

A grayscale photograph of a classical building facade, featuring several large columns with ornate Corinthian capitals. The image is used as a background for the title slide.

CML4607F Law for Engineers

The South African Legal System

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Overview

- Introduction and scenario
- Classification of the law
- Sources of South African law
- The court system (and the meaning of precedent)
- The law of obligations
- Law governing engineers (later in the semester)

Introduction: What is the law?

- Rules of law and other rules:
 - Various rules and norms regulate human behaviour
 - At a basic level, four types of conduct rules:
 - 1. Rules of religion
 - 2. Rules of individual morality
 - 3. Rules of collective morality
 - 4. Rules of law
 - What is the rule of law?
 - Rules and norms often overlap: Eg, A murders B: what basic conduct rules are implicated here?

Introduction: What is the law?

- The role of the law within the engineering profession
 - Ethics
 - Labour relations
 - Legal structures to carry on a business & corporate governance
 - Contracts
 - Intellectual property
 - Risk management
 - Dispute resolution

Introduction: What is the law?

- Is the law fair or just, and should it be?
 - Must legal rules be fair (reasonable) and just for it to have legal effect?
 - Positive law vs natural law
 - How do we determine whether a rule of law is just?

Scenario

Lee, on behalf of their employer (based in Cape Town), purchased equipment from an online supplier (head office in Gauteng).

When the goods arrived, not only was the wrong amount delivered but several of the goods were damaged. Lee calculates that to rectify the situation will cost R50 000.

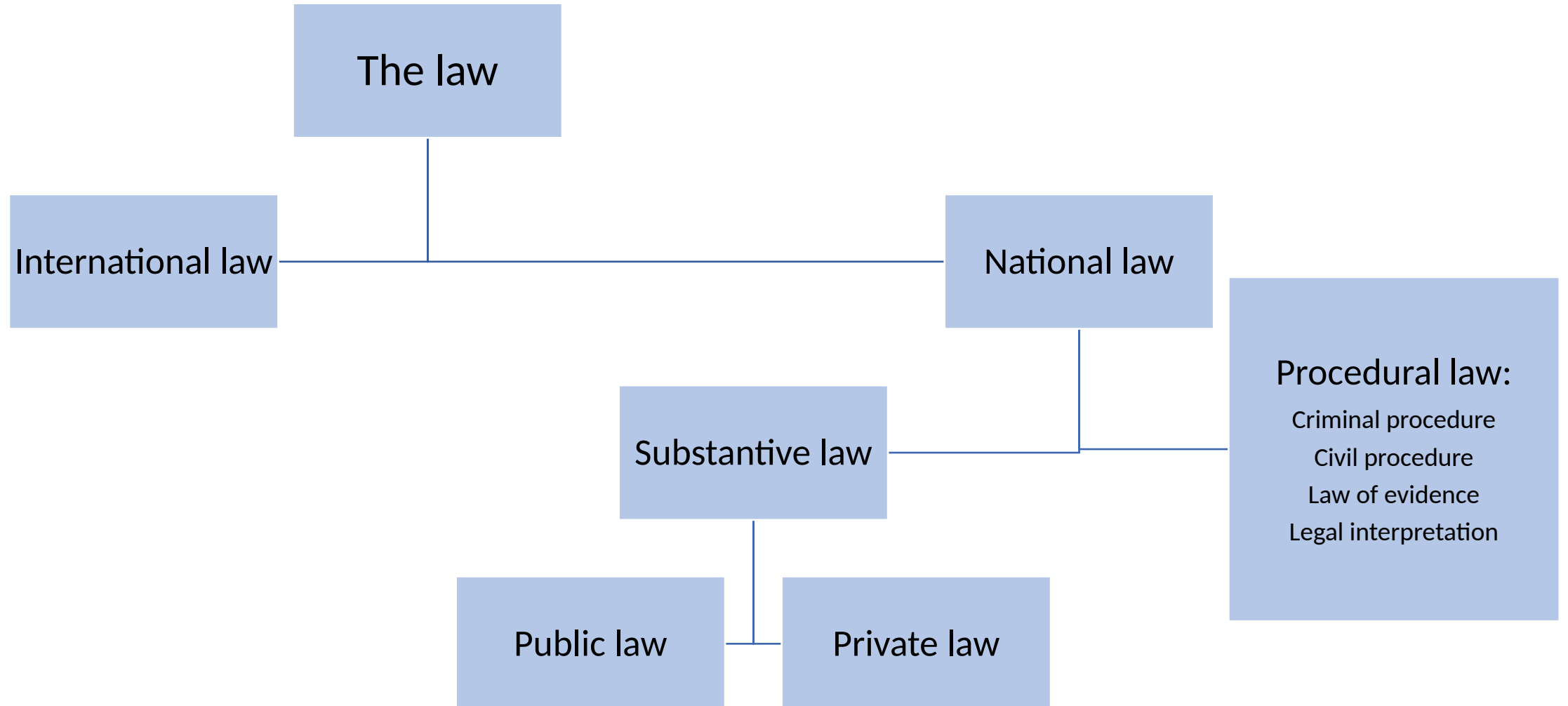
When Lee contacted the online supplier, she was told to check the Terms & Conditions which had been agreed to when the order was placed. In terms of the Ts & Cs, the supplier takes no responsibility for goods damaged in transit, and any possible claims must be brought in Gauteng.

