

THEORY OF LAW ILW101-4

1. Unit 1: Norms

- 1.1.1. Determine which kind of norms by:
 - 1.1.1.1. Applicability;
 - 1.1.1.2. Sanction; and
 - 1.1.1.3. Enforcement.
- 1.1.2. Legal norms: concerned with norms which the community sees as binding – which must be obeyed by all in the society
- 1.1.3. Religion:
 - 1.1.3.1. Extreme example of religion and law being the same: Islamic states
 - 1.1.3.2. Some believe there shouldn't be any overlap
 - 1.1.3.3. In SA, law favours Christianity – blasphemy is a crime, Christmas is a public holiday. Justified as accepted religious convictions of the majority.
- 1.1.4. Individual morality: May overlap, but is personal and sanction is self-inflicted.
- 1.1.5. Community mores: Not private to individual, but to group of individuals. There is also some overlap with religion and law.

2. Unit 2: Rights

- 2.1. Holder of the right is the subject, and the right is to the object. Other people are the other legal subjects. Right made up of two parts: relationship between subject and object and relationship between subject and other legal subjects.
- 2.2. Four classes of rights:
 - 2.2.1. Real rights: to physical, material things (rights of ownership, of pledge, of servitude)
 - 2.2.1.1. Pledge: limited real right over thing pledged as security for a debt
 - 2.2.1.2. Servitude: limited real right to cross another's land
 - 2.2.2. Personality rights: (rights to physical integrity, good name, honour)
 - 2.2.3. Intellectual property rights: (aka immaterial property rights) to creations of the human mind.
 - 2.2.4. Personal rights: (aka claim) right to a person doing or not doing something.
- 2.3. Sometimes confused with powers (to sell own house), capacities, abilities
- 2.4. Laws limit contents of rights (i.e. nuisance on property)/law determines what powers of the holder of a right are
- 2.5. Balance: legal subject has a right – other legal subjects have duties

3. Unit 3: History

3.1. Roman law becomes Roman-Dutch law:

- 3.1.1. Classical Roman law: approx 50 BC to 200 AD, height of Roman empire
- 3.1.2. Roman Empire split: end of 300s AD Roman Empire splits to Eastern (Byzantium) and Western (Rome), Roman law declines as a result
 - 3.1.2.1. Western Roman Empire/German: Germanic ruler takes over in 476 AD, allows citizens to be governed by Roman law as influenced by German law. Catholic church keeps canon law alive.
 - 3.1.2.2. Eastern Roman Empire/Justinian: Justinian rules in 6th century AD, codifies Roman law into *Corpus Iuris Civilis*.
- 3.1.3. 12th Century renewed interest:
 - 3.1.3.1. University of Bologna, then other universities, begin studying *Corpus Iuris Civilis*
 - 3.1.3.2. around 15th – 16th centuries European law was unsystematic and unscientific, so European countries began using Roman law as solution by turning to Roman law when nothing existed in local customary law. Roman law in this way merged with local law.
 - 3.1.3.3. Roman-Dutch law relied on jurists' commentaries – old authorities such as Hugo de Groot and Johannes Voet.

3.2. Roman-Dutch law comes to the Cape:

- 3.2.1. Jan van Riebeeck, of Dutch East India Company, comes to the Cape in 1652 and affairs at the Cape are governed by the *Artyckelbrief* (rules and regulations governing employees of DEIC).
- 3.2.2. Later Dutch settlement governed by *placaeten*, posters hung in the settlement to establish rules. Roman-Dutch law consulted in cases of dispute.

3.3. Addition of English law and African customary law:

- 3.3.1. British occupy the Cape in 1795 and again in 1806, resulting in reception of English law. English said that wouldn't deliberately change the law, but courts were changed to magistrates and influence was felt. English became legal language, and judges sent to England for training. Company and Insolvency law was brought to SA.
- 3.3.2. Except in KZN, most indigenous law still unwritten. Indigenous law applies not only to blacks, but whenever applicable.

3.4. 1996 Democratic Constitution adopted.

