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Dear Student

Welcome to the module *Introduction to Law* (ILW1036)! This is one of the first-year and foundation modules of the four-year LLB degree and is intended to provide you with a sound basis for your law studies. Therefore, the purpose of this module is for students to gain a basic knowledge, insight and skills for the analysis and solution of elementary problems relating to some of the general underlying principles of South African law. We sincerely hope that you will enjoy your first encounter with the law.

In an effort to bring the law to you and make it relevant to your everyday life, we have used real-life situations as a starting-point for our discussions and activities. (Please remember that we made up all these episodes or scenarios; and although they did not actually happen, they could have happened!) After you have completed this module, you will appreciate the place of the law within society and you will be able to find the law and use the sources of law with full knowledge of the hierarchy of sources and authority. You will be able to demonstrate your understanding of the basic principles and influence of the Constitution (more particularly, the Bill of Rights) in practical examples and explain the structure of the legal profession and the courts in constitutional, civil and criminal cases.

The module ILW1036 is a *semester module*. The study guide for the module is made up of 13 study units. Therefore you will have to divide your study time in such a way that you complete these study units in one semester. A semester has approximately 15 weeks of study time if you register early. We recommend that you draw up a strict study timetable (and keep to it!) in which you make time for working through the study units, completing the assignments, for revision and preparation for the examination.

Your study guide for ILW1036 consists of the following study units:

- **Study unit 1: What is “law”?**
  In this unit you will be prompted by real-life situations to appreciate the relevance of law in daily life.

- **Study unit 2: Law and rights**
  After completion of this unit you will be able to demonstrate your understanding of the difference between the concepts “law” and “rights”.

- **Study unit 3: The story of our law**
  After completion of this unit you will have a basic knowledge of the history of South African law.

- **Study unit 4: Families of law or legal cultures**
  In this study unit you are introduced to the different legal families of the world.

- **Study unit 5: Divisions of law**
  In this study unit you are introduced to the different fields of law in the South African legal system.

- **Study unit 6: Where to find the law**
  After completion of this unit you will know what the authoritative sources of law are and you will be able to demonstrate this understanding in practical examples.

- **Study unit 7: The Constitution and you**
  After completion of this unit you will be able to demonstrate your recognition and understanding of constitutional issues in real-life situations.

- **Study unit 8: The Bill of Rights: What are fundamental rights?**
  After completion of this unit you will be able to identify fundamental rights and understand how they work in real-life situations.
Study unit 9: Limitation of your fundamental rights

After completion of this unit you will be able to demonstrate your understanding of the ways in which fundamental rights may be limited in practical examples.

Study unit 10: The influence of the Constitution on South African law

After completion of this study unit, you will be able to demonstrate your understanding of the influence of our Constitution, more specifically the Bill of Rights, on our law by way of practical examples.

Study unit 11: “The laws of our lives”: An edited version of the DVD script

You will notice that you have received a DVD together with the last three study units, namely study units 11, 12 and 13. Watch the DVD or read the DVD text first, before you start studying the individual study units. In this study unit we provide you with an edited version of the DVD script of the DVD titled “The laws of our lives”. The DVD and the DVD script form part of the study material for ILW1036. The story “The laws of our lives” deals with court cases that arise from a motor car accident, the courts in which these cases are heard, and the different roleplayers who are involved in these court cases.

Study unit 12: Different legal disputes

When you have worked through this study unit you will be able to identify the different kinds of legal disputes and you will be able to show that you understand the basic differences between civil and criminal cases.

Study unit 13: The legal profession and the courts

When you have worked through this study unit you will be able to show that you understand the legal profession and the structure of the courts.

The study material for ILW1036 consists of a study guide, Only study guide for Introduction to Law (ILW1036), and the DVD which you have received. You must study all 13 study units in the study guide for the examination. You will also receive tutorial letters in the course of the semester and these tutorial letters also form part of your study material for the examination.

As far as the structure of the study guide is concerned, you will see that each study unit starts with an overview and a key question or key questions. The purpose of these is to guide you when you work through the study unit. You will notice that each study unit has one or more activities that you must do. These activities are very important. They will give you an understanding of the study material, and will help you to develop certain skills that you need for law studies. Each activity is followed by feedback. You must use the feedback to determine whether you have understood and completed the activity correctly.

You will see that we use a left-hand margin to give you the key words or key phrases in certain paragraphs. You should use this margin to add your own notes to these key words and phrases, or to write down anything else that you regard as important. All of this will be of great help to you when you prepare for the examination.

As mentioned above, you receive a DVD together with the last 3 study units (in other words 11, 12 and 13) — more about the DVD in study unit 11!

Studying law is new to you, so do not hesitate to contact us if you have any difficulty with the study material. (See Tutorial Letter 101 for all the contact numbers, addresses, etc.) After all, a lawyer is supposed to ask questions and, most importantly, to find the answers to those questions!

We wish you all the best with your studies!

Your lecturers for ILW1036
In this study unit you will meet two typical South African families. They experience different situations in their daily lives and what we want to find out is how the law is connected to these everyday events. In other words, we will be exploring the relevance of law in each of these events. You will therefore in this study unit be prompted by real-life situations to appreciate the relevance of law in daily life.

**Key questions**

After completion of this study unit, will you be able to

- explain what “law” is?
- identify events that have legal relevance — in other words that have something to do with the law?
- understand the part played by law in daily life?
- divide the events that have legal relevance in divisions?
- explain the difference between legal norms and other norms in everyday real-life situations?
- explain the difference between formal justice and substantive justice in real-life situations?

**Meet our two South African families**

**The Mothibes**

Tom and Jane Mothibe live in Suburbia, a suburb south of Pretoria. They have two children, Bongiwe and Thomas. Tom is a lecturer at the local university, New Africa University, and Jane is a partner at a firm of attorneys called Mothibe and Boucher. Thomas is fifteen and attends the local high school, Suburbia High. He hopes to finish school in two years’ time and plans to become a dress designer. Bongiwe is six years old and she has just started school at Suburbia Primary which is the primary school
around the corner from her home. Bongiwe wants to become an attorney like her mother. The Mothibe family employ Sarah Blom, a domestic worker, who works for them on Mondays, Wednesdays and Fridays and James Molefe, a gardener who works in the garden on Wednesdays.

The Van der Merwes

The Mothibes’ next-door neighbours are Karel and Martie van der Merwe and their two children Carmia and Jimmy. Karel has been employed since 1995 by a firm of engineers called Malan and Jackson. However, for financial reasons, this firm has been forced to reduce its work force and Karel has been retrenched. He will be leaving the firm in two months’ time and is presently looking for another job. Karel’s wife Martie, like her neighbour Tom, is a lecturer at New Africa University. Carmia is seven years old and attends Suburbia Primary. Jimmy is two years old and spends most of the day with a day-mother, Mrs Brown, who lives just across the road from the Van der Merwes. The Van der Merwes employ Sarah Blom’s sister to clean the house on Tuesdays and Thursdays. Her name is Francine. On Tuesdays, the Mothibe’s gardener, James, works in the Van der Merwe’s garden.

Law and life

In this scenario we are going to take a look at what happens in the Mothibe and Van der Merwe households on a typical “blue” Monday when everything seems to go wrong!

Monday 7:15

After an early breakfast in both the Mothibe and Van der Merwe households, the parents and children are preparing to leave for work and school. Thomas cycles to his school each day, and his mother walks Bongiwe to school before she drives to work. Jane and Bongiwe have already left but this morning Thomas is late. His father is angry with him because Thomas has lost the envelope which contains his school fees for the term. Just as Tom is about to write out another cheque for the fees, Thomas remembers that he put the envelope in one of his textbooks. Peace is restored! At last Thomas leaves for school. It has been a crazy rush to get ready for work and school.
and Tom forgets that he has promised Martie, his next-door neighbour, a lift to work because her car is in the garage for repairs. He drives off and the Mothibe house is left in the care of Sarah, the domestic worker.

Next door the Van der Merwe household is also starting a “blue” Monday. Carmia leaves for school and Martie takes Jimmy across the road to Mrs Brown, the day-mother. Martie sees Tom driving past and realises that he has forgotten to give her a lift as they arranged. She persuades her husband Karel to give her a lift to work on his motorbike. They are just about to leave when Mr Cutts arrives. Karel has arranged with Mr Cutts to cut down some branches that overhang from trees in the Mothibe’s yard. Because of these branches there is too much shade over the vegetable patch in Karel’s garden. Mr Cutts had agreed to come and work the previous weekend but he was sick. Karel gives Mr Cutts some hasty instructions and then he and Martie leave for work.

Monday 14:00

Thomas and Bongiwe are home from school. Carmia has gone to Mrs Brown, the day-mother, where she will spend the rest of the afternoon. Martie will fetch Carmia and Jimmy when she gets back from work. At the Mothibe’s house Bongiwe eats her lunch, prepared by Sarah Blom, and then she too goes over the road to play at Mrs Brown’s house. Thomas is doing his homework when he hears a loud bang. He runs into the garden to investigate and sees that the window of his father’s study is smashed. A cricket ball is lying on the grass. Soon two little red-faced boys ring the Mothibe’s doorbell. They apologise for breaking the window. Thomas is cross and says that they will have to speak to his father later about the incident.

Monday 16:00

Tom and Martie are back at their own homes after their working day at the university. Both have to mark their students’ assignments for a while. Jane is working late and Karel is also late, so Tom and Martie begin the preparation for the evening meal. All the children are home and they too help to prepare supper.

Someone drove into Karel’s motorbike while it was parked in its usual place in the parking lot at his place of work. Luckily, the motorbike is not badly damaged and the driver of the car has agreed to pay Karel for the damage.
Monday 19:00

The Mothibes and Van der Merwes enjoy their evening meals after a busy day. But the day is not over yet. Today is election day in the municipal by-elections and the eligible voters in each family must reach the polling stations before they close at 22:00. It has been a stressful day for them all and they will be glad to get a good night’s rest!

Activity

1.1

Write down the events from the above story which you think have something to do with the law. In other words, which events do you think are legally relevant?

Feedback

After you have made your list, read the discussion that follows. This will give you feedback.

Discussion

Introduction

We often think that the law affects only certain parts of our lives. We often think that the law is relevant only when someone commits a crime. We also often think that we need legal advice only when we wish to draw up a will or sign a complicated contract. However, this is not so! The law plays a very
**STUDY UNIT 1: What is “law”?**

**norm:**
- a standard of human conduct
- a rule of human behaviour

important role in every aspect of our daily lives. For example, there is the fact that the Mothibes and Van der Merwes are parents. This fact has something to do with the law because you have to know about the legal norms (a norm is a standard of human conduct or a rule of human behaviour) that are relevant to parents. If you are a parent, the relevant legal norms require that you support or maintain your children: you are obliged to provide your children with the necessities of life, like schooling, medical care and so on, in keeping with your life-style. (We do not always realise that children also have a legal duty to support their parents when the parents are not able to care for themselves!) The ages of children are also legally important. For example, if a child who is under the age of seven steals from a shop, he has not committed a crime. The reason is that the law says that a child who is younger than seven is not able to tell the difference between right and wrong. On the contrary, the law regards (sees) a person who is eighteen years old as a major. This means that a person who is eighteen years old is completely able to tell the difference between right and wrong. Such a major person has according to our law, with certain exceptions of course, full capacity to appear in court or to enter into any contract. (See study unit 2 where we explain that the term “right” can also have the meaning “capacity”.)

The fact that Karel, in our story above, has been retrenched, is also legally relevant — it has something to do with the law. We have to examine the legal norms to find out whether or not his retrenchment is lawful and what compensation he is entitled to because of the loss of his job. In this case we will find the legal norms by looking at the law which applies to labour relations. If we have to examine anything which affects the employment of Sarah, Francine and James (eg the way they carry out their duties and exercise their rights), we will also have to look at the law of labour relations.

We have just seen how the law of labour relations will help us to discover the legal norms or rules that apply to employment. In the same way the law of obligations will help us to find the legal norms that apply to the agreement by the Mothibes to pay school fees, by Martie to have her motor car repaired, and by Karel to allow Mr Cutts to cut down overhanging branches. The duty to pay school fees is a legal matter and it makes no difference whether we have this duty because the provincial legislature says we have to pay school fees or whether we, as parents, have signed a contract with the school authority. The minor accident with Karel’s motorbike also involves legal rules. So too the fact that Martie puts her car in to the garage for repairs will have legal consequences. The legal norms relating to contracts will control Karel’s arrangement with Mr Cutts.
day care
removal of overhanging branches
nuisance of falling leaves
residential address

as well as the arrangement that Karel and Martie have with the day-mother. Even the question of the removal of the overhanging branches will be subject to the law. It would usually be unlawful (against the law) for Karel to get Mr Cutts to cut down the branches that hang over into Karel’s garden from another garden. However, sometimes an action such as cutting down branches will be justified (regarded as lawful), for example where the falling leaves are creating a nuisance.

The law is concerned with where we live. Our address — the address of each family — is of legal consequence. Therefore, the legal home of each family which is called the “domicile” has various legal consequences. For example, if a couple decide to divorce, it may be their “domicile” which will determine which court will hold the divorce hearing.

In our story, two little boys were playing cricket and smashed Tom’s study window with their cricket ball. What are the legal consequences of the smashed window? And what about Tom’s promise to give Martie a lift to work? Do you think the law is involved here?

On Monday evening in our story, the families go to the polling station to vote in the municipal elections. There are legal rules involved here too. Some of these rules will be found by looking at the electoral laws and even our Constitution.

Legal norms and other norms: How do they differ?

It should be clear from reading our story and the discussion that follows it, that the law concerns our everyday lives. However, what do we mean when we use the term “the law”?

“the law” versus “other laws”

When we use the words “the law” in our everyday speech we mean different things at different times. We speak, for example, of “the law of the land” and of “the long arm of the law catching up with criminals”. We also speak of “the laws of physics” and “the law of gravity”. When we speak of “the law of the land” and “the long arm of the law”, we are usually talking about a country’s laws and about criminals being caught and made to answer for their wrongdoings. When we speak of a law of physics, for example, the law of gravity, we are speaking about an unchanging physical force which we normally cannot control. Students of physics will know that gravity draws an object to the earth. We see the law of gravity in action when we see an apple fall to the ground from a tree. Then there are other laws, such as the “laws” of games like cricket and chess, that determine how
A particular game should be played. The one thing that all of these “laws” have in common is that they all deal with order and regularity. However, although laws may have this characteristic in common, we cannot group all laws together. All laws are not the same in all respects, and the following question arises: “How do we know which group the various laws belong to?”

Some of the “laws” we have just mentioned are standards or rules (norms) that determine how we should behave and interact with one another. This is what separates these laws from the laws which are not “norms”. If being a norm or standard of human behaviour is what separates the kinds of laws which are “norms” from other laws, then “the laws” of physics would be out of place in a group of “norms” or standards of human behaviour. In the first place then we may say that “the law” (which we are going to study) means a rule or norm governing human behaviour. You might ask: “But surely the rules of a game also govern human behaviour in a way?” The answer to your question must be: “Yes!” However, we would not consider these rules to be part of “the law”. When we play chess, for example, or a game of cards, only those of us who are playing the game have to follow the rules. No-one outside of the game is bound by the rules. If we cheat, we will be punished either by our own conscience which tells us the difference between right and wrong, or by the fact that the other players will no longer want to play the game with us. This in itself is a form of punishment. We cannot, therefore, see the rules of sport or the rules of a game in the same way as we see the rule which says that we should stop at a red traffic light. If we break this rule and drive through a red traffic light, we can be prosecuted and punished by the state.

What is it then that sets “the law” apart? What makes it stand alone? Perhaps it is because “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. However, just because we should obey these norms does not mean that we always do so. We should always stop at red traffic lights, but some of us do not always do so.

There is a difference between a legal norm and a moral norm. In the case of a legal norm, the whole community is involved and this is what separates the legal norm from the moral norm.

We know that many people regard adultery as morally wrong (immoral), but it is not a crime. However, there are times when a moral norm can also be a legal norm. An example of this is the commandment in the Bible: “Thou shall not kill”. “The law” also says that the intentional killing of a
human being without justification is murder which is a serious crime, and that the murderer will be prosecuted and punished by the state.

Very often, however, legal norms and moral norms are separate. For example, the law says that all contracts for the sale of land should be in writing and that if this is not done then there is no legal contract binding the parties. Morally, if you give your word, or promise to do something, you are obliged to do it whether or not other legal requirements have been fulfilled, and this then involves a moral norm (which cannot be enforced by the state).

**Activity 1.2**

If a friend asks you what “the law” is, how will you explain it to him?

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In your explanation to your friend you should mention the following characteristics of the law:

- The law governs human behaviour/conduct.
- The law should be obeyed by all of society.
- The law is enforced by state organs.
- By ignoring or disobeying the law we may be prosecuted and punished (eg when we ignore a red traffic light) or we may be ordered to compensate the party we have injured (for example when a vehicle is damaged in an accident).

**Activity 1.3**

Did you realise from the above discussion that the events that have legal relevance can be divided into divisions or sections? If your answer is “yes”, can you identify two main divisions of the South African law?
This is a difficult activity that indeed required some thinking. Do not worry if you could not answer the question! Make sure, however, that you understand our explanation and study it for the examination.

There are two methods which are used to divide the South African law into two main divisions. Firstly, the South African law can be divided into the two main divisions, public law and private law. Public law deals with the relationship between the state and the individual. In our discussion the municipal elections relate for example to public law. Electoral laws regulate the relationship between the state and eligible individuals (voters). Private law deals with the relationship between individuals and other individuals. In our discussion there are a number of the events that relate to private law. We merely mention a few examples. Private law is for example applicable to the payment of the children’s school fees, the repair work to Martie’s motor car, the agreement between Karel and Mr Cutts to cut down the branches, and the payment of damages by the driver that drove into Karel’s motorbike. In all these events there is a relationship between an individual and another individual. This division between public law and private law is used in study unit 5 when we deal with the different divisions of South African law. A diagram of this division would look like this:

```
The law
   / \
  /   \ Public law  Private law
 /     /
Individual(s) ↔ State / State organs  Individual(s) ↔ Individual(s)
```

Secondly, the South African law can be divided into the two main divisions, formal (or procedural) law and substantive (or material) law. Formal or procedural law is that part of the law which deals with the
procedures that must be followed in legal proceedings. The rules that determine how court cases are decided or decisions reached, the way we act in courts, the kinds of evidence that are allowed, and so on, are contained in what we call formal law. **Substantive or material law is that part of the law which determines the content and the meaning of the different legal rules.** This division between formal (or procedural) law and substantive (or material) law is later used in study unit 1 when we look at the difference between formal justice and substantive justice. A diagram of this division would look like this:

```
The law
  Formal law / Procedural law
    Substantive law / Material law
```

### Activity

1.4

Read the following discussion on the law and other normative systems carefully and make notes of important aspects in the margin:

### The law and other normative systems

On pages 3–10 of their book, *Beginner’s Guide for Law Students* (Juta, 2002), the authors, Kleyn and Viljoen, show the difference between the following normative systems (that is, systems other than the law) that govern (rule) human behaviour:

- religion
- individual morality
- community mores

We are now going to look at each of these systems and see what connection they have with the law.

### Religion

Kleyn and Viljoen deal with all forms of religion, regardless of whether the religion is Christian, Muslim, an African religion, or any other religion. Every religion has a code (a set of rules) in accordance with which the people who practise that particular religion, live. For Christians, for
example, this code is based on the Bible, for Muslims it is based on the Koran. Every religion has a sanction (a punishment) for those who disobey its particular religious norms (its code of behaviour). Burning in hell is an example of one punishment.

There is much discussion about the relationship between religion and law. One of the questions asked is: When the system of religion and the system of law clash, whose laws should you obey? Should you obey the laws of your religion rather than the laws of the country, or the other way round? Or, should the law be in harmony with religious norms? In other words, should we look at religion and law as completely separate systems of norms or are they the same? Kleyn and Viljoen (p 4) explain these different views as follows:

On the one hand, some people are of the opinion that religion and law should be mutually exclusive. To them religion is a personal matter, only concerned with the individual’s private sphere of conscience. It determines the individual’s destiny after death. The Western (liberal secular) state is based on a distinction between state authority and religious authority. It is not the task of the state to enforce religious norms or convictions on its citizens. However, religious freedom must be made possible by the state, allowing each individual to exercise a free religious choice. For this reason, for example, trade and film shows in South Africa are allowed on Sundays, although devout Christians may object.

On the other hand, it is sometimes accepted that religion and law should have the same content. This appears in its most extreme form in the fundamentalistic Islamic religious states, where law and religion are equated. The Koran dictates that theft is an offence; an offender’s hand must be cut off. The law applies this religious rule in the worldly sphere.

Both of these views may be criticised and the criticism is described briefly by Kleyn and Viljoen (pp 4–5) as follows:

There are many similarities between law and religion. The Western legal tradition is strongly influenced by Christian thought. The basis of modern matrimonial law, the regulation of sexual relationships and the principle that contracts may be concluded by mere agreement, without the requirement of further formalities, all stem from church law (canon law). The content of religious and legal rules is also often the same. Examples are found in the offences of murder, fraud, theft and perjury.

In addition, both law and religion are studied by interpreting authoritative texts. In both, ritual formalities and fixed procedure play an important role.

There are, however, also many differences. These two normative systems do not overlap completely. The Ten Commandments ordain that one should not covet thy neighbour’s possessions. How will a state enforce this? This is not enforced by law. In the same way adultery is not a crime, although it may be regarded a ‘sin’.
Although religion and law are not always similar, there are certain aspects of the South African law that favour the Christian religion. In criminal law blasphemy is an offence: It pertains only to the Christian God. Christian public holidays such as Christmas and Good Friday are given preference by the government. This is justified as part of the accepted religious convictions of the majority.

**Individual morality (personal morality/ethics)**

When we speak of individual morality, we are speaking about the norms or standards of behaviour that each person sets for himself or herself. Examples of these are the following: being honest, not drinking too much, not telling lies. If you disobey these rules, you cause yourself inner conflict — your conscience bothers you. You become upset with yourself.

We set these rules for ourselves, but it is also possible that these rules may coincide with or form part of your religious convictions. In other words, they may be the same as the rules set for us by our system of religion. An example of this would be not telling lies. This could be a norm of individual morality as well as a religious norm.

A person’s own individual sense of morality may, in some instances, coincide (go hand in hand) with certain legal rules. In other words, the content of the legal rules may match the content of the rules an individual has set for himself or herself. For example, honesty (a norm of individual morality) is the value that is violated (offended) when the crimes of theft and fraud are committed. However, individual morality, as such, is not enforced by the law. It is only where a norm of individual morality coincides with a legal norm, such as in the examples mentioned above, that the law will step in (intervene).

Therefore the essential point that you must understand as far as individual morality is concerned is that it has to do with the individual person and that the sanction for disobeying these rules (which can take the form of remorse or being upset with yourself), is personal and self-inflicted (imposed on oneself).

**Community mores**

Kleyn and Viljoen (p 6) explain community mores as follows:

Community mores are the norms of a whole community or group within that community. They are collective morals. Etiquette, fashion and views about free love or interracial marriage all form part of this.
They differ from religion and morality in that they are not private matters concerning only a specific individual. The sanction for non-compliance is varying degrees of disapproval by other members of society. A guest eating his peas with a spoon may find that he will not receive an invitation again from the formal host ... A black husband and white wife may find that after their marriage they are avoided by conservative family members.

In a society such as ours which is made up of many different types of people and different types of groups (ie a heterogenous society), the mores of different communities may differ. For example, while it may be quite acceptable for unmarried couples to live together in a certain community, a more conservative community may not tolerate this.

The origin of some community mores may be found in that community’s religious convictions. For example, gay marriages may not be acceptable in a certain community, because their religion forbids such marriages.

In some instances the law and community mores may coincide — they may be the same. For example, possession and sale of harmful drugs are disapproved of by the community and they are criminal offences. In other instances the law may not reflect or support community mores. For example, there may not be laws that are good enough to prevent the distribution of child pornography on the Internet. On the other hand, the community may feel that the present censorship laws are too strict and should be relaxed.

Conclusion

We have discussed the different types of norms under different headings. From our discussion you should have realised that the various types of norms differ from each other. You should however, also have realised that they may overlap and that, for example, some norms are both religious and legal norms, that community norms (or mores as they are also called) may sometimes be supported by the law, or that individual norms (a person’s own personal moral code) are sometimes religious norms. Since the different types of norms may overlap, it should be clear that they cannot always be divided into these separate categories.
1.5

Activity

Now that you have read the discussion on the different types of norms, answer the following questions:

(1) Complete the following diagram in order to distinguish between the different normative systems:

<table>
<thead>
<tr>
<th>To whom are the rules applicable?</th>
<th>What is the sanction for non-compliance with the rules?</th>
<th>Who enforces the sanction?</th>
</tr>
</thead>
<tbody>
<tr>
<td>The law</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Religion</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Individual morality</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Community mores</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(2) Read the following scenario and answer the multiple-choice questions that follow:

Mr and Mrs Clark have been married for the past ten years. They live in an exclusive but very conservative neighbourhood in Pretoria. Two years ago, Mr Clark, who is a well-known business man in the community, began an extra-marital relationship with his neighbour’s wife. When the neighbours found out about Mr Clark’s adultery a year later, they started to ignore him.

(a) The normative system which is applicable in this scenario is
(1) the law
(2) community mores
(3) individual morality
(4) religion

(b) The sanction for not complying with the norms of the normative system in (a) is
(1) punishment by a state organ
(2) Mr Clarke’s remorse
(3) prosecution by a state organ
(4) disapproval by the community

(3) Although we spoke about the various types of norms under different headings, we said in the conclusion that they cannot always be divided into specific categories.

