

DISTINCTION BETWEEN INTERNATIONAL & NATIONAL LAW

INTERNATIONAL LAW

Also known as the *law of nations* or *public international law*

Consists of the rules that primarily govern the relationships between interdependent states.

No international world government can lay down rules for all states and enforce them - nevertheless, these rules do exist.

These rules may be created by international custom or by international *treaties (conventions)* - states which sign the treaties regulate certain relations between them

Bilateral treaties: treaties between **2 states**

Multilateral treaties: treaties between several states.

Customary International law:

settled practices that states regard as *legally binding norms*.

S39(1) of the Constitution: courts in SA when interpreting the Bill of Rights must have regard to international law.

NATIONAL LAW

Law of a specific state. Also called '*positive law*' (*objective law*). The whole body of legal rules that is applied and enforced in SA.

Distinguish between **substantive law** and **procedural law**

Substantive Law

DISTINCTION BETWEEN INTERNATIONAL & NATIONAL LAW (cont)

Also called *material law*

The part of the law which determines the **content and meaning** of different legal rules/- legal principles. E.g. prohibits criminal offences and determines which acts constitute criminal offences.

Determines the **content and application of the different rights** and individual may have. E.g. determine how an individual can obtain ownership of property.

Procedural Law

Also called *adjective law*

Part of the law which *regulates the enforcement of substantive law*

It determines **the manner in which a case must be practically handled**. E.g. provides the process according to which someone is prosecuted for murder/provides you with the process of claiming damages.

Substantive and procedural law are interdependent

Legal system must determine the **content and meaning** of different legal rules and prescribe **what must happen** when such rules are violated so that disputes can be settled in an orderly and peaceful manner.

LAW OF CRIMINAL PROCEDURE

Prescribes how people who have allegedly committed criminal offences *(murder, robbery, rape) should be prosecuted.

It is the task of the state to **prosecute** people who commit criminal offences.

The Law of Criminal Procedure lays down the rules for the *investigation* of the alleged offence as well as the *process in court*

-**criminal case**

LAW OF CIVIL PROCEDURE

Determines the *procedure* to be followed when an individual wishes to enforce her rights against another. E.g. someone wants to claim damages from another who has damaged their property.

The Law of Civil Procedure determines how such a claim should be instituted.

- **civil case.**

LAW OF EVIDENCE

Determines how the **facts in either a criminal/civil case must be proven**.

E.g. regulates the manner in which witnesses should lay their evidence before the court; what kinds of evidence is admissible and inadmissible.

SUBSTANTIVE LAW

PUBLIC LAW

Determines the **extent of state authority**

It regulates the:

- (1) Organisation of the state
- (2) The relation between the state and its subjects

Vertical relationship- state authority v legal subjects

PRIVATE LAW

Regulates the relationships between persons. (*legal subjects*)

Determines the different **rights and duties** that personas may have towards one another

These rights and duties may find their origin in contracts, delicts, marriage or ownership.

The state can also be a party in private law when, for example, it enters into a contract with an individual or causes and individual harm (e.g. police brutality)

The instance the state does not act with state authority, it is in the same position as any other person.

The private law relationship is an **equal one - horizontal relationship**

It should be noted that the idea that the relationship between *non-state* actors is always an equal one, is problematic:

- (1) When the state enters into a contract with a person, stands in a position of power - **power imbalance**



SUBSTANTIVE LAW (cont)

(2) All individuals are factually *not equal to one another* - individual entering into the contract with a multinational organisation.

When a person wants to enforce her rights against another in terms of private law - *the law of civil procedure applies*

NB- also noted that the distinction between public and private law is often artificial. The state often encroaches upon areas of private law, e.g. state through legislation dictates certain contractual relationships between employer and employee

PUBLIC LAW

CONSTITUTIONAL LAW

The Constitution forms the basis of constitutional law

Constitutional Law determines the *nature of state, its constituent

Divides state authority into three branches

(1) ***the legislature-** which promulgates legislation

(2) **the judiciary-** which interprets and applies legal rules (the courts)

(3) **the executive-** handles government affairs, administers the state and executes court orders (the president together with Cabinet).

Bill of Rights - Chapter 2

ADMINISTRATIVE LAW

PUBLIC LAW (cont)

Controls the administration of the state in general.

Determines the way in which the state is to exercise its executive powers through different bodies such as ministers, state departments and numerous boards.

When these state functionaries make administrative decisions, they are supposed to do so on the basis of certain powers given to them by the Constitution or legislation./To ensure that the government acts in accordance with the law.

Aims to prevent these bodies from exercising their powers in such a way that it prejudices individuals.

S33 of the Constitution

- stipulates that everyone has the right to just administrative action that must be lawful, reasonable and fair. If an administrative decision has been taken against someone and it has an adverse effect on them, they are allowed to request written reasons for that decision.

