Review of the Structure of the Legal System and Courts of South Africa

Sustained Advocacy for Empowered Refugees
Training Course
UCT August 2015
Overview

* Including:
  - Sources of Law
  - Criminal vs Civil Law
  - Types of Courts
  - Development of the Law
Sources of Law

There are a number of sources from which South African Law is derived which include:

* The Constitution
* Legislation / Statutes
* Common Law
* Customary Law
* International Law
The Constitution – Supreme Law of the Land

* Inconsistencies are invalid (Section 2)
* Bill of Rights - BoR - Equality, Dignity, Education, Safety and Security, Access to Court (Chapter 2)
* Limitations Clause - Reasonable and Justifiable Limitation (in Open and Democratic Society) with a Law of General Application (Section 36)
* Section 39 Interpretation of BoR – Promote Values, Int Law & Foreign Law

39 Interpretation of Bill of Rights
* (1) When interpreting the Bill of Rights, a court, tribunal or forum-
  * (a) must promote the values that underlie an open and democratic society
    based on human dignity, equality and freedom;
  * (b) must consider international law; and
  * (c) may consider foreign law.
* Section 232 & 233 – International Law
The National Government (Parliament / Legislature) produce written laws which are binding on everyone living within its borders. These are called Legislation or Statutes or Acts. Three examples:

- Act 108 of 1996
- Act 51 of 1977
- Act 130 of 1998
- Act 51 of 1977 – The Criminal Procedure Act (incl: S50 Arrest, 48hrs and S60 - Bail)
- Act 130 of 1998 – The Refugees Act (S2 S21 S22 and s24)
  Process by which legislation is passed
- In terms of the Legislation the Minister and his or her delegate may be empowered to make Regulations.

- In addition to the National Legislature you have provincial and local legislature which create laws to be applied at the Provincial Level and at the Local Government level.

- These laws are not binding on higher levels.

- Schedule 4 – Concurrent, Disaster Management, Housing

- Schedule 5 – Exclusive Provincial - Abattoirs, Beaches, Public Nuisances, Fencing and Fences
Common Law

- Laws not made by Parliament
- Roman Dutch Law as developed by new decisions of the courts
- The process or system is based on English Law process
- Egs. Theft, Rape, Treason
- Section 8(3)(a) Develop Common Law to give effect to a Right/to Limit a Right where Reasonable
- Section 39(2) interpreting Common Law- promote Spirit, Purport and Objects of the BoR
Customary Law

- Customary Law is applicable to a section of Society
- Special Headman’s Courts and Codes
- Eg Code of Zulu Law in KwaZulu Natal.
- This is not often encountered by most of us.
- Where it is applicable - domestic and family law disputes (eg Matrimonial law position).
International Law

* Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament (S232).
* Prefer interpretation Consistent with International Law than not (S233) unless unconstitutional.
* Examples of International Law - Treaties, Conventions, Customary International Law (1951 Convention)
Civil vs Criminal Law

* Types of Matters Civil vs Criminal
* Parties (State Prosecutor, Defence Accused vs Civil parties Applicant and Respondent/ Plaintiff / Defendant)
* Standard of Proof
* Examples (Rape, Murder, Divorce, Evictions) (What about Immigration Deportation?)
* Refer to Diagram of Courts
Levels of Courts (s34)

- Constitutional Court
- High Court (Eg Western Cape High Court)
- Special Courts (Labour, Divorce, Equality)
- Magistrates’ Court
- Community Court / Peoples Court
- Small Claims Court
- Internal Remedies and Alternative Dispute Resolution Forums
Development of the Law by the Courts

* Common law and or statutes are considered by the courts relative to the facts
* If a law fits for the facts, apply it
* It must not be Inconsistent with the Constitution and ideally consistent with International and Customary Law if Applicable.
* If it does not fit the facts or is inconsistent – (New Law) Precedent (Ratio)
* Binding Precedent (Examples)
* Persuasive Precedent
Asylum Process in South Africa

Sustained Advocacy For Empowerment of Refugees [SAFER]

UCT AUGUST 2015

F. Khan
South African Borders
Refugee reception offices in SA

- Musina
- Johannesburg ................Closed
- Pretoria
- Durban
- Port Elizabeth ...............Closed?/judgment
- Cape Town....................Closed

