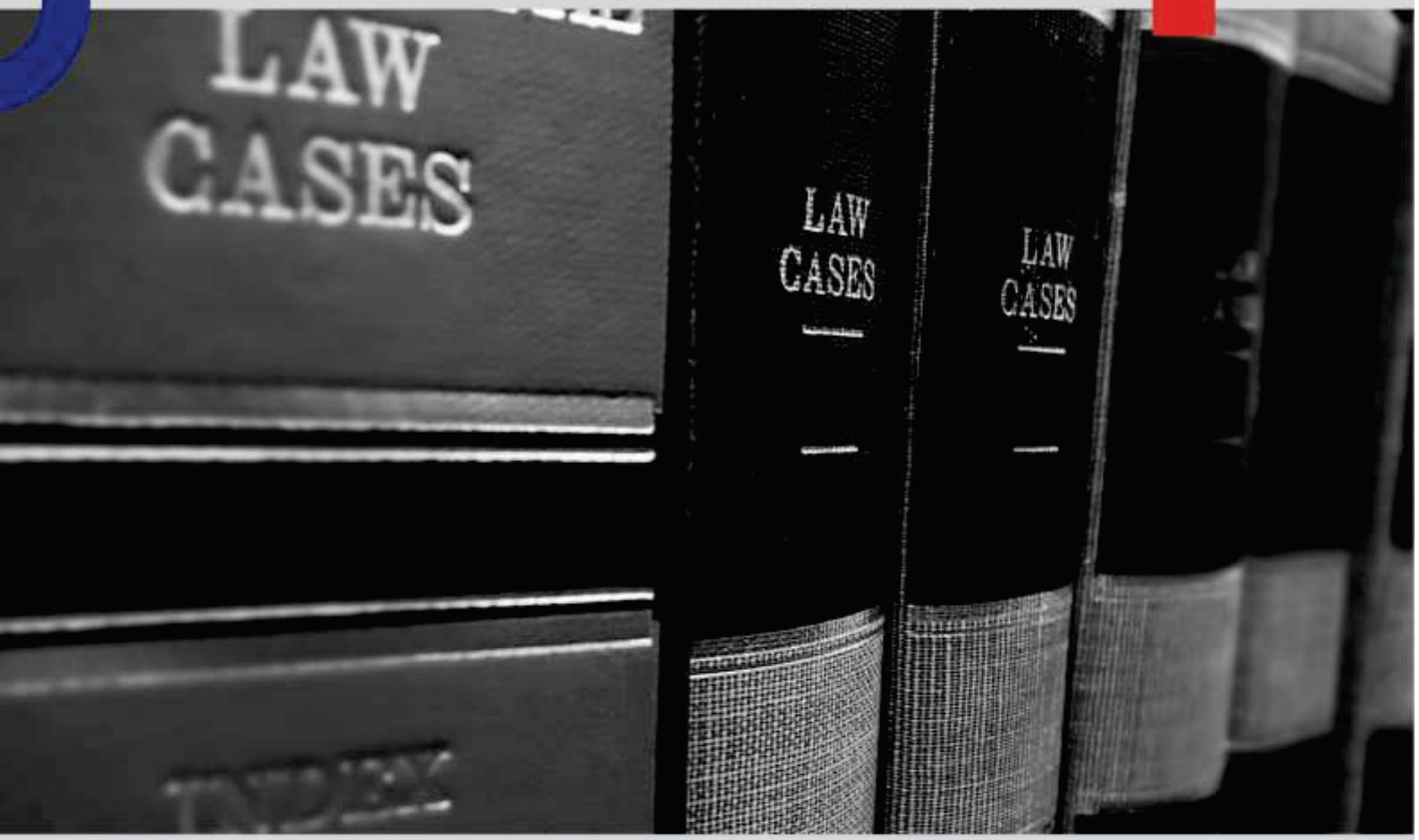

CHAPTER 1 //

THE SOUTH AFRICAN LEGAL SYSTEM

Chapter 1: The South African Legal System

This chapter looks at the following issues:

- What are laws?
- Where does the South African legal system come from?
- How are laws made?
- What are the main differences between civil and criminal law – and where do commissions of inquiry fit?

1.1 What are laws and why do they exist?

Laws are rules made and enforced by the state to regulate the behaviour of people in society. They comprise rights and duties: what you must do, what you may do, what you may not do and what other people and institutions – including the state itself – should or should not do in relation to you. Laws also authorise, limit and distribute powers to various branches of government, and create frameworks enabling private individuals to conclude contracts, make wills and to set up institutions and corporations.