Lee needs to find out what the law says about this situation and to understand the process and steps that need to be taken to remedy the loss.

What we need to determine:

1. The correct legal category for the problem
 - We call this the 'cause of action'
 - I.e. what is the legal basis of the claim / problem (cause of action)?
2. The correct avenue/route for remedying the dispute
 - We say: which court, tribunal or body has 'jurisdiction'?

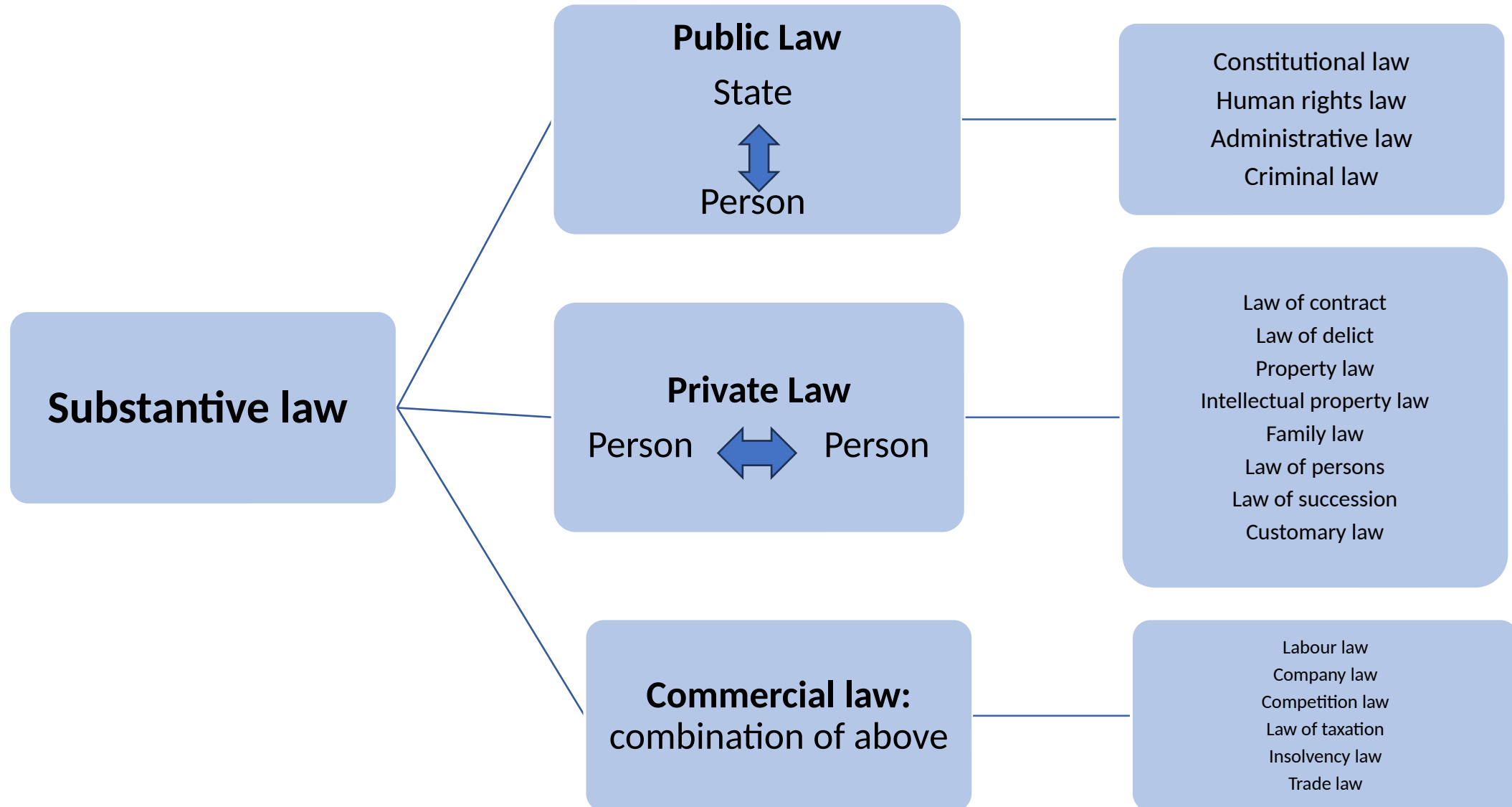
Classification of the law



Classification of the law

- Substantive v procedural law?
- Substantive law
 - Comprises legal principles
 - EG it is a criminal offence to commit murder
- Procedural law
 - Comprises procedural principles & requirements
 - EG you must reply to a pleading (a document that needs to be submitted during court proceedings) within 10 days

Classification of the law



Classification of the law

- **Public law** is the law that exists between the state and its subject (ie the government & us!)
- **Private law** is the law that exists between persons or which deals with persons alone
- **Commercial law** to some extent is a combination of these two (above types of law) but it is also law of relevance to commerce, trade and industry
- Note:
 - There are overlaps between various categories
 - Previous slide is not a closed list - other areas of the law exist too

Classification of law

- The role of different types of law and what it aims to regulate:

Public law	
Constitutional law	The nature & organs of the state (including the Bill of Rights)
Human rights law	Mainly from Bill of Rights (but also international law)
Administrative law	State exercise of executive power, including the implementation of legislation
Criminal law	Criminal offences & penalties/sentences

Classification of law

Private law	
Law of contract	Regulates agreements between parties
Law of delict	Unlawful acts which cause harm (loss)
Law of property	Rights to moveable and immovable property (ownership and lease)
Law of intellectual property	Inventions, patents, copyright, trademarks
Family law	Marriage, civil union, divorce, children, maintenance
