

**The following has been taken and adapted from ‘INTRODUCTION INTO THE SOUTH AFRICAN LEGAL SYSTEM’ available at [www.justice.gov.za › african charter › afr-charter02 \[reported as ACHPR - Chapter 2 - Department of Justice\]](http://www.justice.gov.za/african_charter/afr-charter02/reported_as_ACHPR_-_Chapter_2_-_Department_of_Justice/)**

## **‘2.2 SOURCES OF SOUTH AFRICAN LAW**

South Africa has an uncodified legal system. This means that there is not only one primary source from which the law originates and/or where it can be found. South African law has more than one source including:

- The Constitution (the apex piece of legislation)
- Legislation
- Case Law (court decisions)
- Common Law
- Custom
- Old writers / authors (not binding law)
- Indigenous Law

### **2.2.1 The Constitution**

The Constitution is the supreme piece of legislation in South Africa which means that all other laws – no matter what type or source of law – must comply with it. Laws which fail to comply (eg discriminatory laws) may be struck down (ie declared invalid) therefore. The Constitution includes the Bill of Rights, which sets out the rights which all persons in South Africa are entitled to. One example provided in your slides is the right to equality – this ensures (among other things) that unfair discrimination is prohibited.

### **2.2.2 Legislation**

Legislation is law laid down by an organ of the State which has the power to do so. These laws are embodied in writing and are known as statutes (or acts). In South Africa, Parliament is the highest organ that can pass legislation at the national level. There are also other bodies, that can pass subordinate legislation. These include the provincial legislatures which pass provincial acts and municipal councils which pass by laws. Legislation is a powerful source of law. In principle it binds the whole society. It also has higher status than the common law/case law/indigenous law/ other types of law. So if there is a conflict between legislation and the common law / indigenous law etc, then the legislation will prevail.

**2.2.3 Case Law** – legal precedent (the previous decisions of higher courts and courts of the same status are binding on courts making later decisions)

Courts are institutions that apply the law on [a] daily basis. Judges and magistrates, like all lawyers consult legislation and rules of common law and custom [...applicable] to the particular case before them. Courts also take into account their previous judgements in similar cases, because they are bound to the approach followed in the past [this is legal precedent]. Previous judicial decisions therefore constitute law and the way in which the law was applied there is authoritative. The reason for this lies in the system of judicial precedent,

also called the doctrine of *stare decisis*, which applies in South Africa. The application of the doctrine of precedent depends, among other things, on reported cases.

#### 2.2.4 Common Law

When a specific matter is not governed by legislation, common law usually applies. South African common law is mainly the 17th and 18th century Roman-Dutch law that was transplanted to the Cape. This forms the basis of modern South African law and has binding authority. Examples of common law crimes include murder, robbery and rape, etc. Whilst South African common law is mainly Roman-Dutch law, not all the principles of Roman-Dutch law were transplanted to South Africa. Sometimes English law had, by means of precedent, influenced South African common law. Some common law principles are, for this reason, no longer pure Roman-Dutch law.

#### 2.2.5 Customary Law

Customary law is generally unwritten law. It is fixed practices in accordance with which people live because they regard it as the law. Customary law therefore does not concern all customs or practices, such as practices of polite behaviour. The same can be said of indigenous law. In modern law custom does not play such an important role as a formative source of law. Any assertion of a custom as law has to be proved. The court in the well-known case of *van Breda v Jacobs 1921 AD 330*, required that the following be proved before a custom could qualify as law<sup>(2)</sup>:

- It must be immemorial [long standing];
- It must be reasonable;
- It must have continued (and been practiced/observed) without exception since its ... origin; and
- Its content and meaning must be certain and clear.

#### 2.2.6 Writings of modern authors (not binding but persuasive sources of law)

It has already been pointed out that the writings of the old authorities on common law have binding force as a source of law. Many academics and other lawyers write books and articles in law journals. There are useful sources in which to find legal principles. The authors explain the whole legal position with respect to legislation, common law and case law. Legal practitioners, the courts and students consult these writings on [a] regular basis. Although these writings *do not have binding authority*, they can *sometimes have persuasive authority*. A court may decide to follow the opinion of a particular author, or to depart from precedents which are at variance with such an opinion. In this way modern authors can influence legal reform.

