CHAPTER 2
WHAT IS LEGISLATION?

2.1 What is legislation?

- Legislation (statute law) is written law enacted by a body or person authorised to do so by the Constitution or other legislation.
  - Du Plessis: legislation entails ‘enacted law-texts’.
  - Legislation must be distinguished from other types of law because the rules and principles of statutory interpretation only apply to legislation.

- According to S 2 of the Interpretation Act

  ‘law means any law, proclamation, Ordinance, Act of parliament or other enactment having the force of the law’.

- ‘Law’ in this context does not include the common law (S 1 of the Interpretation Act.

- The Interpretation Act refers to different types of legislation: Acts, ordinances, proclamations, by-laws, regulations, rules and any other enactment with the force of law.

- S 101(3) and 140 (3) of the CON refer to ‘proclamations, regulations and other instruments of subordinate legislation.’

- S 239 of the CON also defines legislation, distinguishing between national and provincial legislation:

  In the CON, unless the context indicates otherwise – ‘national legislation’ includes –
  (a) subordinate legislation made into an Act of parliament;
      and
  (b) legislation that was in force when the Con took effect
and that is administered by the national government.

‘Provincial legislation’ includes –
(a) subordinate legislation made into a provincial Act; and
(b) legislation which was in force when the Con took effect and that is administered by a provincial government.

2.2 CATEGORIES OF LEGISLATION

- These categories relate to the historical origins of legislation (chronological categories) and
  - The status of the various types of legislation in the legal order (hierarchical categories).
  - All types of legislation (statute law or enacted law texts) are not essentially the same.
  - The various hierarchical categories of legislation differ fundamentally from each other.
  - These differences have an impact on the commencement and demise of legislation and play an important role in other branches of the law eg
    * administrative law;
    * human rights law; and
    * constitutional law.

2.2.1 Chronological categories

- Relates to their historical origins.
  - It is a little bit of history and
  - legislation is merely categorized into a chronological timeline.
(i) Legislation before 1806

- Old Dutch *placaaten* are viewed as common law.
- No formal procedures are required for their demise.
- They may become abrogated by disuse.

(ii) Old order legislation (legislation enacted before the i/Con took

- Pre-union legislation (1806-1910)
  - Legislation adopted between the British annexation of the Cape in 1806 and the creation of the Union in 1910.
  - Consists of legislation of the British colonies and the Boer Republics.
  - Most of these had been either
    * incorporated into legislation of the Union (1910-1961) and
    * the Republic (since 1961) or
    * repealed.

- Legislation between Union and the democratic era (1910-1994)
  - In view of the constitutional changes, this legislation is known as ‘old order legislation’. It would include:
    - Acts of parliament;
    - legislation of the so-called independent homelands or TBVC states;
    - legislation of the former self-governing territories (homelands);
    - provincial ordinances enacted by the provincial councils of the four ‘white’ provinces;
    - by-laws enacted by local authorities (town councils and municipalities);
- as well as other delegated (subordinate) legislation.

(iii) Legislation in the new constitutional order since 1994

- All legislation enacted after the beginning of the constitutional democracy in 1994. It includes:
  - the i/Con (since repealed);
  - 1996 Constitution;
  - national legislation;
  - provincial legislation;
  - other regulations and proclamations; and
  - legislation by new local authorities created after 1994.

2.2.2 Hierarchical categories

- The historical distinction dealt with dates and a bit of history.
  - The hierarchical categories deal with the status of legislation.
  - Before 1994 the CON was not supreme; the classification of legislation was simple and straightforward:
    - original legislation (Acts of parliament);
    - subordinate legislation (regulations and proclamations).

- The post-1994 picture is more complicated.
  - We now have
    - a supreme CON;
    - old order legislation and new post-‘94 legislation;
    - three spheres or tiers of co-operative government (national, provincial and local).

- The Constitution is supreme and all other legislation is subordinate to it.
- The CON refers to regulations, proclamations and other instruments of subordinate legislation.

- Du Plessis correctly distinguishes between classifications based on the hierarchy and status of legislation.
  - His distinction brings a new type of legislation into the equation; namely the ‘superordinate non-constitutional legislation’.

(i) The Constitution

- S 2: The CON is the supreme law of the Republic and any law or conduct inconsistent with it is invalid; and the obligations imposed by it must be fulfilled.
  - The courts may now test all legislation and government action in the light of the CON.

- The CON is officially known as the Constitution of the Republic of South Africa, Act 108 of 1996.
  - Van Wyk and Du Plessis criticize this method of numbering.
  - Every year ‘ordinary’ Acts of parliament are numbered in chronological order; the CON, however, is not merely Act 108 of 1996.
  - It is the highest law in the land and incorporates the rights, aspirations and values of all its people.
  - It is degrading to number such an exalted document as merely the next statute on the list.
  - The CON is not Act 108 of 1996.
    * It was not adopted by Parliament.
    * It was drafted by the Constitutional Assembly and
    * certified by the Constitutional Court.
    * It is incorrect and irregular to refer to the CON as Act 108 of 1996.
(ii) **Original legislation**

- Original legislation derives from the complete and comprehensive legislative capacity of an elected legislative body.
  - It is derived directly from the CON or
  - is assigned by another Act of parliament.

**Acts of Parliament**

- These include all Acts of Parliament since 1910.
  - 1910-1983: parliament consisted of the House of Assembly and the Senate;
  - 1983-1994: parliament comprised the House of Assembly, the House of Representatives, the House of Delegates and the President’s Council.
  - Since 1994: parliament consists of the National Assembly and National Council of Provinces.
  - The legislative authority of the current parliament is derived directly from the CON.
  - Parliament is the highest legislative body in SA and it may, subject to the CON, pass legislation on any matter.
  - NB: Now the courts may review (test) Acts of parliament against the CON.

- Although the CON is supreme law, some of the Acts of Parliament have a higher status than other original legislation:
  - the Promotion of Access to Information Act;
  - the Promotion of Administrative Justice Act;
  - the Promotion Equality and Prevention of Unfair Discrimination Act