Read the following scenario and answer the question that follows with reference to this statement:

Karel is under a lot of stress because of his retrenchment. This has caused him to start smoking. His family is most upset about this. Carmia says that he will get cancer. Martie argues that it is morally wrong to smoke. One of Karel’s friends tells him that smoking is a sin. One evening, Karel lights a cigarette in the non-smoking section of a city restaurant. When the manager asks him to put out the cigarette, Karel starts to argue with him. Karel argues that he does not think that it is morally wrong to smoke, but the manager replies that he is not interested in Karel’s “moral arguments”, because smoking in the non-smoking section of the restaurant is in contravention of the law (in this case, one of the municipal by-laws). Karel is so upset that he storms out without ordering any food. What are the merits of Karel’s argument and what are the merits of the management’s argument?

(1) When you completed the diagram, you should have noticed that the different normative systems correspond in the sense that all these systems govern human behaviour. However, it is the differences between the normative systems that should have drawn
your attention. **You should have noticed** that there are clear differences with regard to three aspects in particular, namely (i) the persons to whom the rules apply; (ii) the sanction for non-compliance with the rules; and (iii) the person who, or institution that, enforces the sanction.

Now study the diagram in order to establish whether you agree with the above:

<table>
<thead>
<tr>
<th>To whom are the rules applicable?</th>
<th>What is the sanction for non-compliance with the rules?</th>
<th>Who enforces the sanction?</th>
</tr>
</thead>
</table>
| **The law**                       | • Prosecution or punishment  
|                                   | • Compensation to an injured party                 | • State organ               |
| **Religion**                      | Every religion has its own sanction or punishment.  | Each separate religion      |
| **Individual morality**           | The sanction for disobeying these rules is personal and self-imposed. | Individual                  |
| **Community mores**               | Varying degrees of disapproval/rejection/discrimination by other members of the community. | Community                   |

(2) (a) **Statement (2) is the correct statement.** The normative system which is applicable in this scenario is a particular community’s mores. Community mores are the rules of a whole community or a group within that community.

(b) **Statement (4) is the correct statement.** The sanction for not complying with community mores is varying degrees of disapproval by the other members of the community. The community may expel, reject or ignore someone who does not comply with the community mores, or may discriminate against such a person. In our scenario, Mr Clark’s neighbours started to ignore him.

(3) You may indeed ask whether there is a definite and correct answer to this question. We doubt it. Different students will have different views on the merits of Karel’s and the manager’s arguments.

However, when reading the scenario, did you realise that moral
norms and legal norms often differ? Karel’s moral view on smoking differs from the law’s policy on smoking. Even though Karel may not find it morally wrong to smoke, he is bound by the by-law prohibiting smoking in the non-smoking section of the restaurant. He may be prosecuted and probably fined. Did you also realise that a moral or religious norm may sometimes be the same as a legal norm? In our example, Martie regards smoking as morally wrong and Karel’s friend believes smoking is a sin. In this case, their respective views on smoking coincide with the law’s policy on smoking.

The question of justice

The by-law prohibiting smoking in public places brings us to another important issue, namely 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. A legal rule is therefore not necessarily “just”.

There is no doubt that the by-law prohibiting smoking in public places is indeed a legal rule, but do you think it is a fair or just rule? What would, in these circumstances, determine whether a rule is fair or not? At first glance, the rule seems unjust. How do we then decide if a rule is just or not? You will find the answers to these questions in the discussion that follows.

Discussion

Introduction

Throughout history, people have questioned the justness of legal rules. Many ways have been suggested to decide if laws are just or not. Sometimes writers have suggested that, if rules are applied strictly, this will lead to justice. Others have indicated that, sometimes, the strict application of the law will lead to injustice rather than to justice. And that raises the question of what justice is. Many answers have been given to this question, but no completely accurate description of “justice” exists. For purposes of this discussion the description of justice as “equality before the law” is sufficient.

Of more importance for our discussion is the distinction made by South African law between formal justice and substantive justice. Let us now look at these concepts and the distinction between them.
Formal justice

In Activity 1.3 you learnt what formal law means. Can you still remember? The rules that determine how court cases are decided or decisions reached, are contained in what we call formal law. These are rules that govern the way we act in courts, the kinds of evidence that are allowed, and so on. Thus, formal law is that part of the law which deals with the procedures that must be followed in legal proceedings.

If the formal law meets certain basic requirements and is always applied in exactly the same way, we say that formal justice has been achieved. These basic requirements with which formal law has to comply in order to achieve formal justice are the following:

- There must be explicit rules laid down to show how people must be treated in specific cases.
- The rules must apply generally. This means that the rules must apply to all people in the group in the same circumstances.
- The rules must be applied impartially by a legal institution. This basically means that the judge may not be biased — he or she may not apply the rules unequally.

Activity 1.6

You have now seen what formal justice is. Do you think that formal justice is enough to make a legal system just? In other words: Can we say that a law is just if it meets only the requirements of formal justice? For example, look at the following:

Martie van der Merwe is not promoted by New Africa University and she complains about the decision. The university gives her a chance to complain about this. An impartial person hears the complaint and decides that the rules with regard to promotions within the university are clear and apply to all personnel equally. However, Martie feels that she was not promoted simply because she is a woman. Has justice been done in this case?
It is clear that the requirements of formal justice have been met: The rules with regard to promotions within the New Africa University are explicit. These rules apply generally to all personnel. The rules are applied impartially because Martie’s complaint was heard by an impartial person. However, one still comes away with the feeling that the result was unjust. Therefore, we have to consider the issue of substantive justice.

**Substantive justice**

It seems clear from the above that, in certain cases, there can be formal or procedural justice without there being necessarily “real justice”. This is when the question of substantive justice is raised. **Substantive justice concerns the content of the rule, and not the way in which it is applied.** Remember, in Activity 1.3 you learnt that substantive or material law is that part of the law which determines the content and the meaning of the different legal rules. Therefore, 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.

By the way, have you realised that there is a connection between formal (or procedural) law and substantive (or material) law? We are sure you noticed that formal law is that part of the law which regulates the enforcement of substantive law.

Substantive law is often applied correctly in accordance with the rules of formal law, despite the fact that the rules of substantive law are unjust. Thus, formal justice is achieved, but not substantive justice. In the apartheid years, for instance, the laws were specific, they applied to all persons in a group and they were applied impartially. However, it cannot be said that they served justice! In this case the content of the rules made them unjust. The same can be said of laws that discriminate against women.
You should now have a good idea of the role that the law plays in your day-to-day life and how it regulates human behaviour within our society. However, it should also be clear to you that it is not simple to describe law. Nor is it always easy to determine whether justice has been done in any one case. That is why the study of the law is so exciting, because the law has to change and adapt as society changes. The law also has to balance different interests of different individuals and this is where “rights” come into play. In the next study unit we shall say more about the law and rights.
Overview

In this study unit we explore the meaning of the concept “rights” and we look at the connection between “the law” and “rights”.

Key questions

After completion of this study unit, will you be able to

■ explain what a right is?
■ give examples of four kinds of rights that are especially important in private law (see Activity 1.3)?
■ explain the connection between the law and rights?
■ give examples of the connection between the law and rights?

Setting the Scene

Rights in everyday life

It is Saturday morning and the Mothibes are going to town. Jane is taking Bongiwe to buy school shoes. Tom is taking Thomas to the Speak-well Language Institute. He will enrol Thomas for a special course in French. Thomas plans to go to France when he finishes school and therefore he is keen to learn to speak French well.

Bongiwe visits many shops with her mother before she can find shoes that she likes. She finally chooses a pair of shoes and her mother, Jane, buys them for her. Jane hands Bongiwe the shoes and says: “Look after your new shoes and I hope you enjoy wearing them.”

In the meantime Tom has helped Thomas to enrol for the course in French. Thomas will have to attend language classes every Saturday, for two hours, for the next six months. Tom will have to pay the fees in three instalments of
R300 each. These are the terms (or conditions) of the contract which Tom has signed with Speak-well Language Institute. Thomas is very excited about starting his new course in French.

Now that the shoes have been bought and Thomas has been enrolled for his course, the Mothibe family meets for lunch. Thereafter they go to the cinema to watch a movie.

Discussion

Introduction

You may be wondering what the above little episode has to do with “rights”.

So far we have looked at the law in only one way, as a system of norms and rules; that is, as a group of norms and rules that all work together as a unit to regulate human behaviour within our society in a very specific way. (See study unit 1.) However, we can also see the law as a system of rights.

We will now explain what we mean by “rights”. After our explanation you will find three activities which you should do.

What is a right?

In study unit 1 we learnt that the task of the law is to provide standards (norms) which can measure whether members of a community relate to one another in the way that they should. When we speak about rights, we are dealing with how people relate to one another. Let us say that you have a right to something. In law we say that you are a holder of that right. This means that there is a legal relationship between you (we call you a legal subject and the holder of the right) and what you have the right to (we call this the object of the right or legal object). Other people (they are other legal subjects) have to respect your right. Therefore, when we are dealing with a right we are dealing with the relationship between you and the object of the right, and between you and other legal subjects who have to respect your right. Therefore, every right concerns a relationship made up of two parts:

1. a relationship between a legal subject and the object of the right
legal subject and other legal subjects

(2) a relationship between the legal subject who is the holder of the right, and other legal subjects

Let us go into detail first by giving examples:

examples of rights

I have a right to my car, to my book, to the services of my employee, to the invention which I have patented, to delivery of the thing which you have sold me. I also have a right against the person who has sold me a car, against my employee who must provide me with his services, against all others who must respect my right to my car, my book, and so on.

Let us put this in legal language: legal subjects have rights against one another in respect of the objects of their rights.

legal subject

But first, who is a legal subject? A legal subject is anyone who is subject to (or under the control of) the norms of the law (see “norms” in study unit 1) and who also may be the bearer (holder) of rights and duties.

In modern law everyone is a legal subject. In ancient Roman times, however, the law held that a slave could have no rights. A slave was not a legal subject, but was the object of a right. A slave was the object of her owner’s right to her. (You may now ask why we are referring to Roman law. The answer is simple: The beginnings of our law can be traced back to the law of the ancient Roman Empire which lasted from the first to the sixth century after the birth of Christ (AD). See study unit 3 for a brief historical overview of the Roman history.)

legal object

The object of a right (a legal object) may be anything that is of economic value to people. Something may have economic value because it costs a lot of money. It may also have economic value because it is something which is scarce and therefore difficult to get, or because it is useful and many people wish to have it. It may be of value only to a particular person (eg, that person’s good name); or it may be of value within a particular circle of people (eg, a painting of a family).

Four classes of rights

grouping of rights according to legal objects

Rights are put into particular groups and we do this by deciding what type of right it is. We can find out the type of right by finding out what the object of the right is. The four types of rights that we are going to explain in further detail below are:

four classes of rights:

(1) real rights (object: a thing)
real rights

Real rights. Real rights are rights to physical, material things, that we can touch, such as a pen, a car, a herd of cows (a herd of cows is seen as one unit), or the compressed air in a cylinder. Although the object of a real right is always a thing, the real rights themselves would be called, for example rights of ownership, rights of pledge, rights of servitude. But what does having a right allow us to do? What powers do we have? The powers that we may exercise are what make up the content of a right.

Perhaps we can explain what we have just said by using the examples of real rights that we have mentioned, namely ownership, pledge and servitude.

ownership

In the case of ownership, the owner of property may freely use and enjoy her property. It does not matter whether it is movable property, like a car, or immovable property, like a farm. The owner can also alienate it (that is sell or give it away). She can even destroy it if she chooses. Therefore, the owner’s powers to freely use, alienate and destroy the property are the powers which form the content of the owner’s real rights of ownership.

pledge

The second real right that we mentioned above was that of a pledge. When we pledge something, we give a movable thing as security for a debt. (Eg, a person may give her horse to someone whom she owes money to as security for the debt. When she pays the debt, she gets her horse back.) The pledgee (that is the person who receives the movable thing as security for the debt) does not have the same powers as the owner of the thing, as far as her real right to this object is concerned. She does not own the thing, but only possesses (controls) it. She may not use or enjoy the pledged thing. Thus, the powers of the pledgee over the pledged thing are limited and her right to the thing is known as a limited real right.

servitude

And now we come to the third real right mentioned above: servitude. An example of a servitude is the right of way one person has been given over the land of another person. This entitles the servitude holder to use a road or pathway through the land of another person. Her powers (content of her right) are also limited and she may only use the owner’s land for this purpose and no
other. Thus, the servitude holder, like the pledgee, has a limited real right to the property of another person.

Personality rights. Personality rights are the rights each one of us has to parts of our personality. Examples of these rights are the right to physical integrity (that is a right to your own body), the right to your good name or reputation, and the right to your honour. We can say that the objects of these rights also have economic value in a broad sense. They have no market value, but what gives them value is that they are scarce and not freely obtainable as far as the holder of the right is concerned.

Intellectual property rights. Intellectual property rights relate to the creations of the human mind. A work of art, an invention, and a trade mark are examples of objects of intellectual property rights. These rights are also sometimes called immaterial property rights. Copyright over what an author has written is an example of an immaterial property right. That is why it is against the law to photocopy a whole book, for instance.

Personal rights. A personal right is a right to performance. It is also called a claim. When we speak of performance, we are speaking of a human action. Strangely enough, this human action may be an action of either doing something or not doing something. We may have a right to the action of another person. The action may be the delivery of something by the seller, the payment of the purchase price by the buyer, or the services of an employee. In these instances it is the action of doing something. We said that the human action may also be not doing something. We may demand that a former employee of our company (eg an estate agent) does not compete with us within a particular area because she has agreed in a contract that she will not do so. This right is also called a personal right because it is a right to performance. In this instance it is the action of not doing something.

We can illustrate the different classes of rights that we discussed above as follows:
A Right: Dual Relationship

Legal subject (holder of right) against other legal Subjects

To

Legal object

motorcar (example of a real right)

good name (example of a personality right)

artwork (example of an intellectual property right)

delivery of car (example of a personal right)
Other meanings of the term “right”

Often we find the term “right” used differently in everyday language and even in legal literature. Instead of saying: “Jane Mothibe has the right of ownership of her house”, we might say: “Jane Mothibe has the right to use and sell her house”. What we have to remember when we use language in this way and we say that Jane has the right to use and sell her house, is that the right Jane Mothibe has to use and sell her house is simply the powers she can exercise in respect of the thing to which she has the right of ownership. These powers form the content of her right.

We sometimes use the word “right” in yet another way. We say, for instance, that someone has a “right to appear in court” or the “right to enter into a contract”. This is obviously not a right in the way that we have explained it above. We said that there has to be a legal subject, in other words holder of a right, and that what you have a right to is called the object of the right. We also said that there is a legal relationship between the legal subject and the object of the right and between you, the legal subject, and the other legal subjects who have to respect your right. So, when we speak of a “right to appear in court” or the “right to enter into a contract” there is no legal object or legal relationship with other people involved. Here we are speaking of an “ability” which the law gives to a person in accordance with his status or legal standing. It is usually indicated by the technical term “capacity”.

We come across “rights” frequently in the Constitution when we are dealing with fundamental rights or human rights in the “Bill of Rights”. The idea of fundamental rights or human rights is, of course, not new. From the very earliest times, thinkers have been discussing and arguing about the idea of human rights. In our own time, particularly since World War II, there has been a lively interest in the subject. We shall be talking about fundamental rights and the question of a Bill of Rights in study unit 8.

The connection between law and right

What is the connection between law and right? Let us take the simple example of ownership. The properties on which the Mothibes and the Van der Merwes live are next to each other. The Mothibes’s property is registered in Jane’s name and the Van der Merwe’s property is registered in Karel’s name. We have already told you that the content of a right is made up of the powers that the holder of a right may exercise. So, the following powers make up the content of Jane’s right of ownership: she can use her land, let it, burden it with a mortgage (that is, give it as security for a loan to
be repaid), decide to leave it to her children or to someone else when she
dies and so she will state this in her will (bequeath by will), sell it, et cetera.
Karel’s right of ownership allows him the same powers. However, there is a
limit to their powers. If there were no limit, Karel and Jane would be
constantly quarrelling.

The law brings about a balance between the interests of Jane and Karel.
There are a number of things which a landowner (in our story, Jane and
Karel are landowners) may not do and which would be a nuisance or cause
harm to the neighbouring property. The following are a few examples: Jane
may not build right up to the boundary of her land: there is a municipal
regulation that prohibits this. She may not dig a ditch at the boundary
because this would cause Karel’s land to sink down. She may not cause
excessive smoke on her land, for example, by lighting a fire, because this
would be a nuisance and make life unpleasant for Karel. Karel also may not
do these things. If either Jane or Karel commits such a prohibited act, then
the law comes into operation. Jane or Karel will be forced to remove the
nuisance, or to compensate the other one.

It is most important, when studying law, that you remember at all times that
the content of a right is limited. You also have to remember that “law” and
“right” are connected, because it is the rules of law that decide on what the
powers of the holder of a right are (in other words, the content of a right),
and on what the limits to the content of a right are.

We would like to make a final comment on rights. When a legal subject has a
right, the other legal subjects have a duty. There always has to be this
balance. For example, if I have the right of ownership to my car, the other
legal subjects have a duty to respect this right. They may not use my car
without my permission. If this balance did not exist, the law would have no
meaning.

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**Activity 2.1**

Let us return to the beginning of this study unit and the Saturday morning
activities of the Mothibe family. Reread the scene thoroughly. Can you
recognise at least two classes of rights from this story? Write down your
thoughts on these two classes of rights before you read the feedback on this
activity.
In our story Thomas Mothibe and the Speak-well Language Institute have entered into a contract. Tom Mothibe assisted his son, Thomas, to enter into the contract because Thomas is a minor, in other words younger than 18 years old, and can only enter into a binding agreement if assisted by one of his parents. Before entering into the contract, Thomas and the representative of the Speak-well Language Institute agreed on the terms of the contract. Now that the contract has been entered into, Thomas has a right to language classes and the Institute has a right to payment. So, it is clear that the matter of rights is involved here.

Thomas has a right (claim) to the performance (a personal right to performance) of the Language Institute. The Institute has a corresponding duty to perform. The Institute will perform by giving Thomas classes. The Institute has a right (claim) to performance by Thomas and Thomas has a duty to perform by paying the fees as agreed in the contract.

At the same time as Tom and Thomas Mothibe were at the Speak-well Language Institute, Jane and Bongiwe Mothibe were buying shoes. The shoe transaction also involved a contract. Therefore Jane had a right to receive the shoes and the shopkeeper had a right to payment for the shoes. This means that Jane had a personal right (a claim) to performance from the shopkeeper and the shopkeeper had a personal right (a claim) to performance from Jane. Both Jane and the shopkeeper had corresponding duties to perform: Jane’s duty was to pay the shopkeeper and the shopkeeper’s duty was to hand over the shoes. When Jane gave the shoes to Bongiwe, Bongiwe became the owner of the shoes. Therefore Bongiwe now has a real right (ownership) to her shoes.
Did you recognise the rights involved in the visit to the cinema? In the first place, personal rights are involved in the purchase of the tickets. Once again, the holders of the tickets have a personal right to performance by the cinema. In other words, they have a right to see the movie. The cinema has a duty to show the movie. Also, the cinema has a personal right to payment for the tickets and the family has a duty to pay for the tickets. However, the mere showing of the film also involves rights. Here the right is an immaterial property right (in this instance copyright) which vests in the movie company that made the movie. The cinema must enter into an agreement with the movie company to obtain permission to screen the movie.

Activity

2.2

Read the story given below and write down the rights that you recognise in it. What class of rights does each right belong to?

Francine Blom, who works for the Van der Merwe family, has not been to work since Monday. On Thursday she arrives and explains that she will not be able to come to work for the next three weeks. She shows Martie van der Merwe her right arm which is in a sling. In great detail, she tells Martie how the injury to her arm was caused.

Francine took a taxi home on Monday evening, as usual. During the trip, the taxi in which she was travelling was involved in a collision. The driver of the other vehicle did not stop at a red traffic light. Although some of the passengers were injured, Francine fortunately was not hurt. However, the new radio which she has just bought was smashed. Soon the police were on the scene and took various statements. Francine then decided to walk the rest of the way home, which was fortunately only a few streets. By this time it was nearly dark.

Francine was unaware of the fact that municipal workmen had been repairing the stormwater drain across the street from her house that day. As Francine crossed the street, she stepped into a deep hole left by the workmen and broke her arm. There was nothing around the hole to prevent someone from stepping into it. There were no red and white striped tape, no warning sign or light and Francine could not see the hole in the dark. Some friends heard her cry out and they helped her out of the hole and took her to the hospital. She had to spend the night in hospital.
You should at least have recognised the following classes of rights in our story:

- **Real right**: Francine buys a new radio. Francine’s **right** to the new radio that she bought is a **real right** and is called **ownership**.
- **Personal right**: Francine **buys** a new radio. She has a **personal right** (claim) against the seller of the radio, in other words a **right to delivery of the radio** by the seller of the radio.
- **Personal right**: Francine **pays** her **taxi fare**. She has a **personal right** (claim) against the taxi driver, in other words a **right to be transported by the taxi**.
- **Personality right**: Francine broke her arm when she stepped into the deep hole left by the municipal workmen. Francine’s **right to physical integrity** (right to her own body) was infringed.

**Activity**

2.3

(1) Read the following facts and indicate the **correct** statement:

John buys a second-hand motorbike from his friend Peter for R2 000. Peter hands the motorbike to John. John’s right to enter into a contract of sale with Peter is called

(1) a real right
(2) a personality right
(3) a human right
(4) a capacity
(2) Explain to a friend what the connection between “law” and “right” is.

(1) When you answered this question, did you remember that we often find the term “right” used differently in everyday language and even in legal language. In our facts John’s “right to enter into a contract of sale” is actually “a capacity” (ability) that the law gives to a person in accordance with his or her legal standing. Therefore, statement (4) is the correct statement.

(2) Note that the connection between “law” and “right” is twofold: Firstly, it is the law (which consists of various legal rules) that determines or prescribes what the content of a right is (in other words, what the powers of a holder of a right are). Secondly, the law prescribes what the limits to the content of a right are.

**Conclusion**

In this study unit we looked at different rights and how the law regulates these rights and balances the interests of individuals. But where does “the law” come from? How do we know what “the law” is? In the study units that follow we are going to look at the origins and sources of South African law.
In this study unit we will examine how South African law began. In this way we shall see how our law came to be what it is today. As a prerequisite for your study of study units 4 and 6, you need to have an understanding of the history of South African law.

PLEASE NOTE:

You will study the history of South African law in much more detail in the modules Origins and Foundations of South African Law.

Key question

After completion of this study unit, will you be able to explain the composition of South African law against its historical background?

The history of our law

The Department of Justice is organising a conference on “The Origins of African Legal Systems”. The aim of the conference is to find out how the different legal systems on the African continent began, and how they have developed to suit ever-changing circumstances. Jane is asked to give the introductory paper for the session on South African law. She decides to start with a short history of the development of our law. However, it is not easy to present such a short history of our law, because our law has developed over a period of more than twenty centuries. Jane has to find a way to tell the story of the most important historical moments in our legal history. She has to do this without including too much detail.
3.1 Activity

If you were attending the conference, what kind of information would you expect Jane to give in her paper on our legal history?

You would probably want to know where and when our law started. You would also want to know what happened after that and what influences were most important in developing and shaping the law. In the end, you would want to know what our law looks like today. Quite a lot for us to deal with, so let’s get started!

Feedback

You would probably want to know where and when our law started. You would also want to know what happened after that and what influences were most important in developing and shaping the law. In the end, you would want to know what our law looks like today. Quite a lot for us to deal with, so let’s get started!

Discussion

A three-layered cake

The history of our legal system goes right back to the Romans. It may be divided into three parts. Try to imagine a three-layered cake:

(1) Imagine the first layer to be the way in which Roman law came to form part of the law in Europe and, particularly, how Roman law became part of the law in the Netherlands. This law in the Netherlands was to become known as Roman-Dutch law.

(2) Imagine the second layer to be the movement of Roman-Dutch law from the Netherlands to the Cape.

(3) Finally, imagine the third layer to be the way that Roman-Dutch law developed after it had been brought from the Netherlands to the Cape. (When doing this we have to remember the importance of English law and indigenous or African customary law. This will be discussed a little later on.)
Let us begin with the first “layer”. Most people know something about the history of ancient Rome. They know how Rome took over much of the ancient world. In certain parts of the world today we can still see the ruins of the magnificent buildings and cities which the Romans built in ancient times. Latin, which was the language used in the Roman Empire, is still studied at schools and universities and is still used as part of our legal language. One of the most important things which the Roman Empire gave us and which has lasted until today was its legal system. Roman law, culture and authority were to play an important part in the lives of people in parts of what today is Europe, North Africa and Asia. This was particularly so during the time of the Roman emperors. The history of Rome started in about 753 BC and ended in 476 AD. (‘‘BC’’ means before the birth of Christ; “AD” stands for after the birth of Christ; as you probably know Christ was born during the time that Rome occupied the Holy Land, when Caesar Augustus was Emperor.)

When the Roman Empire was at its height, during the second half of the first century BC and for the first two centuries AD, it became the master of all the peoples around the Mediterranean Sea (and even in parts of England and Asia). During this period Roman civilisation and Roman culture reached their highest level of development. Roman law also reached its peak. This achievement of Roman law was the result mainly of the efforts of the Roman jurists. The Roman law that was applied during this period is usually referred to as “classical Roman law”.

