

INTRODUCTION TO LAW

STUDY UNIT 1- WHAT IS "LAW"?

- **A norm** is a standard of human conduct or rule of human behavior
- **Domicile** the legal home of each person
- Law deals with order and regularity
- Some of the laws are standards or rules that determine how we should behave and interact with one another
- **The law** means a rule or norm governing human behaviour
- The law is concerned with norms which the whole community sees as binding, that is those norms of conduct or rules of human behaviour that should be obeyed by all of society
- In the case of a legal norm, the whole community is involve and this is what separates the legal norm from the moral norm (there are times when a moral norm can also be a legal norm)
- Characteristics of the law:
 - The law governs human behaviour
 - The law should be obey by all of society
 - The law is enforced by state organs
 - By ignoring or disobeying the law we may be prosecuted and punished
- Public law deals with the relationship between the state and the individual
- Private law deals with the relationship between individuals and other individuals
- The South African law can be divided into the 2 main divisions: formal and substantive (or material) law.
- Formal or procedural law is that part of the law which deals with the procedure that must be followed in legal proceedings
- Substantive or material law is that part of the law which determines the content and meaning of the different legal rules

The law and other normative systems

	To whom are the rules applicable?	What is the sanction for non-compliance with the rules?	Who enforces the sanction?
The law	Norms which the whole community regards as binding and that must be obeyed.	<ul style="list-style-type: none"> ■ Prosecution or punishment ■ Compensation to an injured party 	<ul style="list-style-type: none"> ■ State organ ■ State organ
Religion	A set of rules in accordance with which the people who practise that particular religion, live.	Every religion has its own sanction or punishment.	Each separate religion
Individual morality	Norms or standards that every individual sets for himself or herself.	The sanction for disobeying these rules is personal and self-imposed.	Individual
Community mores	Norms of a whole community or group within that community.	Varying degrees of disapproval/rejection/discrimination by other members of the community.	Community

The question of justice

Laws can be just or unjust. The fact that a rule becomes a legal rule is not of course enough to ensure that justice will be done.

- ∞ **Justice** is equality before the law
- ∞ There is a distinction in South African law between justice and substantive law
- ∞ **Formal justice**: formal law is that part of the law which deals with the procedures that must be followed in legal proceedings
- ∞ These are the basic requirements with which formal law has to comply in order to achieve formal justice:
 - There must be explicit rules laid down to show how people must be treated in specific cases
 - The rules must apply generally i.e. to all people in the group in the same circumstance
 - The rule must be applied impartially by a legal institution- the judge may not be biased.
- ∞ **Substantive justice** concerns the content of the rule, and not the way in which it is applied
- ∞ Substantive or material law is that part of the law which determines the content and the meaning of the different legal rules. To establish whether substantive justice has been done, the content of the rule itself is looked at to determine whether it is just and fair.
- ∞ **Formal law regulates the enforcement of substantive law**

STUDY UNIT 2- LAW AND RIGHTSWhat is a right?

- ⇒ We are dealing with the relationship between the legal subject and the legal object, legal subjects and other legal subjects and other legal subjects who have to respect your legal object
- ⇒ **A legal subject** is anyone who is subject to (or under the control of) the norms of the law and who also may be the bearer of rights and duties
- ⇒ The object of a right may be anything that is of economic value to people (a particular person or particular people)
- ⇒ 4 Class's of rights:
 1. Real rights- a thing, ownership, servitude
 2. Personality rights- physical integrity, reputation
 3. Intellectual property rights or immaterial property rights- creations of the human mind
 4. Personal rights- a right to performance (doing or not doing something)
- ⇒ Other meanings of the word "right": powers, capacity, human rights i.e. fundamental rights
- ⇒ The connection between law and right: the content of a right is limited. It is the rules of law that decide on what the powers of the holder of the right are and on what the limits to the content of a right are.
- ⇒ When a legal subject has a right, the other legal subjects have a duty

STUDY UNIT 3- THE STORY OF OUR LAWThe history of our law- 3 parts

- Roman-law came to form part of Europe, particularly Netherlands (became known as Roman-Dutch law)
- Movement of Roman-Dutch law came from the Netherlands to the Cape
- The way the roman-Dutch law developed after it had been bought from the Netherlands to the cape

Roman law becomes Roman-Dutch law

- ❖ "Classical Roman law" – during the 2nd half of the 1st Century BC and for the first two centuries AD
- ❖ Roman law began to decline at the end of the fourth century AD
- ❖ Survives do the part played by the Roman Catholic Church
- ❖ Roman law formed the foundation of church law (cannon law)
- ❖ Cannon law had an important influence on the development of modern law
- ❖ The emperor of the Eastern Roman empire in the 6th C was called Justinian- he decided to "codify" Roman law as a whole. He decided that all the earlier writings of the classical jurists and all the laws which had been passed during the time of the emperors were to be collected and written down as a code called the *Corpus Iuris Civilis*