#### 2.2.7 Indigenous Law

Many Black communities in South Africa live according to indigenous law, which also takes on the form of written or unwritten customary law. Indigenous law may be applied in the ordinary courts. The Evidence Amendment Act, (Act 45 of 1988) stipulates that a court can take judicial notice of indigenous law, provided that it is not in conflict with the principles of

public policy or natural justice. In some instances an expert will have to give testimony on the content of these rules.

The big challenge facing democratic South Africa is to free indigenous law from the effects of colonial and apartheid domination and to develop a legal system that reflects the true values of a new democratic South Africa. The entire South African legal system and its sources must be re-examined critically. All law is being subjected to critical scrutiny to reflect the new constitutional order. The central values of the South African Constitution mainly democracy, equality, dignity and freedom require a fresh look at South African common law, indigenous law, and religious personal law so that the new South African legal system will reflect the plural nature of the South African society and put an... end to South Africa's colonial and apartheid past in its legal system. The process of law reform has begun but is bound to be lengthy.

## **2.3 Courts and the Administration of Justice**

The judicial authority of the Republic vests in the courts. The courts are independent, impartial and subject only to the South African Constitution and the law. No person or organ of state may interfere with the functioning of a court. The state must assist and protect the courts through legislative and other measures to ensure their independence, impartiality, dignity, accessibility and effectiveness. ...

The product of the past poses some serious challenges for the new democratic government. The old framework for justice and the laws of the country have to be transformed to reflect the new Constitution, especially the human rights that are enshrined in it.

### **2.3.1 Structure of the Courts**

The South African Constitution depicts South Africa's judicial system as follows:

- a. the Constitutional Court
- b. the Supreme Court of Appeal
- c. the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts
- d. the Magistrate's Courts
- e. any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrate's Courts.

#### ***2.3.1.1 The Constitutional Court***

The Constitutional Court -

- a. is the highest court in South Africa;
- b. may decide constitutional matters and matters in which an arguable point of law of general public importance is raised (which is extremely broad); and
- c. makes the final decision whether a matter is within its jurisdiction.

## **Jurisdiction of the Constitutional Court**

The Constitutional Court consists of a President, a Deputy President and nine other judges. The court has its seat in Johannesburg and has jurisdiction within the whole geographical area of South Africa. At least eight judges must hear any matter referred to the Constitutional Court, but usually all 11 judges sit together in matters before the Court.

Its decisions bind all other courts, including the Supreme Court of Appeal.

Occasionally, the Court hears matters as a court of first instance, but it will usually hear appeals (from the Supreme Court of Appeal or the Labour Appeal Court and less commonly, the High Courts).

### **2.3.1.2 Higher Courts**

#### **a) Supreme Court of Appeal**

The Supreme Court of Appeal has jurisdiction within the whole geographical area of South Africa. There is no monetary limitation on its jurisdiction. It functions only as a court of appeal and never as a court of first instance. It hears appeals from the high courts and its decisions bind the high courts and the magistrates' courts. Five judges hear every appeal.

- **Criminal and civil cases** The Supreme Court of Appeal can decide all criminal and civil cases on appeal. Its decisions in this regard bind all the ordinary courts.
- **Constitutional matters** The Supreme court of appeal can decide appeals on constitutional matters except matters that only the constitutional court can decide.

#### **b) High Courts**

[Section 169 of the Constitution](#) provides that a High Court may decide -

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" (a) any constitutional matter except [matters] that -

- i. only the Constitutional Court may decide; or
- ii. is assigned by an Act of Parliament to another court of a status similar to a High Court; and

(b) any other matter not assigned to another court by an Act of Parliament."

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A judge president heads a high court. The other presiding officers are judges. Each high court has jurisdiction within a particular provincial area. A local division may co-exist within that provincial area. A high court has appeal jurisdiction and it can function as court of first instance too.

**Jurisdiction as court of first instance:** High courts have jurisdiction as courts of first instance in the following cases:

- **Criminal cases**
- **Civil cases** (EG breach of contract) If the amount of the claim is more than R400 000, the claim must be instituted in the high court.
- **Constitutional matters** A high court can decide any constitutional matter except a matter which falls within the exclusive jurisdiction of the constitutional court. It also cannot decide matters assigned by an act of parliament to another court of a status similar to a high court, for example a special court like the Labour Court.