At the end of the fourth century AD, the Roman Empire split into two parts: a Western Roman Empire which had Rome as its capital, and an Eastern Roman Empire (also known as Byzantium) which had Byzantium (also called Constantinople and nowadays called Istanbul) as its capital. After this period Roman law began to decline.

Various Germanic tribes from Northern Europe (like the Goths and Franks, the so-called “barbarians”) gradually took over the Western Roman Empire and in AD 476 a Germanic ruler came to the throne of Rome. As a result, Germanic customs replaced Roman customs and Roman law became weaker. Yet, Roman law remained alive and this fact, later on, helped to make easier the reception of Roman law into Europe. One of the reasons for this was that many of the Germanic rulers allowed their Roman subjects to be governed by Roman law. This law, however, was not the “pure” Roman law of ancient Rome, but Roman law which was influenced by Germanic law. Another, and perhaps more important, reason for the survival of
role of Roman Catholic Church: canon law

Roman law was the part played by the Roman Catholic Church. Roman law formed the foundation of church law. This church law later became known as canon law. Special church courts decided not only on church matters but also on a number of everyday matters such as questions regarding marriage and the validity of contracts. Canon law had an important influence on the development of modern law. It is, for example, because of the canon law that we have inherited that a mere agreement between two people can be enforced by law.

Eastern Roman Empire: Roman law survived successfully

The old classical Roman law survived more successfully in the Eastern Roman Empire (Byzantium) than in the Western Roman Empire. The emperor of the Eastern Roman Empire in the sixth century was called Justinian. He wanted his empire to be as glorious as the old Roman Empire and he wanted to bring order to the legal system. In an effort to achieve this he decided to “codify” Roman law as a whole. What “codify” meant was that 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. This collection of Roman law by Justinian was called the Corpus Iuris Civilis. By codifying the law, Justinian kept Roman law alive in the Eastern Roman Empire, although this collection of Roman law did not have much influence in the Western Roman Empire at that time. However, the fact that the Roman law had been collected and written down made it possible for Roman law to be received in Europe in about the 12th century AD.

Justinian’s codification: the Corpus Iuris Civilis

In the 12th century there was a renewed interest in Roman law. Medieval universities like the University of Bologna in Italy started studying Roman law as contained in Justinian’s codification. It was because of these medieval universities that Roman law spread throughout Europe. However, it was really only later in the 15th, 16th and 17th centuries that the true reception of Roman law took place in Europe. It is the reception of Roman law in the Netherlands that is particularly important for our story.

12th century: renewed interest — Roman law studied at medieval universities

Roman law was received into Europe at a time when the existing legal systems in Europe were unsystematic and unscientific. These systems were also fragmented. In other words, there were many different kinds of systems. Those medieval jurists who had studied Roman law knew that a legal system such as Roman law with its scientific methods was extremely desirable. Soon these jurists began to look at the laws of their own countries through “Roman eyes”. In this way they could see how, what was lacking in their own legal system, could be improved through the use of the solutions contained in Roman law.
In the whole of Western Europe, therefore, the use of Roman law to fulfil the needs of everyday legal practice, proved to be a force which united the legal systems of the different European countries. At the risk of oversimplification, we may say that if a particular problem, in a particular place or region, could not be solved appropriately by a rule of the customary law of that particular place or region, or if there was no such rule, jurists would look to Roman law for a solution. Roman law, as explained by the medieval jurists, would then become merged (joined) with the existing law. In this way, most of what was contained in the codification of Justinian, was received in Europe. **In the Netherlands it was the reception of Roman law that caused the creation of what was called Roman-Dutch law.** In the same way, Roman-French law, Roman-German law, and so on, were created. In this way a common Western legal tradition began in Europe. In the Netherlands various jurists wrote commentaries on Roman-Dutch law. These commentaries were used, for example, as notes for students or as guides to legal practice. **Some of the important Roman-Dutch jurists, who are also known as the old authorities, are Hugo de Groot and Johannes Voet.** Their writings are still used today as a source of reference in our courts.

(2) The second layer: Roman-Dutch law comes to the Cape

Most people know the story of how Jan van Riebeeck, an employee of the Dutch East India Company, came to the Cape in 1652. In the early days of the business of the Dutch East India Company at the Cape, the affairs at the Cape were regulated in terms of the *Artyckelbrief*. The *Artyckelbrief* was a document that set out the rules and regulations governing the service of those employees of the Company who were on official duty in the Company’s overseas territories. It was only later when the Cape became a settlement that the lives of the people living there were governed by legislation or *placaeten*. *Placaeten* were like posters, which were stuck on the walls of public places. A collection of these old *placaeten* are still to be found today in the archives in Cape Town. The following are examples of *placaeten*: a *placaet* which stated that civil servants who did not go to church were to be punished (if this offence was committed three times, the person who committed it would have to spend one year, in chains, in the Company prison); a *placaet* which prohibited anyone from employing barmaids; and a *placaet* which stated that when you bought a plot of ground you had to build upon it within one year. (This last-mentioned one is not very different from our modern-day municipal rules and regulations!)

If we look at the records of old Cape court cases, we will see that when there
were disputes, Roman-Dutch law, as discussed by the old authorities, was consulted. We mentioned above that the writings of Hugo de Groot and Johannes Voet are still used today in our courts. This has become the practice of our courts throughout our history and in this way Roman-Dutch law has become part of our legal tradition. It is this Roman-Dutch law that still today forms the backbone of most of our law. Because we have this tradition, we are able to make use, scientifically, of the knowledge and wisdom of all the great minds who have written about and practised law for more than two thousand years. More importantly, our Roman-Dutch legal system makes it easy for modern South African lawyers to communicate and interact with lawyers in many countries across the world. The reason that they can do this is that 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. In addition, Roman law is still studied by law students, not only in the countries we have just mentioned, but also in other countries in Africa, Asia (notably the People’s Republic of China) and in the Russian Federation, as well as in the United Kingdom, Australia, New Zealand and in some of the states of the United States of America.

(3) The third layer: English law and African customary law

The British occupied the Cape, first in 1795 and then later in 1806. This resulted in the reception of English law. The British government decided that it would not deliberately change the law of its new colony but, in spite of this decision, 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. For example, the British Government slowly got rid of the existing court structure and replaced it with the English court structure. English became the official language. It was 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 the Roman-Dutch authorities when deciding or resolving a legal problem. English law was received more formally through legislation. For example, the English law of procedure and evidence and the jury system were received at the Cape. (Trial by jury in South Africa was finally abolished in 1969 although today there are those who feel that this system should again be instituted.) The English law relating to insolvency and company law was also received at the Cape. British influence was also felt in legal development outside the Cape (1838–1910). English law was increasingly received in Natal and, after the annexation of the Transvaal and Free State Republics by Britain in the 19th century, English influence spread throughout the rest of South Africa.
Indigenous African law/African customary/indigenous law

When Jan van Riebeeck arrived at the Cape in 1652 there were many different black tribes in Southern Africa who lived according to their own laws and cultures. These laws are called indigenous law or African customary law. They were unwritten laws and it was only during the second half of the 19th century that these laws were officially recognised by the colonial authorities. Today, indigenous law is still largely unwritten. In KwaZulu-Natal, however, much of the indigenous law is now contained in a code which is formally recognised. It has also been recognised in various statutes (legislation). In the past, indigenous law was recognised as a special law which could be applied only to blacks. However, this has changed. In terms of the Constitution of 1996 (see study unit 7), the courts must apply indigenous law where it is applicable. We must also mention that indigenous law is community based, and that the role the group plays is a very important feature of this legal system. At the same time, indigenous law regulates individual relationships between members of the family, rather than relationships between individuals and the state. Because it regulates relationships between members of the family, it is a dynamic system, that is, it is capable of change. This fact has not always been appreciated by Western lawyers.

The Constitution

In 1996, the first democratic Constitution of the Republic of South Africa was adopted. This is an important event in the development of the history of our law. We will give more time to the Constitution in study units 7 to 10.

3.2 Activity

Make a short summary of the most important influences in our legal history. Then use your summary to complete the diagram that follows.
The story of our law is a unique and an interesting one. You will find this brief background of our legal history very useful when we turn to the different legal families and sources of law in the following study units.
There are many different legal systems in the world. In this study unit we will deal with the South African legal system as part of a world legal order, consisting of different legal systems.

PLEASE NOTE:

You will study the different legal families in the world in much more detail in the module Comparative Law.

Key questions

After you have worked through this study unit, will you be able to

- show why the various legal systems in the world are grouped together in different legal families or different legal cultures?
- show how the various legal systems in the world are grouped together in different legal families or different legal cultures?
- explain why the South African legal system is known as a hybrid (mixed) legal system?

The Van der Merwes play cards

The Van der Merwes own a caravan. Every December they take their caravan to a caravan park in Ballito, and spend their holidays by the sea. If it rains, which it often does, they amuse themselves by playing cards inside their cosy caravan. One of their favourite card games is called “Happy Families”. This is a card game for four players.
The game is played with a pack of 54 cards. Each card represents a member of a “family”. The family members are the father, mother, daughter, son, grandfather and grandmother. There are nine “families” in the deck (pack) of cards. Five of the nine families are the Baker family, the Butcher family, the Brown family, the Longfellow family and the Short family. All of the Baker family can be recognised on the cards because they wear a baker’s hat. Members of the Butcher family each wear a striped apron and the Brown family members are all dressed in the colour brown. The Longfells are tall and skinny and the Shorts are dumpy and fat.

It is a custom in the Van der Merwe household for Karel to shuffle the cards. Then Martie usually deals the first game. She deals each player seven cards. The winner is the first person who manages to collect cards that make up two complete families. This is done by “buying”, “selling” and “discarding” (getting rid of) various cards during the game.

Classification of legal systems

We can think about the simple game of “Happy Families” in another way. We can see it as reflecting (representing) the different types of people in the world (different nations and different cultures). Perhaps we can say that the simple game of “Happy Families” reflects the reality of cultural diversity in the world. In other words, it is a reminder of the fact that the peoples of the world are made up of a lot of different cultural groups. We have seen in this card game how certain characteristics serve to identify certain groups. We saw how the Butcher family is identified by the striped butcher’s apron, and the Baker family by the white baker’s hat, and so on. In the same way, each different cultural group in the world can be recognised by its particular way of life. We can speak of a Greek culture, an Italian culture, a Jewish culture, or an African culture. We even see how the Greek legal system reflects the Greek culture and how the Italian legal system reflects the Italian culture. In fact the different legal systems have what we might call a “cultural stamp”.

Over the years various scholars have suggested standards we should use, or criteria, of grouping together (classifying) the different legal systems in the world into families or legal cultures. Those of you who plan to do the module for comparative law will learn more about this later in your studies.
For now, however, we shall mention only some of the criteria that have been suggested for the purpose of grouping (classifying):

- **style and technique**
  - style and technique of the particular system (these refer to the sources of law within a particular system and the importance or weight that different sources have)

- **ideology**
  - the philosophy (system of beliefs) or ideology on which a particular system is based (for example, we could say that the system of values in the Western world is based on the rights of the individual and that the system of values in the African systems is based on the rights of the community)

- **economic elements**
  - economic elements (these are important, for example, if we have to decide whether a particular legal system belongs to the socialist family, or the capitalist system, because these systems are based on certain economic theories)

**Most important legal families**

If we use the above criteria (there are other criteria — remember, we said that we would only mention some criteria) we can identify three major legal families:

1. **the Romano-Germanic or civil-law family**
2. **the Anglo-American or common-law family**
3. **the Socialist family**

**(1) Romano-Germanic or civil-law family**

Some of the legal systems grouped within the Romano-Germanic or civil-law family are the French, German and Dutch legal systems. Roman law or Roman legal science played a very important role in the development of these legal systems. Thus, we can say that the part played by Roman law is the most important characteristic common to legal systems within this group.

**(2) Anglo-American or common-law family**

The legal systems in England and in America belong to the Anglo-American or common-law family. Australia and New Zealand also belong to this family because they were colonised by England who brought its legal system with it. One of the most important characteristics of the legal systems belonging to this family is case law. While these legal systems were developing, the decisions taken in court cases were recorded. These decisions are of the utmost importance and form part of what we call common law.
(3) Socialist family

The legal systems of the former Union of Soviet Socialist Republics (USSR) and Communist China belong to the socialist family. The development of these legal systems, like other legal systems, has been influenced by various historical and political elements. The socialist system of beliefs (ideology) is based on the principle that the law is there to serve social and economic policies, in other words social and economic policies come first. The part played by the doctrine (ideology) of Marxism (called “Marxism” because it was founded by Karl Marx [1818–1883] who was the founder of modern communism) is an important characteristic of socialist systems.

Other legal families

There are many other legal families that can be identified. For purposes of this module we only look at a few of these other legal families:

(1) Religious legal family

This grouping includes the Islamic, Hindu and Jewish legal systems. In general, these systems have their origin in religious sources.

(2) Indigenous legal family

A further family of law consists of the African or indigenous legal family. Legal systems in this grouping mainly comprise unwritten customary laws. The focus is on the community in these systems.

(3) Hybrid or mixed legal family

A very important grouping which we believe forms a separate family or category of legal systems, is the grouping of hybrid (in other words, a mixture of various parts) or mixed legal systems, like those found in South Africa, Scotland and Sri Lanka.

Let us now consider why our own South African legal system is classified as a hybrid or mixed system.

You will remember that we explained in study unit 3 that the South African legal system is made up of various parts. You may remember that we spoke of a “three-layered cake”. The first layer was the Roman-Dutch layer, and we gave you the historical reasons for this. We explained that the Roman-Dutch law which was applied in the early days of the Cape settlement had a
strong Roman-law basis and is part of the civil-law tradition. An example of this in South African law is the law relating to servitudes (see study unit 2).

English law

Another component (part) of the South African legal system is the English-law layer which became part of the South African system after the British occupied the Cape in 1795 and then later in 1806. Therefore, our law has certain common-law features (typical of English law), for example with regard to our rules of procedure in private and criminal cases. Much of our law relating to companies has come from the English-law tradition, and, as mentioned previously, we see evidence of the common-law tradition in the importance of decided cases and the precedent system (see study unit 6).

Indigenous African law/
African customary law/
indigenous law

Finally, there is African or indigenous law. We have told you already in study unit 3 that indigenous law was initially not recognised as part of the general South African legal system. It was a special law which only applied to black people. It did not form part of our common law. Now, however, it has been recognised by our Constitution and the courts have to apply it where it is applicable. Indigenous law now truly forms part of the South African system. Furthermore, when interpreting the Bill of Rights, our Constitutional Court has referred to the African value system and to concepts such as ubuntu. We have no doubt that the influence of the African or indigenous value system will be an important element in future legal development.

Activity 4.1

In the diagram that follows, name the most important features of the different legal families and in the case of each legal family, give examples of legal systems that belong to the family. Give reasons why South African law is classified as a hybrid system.
<table>
<thead>
<tr>
<th>LEGAL FAMILIES</th>
<th>MOST IMPORTANT FEATURES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Romano-Germanic/civil-law</td>
<td>All these systems have a <strong>strong Roman-law basis</strong> since Roman law played a very important role in their development. Examples: the French, German and Dutch legal systems.</td>
</tr>
<tr>
<td>Anglo-American/common-law</td>
<td><strong>Case law</strong> played a very important role in the development of these legal systems. Court decisions still play an important part in their application. Examples: England, America, Australia and New Zealand.</td>
</tr>
<tr>
<td>Socialist</td>
<td></td>
</tr>
<tr>
<td>Religious</td>
<td></td>
</tr>
<tr>
<td>Indigenous</td>
<td></td>
</tr>
<tr>
<td>Mixed/hybrid</td>
<td></td>
</tr>
</tbody>
</table>
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.

These systems have their origin in religious sources. Examples: the Islamic, Hindu and Jewish legal systems.

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.

Various components or legal systems played a role in the development of these legal systems. Examples: South Africa, Scotland, Sri Lanka.

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.

It is important to realise that we form part of a greater world legal order. We trust that you now know how we fit into this global order.
This study unit introduces you to the different divisions (or branches/fields) of South African law which will be dealt with in more detail in other more advanced modules in the LLB curriculum. We divide the South African law into two main divisions, namely public law and private law, and we explain this division. We also explain how public law and private law are further divided into different divisions, and some of these divisions even in subdivisions.

Key questions

After you have worked through this study unit, will you be able to

- distinguish between the two (major) main divisions, public law and private law?
- name and describe each of the divisions of public law, and to identify each division in everyday real-life situations?
- name and describe each of the divisions of private law, and to identify each division in everyday real-life situations?
- name and describe the other areas of law, and to identify them in everyday real-life situations?
- set out schematically (that is in a diagram) the divisions and subdivisions of public law and private law, as well as the other areas of law?

Setting the Scene

The nuisance of falling leaves

Mr Brown’s hobby is his garden. He fills it with beautiful flowers and shrubs. He keeps the grass cut and the edges of the lawn neatly trimmed. He is very fussy about his swimming pool and every time he walks through his garden, he takes a net and removes any leaves that may be floating on
the water. However, Mr Brown has a problem. The branches from a tree in his neighbour’s garden hang over Mr Brown’s wall and over his pool. The leaves from these branches fall into the swimming pool, get sucked into the pool filter, and as a result of this the filter is constantly being blocked by the leaves. Mr Brown asks his neighbour, Mr Green, to cut down these branches, but Mr Green refuses to do so. Mr Brown approaches Jane Mothibe to find out if the law can help him in any way. During Mr Brown’s first short visit to Jane Mothibe’s offices, Jane asks him for his personal details: his name, address, et cetera. She also asks him for the facts of the case. She tells Mr Brown that he probably has a case. In other words, there is probably a legal remedy to his problem. She tells him, however, that she will have to do some research, and arranges for him to come and see her the following week.

**Discussion**

**The main divisions of South African law**

Jane can give Mr Brown advice only when she is sure of the legal position. In other words, she will have to “find the law” that is relevant to a situation such as the one Mr Brown has described. An attorney such as Jane Mothibe will find the task simple if she knows which particular “field” or “branch” of law is involved. She can identify the particular branch or field of law by looking at the divisions and subdivisions of our law and deciding which division or subdivision fits the facts. The reason our law is divided up into certain divisions is to make it easier to deal with and to understand.

**“field” or “branch” of law**

Two of the major (main) divisions in our law are “public law” and “private law”. Ulpian, the famous Roman jurist of the third century AD, defined these two divisions as follows: “Public law is that which relates to the welfare of the Roman State, private law that which relates to the welfare of particular individuals. For certain matters are of general, whereas others are of private, importance.”

**Public law, then, regulates relationships that are concerned with public interests (that is, general interests or the interests of the community).** If someone commits a crime, this act goes against the interests of the community and must be punished. Such an act becomes the concern of public law. If the same act harms (infringes) the interests of a private person, the act becomes the concern of private law also. The person whose interests have been harmed will be able to look for a solution by means of a private-
law remedy. If A steals B's property, A will be prosecuted and punished by the state because theft is not in the public interest. This will be done in terms of public law. In terms of private law, B will also be able to claim compensation for the damage he has suffered. He will institute a private-law action against A, because private law ensures that his individual interests are protected.

Public law deals with the relationship between the state and the subject of the state (the citizen). Private law deals with the relationship between individual and individual. For example, a husband and wife are the parties to the contract of the relationship between them (their marriage) and this relationship is governed by private law.

The divisions of public law

(1) **Public international law.** Public international law is concerned with relations between states (eg the law of war and peace, the law of international organisations such as the United Nations and the law of international treaties).

(2) **Constitutional law.** Constitutional law is concerned with the institution of the state (how the state is formed) and its organisation. It also governs the powers of the organs of state (organs such as parliament, the courts, the cabinet, and so on).

(3) **Administrative law.** Administrative law controls the administration of the state in general. It determines the way in which state bodies, state departments and numerous boards (eg the licensing board) as well as ministers should exercise their powers, particularly in their relationships with citizens. The rules of administrative law try to ensure that these bodies or people do not exercise their powers unfairly or arbitrarily (that is without motivation).

(4) **Criminal law.** Criminal law states which acts are crimes and what the penalties (punishments) are that are imposed by the state for the commission of these crimes.

(5) **Law of procedure.** The law of procedure may be divided into three subdivisions:

(a) **Law of civil procedure.** There is a certain process (or method) by which private-law disputes are brought before the courts. The rules of civil procedure are concerned with this course of action. These rules prescribe, for example, how
the summons must be served on the defendant, how and when pleadings must be drawn up and lodged, what the jurisdiction of each court is, the fact that each party must have an opportunity to be heard, and so on. You will learn more about this later on in your LLB studies.

(b) **Law of criminal procedure.** Criminal procedure is concerned with the way in which someone who is suspected of having committed a crime is prosecuted and tried.

(c) **Law of evidence.** The law of evidence is concerned with how evidence must be presented before the court.

**The divisions of private law**

1. **Law of persons.** The law of persons is concerned with persons as subjects of the law: a legal subject’s beginning (how the person comes into being), a legal subject’s status (legal position), and a legal subject’s end (how a person comes to an end in the eyes of the law).

2. **Family law.** Family law is concerned with the legal relationship between spouses, the legal relationship between parent and child and the legal relationship between a guardian and the person who is the subject of the guardianship. In other words, family law governs marriage and its consequences, as well as relationships within the family (for example, relationships between parents and children).

3. **Law of personality.** The law of personality is concerned with what we call “personality rights”. We have rights, for example, as far as our body, our reputation, and our dignity are concerned. If someone publishes defamatory statements about us (that is statements about us that are bad or perhaps untrue and that are likely to damage our reputation), he may be forced in terms of the law of personality, to pay a sum of money to us as satisfaction.

4. **Law of patrimony.** The relationships in terms of this law concern persons and their means. When we speak of “means”, we are speaking about whatever a person has that can be given a value in money. Law of patrimony covers a very wide field and may be subdivided as follows:

(a) **Law of things (law of property).** Things are classified as “movables” or “immovables”. Movables are things that can be moved from one place to another without being damaged, for example a book, a car, or even a wooden
house which is not built into the ground. Immovables are things that cannot be moved and that are fixed, like land and what is attached to it, for example a house.

Ownership is considered to be the most comprehensive right in property (the right that includes everything) and is the most complete real right (see study unit 2 on the classification of rights) because you can do whatever you like with your property. Note, however, that this very comprehensive right may be limited in certain circumstances: You may not exercise your right in such a way that it infringes upon the rights of other legal subjects. For example, you may not have a panel-beating business in a suburban area, because your neighbours have a right to live in peace and quiet on their properties, and you will be infringing that right by the noise you make.

law of succession  
(b) Law of succession. The law of succession is concerned with who inherits from a person who dies, in other words who receives the property of the deceased. The person who dies (the deceased) may have written a will before she died, and stated in the will what is to be done with her property, that is who is to inherit her property.

If there is no will, the deceased’s property will be given away in accordance with the rules of what is called “intestate succession”. These rules also come into operation when someone has not left a valid will.

law of obligations  
(c) Law of obligations. An obligation is a legal relationship between two (or more) parties in terms of which one party has a right against another party for performance and the other party has a corresponding duty to perform. There are three ways in which obligations arise, namely agreement (ex contractu), delict (ex delicto) and unjustified enrichment.

Law of obligations can therefore be further divided into three subdivisions. Let us briefly look at each of these subdivisions:

law of contract  
- Law of contract. A buyer can, for example, claim delivery of the thing bought and the seller has a duty to deliver it.

law of delict  
- Law of delict. If Tom breaks a valuable statue in my garden, I have a right to claim compensation. Tom would, for example, probably either have to replace the statue or pay me for it. Tom has a duty to compensate me.
Unjustified enrichment. In accordance with our law, no one may be enriched (increase her wealth) without justification, at the expense of another. What this means is that there is no valid legal ground on which one individual can obtain a benefit at the expense of another. You will learn more about this later on in your studies.

Other areas of law

Mercantile law (commercial law) is a large and very important field of law. It is not purely public law, and it is not purely private law. It is a bit of both. It includes all the law which relates to the broad field of commerce: company law, insolvency, negotiable instruments, tax law and so on.

Labour law has become a very important branch of law today which has connections with private law and public law. It is concerned with the relationships between employer and employee and includes all labour legislation.

Conflict of laws is concerned mainly with the question of which private-law system applies if more than one private-law system is involved. For instance, if A and B enter into a contract in Finland and the case then comes before a South African court, which private-law system must be applied: the law of Finland or the law of South Africa? International conventions between states may also play a role in conflict of laws and therefore private as well as public law become involved in conflict of laws.