- ❖ The fact that Roman law had been collected and written down made it possible of Roman Law to be revived in Europe in 12th C AD
- ❖ Later in the 15th, 16th and 17th centuries Roman law was truly accepted in Europe
- ❖ In the Netherlands it was the reception of Roman law that caused the creation of what was called Roman-Dutch law

Roman-Dutch law comes to the Cape

- When the cape became a settlement they were governed by legislation or *placaeten* which were like posters, which were stuck on the walls of public places
- The writings of Hugo De Groot and Johannes Voet are still used today in our courts
- Our Roman-Dutch law systems makes it easy for South African lawyers to communicate and interact with international lawyers
- Roman law forms the basis of the laws of almost all the countries in western and eastern Europe, South America and also of the laws of Japan

English law and African Customary law

- The British occupied the cape first in 1795 and later in the 1800's
- The influence of English law was still felt, particularly after the 1820 settlers arrived in South Africa
- This influence was felt both in the administration of justice and in the rules of law.
- English became the official language. It was also decided that judges and advocates had to receive their training in England. Because of this these judges and advocates often turned to English law rather than to Roman-Dutch authorities when resolving a legal problem.
- English law was more formally received through legislation e.g. BEA
- Indigenous law or African customary law. They were unwritten laws and it was only during the 2nd half of the 19th century that these laws were officially recognised by the colonial authorities
- In KwaZulu Natal much of the indigenous law is now contained in a code, which is formally recognised.
- In the past, indigenous law was recognised as a special law, which could only be applied to Black people. However, this has changed. In terms of the constitution of 1996 the courts must apply indigenous law where it is applicable
- Indigenous law is community based. Indigenous law regulates individual relationships between members of the family
- Indigenous law is a dynamics system that is capable of changing
- In 1996 the first democratic Constitution of the republic of South Africa was adopted.

STUDY UNIT 4- FAMILIES OF LAWS AND LEGAL CULTURE

Criteria that have been suggested for the purpose of grouping (classifying)

- ⇒ Style and technique of the particular system
- ⇒ The philosophy or ideology on which a particular system is based
- ⇒ Economic elements

LEGAL FAMILIES	MOST IMPORTANT FEATURES
Socialist	The development of these legal systems has been influenced by historical and political elements. The law is there to serve social and economic policies in these legal systems. The doctrine of Marxism is common to all of these legal systems. Examples: the former USSR and Communist China.
Religious	These systems have their origin in religious sources. Examples: the Islamic, Hindu and Jewish legal systems.
Indigenous	The legal systems in this grouping are mainly made up of unwritten customary laws. In these systems the focus is on the community. Example: African indigenous law.
Mixed/hybrid	<p>Various components or legal systems played a role in the development of these legal systems. Examples: South Africa, Scotland, Sri Lanka.</p> <p>South African law is classified as a hybrid legal system because various components or legal systems played a role in its development. Roman-Dutch law (which forms part of the civil-law legal family), English law (which forms part of the common-law legal family) and African indigenous law (which forms part of the indigenous family) all played a role.</p>

STUDY UNIT 5- DIVISIONS OF LAW

LAW	
PUBLIC LAW	PRIVATE LAW
(1) International law (2) Constitutional law (3) Administrative law (4) Criminal law (5) Law of procedure (a) Civil procedure (b) Criminal procedure (c) Law of evidence	(1) Law of persons (2) Family law (3) Law of personality (4) Law of patrimony (a) Law of things (b) Law of succession (c) Law of obligations (i) Law of contract (ii) Law of delict (iii) Enrichment
Other areas of law	
(1) Mercantile law (2) Labour law (3) Conflict of laws (4) Legal philosophy	

STUDY UNIT 6- WHERE TO FIND THE LAWS v Makwanyane

Legally, the death penalty would be regarded as "cruel, inhuman and degrading". Therefore, it is in conflict with the provisions of the Constitution as set out in the Bill of Rights.

- ❖ When the law has been written down we say it has been codified and can be found by going to one source, a codification
- ❖ We do not have just one single code in South Africa that contains the whole of South African law
- ❖ We have a number of sources of authoritative law
 - Legislation/statutes/acts of parliament
 - Court decisions/case law/ court cases
 - Common law
 - Custom
 - African indigenous law/ indigenous African law
- ❖ Legislation:
- ❖ Is the most important authoritative source of law
- ❖ Legislation is made up of rules laid down by national parliament, provincial legislators and local authorities. These legal rules are contained in acts of parliament, provincial ordinances and municipal by-laws
- ❖ All law, and not only legislation, is always subject to the constitution
- ❖ Constitution is the supreme law of the land and no other law may be in conflict
- ❖ The acts which are passed by parliament are contained in the government gazette
- ❖ Court decisions:
- ❖ Different courts may have interpreted the act differently. The lawyer will have to decide which court decision is authoritative- the principle of judicial precedent is applied
 - Two requirements for the operation of the precedent system: an effective system of law reporting and a hierarchy of courts
 - *Obiter dicta* do not create a precedent and are not binding, but they can sometimes have persuasive force. *Obiter Dictums* can be found when:

