  - as well as the principle that legislation should be as far as possible be interpreted to render it constitutional, the following solution is suggested:
    > in the case of an irreconcilable conflict between versions of the same legislative text, the text which best reflects the spirit and purport of the B/R must prevail.

7.2.2 The preamble

* Statutes beginning with a preamble are rare nowadays. The Constitution has a preamble. It usually contains:
  - A programme of action; or
  - a declaration of intent with regard to the broad principles contained in the particular statute.
  - Preambles may be used during interpretation of legislation, since the text as a whole should be read in context.
  - Although a preamble on its own cannot provide the final meaning of the legislative text, post-1994 preambles should provide the interpreter with a starting point.

* Please read the preamble to the CON on p.78.

* Study the following cases:
(i) *Green v Minister of Interior:*  
If provisions are clear and unambiguous, court may not resort to the preamble. Such an approach is narrow and textually orientated.  
- The purpose of the legislation should be determined without any limitations.

(ii) *Jaga v Dönges:*  
Court considered the preamble to be part of the context of the statute.

(iii) *S v Davidson:*  
The Zimbabwean court followed the orthodox textual approach in deciding that the preamble may be referred to only if the provisions of the Act are ambiguous and vague.

* However, in a number of recent cases the courts acknowledged the unqualified application of the CON’s preamble:  
- *Qozeleni v Minister of Law and Order* and  
- *Khala v The Minister of Safety and Security.*

*(i) National Director of Public Prosecution v Seevnarayan:*  
The court rejected the argument that a preamble may be considered only if the text of the legislation is not clear and ambiguous as an outdated approach to interpretation.

7.2.3 The long title

* It provides a short description of the subject matter of the legislation.  
- It forms part of the statute considered by the legislature during the legislative process.  
- The role played by long title in helping to ascertain the **purpose** of the legislation will depend on the information in it.  
- *Bhyat v Commissioner for Immigration:*
Courts may refer to the long title to establish the purpose of the legislation.

7.2.4 Express legislative purpose and interpretation guidelines

* While the purpose clause and the interpretation guidelines provide a more detailed description of the legislative scheme than the long title, this can never be decisive.
  - To take such a view would merely be to create a new and sophisticated version of legal interpretation.
  - The interpreter must analyse the legislative text (as a whole) with external aids.
  - Examples of a purpose clause and an interpretation clause are SS 1 and 3 of the Labour Relations Act. Read carefully through these clauses on p.80 of your textbook.

7.2.5 The definition clause

* Most statutes contain a definition clause, in which certain words and phrases used in the legislation are defined.

* A definition in the definition section is conclusive, unless the context in which the word appears in the legislation indicates another meaning.
  - In that case the court will follow the ordinary meaning of the word.
  - Brown v Cape Divisional Council

  - Canca v Mount Frere Municipality:
  Court will always examine the meaning given to a word in a definition clause, to see whether it is in accordance with the *purpose* of the legislation.
- *Kanhym Bpk v Oudtshoorn Municipality:* The court held that a deviation from the meaning in the definition clause will only be justified if the defined meaning is not the correct interpretation within the context of the particular provision.

7.2.6 Headings to chapters

* Headings to chapters or sections may be regarded as preambles to those chapters or sections.
  - Within the framework of text-in-context headings should be used to determine the purpose of the legislation.

- *Chotabhai v Union Government:* Within the framework of the contextual approach all factors, including headings, should be considered to determine the purpose of the legislation.

- *Turffontein Estates v Mining Commissioner Johannesburg:* Value attached to headings will depend on the circumstances of each case.

7.2.7 Paragraphing and punctuation

* Customarily punctuation was not considered to be part of legislation. Division into paragraphs also was not part of legislation.
  - However, it is a grammatical fact that punctuation can affect the meaning of the text.
  - Steyn: Correctly criticizes this approach. It is a grammatical fact that punctuation can affect the meaning of the text. (See tomb-stone example).
- **R v Njiwa:**
  Court gave preference to Steyn’s view and held that punctuation must be taken into consideration during interpretation.

- **S v Yolelo:**
  Appellate Division left this question open but held that an interpretation based on the *purpose of the legislation* should take precedence over an interpretation based solely on the division into paragraphs.