- Five days (New Amendment Act)
- Section 23 of the Immigration Act 2002
Number of refugees in SA

December 2014

- Refugees 112,192
- Asylum seekers – 463,940

Total 576,133
Who is a Refugee? Definitions

- Section 3(a) of Refugees Act, as amended:
  - A person qualifies for Refugee status if that person
    - owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion, or membership in a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail him/herself of the protection of that country
Who is a Refugee? Cont’d

- Section 3(b) of Refugees Act, as amended:
  - A person qualifies for Refugee status if that person
    - owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or
Section 3(c)

- Section 3(c) of Refugees Act, as amended:
  - A person qualifies for Refugee status if that person
    - Is a **spouse** or **dependant** of a person contemplated in sections (a) and (b)
Dependants

Section 3C
Proof of relationship
Section 33
– Ceases to meet the definition of dependant
– Death or divorce of a recognised refugee
Art 31 of the 1951 UN Convention relating to the status of refugees

The contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation and show good cause for their illegal entry.
Application for asylum

- Section 21 of the Refugees Act
- In person
- Prescribed form (Eligibility form – BI 1590)
- Interpretation
- Disclosure
- Section 22 permit – note conditions
  - Section 37 Refugees Act
  - Expired permits
- 180 days
Refugee Status Determinations

1. Unfounded –
   Right to Appeal to the Refugee Appeal Board;
   Appeal affidavit (RAB 01)
   must apply within 30 days
   Appearance before Refugee Appeal Board
Refugee Status Determinations

- Manifestly Unfounded – Right of Review to the Standing Committee for Refugee Affairs; must make representations within 14 days (Fraudulent)
- Form 23 after Final Rejection
- Note: Refugees Amendment Act 2008 (not yet operational) – new Refugee Review Authority
Reviews

- RAB –
  - Appeals –
  - High Court Review

- SCRA
  - Written representations
  - High Court review
Refugee Status and Identity Documents

- Section 24 Refugee Status
- Refugee ID book
- United Nations Convention Travel Documents (UNCTDs) / green passport
- Navy Blue?
Certification for Permanent Residence

- Recognized refugee, after five years of continued residence in the Republic, has right to apply for certification that s/he will remain a refugee indefinitely (section 27g Refugees Act)
- Only once certified, may apply for Permanent Residence
- Withdrawal of status – s36
Cessation

- Section 5
- a person ceases to be a refugee when –
  (a) Voluntarily re-avails himself to the protection of his state
  (b) Having lost it – by some act reacquires it
  (c) Becomes a citizen or acquires the nationality of another country
Cessation

(a) Re–establishes himself in the country which he left

(b) He can no longer refuse to re–avail himself because the circumstances on connection with which he was recognised have ceased to exist

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- Angolans
SAFER REFUGEE TRAINING
August 2015
F. Khan
What is a right?

- A right can give a person the ability to **demand** something from someone.

**Example:** The right to healthcare gives an asylum seeker or refugee the right to receive treatment at the same rates as a South African in similar circumstances.
A negative right
A right can also prevent someone from doing things to a person.

Example:
The Police may not kill or injure a person
If a person has a right he also has a duty or an obligation.

Example:
John has a right not to be harmed by Jack and similarly John has a duty not to harm Jack.
- Rights can be limited

- Example: The right to freedom of speech does not allow a person to use inflammatory speech to incite violence.
Rights guaranteed absolutely

- Administrative rights
- Non-penalisation for illegal entry
- Non-refoulement
- Pre-existing rights
Rights *shared* by the general population

- Right to liberty and security of person
- Freedom from arbitrary arrest
- Freedom from torture, cruel, inhumane and degrading punishment
- Right to equal; protection before the law
- Right to dignity
- Right not to be discriminated against
Rights that lead to a meaningful existence in the country of asylum/local integration

- freedom of movement
- work
- labour
- social security
- housing
- Education
- health care
- children
Rights related to *long stay*

- naturalisation
- permanent residence
- citizenship
Voluntary repatriation
Is this a right?

Article 5

Voluntary Repatriation

1. The essentially voluntary character of repatriation shall be respected in all cases and no one shall be repatriated against his will.