- The principle of a case is more broadly formulated by the judge than is necessary to cover the facts
- The judge makes an incidental remark,
- The judge asks and then answers a hypothetical set of facts
- The judge quotes a similar case or gives an illustration
- ❖ Common law:
- ❖ The law of a country which is not contained in legislation
- ❖ The writings by 17th and 18th century Roman-Dutch jurists, and how this has been interpreted by our courts
- ❖ English law, Indigenous and African customary law
- ❖ Custom:
- ❖ Custom is not made up of written rules but develops from customs within the community. Custom is carried down from generation to generation
- ❖ Requirements for a custom to be recognised as a legal rule:
 - The custom must be reasonable
 - The custom must have existed for a long time
 - The custom must be generally recognised and observed by the community
 - The contents of the custom, what the custom involves, must be clear
- ❖ African indigenous law/ Indigenous African law:
- ❖ Is largely unwritten law
- ❖ Is recognised as a source of law by the constitution. South African courts must apply indigenous law where it is applicable
- ❖ Other sources of law:
- ❖ Look at legal systems which are closely related to ours
- ❖ The bill of rights states that the courts may take foreign law into account when they interpret the provisions of the bill of rights
- ❖ Modern legal writers do not have authority as sources of law. They are often consulted by judges, practitioners and academics, and they may have great influence when a legal principle or legal rule has to be determined

Naude and Another v Fraser

Summary

- ⇒ This case was heard in the Supreme Court of Appeal. We know this because the "SCA" (Supreme Court of Appeal) we see in brackets at the end of the reference tells us this. This means that, before the case ever came to the Supreme Court of Appeal, it was heard in another court. The first court in which the case was heard was the Transvaal Provincial Division of the High Court, abbreviated to "TPD". (This is given as "T" in case references.) Therefore, before the case came to the Supreme Court of Appeal, the reference looked as follows: Fraser v Children's Court, Pretoria North, and Others 1997 (2) SA 218 (T). (See pp 540G and 543B of the court's judgment in this regard.) In the report the court which had previously heard the case, namely the Transvaal Provincial Division (in other words, which heard it before an appeal was brought), is called the court a quo. A quo is a Latin term that means "from where". In other words, the Transvaal Provincial Division (cited as "T" in the case reference) is the court from where the case comes to the Supreme Court of Appeal.
- ⇒ Naude and Another are the appellants in this matter. The word "appellant" comes from the verb "to appeal". So, Naude and Another are appealing against the decision of the previous court (the TPD) that heard the matter, because they were not satisfied with the decision of the TPD. They want the Supreme Court of Appeal to overturn the decision given by the previous court. (When you read the extracts from the case, you will see that Naude is the first appellant and that the couple who adopted the baby [the adoptive parents] are the second appellants. That is why the appellants are indicated as "Naude" [first appellant] and "Another" [second appellants].)
- ⇒ Fraser is the respondent in this case. This means that he must respond (that is he must answer) to the appeal by the appellants. He must show why their appeal should not succeed. In other words, he must show why the decision of the previous court should not be overturned.
- ⇒ 1998 means that this case is reported in the 1998 Law Reports.
- ⇒ (4) Indicates that you can find this case in the fourth volume of the 1998 law reports.
- ⇒ SA simply stands for South African Law Reports.

⇒ 539 refer to the page number of that particular volume of law reports (the fourth volume) on which the report of the case starts.

Feedback

(1) Which sources of law did the judge consult? You should have found at least the following sources of law in the judgment:

- ⇒ References to "common law" and, more particularly, to 17th century Roman-Dutch law. In terms of this law an illegitimate child was under the parental authority of its mother and its father had no such authority.
- ⇒ References to decided cases, for example *B v S* 1995 (3) SA 571 (A); *T v M* 1997 (1) SA 54 (A); *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A). (You may wonder why in some of the names, only initials are used instead of full names. This is sometimes done to protect the identity of the parties, especially, for example, where children are involved.)
- ⇒ References to statutes, in this case the Constitution of the Republic of South Africa 200 of 1993 and the Child Care Act 74 of 1983. (Note that the references to the Constitution are to the interim Constitution of 1993, in other words, the pre-final Constitution. The reason for this is that this case started before the Constitution was finalised in 1996:)

(2) In South Africa there is no specific order in terms of which the sources of law must be applied.