Law of persons	Rights & status of humans
Law of succession	Regulation of a person's estate after death
Law of customs, indigenous law	Regulation of indigenous communities

Classification of law

Commercial law	
Law of taxation	Rules regulating the taxation of persons and businesses by the state
Company law	Regulates the rights and conduct related to businesses
Competition law	Regulates anti-competitive conduct by companies
Insolvency law	Regulates where debtors can no longer meet their financial obligations
Banking law	Governs the legal relationships between banks, customers and interested persons
International trade and maritime law	Business of carriage of goods by sea
Labour law	Regulation of labour relations and employment relationships

Sources of South African law

- 1. The Constitution and legislation
- 2. Common law
- 3. Custom
- 4. Indigenous law
- 5. Court decisions/case law

Sources of South African law

The role of the Constitution

- Supreme law and all other laws/actions/policies must comply with it
- Regulates the structure of the state, including:
 - Parliament
 - National Council of Provinces
 - President & Executive
 - Provincial legislatures
 - Local government
 - The courts
 - Chapter 9 institutions (Public Protector, SAHRC, Auditor General, Electoral Commission)
 - Public administration
 - Security services
 - Traditional leaders
 - Finance
- It also regulates the role and status of International law in South Africa
- Importantly, it includes the Bill of Rights

Sources of South African law

- **Section 1 of the Constitution is entitled 'Republic of South Africa' and provides:** 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:
 - (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
 - (b) Non-racialism and non-sexism.
 - (c) Supremacy of the constitution and the rule of law.
 - (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'
- **Section 2 of the Constitution is entitled 'Supremacy of Constitution' & provides:** 'This 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.'
- **Section 8 Application** '(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person...'

