1.3 GLOSSARY OF DEFINITIONS AND TERMS

These will help you to find your way through the terminological minefield in this book.

- **Act / act**
  - Act: parliamentary statute or legislation
  - act: an act ("handeling") of a government organ

- **Concretisation**
  - Final phase of the interpretation process.
  - Legislative text, purpose and situation are harmonised
  - meaningful conclusion.

- **Constitutionalism**
  - Refers to government (=GM) in accordance with the CON.
  - GM derives its powers from and is bound by the CON.
  - Refers to state where law is supreme and
  - GM and state authorities are bound by the rule of law.

- **Constitutional state**
  - Constitutionalism prevails.
  - Law is supreme;
  - underpinned by two foundations:
    i)  formal: * the separation of powers;  
        * checks and balances on GM; and  
        * principle of legality.
    ii) material: refers to state bound by system of fundamental values such as  
          - justice and
- equality.

- Contextual approach
  - Same meaning as purposive or functual approach.

- Contextualisation
  - Process during which the legislative text is read and researched
  - within its total context
  - to ascertain the purpose of the legislation.

- Entrenched
  - Refers to provisions in a CON which can only be altered or amended or repealed with difficulty
  - Rigid or inflexible provisions.
  - Legislation usually changed by means of a simple majority vote (50%+1 of the members present).
  - Entrenched provision would entail a more difficult procedure (two thirds of all the members (not only those present) of both houses sitting together.

- Intra vires
  - When a GM organ acts within the scope of the powers conferred on it, it acts intra vires.
  - Ultra vires?

- Judicial lawmaking
  - Courts primarily involved in application of the law;
  - also have a secondary lawmaking function.
  - This involves
    * the development of the common law, and
    * giving form, substance and meaning to legislative provisions in concrete situations.
- The judiciary may modify or adapt the ordinary meaning of a legislative provision so that it conforms to the purpose or aim of the legislation.
- Judicial lawmaking involves a creative judicial discretion but it must be based on legal rules and principles.

- **Jurisdiction**
  - The competency of a particular court to adjudicate on a specific case.
  - **Where** may **which** court adjudicate **what** type of case.
  - Court’s jurisdiction is determined by two factors:
    i) geographical area in which it operates
      - there must be a link between the courts area of jurisdiction and the persons appearing before the court;
    ii) the type of case which the court may hear:

  1. **type of offence**
     - Type of offence and
     - the possible sentence are determining factors.

  2. **civil cases**:
     - Amount claimed and
     - the type of legal remedy are important.

  3. **constitutional matters**
     - In which legislation and the conduct of government can be tested against the supreme CON.
• **Law**

1 **Statute law:**

- It consists of different types of legislation enacted:
  - Acts of Parliament,
  - provincial legislation,
  - municipal by-laws,
  - proclamations and regulations.

2 **Common law**

The common law is composed of the rules of law which were not originally written down but was accepted as law of the land.

- South African common law is known as *Roman-Dutch law*; originated during the 17th century in the province of Holland.
- Common law is not a codification (or compilation of all legal principles).
- The common law may be changed by original legislation.
- If there is no statutory law on a specific subject, the common law applies.

3 **Case law**

Case law (also referred to as ‘judicial precedent’) is the law as it has been decided by various courts in specific cases before them.

- The precedent system (=*stare decisis*): the judgements of higher courts bind lower courts and courts of equal status.
• Legality
  - Refers to lawfulness and
  - the control of arbitrary state action.

• Legislature
  An elected body which has the legal power to enact laws.
  - Collective name for these laws is legislation.

• Legitimacy
  - This is the level of acceptance of a constitution, government, legal system etc. by the people.
  - It refers to the faith of the population in a system or situation.

• *Locus standi*
  - It deals with access to the courts.
  - Literally means ‘one has a place of standing in the court’.
  - It determines whether a person has a right to be heard by a court:
    i) person must show some personal interest which has been affected; however,
    ii) S 38 of the CON has considerably widened the base for approaching a court to hear a matter when fundamental rights has been infringed.
    iii) One can even approach the court on behalf of ‘a group of persons’
        - such wide *locus standi* is called a class action.

• Parliamentary / legislative sovereignty
  - Parliament is supreme.
  - It is the highest legislative body, capable of enacting any laws
- but no court may test the substance of parliamentary Acts against standards such as *fairness and equality*.
- This system operated in SA before the 1993 CON came into operation.

- **Proclamation**
  - It is a specific category of subordinate legislation.

- **Promulgation**
  - Promulgation of a statute should be distinguished from the adoption of legislation (which deals with the formal enactment procedures).
  - Legislation is made known by promulgation and comes into operation when it is published in an official gazette (eg Government Gazette), unless another date is specified.

- **Purpose**
  - Purpose of legislation means the same as
    * object,
    * the aim.
    * scope or
    * any other word having the same meaning.

- **Supreme constitution**
  - Constitution is the highest law (*lex fundamentalis*) in the land.
  - Although Parliament remains the highest legislative body, any legislation or act of any government body (including parliament) which is in conflict with the CON, will be *invalid*.
  - Constitutional supremacy does not imply judicial supremacy.
  - The courts are also subject to the Constitution.
- On 27 April 1994 the system of sovereignty of Parliament in SA was replaced by a system of constitutional supremacy.

- To test legislation
  - Known as constitutional review or judicial review, it refers to the process whereby legislation (which is alleged to be in conflict with the CON) is reviewed or tested by the court.
  - The court measures the legislation against the provisions of the CON and decides whether the legislation is valid or invalid.

- Textual approach
  - Has the same meaning as
    * the literal approach or
    * the ‘plain meaning’ approach.

- Ultra vires
  - Act or conduct of a Government organ which goes beyond the authority conferred upon it, is ultra vires,
  - outside the scope of its powers.
1 THE THREE-PHASE PROCESS OF INTERPRETATION

A simplified model of the interpretation process, consisting of three phases, is used in Botha’s book.
- This is a theoretical model and will not be encountered in the case law.

i) The initial phase

- During the initial phase a number of basic principles are used as a point of departure.

- The supreme Constitution in general, and the Bill of Rights in particular, are the corner stones of the legal order.

- The most important principle of statutory interpretation is to ascertain and to apply the purpose of the legislation in the light of the Bill of Rights.

- The text of legislation is read to find the initial meaning of the text and the following are born in mind:
  * the common law presumptions; and
  * a balance between the text and the context of the particular legislation.

ii) Research phase

* During the research phase the purpose of the legislation is determined by studying all the factors and considerations that may have a bearing on the particular legislation:
- the Interpretation Act;
- presumptions;
- intra-textual aids; and
- extra-textual aids.

* Sec 39 of the Constitution obliges the interpreter to use the research phase fully.
- Additional extra-textual (external) aids to interpretation are now at the disposal of the interpreter.

* When the purpose of the legislation has been determined, the next stage comes into play.

(iii) Concretisation phase

* During the concretisation phase the
  - legislative text;
  - the purpose of the legislation; and
  - the facts of the particular case are *harmonised* to bring the process to a just, purposive and meaningful end within the framework of the purpose of the legislation.

* During this process the spirit, purport and aim of the fundamental rights in the Constitution must be promoted.