Therefore, when judges give judgments in court cases, they do not always use the legal sources in the order that we have set out above. They usually consult legislation and case law first, and then the other sources. However, the order in which they choose to consult the sources will ultimately depend on each specific case. In the case of *Naude v Fraser* there were several different matters on which the judges had to decide. Let us now look at how the judges used the sources of law in respect of two of these matters, namely (a) The legal position of an unmarried father, and (b) adoption. (Bear in mind that judgment in this case was delivered on 26 June 1998.)

(a) The legal position of an unmarried father

Regarding the above, you will see that the common-law position was stated first. This is so because when the court had to deliver its judgment, there was no applicable legislation on the legal position of an unmarried father, but there were some court decisions on it. In this case it was therefore important that the judges had to establish, first of all, what the common-law position was, and then whether the common law had been further changed or developed by case law. In the court's judgment you will see that in terms of common law (Roman-Dutch law), the unmarried father did not have an automatic or inherent (natural) right of access to his child. This position was supported by the courts in the decisions of *B v S* 1995 (3) SA 571 (A) and *T v M* 1997 (1) SA 54 (A). However, you will see that in these cases, the common-law position was extended to make provision for the unmarried father to gain access to his child, provided that this was in the best interests of the child.

On 4 September 1998 legislation came into force which confirmed the common-law position as developed by case law, namely that the unmarried father has no inherent right of access to his child, but that the court may award this right if this is in the child's best interests. In terms of this Act, titled the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, an unmarried father could apply to court for an order granting him access rights or even custody or guardianship.

On 1 July 2007 certain provisions of the new Children's Act 38 of 2005 came into effect. The new Children's Act brought about major changes especially with regard to the parent/child relationship. The

Children's Act, for example, repeals the Fathers of Children born out of Wedlock Act of 1997 and has also changed the meaning of certain terminology that relate to the parent/child relationship.

Thus, if a similar case had to be brought before court now, the judge will first have to consult the Children's Act 38 of 2005. Only then the judge will probably consult already decided cases based on the Act, if any, in order to find out how the courts have interpreted the Act.

(b) Adoption

The second and very important aspect that we look at is the issue of adoption. When you read the case report, you will see that there is an Act that covers this aspect of law, namely the Child

Care Act 74 of 1983. You will also see that adoption was not part of Roman-Dutch law and for that reason we do not have common-law authority on adoption. In South Africa, adoption is therefore regulated by legislation. Hence this legislation and any decided cases on adoption should be consulted in matters that deal with adoption. As far as the regulations of the Child Care Act are concerned, case law was consulted: see for example, the reference to Administrator, Transvaal, and Others v Theletsane and Others 1991 (2) SA 192 (A). Cases often provide clarity on the interpretation of statutes. In other words, they make the statutes easier to understand.

(3) When you read the case, did you spot that the constitutionality of S 18(4)(d) of the Child Care Act had been questioned? Did you notice that this section was referred to the Constitutional Court to decide whether it was consistent with the Constitution? Did you see that in 1997 the Constitutional Court decided in the case of Fraser v Children's Court, Pretoria North and Others 1997 (2) SA 261 (CC) that S 18(4)(d) of the Child Care Act was indeed unconstitutional and that this particular section had to be amended (changed) by parliament within two years? Did you realise that this section had not yet been amended by parliament when judgment was delivered in Naude and Another v Fraser in 1998?

(You will remember that the Constitution is the supreme law (highest) law in the country and that any law (common law, statute law, and case law) which is inconsistent with the Constitution, may be challenged in a South African court. Therefore the Supreme Court of Appeal cannot overrule a decision of the Constitutional Court. However, as far as other matters are concerned, the Supreme Court of Appeal is the highest court.)

Since the judgment of Naude and Another v Fraser, the law with regard to the adoption of a child born out of wedlock has changed. In 1998, parliament amended S 18(4)(d) of the Child Care Act. In terms of the amended Act, which came into operation on 4 February 1999, both the mother and the father of a child born out of wedlock have a say in the adoption of their child. Thus, the amendment on the Child Care Act, namely the Adoption Matters Amendment Act 56 of 1998, will have to be kept in mind when the case before court relates to the adoption of a child born out of wedlock. The Children's Act 38 of 2005 also aims to repeal the Child Care Act and then the position with regard to adoption will change

Choice on termination of pregnancy act 92 of 1996

Questions:

- (1) When did the Choice on Termination of Pregnancy Act 92 of 1996 come into operation?
- (2) What is the short title of this Act? Where did you find this in the Act?
- (3) What is the purpose of this Act? Where did you find this purpose in the Act?
- (4) What is the underlying philosophy of this Act? Where did you find this in the Act?
- (5) What is the purpose of S 1 of this Act?
- (6) One of Martie's friends had a blood transfusion and found out afterwards that the blood was infected with AIDS. The friend is now HIV positive. She is advised by her doctor to be sterilized. Does this Act apply to her situation? Give reasons for your answer.
- (7) Name the three different periods during which termination of a pregnancy can be performed and refer to the relevant section of the Act in each case.
- (8) Martie's niece, Janet, is married to Peter. Janet is 17 years old and already has twin daughters. She is now 20 weeks pregnant and desperately wants an abortion because financially she and her husband cannot cope with a third child. Peter wants to keep the child because he is hoping for a son.
 - (a) Advise Janet if she can have an abortion in terms of the Act.
 - (b) Substantiate your answer by referring to
 - (i) The circumstances in which a pregnancy may be terminated
 - (ii) Consent as a legal requirement
 - (iii) The person who can perform the abortion
 Refer to the relevant sections of the Act in each case.
- (9) Tom's brother, Jack, is married to Eileen. Both Jack and Eileen are career-minded people and therefore they have decided not to have any children. Eileen is physically and mentally healthy. After being married for a year, Eileen discovers that she is 21 weeks pregnant. (Eileen had thought she was gaining weight because she was eating too much.) Advise Eileen what her chances are of having a legal abortion in terms of the Act. Refer to the relevant section of the Act.

(10) Jane has been approached by a girl of 16, the girl's uncle has impregnated her and the girl is now 24 weeks pregnant. Both the mother and the unborn baby are physically and mentally healthy. What are the girl's chances of having an abortion? What advice do you think Jane would give to the girl? Refer to the relevant sections of the Act.

(11) What is the highest sentence that can be imposed in terms of this Act? Which section did you use in order to work out your answer?

Answers

(1) 1 February 1997.

(You will find the date of assent as well as the date of commencement in square brackets directly underneath the name of the act. Note that the date of assent and the date of commencement of an act often differ. The fact that an act has been assented to, does not mean that it is in force. Usually an act comes into operation on the day of its publication in the Government Gazette. However, the act itself may stipulate that it will come into force only at a later date.)

(2) Choice on Termination of Pregnancy Act 92 of 1996; the short title comes at the beginning of the Act and is usually also found in the last section of the Act; in this case S 12. (3) The purpose of the Act is to give the regulations regarding termination of pregnancy. The purpose is set out in the long title of the Act.

(4) The underlying philosophy of an act is found in the "preamble" (aanhef) of the act.

When we speak of the underlying philosophy of an act, we are talking about the reasons why the act has been drawn up in the first place. The underlying philosophy of this Act, or reasons for its existence are the recognition of the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa.

(Note that the rest of the preamble is just a further explanation of the first paragraph; therefore the actual answer is to be found in the first paragraph.)

(5) S 1 is called a definition clause. The purpose of the definition clause is to define some of the words as they are used in the Act.

(6) No. This Act deals with the termination of pregnancy only, and Martie's friend is not pregnant. Even though the preamble states that this Act repeals certain provisions of the Abortion and Sterilization Act 2 of 1975, it is clear from the schedule (at the end of the Act) that it only concerns abortion, and not sterilisation.

(7) S 2(1): The three periods during which termination of a pregnancy can be performed:

⊖ first 12 weeks (s 2(1)(a))

⊖ 13th up to and including the 20th week of pregnancy (s 2(1)(b))

⊖ after the 20th week (s 2(1)(c))

(8) (a) Yes, Janet can have an abortion.

(b) (i) In terms of S 2(1)(b) of the Act, an abortion may be performed up to and including the 20th week of pregnancy on the basis that the continued pregnancy would significantly affect the social or economic circumstances of the woman (s 2(1)(b)(iv)). (It was important to state that S 2(1)(b) was applicable because Janet is in her 20th week of pregnancy.)

(ii) S 5(1) or (2): only the informed consent of the pregnant woman is required. (Please note that if a person under the normal age of majority, that is 18 years, enters into a valid marriage, that person's minority is ended. Therefore, because she is married, Janet is no longer a minor.)

(iii) S 2(2): only a medical practitioner (doctor) may carry out the abortion. (Please note that a registered midwife or a registered nurse (according to the Choice on Termination of Pregnancy Amendment Act 38 of 2004) who has completed the prescribed training course may carry out an abortion only during the first 12 weeks of a pregnancy: s 2(2).)

(9) No. Eileen cannot have a legal abortion. Although she is 21 weeks pregnant, none of the exceptions provided for in S 2(1)(c) apply to her circumstances. (Please note that S 2(1)(b) cannot be applied, because Eileen is more than 20 weeks pregnant. Also note that the set of facts does not comment on the physical condition of the fetus. Therefore you could have argued that Eileen can have a legal abortion if her continued pregnancy would result in a severe malformation of the fetus (s 2(1)(c)(ii)) or would pose a risk of injury to the fetus (s 2(1)(c)(iii).)