Laws are intended to create social order, to provide certainty, to enforce duties and to protect rights. Crime is defined as not obeying ('breaking') the law, and when a court of law finds that laws have been breached, offenders suffer penalties. These can range from imprisonment, paying a fine, performing community service or attending a rehabilitation programme. These measures are designed to punish the offenders and forestall vigilante reprisals ('taking the law into their own hands') – but also to deter offenders from breaking the law again.

However, there has been an increasing shift away from punitive justice to embracing **rehabilitative and restorative justice**. Restorative justice, a concept developed in North America in the 1970s, has been incorporated into South African law:

> *Restorative Justice is an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation.*[1]

Restorative justice can play a role in rehabilitating offenders and curbing crime. The 2004 *White Paper on Corrections* stated that 'Restorative justice, as opposed to retributive justice, requires synergy across the integrated justice system as to the purpose of sentencing an individual, the purpose of incarceration, and the role of correction.'[2]

A society with fair rules that are applied consistently, equitably and predictably is said to be **'governed by the rule of law'**. One concern in South Africa is that even in the case of laws that are now considered fair, detection and conviction rates remain low – for example, no more than 8% of the perpetrators of reported rapes are convicted in South Africa[3]. This shows that laws cannot operate in a vacuum. Upholding the law cannot be left to the judiciary. Laws need to be implemented effectively, efficiently and equitably by all state institutions – including by the police, prosecutors, other enforcement agencies and the prisons system.

Sometimes individuals or communities feel it is unfair that they have to obey a law that does not accord with their beliefs or the traditions of their community. The Constitution acknowledges the diversity and cultural richness of the people of South Africa and affords constitutional protection to cultural, religious and linguistic communities. Yet, the law aims to serve the interests of all. For democracy to work, people must trade off some aspects of their individual or smaller group rights to enable the establishment of order for the whole

[1] Department of Justice and Constitutional Development, 'Restorative Justice', 2011, available here: https://www.justice.gov.za/rj/rj.html

[2] Department of Correctional Services, 'Draft White Paper on Corrections', 2004, available here: https://www.gov.za/sites/default/files/gcis_document/201409/corrections1.pdf

[3] Smythe, 'Why so few reports of rape end in conviction in South Africa', February 2016, available here: https://www.news.uct.ac.za/article/-2016-02-29-why-so-few-reports-of-rape-end-in-conviction-in-south-africa

community.

For example, tradition may allow people to build a dwelling anywhere on community land, provided community leaders agree. But a building may block or contaminate a river flowing through the community, and whose water is needed by people outside it. The statute or common law may require that the building go through a much wider decision-making process before it is permitted, so these broader rights can be protected.

Courts are not overtly political, and do not determine policy (this is the role of the Executive). South Africa is a representative democracy, and every adult citizen has the right to vote. By voting, South Africans entrust their representatives with the power to decide what laws should be made and how rights can be safeguarded for the whole country (policy). If voters do not like these decisions, they have the opportunity to vote for representatives with different policies at the next election.

While the decisions of all courts feed into deciding how laws are interpreted and applied, the Constitutional Court has the final say on whether these laws pass constitutional muster. Thus, every court decision can play an important role in shaping what the policy expressed through the laws means in practical and constitutionally compliant terms.

However, the main role of the courts is to decide the meaning of existing laws and whether they have been breached and – taking into account both the law and the circumstances of a specific case – to determine the most suitable penalty.

1.2 Rule by law as opposed to rule of law

While apartheid was enforced through a web of laws, there is a key distinction between rule *by* law versus rule *of* law. The former is a system of laws that are merely instrumental and used to exert political power and control citizens; this is instanced by South Africa's history of struggle and subordination under the law. The latter is a system of laws designed to enshrine and protect rights, fairly distribute power and ensure that all citizens – and the state – are equal before the law and subject to the law, which must be predictably and justly applied. South Africa's shift from apartheid (under parliamentary supremacy) to democracy (with constitutional supremacy) was well-articulated by Etienne Mureinik[4] as a decisive break from a culture of authority to a culture of justification, where laws are built on cogency and persuasion not coercion and fear.