- **Skipper International v SA Textile and Allied Workers’ Union:**
  Court must take punctuation into account during the interpretation process since the punctuation was considered during the passing of the legislation.

### 7.2.8 Schedules

* They serve to shorten and simplify the content-matter of sections in legislation. Their value in interpreting provisions will depend on:
  - the nature of the schedule;
  - its relation to the rest of the legislation; and
  - the language in which it is referred to in the legislation itself.

* **General rule:** Schedules which expound sections of an Act should have the same force of law as a section in the main Act.

* Example of a schedule: schedule 1 of the CON (which contains the description of the National flag).

* In the case of a conflict between schedule and section of legislation, the section prevails.
1993 Constitution schedules were deemed to form part of the Constitution.
- In certain cases the schedule will state that it is not part of the Act and that it does not have the force of law, in which case it may be considered as part of the context.
- Example: Schedule 4 of the Labour Relations Act, which consists of flow diagrams explaining the procedures for dispute resolution set out in the Act.

7.2 External aids

7.3.1 The Constitution

* The CON, being the supreme law, is the most important aid to interpretation. No argument about plain meanings and clear texts could prevent the CON from being used or referred to during interpretation.
- It describes how other legislation must be interpreted, contains the B/R, and is the repository of fundamental values.

7.3.2 Preceding discussions

* It entails:
- Discussions about a specific Bill before Parliament.
- Debates and reports of various committees (part of legislative process).
- Reports of commissions of inquiry.

* Whether courts may use such preceding discussions (and to what extent) has been the subject of lively debates!
- One should distinguish between debates during the legislative process, and the reports of commissions of inquiry which precede the passing of legislation.
(i) Debates during the legislative process

* Common law writer Eckhard: he believed that the debates preceding the acceptance of a Bill are important in establishing the intention of the legislature, especially when this is not evident from the wording of the legislation.

* The use of debates has not been accepted by the courts:

i) Bok v Allen and Mathiba v Moschke: preceding discussions were rejected outright, although the court a quo in the Moschke case had in fact taken preceding debates into account.

ii) Ngobo v Van Rensburg: Dodson J made the following remarks with regard to the use of explanatory memoranda during the interpretation of statutes:

The weight of authority is very much against allowing such documents to be used as an aid in the interpretation of a statute. This authority has received considerable academic criticism.

However, the antagonism against the inclusion of debates may be disappearing:

(i) De Reuck v Director of Public Prosecutions, Witwatersrand Local Division: The court referred to parliamentary debates, reports of task teams and the views of academics in interpreting the Films and Publications Act.

ii) Western Cape Provincial Government: In re DBV Behuising (Pty) Ltd: The CC used parliamentary debates during interpretation.
iii) *Case v Minister of Safety and Security;* and
iv) *Curtis v Minister of Safety and Security:* the CC referred to the speech by the then Minister of Justice during the second reading of a Bill.

v-vii) *S v Dzukuda, S v Tilly; and S v Tshilo:* the court referred to a report of the SA Law Commission and a ministerial speach in parliament during the interpretation of a statute.

(ii) Commission reports:

* *Hopkinson v Bloemfontein District Creamery:* Court held that the prevailing law prevented the use of a commission report about the Companies Act.

* *Rand Bank Ltd v De Jager:* The court decided that the report of the commissioner of enquiry, which was largely responsible for the Prescription Act of 1969, was an admissible aid in construing the Act.

* *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd:* The AD held that the report of a commission of enquiry which preceded the passing of an Act may be used to establish the purpose of the Act, if a clear link exists between the recommendations of the report and the provisions of the particular legislation.

* Steyn: the reasons given by the courts for not admitting such material are not convincing. The speech given by the minister at the second reading of a Bill and the explanatory memoranda provided for members of parliament are especially useful in understanding and explaining legislation.
* The deliberations and reports of the large number of standing, ad hoc, joint and portfolio committees of parliament (which play an important role during the legislative process), may be used to help to ascertain the purpose of the legislation.

* The argument that not all debates in parliament apply to the purpose of the legislation is not relevant.
  - The courts are expected to use their discretion in imposing punishment and in reaching decisions amidst conflicting evidence.
  - The judiciary in SA ought therefore to be able to ascertain the relevant debates in parliament for the purpose of statutory interpretation.