2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.

3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary–General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return.
THE RIGHT TO SEEK EMPLOYMENT AND OTHER LABOUR ISSUES
The right to seek employment

- Right includes right to self employment and to enter into contracts of employment
- 27(f) of Refugees Act 1998: a Refugee is entitled to seek employment
- Asylum seekers?
SCA found the general prohibition on work and study for asylum seekers to be unlawful.

The right to seek employment and to attend school stems from the right to dignity. Everyone, has inherent dignity and the right to have their dignity respected and protected.

Prohibition against work and study can now only be made on a case-by-case basis.

Section 27A Refugees Amendment Act, 2008 - asylum seeker - right to work and study pending finalization of application
Right to seek employment

- No work permit is required
  - For refugees, section 24 permit - proof of the right to work
  - For asylum seekers, section 22 permit - the proof of the right to work
- Employers may not discriminate against asylum seekers because their status has not been determined
Legal Protections

- In terms of employment and conditions of employment, refugees and asylum seekers are protected by the same rights as South Africans.
- Can approach both the CCMA or the Labour Court where their rights have been violated.
Who is an ‘employee’?

- Employees v Independent contractors
- Fixed term v indefinite term employment contracts
- Temporary employment services i.e. labour brokers
- 2015 Amendments to LRA (non-standard work)
Who is an ‘employee’?

- **Unauthorised work:**
  - *Dunwell Property Services CC v Sibande & others* [2012] 2 BLLR 131 (LAC)

- **Statutory prohibition against permanent employment:**
  - *Ndikumdavyi v Valkenberg Hospital & others* (2012) 33 ILJ 2648 (LC)

- **Illegal work:**
  - *Kylie' v CCMA & others* 2010 (4) SA 383 (LAC); (2010) 31 ILJ 1600 (LAC)
Legal Protections

- **Labour Relations Act 1995** governs relationships between employers and employees; emphasises fairness, stresses rights and facilitates dispute resolution processes.

- **Basic Conditions of Employment Act 1997** sets out important protections, including paid leave, sick leave, overtime, holiday pay, payslips and lunch breaks.

- **Employment Equity Act 1998** prohibits unfair discrimination – also applies to applicants for employment.
LRA: Unfair Labour Practices

- Occurs during the currency of employment
- An employer acts unfairly in respect of the following labour practices:
  - Failure to promote, training, demotion, probation, suspension, benefits, refusal to re-instate where there’s an agreement, protected disclosures in the Protected Disclosures Act
  - Employee can challenge the fairness of employer’s decision when subjected to these labour practices
LRA: Unfair dismissal

- Not every termination is a ‘dismissal’ and not every dismissal is unfair.
- When an employer contemplates dismissing an employee – needs a fair reason and needs to follow a fair procedure.
- ‘Dismissals’ under the LRA:
  - Employer terminates contract with or without notice
  - Failure to renew fixed term contract/grant permanent employment where reasonable expectations exists
  - Refusal to allow employee to return to work after taking maternity leave
  - Selective non re-employment
  - Constructive dismissal
  - Termination after a business transfer
Unfair dismissal: AUD

Automatically Unfair Dismissals

- Dismissal is unfair if person is dismissed on one or more of the following:
  - Freedom of Association (i.e. in a trade union)
  - Participation in a lawful strike
  - Unfair discrimination
  - Exercising a right given by law
  - Dismissal for exposing corruption
Unfair Dismissal: 3 Fair reasons for a dismissal

- An employer may dismiss an employee for (1) misconduct, (2) incapacity and (3) for operational requirements

(1) Dismissal due to misconduct
- Misconduct must be proven
- Examples: theft, assault, disobedience, fraud, being under the influence of drugs or alcohol, etc
- Breakdown of relationship
Unfair Dismissal: 3 Fair reasons for a dismissal

(2) Dismissal based on incapacity
- Failure of the employee to perform due to inability or inaptitude of the person
- Examples: Poor work performance, ill health or injury