The rule of law is expressly enshrined as one of the founding values of our Constitution. The Constitutional Court has highlighted the critical importance of the rule of law and that it must be zealously guarded by the Judiciary. The Court has said that 'constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.'[5] The Court has powerfully observed that if the rule of law is undermined and impunity prospers 'our Constitution is not worth the paper upon which it is written.'[6]

Linked to the rule of law, and vital to democracy, is the principle of **open justice**. The transformation of our legal system entailed the entrenchment of accountability, responsiveness and openness. Our legal system must be open and accessible for public exposure and public scrutiny. And media freedom plays an essential role in disseminating knowledge and informing citizens of what is taking place in their name. Former Chief Justice Ngcobo aptly remarked that[7]:

> *'Open justice is the principle that the doors of all the courts in the nation must be open to the public and the press (. . .) It is deeply rooted in African tradition. In African societies, justice was administered in the open in the literal sense of the word. Trials were conducted under a tree; the courtroom had no walls, only a roof of leaves and branches to provide shade from the sun and shelter from the elements.'*

The principle of open justice is a thread that weaves through the Court's jurisprudence,[8] and also infuses the open and accessible physical structure of the Court. Pointedly, the media box is perched at the top, watching over the Court.

As corruption and state capture threaten to erode the rule of law, our robust media have sought to expose near-disastrous levels of looting, generating acute demands for justice and change. While our Constitution may be precarious, it is a functioning document that has laid the basis for a functioning democracy. It has created a collective consciousness that tells us what our values and rights are. Our Constitution indispensably requires maintenance of the rule of law, an independent and impartial judiciary operating in an open manner, coupled

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[4] Mureinik "A Bridge to Where – Introducing the Interim Bill of Rights" (1994) *South African Human Rights Journal* 10(1) at 32.

[5] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11 at para 1.

[6] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v* Zuma [2021] ZACC 18 at para 137.

[7] Ngcobo, 'Speech to the South African National Editor's Forum', 2010, available at https://www.polity.org.za/article/sa-ngcobo-speech-by-the-chief-justice-to-the-south-african-national-editors-forum-cape-town-13022010-2010-02-13.

[8] See for example *SABC v NDPP* [2006] ZACC 15*; Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* In re: *Masetlha v President of the Republic of South Africa* [2008] ZACC 6; and *Centre for Child Law v Media 24 Limited* [2019] ZACC 46.

with a fearless, fact-committed and truth-seeking media.

1.3 Where does our legal system come from?

South Africa has a rich legal history that stems from various sources including African customary law, Roman Law, Roman-Dutch Law and English Law authorities. Our law reflects all of these traditions.

Different eras have contributed to different sections, aspects and interpretations of the law. Our legal system is drawn mainly from four distinct sources: common law (through precedent); customary law; statute; and the Constitution.

The common law is a continually developing system of rules that transforms in reflecting disseminated 'legal convictions' in the community. Understanding its history enables writers and reporters to put current societal and legal changes and debates into context, and ensures these topics are understandable to their audiences.

1.3.1 Roman-Dutch and English law

Roman-Dutch law refers to the modern system whose roots are in laws developed under the Roman Empire (between 31BCE and 476AD). After the fall of the Roman Empire, these laws had fallen into abeyance in Europe. They were vigorously revived by Dutch jurists in the 1500s. Holland was developing as a major trading and colonising power, and needed a robust legal system that could handle complex trading and business cases. Over the next 200 years, a system combining elements of existing Dutch law and the old Roman codes developed: Roman-Dutch law.

When Jan van Riebeeck landed at the Cape of Good Hope in 1652 to establish a refreshment station for the Dutch East India Company, he brought the influence of the Roman-Dutch legal system with him.

When Britain took over the colony in 1806, Roman-Dutch legal principles were preserved, but gradually court procedures and legal concepts were adapted to the requirements of English law. By 1827, courts had been established throughout the colony that followed English procedures for how evidence was presented and dealt with in civil and criminal trials.

By the Nineteenth Century, England was the world's leading merchant and colonial power. English law was therefore developing and contributing more modern definitions and procedures for mercantile (business) law, company law, trusts, insurance and maritime law (the law of shipping and the seas).

1.3.2 Common and customary law

Common law in South Africa is so-called because it was said to derive from a 'common sense' community understanding of right and wrong. This label distinguishes it from 'statutory' law derived from the decisions made about laws by Parliament (**statutes**).

English common law began in community practice, written down and formalised after the Normans conquered England in 1066. It was developed and codified over the following centuries by the interpretive decisions (**precedents**) of judges in the English courts, and was one of the sources for English statutory law.

In South Africa, subsequent judges' decisions developed it further. Most of the laws governing crimes such as murder, rape, theft and treason were originally grounded in the common law, and common law is still consulted to guide judges when there are gaps or a lack of clarity in the statutes.