7.3.3 SURROUNDING CIRCUMSTANCES

* Surrounding circumstances are those conditions prevailing before and during the adoption of the legislation;
  - it refers to the context of the legislation which encompasses a wide spectrum.

(i) The mischief rule entail?

* The historical context of the particular legislation is used to place the provision in question in its proper perspective. The use of these surrounding circumstances is also known as the ‘mischief rule’.

* This rule was laid down:
  - in the 16th century
  - by Lord Coke
  - in the famous Heydon’s case and
  - forms the cornerstone of the contextual approach to interpretation.
* It poses 4 questions to establish the meaning of legislation. What was:

- the legal position before legislation was adopted?
- the mischief or defect not provided for by existing legislation or common law?
- what remedy was provided by the legislature to solve this problem;
- what was the true reason for the remedy?

* the object of the rule is to examine the circumstances leading to the measure in question. This rule has been applied on numerous occasions by the courts.

* This rule was explained in the following cases:

(i) *Santam Insurance Ltd v Taylor:* on account of incomprehensible language used in the compulsory Motor Vehicle Insurance act court was obliged to examine the historical background in order to ascertain the purpose.

(ii) *Qozeleni v Minister of Law and Order:* Froneman J observed that the suggested approach to interpret the Constitution is not foreign to the mischief rule.

(ii) *Travaux préparatoires*

* It refers to the discussions during the drafting of an international treaty, but is increasingly used by drafters of a supreme Constitution.
* Since S 39(2) of the CON has the practical effect that every court will have to indulge in some constitutional interpretation, this aspect will be discussed briefly.

* The *contextual approach* favours the use of all relevant factors and circumstances during the interpretation process.

* A supreme Constitution which includes a bill of fundamental rights can be described as a ‘living tree’.
  - It is a dynamic document
    > which must be interpreted in the light of ever-changing *circumstances, values*; and *perceptions*.

* Constitutional drafters must leave room for development and adaptability.
  - In other words the *travaux préparatoires* of a Constitution may be consulted as a ‘secondary source’, but cannot be the deciding factor.

(iii) *Contemporanea expositio*

* It is an exposition of the legislation which is given
  - at the time of its adoption or
  - shortly afterwards.

* The following may all serve as *contemporanea expositio*:
  - marginal notes;
  - punctuation;
  - division into paragraphs; and
  - first application of the legislation.

* The implication is that the exposition was probably given by persons who were involved in the adoption of the legislation, or shortly afterwards during its first application.
(iv) **Subsecuta observatio**

* Concerned with established *use or custom* which may originate at any time *after* the adoption of the legislation - which may be in conflict with the *contemporanea expositio*.

* *Rex v Lloyd*: The *use of a measure* by the courts over a long period of time was a good indication of its meaning.

* Custom cannot dictate a particular interpretation but - when two interpretations are possible the long term use of a measure may be the deciding factor.

(v) **‘Ubuntu’**

* The postamble of 1993 Constitution referred expressly to *ubuntu*.

There is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation ... 

* It is an indigenous African concept and refers to - a practical humanist disposition towards the world, - and to compassion, tolerance and fairness.

* The concept *ubuntu* was applied and explained by the Constitutional Court in *S v Makwanyane*. - P 85: know the quotation *verbatim*.

* It was not expressly mentioned in the 1996 Constitution; will however not disappear from the legal scene: - because it was used in the Makwanyane case it forms part of the new SA Constitutional jurisprudence;
- *ubuntu* lives on in numerous references to human dignity in the Constitution; and
- *ubuntu* forms an important bridge between the communal African traditions and Western traditions.
QUESTION 2

Discuss dictionaries and linguistic evidence as an external aid when dealing with statutory interpretation. Make use of relevant case law throughout your answer. [5]

* As legislation is becoming ever more technical and highly specialised, dictionaries are used more and more frequently by the courts to define the meaning of words.

* Transvaal consolidated Land and exploration Co Ltd v Johannesburg city council:
  - Court used dictionaries in a contextual framework.
  - Dictionary definitions can be used but the task remains of ascertaining the particular meaning of the language intended in the context of the relevant statute.