Legal philosophy (jurisprudence) is the field of law which looks at law from a philosophical perspective. Legal philosophers ask questions such as “What is law?” or “What is the function of law?” or “What should the function of the law be?” Legal philosophers differ in their answers on these questions. Therefore different perspectives have emerged, such as positivism, the natural-law approach, feminism and Critical Legal Studies. Legal philosophy is important because through a philosophical evaluation of law, a better understanding of the law and a critical approach towards it is acquired, which can be of value in determining the need for legal reform.
Activity 5.1

Draw a diagram in which you set out schematically the divisions and subdivisions of public law and private law, as well as the other areas of law.
This is what your diagram setting out the divisions and subdivisions of public law and private law, as well as the other areas of law should look like:

<table>
<thead>
<tr>
<th>PUBLIC LAW</th>
<th>PRIVATE LAW</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Internation al law</td>
<td>(1) Law of persons</td>
</tr>
<tr>
<td>(2) Constitutional law</td>
<td>(2) Family law</td>
</tr>
<tr>
<td>(3) Administrative law</td>
<td>(3) Law of personality</td>
</tr>
<tr>
<td>(4) Criminal law</td>
<td>(4) Law of patrimony</td>
</tr>
<tr>
<td>(5) Law of procedure</td>
<td>(a) Law of things</td>
</tr>
<tr>
<td>(a) Civil procedure</td>
<td>(b) Law of succession</td>
</tr>
<tr>
<td>(b) Criminal procedure</td>
<td>(c) Law of obligations</td>
</tr>
<tr>
<td>(c) Law of evidence</td>
<td>(i) Law of contract</td>
</tr>
<tr>
<td></td>
<td>(ii) Law of delict</td>
</tr>
<tr>
<td></td>
<td>(iii) Enrichment</td>
</tr>
</tbody>
</table>

**Other areas of law**

| (1) Mercantile law |
| (2) Labour law |
| (3) Conflict of laws |
| (4) Legal philosophy |

5.2

When you have worked carefully through this study unit, read the scenario in *Setting the scene* at the beginning of the study unit and then answer the following questions:

(1) Which major (main) division of law will Jane have to consult in order to advise Mr Brown? Give a reason for your answer.

(2) Which division and subdivision of your answer in (1) will Jane have to consult in order to advise Mr Brown? Give a reason for your answer.
Feedback

(1) The main division of the law that Jane will have to consult in order to advise Mr Brown, is private law. She will have to consult the private law since private law deals with the legal position of individuals — in this case, the legal position between Mr Brown and Mr Green.

(2) The division of private law that Jane will have to consult in order to advise Mr Brown, is the law of patrimony, more specifically the subdivision, the law of things or the law of property. She will consult the law of patrimony since the law of patrimony concerns persons and their means, or their things with a value in money. She will specifically consult the subdivision of the law of things, because the legal problem deals with the property (movable and immovable things) of Mr Brown and Mr Green.

Activity

5.3

When you have read through the story and looked at all the facts, try and identify the specific divisions and subdivisions of law (discussed in this study unit) which may apply in this situation. Also give the major divisions into which these divisions and subdivisions fit.

One Saturday morning, Martie van der Merwe’s neighbour, Ann Steel, goes to the hairdresser to have her hair done. Her husband, Robin Steel goes with her. Robin watches the hairdresser work on his wife’s hair for about half an hour and then gets bored. He decides to go for a walk. He enters a sweetshop owned by Bob Zwane. Robin walks around for a bit, examining the sweets, and then he takes a handful of sweets and puts them in his pocket. He tries to leave without paying. When Bob tries to stop him, Robin gets very angry and hits Bob. Ann hears all the noise and she can hear Robin shouting. She rushes from the hair salon and runs into the sweetshop. She demands an explanation for the fighting and Bob tells her what happened. When she hears what Robin did she starts to scream at him that she wants a divorce. She beats him round the head with her handbag. Bob becomes a little frightened and tries to calm her down. But she just swears at him and bangs the till with her handbag until the till breaks. Just then, Kgomotso Sebenza, Ann’s boss, happens to be passing by. She is amazed to see her employee, who is totally out of control, attacking her husband, Robin, and bashing the till with her handbag. She enters the shop and asks Bob what is happening. Bob tells her the story. When Kgomotso hears that Ann is married to a thief she fires her immediately. By now a curious crowd has gathered outside the shop. Ann is angry and starts shouting out to the crowd that Kgomotso has been stealing money from the government and that she works as a prostitute at night. Ann knows that she is telling lies, but
she is so angry about being fired that she wants to ruin Kgomo'tso’s reputation.
Public law

Criminal law

— Robin Steel may be guilty of the crime of theft because he stole the sweets.
— Robin Steel may be guilty of the crime of assault because he hit Bob Zwane.
— Ann Steel may be guilty of the crime of assault because she hit her husband, Robin.
— Ann Steel may be guilty of the crime of damage to property because she broke Bob Zwane’s till.


Law of civil procedure

Civil procedure may apply if a civil case is brought to court.

Law of criminal procedure

Criminal procedure may apply if a criminal case is brought to court.

Law of evidence

Evidence may apply if a matter is brought to court and evidence has to be put before the court.

Private law

Family law

Ann Steel is married to Robin Steel and she wants to divorce him.

Law of personality

— Ann Steel says things about Kgomotso Sebenza which are not true and which may damage her reputation.
— Ann Steel swears at her husband and this may infringe upon his dignity.

Law of patrimony: Law of property (Law of things)

Besides the criminal case that the state may bring against Ann Steel for
damaging Bob Zwane’s till, Bob may also be able to bring a civil case in order to claim compensation for the damage to his till which is his property. This civil case would involve the law of things.


**Law of contract**

Ann Steel has contracted with the hairdresser for a hairdo. The hairdresser has an obligation to do Ann’s hair and Ann has an obligation to pay her.

**Law of delict**

Instead of the civil case in terms of the law of property, Bob Zwane can institute a civil case against Ann Steel in terms of the law of delict to claim compensation for the damage to Bob’s till which is his property.

**Within public law and private law**

**Labour law**

Labour law will apply because of the employee-employer relationship between Ann Steel and Kgomotso Sebenza. Labour law will determine whether Ann Steel can be fired by Kgomotso Sebenza under these circumstances.

**Conclusion**

You should now have a good idea of the different areas of the law and where they fit in. We have just given you a very basic indication of what each field deals with. You will learn more about these different fields of law in your further LLB studies. In the next study unit you will be introduced to the sources of South African law. The law that is relevant to the different divisions of law can be found in these sources.
In this study unit you will be introduced to the sources of South African law. In other words, you will learn where to find South African law.

Key questions

After you have worked through this study unit, will you be able to demonstrate

- that you have a basic understanding of all the sources of South African law, in particular the authoritative sources of law?
- that you understand the use of authoritative sources of law in practical examples?

Finding the law

Thomas has been chosen to represent his school, Suburbia High School, at the inter-high debate. The subject of the debate is the death penalty. He is to speak against the death penalty. Thomas knows what the moral arguments are against the death penalty. (Go back to study unit 1 and read again what we said about legal norms and moral norms.) He is able to state clearly the moral arguments against the death penalty, but he is not sure what the legal arguments might be. Thomas is very lucky that his mother Jane is an attorney and that he is able to discuss the legal position with her.

Thomas will use moral arguments, and in doing so, he will discuss the fact that society usually considers life to be sacred. Most people believe that it is wrong to take a life and most religions teach this. Thomas does not have any
problem about stating these arguments. However, Thomas needs his mother’s help to work out what the legal arguments are.

The representatives in the debate who are arguing against Thomas might say the following, for example:

(1) In order to protect society it is sometimes necessary to take another person’s life.

(2) If the punishment is severe for the serious crime of murder, this will prevent criminals from committing this crime.

When Thomas has finished giving his moral arguments, he will then use legal arguments. His legal arguments will relate to the law. We have to ask ourselves at this point what the legal position is regarding the death penalty (the death penalty is also called “capital punishment”). But Thomas cannot possibly know what the legal position is unless he knows what the law says about murder and capital punishment, and he cannot know what the law says unless he knows where to find this law. Here, Jane, who is helping Thomas with the legal arguments, explains to Thomas how to find the law that deals with murder and capital punishment. In the first place, the legal rule that murderers and other criminals should be put to death was already a legal rule from the earliest times, centuries ago. For example, this legal rule was already part of the law that governed the lives of Dutch settlers at the Cape in 1652. This meant that it was part of what is called our “common law”. (You will learn more about the meaning of “common law” later on in this study unit.)

As you know, we now have our Constitution (see study units 7 to 10) that was drawn up by our law makers and passed (or promulgated) by parliament. This Constitution is the supreme law of our country. We have to go to the Constitution to find out if putting people to death for serious crimes is still legal, and the part of the Constitution to which we will go is known as the Bill of Rights. One of the things which the Bill of Rights states is that everyone has a right to life and that everyone has the right not to be treated or punished in a cruel, inhuman or degrading way.

*Everybody has the right to life.*

*Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.*

Thomas is still confused even though his mother, Jane, has explained about looking for an answer in the Constitution. He still does not know how he will argue about the legal position in the debate. He asks his mother the
following question: “Does the fact that the Constitution protects the right to life mean that the death penalty or capital punishment is against the law?” Jane tells Thomas that to answer this question they will have to find out whether any case about this matter has been decided by the courts.

As it turns out, the Constitutional Court has considered the question of the death penalty. Luckily for Thomas, Jane has a report of this case in her office. The case is *S v Makwanyane* and it was decided in 1995 by our Constitutional Court. In the activity that follows we are going to pretend that we are Thomas, and that we have to find out what the legal position is as far as the death penalty is concerned.

### 6.1

Read the summary of *S v Makwanyane* below and then answer the question that follows:

**PLEASE NOTE:**

You need not study the contents of this case for the examination. You need only study the name of the case and the decision of the court as given in the feedback.

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. See study units 7 to 10 for more information on the Constitution.

*S v Makwanyane*

The actual judgment in this case was quite long, and for this reason we are going to use the summary for purposes of this activity.

Two accused had been convicted on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. On each of the murder counts they were sentenced to death. On appeal to the Appellate Division the appeals against the convictions were dismissed but the further hearing of the appeals against the death sentences was postponed until such time as the Constitutional Court should determine the constitutionality of the death sentence. Although there had been no formal referral of the question to the Constitutional Court, the Appellate Division’s order...
was regarded as impliedly referring the question. In any event it was essential to resolve the issue without further delay. No executions had taken place in South Africa since 1989. In the interim several hundred persons had been sentenced to death and were waiting on death row for the issue to be resolved. Most of them had been sentenced more than two years prior to the hearing.

Counsel representing the South African Government informed the Court that the Government accepted that the death penalty was a cruel, inhuman and degrading punishment and that it should be declared unconstitutional.

It was contended on behalf of the two accused that imposition of the death penalty for murder was a cruel, inhuman or degrading punishment, which was also inconsistent with the right to life entrenched in the Constitution. It was incapable of correction in the case of error. It negated the essential content of the right to life. Furthermore, its application could not but be arbitrary.

The Attorney-General contended that the death penalty is a necessary and acceptable form of punishment which is not cruel, inhuman or degrading within the meaning of section 11(2) of the Constitution. If the framers had wished to make the death penalty unconstitutional, they would have done so expressly. This indicated an intention to leave the issue to Parliament to decide. Abolition or retention was a matter for Parliament to decide and not for the Government. The death penalty was recognised as a legitimate punishment in many parts of the world. It served as a deterrent to violent crime. It met society’s need for retribution in the case of heinous crimes. What is cruel, inhuman or degrading depends on contemporary attitudes of society. South African society regarded the death penalty as an acceptable form of punishment. Therefore it was not cruel, inhuman or degrading within the meaning of section 11(2). To the extent that it infringed fundamental rights, the limitation of such rights was justified in terms of section 33 of the Constitution. The death penalty met the sentencing requirements for extreme cases more effectively than any other sentence. Necessarily it would have a greater deterrent effect than would life imprisonment. It ensured that the worst murderers would not be able to endanger the lives of others in the future. Its retention was required in the light of the prevailing high level of violent crime. The fact that violent crime had increased considerably over the past five years while there had been a
moratorium on executions indicated that imprisonment was not a sufficient deterrent. Public opinion supported the retention of the death penalty.

As regards the Attorney-General's submission that abolition or retention was an issue for Parliament to decide, Chaskalson P in the main judgment observed that there was a specific reason why it was left to the Constitutional Court to decide the issue. The written argument of the South African Government dealt with the debate which had taken place in regard to the death penalty before the commencement of the constitutional negotiations. The South African Constitution was the product of the multiparty negotiations. Capital punishment had been the subject of debate during the constitution-making process. The failure to deal expressly with the subject in the Constitution was not accidental. The issue had remained unresolved, and it was decided to leave to the Constitutional Court the task of deciding whether pre-constitutional law making the death penalty a competent sentencing option was consistent with the fundamental rights provisions of the Constitution. This appeared from the information which had been placed before the Court in the written argument of the South African Government. It was permissible to take that background information into account as part of the context within which the Constitution should be interpreted. The information was not in dispute and no reason existed to exclude the use of such evidence in construing the South African Constitution. While the rules of interpretation of statutes precluded the use of Parliamentary material as an aid to interpretation, this exclusionary rule had been relaxed in certain jurisdictions. It was not necessary to decide whether our courts should follow suit. The Court was here concerned with interpretation of a constitution as distinct from ordinary legislation. In countries where the constitution was the supreme law, it was not unusual for courts to have regard to the circumstances existing at the time of adoption of the constitution in considering its provisions. In many instances reference had been made to historical background and the deliberations preceding the adoption of a constitution in construing its provisions. Such background evidence was useful in order to see why particular provisions were or were not included. It was unnecessary for purposes of the instant case to lay down principles governing the admissibility of such evidence. Where — as in the instant case — the background material was not in dispute and was relevant to the reasons for including or not including particular
provisions in the Constitution, it could be taken into account in interpreting provisions of the Constitution.

Section 11(2) prohibited “cruel, inhuman or degrading treatment or punishment” but there was no definition in the Constitution of what was to be regarded as such. In *S v Zuma* 1995 (4) BCLR 401 (SA) the proper approach to the interpretation of the fundamental rights provisions had been held to be one which was “generous” and “purposive”, giving expression to the underlying values of the Constitution whilst paying due regard to the language that had been used. Without seeking to qualify what had been held in *Zuma’s* case, it was also necessary that section 11(2) should not be construed in isolation but in the light of other related provisions of Chapter 3 and also the history and background to the adoption of the Constitution itself. Associated provisions were those of section 9 (the right to life), section 10 (the right to respect for and protection of one’s dignity) and section 8 (the right to equality before the law). Punishment had to meet the requirements of those sections too.

Applying the ordinary meaning of the words of section 11(2) the death penalty was cruel, inhuman and degrading. Death was a cruel penalty and the legal processes which necessarily involved waiting in uncertainty for the sentence to be set aside or carried out added to the cruelty. It was inhumane because it involved, by its very nature, a denial of the executed person’s humanity. It was degrading because it stripped him of all dignity and treated him as an object to be eliminated by the State. The question was not, however, whether it was cruel, inhuman or degrading in the ordinary sense of those words, but whether it was so within the meaning of section 11(2).

The death sentence had been used as a punishment throughout history by different societies. There was a trend in those countries where it was retained to restrict its use. It was not prohibited by public international law. International agreements and customary international law provided a framework within which the fundamental rights provisions could be understood, and for that purpose the decisions of international tribunals dealing with comparable instruments could provide guidance to the correct interpretation. However, such instruments differed from our Constitution in that where the right to life was expressed in unqualified terms they dealt specifically with the death sentence, or sanctioned its use as an exception to the right to life.
The arbitrariness inherent in the application of the death sentence was a factor that had to be taken into account. Although a law was on the face of it not discriminatory, its application in practice might well be discriminatory in effect. A discretionary provision was in the words of Douglas J in *Furman v Georgia* “pregnant with discrimination”. It was necessary to accept that chance factors were present to some degree in all court systems. The possibility of error could not be excluded totally. Perfect equality as between accused persons in the conduct and outcome of criminal trials was unattainable. Where error resulted in unjust imprisonment, the error could be rectified if discovered; but the killing of an innocent person was irremediable. Attempts to temper this fact by allowing wide rights of appeal and review led to the “death row phenomenon” and a delay in carrying out or setting aside the sentence. To design a system that avoided arbitrariness and delay in carrying out a sentence was exceedingly difficult. That such delay was cruel and inhuman was obvious. Of the thousands of persons arraigned for murder only a small fraction received a death sentence which survived an appeal. At every stage from arraignment to appeal an element of chance played a role in as much as the outcome could be affected by factors such as the way the case had been investigated or presented, how effectively the defence had been conducted, the personality of the trial judge and his attitude towards punishment. Most accused in that position were defended under the *pro Deo* system. Constraints of resources and infrastructural support operated to reduce the effectiveness of a *pro Deo* defence. As a result, accused who had funds to secure their own legal representatives and enable them to undertake the necessary research and investigations, were less likely to be sentenced to death. To this extent poverty, race and chance played a role in determining who should live or die. Severe difficulties had been experienced in the United States, a system where capital punishment was not *per se* unconstitutional but could in circumstances be held to be arbitrary, and therefore unconstitutional. The United States experience persuaded Chaskalson P that “that route should not be followed”.

Chaskalson P surveyed how the protection against cruel, inhuman or degrading punishment had been treated in other jurisdictions. He concluded that in the context of our Constitution the death penalty was indeed a cruel, inhuman and degrading punishment. The following question which had to be considered was whether it was nevertheless justifiable as a penalty for murder, and whether its retention met the requirements of section 33(1). It had to be shown to
be both reasonable and necessary. This involved the weighing up of competing values and ultimately an assessment based on proportionality. No absolute standard could be laid down for determining reasonableness and necessity. Principles could be established, but the application of those principles to particular circumstances could only be done on a case by case basis. This was inherent in the requirement of proportionality, which called for the balancing of different interests. Relevant considerations included the nature of the right that is limited, its importance to an open and democratic society based on freedom and equality, the purpose for which the right was limited and the importance of that purpose to such a society. Furthermore, the extent of the limitation, its efficacy and — where the limitation had to be necessary — whether the desired ends could reasonably be achieved through lesser means also had to be taken into account. Although there was a rational connection between capital punishment and the purpose for which it was prescribed, the elements of arbitrariness, unfairness and irrationality in the imposition of the penalty, were factors that had to be taken into account. As regards whether the purpose could be pursued by lesser means, a severe punishment in the form of life imprisonment was available as an alternative sentence. That was relevant to the question whether the death sentence impaired the right as little as possible. The death sentence and life imprisonment were both deterrents. The question was whether the possibility of being sentenced to death, rather than being sentenced to life imprisonment, had a marginally greater deterrent effect, and whether the Constitution sanctioned the limitation of rights effected thereby. The Attorney-General had conceded that there was no proof that the death sentence was a greater deterrent than life imprisonment. His contention was that this proposition was not capable of proof. The onus rested on him to satisfy the Court that the penalty was reasonable and necessary. The fact that doubt existed as to which was the greater deterrent was a major obstacle in his way. A punishment as extreme and irrevocable as death could not be predicated upon speculation as to what the deterrent effect might be. As regards prevention, life imprisonment served that purpose. Retribution was an object of punishment, but carried less weight than deterrence. Capital punishment was not the only way society had of expressing its moral outrage at crimes which had been committed. Retribution ought not to receive undue weight in the balancing process. The Constitution was premised on the assumption that a State founded on the recognition of human rights would be established. This was expressed in the
concluding commitment of the Constitution. To be consistent with the value of ubuntu ours should not be a society that wished to kill criminals simply to get even with them, but rather one that wished to prevent crime.

As to the essential content of the right, the meaning of the provisions of section 33(1)(b) was not free of difficulty. In any event it was not necessary to determine whether the content of any right was negated, since a finding that the requirements of section 33(1) had not been satisfied was an end to the matter. It had been found that retention of the death penalty was inconsistent with section 11(2). Accordingly, it was also not necessary to consider whether it was inconsistent with sections 8, 9 or 10.

All the other members of the Court concurred with Chaskalson P in separate judgments.

Ackermann J considered it necessary that greater emphasis be placed on the inevitably arbitrary nature of a decision to impose the death penalty in supporting the conclusion that it conflicted with section 11(2). The commencement of the Constitution marked a move from a past characterised by much which was arbitrary and unequal in the operation of the law to a dispensation where State action had to be susceptible of rational justification. Any laws inherently arbitrary could not be tested against the precepts of the Constitution. Arbitrariness by nature led to unequal treatment. So extreme a penalty was inevitably arbitrary. Arbitrariness conflicted with the idea of a right to equality before the law. It was virtually impossible to avoid arbitrariness in the imposition of any punishment. However, the consequences of the death sentence as a form of punishment differed radically from any other type of sentence. Whatever the scope of the right to life entrenched in section 9, it must encompass the right not to be deliberately put to death by the State in a way which was arbitrary and unequal. Therefore the provisions of section 277(1)(a) of the Criminal Procedure Act were inconsistent with the right to life entrenched in section 9. They were also inconsistent with section 11(2) because of the inherent arbitrariness in their application. For one person to receive the death sentence while a similarly placed person did not, was cruel to the person receiving it. To allow chance to determine the prisoner’s fate was to treat him as inhuman. This rendered the death sentence cruel, inhuman and degrading. The public was understandably concerned about the situation where the
incidence of violent crime was high and the rate of convictions low. In a constitutional state citizens abandon the right to self-help in protection of their rights because the State assumes the obligation to protect them. If the State fails to discharge that duty there is a danger that individuals might resort to self-help. Society was concerned that the aims of punishment should be achieved. It feared the possibility that the recidivist on release from prison would repeat his crime. With the abolition of the death sentence society needed the firm assurance that the unreformed, violent criminal would not be released but would remain in prison permanently. The State had an obligation to protect society from once again being harmed by an unreformed recidivist.

Didcott J considered that capital punishment violated the right to life entrenched in section 9 and the prohibition against cruel, inhuman and degrading punishment entrenched in section 11(2). Without deciding on a comprehensive and exact definition of what was encompassed by the right to life, such right must include at the very least the right not to be put to death by the State deliberately. As to section 11(2), the ordeal suffered by criminals awaiting and experiencing execution was intrinsically cruel, inhuman and degrading. It was nevertheless necessary to examine whether the death penalty was saved by section 33(1). If it could be established that it were a unique deterrent against future crimes, that proposition would render the death sentence an expedient which, though regrettable, would pass constitutional muster. The question was not, however, whether capital punishment had a deterrent effect, but whether that effect was significantly greater than any alternative sentence available. Without empirical proof it was not possible to determine the extent to which capital punishment worked as a deterrent. The inherent arbitrariness of its application was intolerable because of the irreversibility of the punishment and the irremediability of mistakes discovered afterwards. This defect militated against the reasonableness and justifiability of capital punishment. It was therefore unconstitutional.

Kentridge J agreed that a decision could be reached without giving an authoritative interpretation of section 33(1)(b). The issue for decision was whether the death penalty was a cruel, inhuman or degrading punishment. The uniquely cruel and inhuman nature of the death penalty was amply described in the American authority cited by Didcott J. The “death row phenomenon” was a further factor in the cruelty of capital punishment. However revolting the act of cruelty committed against a victim, it did not follow that the State should
respond to the murderer’s cruelty with a deliberate and matching cruelty of its own. In general civilised democratic societies had found the death penalty to be unacceptably cruel, inhuman and degrading. The State ought to be “institutionalised civilisation”. This was especially true of the State created by the new Constitution. The deliberate execution of a human, however depraved his conduct, must degrade the emerging new society. The striking down of the death penalty entailed no sympathy for the murderer nor condonation of his crime. It did, however, entail recognition that even the worst and most vicious criminals were not excluded from the protection of the Constitution.

Kriegler J observed that the issue was not whether the death penalty ought to be abolished or retained, but what the Constitution said about it. This was a legal question, not a moral or philosophical one. What had to be established was whether there was an invalid infringement of fundamental rights. Section 9 plainly indicated that the State could not deliberately deprive a person of his life. Accordingly section 277(1) of the Criminal Procedure Act was liable to be struck down unless saved by section 33. Kriegler J was satisfied that it was not saved by section 33, as it did not pass the test of reasonableness. No empirical study had demonstrated that capital punishment had greater deterrent force than a lengthy sentence of imprisonment. It could not be reasonable to sanction judicial killing without knowing whether it had any marginal deterrent value. This made it unnecessary to decide whether it conflicted with any other fundamental right.

Langa J considered that section 9 meant at least that every person had the right not to be deliberately put to death by the State as punishment. Any law limiting that right had to comply with section 33. However, without clear proof that the deterrent value of the death penalty was substantially higher than that of a suitably lengthy period of imprisonment, its retention could not be reasonable. It was accordingly unnecessary to deal with the other requirements of section 33(1). Furthermore, the new constitutional dispensation had replaced rule by force with a system based on democratic principles, equality and freedom. The State had to be a role model for the new society, engendering a culture of respect for human life and dignity. Its actions had to be informed by the values expressed in the Constitution. The State could not afford to convey a message that the value of human life was variable. Severe punishments had to be meted out to
those who destroyed human life, but the Constitution constrained society to express its justifiable anger in a manner which preserved its own morality. As alternative and suitable sentencing options existed, the death penalty was neither reasonable nor necessary.

Madala J wished to stress that the death penalty ran counter to the concept of ubuntu. Although ubuntu was mentioned only in the “post-amble” it was a concept that permeated the Constitution generally. It necessitated a recognition that even in the perpetrators of the most heinous offences, the possibility of rehabilitation was not to be discounted. It required that in the maintenance of law and order — even in the most difficult circumstances — a sense of compassion be retained and that society avoid options which dehumanise and degrade individuals. The death penalty violated the provisions of section 11(2).

Mahomed J set out his reasons for finding that the death penalty was prima facie in conflict with the rights contained in sections 8, 9, 10 and 11(2) of the Constitution. Its infringement of those rights was not justified by the requirements of section 33(1). The State had not established that the death penalty per se had any deterrent effect on the potential perpetrators of serious offences. Furthermore, the premise that murder should be a permissible punishment for murder was at variance with the ethos underlying the Constitution. The Constitution gave expression to the new ethos of the nation by a commitment to “open a new chapter in the history of our country” and by the adoption of “humanitarian principles”. The Constitution identified the moral and ethical direction which the nation had identified for its future. The “need for ubuntu” expressed the ethos of an instinctive capacity for an enjoyment of love towards one’s fellow men and women; the joy and fulfilment involved in recognising their innate humanity; the reciprocity which this generated in interaction within the collective community; the richness of the creative emotions which it engendered and the moral energies which it released.