(3) Retrenchment:
- Due to operational requirements
- Severance pay (at least one week for every year of service)
- Dispute over severance pay can be referred to relevant bargaining council or to the CCMA
Possible remedies for unfair dismissals:
- Order that employee be given job back unless employee does not want to return, or continued relationship no longer possible, no longer reasonably practical to award re-statement
- Compensation
  - Maximum of 12 months wages for dismissal and unfair labour practice
  - Maximum of 24 months for automatically unfair dismissal
CCMA

- Commission for Conciliation, Mediation and Arbitration
  - Alternative dispute resolution body
  - Established into LRA
  - Independent body, not belonging to or controlled by any political party, trade union or business

- Unfair labour practices and unfair dismissals (90% of CCMA’s caseload)

- Only used if there is no established Bargaining Council in the sector

- A verbal contract or proof of an employment relationship is enough to grant the right to approach the CCMA
Methods of Dispute Resolution:

- Conciliation: a structured negotiation process involving the services of a neutral party, known as a conciliator, whose role it is to assist the parties to reach an agreement.

- Arbitration: similar to a court process, where an impartial third party decides the issue after reviewing evidence and hearing arguments from the parties.
Arbitration hearing includes witnesses and documentation and well as cross examination of the parties.

Within 14 days of conclusion of the hearing, a final and binding decision called an arbitration award will be made.

If a party does not comply with the award, it may be enforced as if it were an order of the Labour Court or if party is dissatisfied with the award, it may review it to the Labour Court.
CCMA Process for ULP and Unfair Dismissal

- 30 days from the date of the dismissal, or 90 days for ULP, to open a case at the CCMA
- Complete case referral form and deliver copy to opposing party
- Send copy of referral form to CCMA
  - See 7.11 Form (www.ccma.org.za)
- Scheduled for conciliation first; if no agreement reached, case proceeds to arbitration - CCMA or adjudication - Labour Court
Unemployment Insurance Fund

- UIF purpose: Short-term relief for persons out of work
- Termination of employment; illness; maternity; adoption
- Obtain guidance from DoL Labour Centre for Fund application and requirements
Injured at Work – The Compensation Fund

- Compensation for workplace injuries or diseases acquired in the workplace
- available to all workers (including Refugees and Asylum Seekers)
- Unlike the UIF, workers do not need to make contributions to the Fund to be able to access it
- CF covers medical costs and compensation for disability (permanent or temporary)
Dept of Labour’s Labour Centres

- Service points of the Department of Labour
- Provide services related to UIF, Skills Development, Workers’ Compensation and Labour Relations
- Good place to enquire about your rights if you have a labour dispute with your employer, i.e. unpaid wages or UIF claim
Banking and Doing Business in SA

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Overview

* Banks and FICA
* Giving Meaning to FICA  Circular PCC03A & PCC27
* Approaching Banks
* The Banking Ombudsman
* Consumer Rights
* Business Entities
* Informal Trader Permit
Financial Intelligence Centre stipulates certain information required before opening any bank account

FICA passed circulars excluding the use of S22s and S24s

Court Cases in Gauteng and In Cape Town

PCC03A – section 22 and section 24 permits issued in terms of the Refugees Act 1998 (Act 130 of 1998) as alternative forms of identification, is permissible.
Verification of S22s and S24s was required within 48 hours when opening an account. The periods became longer and a shift from National to Regional verification initially worked but then delays returned. Difficulties from Verification required after each extension until alleviated by PCC27. All the banks require proof of residence to open an account along with some form of document for identification purposes. In terms of proof of residence a document is required which may be: a utility bill (water or electricity bill), a TV licence or any account sent to your physical address.
Nedbank –
Asylum Seekers and Refugees with a S22 or S24 respectively may open normal savings accounts at Nedbank only.
The S22 or S24 permit holder will go to any branch of Nedbank.
At the bank branch a copy of their permit is made and is sent to the Nedbank verifications office in Johannesburg – the document is verified (this is taking +- 1 week at the moment due to the system going down at DHA and needing to clear the backlog).

Bidvest –
S22 and S24 permits are accepted
client would need to pay a R50 deposit and provide proof of employment
the copy of the permit is then sent by Bidvest for verification after 24 to 48 hours the document is verified. (48 hours FOR VERIFICATION)

ABSA –
Only opens accounts for S24 permit holders once the documents is verified
does not for Asylum Seekers - Section 22 permit holders.
FNB and Capitec –
Since 2013 both have advised they will and continue to **assist existing clients** who opened accounts with them but Since 2013 will not be and do not open new accounts for S22 or S24 permit holders.