* De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka:
  - Court stated that the interpretation of a word could not finally be determined by its meaning in a dictionary
    > can only be a guideline.
  - The context in which a word was used should be a decisive factor.

S v Makhubela:

- The accused was charged with being behind the wheel of a vehicle that was being pushed by a group of people on a public road, without a driver’s licence.

- He was found guilty of driving a vehicle on a public road without a valid driver’s licence.

- On review, the court decided that the definition of the word ‘drive’, as found in the Road Traffic Act of 1973, was inadequate.
• The court held that the word ‘ drive’ should not be construed only according to its dictionary meaning, but should be understood within the context of the Act as a whole.

• The legislature had meant that a person driving a vehicle propelled by its own mechanical power should be in possession of a driver’s license.
• The conviction and sentence were set aside.

* Association of Amusement and Novelty Machine Operators v Minister of Justice:
  - Meaning of the word ‘pin tables’ was in dispute.
  A.D. held that the testimony of language experts was not admissible as an aid in construing legislation.

* Metro Transport (Pty) Ltd v National Transport Commission:
  - Court decided that supplementary linguistic evidence was not admissible.
  - (On the other hand, are dictionaries not the written evidence of linguistic experts?)
7.3.5 The source of a provision

* Courts sometimes must interpret a section of an English statute that has been incorporated verbatim into SA legislation. Should SA courts follow the interpretation given to original English legislation by the English courts?

* SA courts will use the interpretation by the English courts as a guideline, but will always construe legislation in the light of the SA common law.

- The drafters who incorporated English legislation word-for-word into SA legislation, did so for reasons of effectiveness, and not in order to compel the SA courts to follow the English interpretation.

* If the SA legislation is identical to the the language of the English legislation and the interpretation of the English courts is not in conflict with SA common law principles, the SA courts may take cognisance of the English cases.
  - *Mjuqu v Johannesburg City Council*

* This is now further qualified by the Constitution.
  - S.39(2): when our common law is developed by any court, tribunal or forum, the spirit, purport and objectives of the B/R must be promoted.
  - It is not only the rules of common law that determine whether our courts refer to foreign law, but the supreme Constitution as well.
7.4 The Interpretation Act

7.4.1 General

* The act consists of six parts.
- We will deal with only three aspects of part one, which contains general provisions regarding the interpretations of statutes that apply in the RSA or any part thereof.
- Parts II to V contain particular provisions applying in the different provinces, and
- part VI expressly provides that the Act binds the state.

7.4.2 The time factor

7.4.2 The meaning of ‘month’

* According to S 2 ‘month’ means a calendar month and not a lunar month of 28 days.
- Application of this definition is ambiguous, as the term calander month may be construed in two ways:
  > a month as it appears on the calendar, e.g. 1 to 31 January
    (as in service contracts); and
  > a month as it is measured in e.g. prison terms from a certain day of a month to the corresponding day of the next month, e.g. 9 June to 9 July.
- It would be more appropriate to use calendar month for 1 to 31 January and month for 19 June – 19 July.

(ii) Computation of time

* This matter is very important, because large numbers of statutory and contractual provisions
- prescribe a time or period in which or after which
certain actions are to begin, or to be executed, abandoned or completed.

* Although S 4 of the Interpretation Act deals with computation of time, it should be read with the common law methods of computation of time.

### The statutory method (S 4 of the Interpretation Act)

**4 Reckoning of number of days**

When any particular number of days is prescribed for the doing of any act, or for any other purpose, the period shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

* “Number of days shall be reckoned **exclusively of the first** and **inclusively of the last day** unless the last day happens to fall on a Sunday or any public holiday exclusively of the first day and exclusively also of every such Sunday or public holiday.

* S4 refers to days only – not to periods of months or years.
  - It will be applied only when the legislature has made no other arrangements in the legislation concerned.

* In cases where S 4 is not applicable, our **ordinary civil method** applies, as it corresponds to common law.

* Another method will be used only if a contrary intention is apparent in the legislation concerned.
  - (Kleynhans v Horkshire Insurance Co Ltd.)
* In *Brown v Regional Director, Dept of Manpower* it was held
  - that if it is clear that S 4 has to be used, it must be interpreted as follows:
    > The purpose of the calculation is to determine the end and not the beginning of the particular period.
    > The beginning of the period is when the particular right in question arises.