Mokgoro J considered it important to recognise indigenous South African values. There was a paucity of homegrown judicial precedent upholding human rights because the past legal order had been a repressive one. Indigenous value systems were the premise from which the goal of creating a society based on freedom and equality should proceed. It was important to consider the value systems of the formerly marginalised sectors of society in creating a South African
jurisprudence. Although South Africans had a history of deep divisions characterised by strife and conflict, certain values and ideals were shared. One such was the value of ubuntu. Ubuntu translated into humaneness, personhood and morality. It enveloped the key values of group solidarity, compassion, respect, human dignity and collective unity. It embraced respect and value for life in the concept of humanity, and gave meaning and texture to the principles of a society based on freedom and equality. Even the most evil offender remained a human being possessed of a common human dignity. Because this was so, the calculated process of the death penalty was inconsistent with this basic fundamental value. The Constitution committed the State to base the worth of human beings on the values espoused by open democratic societies the world over. The high level of crime prevailing in the country was indicative of the breakdown of the moral fabric of society. It had not been shown conclusively that the death penalty, which was an affront to the basic values mentioned above, was the best available practical form of punishment to reconstruct that moral fabric. The State was representative of its people and also set the standard for moral values within society. If the State sanctioned killing in order to punish killing, it sanctioned vengeance by law. If it did so with a view to deterring others, it dehumanised the offender and objectified him as a tool for crime control. This stripped the offender of his human dignity and dehumanised him.

O’Regan J considered that the death sentence constituted not only a breach of section 11(2) but also a breach of sections 9 and 10. In interpreting the content and scope of these rights section 35(1) was all important. The Constitution enjoined the Court to “promote the values which underlie an open and democratic society based on freedom and equality”. This directed the Court to the future; to the ideal of a new society which was to be built on the common values which made a political transition possible and which were the foundation of the new Constitution. In giving meaning to section 9 one had to seek the purpose for which it was included in the Constitution. The right to life was antecedent to all other rights. It was not merely life as organic matter that the Constitution cherished, but the right to human life: The right to life as a human being, to be part of a broader community and to share in the experience of humanity. This concept was at the centre of our constitutional values. The Constitution sought to establish a society where the individual value of each member of the community was recognised and treasured. The right to life was central to such a society. The right to life also incorporated the right to dignity. Recognising a right to dignity was an acknowledge-
ment of the intrinsic worth of human beings. Respect for the dignity of all human beings was particularly important in South Africa. Apartheid had been a denial of a common humanity. Respect for human dignity was the essence and cornerstone of democratic government. The entrenchment of a bill of rights enforable by a judiciary was designed, in part, to protect those who are the marginalised, the dispossessed and the outcasts of our society. The rights in Chapter 3 were available to all South Africans no matter how atrocious their conduct. Extending the rights to all was the test of our commitment to a common humanity. The purpose of the death penalty was to kill convicted criminals. This inevitably resulted in the denial of human life. Such methodical and deliberate destruction of life by the Government could not be anything other than a breach of the right to life. The death penalty was also a denial of the individual’s right to dignity. It was not only the manner of execution which was destructive of dignity but also the circumstances in which convicted criminals had to await the execution of their sentence. In determining whether the provisions of section 277(1) of the Criminal Procedure Act could be saved by section 33(1) of the Constitution, a balancing of competing interests had to be made. But sections 9 and 10 contained rights which weighed very heavily in such balancing process. They lay at the heart of our constitutional framework. While the goals of deterrence and prevention were important legislative purposes, it had not been satisfactorily demonstrated that they could not be sufficiently and realistically achieved by other means. Accordingly the death penalty could not be a constitutionally acceptable limitation upon the rights to life and dignity.

Sachs J agreed fully with the judgment of Chaskalson P but considered that two aspects merited further treatment. Firstly, the main judgment placed greater reliance on the protection against cruel, inhuman or degrading punishment than it did on the right to life and the right to dignity. In the view of Sachs J the starting point ought to be the right to life. The words of section 9 were clear, unqualified and binding on the State. Section 33 made allowance for limitations on rights, but not their extinction. Life by its nature could not be restricted or abridged. In the case of other rights proportionate balances could be struck; but when it came to the right to life there could be no scope for proportionality. A second aspect which required further treatment was the source of the values which in terms of section 35 of the Constitution the interpretation of fundamental rights was required to promote. The Court’s function was to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution. One of the values of an open and democratic society was
precisely that the values of all sections of society had to be taken into account and given due weight when matters of public import were being decided. It was distressing that the written sources of our jurisprudence contained few references to African sources as part of the general law of the country. Section 35(1) required the Court not only to have regard to public international law and comparable foreign case law, but also to all the dimensions of the evolution of South African law which might help in the task of promoting freedom and equality. This required reference to traditional African jurisprudence. A large number of studies by scholars of repute dealt with the manner in which disputes were resolved and punishments meted out in traditional African society. It would appear from these sources that the judicial processes of indigenous societies did not in general encompass capital punishment for murder. It was also instructive to look at the evolution of values during the period of colonialism. Of six neighbouring countries, only one had carried out executions in recent years. The positions adopted by the framers of the Mozambican and Namibian constitutions were “not apparently based on bending the knee to foreign ideas ... but rather on memories of massacres and martyrdom in their own countries”. It was not unreasonable to think that similar considerations influenced the framers of our Constitution. Constitutionalism had developed as a reaction to the abuse of power, institutionalised inhumanity and organised disrespect for life. The more that life had been cheapened by oppressive regimes, the greater the entrenchment of the rights to life and dignity that occurred thereafter. The framers of our Constitution had rejected not only the law and practices that imposed domination and kept people apart, but those that prevented free discourse and rational debate and those that brutalised us as people and diminished our respect for life. Even if the framers subjectively intended to keep the issue open for determination by the Constitutional Court, in the view of Sachs J they effectively closed the door by the language which they used and the values that they required to be upheld. In a founding document dealing with fundamental rights, the death sentence was either authorised or not. In the view of Sachs J, the values expressed by section 9 were conclusive of the matter.

The Court accordingly ordered that the provisions of paragraphs (a), (c), (d), (e) and (f) of section 277(1) of the Criminal Procedure Act, and all corresponding provisions of other legislation sanctioning capital punishment which were in force in any part of the national territory in terms of section 229 of the Constitution, were declared to be inconsistent with the Constitution and invalid. It was further ordered in terms of section 98(7) of the Constitution that as from the date of the
order the State and all its organs were forbidden to execute any person already sentenced to death under any of the provisions declared to be invalid, and that all such persons would remain in custody under the sentences imposed on them, until such sentences had been set aside in accordance with law and substituted by lawful punishments.

If you were Thomas, what would you say is the legal position on the death penalty? Give your answer in not more than two sentences.

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.

Introduction

The episode that we have just discussed in the life of Thomas makes a number of things clear to us. We need to know what “law” means and how it is different from other norms of conduct like ethical or moral norms (we discussed this in study unit 1). We also need to know where to find “law” so that we can find the legal rule or legal rules that apply to a particular situation. Where do we look? Lawyers look through what we call authoritative sources of law to find out what the law says about the kind of case they are dealing with. We call these sources of law “authoritative sources” because they give authority (weight/power) to lawyers’ arguments. In other words, lawyers use the information they find there to support their arguments.

Many people think that the whole of South African law is contained in the legislation which has been passed by parliament. In other words, they think that all of South African law is written down. When law is written down we
say that it has been codified and can be found by going to one source, a codification. This is not the case in South Africa. Even the Constitution itself is not a complete written code or description of South African law. (See study unit 7 for information on the specific topics which the Constitution deals with.) However, although large sections of our law are written down in the statutes (laws) that are passed by parliament, we do not have just one single code in South Africa (like many European countries) that contains the whole of South African law. **Briefly then, it can be said that South African law cannot be found in a single codification of law. We do not have just one authoritative source of law. We have a number of authoritative sources of law.** It is important for a lawyer to know which sources of law are authoritative, and which sources are more important than others.

For example, what is the source a court should go to if it is dealing with a matter in which a divorce order is being requested? If the court goes to a legal textbook on the subject, will it be bound by what the author of the textbook says? The court will only be bound if what is said in the textbook is in agreement with the law on divorce which is set out in the Divorce Act, decided cases and the common law (see (c) below). The reason for this is that legislation is the primary authoritative source of South African law. Therefore, the court will first have to look at the provisions of legislation (here the Divorce Act 70 of 1979), decided cases and the common law in order to find out what the law is. The textbook will merely help the court to find the references it needs. In this case the references will be the correct act of parliament and the cases which have already been decided on the particular question the court is dealing with, as well as the common law.

**Authoritative sources of South African law**

The main authoritative sources of South African law are as follows:

- legislation/statutes/acts of parliament
- court decisions/case law/court cases
- common law
- custom
- African indigenous law/Indigenous African law
(a) Legislation

If lawyers or judges want to find out what the law is as far as the problem they are dealing with is concerned, they will first have to find out what the legislation is that relates to this problem. This is because legislation is the most important authoritative source of law. You will see that we place it first in our list above. We also call legislation statutory law. Legislation is made up of rules laid down by, for example, national parliament, provincial legislatures and local authorities. These legal rules are contained in acts of parliament, provincial ordinances and municipal by-laws. The Companies Act and the Labour Relations Act are examples of statutes which have been written down and passed by parliament.

subject to Constitution

It is very important for you to note that all law, and not only legislation, is always subject to the Constitution of the Republic of South Africa. In other words, the Constitution is the supreme (or highest) law of the land and no other law may be in conflict with it. You will learn more about this in study units 7 to 10.

Government Gazette

The acts (laws) which are passed by parliament are contained in the Government Gazette. (A gazette is an official publication containing notices to the public.) A few issues of the Government Gazette are published every week, and they keep people informed on a wide variety of topics. You will find the Government Gazette at your nearest reference library, you can buy it from the Government Printer in Pretoria or you can find it on the Internet.

(b) Court decisions

If there is no legislation (act(s) of parliament) on a specific subject a lawyer will look at the previous decisions of the South African courts on the subject of the court case. However, even if there is legislation on a specific subject, a lawyer will still want to refer to decided cases and to read the decisions which were based on that particular Act, because different courts may have interpreted the Act differently. After the lawyer has read the decisions of various courts, he or she will have to decide which court’s decision is authoritative, in other words which decision should take first place. In order to do this, we apply the principle of judicial precedent.

judicial precedent

Let us briefly explain here what judicial precedent means. It means that the lower courts are bound by the decisions of the higher (superior) courts.

requirements:

(1) law reporting

(1) an effective system of law reporting (to enable the lower-ranking courts to see what the higher-ranking courts have held)
(2) hierarchy of courts (in other words, the courts are divided into ranks, each court being bound by the decisions of the courts above it)

In South African law both these requirements are complied with.

Over the years the cases in the higher (superior) courts have been reported in different law reports. The best known of these law reports is the *South African Law Reports*. These published decisions contain the facts of the case concerned, the various arguments the lawyers put before the court and most important, the reasons upon which the court based its decision. When it gives its reasons, the court sets out the relevant legal rules relating to the dispute. These legal rules create a precedent and will bind other courts dealing with the same kind of disputes. This part of the court’s decision is the so-called *ratio decidendi*. A literal translation of *ratio decidendi* means “the reason(s) for the decision”. When you read a reported court decision you will never find a direct indication where the *ratio decidendi* is. You are expected to find the *ratio decidendi* yourself. This is often very difficult. In order to locate the *ratio decidendi*, you will have to be very familiar with the law that is applicable to the specific case.

The importance given to a particular precedent (court decision) will be based on how senior the court is which handed down the decision within the hierarchy of the courts. For example, a decision of the Supreme Court of Appeal (known in the past as the Appellate Division) will be binding on all High Courts and lower courts. Similarly, decisions by High Courts will be binding on the lower courts. Remember that, as far as constitutional matters are concerned, decisions of the Constitutional Court bind all other courts.

In contrast with the *ratio decidendi* of a court’s decision which can bind other courts, one sometimes find *obiter dicta* (singular: *obiter dictum*) in a court’s decision. A literal translation of *obiter dicta* is “remarks in passing”. These are casual remarks made by the judge. They are not directly relevant and applicable to the resolving of the dispute before the court. It is not necessary for the court to take them into account in order to reach its decision. *Obiter dicta* do not create a precedent and are not binding, but they can sometimes have persuasive force. You may find an *obiter dictum* when, for example:

1. the principle of a case is more broadly formulated by the judge than is necessary to cover the facts
2. the judge makes an incidental remark
3. the judge asks and then answers a hypothetical set of facts
4. the judge quotes a similar case or gives an illustration
(c) Common law

When we speak about common law in general, we are speaking about the law of a country, which is not contained in legislation. It is not written down in acts of parliament. In South Africa, when we speak of “common law” we are speaking about the writings on law by 17th and 18th century Roman-Dutch jurists, and how this law has been interpreted by our courts. We also consider that ancient Roman law, especially the law contained in the *Corpus Iuris Civilis*, still applies as a source of our law because it was received in Holland just after the Middle Ages. (We deal with the role of Roman law as it affects our present-day legal system, in the modules *Origins and Foundations of South African Law*. These modules will also form part of the curriculum for your LLB studies.) Certain parts of our law have been heavily influenced by English law and therefore our courts also have to take English law into account. Another important influence on our law is indigenous or African customary law. (See further below (e).)

(d) Custom

Custom is not made up of written rules but develops from customs within the community. Custom is carried down from generation to generation. Indigenous or African customary law also forms part of the broad definition of custom. However, because African customary law has a more formal status under South African law, it will be dealt with separately as a source of law under (e) below.

Usually a custom has to fulfil certain requirements in order to be recognised as a legal rule. These requirements are the following:

- 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, in other words, what the custom involves, must be definite and clear.

In each case before the court, these four requirements will be applied to a particular custom, by the court, in order to decide whether or not that particular custom has the force of law.

The case of *Van Breda v Jacobs* gives a good example of a custom which was recognised as a legal rule. This case was decided in 1921. Between Cape Point and Fish Hoek the fishermen had a custom that if certain fishermen had been the first to see a shoal of fish moving up the coast, and these...
fishermen had already cast their own nets, other fishermen would not cast their nets ahead of the fishermen who had first seen the fish, and prevent them from catching the fish. The plaintiffs proved that this custom existed and the court was satisfied that this was a well-tried and reasonable custom and that the purpose of it was to prevent arguments and disputes.

(e) African indigenous law/Indigenous African law

Indigenous law is largely unwritten law. We mentioned above that indigenous law has a more formal status within South African law. It has been recognised in various statutes and does not, in each case, have to be measured against the requirements set out above for custom. In the past, indigenous law was recognised as a special law which could be applied only to blacks. However, it has now been recognised as a source of law by the Constitution. In terms of the Constitution, South African courts must apply indigenous law where it is applicable. (See study unit 3.)

Other sources

Legislation, case law, common law, custom and African indigenous law, all of which we have just mentioned, are the authoritative sources of our law. However, there are also what we may call “persuasive influences”. We will now discuss these.

If, after using all the authoritative sources in the order set out above, lawyers and judges cannot find anything on a particular matter, they may then turn to other modern legal systems in order to look for a similar legal principle (a principle is a basic rule or truth) that could possibly be used to decide the case. They would look in particular to those legal systems which are historically related to ours (because of a common Roman-law basis: see study units 3 and 4) such as those of France, Germany and the Netherlands.

For certain areas of law they might consult English law, for example, if they were dealing with company law and maritime law.

The Bill of Rights states plainly that the courts may take foreign law into account when they interpret the provisions of the Bill of Rights. Therefore we can expect our courts to refer to foreign law more often when dealing with the Bill of Rights.

The views of modern legal writers do not have authority as sources of law. However, 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. Thus, when you read the reported cases, you will see that there are references to leading textbook writers. Articles in the various law journals are also often mentioned. As you go on with your studies, you will be referred to articles in some of the leading South African journals; for example, the *South African Law Journal* (SALJ), the *Journal for Contemporary Roman-Dutch Law* (*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*) (THRHR), the *Comparative and International Law Journal of Southern Africa* (CILSA) and *De Rebus*, the journal of the *Association of Law Societies of the Republic of South Africa*.

**Activity 6.2**

(1) Read the following scenario and answer the multiple-choice question that follows:

Anne Peterson buys a house from Kevin Smith. In one of the rooms a bar unit is fixed to the floor and there are four loose bar stools in front of the unit. Kevin wants to take the bar stools with him when he moves out of the house. Anne, who is an attorney, tells Kevin that in a similar case (*Senekal v Roodt* 1983 (2) SA 602 (T)) the High Court decided that the bar stools formed part of the bar unit and may not be removed by the seller when the house is sold.

The decision of the High Court in *Senekal v Roodt* 1983 (2) SA 602 (T) is binding on

(1) the Supreme Court of Appeal  
(2) the magistrates’ courts  
(3) the Constitutional Court  
(4) more than one of the above-mentioned courts

(2) Which one of the following sources of law is the **odd one out**? Give a reason for your answer.

(1) Foreign law  
(2) Legal textbooks  
(3) Articles in law journals  
(4) Case law
You will remember that according to the system of judicial precedent, the lower courts are bound by the decisions of the higher courts. In our scenario, the decision of the High Court will therefore only be binding on the magistrates’ courts. Thus, statement (2) is the correct statement.

Case law, the source of law in statement (4), is the source which is the odd one out. Case law is an authoritative source of law with binding authority in court, whereas the sources of law mentioned in statements (1) to (3) are sources of law which merely have persuasive influence in court and do not bind the court. Thus, statement (4) is the correct statement.

You may be wondering how lawyers (and you as a student) can ever find their way through this “maze” of sources of law. In this activity we will try to help you by giving you examples of how the different sources of law have been used to decide a specific legal issue. Thus, you will learn how sources of law are used.

If you want to find the best examples of the way our legal sources are used, you will find them in our case law. In other words, you will find them in decided court cases. We are going to look at the case of *Naude and Another v Fraser*. We also want to show you what the effect of the Constitution has been on existing law in this particular instance.

Do not concern yourself with the technicalities and legal terms that are used in this case because you will learn how to read a court case in the module *Skills Course for Law Students*. There are just some things that we would like to explain at this stage. At this point these are the only things we want you to concentrate on.

The full reference of this case is: *Naude and Another v Fraser* 1998 (4) SA 539 (SCA). If we break down this reference, we get the following information:

- 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 refers to the page number of that particular volume of law reports
(the fourth volume) on which the report of the case starts.

When you read the following extracts, you will find references to judges.
These references are, for example: J (Judge); JA (Judge of Appeal) or AJA
(Acting Judge of Appeal). We have given you enough information to enable
you to start hunting for the sources of law which were used to decide this
case!
Now read through *Naude and Another v Fraser* and do the following:

1. Underline or highlight each source used.
2. Try to determine the order in which the sources were used.
3. Try to say, in your own words, what the effect of the Constitution was in this instance.

**PLEASE NOTE:**

You need not study the contents of this case for the examination. You need only study the name of the case, the activity and the feedback on the activity.

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**NAUDE AND ANOTHER v Fraser**  
**SUPREME COURT OF APPEAL**  
**SMALBERGER JA, SCHUTZ JA, SCOTT JA, PLEWMAN JA and MELUNSKY AJA**  
1998 May 8; June 26  
Case No 150/97

Minor—Adoption—Illegitimate child—Adoption proceedings in terms of regulations promulgated under Child Care Act 74 of 1983—Reiterated that such proceedings sui generis, having both administrative and judicial components—Supreme Court of Appeal accordingly not barred from hearing appeal against decision in such proceedings, particularly in view of fact that Court in terms of item 17 of Schedule 6 to Constitution of the Republic of South Africa Act 108 of 1996 entitled if required by interests of justice to assume constitutional jurisdiction it would not otherwise have.

Minor—Adoption—Illegitimate child—Adoption proceedings in terms of regulations promulgated under Child Care Act 74 of 1983—Section 18(4)(d) of Act requiring consent of mother only for adoption of illegiti-
mature child—Constitutional Court having held that s 18(4)(d) discriminatory and thus inconsistent with s 8 of Constitution of the Republic of South Africa Act 200 of 1993—Constitutional Court instructing Parliament to correct defect within two years—Such defect not yet corrected and s 18(4)(d) accordingly still applying.

Minor—Adoption—Illegitimate child—Adoption proceedings in terms of regulations promulgated under Child Care Act 74 of 1983—Regulation 21(1) proceedings—Father launching application to intervene under reg 4(2)—Regulation 4(2) conferring discretion on commissioner—Neither Act nor regulations requiring that reg 21(1) proceedings be abandoned and reg 21(2) inquiry embarked upon as soon as interested party objecting to proposed adoption—In exercising discretion under reg 4(2), commissioner to have regard, inter alia, to general circumstances bearing on matter, nature of applicant’s interest, underlying motive of applicant, nature of bond between applicant and child, need to maintain balance between competing interests of parties and need to protect identity of adoptive parents—In casu father given proper hearing and commissioner having exercised discretion judicially—Commissioner’s decision upheld.

Minor—Adoption—Illegitimate child—Adoption proceedings in terms of regulations promulgated under Child Care Act 74 of 1983—Proceedings in terms of reg 21(1)—Counter-application by father for adoption of own illegitimate child—Whether commissioner as result obliged to embark on reg 21(2) inquiry—Counter-application in casu doomed to failure because it did not carry consent of mother as required by s 18(4)(d) of Act and no reasonable ground existing for dispensing therewith—Matter capable of being disposed of in terms of reg 21(1) and no need for commissioner to embark on reg 21(2) enquiry.

The first appellant and the respondent were the mother and father of a child born out of wedlock on 12 December 1995. When the respondent found out that the first appellant was putting the child up for adoption he sought to intervene in the adoption proceedings in terms of reg 4(2) of the regulations promulgated in terms of the Child Care Act 74 of 1983 on the grounds (1) that he was an interested party and (2) that he wished to be considered as a prospective adoptive parent (viz a counter-claim for the adoption of his own child). The Children’s Court refused leave to intervene and gave judgment sanctioning the adoption of the child. The respondent then initiated review proceedings in a Provincial Division (the Court a quo) in which he sought an order setting aside the adoption order; declaring the father of an illegitimate child to be entitled to be heard on, and to participate in, the hearing of an application for the adoption of his child; declaring s 18(4)(d) of the Child Care Act 74 of 1983 to be inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution") insofar as it did not require the father’s consent for the adoption of an illegitimate child; and declaring the common-law rule that the guardianship of an illegitimate child vested only in its mother to be inconsistent with the spirit of chap 3 of the interim Constitution. The Court a quo set aside the adoption order on the basis that the respondent did not get a proper hearing and granted leave to appeal to the Supreme Court of Appeal. The issue of the constitutional validity of s 18(4)(d) was referred to the Constitutional Court, which held that s 18(4)(d) was discriminatory and thus contrary to s 8 of the interim Constitution (see Fraser v Children’s
STUDY UNIT 6: Where to find the law

NAUDE AND ANOTHER v FRASER
1998 (4) SA 539
SCA

Court, Pretoria North, and Others 1997 (2) SA 261 (CC)). The Constitutional Court referred the provision to Parliament for its rectification. The following issues were dealt with in the course of the instant appeal: (1) the question of the jurisdiction of the Supreme Court of Appeal; (2) the constitutionality and applicability of s 18(4)(d) of the Child Care Act; and (3) whether the decision of the commissioner of the children’s court fell to be set aside on review.

Regulation 4(1) of the Child Care Act provided that ‘a parent or an adoptive parent of a child in respect of whom a children’s court holds an enquiry, the child and the respondents shall have the same rights and powers as a party to a civil action in a magistrate’s court in respect of the examination of witnesses, the production of evidence and of address to the court’. In terms of reg 4(2) ‘(a) commissioner may allow any person who, in his opinion, has a substantial interest in the proceedings . . . to join the proceedings, and a person who so joins shall . . . be deemed to be a party to those proceedings and shall have the same rights and duties as a party referred to in subreg (1)’. Regulation 21(1) provided that ‘(i) if a social worker’s report is lodged with the children’s court to the effect that the proposed adoptive parent or parents have been selected as such by a social worker . . . and the court has satisfied itself on the strength of the said report and such other information as it may obtain as regards the matters mentioned in s 18(4) of the Act, the court may, in its discretion, consider the application and make an order without giving a hearing to any person’. It was further provided in reg 21(2) that ‘(i) if an application has not been or cannot be disposed of in terms of subreg (1), the clerk of the children’s court shall fix a date for the hearing of the application . . . and he shall notify the prospective adoptive parent or parents of the enquiry and shall, at the request of the children’s court assistant, issue a subpoena’.

Held (par Smallberger JA; Schutz JA, Scott JA and Plewman JA concurring), as to (1), that, although it was held in Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1998 (2) SA 1115 (SCA) that in terms of s 101(5) of the interim Constitution attacks on administrative action on the basis of unlawfulness fell within the exclusive jurisdiction of the Constitutional Court, adoption proceedings were at the very least sui generis, having a judicial component and not being purely administrative in nature, with the result that they were unaffected by the Fedsure decision. (At 547D–E.)