However, it is now acknowledged that the common law and 'common sense' of any society are not neutral or 'natural'. The common law is shaped by the belief systems and power relationships prevailing at a given time. This has had a particular impact on the common law frameworks affecting race, gender, class, property and land, and needs to be taken into account in both drawing on common law for guidance, and in considering law reform.

Customary law is the term used for the laws developed by South Africa's many traditional African communities. There are two forms of customary law, (i) living / unwritten practices and (ii) official customary law. Both have been recognised by the courts and are now, subject to the Bill of Rights, embedded in our Constitution.

Unfortunately, that law was often recorded by missionaries or colonisers who consulted their own selection of elders, and interpreted and formalised what they were told in accordance with their own social understanding – or what they wanted the situation to be. Colonisers also pressured local leaders into following these interpretations. This occurred over hundreds of years and had an impact in tainting aspects of African customary law. Furthermore, apartheid degraded and manipulated African customary law to subordinate the African communities subject to it.[9]

It is very hard to trace the customary law that is applied today back to the 'real' customs of pre-colonial South African kingdoms: much of that knowledge has not been preserved, and it was sometimes deliberately erased or reshaped by the colonisers.

[9] Himonga et al *African Customary Law in South Africa: Post-apartheid and living law perspectives* (2014) Oxford University Press at p 14.

South Africa's post-apartheid Constitution recognises African customary law subject to the Bill of Rights. This means that aspects of customary law (particularly as it relates to family, marriage, inheritance and chieftainship issues) must be in line with spirit, purport and objects of the Bill of Rights. At times, this provokes contention. Like the English Common Law, customary law sometimes includes values and beliefs from bygone eras. At the time of revising this handbook, for example, debates are taking place on the proposed new Traditional Courts Bill, as well as rural people's entitlement to secure land tenure (*see Chapter 9*).

1.3.4 Precedent

Courts play a major role in making and developing law through their decisions. Our courts follow what is known as the doctrine of precedent. A precedent is an authoritative decision taken by a court of equal or higher authority within the judicial hierarchy at an earlier date on a comparable set of facts or point of interpretation. All subsequent cases must take this earlier decision into account in decision-making to form a binding precedent.

Lawyers may, however, argue that a current case is distinguishable from the previous one so that the precedent does not apply. This is how legal definitions and principles are refined over time. (If you have ever wondered what is in those heavy luggage-trolleys that lawyers wheel into court, alongside documentary evidence, it is the law books and records detailing precedent!)

There is a hierarchy of courts in South Africa and this is discussed in more detail in Chapter 2. The decisions of higher courts bind lower courts. So, a decision by the Supreme Court of Appeal in Bloemfontein binds all other courts in the country. A judgment by a High Court in a particular provincial division binds other judges in that Court and all the lower courts in that division. Courts in other provincial divisions, however, will take that high court decision into consideration in their own deliberations, but are not bound by it.

The decisions of the Constitutional Court, as the apex court, bind all other courts in the country

1.3.5 Statutory law (statute)

This is the law made by a democratically elected Parliament. It, too, must be consistent with the Constitution and the Bill of Rights. The Constitutional Court makes the final decision to declare invalid any statute inconsistent with the Constitution as a whole, or with the spirit, purport and objects of the Bill of Rights.

Because of South Africa's history, and the adoption of the final Constitution in 1996, we have side by side in our law books statutes that come from two very different legal frameworks. Apartheid law was designed to enforce racial separation, treated communities unequally and had many provisions that placed secrecy, repression and minority security and privilege before human rights.

1.3.6 The Constitution and Bill of Rights

The supreme Constitution enshrines founding values which include – human dignity, equality and freedom. These founding values are to be the foundation of official practice, law-making, legal interpretation, and provide for new freedoms and fundamental rights. The Bill of Rights, found in Chapter 2 of the Constitution, entrenches an array of progressive civil, political and socio-economic rights. It has been lauded as one of the most progressive Constitutions in the world. The supremacy of the Constitution means that all conduct and laws – statutory, common law and customary law – are subject to the Constitution for their validity.

So, while all legal systems are works in progress, in South Africa today, the courts still face the challenge of bringing old laws (statutory and common law and customary law) into line with constitutional principles through their interpretations and rulings.

One notable distinction is the framework the Constitution provides for the media.

