

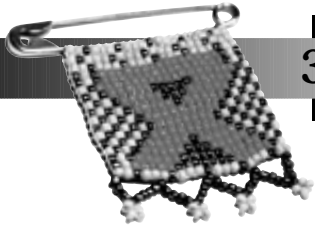


CHAPTER 3

Introduction to the legal system

3.1	The law	48
3.1.1	What is the law?.....	48
3.1.2	Where does the law come from?	49
	<i>The Constitution</i>	49
	<i>Statute law</i>	50
	<i>Common law</i>	51
	<i>Customary law</i>	51
	<i>Court decisions</i>	51
3.2	Different kinds of law	53
3.2.1	Constitutional law.....	53
	<i>What is constitutional law?</i>	53
	<i>What happens when constitutional law is violated?</i>	53
3.2.2	Criminal law.....	55
	<i>What is criminal law?</i>	55
	<i>What happens when the criminal law is broken?</i>	55
3.2.3	Civil law.....	55
	<i>What is civil law?</i>	55
	<i>What happens when civil law is broken?</i>	55
3.3	The courts	56
3.3.1	What are the courts?.....	56
3.3.2	Different court processes.....	56
	<i>Trial</i>	56
	<i>Appeal</i>	56
	<i>Review</i>	56

3.4	Different kinds of courts	57
3.4.1	Constitutional Court.....	57
3.4.2	Supreme Court of Appeal.....	57
3.4.3	High Courts.....	57
3.4.4	Equality Courts.....	58
3.4.5	Magistrates' Courts.....	58
	<i>Regional Magistrates' Courts</i>	58
	<i>District Magistrates' Courts</i>	58
	<i>Maintenance Courts</i>	58
	<i>Juvenile Courts</i>	58
	<i>Children's Courts</i>	59
3.4.6	Other special courts.....	59
	<i>Labour Appeal Court</i>	59
	<i>Labour Courts</i>	59
	<i>Small Claims Courts</i>	59
	<i>Family Courts</i>	59
	<i>Courts of Chiefs and Headmen</i>	59
3.4.7	Settling disputes out of court.....	59
3.5	Summary of courts and procedures	60
	Talking points	61
	References and resource materials	62



3.1 The law

3.1.1 WHAT IS THE LAW?

The law is a set of rules which govern the way people behave. The law tells you:

- What you must do
- What you are allowed to do
- What you must not do.

In this way, the law tells you what your rights are (what you *may* do) and what your duties are (what you *must* do).

In South Africa, we have a democratic system of government. This means that we all can contribute to making the law for our country.

We can take part in making the law:

- By voting in elections. We can vote for people or parties that will represent our views when laws are made.
- By voicing our opinion. For example, before a new law is made, the public are given the chance to comment on the proposed law. You can do this either by writing to the law-makers, or speaking out at a public hearing.

People choose to follow the law for a number of reasons:

- The law brings order to society. The set of rules help people to know what behaviour is allowed, and what is not allowed.
- The law says that people who do not follow the rules can be punished. The fear of punishment is one reason why people obey the law.
- In a democracy, people help to make the law. The laws show what the people of the country believe in, so they are more likely to want to follow that law.

3.1.2 WHERE DOES THE LAW COME FROM?

The sources of law (where the law comes from) in South Africa are:

- The Constitution
- Statute law
- Common law
- Customary law
- Court decisions.

The Constitution

The **Constitution** is the supreme (highest) law of South Africa. All laws and State actions must be in line with the Constitution.

Our Constitution tell us how the State is organised. It also has a **Bill of Rights** (list of human rights), which sets a standard for all laws. This means that laws that go against the rules in the Constitution can be challenged. The courts must also follow the ideas in the Bill of Rights when they interpret (give meaning to) the common law and customary law.



SODOMY NO LONGER A CRIME

Our common law and the *Sexual Offences Act* used to make **sodomy** a crime. In *National Coalition for Gay and Lesbian Equality v The Minister of Justice* (1999), the Constitutional Court examined these laws under the Bill of Rights, which gives every person the right to **equality** and **non-discrimination** on the basis of **sexual orientation**.

The Court decided:

- These laws discriminate against gay men because of their sexual orientation, and
- These laws are thus **unconstitutional**.

The Constitution also says that when the courts interpret the Bill of Rights, they must look at **international law** and they can also look at **foreign law**. This means that our courts can now look at laws made outside of South Africa for guidance.