Sources of South African law

Legislation

- Refers to statutes, acts, regulations etc.
- **Types of legislation**
- The Constitution
- Parliamentary legislation (national legislation)
- Provincial legislation (e.g, provincial regulations)
- Subordinate legislation (Local level and other)

What is legislation?

- These are written laws passed by national / provincial / municipal government
- They bind everyone / specific groups within the population (eg creditors & debtors)
- Legislation can change existing law (eg common law principles)
- Designed to:
 - fill gaps & loopholes
 - update existing law
 - engage in social engineering
 - ensure legal protection
 - promote legal certainty & provide clarity

Sources of South African law

Where do we find legislation?

- Statutes are published in Government Gazettes
- LexisNexis, Juta & Sabinet have electronic versions of all statutes
- You can search:
 - by title (eg Labour Relations Act)
 - by Year (eg Act 66 of 1995) OR
 - by category (eg Employment / labour law)

How is legislation applied/enforced?

- Criminal law – enforced by police, public prosecutors & the courts
- Administrative law – courts & tribunals & criminal prosecution
- Civil law – litigation/arbitration by individuals (courts and other bodies)
- Chapter 9 Institutions – eg Public Protector

Sources of South African law

Common law

- Not a codified system
- Roman Dutch law & English law through precedent = influenced SA law
- Applies where there is no specific legislation
- Can be 'abrogated by disuse' – eg crime of adultery
- Section 39(2) of Constitution – duty on courts to develop the common law (in line with the constitution & Bill of rights)
- The common law may also be amended by legislation

Sources of South African law

She likes to use examples from class in tests

Common law

- Is the common law still relevant today?
- Many principles of common law are long standing and remain applicable despite legislation.
- One example is the *locatio conductio operarum*, a contract for rendering of personal services. Roman employment relationship as they knew it
Employer was able to dismiss employee without reason provided the employer gives notice.
 - Employee subordinate to the will of employer. Today, employees are protected against unfair dismissal
 - Obligated to obey lawful instructions.
 - Deference, good faith, honesty and trust
- *BUT particularly in the labour law context, legislation has made substantial changes to the law
 - Eg. Fairness mechanisms

Sources of South African law

Law of customs

- Long standing, established practices within specific communities
- Derived from the customs of society which are carried through from one generation to another.

- Usually unwritten

About a group of fishers along cape point. Once a specific group of fishers target an area and start catching fish, then another group of fishers was not allowed to target that same school of fish

- *Van Breda v Jacobs* 1921 AD 330 ruled that a custom could be a source of law if it meets the following 4 requirements:

Called first come, first pull;

Used this custom amongst themselves to regulate who was able to fish in a particular area.

NB

- In use for a long time
- It must be fair/reasonable
- Certain & clear content
- Generally recognised and faithfully observed by society

There was a dispute bcz Jacobs' group of fishers targeted the same area as Van Breda. Ended up in court. And the parties acknowledged the custom. So Jacobs violated this custom.

What could be a remedy?

The court can order Jacobs to pay reparations. The fish has already been caught and sold but they can still award damages to the party that succeeded with the claim. Damage amount was the amount for the catch on that day.

Long before our legal system was influenced by Roman-Dutch Law, an Indigenous Legal System Existed.

Initially, there was not legislation containing indigenous rules observed by indigenous communities in South Africa. So it was a form of living law. It was involved with a specific indigenous community, and that's how they enforced their laws. Many indigenous rules have fallen under disuse.

Sources of South African law

Indigenous law

- Unwritten customary law which applies to many African communities in SA
- Today, it is applied in the ordinary courts in accordance with the principles of conflict of laws
- Once proven, it enjoys the status of common law
- Proof of indigenous law often requires expert evidence

Some of the ind. laws were codified in legislation because they were being used continuously.