Freedom of information and expression are guaranteed by the Constitution. This is reflected in judgments that set precedents about the meaning of open democracy and the role and rights of the media: what information reporters can access and publish. This is ongoing. These developments take into account the new landscape created by the dominance of digital and social media, and the ease with which false or damaging material can be disseminated. It is still not complete, and its results are not always what the media or the public would like, or yet fully in line with constitutional principles.

But the media do have increasing freedom to examine and comment on what those in positions of power do – and that includes matters relating to the law and the courts. This book provides information and guidance on these freedoms – and their limits – in the relevant sections of the chapters that follow.

1.4 How laws are made

Ideas for new laws generated by official bodies often first appear as public discussion documents, called **Green Papers**, sometimes followed by more refined statements of broad government policy thinking, called **White Papers**. Further refinement leads to legislative proposals called **Bills**. These are **gazetted** (published in draft form in the *Government Gazette*), go through a process of discussion in Parliament and in specialist committees, and

public participation is further invited. When they have been constructively developed into a form that Parliament adopts, the President signs them. If the President has reservations about the constitutionality of a Bill, the President has the power to hold up signing or assenting to a Bill and may refer the Bill back to Parliament for reconsideration.

▶ *For details of the different procedures for Bills in Parliament, go to* parliament.gov.za/how-law-made

When the President has signed them off, Bills become Acts of Parliament, and are re-published in their final form in the *Government Gazette.* Sometime Acts give the relevant minister power to make regulations: detailed practical instructions about how the statute is to be interpreted and carried out. Provinces, towns and cities are also allowed to make local laws which apply only within the area they govern. These laws are called **ordinances** (for provinces), and **by-laws** (for cities and towns).

A changing and developing legal framework

Statutes are passed by Parliament to deal with new social circumstances, technological developments, new policy thinking or other issues that existing laws do not cover. Sometimes this is done through an amendment (change), which updates an existing law to introduce the new considerations. Sometimes a completely new law must be made – for example, the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 was enacted to give South African law additional powers to deal with crimes involving terrorist activity.

The South African Law Reform Commission (SALRC)

This is the key body involved in developing the law. Its role is advisory, but its opinions are always consulted, and normally respected, by law-makers. The SALRC's predecessor was established in 1973. It is a body of senior judges, advocates, attorneys and academics chaired by a senior judge. A working committee from among these commissioners, and sometimes project committees of experts, carries out the SALRC's work. A secretariat of Department of Justice employees – both state law advisers *(see Chapter 3)* and clerical and administrative staff – does the administrative work. The SALRC is tasked with:

- Repealing unnecessary or obsolete (out of date) laws;
- Removing anomalies (provisions that contradict one another or are out of place with the rest of a law);
- Bringing about uniformity in South African law all over the country;
- Codifying and consolidating the law (bringing all laws dealing with a particular issue together); and
- Making justice more accessible.

Law reform proposals may come from Ministries, Parliamentarians, civil society and individual private citizens. The SALRC also initiates law reform proposals. Proposals are studied to evaluate whether they have substance and are within the SALRC's powers. If they are accepted, the SALRC seeks permission from the Minister of Justice and Constitutional Development to include a proposal in its programme and decides how urgently the work must be done. It then plans research on the proposal, setting up a project committee if it requires specialist expert input.

When preliminary research has been done, an issue paper is published on the SALRC's website and announced in the media, and public comments are invited. Once public input is received and research completed, a discussion paper setting out the problem, the options, the legal context and the proposed draft bill is made available for comment.

SALRC also organises workshops and seminars around the country. Once this process is complete, the final report has to be approved by the full SALRC and then goes to the Minister of Justice and Constitutional Development. If accepted, the draft bill then goes through the parliamentary process described above.

1.5 Civil and criminal law

A main division in South African law is between criminal law and civil law. This reflects differences in how crimes are defined, what procedures the courts follow, how proof of a crime is determined, and the kinds of penalties imposed.

This section sets out the broad principles underlying this distinction; you will find the details in Chapter 4 (Criminal Procedure) and Chapter 5 (Civil Procedure).

1.5.1 Criminal Law

Criminal law deals with breaches of the laws enacted by Parliament or deriving from the common law to maintain safety and order. It also provides proportionate sanctions for breaches. Rape, murder, assault, trespass and theft are dealt with under the provisions of criminal law, because – although the victim may be an individual – the attack on them has disturbed the order of society as a whole.