4. Unit 4: Where to find the law

4.1. Authoritative sources:

- 4.1.1. legislation/statutes/acts:
 - 4.1.1.1. Nevertheless subject to the Constitution
 - 4.1.1.2. Acts passed by Parliament are in *Government Gazette*

- 4.1.2. case law
 - 4.1.2.1. read as source on interpretation of statute; or
 - 4.1.2.2. as authoritative law
 - 4.1.2.3. For judicial precedent to be effective, requires:
 - 4.1.2.3.1. effective system of law reporting: see African Law Reports for higher court decisions
 - 4.1.2.3.2. hierarchy of courts: Constitutional Courts, Supreme Court of Appeal (Appellate Division), then High Courts, then lower courts
- 4.1.3. common law
 - 4.1.3.1. writings on law by 17th and 18th century Roman-Dutch jurists
 - 4.1.3.2. *Corpus Iuris Civilis*
- 4.1.4. custom
 - 4.1.4.1. requirements for recognition of custom:
 - 4.1.4.1.1. reasonable
 - 4.1.4.1.2. existed for a long time
 - 4.1.4.1.3. generally recognised and observed by community
 - 4.1.4.1.4. contents are definite and clear
 - 4.1.4.2. Example is *Van Breda v Jacobs* concerning fisherman who first spots fish
- 4.1.5. indigenous law

4.2. Persuasive influences

- 4.2.1. laws of other Roman-Dutch law countries or England (for company, maritime)
- 4.2.2. laws of other countries with respect to the Bill of Rights
- 4.2.3. law journals, such as *Codicillus*

5. Unit 5: Constitution

- 5.1. Government responsibilities, *inter alia*, to protect rights, develop and advance the country, look after well-being of citizens, regulate health, education, environment, tourism, housing and population.
- 5.2. Constitution comprises rules by which country is governed.
- 5.3. History:
 - 5.3.1. 3 previous non-democratic constitutions
 - 5.3.1.1. 1910 Union Constitution
 - 5.3.1.2. 1961 Republic Constitution

- 5.3.1.3. 1983 Parliamentary Constitution (establishing tri-cameral parliament)
- 5.3.2. Interim constitution of 1993 effective on election day, 27 April 1994, for 2 years and contained 34 constitutional principles.
- 5.3.3. Following widespread participation, constitution following the interim constitutional principles was certified by the Constitutional Court on 4 December 1996.
- 5.4. Important provisions;
 - 5.4.1. Supremacy of Constitution: all legislation may be challenged in terms of the Constitution.
 - 5.4.2. Separation of Powers (legislative, executive, judicial): keeps power from concentrating power anywhere.
 - 5.4.3. Judiciary: Main courts are Constitutional Court, Supreme Court of Appeal, High Courts and Magistrate Courts.
 - 5.4.4. Institutions supporting democracy: Public Protector, Human Rights Commission, Commission for Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities, Commission for Gender Equality, Auditor-General, Electoral Commission, Independent Authority to Regulate Broadcasting.
- 6. **Unit 6 Bill of Rights**
 - 6.1. Origin: result of negotiations among all stake-holders.
 - 6.2. Types of Fundamental Rights (Fundamental Right: every person is born with human dignity giving a claim to human rights. Rights are natural and fundamental to each human being, and cannot be taken away by the state):
 - 6.2.1. First-generation rights (aka blue rights): civil rights, procedural rights, political rights which protect individuals from abuse of state power. (Examples include right to equality, human dignity, life, freedom of expression, freedom and security of the person).
 - 6.2.2. Second-generation rights (aka red rights): deal with socio-economic issues concerning society and economy. (Examples include right to education, access to health care, sufficient food and water).
 - 6.2.3. Third-generation rights (aka green rights): rights shared by groups, such as rights to clean air.
 - 6.3. Application of the Bill of Rights:
 - 6.3.1. Vertical application is between the state and individuals/groups/institutions
 - 6.3.2. Horizontal application is between individuals and/or private institutions
 - 6.4. Rights discussed in activities: right to equality, right to a healthy environment, right to security and freedom, right not to be tortured, right to equality of religion
- 7. **Unit 7: Limitations on Fundamental Rights**
 - 7.1. Fair vs unfair discrimination, such as not allowing women to apply for job moving heavy equipment.

- 7.2. Qualifications on rights, such right to protest, provided peaceful and unarmed
- 7.3. Conflict of rights, such as right to life and right to make decisions regarding reproduction.
- 7.4. State of emergency can limit rights, except non-derogable rights (such as right not to be tortured)
- 7.5. Section 36: The limitation clause, allows limits in certain circumstances:
 - 7.5.1. general application to everyone;
 - 7.5.2. reasonable and justifiable in an open democratic society (good reason within framework of constitutional democracy);
 - 7.5.3. relevant points taken into account:
 - 7.5.3.1. nature/kind of right?
 - 7.5.3.2. purpose of limitation and importance of purpose?
 - 7.5.3.3. nature of limitation and scope of limitation?
 - 7.5.3.4. how do purpose and limitation relate to one another?
 - 7.5.3.5. could purpose be achieved in less restrictive way?