-The Promotion of Administrative Justice Act 3 of 2000

(PAJA) is a statute passed by Parliament to give effect to the *section 33 right**

PUBLIC LAW (cont)

-According to PAJA, administrative decisions may be reviewed and invalidated by a court for a number of reasons including unlawfulness, procedural fairness and unreasonableness.

e.g. legislation that stipulates that government officials must together take a decision and only one official made the decision, the administrative act can be overturned because it was unlawfully made.

CRIMINAL LAW

Determines which acts amount to criminal offences, and it also dictates that criminal offences must be punished.

Criminal offence- act against the law - state prosecutes and punishes subjects who have committed criminal offences

The manner in which prosecution takes place and punishment is imposed is determined by the law of criminal procedure.

PRIVATE LAW

LAW OF PERSONS

Regulates the relationships between persons.

Persons are *subjects of private law*

Determines what a 'person' is in the legal sense

Humans and entities (companies)

PRIVATE LAW (cont)

Determines the juridical status of persons, nature of a person's position in the law

e.g. children cannot conclude contracts or marry but can inherit.

FAMILY LAW

Regulates family relationships.

Relates to matters such as *engagement, marriage, civil unions, marital property, divorce, and child-parent relationships.

LAW OF PATRIMONY

Part of **Private Law** that regulates the relationship between persons with respect to their *means*.

Means indicates the sum total of a person's assets and liabilities

- person's estate.

LAW OF PROPERTY

Deals with the relationships between persons with respect to things

Determines which rights persons can have with respect to moveable and immovable property.

It also regulates the origin, termination and protection of such rights.

The best known example of such a right is ownership.

The right to property is not only a private law right but is also protected by the **Constitution in S25**

LAW OF SUCCESSION

Determines what happens to an estate after a person's death



LAW OF PATRIMONY (cont)

In a will, one can stipulate who is to inherit their estate (testate succession). In the absence of a will, the law of intestate succession prescribes who will inherit the estate.

LAW OF OBLIGATIONS

Regulates the relationship between persons where one person (the creditor) has a right against another for performance, and the latter person (the debtor) has a corresponding duty to perform

This type of relationship is called an **obligation**

It is mainly contracts and delicts that create such obligations.

CONTRACT/DELICT

Contract

- an agreement between two persons in terms of which a right and a corresponding duty to perform come into existence

- the law of contract prescribes the requirements for the conclusion of contracts, and regulates the rights and duties created by a contract, as well as the *termination of a contract*

Delict

- a wrongful and **culpable** act which causes damage to another. The persons who suffers the damage can claim damages from the person who caused it.

LAW OF PATRIMONY (cont)

-Patrimonial loss: damage to property

-Non-Patrimonial loss: negligent medial practice, defamation, unlawful detainment by police that causes infringement of bodily integrity.

A delict thus creates an obligation (*the payment of damages*)

Law of Delict determines what a delict is and regulates the rights and duties which arise from it.

Difference between criminal offence and delict

***criminal offence:** purpose is to punish the offender (public law)

delict: compensate the person who suffered the damage (private law)

NB: a criminal offence that causes damage to another (assault, theft) also constitute a delict.

LAW OF INTELLECTUAL PROPERTY

Governs the relationship between persons with respect to intellectual property (immaterial or industrial property).

Intellectual property denotes the creations of the human intellect or ingenuity.

eg, inventions, the content of literary works, and musical compositions.

Rights with respect to intellectual property include copyright and rights to patents.

LAW OF PATRIMONY (cont)

Intellectual property as subject that falls within the domain of property law broadly understood. Intellectual property rights are protected through **s25** of the Constitution.

COMMERCIAL LAW

Commercial law embraces numerous branches of law important for *commerce or trade and industry*.

Mixture of public and private law.

Specialised **private law**. *e.g Law of insurance*

Sometimes exclusively regulated by the state in the form of legislation, and entails a **state-citizen relationship**.

eg., tax law, company law, law of insolvency, labour law, banking law.

BANKING AND FINANCE LAW

regulates the powers and functions of banks and financial service providers by means of many different statutes, including the **Banks Act, the Financial Advisory and Intermediary Services Act and the National Credit Act**.

COMPANY LAW- in 2008, South Africa adopted the new Companies Act, which forms the backbone of South African *company law* dealing typically with issues such as the registration, incorporation and management of companies.

COMMERCIAL LAW (cont)

THE LAW OF INSOLVENCY is concerned with insolvent estates, bankruptcy business rescue, the winding up and liquidation of companies and debt counselling based on, among other sources, **the Insolvency Act**.

LABOUR LAW comprises a wide array of legal sources regulating the relationship between employers and employees, the conditions of employment that must be adhered to by all employers, as well as the law relating to the recognition of trade unions and their representation of workers.

TAXATION LAW deals with all matters related to the payment and collection of taxes and the relationship between tax payers and the *South African Revenue Service (SARS)*

INSURANCE LAW has to do with, among others, the regulation of the South African insurance industry as well as the requirements for insurance contracts and the rights and duties arising from these contracts.