Expert evidence is required for the court to take notice of the Ind Law.

Someone from that community needs to testify in court about the existence of the rule.

Sources of South African law

Constitution is always the starting point to develop the sources of law

- **Indigenous law**
- What if custom/customary law is inconsistent with the Bill of Rights/Constitution?
 - **Eg** customary rule of succession - male primogeniture
 - This led to the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009
- Ultimately, it is about developing customary law (or other laws) to ensure that it is consistent with the Constitution
 - This may happen through legislation (but there are other routes too)

Main difference between custom law and indigenous law:

- Customs have to be proven using the four requirements. (I.R don't need to be proven using the four requirements)
- Customs can exist in a community that doesn't form part of an indigenous community.
- I.R is a form of unwritten customary law.

Sets precedent for other courts to abide by the law

Sources of South African law

Court decisions/case law

- Not strictly a source of law but rather a statement of the law.
- Judges do not create law, they interpret it
- Doctrine of Stare decisis – “to stand by previous decisions” (also referred to as “precedent”)
- Consistency & predictability – Legal uniformity
- Allows us to plan & react in an informed way
- Ratio decidendi – “the rationale for the decision”.
- Obiter dicta - “things said by the way.”

Precedent system

The court system

It is significant in SA that we have a justiciable bill of rights. (the court may invalidate any actions that are against the bill of rights.)

The court needs to be able to balance depending on the situation (legislation and the bill of rights in the constitution)

The purpose of this court is to uphold the constitution and has the power to declare decisions that are contrary to the constitution and the power to declare those decisions invalid and unconstitutional

Constitutional Court

Apex (Final say in cases when dealing with a constitutional issue)

Supreme Court of Appeal

If a case doesn't deal with a constitutional issue (not related to the interpretation of the bill of rights) then this is the apex court. (Civil matter about contract)

High Courts

Lower Courts

Parliament derives its legislative power from the Constitution.

Political parties (legislation) have the responsibility to keep up with collective morale.

Constitutional Court

- Apex court
- Jurisdiction (definition?) over all constitutional matters & public interest matters
- May sit as a court of first instance and of appeal
- Covers the whole of South Africa
- Testing right: measure state's conduct to standards set by constitution and bill of rights
- CC can invalidate legislation or legal principles that violate the principles of freedom, equality and human dignity
- Seat in Johannesburg
- Acronym: CC





Supreme Court of Appeal

- Hears Civil & Criminal & Constitutional matters
- Covers the whole of South Africa
- May only hear matters brought on appeal from another court
- Caveat: CC
- Seat in Bloemfontein
- Acronym: SCA

Any decisions related to a constitutional issue needs to be confirmed by the constitutional court