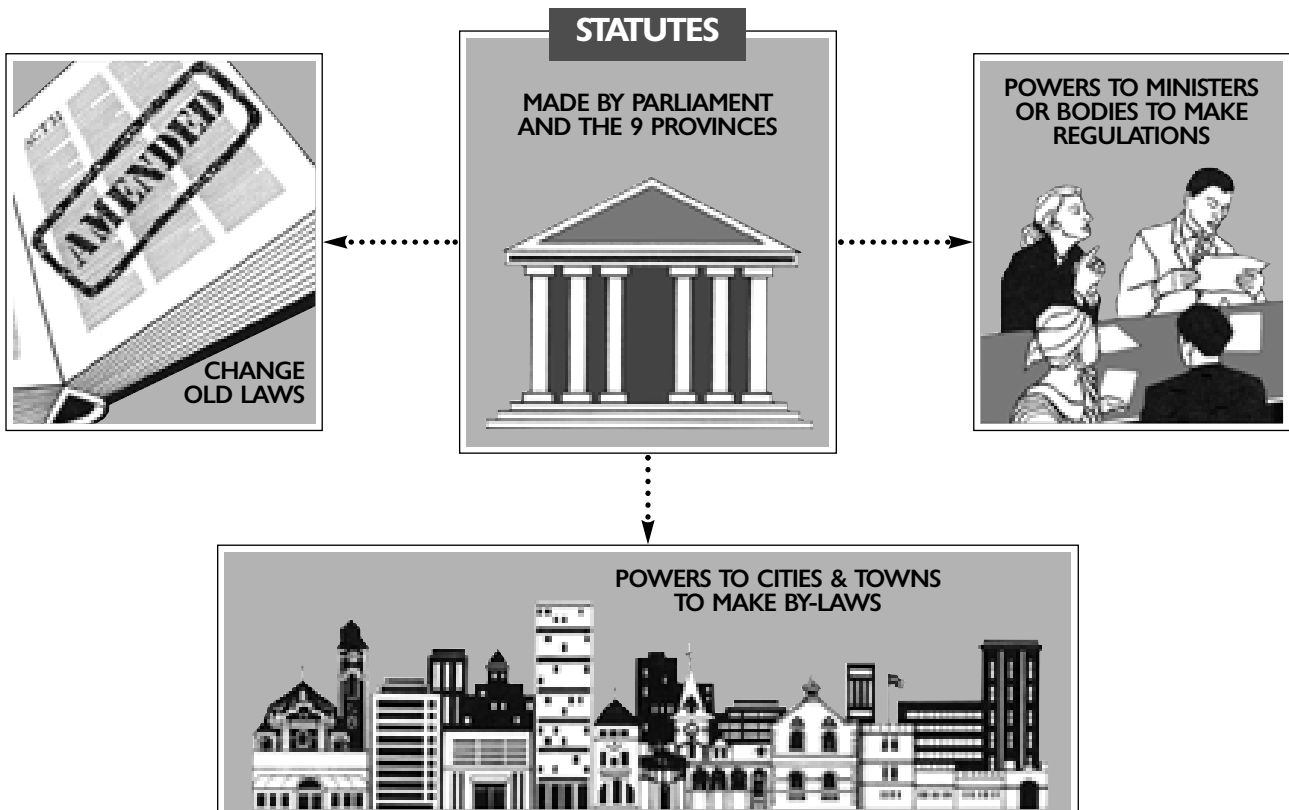
Statute law

Statute law is written law. **Statutes** (written laws) are made by Parliament as the highest law-making body in the country. Our Constitution also allows Provincial legislatures (parliaments) to pass statute laws for the province, and gives some law-making powers to municipalities.

A new statute can change everything the old law said. When you are looking for the answer to a legal problem, you should first look at statute law – there may be a written law which covers your problem. An example of a statute is the Child Care Act.

Often an Act gives powers to a person (eg a Minister) or a body (eg the Department of Welfare) to make more laws under the Act. These laws are called ‘**regulations**’ – these are usually more detailed rules to implement the Act, eg Electoral Regulations under the Electoral Act.

Statutes can also give powers to towns and cities to make written laws (called ‘**by-laws**’) for themselves.



Common law

Common law is law that is not made by Parliament or another law-making body. This law comes from Roman-Dutch law and English law, brought to South Africa by the Dutch and English settlers. When a legal problem is not covered by statute law, you can look at the common law for an answer.

Many of the general principles of our law come from the common law, eg the **criminal law** that says that murder and robbery are crimes.

Customary law

Customary law is written and unwritten law which develops from the customs of a community. When the customs of a community become fixed practices (customs) which people use and believe in, these customs become a form of customary law.