8. **Unit 8: Types of legal disputes**

- 8.1. Civil cases: between people, not the state (plaintiff and defendant)
 - 8.1.1. Plaintiff must prove case on a preponderance of probabilities or a balance of probabilities (more likely true than not true)
 - 8.1.2. Aim is generally financial damages
 - 8.1.3. May involve attorneys or advocates (depending on seriousness of issues)
 - 8.1.4. May involve magistrates or judges (depending on court in which heard)
- 8.2. Criminal cases: between the state and alleged criminal (state and accused)
 - 8.2.1. State must prove beyond a reasonable doubt
 - 8.2.2. Aim is generally punishment for a crime
 - 8.2.3. Will have a state prosecutor or state advocate, and an attorney or advocate (depending on seriousness of crime)
 - 8.2.4. May involve magistrates or judges (depending on court in which heard)
- 8.3. Constitutional cases: could be any parties (an applicant and respondent, on appeal appellant and respondent)
 - 8.3.1. Involves interpretation, protection or enforcement of Constitution;
 - 8.3.2. May involve issues of fundamental rights;
 - 8.3.3. May involve attorneys or advocates, magistrates or judges.

9. **Unit 9: Legal Profession**

9.1. Attorney:

- 9.1.1. advise and represent clients in court
- 9.1.2. apply to High Court for admission, after fulfilling academic and professional requirements, including: LLB, practical legal training and passage of exam
- 9.1.3. names recorded on “roll”, from which may be struck by court in cases of serious misconduct
- 9.1.4. must belong to Law Society of province
- 9.1.5. in the past could only appear in magistrates courts, but now may appear in High Court if apply for such right. If an attorney acquires the right to appear in High Court, may also appear in Constitutional Court.

9.2. Advocate:

- 9.2.1. main function is to represent clients in court
- 9.2.2. may appear in any court, in accordance with statutory requirements: LLB, practical legal training with advocates, and passage of examination
- 9.2.3. generally belong to a professional Bar Council linked to a division of High Court.

9.3. State Prosecutors appear in magistrate’s court.

9.4. State Advocates appear in high court and may be involved in drafting legislation as legal advisers.

9.5. Presiding officer will be magistrate in magistrate’s court or judge in high court.

10. **Unit 10: Court cases**

10.1. Finding court cases *Case Name*, year (volume) series of law reports page report begins (court of decision):

10.1.1. Case names:

- 10.1.1.1. S v [name] for criminal, [plaintiff v respondent] or [appellant v respondent] for civil
- 10.1.1.2. Old names may have R for *Rex* or *Regina* in criminal cases pre-1961
- 10.1.1.3. Case names may also include *NO* (*nominee officio* or in official capacity) or *In re* (case or matter of) where court will interpret the law but there is no dispute.

10.1.1.4. Proceedings:

- 10.1.1.4.1. Action proceeding is started by summons, and is used when there is a fundamental difference between the two parties.
- 10.1.1.4.2. Application proceeding uses *Ex Parte* [applicant’s name], is started by way of a notice of motion, and is used when there is not a fundamental difference between the parties.