High Courts

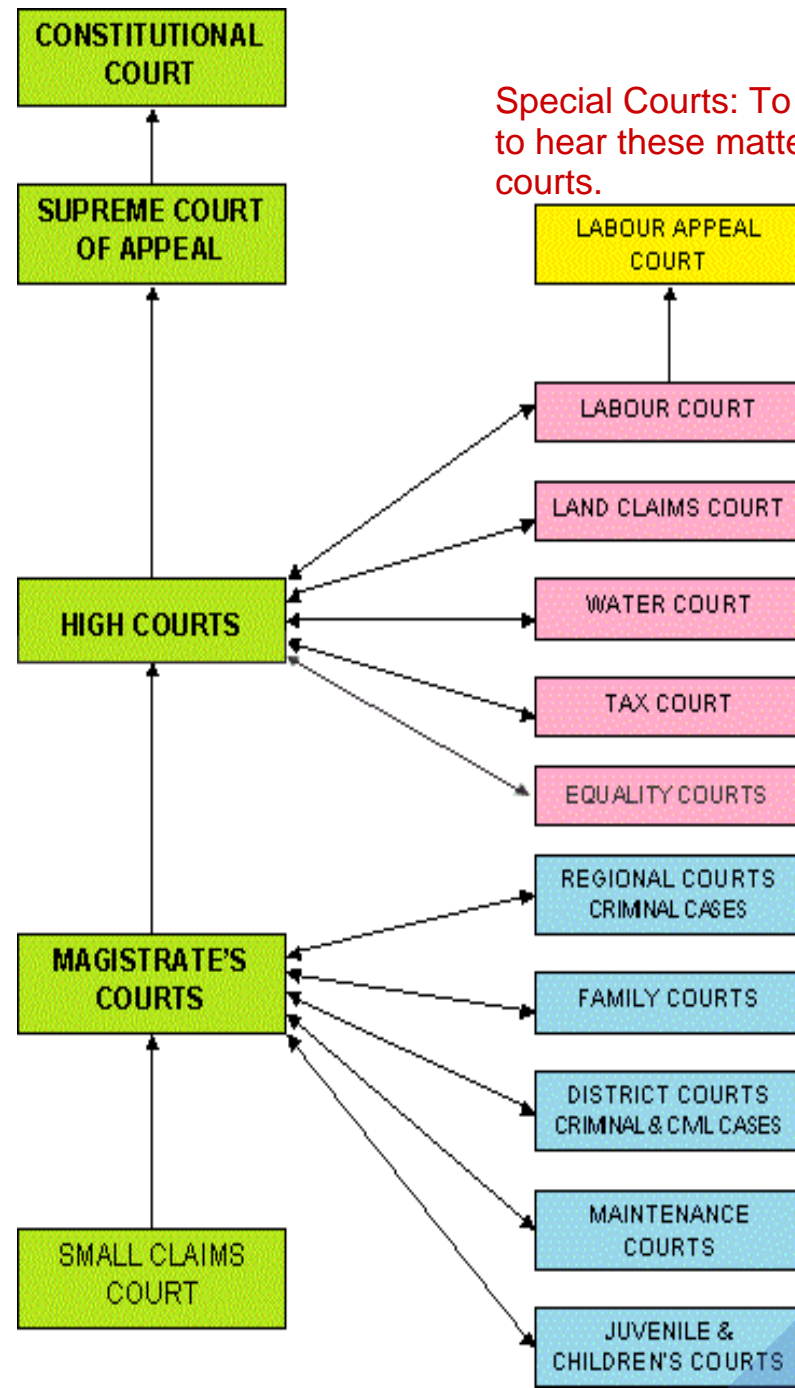
- There are 9 provincial divisions of the High Court as well as 6 local seats
- Hear Civil & Criminal & Constitutional matters
- The Courts cover the Provinces in which they are situated
- May sit as courts of first instance & of appeal
- Acronyms: Eg WCC

There is appeal within full bench in high court and an appeal to the SCA

Lower courts & special courts

- Regional courts
- Magistrate courts
 - There are 100s of MCs
 - These sit both at the Regional + District levels
 - MCs hear both Civil & Criminal matters
 - They cover local areas (eg municipalities)
 - They may only hear matters sitting as a court of first instance (MCs cannot hear appeals or reviews)
- Special courts: Eg Family Court, Maintenance Court





Special Courts: To allow for a court that has expertise in particular issues to hear these matters. Takes the pressure away from the rest of the high courts.

The court system

- But the system is bigger...
- In addition to the courts are tribunals
 - Eg the Commission for Conciliation, Mediation and Arbitration (CCMA)
 - This is the key body responsible for resolving labour disputes
 - BUT it does not have the status of a court
 - Instead, it is an administrative tribunal
 - So while its decisions may be made binding, it does not produce legal precedent

The court system

Precedent

- **Constitutional Court** – apex court but limited to constitutional & public interest matters
 - A minimum of 8 and a maximum of 11 judges sit on this court
- **SCA** – highest court, bound by its own judgments (unless wrong)
 - Judgments bind all subordinate courts in SA
 - Five judges sit in a matter (sometimes 3 in criminal appeals)
- **High Courts (includes Labour Court)** – if no SCA/LAC decision, bound by its own judgments (unless wrong)
 - Single judge bound by judgment of full bench (ie 3 judges)
- **Lower Courts (eg Magistrates Courts)** – bound by SCA's and High Courts' decisions
 - Their judgments – not precedent
- **Other bodies? Eg Commission for Conciliation, Mediation & Arbitration (CCMA)**
 - Generally not binding but may be influential

The court system

Practical implication of precedent:

CASE 1

- An employee was dismissed for stealing a can of Fanta and the court said the following:

“It is not the value of the item stolen that should determine whether dismissal for theft is fair; it is whether the employee's actions had the effect of rendering the continuation of the relationship of employer and employee intolerable.”