Held, further, that item 17 of Schedule 6 to the Constitution of the Republic of South Africa Act 108 of 1996 (‘the new Constitution’) in any event provided that the Supreme Court of Appeal was entitled to assume a constitutional jurisdiction it would not otherwise have had if the interests of justice demanded it, and that the interests of justice in the instant case required the Court to hear and dispose of the appeal. (At 547E–H.)

Held, as to (2), that, although the Constitutional Court declared s 18(4)(d) to be unconstitutional, Parliament had not yet rectified the defect in the provision, with the result that s 18(4)(d) had to be regarded as having been in force at the time of the adoption. (At 548G–H.)

Held, as to (3), that a social worker’s report had been lodged in terms of reg 21(1) and the consent of the first appellant obtained as required by s 18(4)(d) (the respondent’s consent having been excluded because the child was illegitimate). In addition, the information available to the commissioner was such as could have satisfied him with regard to the other matters mentioned in s 18(4) of the Act. The commissioner was thus in a position to exercise his discretion to dispose of the adoption application without a hearing (viz in terms of reg 21(1)) before the respondent appeared to pursue what he...
perceived to be his rights. There had been no need for an enquiry, and nothing to suggest that the commissioner intended to embark upon any enquiry as envisaged by reg 21(2). (At 552F–H/I.)

Held, further, that it did not follow simply from the fact that the respondent put in an appearance at the proceedings that the application was not dealt with terms of reg 21(1): his appearance per se did not automatically convert the proceedings into an enquiry, nor did it oblige the commissioner to do so. The respondent sought leave to intervene in terms of reg 4(2), and the first consideration was whether, in the exercise of his discretion, the commissioner was prepared to allow him to do so. There was nothing in the Act or the regulations from which it could be inferred that an enquiry necessarily had to be held as soon as a party with an interest objected to the proposed adoption. To so hold would render reg 4(2) largely nugatory for it would not only deprive the commissioner of control over the proceedings but also deny him the discretion envisaged by reg 4(2) and the power to determine whether the matter had to be dealt with under reg 21(1) or converted into an enquiry under reg 21(2). (At 553A/B–C/D and G/H–H/I.)

Held, further, that it was clear from reg 4(2) that a person with a substantial interest did not have the right to join the proceedings but that this depended on the exercise of the commissioner’s discretion in his or her favour. Relevant considerations in this regard included the general circumstances bearing upon the matter; the nature of the applicant’s interest; the applicant’s underlying purpose or motive; the nature of the bond between the applicant and the child; the need to have regard to and maintain a balance between the competing interests of the various parties; and the need to protect the identities of the persons seeking to adopt. (At 554A–C/D.)

Held, further, that there was nothing to suggest that the respondent was not given a proper hearing in regard to his reg 4(2) application, nor was it ever suggested that the commissioner had failed to exercise his discretion judicially in deciding not to allow the respondent to intervene. (At 554E/F–H, paraphrased.)

Held, further, that, once the commissioner had refused the respondent’s application for leave to intervene, the position effectively reverted to what it was before the respondent had put in his appearance, save for respondent’s counter-application for his son’s adoption. (At 554H–H/I.)

Held, further, that the counter-application did not disentitle the commissioner from proceeding in terms of reg 21(1) because it was doomed to failure on the law as it stood: it did not carry the first appellant’s consent as required by s 18(4)(d) in circumstances in which there were no reasonable grounds for dispensing therewith. The children’s court assistant in effect concluded that consent had not been unreasonably withheld, a conclusion that was accepted by the commissioner. The result was that the counter-application had no prospect of success because the law precluded it from being granted. (At 554H/I–555C, paraphrased.)

Held, further, that the counter-application consequently presented no obstacle to the disposal of the adoptive parents’ application in terms of reg 21(1). As the matter was not one incapable of being disposed of in terms of reg 21(1), there was no need to invoke the provisions of reg 21(2). As there was no reason for the commissioner not to have been satisfied with regard to the matters mentioned in s 18(4) of the Act, there was no bar to his granting the adoptive parents’ application for adoption. (At 555F/G–H/I.)

Held, further, that there was also no breach of the audi alteram partem principle: the commissioner was bound to proceed in terms of the Act and the
regulations, and their provisions precluded any hearing other than in respect of the reg 4(2) application. (At 556B–B/C.)

Held, further, that because the commissioner allowed the respondent a full hearing in regard to his reg 4(2) application and did not commit any gross irregularity in the proceedings and was not guilty of any improper exercise of his discretion, the Court a quo had erred in granting the review application. (At 556C–D.) Appeal upheld.

The decision in the Transvaal Provincial Division in Fraser v Children’s Court, Pretoria North, and Others 1997 (2) SA 218 reversed.

Annotations:
Reported cases

Administrator, Transvaal, and Others v Theletsane and Others 1991 (2) SA 192
(A): dicta at 195F–196E and 200G applied
Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731
(A): dictum at 748G–H applied
B v S 1995 (3) SA 571 (A): dictum at 575G–H applied
Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA 276
(A): considered
Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) (1996
(4) BCLR 449): considered
Ex parte Commissioner of Child Welfare, Durban: In re Kidd 1993 (4) SA 671
(N): dictum at 673B–C applied
FedSure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1998 (2) SA 1115 (SCA): distinguished
Fraser v Children’s Court, Pretoria North, and Others 1997 (2) SA 218 (T): reversed on appeal
Fraser v Children’s Court, Pretoria North, and Others 1997 (2) SA 261 (CC)
Fraser v Naude and Others 1997 (2) SA 82 (W): referred to
Government of the Province of KwaZulu/Natal and Another v Ngwane 1996 (4)
SA 943 (A): dictum at 949B–C applied
Napolitano v Commissioner of Child Welfare, Johannesburg, and Others 1965
(1) SA 742 (A): dictum at 745F applied
Ex parte Neethling and Others 1951 (4) SA 331 (A): dictum at 335D–E applied
Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A): considered
Reynieke v Wetgenootskap van die Kaap die Goeie Hoop 1994 (1) SA 359 (A):
dictum at 369E–F applied
Rudolph and Another v Commissioner for Inland Revenue 1996 (2) SA 886 (A)
referred to
T v M 1997 (1) SA 54 (A): referred to
Yannakou v Apollo Club 1974 (1) SA 614 (A): dictum at 623G applied

Statutes

The Child Care Act 74 of 1983, s 18(4)(d): see Juta’s Statutes of South Africa 1997 vol 5 at 2-90


A Appeal from a decision in the Transvaal Provincial Division (Preiss J), reported at 1997 (2) SA 218. The facts appear from the judgment of Smalberger JA.

N M Davis (with him G G van der Walt) for the appellants.
W H Trengove SC (with him M Chaskalson) for the respondent.

B In addition to the authorities cited in the judgment of the Court, counsel on both sides referred to the following authorities:

Administrator, Transvaal v Van der Merwe 1994 (4) SA 347 (A)
Administrator, Cape, and Another v Ikapa Town Council 1990 (2) SA 882 (A)

C Administrator, Transvaal, and Others v Zenzile and Others 1991 (1) SA 21 (A)

Re a Male Infant (1986) 25 DLR (4th) 641 (BCCA)
Brink v Kitshoff NO 1996 (4) SA 197 (CC) (1996 (6) BCLR 752)
Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 92 (HL)

D Claude Neon Ltd v Germiston City Council and Another 1995 (3) SA 710 (W)

Dhanabakium v Subramanian and Another 1943 AD 160
Director of Education v Lekhetho 1949 (1) SA 183 (T)
Doody v Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92 (HL)

E Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC)

Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A)

F Estate Agents Board v Lek 1979 (3) SA 1048 (A)
Estate Woolf v Johns 1968 (4) SA 492 (A)
Ex parte van Dam 1973 (2) SA 182 (W)
Foulds v Minister of Home Affairs and Others 1996 (4) SA 137 (W)
Gardner v East London Transitional Local Council and Others 1996 (3) SA 99 (E)

G Gardener v Whitaker 1996 (4) SA 337 (CC)

General Medical Council v Spackman [1943] AC 627 (HL) ([1943] 2 All ER 337)
Gordon NO v Standard Merchant Bank Ltd 1983 (3) SA 68 (A)

Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another 1980 (3) SA 476 (T)

H Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W)
Ismael v Ismael 1983 (1) SA 1006 (A)
John v Rees and Others; Martin v Davis; Rees v John [1970] Ch 345 ([1969] 2 All ER 274)
Lehr v Robertson 463 US 248 (1983)

I Lukral Investments (Pty) Ltd v Rent Control Board, Pretoria, and Others 1969 (1) SA 496 (T)

Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)
Nel v Le Roux NO and Others 1996 (3) SA 562 (CC)

Ngema v Minister of Justice, KwaZulu, and Another; Chulu v Minister of Justice, KwaZulu, and Another 1992 (4) SA 349 (N)
STUDY UNIT 6: Where to find the law

SMALBERGER JA

NAUDE AND ANOTHER v FRASER
1998 (4) SA 539

Oberholzer v Padraad van Otjoo en 'n Ander 1974 (4) SA 870 (A)
Porter v Union Government 1919 TPD 234
R v Ngwevela 1954 (1) SA 123 (A)
In re Raquel Marie X 559 NE 2d 418 NY (1990)
Ryland v Edros 1997 (2) SA 690 (C) (1997 (1) BCLR 77)
'S' v Kommissaris van Kindersorg, Brakpan, en Andere 1984 (3) SA 818 (T)
Sachs v Minister of Justice 1934 AD 11
SA Roads Board v Johannesburg City Council 1991 (4) SA 1 (A)
Stanley v Illinois 405 US 645 (1972)
SW v F 1997 (1) SA 796 (O)
Zondi and Others v Administrator, Natal, and Others 1991 (3) SA 583 (A)

Cur adv vult.
Postea (June 26).

Smalberger JA:

Introduction

On 12 December 1995 the first appellant ('Ms Naude') gave birth to a baby boy. The child ('Timothy') was born out of wedlock. The respondent ('Mr Fraser') is Timothy's natural father. Ms Naude and Mr Fraser had previously cohabited for some months, but their relationship broke up soon after Ms Naude became pregnant.

During her pregnancy Ms Naude decided to give up her unborn child for adoption. To this end she sought appropriate counselling in August 1995 from a registered social worker. Her decision was taken in what she perceived to be the best interests of the child. The second appellants ('the adoptive parents') were in due course identified as suitable prospective adoptive parents and were approved as such by Ms Naude. The necessary pre-adoption procedures were thereupon set in motion.

Mr Fraser did not accept Ms Naude's decision to have her baby adopted. He consequently brought an urgent application in the Witwatersrand Local Division for an interdict to prevent the child, once born, from being handed over for adoption. He also sought an order that the child be handed over to him. His application was dismissed with costs on 8 December 1995. The Court (Coetzee J) held that his lack of parental authority at common law deprived him of a prima facie right to an interdict. The judgment is reported—see Fraser v Naude and Others 1997 (2) SA 82 (W).

Ms Naude requested that the prospective adoptive mother be present when she gave birth. The latter underwent medical treatment to enable her to breast feed the baby after birth, and effectively took charge of Timothy immediately after he was born. Timothy has been in the custody and care of the adoptive parents ever since. It has never been suggested that they are anything other than eminently suited to care for him.

On 14 December 1995, two days after Timothy's birth, Mr Fraser's attorneys took the somewhat unusual step of writing to the Minister of Justice seeking, inter alia, an undertaking from him that their client would be afforded 'a proper opportunity of being heard at the adoption
proceedings which are about to take place in the children’s court’. A prompt reply was received from the Minister. Not surprisingly no undertaking was forthcoming, but the Minister expressed the belief that Mr Fraser ‘should at least be afforded the opportunity to be heard by the relevant commissioner’.

Proceedings relating to the adoption of Timothy commenced in the children’s court, Pretoria North, on 27 December 1995. They terminated, after various postponements, on 23 February 1996 when Mr Fraser was refused leave to intervene in the adoption application by the adoptive parents. What occurred on these occasions will be dealt with in greater detail later. On the same day the adoptive parents’ application for the adoption of Timothy was granted.

Mr Fraser launched a further application in the Witwatersrand Local Division on 24 February 1996 in which he claimed, inter alia, the disclosure of the identities of the adoptive parents, allegedly to enable him to interdict the removal of Timothy from South Africa pending the outcome of contemplated appeal or review proceedings. The application was dismissed with costs.

Finally, on 11 March 1996, Mr Fraser initiated review proceedings in the Transvaal Provincial Division in which he sought, inter alia, the following relief (encompassed in respectively prayers 3 to 6 of the notice of motion):

3. An order reviewing and setting aside the order for the adoption of Timothy Naude made on 23 February 1996.

4. An order declaring that the father of an illegitimate child is entitled to be heard on, and to participate in any hearing of, an application for the adoption of his child in terms of the Child Care Act 74 of 1983.

5. An order declaring that s 18(4)(d) of the Child Care Act 74 of 1983 is inconsistent with the Constitution and invalid in so far as it does not require the father’s consent for the adoption of an illegitimate child.

6. An order declaring that the common-law rule that the guardianship of an illegitimate child vests in its mother and not in its father, is inconsistent with the Constitution and with the spirit, purport and objects of chap 3 of the Constitution.'

The matter came before Preiss J. He granted an order in favour of Mr Fraser setting aside the order for the adoption of Timothy on the basis that the children’s court commissioner (‘the commissioner’) had committed a gross irregularity in not affording Mr Fraser a proper hearing. The question as to whether s 18(4)(d) of the Child Care Act 74 of 1983 (‘the Act’) was inconsistent with the Constitution and invalid in so far as it dispensed with a father’s consent for the adoption of an illegitimate child was referred to the Constitutional Court for determination. Leave to appeal was granted to this Court. The judgment of the Court a quo is reported as Fraser v Children’s Court, Pretoria North, and Others 1997 (2) SA 218 (T).
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**Jurisdiction**

At the commencement of his argument Mr Trengove, who appeared for Mr Fraser, raised the question whether this Court had jurisdiction to entertain the appeal. When the events giving rise to this appeal occurred, the Constitution of the Republic of South Africa Act 200 of 1993 (‘the interim Constitution’) applied. In *FedSure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (a judgment of this Court in case No 328/97 delivered on 23 March 1998 and as yet unreported) it was held (at p 9 of the judgment) that in terms of the interim Constitution any attack on any administrative action on the ground that such administrative action was not lawful fell within the jurisdiction of the Constitutional Court, and for that reason outside the jurisdiction of this Court, because of the express provisions of s 101(5) of the interim Constitution (see also *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996 (2) SA 886 (A)).

The short answer (as suggested by Mr Trengove himself) would seem to be that adoption proceedings are dealt with by a children’s court in the exercise of its judicial function; at the very least adoption proceedings are *sui generis*, having a judicial component and not being purely administrative in nature. (*Napolitano v Commissioner of Child Welfare, Johannesburg, and Others* 1965 (1) SA 742 (A) at 745F; *Ex parte Commissioner of Child Welfare, Durban: In re Kidd* 1993 (4) SA 671 (N) at 673B–C.) Such proceedings are therefore unaffected by the decision in the *FedSure* case. In any event, this Court now has constitutional jurisdiction in terms of the provisions of the Constitution of the Republic of South Africa Act 108 of 1996 (‘the new Constitution’). In terms of item 17 of Schedule 6 to the new Constitution ‘all proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise’. This Court may therefore assume a constitutional jurisdiction it would not otherwise have had if the interests of justice require it to do so. It is not necessary to consider the precise meaning of that phrase in the context of the present matter. Mr Trengove submitted, and I agree, that the interests of justice, which would, as a primary consideration, encompass the interests and well-being of Timothy, require this Court to hear and dispose of the appeal.

**The common-law position of an unmarried father**

This Court recently re-affirmed in *B v S* 1995 (3) SA 571 (A) at 575G–H that

‘in Roman-Dutch law an illegitimate child fell under the parental authority, and thus the guardianship and custody, of its mother; the father had no such authority’.

As a consequence, current South African law does not accord a father an inherent right of access to his illegitimate child. It does, however,
A. recognise that access is available to the father if that is in the child's best interests (B v S at 583G-H; see also T v M 1997 (1) SA 54 (A)).

The common-law rules referred to may require reconsideration having regard to the provisions of the new Constitution relating to, *inter alia*, equality (s 9), the rights of a child (s 28) and the requirement that a court, when developing the common law, 'must promote the spirit, purport and objects of the Bill of Rights' (s 39(2)). This, however, is not something which need concern us further in the present appeal.

The constitutionality and applicability of s 18(4)(d) of the Act

Section 18(4)(d) of the Act requires only the consent of the mother of an illegitimate child for the adoption of the child. The validity of this provision, following on the referral by the Court a quo, was determined by the Constitutional Court in *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC). That Court held (at 272 para [21]) that the section offended s 8 of the interim Constitution because it impermissibly discriminated between the rights of a father in certain unions and those in other unions. For trenchant reasons that appear from paras [47]–[49] of the judgment (at 282–3), the Court held that it could not simply sever certain words from the section and declare them invalid, nor could it simply declare the whole of s 18(4)(d) of the Act to be invalid without invoking the proviso to s 98(5) of the interim Constitution. It accordingly made the following order:

1. It is declared that s 18(4)(d) of the Child Care Act 74 of 1983 is inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993 and is therefore invalid to the extent that it dispenses with the father's consent for the adoption of an "illegitimate" child in all circumstances.

2. In terms of the proviso to s 98(5) of the Constitution, Parliament is required within a period of two years to correct the defect in the said provision.

3. The said provision shall remain in force pending its correction by Parliament or the expiry of the period specified in para 2.

Judgment was given on 5 February 1997. Parliament has not yet corrected the defect in the provision. The effect of the Constitutional Court's judgment is that s 18(4)(d) of the Act must be regarded as having been in force and of application in relation to Timothy's adoption.

Adoption

Adoption was not part of Roman-Dutch law. It was introduced into our law in 1923 in terms of the Adoption of Children Act 25 of 1923. Adoption is currently statutorily regulated by ss 17–27 of the Act, and the regulations promulgated in terms of the Act ('the regulations'). It may fairly be accepted that these statutory provisions are the product of long experience in adoption matters.

Adoption is the legal process through which the rights and obligations between a child and its natural parent or parents are terminated, and a new parental relationship enjoying full legal recognition is created.
between the child and its adoptive parent or parents. Following upon adoption the child is deemed to be the legitimate child of the adoptive parent or parents as if it were born of a lawful marriage (s 20(2) of the Act). Adoption thus supplants the rights of natural parents in favour of adoptive parents, while severing a child’s rights in respect of the former and transferring them to the latter. It is a process which calls for a delicate balance to be struck when considering and weighing up the respective interests of all the parties concerned, subject always to the best interests of the child being paramount. The Act and regulations give recognition to these competing interests (see, for example, s 18(6) of the Act and reg 21(3) and (7)). Regulation 21(3) is designed to avoid the simultaneous presence of a natural and an adoptive parent in the children’s court in the interests of the latter’s anonymity. In this respect I agree with what was said by the Judge a quo at 233F–H of the judgment:

‘A cornerstone of an adoption hearing is the anonymity which attaches to the adoptive parents. (See, for example, reg 23(2) and 28(6).) The reasons are manifest. If the anonymity of the adoptive parents is in any way compromised, the best interests of the child will be subverted. It is clearly undesirable that natural parents, especially the applicant, for example, who is so determined to stop the adoption by the adoptive parents, should become aware of their identity. It would in all probability lead to a prolonged tug-of-war, persisting even after an adoption. This would be inimical to the interests of the child.’

The children’s court’s proceedings in relation to Timothy’s adoption

The events that took place on 27 December 1995 and at subsequent appearances are dealt with in the judgment of the Court a quo at 221I–223J. I do not propose to canvass them afresh or in detail, but shall concentrate on what I consider to be the important aspects in relation to the present appeal.

There were appearances before the commissioner on 27 December 1995, 25 January 1996 and 15 February 1996. (These dates do not coincide with those reflected in the judgment of the Court a quo but are correct as far as the record goes.) An analysis of the addresses to the court by Mr Fraser’s attorney (Mr Soller) establishes conclusively that what was sought throughout was leave to intervene as a party in the pending adoption application. This approach was no doubt premised, correctly in my view, on the basis that only if such leave was granted could Mr Fraser become a party to any proceedings relating to the application for Timothy’s adoption by the adoptive parents. (See in this regard s 8(2) of the Act, and particularly reg 4(2), with which I shall come to deal.) Mr Soller’s attitude on behalf of Mr Fraser was made clear at the outset when he stated, at the commencement of his address on 27 December 1995, that ‘(m)y application is for permission to intervene’. The matter did not proceed further at that stage as the other interested parties were not present or represented. It was postponed in order to allow them an opportunity to oppose Mr Fraser’s application.

The proceedings resumed on 25 January 1996. The commissioner, acting in terms of s 7(3) of the Act, announced that he had appointed Miss L Grobbelaar to act as the children’s court assistant (‘the assis-
Mr Soller then again made it clear that he was applying 'for leave to intervene in these proceedings'. He went on to outline 'the purpose of applying to intervene in the proceedings'. He also hinted at a possible postponement or stay of the proceedings pending an application to the Constitutional Court to have s 18(4)(d) of the Act declared unconstitutional. (In the event nothing came of this at that stage and no recourse to the Constitutional Court was formally sought until the review proceedings were launched.) He further raised the question of Mr Fraser applying for the adoption of Timothy (Mr Fraser being qualified to do so in terms of s 17(b) of the Act). After a response by counsel (Mr Davis) appearing for Ms Naude and the (prospective) adoptive parents Mr Soller again reiterated 'this application ... was an application to intervene in the proceedings'. He disavowed that the application was one that related to the merits. The matter was then further postponed to 15 February, because in the words of the commissioner, 'I think in all fairness we should grant all the parties the opportunity of putting their cases before the court'.

At the resumption of the proceedings the commissioner's opening remark was that '(w)e will proceed in this application in terms of reg 4(2) of the Child Care Act'. No objection was raised to this statement. The significance of this is that there was never any suggestion that the application to intervene was anything other than one under reg 4(2). In the interim Mr Fraser had launched a counter-application for the adoption of Timothy and certain written reports and other documents had been filed in support thereof. In his address Mr Soller pointed out that there were now two competing applications for adoption, and went on to add:

'I do not believe with respect in any event that it is necessary for you any longer to give a judgment in respect of the application to intervene because that has been overtaken by an application brought by the father to adopt his own child.'

Notwithstanding this, when pertinently asked by the commissioner whether that meant that the application to intervene (and join as a party) was being withdrawn, Mr Soller replied 'Not at all, I am persisting with my application to join'. Nothing could be clearer than that. And if further confirmation of this attitude is needed it is to be found in a later comment made by Mr Soller, when replying to the submissions of Mr Davis, that his client 'ought to be given permission to intervene in the present adoption proceedings. That is basis number one.'

It was also in reply that Mr Soller raised for the first time, almost as an afterthought, the question of evidence being heard. He did so mainly in the context of any decision to be made by the assistant with regard to whether Ms Naude had unreasonably withheld her consent to Mr Fraser adopting Timothy.

The commissioner gave judgment on 23 February 1996. What transpired on that occasion is set out in the following paragraphs from Mr Fraser's founding affidavit in the review proceedings:
17. On 23 February 1996, the first respondent (the commissioner) delivered an oral judgment wherein he held that I had no entitlement to intervene in the pending adoption proceedings.

18. Thereafter the children’s court assistant delivered the results of her investigation into the refusal by the second respondent (Ms Naude) to consent to the adoption application brought by me. The children’s court assistant found that no reasonable grounds existed to dispense with the second respondent’s consent.

19. Thereafter, on 23 February 1996, the first respondent finalised the adoption application brought by the third respondent (the adoptive parents) and granted an order of adoption in favour of the third respondent.’

(The salient aspects of the commissioner’s judgment are set out in the judgment of the Court a quo at 224A–E.)

The learned Judge in the Court a quo came to the conclusion (at 223I–J) that

‘whatever may have been sought or submitted on the first two days, the applicant’s (Mr Fraser’s) claim on the final day was to have his counter-application for adoption decided by viva voce evidence. Whether his claim was adequately considered and dealt with must be tested as against the children’s court judgment upon this claim.’

He went on to hold (at 233B):

‘I find that the applicant sought to have his claim for adoption decided by viva voce evidence, to which I am satisfied he was entitled. The commissioner’s judgment frustrated the applicant’s attempt and in the circumstances amounted to such prejudice as to constitute a gross irregularity. In short, he was not afforded a proper hearing on his claim for the adoption of his own son.’

As will appear from what I have set out above these findings, in my view, do not entirely accurately reflect what transpired, and overlook the real thrust of Mr Fraser’s application. In any event, having regard to what occurred, I do not agree, for reasons that follow, with the conclusion reached.

Was the commissioner’s decision liable to review?

It is common cause that the only ground on which Mr Fraser sought to have the decision of the commissioner to grant the adoptive parents’ adoption application reviewed and set aside, is that contained in s 24(1) of the Supreme Court Act 59 of 1959, namely ‘gross irregularity in the proceedings’.

The children’s court is a creature of statute. It has no inherent jurisdiction. It is required and obliged to follow and give effect to the provisions of the Act and the regulations. The commissioner was accordingly bound to deal with the matters before him strictly in accordance with the Act and regulations. Where their provisions vested him with a discretion, he was required to exercise his discretion judicially with proper regard to all relevant facts and circumstances pertaining to its exercise. Neither this Court, nor the Court a quo, may simply substitute its view for that of the commissioner. The latter’s exercise of his discretion is only open to attack on certain circumscribed and
A well-known grounds (Ex parte Neethling and Others 1951 (4) SA 331 (A) at 335D–E; Reyneke v Wetenskapskraam van die Kaap die Goeie Hoop 1994 (1) SA 359 (A) at 369E–F).