(10) No. She cannot have a legal abortion. Although she is 24 weeks pregnant, none of the exceptions provided for in S 2(1)(c) apply to her circumstances. (Note that incest is a ground for the termination of a pregnancy only up to and including the 20th week (s 2(1)(b)). It is not a ground for a legal abortion after the 20th week (s 2(1)(c)).)

(11) The highest sentence the court can impose in terms of this Act is imprisonment for a period of ten years (s 10(1)). (Please note that imprisonment [i.e. limitation of a person's freedom] will always constitute a more drastic measure of punishment than a fine.)

STUDY UNIT 7- THE CONSTITUTION AND YOU!

- Health care
- Chemical waste
- Prohibits religious practices in schools
- Freedom to sell

Citizens expect their government to protect their rights. They also expect their government to develop and advance their country politically and economically. It is also the responsibility of the government to look after the well being (or interests) of the country's inhabitants and to regulate matters such as health, the environment, education, tourism, housing and population development. These are only a few of the matters, which concern the government.

These powers cannot be unlimited- balance between the power of the state and the rights of the individual

The constitution

A Constitution is usually a very long document, which sets out the structure and functions of government. It also sets out the standards that will have to be used to protect the individual against any abuse of power by the state.

Where does our constitution come from?

- The Constitution of the Republic of South Africa of 1996 is our country's first democratic Constitution. Before this there were three other Constitutions: the 1910 Constitution when the Union of South Africa was formed; the 1961 Constitution when South Africa became a Republic; and the 1983 Constitution which established a tricameral Parliament. (The tricameral Parliament was a parliament with three houses - one for each of the white, Indian and coloured population groups.
- Sanctions are a form of punishment intended to force a government to behave in a way that is internationally acceptable
- The interim constitution was adopted in 1993 and came into effect on the day of the first democratic elections 27 April 1994

What is contained in the constitution?

In broad terms the contents of Constitution terms it covers the following: the governing of the country at national, provincial and local level, and the legislative powers and processes at each of these levels; the administration of justice by all the different courts; the rules relating to regular elections; the functioning of the police, the army and other security services; the manner in which the finances of the country should be managed; provisions regarding the powers of traditional leaders; as well as the establishment of institutions (such as the Human Rights Commission and the Commission for Gender Equality) to support our constitutional democracy. The Constitution also sets out the nine provinces of the country, the eleven official languages of the country, as well as the national symbols, such as the flag. Very importantly, our Constitution has a Bill of Rights.

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Why is the constitution so important?

- ⇒ The constitution is the foundation of our democracy
- ⇒ It is the highest law- every individual and every institution or organisation as well as all law is ruled by the constitution
- ⇒ All legislation may be challenged in terms of the constitution, in a court, and changed or removed if it is found to be inconsistent with the constitution.
- ⇒ The legislative authority, the executive authority and the judicial authority- the separation of powers is essential in a democratic state, because if too much power is concentrated in any one branch of state, this may easily lead to abuse
- ⇒ The constitution sets out the structure of the judiciary and the judicial system. The judiciary deals with the courts. The constitutional court, the Supreme Court of Appeal, High Courts and Magistrates courts. The constitutional court has the final say on constitutional matters.
- ⇒ The high courts and the Supreme court of Appeal may also hear constitutional issues, but the constitutional Court has the final say on these matters
- ⇒ It has established a number of institutions to support democracy:
 - The Public Protector
 - The Human Rights Commission
 - The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
 - The Commission for Gender Equality

- The Auditor-General
 - The Electoral Commission
 - The Independent Authority to Regulate Broadcasting
- ⇒ These institutions are independent and their job is to protect the people from abuse of state power and to make sure that the government does its work properly
- ⇒ The bill of rights is there to protect the fundamental rights that each person has

STUDY UNIT 8- THE BILL OF RIGHTS: WHAT ARE FUNDAMENTAL RIGHTS?

- Right to human dignity
 - Right to equality- s9
 - Right to an environment- s24
 - Right to security and freedom- s12
 - The right not to be tortured in any way- s12
 - Rights of arrested, detained and accused persons- s35
- They are the rights that safeguard democracy and protect the individual from the abuse of state power
- Divided into 3 categories:
1. 1st generation rights: “blue rights” they are civil rights, procedural rights and political rights- rights that protect the individual from the abuse of state power. Right to equality, the right to human dignity, the right to life, the right to freedom of expression and the right to freedom and security.
 2. 2nd generation rights: “red rights” they relate to socio-economic issues. Right to education and the right to access to health care services and to sufficient food and water
 3. 3rd generations: “green rights” have more to do with the group than with the individual. The right to clean or unpolluted air

What is a fundamental right? Every person is born with human dignity, and it is this human dignity that gives that person a claim to human rights. You do not have to work for these rights or qualify to be given them - they are your natural rights; in other words, they are fundamental to each human being. Every person has these fundamental rights and the state can never take them away

Application of the bill of rights:

- Vertically: between the state and individuals, organisations or groups
- Horizontally: between individuals or private institutions

STUDY UNIT 9- LIMITATION OF YOUR FUNDAMENTAL RIGHTS

Protest action against the new apportion bill

The Concerned Christians base their protest on the right to life. The pro-abortionists base their argument on the right of everyone to make their own decisions concerning reproduction. The Concerned Christians also have the right to demonstrate, and to present a petition, but it should be peaceful and they must not carry any weapons. The question is, of course, whether the surgical instruments they carried can be regarded as weapons.