- 10.1.2. Year and volume indicate the year reported and the volume containing the report.
- 10.1.3. Series of law reports:
 - 10.1.3.1. SACR – South African Criminal Law Reports
 - 10.1.3.2. SA – South African Law Reports
 - 10.1.3.3. CLR – Commercial Law Reports
 - 10.1.3.4. SALLR – South African Labour Law Reports
 - 10.1.3.5. BCLR – Butterworths Constitutional Law Reports
- 10.1.4. Page on which report starts
- 10.1.5. Court decided, important to note court of first instance and the court *a quo* (from where the case comes on appeal)
 - 10.1.5.1. CC/KH – Constitutional Court (Jo'burg)
 - 10.1.5.2. SCA/HHA – Supreme Court of Appeal (Bloemfontein) (previously just A)
 - 10.1.5.3. C/K – Cape Provincial Division (Cape Town)
 - 10.1.5.4. E/OK – Eastern Cape Provincial Division (Grahamstown)
 - 10.1.5.5. SE/SO – South East Cape Provincial Division (PE)
 - 10.1.5.6. N – Natal Provincial Division (Pietermaritzburg)
 - 10.1.5.7. D or D+C/D or D+K – Local Division Durban and Coast (Durban)
 - 10.1.5.8. NC/NK – North Cape Division (Kimberley)
 - 10.1.5.9. O – Orange Free State Provincial Division (Bloemfontein)
 - 10.1.5.10. T/TPD/TPA – Transvaal Provincial Division (Pretoria)
 - 10.1.5.11. W/WLD/WPA – Witwatersrand Local Division (Jo'burg)
- 10.2. Judges names:
 - 10.2.1. Constitutional Court
 - 10.2.1.1. CJ/HR – Chief Justice (*Hoofregter*)
 - 10.2.1.1.1. Pre-2001 P – President (*President*)
 - 10.2.1.2. DCJ/AHR – Deputy Chief Justice (*Adjunkhoofregter*)
 - 10.2.1.2.1. Pre-2001 DP/AP – Deputy President (*Adjunkpresident*)
 - 10.2.1.3. J/R – Judge/Justice (*Regter*)
 - 10.2.2. Supreme Court of Appeal
 - 10.2.2.1. P – President (*President*)

- 10.2.2.1.1. Pre-2001 CJ/HR – Chief Justice (*Hoofregter*)
- 10.2.2.2. DP/AP – Deputy President (*Adjunkpresident*)
 - 10.2.2.2.1. Pre-2001 DCJ/AR – Deputy Chief Justice (*Adjunkhoofregter*)
- 10.2.2.3. JA/AR – Judge of Appeal (*Appèlregter*)
- 10.2.2.4. AJA/WnAR – Acting Judge of Appeal (*Waarnemende Appèlregter*)
- 10.2.3. High Courts
 - 10.2.3.1. JP/RP – Judge President (*Regter-president*)
 - 10.2.3.2. DJP/AdjRP/ARP – Deputy Judge President (*Adjunkregter-President*)
 - 10.2.3.3. J/R – Judge (*regter*)
 - 10.2.3.4. AJ/WnR – Acting Judge (*Waarnemende Regter*)
- 10.3. Date on which case was heard
- 10.4. Flynote (catch phrase) – not part of judgment as are compiled by publisher
- 10.5. Headnote – summary also written by publisher
- 10.6. Legal Representatives – either advocates or attorneys
- 10.7. May be summaries of arguments and list of authorities
- 10.8. If judgment given on different day than heard, will say *Cur adv vult* (court considers its verdict), followed by *postea* (aftwards) and the date of the judgment.
- 10.9. Judge's name, followed by judgment
 - 10.9.1. Majority judgment – *ratio decidendi* of majority judgment is binding and creates precedent
 - 10.9.2. Minority judgment – not binding but may be persuasive
 - 10.9.3. Separate judgment – not disagreeing but having different reasons (not precedential) (sometimes concurring judgment)
- 10.10. May be a letter after the page number to help find item on the page
- 10.11. *Ratio decidendi v obiter dicta*
 - 10.11.1. Only *ratio decidendi* (the reason for the decision) is binding, but a finding purely on facts cannot create a precedent
 - 10.11.2. *Obiter dicta* (remarks in passing) are not precedential, but may be influential
 - 10.11.2.1. judge formulates the principle of the case more broadly than necessary,
 - 10.11.2.2. judge makes an incidental remark,
 - 10.11.2.3. judge asks and answers a hypothetical question,

10.11.2.4. judge quotes a similar case or gives illustration

10.12. Appeal and review

10.12.1. Appeals court doesn't hear evidence again – rather studies the record and listens to arguments

10.12.1.1. upholds the appeal (dismisses the *a quo* court decision)

10.12.1.2. dismisses the appeal (upholds the *a quo* court decision)

10.12.1.3. in criminal case may appeal verdict or sentence or both

10.12.2. Review may occur on irregularities of procedure (not a complaint about decision itself, but about procedure)

10.13. Summarizing a case:

10.13.1. Need only key facts and legal principle(s)

10.13.1.1. after facts, note the legal question the court will answer

10.13.1.2. the court's finding

10.13.1.3. and the *ratio decidendi*