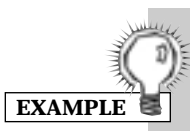
We say that customs become law only when they are:

- Generally known by everyone in the community.
- Generally followed by everyone in the community.
- **Enforced** in some way.

Finding and using customary law is not always easy because:

- It is mostly unwritten law.
- Where it is written law, it is not always a true and reliable example of the law that is practised in communities.
- It is often used in the courts by people who know very little about customary law.

*For more on
customary law, see
Chapter 9 on page 207.*



EXAMPLE

WRITTEN CUSTOMARY LAW

The Black Administration Act – this Act gave legal recognition to parts of customary law.

Court decisions

When people are involved in a **dispute** (conflict) about the law, or when a person has broken the law, the dispute can go to the courts. The courts look at the facts of the case, and the law. Then the courts make a **judgement** (court decision).

In modern times, new problems can arise all the time. This means that the courts will carry out the law in a new or different way sometimes, depending on the facts of the case. When this happens, we say the courts have set a precedent (case example) for other courts to follow.



CASE

For more on the Constitution and non-discrimination, see Chapter 4 on page 63.

A NEW DEFINITION OF 'DEPENDANT'

In *Langemaat v Minister of Safety and Security* (1998), the High Court examined the way that the law defined a 'dependant' for the purposes of a medical scheme. The Court measured this against the Constitution, and the right to equality and non-discrimination on the basis of sexual orientation. The High Court decided:

- The definition was unconstitutional because the definition excluded a **same-sex** partner by saying that same-sex partners could not be registered on a medical scheme like married partners.
- 'Dependant' should now be interpreted in a new way, to make sure that it does not discriminate against same-sex couples.

In South Africa, the courts have to follow these precedents. Lower courts have to follow the precedents of higher courts. This means that we must also look at court decisions when we look for the law to tell us:

- How statute law has been interpreted, and
- How the common law and customary law has been changed to suit modern times.

LOOKING FOR THE LAW TO SOLVE YOUR PROBLEM

STEP 1

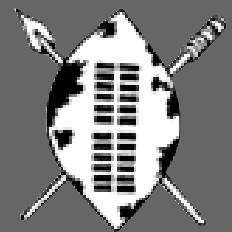
IS THE PROBLEM COVERED BY ...



STATUTE LAW ?



COMMON LAW ?



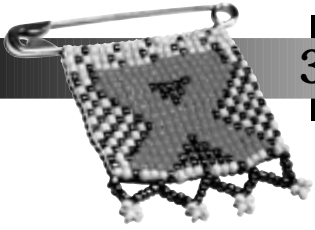
CUSTOMARY LAW ?

STEP 2

CHECK THE COURT DECISIONS TO SEE HOW THE COURTS INTERPRET THE LAW

STEP 3

CHECK THE CONSTITUTION TO SEE IF THE LAW IS CONSTITUTIONAL



There are 3 main kinds of law in South Africa:

- Constitutional law
- Criminal law
- Civil law.

3.2.1 CONSTITUTIONAL LAW

What is constitutional law?

Constitutional law tells you how the State is organised and what your human rights are.

Organisation of the State

The Constitution sets out the rules that are used to govern the country.

At a national level, the State has 3 main organs (parts):

- The Legislature (bodies that make the law), eg Parliament
- The Executive (bodies that carry out the law), eg the Cabinet
- The Judiciary (bodies that interpret the law and decide legal disputes), eg the Supreme Court of Appeal.

Constitutional law tells you what each of these State organs do and how they are allowed to do it.

Human rights

Our Constitution also has a Bill of Rights. This is a list of the basic rights that all people in South Africa have as human beings.

What happens when constitutional law is violated?

The person or organisation who thinks that constitutional law has been **violated** (not respected), can take the problem to the courts or to a human rights body.

*For more on
the Bill of Rights,
see 4.1 on page 66.*



WHO CAN BRING A CASE TO THE COURTS?

- A person who thinks that his/her constitutional rights have been violated.
- A person who acts on behalf of another person whose rights have been violated (eg parents can bring an action on behalf of their child).
- A person acting on behalf of a group of people whose rights have been violated (eg a person living in a community can bring an action on behalf of all the community members).
- A person acting in the interest of all members of the public, who believes that the general public's rights have been violated (eg a person who thinks that a law is unconstitutional and violates everyone's rights, can take the case to court on behalf of the general public).
- An association acting on behalf of its members, who thinks that its members' rights have been violated (eg the National Association of People Living with HIV/AIDS can bring an action on behalf of all its members living with HIV or AIDS).