**Standard Bank** –
A passport is required to open an account and that Refugee Passports are accepted but, S22 and S24 permits are not accepted Standard bank does not have previous existing clients who were able to use S22 or S24 permits.

**FICA CIRCULARS**
**FICA Circular to the banks entitled PCC03A allowed for verification and acceptance of S22 and S24 permits by banks to correct precious two notices precluding this**
**FICA Circular to the banks entitled PCC27 allowed for and allows for once off verification and confirms that S22 and S24 permit holders do not need to verify their documents again each time their permit is extended**
The Banking Ombudsman

* Complaints with the banks are common
* Exhaust internal banking remedies before approaching the Ombudsman.
* A complaint should be given a reasonable time to be addressed (approx 4 weeks). Thereafter complete application for assistance form.
* Addresses both sides, work towards a negotiated settlement
* If not satisfied can take the decision to court or reconsider if was only recommendation.
Consumer Rights

* Five day Cooling Off Period - Section 16
  * Must return money paid in total if no delivery
  * Return full amount of delivery unless reasonable fee for damage to goods delivered (not possible if in tact and original packaging)

* 20 days notice of Cancellation Section 14-17
* Reasonable Cancellation Fee Section 17
- Sole Proprietorship (Individual Business), Partnership, Non-Profit Organisations, Close Corporations (Legacy), Companies, Trusts
  - Sole Proprietorships and Partnerships are both addressed as individuals
  - A Close Corporation (previously) or Company have their own personality separate from members
Informal Trading


* City Of Cape Town Informal Trading By-Law of Promulgated 20 November 2009.

* Informal Trader means a person or an enterprise which is not registered or incorporated in terms of the corporate laws of South Africa and which engages in informal trading
Informal trading means trading in goods or services in the informal sector by an informal trader and which typically constitutes the types of trading described in section 3.1 and section 3.2;

Section 3 defines types of Informal Trading incl: Street trading, markets, mobile (eg caravans), trading at transport interchanges and beach trading

Trading Plans for Particular Areas, Includes Public Participation. Adoption (& Amendment may follow)
Informal Trading is only legal with an informal trading permit as applied for.

S8(4) In order to qualify for a permit, the applicant
– must be an informal trader
– may not already hold a permit in the trading area in respect of which a permit is applied
– must be a South African citizen, failing which, must be in possession of a valid work permit which includes, but is not limited to, a refugee permit:
– must not employ and actively utilise the services of more than 20 (twenty) persons
To register an NPO the first step is drafting a constitution and thereafter carrying out business in terms of the Constitution (bank account, signatories..)

The founding document or constitution of an NPO must comply with a number of requirements in order for it to be registered with the Department of Social Development.

These 'mandatory requirements' are as follows: "... the constitution of a non-profit organisation that intends to register must -

* state the organisation's name;
* state the organisation's main and ancillary objectives;
NPO Constitution Requirements

- state that the organisation's income and property are not distributable to its members or office-bearers, except as reasonable compensation for services rendered;
- make provision for the organisation to be a body corporate and have an identity and existence distinct from its members or office-bearers;
- make provision for the organisation's continued existence notwithstanding changes in the composition of its membership or office-bearers;
NPO Constitution Requirements

* ensure that the members or office-bearers have no rights in the property or other assets of the organisation solely by virtue of their being members or office-bearers;
* specify the powers of the organisation;
* specify the organisational structures and mechanisms for its governance;
* set out the rules for convening and conducting meetings, including quorums required for and the minutes to be kept of those meetings;
* determine the manner in which decisions are to be made;
NPO Constitution Requirements

* provide that the organisation's financial transactions must be conducted by means of a banking account;
* determine a date for the end of the organisation's financial year;
* set out a procedure for changing the constitution;
* set out a procedure by which the organisation may be wound up or dissolved;
* provide that, when the organisation is being wound up or dissolved, any asset remaining after all its liabilities have been met, must be transferred to another non-profit organisation having similar objectives.”