Mr Fraser did not in his review application seek to impugn any of the provisions of the Act or regulations, other than s 18(4)(d) of the Act, on the grounds of lack of constitutionality. As I have pointed out, although declared unconstitutional by the Constitutional Court, the provisions of s 18(4)(d) continue to apply in terms of that Court’s order until such time as it is amended by Parliament or a period of two years has elapsed from the time of such order. The commissioner was obliged to give effect to its provisions, as must this Court as matters stand at present, despite the anomalous situation that its provisions are unconstitutional. The unfortunate result, as far as Mr Fraser is concerned, is that he does not at present stand to benefit personally from the declaration of unconstitutionality, although parents similarly placed are likely to do so in future.

Regulation 21(1) and (2) provides as follows:

D '(1) If a social worker’s report is lodged with the children’s court to the effect that the proposed adoptive parent or parents have been selected as such by a social worker and have received counselling in respect of the proposed adoption and the court has satisfied itself on the strength of the said report and such other information as it may obtain, as regards the matters mentioned in s 18(4) of the Act, the court may, in its discretion, consider the application and make an order without giving a hearing to any person.

E (2) If an application has not been or cannot be disposed of in terms of subreg (1), the clerk of the children’s court shall fix a date for the hearing of the application by the children’s court and he shall notify the prospective adoptive parent or parents of the inquiry and shall, at the request of the children’s court assistant, issue a subpoena in the form of Form 1.'

F It is common cause that a social worker’s report was lodged in respect of Timothy’s adoption application which satisfied the requirements of reg 21(1). In terms of s 18(4)(d) of the Act, because Timothy was illegitimate, only the consent of Ms Naude was required for his adoption. The consent of Mr Fraser was by necessary implication excluded. The information available to the commissioner was such as could have satisfied him with regard to the matters mentioned in s 18(4) of the Act. Consequently, before Mr Fraser appeared through his attorney on 27 December 1995 to pursue what he perceived to be his rights in relation to the adoption application, the commissioner was in a position to exercise his discretion to dispose of the adoption application without the need for a hearing. There was no need for an inquiry at that stage, and nothing to suggest that the commissioner intended to embark upon any inquiry as envisaged in reg 21(2).

Because of what follows, it will be convenient at this point to set out the provisions of reg 4(1) and (2). They provide:

I ‘(1) Subject to the provisions of reg 21(3) and (7) a parent or an adoptive parent of a child in respect of whom a children’s court holds an inquiry, the child and a respondent shall have the same rights and powers as a party to a civil action in a magistrate’s court in respect of the examination of witnesses, the production of evidence and of address to the court.

(2) A commissioner may allow any person who, in his opinion, has a substantial interest in the proceedings of the children’s court concerned to join
the proceedings, and a person who so joins shall for the purposes of these regulations be deemed to be a party to those proceedings and shall have the same rights and duties as a party referred to in subreg (1).'

It does not follow simply from the fact that Mr Fraser put in an appearance on 27 December 1995—that the adoption application was no longer capable of being dealt with and disposed of in terms of reg 21(1). His appearance per se did not convert the proceedings into an inquiry as envisaged by the regulations, nor did it oblige the commissioner to convert them into an inquiry at that stage. The first consideration was whether, in the exercise of his discretion, the commissioner was prepared to allow Mr Fraser, whom he accepted had a substantial interest in the proceedings, to join the proceedings. It was to this end that Mr Fraser sought leave to intervene in the proceedings in terms of reg 4(2).

In the course of his judgment the Judge a quo said (at 229B–D):

'I do not agree that the proceedings before the commissioner were reg 21(1) proceedings. The applicant applied to be heard. The commissioner at no time refused to hear him on the strength of reg 21(1). On the contrary, the commissioner did accord him a hearing of a sort and then dismissed his application.

In my view, reg 21(1) gives the commissioner a discretion to deal with certain adoptions administratively without hearing persons. That is the situation where there are no disputing parties and where the hearing is accordingly unnecessary. As soon as a party with an interest objects to a proposed adoption, the matter cannot proceed administratively without hearing such party. Regulation 21(1) accordingly would have been inappropriate for the hearing which took place.'

To the extent that the views expressed by the Judge are at variance with what I have said above, I respectfully disagree with them. The effect of the second quoted paragraph is that as soon as a party with an interest objects to a proposed adoption an inquiry perforce must be held. There is nothing in the Act or regulations which expressly says, or from which it may necessarily be inferred, that that is the case. Furthermore, to so hold would mean that Mr Fraser, as a parent (assuming, without deciding, that the judgment of the Court a quo at 228B–H was correct on this point) of a child in respect of whom an inquiry is held, would automatically (subject to reg 21(3) and (7)) acquire the rights and powers conferred by reg 4(1). This would render the provisions of reg 4(2) largely if not entirely nugatory, for it would deprive the commissioner not only of the control over the adoption proceedings that reg 4(2) envisages, but also deny him the discretion it affords him. It would also deprive him of his power to determine whether the matter was one which could be disposed of under regulation 21(1), or whether it would be necessary to invoke the provisions of reg 21(2). As is apparent from the résumé of the relevant events before the children's court, Mr Fraser never sought to rely on reg 4(1), and never claimed a right in terms of the Act or regulations to be a party to the pending adoption application. What he sought was leave to intervene in the proceedings in terms of reg 4(2). To the extent that he seeks to build a case on a foundation not previously laid, he is precluded from doing so (cf Administrator, Transvaal, and Others v Theletsane and Others 1991 (2) SA 192 (A) at 195F–196E, 200G).
As appears from reg 4(2), a person with a substantial interest in adoption proceedings does not have a right to join such proceedings. Whether or not such a person will be allowed to join depends upon the exercise of the commissioner’s discretion in his or her favour. Regulation 4(2) is intended, in my view, to operate as a sifting mechanism. It enables the commissioner in exercising his discretion also to exercise control over who will be permitted to participate in the proceedings. Relevant considerations in this regard would include the general circumstances that bear on the matter; the nature of the applicant’s interest; what the applicant’s underlying purpose or motive is; what bond, if any, exists between the applicant and the child whose adoption is being sought; the need to have regard to, and maintain a balance between, the competing interests of the various concerned parties; and the need to protect the identity of the persons seeking to adopt (the list is not intended to be exhaustive). Thus, if the child concerned was born in consequence of rape, the rapist would probably be turned away if he sought to join the proceedings. So too might someone who seeks to intervene from an ulterior motive and whose concern does not lie with the child; or someone whose participation in the proceedings would pose a threat to the anonymity of the prospective adoptive parents and the future well-being of the child. No blanket rule can be laid down. Ultimately each case falls to be dealt with in relation to its own particular merits (or demerits).

In the passage from the judgment of the Court a quo which I have quoted above reference is made to Mr Fraser having been accorded ‘a hearing of a sort’. This could create a wrong impression. The fact of the matter is that it has never been suggested that the commissioner did not give Mr Fraser a proper hearing in regard to his reg 4(2) application. Indeed, as the record shows, the commissioner went out of his way to accommodate Mr Fraser and to ensure that all the interested parties, and particularly Mr Fraser, be given a full opportunity of being heard. Nor has it ever been contended that in exercising his discretion against Mr Fraser by refusing to allow him to intervene in the proceedings the commissioner acted unreasonably, arbitrarily, capriciously or with an improper motive or purpose—in short, that he failed to exercise his discretion judicially. The review application never sought to challenge the way in which the commissioner exercised his discretion in this regard.

Once the commissioner refused Mr Fraser’s application for leave to intervene, the position effectively reverted to what it was at 27 December 1995 before Mr Fraser put in his appearance, save for the counter-application for Timothy’s adoption subsequently lodged by Mr Fraser. Did this disentitle the commissioner from proceeding in terms of reg 21(1) and oblige him to embark upon an inquiry in terms of reg 21(2)? In my view, not. On the law as it stood and had to be applied the counter-application was doomed to failure. It did not carry with it Ms Naude’s consent, an essential prerequisite in terms of s 18(4)(d) of the Act, unless unreasonably withheld. In terms of s 19 of the Act no consent in terms of s 18(4)(d) shall be required from any parent who is withholding his or her consent unreasonably. In terms of reg 21(4) it was
for the assistant in the first instance to investigate whether reasonable grounds existed for dispensing with Ms Naude's consent. She formed the opinion that no such grounds existed. Her opinion was reached with regard to the considerations mentioned in the report she presented after Mr Fraser's application to intervene had been dismissed. In effect she concluded that Ms Naude's consent had not been unreasonably withheld, a conclusion which (so it must be inferred) was accepted by the commissioner. Once that conclusion was reached there was no need for the clerk of the court to serve the notice contemplated in reg 21(4) requiring the person withholding consent, viz Ms Naude, to appear at a stated time and place to show why her consent should not be dispensed with. The effect of that conclusion was also that the counter-application had no prospect of success because the law precluded it being granted. Any hearing of evidence in relation thereto would have served no purpose. It must be borne in mind that to the extent that an opportunity was sought to have evidence heard its purpose was to advance Mr Fraser's counter-application. This would have been an exercise in futility. It was never sought to lead evidence, designed to defeat the adoptive parents' application for adoption, directed at showing that certain provisions of s 18(4) of the Act had not been satisfied.

It is correct that the assistant did not hear any evidence before forming her opinion, as Mr Soller in his final address suggested that she should. She had, however, been present during the presentation of argument on 25 January and 9 February 1996. She had available to her the reports and other documents filed by Mr Fraser in support of his counter-application. To that extent her opinion was an informed one. A right to be heard does not necessarily include a right to lead evidence. But, in any event, her conclusion was never the subject of any attack in the review application on the ground that she failed to give Mr Fraser a hearing, nor was any challenge directed at its acceptance by the commissioner.

The counter-application consequently presented no obstacle to the disposal of the adoptive parents' application in terms of reg 21(1). As the matter before the commissioner was not one incapable of being disposed of in terms of reg 21(1), there was no need to invoke the provisions of reg 21(2). The fact that the commissioner did not make specific mention of reg 21(1) does not detract from the conclusion that he, if the events that occurred are placed in proper perspective, acted in terms thereto. As there was no reason for the commissioner, on the information available to him, not to have been satisfied with regard to the matters mentioned in s 18(4) of the Act, there was no bar to his granting the adoptive parents' application for adoption.

It was claimed that Mr Fraser was in any event entitled to a hearing in respect of the adoption proceedings in terms of the "audi alteram partem" principle at common law. In Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A) at 748G-H Corbett CJ stated the position as follows:

'The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the
A decision is taken . . . unless the statute expressly or by implication indicates the contrary."

The commissioner was alive to the fact that any decision taken by him in regard to the adoption application or counter-application would be one affecting Mr Fraser’s interests. He was bound, however, to proceed in terms of the Act and regulations. Their provisions, as the events unfolded, precluded (at least by implication) any hearing other than in respect of the reg 4(2) application. There was accordingly no breach of the audi principle.

Conclusion

In my view, the commissioner conducted the proceedings in the children’s court in a proper manner and in consonance with the provisions of the Act and regulations. He allowed Mr Fraser a full hearing in regard to his reg 4(2) application. He did not commit any gross irregularity in the proceedings, nor was he guilty of any improper exercise of his discretion. Consequently the Court a quo erred in granting the review application, and the appeal must succeed.

One final point. The heads of argument filed on behalf of Mr Fraser foreshadowed the possible referral of certain issues to the Constitutional Court. These were never clearly formulated and no proper basis, factual or otherwise, was laid for such referral. Mr Fraser is obviously free to pursue any constitutional rights he considers he may have in that Court.

Order

A. The appeal is allowed, with costs.

B. The orders of the Court a quo, with the exception of order 2, are set aside and there is substituted in their stead the following:

‘Application dismissed, with costs, such costs to include the reserved costs of 26 March, 2 April and 17 April 1996.’

Schutz JA, Scott JA and Pleman JA concurred in the judgment of Smalberger JA.

Melunsky AJA: I have had the benefit of reading the judgment of my Brother Smalberger JA, which I will refer to as ‘the main judgment’, but regret that I am unable to agree with the decision to allow the appeal. I agree, however, for the reasons stated in the main judgment, that this Court has jurisdiction to entertain the appeal and that the provisions of the Constitution of the Republic of South Africa Act 200 of 1993 (‘the interim Constitution’) do not preclude it from exercising such jurisdiction. It is therefore not necessary, in my view, to consider whether the interests of justice require this Court to assume jurisdiction in terms of item 17 of Schedule 6 to the new Constitution (the Constitution of the Republic of South Africa Act 108 of 1996).

In the Court a quo the respondent (‘Mr Fraser’) sought, inter alia, an order reviewing and setting aside the order for the adoption of his son, Timothy. This order was granted (see Fraser v Children’s Court, Pretoria North, and Others 1997 (2) SA 218 (T)).

J It was the essence of Mr Fraser’s application that he, as the natural
father of the child, had the right to be heard in the adoption application brought by the second appellant ('the adoptive parents') and that the children’s court commissioner, by dismissing his application to intervene in those proceedings, denied him the right to be heard prior to the grant of the adoption order. The learned Judge a quo, Preiss J, however, considered that what Mr Fraser sought was the right to have his own claim for adoption decided by *viva voce* evidence (at 233B). He held that he was entitled to this relief, and that was the basis upon which he granted the order in Mr Fraser’s favour.

In the proceedings before the commissioner Mr Fraser’s attorney did indeed refer to the need for *viva voce* evidence to be led. But, as I understand his argument, he submitted that oral evidence would, in due course, be required to enable the commissioner to rule on three matters:

1. the adoption application by the adoptive parents;
2. Mr Fraser’s counter-application for adoption; and
3. the ruling by the children’s court assistant that Timothy’s mother, the first appellant, did not unreasonably withhold her consent to Mr Fraser’s counter-application.

Mr Fraser’s immediate aim before the commissioner, however, was to be heard in the adoption application made by the adoptive parents. This, too, as I have pointed out, was the ground upon which he based his application in the Court a quo. In my view, therefore, Preiss J, did not decide the application on the grounds advanced by Mr Fraser in his founding and supplementary affidavits. But I am nevertheless of the opinion, for the reasons that follow, that the appeal against his order should be dismissed.

The question that has to be decided in this appeal depends largely upon the interpretation to be placed on the regulations promulgated under the Child Care Act 74 of 1983 ('the Act'). The provisions of most of the regulations which are relevant for present purposes are set out in the main judgment. The children’s court disposed of the adoption application in terms of reg 21(1). For reasons which I will give later the court should, in my judgment, have held an inquiry in terms of reg 21(2). Moreover, and upon a proper construction of the regulations, I am of the view that Mr Fraser had an unqualified right to be a party to the inquiry in terms of reg 4(1), subject, of course, to the limitations imposed by reg 21(3) and (7).

The first question which I consider is whether it is open to Mr Fraser to rely on reg 4(1) in this appeal on the grounds that the attorney for Mr Fraser, in the proceedings before the commissioner, did not claim to rely upon it. He sought the leave of the commissioner to intervene in the adoption proceedings or to become a party to the application for adoption. The commissioner treated this as an application to become a party in terms of reg 4(2). That, in my view, does not preclude this Court—nor was the Court a quo precluded—from holding that Mr Fraser was entitled to apply in terms of reg 4(1) if this is what the law provides. If Mr Fraser had the right to become a party in terms of the said regulation, this Court is entitled—if not obliged—to apply that regulation despite the erroneous approach adopted in the children’s
A court. It has often been held that it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness to the other party and raises no new factual issues (see Paddock Motors (Pey) Ltd v Igesund 1976 (3) SA 16 (A) at 24B–G and Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA 276 (A) at 290E–I).

Indeed, as Jansen JA said in the Paddock Motors case at 23F–G:

‘... (I) would create an intolerable situation if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part ...’

There appears to me to be no sound reason why the aforesaid principles should not apply to review proceedings. Different considerations arise where a party, whether on review or appeal, raises a point for the first time which is dependent upon factual considerations that were not fully explored in the court of first instance. This is the situation that arose in Government of the Province of KwaZulu-Natal and Another v Ngwane 1996 (4) SA 943 (A) at 949C–950A. The decision in Administrator, Transvaal and Others v Theletsane and Others 1991 (2) SA 192 (A) at 195F–196D does not detract from the principle that a court may take cognisance of a point raised for the first time on appeal provided that it results in no unfairness and causes no prejudice.

Where the issue raised for the first time on appeal is purely a legal one, there would normally be no unfairness or prejudice to the other party provided that due notice was given of the intention to rely upon it. In the present matter, counsel for Mr Fraser explicitly submitted in their heads of argument that the decision to grant the adoption application was irregular in terms of reg 4(1). The appellants’ counsel were not taken by surprise. They were entitled to argue, as they did, that reg 4(1) did not apply to the present appeal. If this Court, however, comes to the conclusion that the children’s court was obliged to apply reg 4(1), it cannot, in the circumstances, refuse to apply it because Mr Fraser’s attorney had an erroneous understanding of the legal position. Indeed, whatever Mr Fraser’s attorney may have said, the commissioner was bound to apply the law as it stood. It only remains to add, on this point, that nothing turns on the fact that the commissioner has not commented on the provisions of reg 4(1). The interpretation of the regulations is purely a matter of law and the commissioner’s comments are not essential to a resolution of this issue.

I turn to deal with the regulations. The Judge a quo correctly pointed out (at 229F–I) that the provisions of the Act and the regulations contain apparent anomalies in relation to adoption proceedings. The provisions are not easy to interpret and, in my view, it is not always clear to understand how the procedures are to operate in practice. In these circumstances this seems to me to be a case where this Court, in interpreting the regulations, should have regard to the spirit, purport and object of chap 3 of the interim Constitution. Section 35(3) imposes a duty on all courts to interpret statutory provisions and apply common-law principles in accordance with the fundamental rights contained in the chapter. Statutory provisions should be construed so as not to infringe these rights if this can be done reasonably and without doing violence to the language of the provisions. The requirement of reason-
ABLENESS also applies to s 35(2) which is interrelated to s 35(3) and which provides for a restrictive interpretation or ‘reading down’ of a statute to avoid invalidity (see Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) paras [59]–[60] at 785F–786F (1996 (4) BCLR 449). I agree with the views of Preiss J at 228B–H that a father of a child born out of marriage is a ‘parent’ within the meaning of reg 4(1). In addition to the reasons given by the Judge a quo for arriving at this decision, there is the need, imposed by s 35 (3) of the interim Constitution, to interpret ‘parent’ in a way which does not discriminate between the father of a child born out of wedlock and all other parents. It was this kind of discrimination which resulted in the Constitutional Court holding that s 18(4)(d) of the Act was unconstitutional (see Fraser v Children’s Court, Pretoria North, and Others 1997 (2) SA 261 (CC) paras [19]–[21] at 271F–272H (1997 (2) BCLR 153)).

In my view, once Mr Fraser appeared and asked to be heard the commissioner was not entitled to apply reg 21(1) which entitles him to grant an adoption order ‘without giving a hearing to any person’. He was then obliged to hold an inquiry in terms of reg 21(2). The Judge a quo at 229C–D went as far as to say that as soon as a party with an interest objects to a proposed adoption the matter cannot proceed administratively without hearing such a party. I do not, with respect, agree that it is necessary to hold an inquiry if any person with an interest objects to the proposed adoption. The regulations draw a distinction between a parent (reg 4(1)) and a person who has a substantial interest in the proceedings (reg 4(2)). Persons with a substantial interest in the proceedings require the consent of the commissioner to become a party to the adoption proceedings.

This brings me to consider whether reg 4(2) also applies to a parent. I have considerable difficulty in holding that it does. For, if a parent is to be regarded as a person who has a substantial interest in terms of reg 4(2), he or she would have to apply to the commissioner to become a party to adoption proceedings and, if the commissioner granted such permission, he would then be obliged to hold an inquiry in terms of reg 21(2). The effect would be that reg 4(1) would serve no purpose insofar as adoption proceedings are concerned. In my view, therefore, reg 4(1) and (2) can only be reconciled on the basis that the rights of a parent differ from those of a person who has a substantial interest in the proceedings. While the latter is obliged to obtain permission to join in an inquiry the former is entitled as of right to do so. The words ‘in respect of whom a children’s court holds an inquiry’ in reg 4(1) do not mean that a parent has a right to become a party only if an inquiry is held. These words are descriptive of the child and do not qualify the rights of the parent.

For these reasons I am of the opinion that reg 4(1) and (2) read with the commissioner’s powers in terms of reg 21(1) and (2) oblige the commissioner to hold an enquiry when a parent desires to be heard in relation to the adoption of his or her child. This interpretation also accords with the provisions of chap 3 of the interim Constitution to the extent that those provisions require that every person should have the right to be heard in proceedings in which his or her rights may be affected.
A or whenever he or she has a legitimate expectation to a hearing. In saying this I have not lost sight of the fact that a parent is not the only person who has an interest in the proposed adoption. It may be that a parent’s participation in the adoption proceedings may not be in the interests of the child or the adoptive parents. Regulation 21 contains sufficient safeguards to prevent abuse. The commissioner is entitled to control the proceedings in the interests of the child and the prospective adoptive parents. In terms of reg 21(3) a parent is not entitled to be present at an inquiry unless he or she has been summoned as a witness. This, it may be noted, merely means that a parent is not entitled as of right to attend but it does not absolutely exclude his or her presence if the commissioner considers this to be necessary. The commissioner, in his discretion, may exclude the parent from being physically present but may, for instance, permit him or her to make written representations. Regulation 21(7) provides that a parent may not attend the proceedings when the prospective adoptive parents are present. This provision, too, will minimise the risk of abuse by an unscrupulous parent. If the regulations are construed as I respectfully suggest they should be, it will result in a reasonable balance between the rights of a parent and the rights of other persons whose interests may be affected by an adoption order.

There are two other matters raised by counsel for Mr Fraser that require mention, albeit briefly. The first was the submission that the common-law rule that parental authority over children born out of marriage vests exclusively in their mothers requires re-examination in the light of the equality provisions of the interim Constitution. There is no need for me to express an opinion on this submission, and I refrain from doing so, for even if Mr Fraser lacks parental authority he is entitled, as a natural parent, to a hearing in terms of reg 4(1).

The second matter was the submission by counsel for Mr Fraser that certain provisions of the Act, by implication, clearly indicate that every parent is entitled to participate in the adoption proceedings before the children’s court. In particular counsel referred to s 21 of the Act which affords the right to a parent to apply for the rescission of an adoption order and s 22 which gives the parent the right to appeal against such an order. As I am satisfied, for the reasons given, that Mr Fraser has the right to become a party to the proceedings in terms of reg 4(1), it is not necessary to consider whether the aforesaid provisions have a bearing on the meaning of the regulations.

I would therefore dismiss the appeal.

Schutz JA: Whilst content to concur in the judgment of Smalberger JA I find it necessary to make some comments about the reasoning contained in the dissenting judgment of Melunsky AJA. Two main points arise. The first is whether Mr Fraser (‘Fraser’) had an absolute right to be heard, as opposed to an entitlement to request that a discretion be exercised in his favour to like end. This depends upon the interpretation of subregs 4(1) and (2) seen in their entire setting. The second is whether, assuming that Fraser had such a right, he could rely upon it for the first time as a ground for setting aside the adoption order
after the adoption proceedings were complete, notwithstanding that he had not claimed his right at any stage during their course.

Concerning the interpretation of the regulations, Melunsky AJA expresses the view that they, like the Act, are not easy to interpret. Although these statutes do require application, I confess to finding less difficulty in understanding them. In the first place it helps to place reg 4 in perspective in relation to the Act and the regulations as a whole. The present Act, the Child Care Act 74 of 1983, is but the latest in a series, going back to 1923 where adoption is concerned. It can be safely assumed that the Act and the regulations under it are based upon a wealth of practical experience and that its main object is the protection of disadvantaged children in a wide variety of circumstances. These include but are not confined to those which may render adoption desirable. The regulations are plainly framed with this object in mind. Thus, while they cover a wider subject-matter, adoption as such is covered by regs 17–28, which fall under the heading ‘Adoptions’. On the other hand, regs 2–7 under the heading ‘Children’s courts’ are of a general procedural nature. Regulation 4 is headed ‘Parties to inquiries and summoning of witnesses’. Inquiries may arise in a variety of circumstances of which adoption is but one. To take an example, an inquiry under s 13 of the Act into the ‘safety and welfare’ of a child (see s 11) is a procedure which would then be governed in the respects dealt with therein by reg 4. It is to be noted that in such an inquiry the Legislature has given parents the right to be given notice of and the duty to attend the inquiry, unless the commissioner otherwise directs (s 13(5)(a)). The starting point in the present matter is for these reasons not reg 4 but reg 21. As will be shown below that regulation, the principal one dealing with procedure in the adoption section, vests a discretion in the commissioner not to hold an inquiry in an adoption matter where circumstances suggest that this is either not necessary or not desirable. Seen in this light it will be apparent that the immediate focus of reg 4(1) is not the creation of a right in a parent in adoption proceedings, as is suggested by Melunsky AJA. In fact quite the contrary. Regulation 4(1) starts off with the exception ‘Subject to the provisions of reg 21(3) and (7)’. Further, the rights conferred on parents by reg 4(1), such as they are, arise only when ‘a children’s court holds an inquiry’. In the context this is an implicit further reference to reg 21, particularly reg 21(2). By contrast reg 4(2), the discretion regulation, refers to the joinder of a person ‘with a substantial interest in the proceedings’.