Limitation of fundamental rights

- Only unfair discrimination will be unconstitutional
- S17- the right to assemble, demonstrate, picket and petition- requiring that the action is peaceful and that the participants are unarmed
- Certain fundamental rights may also be suspended for a period of time when the state declares a state of emergency
- Certain rights, such as the rights to human dignity and life, may not be derogated or infringed or suspended in any way. (S37 together with the table of non-derogable rights)
- S36- limitation clause:
 - ❖ Law that limits the right must be of general application
 - ❖ The limitation must be reasonable and justifiable in an open and democratic based society based on human dignity, equality and freedom

- ❖ What is the nature of the right? What is the purpose of the limitation and how important is this purpose? What is the nature of the limitation and how much of a limitation will it be? How do the limitation and the purpose of the limitation relate to one another? Could this purpose be achieved in a less restrictive way?

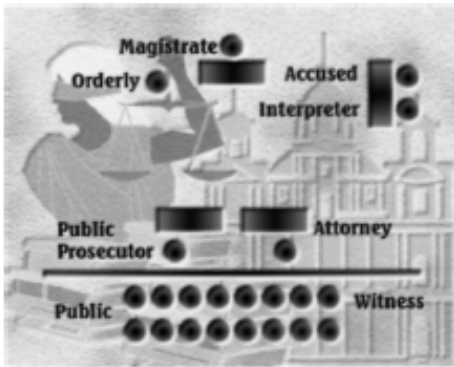
STUDY UNIT 10- THE INFLUENCE OF THE CONSTITUTION ON SOUTH AFRICAN LAW

- Civil union
- Definition of marriage unconstitutional
- Right to vote abroad
- Etc

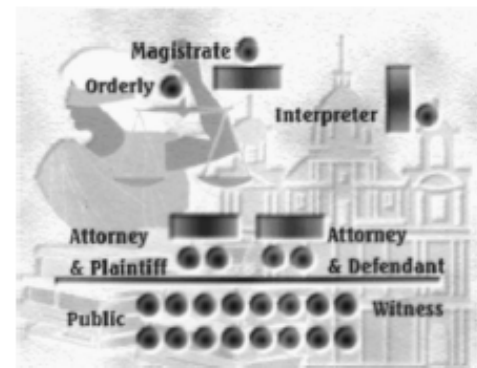
STUDY UNIT 11- "THE LAWS OF OUR LAWES"

- ⇒ Both the attorney and the prosecutor must have robes
- ⇒ Magistrates preside over magistrates courts and judges preside over the superior courts
- ⇒ A presiding officer is any persons who are in charge, or who preside over the proceedings- they consider the facts and the law and they must come to a decision
- ⇒ **Prosecutor:** works for the state- to prosecute people who are accused of committing crimes
- ⇒ **Orderly:** keeps order in the court and calls witnesses
- ⇒ **Investigating officer:** collects all the evidence and then submits it to the public prosecutor who decides whether we should charge the person
- ⇒ **Serving the summons:** contains the accused persons details, the charges and the details regarding his appearance in court. 3 ways of securing the attendance of the accused: arrest, notice issued by a peace officer and the summons, which is issued by the clerk of the court. In the High court the accused is sent a notice of trial and an indictment
- ⇒ The state always has an interest where there is a possibility that a crime has been committed. It is the state's job to prove that beyond reasonable doubt that you have committed these acts. Much more difficult to prove than in civil cases where it is proved on a balance of probabilities
- ⇒ **Criminal case:** state is the "plaintiff"- public prosecutor, the accused, his attorney, the presiding officer and the Magistrate
- ⇒ **Civil case:** plaintiff, defendant, both their attorneys, the orderly, and the Magistrate
- ⇒ Criminal offences of high treason can never be heard in the magistrate's court.
- ⇒ A Magistrate courts sentencing power is limited
- ⇒ **Jurisdiction:** is the power to hear the matter. A court cannot hear a matter unless there is some factor that connects the persons before the court to the geographical area
- ⇒ In criminal matter the type of offence and the sentence determine a court's jurisdiction. In civil matter the nature of relief claimed and the amount claimed can also determine the jurisdiction
- ⇒ **Court structure:** magistrates court (regional and district) – high court- Supreme court of appeal- Constitutional court