**Common law methods**

* There are three common law methods of computation of time. They do not form part of the Interpretation Act.

- *Computatio civilis*

  * This method is directly opposed to the statutory method of S 4 of the Interpretation Act.
    - The time is computed *de die in diem*.
    - The first day of the prescribed period is included and the last day is excluded.

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**Minister van Polisie v De Beer:**

- The cause of action in this case was a motor car collision involving a police vehicle.
- Ito S 32 of the Police Act, a civil suit brought against the police as a result of an action executed ito the Police Act must be instituted within six months.
- The collision took place on 5 August 1967.
- The summons was served on 5 February 1968.
- On appeal the Supreme Court found that the ordinary civil method should be used to calculate the time.
- The last day was therefore excluded and the serving of the summons was therefore one day too late.
• The action was refused.

• *Computatio naturalis* (natural method)

  * The prescribed period is calculated from the hour (or even minute) of an occurrence to the corresponding hour (or minute) on the last day of the period in question (*de momento in momentum*).

• *Computatio extraordinaria* (extraordinary civil method)

  * Both the first and the last day of the period concerned are included according to this method.
    - With regard to both the statutory and the common law methods of computing time, the purpose of the legislation will remain a decisive factor.

7.5 Other common law presumptions

7.5.1 Government bodies are not bound by their own legislation

  * As a general rule the State is not bound by its own legislation, unless the legislation provides otherwise expressly or by necessary implication.

  * In *Union Government v Tonkin* the court confirmed that the intention that the state should indeed be bound can be inferred
    • not only from the wording of the law,
    • but also from the surrounding circumstances and
    • other indications.

  * *Hahlo & Kahn* define this presumption as follows:
An enactment does not apply to the state or its executive arm or to a provincial council, local authority or public body from which it emanates.

* It seems that this presumption sanctions unbridled lawlessness by government agencies, similar to the principle "The king can do no wrong" in old English law. However it does not create a carte blanche (unfettered power) but rather a principle of effectiveness to ensure that the state is not hampered in its government functions.

* Du Plessis: Proper care should therefore also be exercised in order to ensure that the presumption is invoked in such a way that it serves the purpose of maintaining a public order of law.

* Wiechers holds the view that the state should always be bound by its own legislation except in those instances, where it would be hindered in the performance of its government functions. In S v De Bruin, however, the court rejected this viewpoint in the light of previous precedents.

* The application of this presumption was later again confirmed by the AD in Administrator, Cape v Raats Röntgen & Vermeulen (Pty) Ltd. (1992).

* In Evans v Schoeman the court held that the presumption against the state being bound is not limited to instances where the state’s prerogatives are involved. The following are also indications that the state is not bound:
  * If the state would be rendered subject to the authority of or interference by its own officials.
  * If the state would be affected by penal provisions (as in S v Huyser) (see below).
• Whether the state is bound depends upon the particular legislation and specific circumstances. Each case has to be judged on its own merits.

• The following are examples of the practical application of the presumption:

(i) Government bodies and state controlled agencies are bound by town planning schemes. 
(\textit{Drakensberg Administration Board v Town Planning Appeals Board}).

(ii) A security official who contravenes a statutory provision when acting outside the scope of his duties (\textit{?}) cannot rely on the presumption against the state being bound (\textit{S v Reed}).

(iii) The driver of a fire engine may disregard a red traffic light while fire-fighting (\textit{S v Labuschagne}).

(iv) An agricultural official who combats stock diseases and at times has to cull stock is not bound by statutory requirements regarding hunting permits (\textit{S v Huyser}).
QUESTION 3

‘The question whether the state is bound depends on the particular legislation and specific circumstances. Each case has to be judged on its own merits’. In this regard discuss the case of *S v DeBruin 1975 (3) SA 57 (T).* [6]

- The accused was caught exceeding the speed limit.
- He was charged with contravening the fuel saving regulations and convicted in the magistrates’ court.
- On appeal De Bruin claimed that he was a public servant who, on the day in question, had been running late for an on-site inspection on the state’s behalf.
- If he had arrived late, this could have been to the state’s detriment.
- The court found that being bound by the provisions in question could have obstructed essential state services and jeopardized state security.
- In addition the court found that De Bruin’s decision to exceed the speed limit was reasonable, and set aside the conviction.
* Steyn correctly points out that this presumption applies to both original and subordinate legislation.