If the court decides that a person's rights have been violated, it can make an order (a formal instruction of the court) to put right the wrong, and to compensate (pay) the person for the harm caused.

If the court decides that a law is unconstitutional, it can:

- Make an order saying that the law is **invalid** (has no legal force), and
- If it is a statute, say that the statute must be corrected to bring it in line with constitutional law.

For more on taking up constitutional cases, see 17.2 on page 399.

For more on unfair discrimination, see 4.2 on page 67.

CASE



PARTS OF ALIENS CONTROL ACT UNCONSTITUTIONAL

In *National Coalition for Gay and Lesbian Equality (NCGLE) & Others v Minister Of Home Affairs & Others* (2000), the NCGLE challenged sections of the Aliens Control Act as unconstitutional.

This Act allowed spouses of citizens and permanent residents of South Africa to apply for immigration permits from within South Africa. All other people, including long-term **homosexual** or **heterosexual**

partners had to apply for these permits from outside South Africa.

The Court decided:

- In preferring some types of life partnerships over others, s25(5) of the Act discriminated unfairly against people because of their sexual orientation.
- The section was thus unconstitutional.

3.2.2 CRIMINAL LAW

What is criminal law?

Criminal law tells you how the State expects you to behave in society, and also says that when you break the law, you must be punished. This kind of law tells you what acts are crimes. Although a crime is often committed against another person, it is seen as a wrong against the State.

You will find criminal law in the common law and statute law.



EXAMPLES

CRIMES

- *The common law crime of murder says it is a crime to kill another human being.*
- *A statute, the Arms and Ammunition Act, makes it a crime to have an unlicensed gun.*

What happens when the criminal law is broken?

When the criminal law is broken, the State brings a legal action against the accused (the person charged with the crime). The complainant (the person who is the victim of the crime) is usually a witness in the court case.

If the accused is found guilty, he/she is punished (eg by being fined or sent to prison).

For more on criminal law, see Chapter 14 on page 313.

For more on making criminal charges, see 17.7 on page 425.

3.2.3 CIVIL LAW

What is civil law?

Civil law tells you how you must behave in your private relationships with other people. This kind of law tells you what your rights and duties are in your relationships with other people.



EXAMPLE

CIVIL LAW

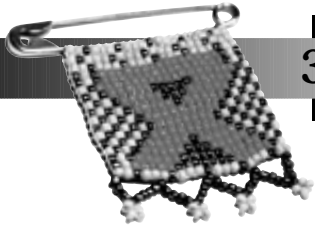
Marriage, contract of sale, damage to property, injuries to people, rent agreements.

What happens when civil law is broken?

When two people are involved in a civil law dispute, the State does not get involved. The plaintiff (the person who thinks they have been wronged) brings a case, called a **civil claim**, against the defendant (the person who the plaintiff thinks has done the wrong).

If the plaintiff wins the case, the defendant is ordered to pay some sort of compensation (usually money) to the plaintiff. Sometimes the defendant is ordered to do something, or to stop doing something, to put right the wrong.

For more on how to make a civil claim, see 17.8 on page 428.



3.3.1 WHAT ARE THE COURTS?

When the law is broken, or there is a legal dispute, the problem can go to the courts. The courts are bodies which are made up of people who know the law. These people are impartial (they do not take one person's side). The courts give every person a chance to tell his/her side of the story. Their duty is to listen to the facts and then decide the law around these facts. There are different kinds of courts that have the power to hear different legal disputes.

For more on the different courts, see 3.4 on page 57.

3.3.2 DIFFERENT COURT PROCESSES

Trial

A trial is a court hearing. The court listens to all the facts from the people who are part of the case (this is called 'oral evidence'). The court also looks at objects, such as a gun or a contract (these are called 'physical evidence').

The court looks at the law and the facts of the case. The court then makes a decision, called 'a **judgement**':

- In a civil case, they order the losing side to pay compensation.
- In a criminal case, they order the guilty person to be punished.

Appeal

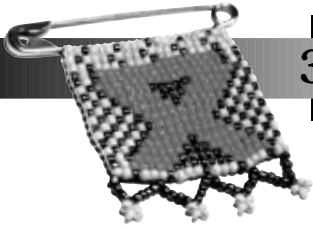
If you are unhappy with the court's decision or judgement, you can take the case to a higher court. This is called an appeal. The court that hears the appeal looks at the evidence again. It decides if the first court used the law correctly or not. The appeal court can agree with the first court decision, or it can change the first court decision.