The immediate purpose of a criminal prosecution is to impose punishment for this disturbance, rather than to offer redress to the injured party. This is the first main difference between criminal and civil law. The individual affected (called the **complainant**) lays the charge at the police station, but it is the state that prosecutes the accused person. A criminal charge can be brought against anybody who breaks the law. It is both a constitutional

and a common law principle, and key to the rule of law, that nobody is above the law, including members of government, the police service and court officers.

The correct terminology is that the person who has committed the crime is called the **perpetrator**; the person the state alleges is the perpetrator a **suspect** until they are charged. After that they are the **accused** and, if convicted, can then be referred to as a **criminal**.

Note: in criminal cases the accused is said to be 'innocent until proven guilty'. But this does not mean they are innocent. It is merely the legal description of how the court is supposed to treat the person until the case is proved.

Burden of proof in criminal cases

Before an accused person can be convicted (found guilty), the case against them must be proven 'beyond reasonable doubt'. This is the second main difference between criminal and civil law. It means there must be convincing, adequate proof that the crime has occurred and that the person accused committed it.

The 'beyond reasonable doubt' standard does not mean 'without any doubt whatsoever'. It means that what the legal system considers a 'reasonable person' would have no further doubts. (In England, a 'reasonable person' used to be defined by judges as 'the man on the London bus' – which illustrates the pitfalls of such definitions!)

1.5.2 Civil law

Civil law concerns private relationships between individual members of society. It deals with issues such as marriage and divorce, business deals, rent, damage to property or neglect of duties resulting in harm to somebody or something. Unlike in criminal cases, the state is not normally involved in such disputes as a party, but its services are called upon as an arbiter and interpreter of the law relating to the dispute. The state can be a party in delictual and contractual disputes when, for example, government property is damaged, or an official body's carelessness has caused harm, or when the state itself is a party to a transaction like a contract that has been breached or whose conclusion is suspected to be irregular or corrupt.

Civil cases often arise out of **contracts** (voluntary agreements between parties to perform certain actions which then create rights and obligations). For example, when someone decides to buy something, the buyer must hand over the money and the seller must hand over the

item. Both the failure of the buyer to pay and the failure of the seller to provide an item of the promised standard could lead to a civil action.

The same facts that give rise to a criminal case may also give rise to a civil action, as when an assaulted person lays a criminal charge, but also sues for compensation for injuries suffered. The correct terminology is the person who feels they have been wronged is known as the **plaintiff** and the party sued is referred to as the **defendant**. A civil case can be heard by either a magistrate or a judge.

Burden of proof in a civil case

In a civil case, the plaintiff normally needs only to prove their claim on a 'balance of probabilities' (that their case is more probably true than the defendant's). The 'innocent until proven guilty' legal presumption is not universal in civil cases. And as in criminal law, civil law needs both the disputed act and the liability of the defendant to be proved for the claim to succeed. These factors are critical in determining the liability of the defendant and the amount to be awarded.

1.5.3 Commissions of inquiry

Commissions of inquiry are not courts of law, although they are very often chaired by judges. The aim is not to determine innocence, guilt or penalties, but to discover and synthesise evidence about an issue, action or problem. The process is **inquisitorial** (to find out), **not adversarial** (to argue innocence and guilt). The objective of a commission of inquiry is to seek truth, accountability and transparency, and this may inform further punitive measures. The Constitution confers the power to appoint a commission of inquiry on the President as part of their executive powers. For a more detailed discussion of commissions of inquiry, *see Chapter 6*.

Reporting Tips

- Be clear about which laws someone is accused of breaking and whether you are covering civil or criminal proceedings. Check the terminology you are using to ensure it is correct.
- In a civil case tell readers clearly who is bringing the case and why.
- Where a case is based on laws that pre-date democracy, you can deepen your reporting by consulting experts outside the courts on the relevance of those laws in our new constitutional and rights climate.
- Take care when you use words like 'proof', 'probability' and 'doubt' because these have specific meanings in the context of different types of cases, as described above.
- If your beat includes the law as well as the courts, an excellent – and neglected – source of stories is proposed new laws and changes in existing laws. Regularly check the SALRC website, the *Government Gazette* and media announcements of law workshops and seminars for information.
- Do not confuse commissions of inquiry with court cases, and do not use terms such as 'accused', 'plaintiff', 'crime' or 'guilty' when reporting on these.
- Whatever the case, try to stay with it from beginning to end and keep your story consistently updated with the most recent developments. Use your publication or platform social media pages to do this if you cannot run regular full stories. A single session of evidence can change a case completely – but even if it does not, news consumers always want to know how a newsworthy case develops and ends.