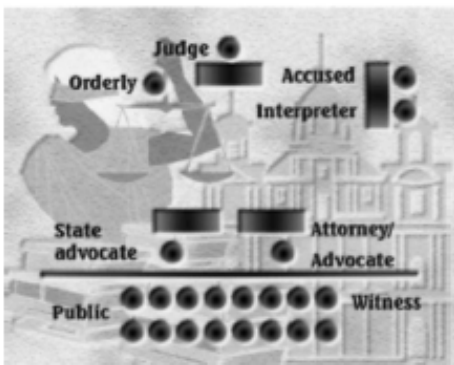
Criminal case in Magistrate's Court



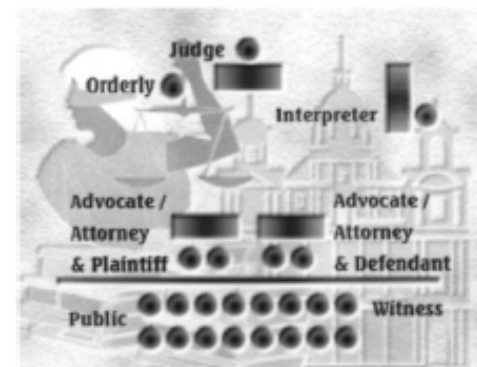
Civil case in Magistrate's Court and



Criminal case in High Court



Civil case in High Court



STUDY UNIT 12- DIFFERENT LEGAL DISPUTES

Civil, criminal and Constitutional matters

Criminal v Civil v Constitutional

- ⇒ In criminal cases the state is involved
- ⇒ A constitutional matter involves any issue requiring the interpretation, protection or enforcement of the constitution. It may also involve fundamental rights.
- ⇒ The state, individuals or private institutions may be parties in a constitutional case
- ⇒ **Parties:** in a civil case the plaintiff and the defendant, and in a criminal case the parties are the state and the accused
- ⇒ **Onus of proof:** in a civil case the plaintiff must be able to prove on a balance of probabilities and in a criminal case the state must prove that it is beyond reasonable doubt
- ⇒ **Purpose of proceedings:** in a civil case the purpose is usually to claim financial damages and in a criminal case the purpose is to punish someone for a crime
- ⇒ **The role-players:** in a civil case we have the plaintiff and the defendant with their legal reps, the presiding officer may be a magistrate or a judge. In a criminal case we have the state prosecutor or state advocate who conducts the state's case. The presiding officer may again be a magistrate or judge

STUDY UNIT 13- THE LEGAL PROFESSION AND THE COURTS

- ❖ Attorneys are trained lawyers who can advise clients and represent them in court. Attorneys have to apply to the High Court to be admitted to the legal profession. - Requirements include an LLB degree, practical legal training for at least two years at a private firm of attorneys, a legal-aid clinic or a community-aid center (or a period of only one year if a practical legal training course of five months has been completed), and the successful completion of an attorneys admission examination

- ❖ All practicing attorneys must belong to the Law Society in their province. The Law Society is what the professional body for attorneys is called
- ❖ In terms of section 3(2) of the Right of Appearance in Courts Act 62 of 1995, all attorneys who want to appear in the High Court may apply for such a right to appear. Section 3(3) of the Act determines that attorneys who have acquired the right of appearance in the High Court may also appear in the Constitutional Court.
- ❖ Advocates have an automatic right to appear in all the courts (lower, as well as superior courts). The main function of advocates is to represent clients in court
- ❖ Practicing advocates usually belong to one of the professional Bar Councils, which are linked to the divisions of the High Court.
- ❖ If you want to practice as advocate at one of the Bar Councils, you will first have to do practical legal training with one of the already qualified advocates (i.e. pupillage for a prescribed period) and then successfully complete the Bar Council's examination.
- ❖ State advocates also serve as legal advisers to the state and may even be involved in drafting legislation
- ❖ In terms of the Renaming of High Courts Act 30 of 2008, the names of the different divisions of the High Court in South Africa have changed. The date of the commencement of the Act was on 1 March 2009.
- ❖ Three basic legal principles that form part of the legal process: the principle of judicial precedent, appeal and review
 - Appeal: in a civil matter when a party feels that the court has made an error in its decision that party can appeal to a higher court. In criminal matters the appeal may be lodged against the conviction, against sentence or both.
 - On appeal the court does not listen to all the oral evidence about the facts of the case. The court studies the typed record of the court, which originally made the decision (court *a quo*) and then listens to arguments made by the legal representatives. When the appeal is upheld it means that the decision by the court *a quo* is set aside. If the appeal is dismissed the decision of the court *a quo* is confirmed
 - Review: the person is complaining about the way the proceedings have taken place and not about the decision