Review

There are strict rules about how a trial must take place – court rules, for example, say:

- What evidence may be allowed.
- Each person may tell his/her side of the story.
- Each person involved in the dispute has a right to be spoken to in the language of their choice.

If you are unhappy with the way that your trial was run, you can ask a higher court to review the case. A **review** means that the higher court will look at the record of the trial, to make sure that the trial took place fairly, and by the rules. The court that reviews the trial can order the trial to be heard again.



These are the different kinds of courts we will look at:

- Constitutional Court
- Supreme Court of Appeal
- High Courts
- Equality Courts
- Magistrates' Courts
- Other Special Courts:
 - Labour Appeal Court
 - Labour Courts
 - Small Claims Courts
 - Family Courts
 - Courts of Chiefs and Headmen.

3.4.1 CONSTITUTIONAL COURT

There is one Constitutional Court for the whole country, based in Johannesburg. The Constitutional Court deals with constitutional problems. The Constitutional Court can only deal with appeals from other courts if they are about a constitutional law problem.

A Constitutional Court decision is **binding** on all the other courts – this means the decision must be followed.

3.4.2 SUPREME COURT OF APPEAL

There is one Supreme Court of Appeal for the whole country, based in Bloemfontein. This court only hears appeals from the High Courts. It is the highest court of appeal for criminal and civil cases. However, constitutional law issues can still go on appeal from the Supreme Court of Appeal to the Constitutional Court.

The Supreme Court of Appeal's decision is binding on all the High Courts and lower courts.

3.4.3 HIGH COURTS

There are a number of High Courts in South Africa. There are some high courts which hear cases for the whole province (called 'provincial divisions'). Other High Courts hear cases in their area (called 'local divisions').

The High Courts can hear all criminal and civil cases. They also hear some constitutional cases. These courts can also hear appeals and reviews from Magistrates' Courts.

For more on using the Constitutional Court, see 17.2 on page 399.

For more on civil claims in the High Courts, see 17.8.3 on page 430.

3.4.4 EQUALITY COURTS

The Equality Courts were created by *The Promotion of Equality and Prevention of Unfair Discrimination Act* of 2000, to hear cases about equality and non-discrimination (but not employment discrimination, which is handled by the Labour Courts). In future, every High Court and every Magistrate's Court will be an **Equality Court** for the area the court covers.

For more on equality and non-discrimination, see 4.2 – 4.4 from page 67 onwards.

Any person or association of persons acting on their own behalf or on behalf of others can bring a case to the Equality Court.

TAKING A CASE TO AN EQUALITY COURT

EXAMPLE



- A non-governmental organisation can bring a case on behalf of the public, just like with constitutional law cases
- The *South African Human Rights Commission* or the *Commission for Gender Equality* can bring a case to the Equality Court.

3.4.5 MAGISTRATES' COURTS

There are many Magistrates' Courts – usually one in each town. Magistrates' Courts are lower courts. They can hear less serious criminal cases and civil cases. They do not hear appeals, except of customary law decisions, but they can review decisions from the Small Claims Court.

There are different kinds of Magistrates' Courts:

Regional Magistrates' Courts

These courts can hear all criminal cases, except cases of treason. They do not take civil cases.

District Magistrates' Courts

These courts can hear all criminal cases, except cases of murder, rape and treason. They also hear civil cases.

Maintenance Courts

Maintenance Courts are in the Magistrates' Courts. They only deal with maintenance orders (orders to make a parent pay money to support a child).

Juvenile Courts

A juvenile is a person who is under 18. In some Magistrates' Courts, there are special courts for juveniles charged with crimes. These court hearings are not open to the public (called 'in camera hearings').

For more on using the Magistrates' Courts for civil claims, see 17.8.3 on page 430.

For more on the 'best interests' of a child, see 11.1.2 on page 251.

Children's Courts

Children's Courts are special courts for children. They decide who is the best person to take care of a child. If the Children's Courts think the child's parents are unable to look after the child, they will decide who should take care of the child.

3.4.6 OTHER SPECIAL COURTS

Labour Appeal Court

The Labour Appeal Court can hear appeals from Labour Court decisions. It is based in Johannesburg.

Labour Court

The Labour Court is equal to the High Court, but only hears labour cases.

Small Claims Court

The Small Claims Court hears civil cases, where the amount of money claimed is up to R3000.