* As Labuschagne indicates with reference to *R v Thomas*, that strictly speaking, this presumption deals with the state being bound by particular provisions.
  - He argues that the state might be bound by one provision of the legislation, but not by another.

- Since S 39(2) of the Constitution clearly stipulates that rules of common law have to be developed in the light of the fundamental rights in the Constitution, it is submitted that this particular presumption should no longer be applied under the new constitutional order.

- S 8(1) of the Constitution expressly provides that government at all levels are bound by the Bill of Rights. The Constitution is the supreme law of the Republic, and all law and government conduct must be tested against the *spirit, purport and objects* of the fundamental rights entrenched in the Bill of Rights.

- After all it would be illogical and absurd if government organs were bound by the CON (as the supreme law), but if it were at the same time presumed that those organs are not bound by their own legislation, which is subordinate to the supreme CON.

- The Constitution abounds with references to principles such as
  - accountability and openness;
  - supremacy of the Constitution;
  - the values underlying an open and democratic society based on *freedom, equality* and *human dignity*;
  - the state is bound by the Constitution, as well as
- respecting, protecting, promoting and fulfilling the Constitution and the Bill of Rights and
- the official oath of judicial officers.
All of these merely strengthen the argument that this presumption can no longer be invoked.

* As Du Plessis points out, Wiechers’ viewpoint that this presumption should be applied the other way round, has been proved correct after all these years.

Study the quotation on p. 92 of your textbook.

* Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council:
The CC explained the principle of legality in the new constitutional order as follows:

   It seems central to the conception of our constitutional order that the Legislative and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. At least in this sense, then, the principle of legality is implied within the terms of the i/C. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the i/C is a principle of legality.

* State organs should always be bound by their own legislation, unless a particular government organ can prove that it would be hampered in the execution of its duties and functions if it were bound by its own legislation.

7.5.2 Legislation does not oust or restrict the jurisdiction of the courts

* Tefu v Minister of Justice:
Unless expressly stated or necessarily implied in the legislation, it is presumed that the legislature does not wish to exclude or restrict the courts’ jurisdiction.

* In *De Wet v Deetlefs* it was held that the **intention of the legislator** clearly indicate that a court’s jurisdiction is to be excluded.

* Sometimes legislation confers the power to make decisions
  - on certain persons (**eg** immigration officers) or
  - bodies (**eg** licensing boards).
  - Whether the courts were competent to review such decisions depended on the particular enabling Act.

* The High Court’s jurisdiction to review administrative decisions
  - (**eg** those of police officers) was often ousted by security legislation during the various states of emergency of the late 1980s, but under a supreme justiciable Constitution this will not be possible any more.

* Even if such legislation expressly excluded the court’s jurisdiction, their power to review such a decision was not totally excluded.
  - The High Court always have had an inherent common-law jurisdiction to review such decisions
    * **eg** on the ground of *mala fides* (bad faith).

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*Mathope v Soweto Council:*

- This presumption was applied in the *Mathope* case.
- The court found that S 12 of the Community Councils Act of 1977 does not exclude the jurisdiction of the Magistrate’s courts or the Supreme Court.
• S 12 provides that a civil action between a black person and a community council shall be heard by the erstwhile commissioner’s court.
• The court referred to an individual’s fundamental right to approach the ordinary courts, and found that the provision concerned contains nothing that rebuts this presumption.

* Du Toit v Ackermann: A statutory provision which denies or restricts the right of an individual to appeal to a court was also interpreted strictly.

* The principle underlying the common law presumption that the jurisdiction of the courts is not ousted by legislation, is now also entrenched as a fundamental right in the Constitution.

* Section 34 provides: Everyone has the right to any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.

* Read with S 33 (the right to just administrative action) and S 35(3) (every accused person has the right to a fair trial), means that the legislature can no longer (as in the past) oust or limit the jurisdiction of the courts at will with ouster clauses.