**Appeal and review jurisdiction** High Courts may hear reviews and appeals of **criminal** and **civil** cases in the lower courts (Magistrates' Courts). In these cases, a further appeal can be made to the Supreme Court of Appeal. Sometimes one can appeal within a high court against the decision of a single judge to [a] full bench (three judges) of the same court.

### ***2.3.1.3 Lower Courts (Magistrates' Courts)***

Magistrates are the presiding officers in the lower courts. The regional court has jurisdiction within a particular regional division and the district court within a particular magisterial district. They only function as courts of first instance.

#### ***- Regional & District Courts***

- A regional court can hear criminal and civil cases (with a minimum amount claimed of R200 000 and up to a maximum of R400 000).
- District courts have jurisdiction in a limited range of criminal and civil matters (where the maximum amount able to be claimed is R200 000).

### ***2.3.1.4 Special Courts*** [Note this is not a closed list; a few examples only are included]

Special courts have been instituted for the purposes of specialised litigation. They are also divided into higher and lower courts. The presiding officers in the higher courts are judges. Special courts can decide constitutional matters only if an act of parliament allows it.

A brief outline of some of these courts is set out below:

#### **a) Labour court and labour appeal court**

The labour court and the labour appeal court were established in terms of the Labour Relations Act, ([Act 66 of 1995](#)).

The labour court consists of a judge president, a deputy judge president and additional judges. It has jurisdiction within the whole geographical area of South Africa. This court adjudicates labour disputes concerning, for example, retrenchments and discrimination. The Labour Relations Act provides the labour court with jurisdiction in certain constitutional matters, for example, when infringements of human rights by the state in its capacity as an employer are alleged.

The general rule is that a labour dispute must first be resolved through conciliation. Only if conciliation is unsuccessful, may the dispute be referred to either the Commission for Conciliation, Mediation and Arbitration (CCMA) for arbitration or to the labour court for adjudication. Labour Courts also hear reviews (and occasionally appeals) from the CCMA and bargaining councils.

An appeal can proceed from the labour court to the labour appeal court. The Labour Appeal Court consists of the judge president and deputy judge president of the labour court and three other high court judges. It is not a court of first instance, but may hear matters on appeal.

#### **b) Water court / Water Tribunal**

The Water Courts have been replaced by the Water Tribunal. It hears disputes about matters related to public water resources.

#### **c) Court for income tax appeals**

These courts hear appeals concerning income tax issues. Matters are heard primarily by judges.

#### **d) Land claims court**

This court has been instituted by the Restitution of Land Rights Act, (Act 22 of 1994). The function of the court is to restore land rights to people who have been dispossessed of such rights in terms of racial discrimination after 19 June 1913. The court can, amongst others, restore the original or alternative state land or award compensation.

**2.3.1.5 Special Lower Courts** [Note this is not a closed list; a few examples only are included]

#### **a) Children's court**

Each magistrate's court functions as a children's court within its particular magisterial district. It investigates matters concerning, for example, the adoption of children, children whose parents or guardians cannot be traced or children whose parents or guardians are unfit (to be parents).

#### **b) Maintenance court**

Each magistrate's court functions as a maintenance court within its particular magisterial district. Some persons, such as parents, are legally liable to maintain (support) others, for example their children. If they do not fulfil their duties, a complaint can be lodged with the court's maintenance officer. The court can make an appropriate order. It can also increase the amount of maintenance in light of changed circumstances.

#### **c) Family court**

The Magistrates' Courts Amendment Act, 1993 (Act 120 of 1993) provides for the establishment of family courts. These Courts hear divorce applications as well as other family related disputes. (Note that the High Court also has jurisdiction over divorces.)

#### **d) Traditional Courts**

In rural areas the chiefs and headmen of certain African communities have their own courts. These courts have restricted civil and criminal jurisdiction. They apply the traditional customary law of the specific community. No legal representation is allowed. There is a right of appeal to the magistrates' court. Traditional courts are alternative dispute resolution structures and are involved mainly with mediation and arbitration.