Family Courts

The *Magistrate's Court Amendment Act* of 1993 created new family courts to hear different kinds of family law cases. These courts have been piloted (tested) around the country and are at present being evaluated.

For more on the Labour Court, see 17.5 on page 414.

For more on civil claims in the Small Claims Court, see 17.8.3 on page 431.

For more on settling disputes out of court, see 17.10 on page 434.

Courts of Chiefs and Headmen

In some areas, the chiefs and headmen of African communities have their own courts. These courts can hear some civil and criminal cases. They use **customary law**. You can appeal to the Magistrate's Court if you are unhappy with the decision of the Courts of Chiefs and Headmen.

3.4.7 SETTLING DISPUTES OUT OF COURT

You don't always need to go to court to solve a dispute. There are ways of settling disputes out of court that can save you a lot of time and money.



SUPREME COURT OF APPEAL
Appeal only – criminal, civil and some constitutional cases



LABOUR APPEAL COURT
Appeals of labour cases



HIGH COURT (PROVINCIAL & LOCAL DIVISIONS)
*All criminal and civil cases
 Some constitutional cases
 Equality cases*



LABOUR COURT
Labour cases only

MAGISTRATES' COURTS

APPEAL · REVIEW
Less serious civil & criminal cases

EQUALITY COURTS
Equality cases

REGIONAL COURTS
Criminal cases

DISTRICT COURTS
Criminal & civil cases

MAINTENANCE COURTS
Maintenance cases

JUVENILE COURTS
For young offenders

CHILDREN'S COURTS
Special courts for protection of young children

COURTS OF CHIEFS & HEADMEN
Some civil and criminal cases

SMALL CLAIMS COURT
Civil cases less than R3 000



Talking points



POSSIBLE ANSWERS TO 1

CRIMINAL LAW

- When Sarah hit Jeeva, she committed the crime of assault.
- Also, when the students stole money, they committed theft.

CIVIL LAW

- Sarah's assault on Jeeva violated Jeeva's right to the safety of her body.
- Jeeva can claim compensation for her medical and other expenses from Sarah.

CONSTITUTIONAL LAW

- By refusing entry to Sarah's group, Jeeva discriminated against them because of their age.
- She violated their right to equality.

1 What kind of law was broken?

Jeeva is the caretaker at the municipal swimming pool in Melville. Sarah, a student, and a group of her friends come to swim at the pool one afternoon. Jeeva does not like having young people at her swimming pool and tells Sarah and her friends that they may not come in.

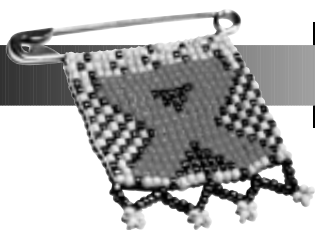
The group of students become angry. They argue with Jeeva, and Sarah hits Jeeva and breaks her nose. Then the students steal money from the till and run away.

- *Can you find a criminal law problem?*
- *Can you find a civil law problem?*
- *Can you find a constitutional law problem?*

2 The Ministry of Justice has considered changing the relationship between the Constitutional Court and the Supreme Court of Appeal:

- One view is that these two courts should be joined to form one court. They say the Supreme Court of Appeal has many cases to hear each year, while the Constitutional Court hears far fewer cases. They also say the Supreme Court of Appeal has far less resources than the Constitutional Court.
- Another view is that the Constitutional Court has a special job and needs special judges, and should be left separate.

What do you think?



References & resource materials

LAWS

- Aliens Control Act, No 96 of 1991.
- Black Administration Act, No 9 of 1927.
- Constitution of the Republic of South Africa Act, No 108 of 1996.
- Magistrates Court Amendment Act, No 66 of 1998.
- Promotion of Equality and Prevention of Unfair Discrimination Act, No 4 of 2000.
- Sexual Offences Act, No 23 of 1957.

CASES

- Langemaat v Minister of Safety and Security and Others, 1998(4) BCLR 444.
- National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others, 1999 (1) SA 6 (CC).
- National Coalition for Gay and Lesbian Equality and Others v The Minister of Home Affairs and Others, 2000 (2) SA 1 (CC).

REPORTS, MANUALS AND OTHER USEFUL MATERIALS

- AIDS Law Project and Lawyers for Human Rights: HIV/AIDS and the Law – A Trainer's Manual (First Edition), July 1997.
- Black Sash and Education and Training Unit: Paralegal Manual (Updated Edition), January 2001.

WEBSITES

- AIDS Law Project: www.alp.org.za
- AIDS Legal Network: www.redribbon.co.za/legal