- *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC)

CASE 2

- An employee was dismissed for consuming a 250ml container of orange juice. His defence was that it was expired stock. The court said the following:

“Theft is theft and does not become less so because of the size of the article stolen or misappropriated. Trust is the core of the employment relationship. Dishonest conduct by an employee breaches the trust the employer places on the employee.”

- *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & another* (1998) 19 ILJ 1516 (LC)

The court system

Jurisdiction

(a) Monetary jurisdiction

- Small Claims Court – can hear matters involving amounts up to R20 000
- Magistrates Courts (MCs) – can hear matters up to R200 000 (District MCs) & up to R400 000 (Regional MCs)
- High Court – can hear matters from R400 000 & up (ie to an unlimited amount)
- Specialist courts/tribunals?
 - Eg consumer courts/ labour court
 - Generally, there are no monetary restrictions in these types of matters **BUT** the nature of the dispute is determinant
 - Eg a dispute about an unfair dismissal will go first to the CCMA and either back to the CCMA or to the Labour Court

The court system

Jurisdiction

(b) Geographical location

- The general principle in civil matters is that the plaintiff must **follow the defendant** to their court
 - So a plaintiff (**IE** the person bringing the claim to court **EG** Lee) has to bring the matter to the court in which the defendant (**IE** the person who is being sued) resides or has its principal place of business
- BUT Contracts often include an agreement as to the geographical location where claims must be brought which usually overrides the general principle
 - **NOTE** that sometimes, specifying the court / tribunal (or geographical location) may be unlawful
 - **EG** in some cases under the CPA
 - **What did Lee's contract say?**
- NOTE ALSO some legislation provides for **Alternative Dispute Resolution (ADR)**
 - Consumer Protection Act
 - Labour Relations Act

The law of obligations

- The concept “right” and “obligation”
- (Objective) law consists of legal rules
- A legal rule may confer a right upon a person = e.g. right to receive basic education
 - Afforded protection by law.
- A right is defined as the relationship between a person (legal subject) & a legal object

The law of obligations

Bearer of right

- **Legal subject** is person who holds right.
 - This could be a natural person (human being) or a juristic person (a company, a University or the State) who has legal capacity
 - Different types of persons:
 - **Natural person:** all human beings are natural persons, legal personality is acquired at birth & ends when a person dies, only natural persons have personality rights
 - **Juristic person:** all companies & close corporations are juristic persons (JPs) but also certain other institutions/registered organisations (*EG NGOs), JPs enjoy 'perpetual succession', the personality of a JP is separate from its shareholders/directors/employees etc
 - Legal personality: holder of rights and duties, can sue or be sued in their own name
- **Legal object** = object to which the legal subject has a right

The law of obligations

Typically four types of rights are identified with reference to the legal object:

the delivery of something (doing, giving or not doing something)

if you sell your friend a textbook, you have a property right to that textbook and now the performance is the payment of money.

- 1. Personal Rights* (legal object is performance)
- 2. Real rights (the legal object is a thing) Can be tangible or intangible: Property rights, servitude or security rights.
- 3. Personality Rights (legal object is aspects of your personality) Some that would be your reputation, human dignity, your body integrity.
- 4. Immaterial Property Rights/Intellectual Property Rights (the legal object is an intellectual product) Maybe a copyright that you own

*Personal rights imply corresponding duties (obligations)

Let's return to our scenario

1. Into what **legal category** does the claim fall?
2. Which **law** or laws apply?
3. Which **court, tribunal or body** has jurisdiction?
 - Value of ADR if permissible/available?