Regulation 21(1) provides that after the commissioner has satisfied himself of certain important matters (chiefly in the interest of the child) he ‘may’, in his discretion, consider the application and ‘make an order without giving a hearing to any person’. Nothing could be clearer. ‘Any person’ can include a parent, indeed both parents. Regulation 21(2) proceeds to lay down that if an application ‘has not been or cannot be disposed of in terms of subreg (1)’ an inquiry has to be arranged. There is no suggestion anywhere that if a parent, whether legitimate or otherwise, wishes to be a party, the commissioner is not entitled to exercise the discretion expressly conferred on him in general terms, but must hold an inquiry at the behest of that parent. Apart from the
A wording of the regulations, common sense demands that the commissioner’s discretion should not be fettered in the way suggested. Take the
case in which the social worker has reported that both (legitimate)
parents are drunk through most of their waking hours. Or take the case
of the man who is the father by virtue of an act of rape, or one whose
object is blackmail. These examples cannot be brushed aside as extreme
or implausible ones. They illustrate why the commissioner ought to have
an all-inclusive discretion. And they illustrate, in my opinion, why
Melunsky AJA err in his view that a parent, merely by virtue of being a
parent, has an absolute right to insist on an inquiry being held under reg
21(2). That the legislation does not accept the paramountcy of parent-
hood is demonstrated by s 19 of the Act, which sets out the instances in
which the consent of a parent to an adoption may be dispensed with.
One of the instances is where that consent is unreasonably withheld.
Another striking example is the curtailment of any claim to be present at
an inquiry, contained in regs 21(3) and (7). Further, one may ask why a
grandparent who has taken in a child from birth and given it succour,
should have less potential rights, when it comes to that child’s adoption,
than a father who has shown no interest in it, done nothing for it, nor
paid a penny towards its upkeep.

If it be correct that a parent, any sort of parent that is, can insist on an
inquiry under reg 21(2) that would, so the argument proceeds, lead one
back to reg 4(1). Once there is to be an inquiry, then a ‘parent’ has an
absolute right to be a party. I disagree entirely with that conclusion and
the process of reasoning by which it is reached. Both a literal and a
purposive reading of reg 21, as I have sought to demonstrate, leads to the
conclusion that a parent is not the commissioner’s master. The legisla-
tion lacks any basis that I can see to support Melunsky AJA’s accentuation
of the parent’s rights, leading him to the conclusion that reg 4(1) is
for parents and reg 4(2) for others.

Nor do I consider that his reference to s 35(3) of the interim
Constitution, with its injunction to interpret laws in accordance with the
fundamental rights provided by it, takes the matter any further. The
Constitution is a protean instrument encompassing all kinds of rights for
all kinds of people. It does not have the narrow focus simply of protecting
the rights of natural fathers to be heard in adoption proceedings at the
expense of others. Not least among those others is the boy Timothy. The
legislation strives, in an emotion-laden ambience, to achieve a balance
between conflicting interests, with an emphasis upon the interests of the
child and the adoptive parents. One of the inevitable consequences of the
secrecy conceived in their interest is the curtailment in adoption
proceedings of participation by other persons, including natural parents.
The balance that the legislation aims to achieve is no doubt an imper
fect one. But no reason has been advanced why its policy should be somehow
tempered, or why it should not be construed according to its plain terms.
Section 35(3) does not confer unconstrained powers of legislation on
this Court. So much for construction, the basis relied upon. Throughout
these lengthy proceedings, crammed with arraignments as they are, there
has been no attempt to attack the constitutionality of the regulations. So
that, if there are imperfections in detail, the remedy is legislation.
Melunsky AJA suggests that some obviously undesirable consequences of allowing the unrepresented participation of certain kinds of parent may be alleviated by the commissioner's restrictive control of the proceedings. To my mind this suggestion caters for form rather than substance. The right of hearing given by the one hand is to be taken away by the other. The practicality of the suggestion may also be doubted. Indeed the suggestion made would do no more than transpose the decision to be made as to whether an inquiry is the appropriate course, to a later reconsideration of the same question after having embarked upon an inquiry. The purpose of such a division of function is obscure.

My conclusion on the first point is that a parent does not have an absolute right to be heard in adoption proceedings (proceedings as opposed to inquiries). In this case the commissioner decided not to hold an inquiry, so that, even if Fraser is a 'parent', reg 4(1) did not give him an absolute right to be a party to those proceedings.

I would add, on the facts of this case, that no attempt whatever has been made to review the commissioner's discretionary decision to proceed to conclusion under reg 21(1). Nor is there anything, except a view of the law that is in my opinion mistaken, to show that he acted wrongly in doing so. As regards the second point, if Fraser is allowed to raise his contention that he had a right under reg 4(1) (assuming now that he had such a right) for the first time after the adoption proceedings have been concluded, there is, to my mind, a real danger that the other parties will have been denied a fair trial. It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces. This is usually spoken of in the criminal context, but it is no less true in the civil. There is little point in granting a person a hearing if he does not know how he is concerned, what case he has to meet. One of the numerous manifestations of the fundamental principle is the subrule that he who relies on a particular section of a statute must either state the number of the section and the statute, or formulate his case sufficiently clearly so as to indicate what he is relying on:

Another manifestation of the general principle is to be found in the decision in Administrator, Transvaal, and Others v Theleisane and Others 1991 (2) SA 192 (A) at 195–7. The case that the respondent sought to make on appeal was not squarely raised in his founding affidavit. That lacking, he tried to piece that case together out of statements in the appellant’s answering affidavit. The attempt failed, because of the unfairness of possibly taking out of context statements which the appellant had made in reply to what he thought he faced and in ignorance of the case only later laid at his door. Although the emphasis was on the applicant’s having to set out the facts on which he relied, so that the respondent might respond with any facts at his disposal; when the decision was followed in Government of the Province of KwaZulu Natal and Another v Ngwane 1996 (4) SA 943 (A), Nienaber JA said (at 949B–C), in my view correctly:
Had the point been spelt out in the application papers the respondent, duly alerted, could have responded on fact and on law.'

(Own emphasis.)

As far as the facts in this case are concerned, I do not agree with Melünsky AJA that 'the essence' of Fraser's case was that he had the right to be heard in the application of the adoptive parents. Despite the many words spoken by his attorney this was the one thing that was never claimed. What was claimed was the antithesis of such a right. And it is clear that both the commissioner and counsel for the adoptive parents and the mother understood that the claim was one under reg 4(2) and not under 4(1). Consequently there was no debate about the construction of the relevant regulations.

On appeal it was argued that the switch to reg 4(1) caused no prejudice and involved no unfairness. The argument based on that subregulation was one of law purely, so it was said. I am not convinced. Just as in the application of the audi alteram partem principle one must keep the procedures and the merits apart; one must not assume that the case is so obvious that there could have been no answer if opportunity had been offered (see the authorities mentioned in the judgment of the Court a quo—Fraser v Children's Court, Pretoria North, and Others 1997 (2) SA 218 (T) at 231H–233A); one may not in a case of failure to claim simply assume that even if notice of claim had been given it would not have had any effect on a past course of events, that the proceedings would in any event have gone on in their settled course.

Is one entitled to assume the inevitable sameness of the proceedings in this case had Fraser's attorney relied on reg 4(1)? When answering this question one must assume, contrary to the opinion that I have earlier expressed, that the reliance would have been well placed. If that is so, then one must allow that the magistrate would probably have admitted Fraser as a party, even that the other parties might not have resisted a legal inevitability. What would then have happened is anyone's speculation. But it is perfectly possible that after Fraser had established the identity of the adoptive parents, had cross-examined, had given oral evidence, had led witnesses, had argued, the result would have been the same; the adoption order would have been granted. But now, such is the contention, after the first years of Timothy's life have already passed in the custody of the adoptive parents, the order is to be set aside, because the adoption proceedings all along had the hidden germ of avoidance within them. That because Fraser did not take his point then, only later.

In my opinion there is something wrong with this argument. Suppose that Fraser believing, for whatever reason, that he did not have rights under reg 4(1), had stayed away from the proceedings altogether; could he, long after, after gaining advice that he had such rights after all, have reviewed the commissioner's decision on the ground that he could have raised the point, when in fact he did not? And if not, does it make any difference that he gained admission to the commissioner in seeking participation, yet still failed to play his trump?

I think not. One is not here dealing with a point of law which may without danger of prejudice be applied to the facts relevant to it, which have plainly been fully explored and established. One is dealing with the
course proceedings may have taken, whether this way or that way, or some other way, depending upon what the parties may have put forward in the course of establishing the facts. It is like the case of a person who attends a meeting and claims to have the proxy of A but is refused a vote, upon its being shown that the proxy form is not that of A, who later demands that a resolution taken at the meeting be set aside because he had B’s potentially decisive proxy with him, which he failed to put forward. There must come a stage at which we must say with the Romans, *vigilantibus non dormientibus jura subveniunt*.

Put more simply, I am of the view that basic justice demands that Fraser should have put forward what is now said to be the true basis for his joinder at the right time and the right place. The heads of argument put forward on his behalf on appeal are neither timely nor the right place.

For these reasons I disagree with the reasons of Melunsky AJA and concur in the judgment of Smalberger JA.

Scott JA and Plewman JA concurred in the judgment of Schutz JA.

First Appellant’s Attorneys: Van der Walt & Hugo, Pretoria; Rosendorff & Reitz, Barry, Bloemfontein. Second Appellant’s Attorneys: Dion Rhöder & Heinis, Ladysmith; Naude, Bloemfontein. Respondent’s Attorneys: Soller & Manning, Johannesburg; McIntyre & Van der Post, Bloemfontein.
(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: see study units 7 to 10 for more information on the Constitution.)

(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. You will deal with these new legal developments in more detail in the private law modules, Law of Persons and Family Law.

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.

When you read the case, did you spot that the constitutionality of section 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 section 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, case law) which is inconsistent with the Constitution, may be challenged in a South African court. In your study of the Constitution (study units 7 to 10) you will learn that the Constitutional Court is the highest court in respect of constitutional matters. 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 section 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. You will deal with these new legal developments in more detail in the private law modules, Law of Persons and Family Law.

We hope that this exercise has given you an idea of the way in which
sources of law are consulted and some understanding of the authority of each source. You will become more familiar with the sources of South African law and the way in which they are used as you progress with your studies.

**Activity 6.4**

In the discussion we have just had, we noted that legislation or statutory law is a primary source of law, and you will consult it when dealing with a legal problem. You learn how to read a court case in the module *Skills Course for Law Students*. In the activity which follows you will

- consult a particular statute/Act which forms part of legislation in general
- learn how to interpret a statute
- apply the legal rules contained in the statute to factual situations

The Act you will be looking at is the **Choice on Termination of Pregnancy Act 92 of 1996**.

In some of the questions in this activity you will come across an instruction like "Give reasons for your answer" or "Refer to the relevant section(s) of the Act". This means that you must substantiate (give reasons for) your answer by (1) referring to the relevant section(s) of the Act in which you found your answer and (2) by briefly explaining the information contained in the section(s) of the Act.

You will notice that we speak of "relevant section(s)". By placing the "s" in brackets we are showing you that sometimes there is more than one section in the Act which you can use to give reasons for your answer. We expect you to look for all the reasons you can find.

Look at the following example which we have marked on the Act that follows.

**Example**

The correct way of referring to a section of an act (eg s 2(1)(b)(iii)), is as follows:

1. Refer to the **number of the section** — 2.
2. This is followed by the **sub-section** — (1).
3. Next comes the **paragraph** — (b).
4. Finally, you must provide the **sub-paragraph** — (iii).
Section 2(1)(b)(iii) provides that a pregnancy may be terminated from the 13th week up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that the pregnancy resulted from rape or incest.

In cases where you are required to explain or discuss reasons for your answer, your answer should be clear and to the point. In your answer, you should give the number of the appropriate section(s) as well as a brief summary of what is contained in the section. An example of such an answer would be the following: “In terms of section 2(1)(a) of the Choice on Termination of Pregnancy Act 92 of 1996, a pregnant woman may, if she requests it, have her pregnancy terminated during the first 12 weeks of the gestation period.”

PLEASE NOTE:

You need not study in detail the Choice on Termination of Pregnancy Act 92 of 1996 for the examination. You need only study the activity on the Choice on Termination of Pregnancy Act 92 of 1996 and the feedback on this activity for the examination.
CHOICE ON TERMINATION OF PREGNANCY ACT
NO. 92 OF 1996

[Assented to 12 November, 1996]  [Date of Commencement: 1 February 1997]

(Afrikaans text signed by the President)

ACT

To determine the circumstances in which and conditions under which the pregnancy of a woman may be terminated; and to provide for matters connected therewith.

Preamble.—Recognising 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;

Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies;

Recognising that both women and men have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, and that women have the right of access to appropriate health care services to ensure safe pregnancy and childbirth;

Recognising that the decision to have children is fundamental to women's physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy, as well as sexuality education and counselling programmes and services;

Recognising that the State has the responsibility to provide reproductive health to all, and also to provide safe conditions under which the right of choice can be exercised without fear or harm;

Believing that termination of pregnancy is not a form of contraception or population control;

This Act therefore repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act, 1975 (Act No. 2 of 1975), and promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs.

1. Definitions.—In this Act, unless the context otherwise indicates—

"Director-General" means the Director-General of Health;

"gestation period" means the period of pregnancy of a woman calculated from the first day of the menstrual period which in relation to the pregnancy is the last;

"incest" means sexual intercourse between two persons who are related to each other in a degree which precludes a lawful marriage between them;

"medical practitioner" means a person registered as such under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act No. 56 of 1974);

"Minister" means the Minister of Health;
"minor" means any female person under the age of 18 years;

"prescribe" means prescribe by regulation under section 9;

"rape" also includes statutory rape as referred to in sections 14 and 15 of the Sexual Offences Act, 1957 (Act No. 23 of 1957);

"registered midwife" means a person registered as such under the Nursing Act, 1978 (Act No. 50 of 1978);

"termination of a pregnancy" means the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman;

"woman" means any female person of any age.

2. Circumstances in which and conditions under which pregnancy may be terminated.—(1) A pregnancy may be terminated—

(a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;

(b) from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that—

(i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or

(ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or

(iii) the pregnancy resulted from rape or incest; or

(iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or

(c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy—

(i) would endanger the woman’s life;

(ii) would result in a severe malformation of the fetus; or

(iii) would pose a risk of injury to the fetus.

(2) The termination of a pregnancy may only be carried out by a medical practitioner, except for a pregnancy referred to in subsection (1) (a), which may also be carried out by a registered midwife who has completed the prescribed training course.

3. Place where surgical termination of pregnancy may take place.—(1) The surgical termination of a pregnancy may take place only at a facility designated by the Minister by notice in the Gazette for that purpose under subsection (2).

(2) The Minister may designate any facility for the purpose contemplated in subsection (1), subject to such conditions and requirements as he or she may consider necessary or expedient for achieving the objects of this Act.

(3) The Minister may withdraw any designation under this section after giving 14 days' prior notice of such withdrawal in the Gazette.

4. Counselling.—The State shall promote the provision of non-mandatory and non-directive counselling, before and after the termination of a pregnancy.
STATUTES OF THE REPUBLIC OF SOUTH AFRICA—MEDICINE, DENTISTRY AND PHARMACY

Choice on Termination of Pregnancy Act,
No. 92 of 1996

ss. 6 – 10

5. Consent.—(1) Subject to the provisions of subsections (4) and (5), the termination of a pregnancy may only take place with the informed consent of the pregnant woman.

(2) Notwithstanding any other law or the common law, but subject to the provisions of subsections (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy.

(3) In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated. Provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them.

(4) Subject to the provisions of subsection (5), in the case where a woman is—

(a) severely mentally disabled to such an extent that she is completely incapable of understanding and appreciating the nature or consequences of a termination of her pregnancy; or

(b) in a state of continuous unconsciousness and there is no reasonable prospect that she will regain consciousness in time to request and to consent to the termination of her pregnancy in terms of section 2, her pregnancy may be terminated during the first 12 weeks of the gestation period, or from the 13th up to and including the 20th week of the gestation period on the grounds set out in section 2 (1) (b)—

(i) upon the request of and with the consent of her natural guardian, spouse or legal guardian, as the case may be; or

(ii) if such persons cannot be found, upon the request and with the consent of her curator personae:

Provided that such pregnancy may not be terminated unless two medical practitioners or a medical practitioner and a registered midwife who has completed the prescribed training course consent thereto.

(5) Where two medical practitioners or a medical practitioner and a registered midwife who has completed the prescribed training course, are of the opinion that—

(a) during the period up to and including the 20th week of the gestation period of a pregnant woman referred to in subsection (4) (a) or (b)—

(i) the continued pregnancy would pose a risk of injury to the woman’s physical or mental health; or

(ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or

(b) after the 20th week of the gestation period of a pregnant woman referred to in subsection (4) (a) or (b), the continued pregnancy—

(i) would endanger the woman’s life;

(ii) would result in a severe malformation of the fetus; or

(iii) would pose a risk of injury to the fetus,

they may consent to the termination of the pregnancy of such woman after consulting her natural guardian, spouse, legal guardian or curator personae, as the case may be: Provided that the termination of the pregnancy shall not be denied if the natural guardian, spouse, legal guardian or curator personae, as the case may be, refuses to consent thereto.
6. Information concerning termination of pregnancy.—A woman who in terms of section 2 (1) requests a termination of pregnancy from a medical practitioner or a registered midwife, as the case may be, shall be informed of her rights under this Act by the person concerned.

7. Notification and keeping of records.—(1) Any medical practitioner, or a registered midwife who has completed the prescribed training course, who terminates a pregnancy in terms of section 2 (1) (a) or (b), shall record the prescribed information in the prescribed manner and give notice thereof to the person referred to in subsection (2).

(2) The person in charge of a facility referred to in section 3 or a person designated for such purpose, shall be notified as prescribed of every termination of a pregnancy carried out in that facility.

(3) The person in charge of a facility referred to in section 3, shall, within one month of the termination of a pregnancy at such facility, collate the prescribed information and forward it by registered post confidentially to the Director-General: Provided that the name and address of a woman who has requested or obtained a termination of pregnancy, shall not be included in the prescribed information.

(4) The Director-General shall keep record of the prescribed information which he or she receives in terms of subsection (3).

(5) The identity of a woman who has requested or obtained a termination of pregnancy shall remain confidential at all times unless she herself chooses to disclose that information.

8. Delegation.—(1) The Minister may, on such conditions as he or she may determine, in writing delegate to the Director-General or any other officer in the service of the State, any power conferred upon the Minister by or under this Act, except the power referred to in section 9.

(2) The Director-General may, on such conditions as he or she may determine, in writing delegate to an officer in the service of the State, any power conferred upon the Director-General by or under this Act or delegated to him or her under subsection (1).

(3) The Minister or Director-General shall not be divested of any power delegated by him or her, and may amend or set aside any decision taken by a person in the exercise of any such power delegated to him or her.

9. Regulations.—The Minister may make regulations relating to any matter which he or she may consider necessary or expedient to prescribe for achieving the objects of this Act.

10. Offences and penalties.—(1) Any person who—

(a) is not a medical practitioner or a registered midwife who has completed the prescribed training course and who performs the termination of a pregnancy referred to in section 2 (1) (a);

(b) is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2 (1) (b) or (c); or

(c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.

(2) Any person who contravenes or fails to comply with any provision of section 7 shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.
11. **Application of Act.**—(1) This Act shall apply to the whole of the national territory of the Republic.

(2) This Act shall repeal—
   
   (a) the Act mentioned in columns one and two of the Schedule to the extent set out in the third column of the Schedule; and

   (b) any law relating to the termination of pregnancy which applied in the territory of any entity which prior to the commencement of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), possessed legislative authority with regard to the termination of a pregnancy.

12. **Short title and commencement.**—This Act shall be called the Choice on Termination of Pregnancy Act, 1996, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

<table>
<thead>
<tr>
<th>No. and year of law</th>
<th>Short title</th>
<th>Extent of repeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act No. 2 of 1975</td>
<td>Abortion and Sterilization Act, 1975</td>
<td>In so far as it relates to abortion.</td>
</tr>
</tbody>
</table>

Now that you have studied the Act, answer the following 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 section 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 sterilised. 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.
(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 section 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) Section 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) Section 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 section 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 section 2(1)(b) was applicable because Janet is in her 20th week of pregnancy.)

   (ii) Section 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) Section 2(2): the abortion may be carried out only by a medical practitioner (doctor).

   (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 section 2(1)(c) apply to her circumstances.

(Please note that section 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)(iii)) or would pose a risk of injury to the foetus (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 section 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 [ie limitation of a person’s freedom] will always constitute a more drastic measure of punishment than a fine.)

Conclusion

Now you should have a good idea of where to find South African law and the authority that every source carries. In the next four study units we shall be looking at the supreme source of law in South Africa, namely the Constitution.
In this study unit we introduce you to constitutional democracy. You are going to learn more about our Constitution and the way in which a democratic country is governed. We try to make this even clearer with examples of typical “constitutional issues”.

PLEASE NOTE:
You will study the Constitution and fundamental rights, which are briefly dealt with in the following four study units, in much more detail in the modules Constitutional Law and Fundamental Rights.

Key questions
After you have worked through this study unit, will you be able to

- identify constitutional issues and give your own examples?
- explain what a “Constitution” is?
- name and explain what the essential characteristics of our Constitution are?
- demonstrate your understanding of the separation of the powers of the state by way of a diagram?

Everyday life and the Constitution
Consider the following scenarios in which our characters are involved:

- Sarah Blom is a single parent. She has one child, a boy named Jonathan. Sarah did not marry Jonathan’s father, because he went to England straight after the birth and she has never heard from him again. A few months ago parliament passed a new law which said
that state hospitals have to provide free medical treatment to the children of parents who earn less than R2 000 a month and have no other means of support. Jonathan has a bad cough and Sarah takes him to the nearest state hospital for treatment. The receptionist at the front desk asks Sarah about her financial position and also asks her whether she has made any effort to get a financial contribution from the father of the child. The hospital refuses to give Jonathan medical treatment and says that its reason is that no effort has been made to get a contribution from his father. Sarah is very upset and speaks to her employer, Jane Mothibe. Jane immediately searches for the act which is relevant to this matter. Jane reads through the act and does not find anything which says that a mother should have tried to get a financial contribution from the child’s father. The only requirement which the act demands is that the income of the parents should be less than R2 000 and that the parents should have no other means of support.

The government enters into a very profitable contract with an overseas company. In terms of this contract the government will allow the overseas company to use South Africa for the disposal of chemical waste. The Green Party, whose main concern is environmental matters, is upset about what the Party sees as a threat to the environment and the health of the nation. The members of the Green Party hold demonstrations and present a petition to the Minister of Environmental Affairs. The Green Party receives no reaction from the government and decides to hold a major demonstration. At this time an important conference is being held at a conference centre. The conference is dealing with health and the environment. The Green Party decides that this will be the best place for the demonstration. The Mothibes and the Van der Merwes join in the demonstration. They hold placards which say: “Save our environment!” “Do not destroy our children’s future!” Other placards say: “Shame on South Africa!” “You are selling our environment for a few pieces of gold!” The demonstration begins to get out of control and there is a danger that the conference will be disrupted. The police are called in and ordered to break up the demonstration.

Parliament passes a law which prohibits all religious practices in schools. The day on which this law is passed happens to be a special day for many religious groups. The result of this is that the parliamentary representatives who belong to these religious groups are absent from parliament and can therefore not object to the passing of the law. The Mothibes belong to the Anglican church, and the Van der Merwes belong to the Baptist Church. Both families
believe that religious practices should be allowed in schools as long as these practices are moderate and voluntary. Martie and Jane belong to a group which call themselves The Concerned Christians. At a special meeting The Concerned Christians decide to join with other religious groups to fight the new law.

- The Tshwane Municipal Council publishes a by-law prohibiting the sale of fresh produce, like vegetables and fruit, on pavements and at street markets. Certain groups had been concerned about whether this fresh produce, which was being sold at open air venues, could be healthy. They were worried about the effect it could have on the health of the public. These groups had persuaded the Tshwane Municipal Council to publish this by-law. James has a vegetable garden at home and he sells fresh vegetables at a street market on Saturdays and Sundays. One Saturday morning when he is setting up his stall, the police arrive and order him to remove the stall.

Discussion

You may find that the stories above are familiar. Yes, it might have happened to you! All of the characters in our stories interacted in some way with a government authority. It might have been at national level, provincial level, or local level.

Let us look at the problems in the scenarios.

- **health care**
  
  Sarah wanted medical treatment for her son. This matter concerns the provision of health care by the government. The provision of health care is something that we expect the government to do.

- **environment and health**
  
  When chemical waste has to be disposed of, there is always a threat to the environment and the health of the citizens of the country. We expect the government to act responsibly in this regard.

- **religion**
  
  The act which prohibits religious practices in schools, concerns the freedom to practise religion in schools. Maybe you will want to ask whether the government can limit this freedom?

- **freedom to trade**
  
  James may think that the municipal by-law which prevents him from selling fresh produce is unnecessarily restrictive because it limits his freedom to sell his products where he wants to. Other people who live in Pretoria may welcome this by-law.

- **constitutional issues**
  
  These issues we have just mentioned concerning the provision of health care, the disposal of chemical waste, the prohibition on religious practices
and the issue concerning the sale of fresh produce, are known as constitutional issues.

Activity 7.1
Try to think of examples of everyday events that involve some kind of interaction between the government and you as an individual or as a member of a group of people. In other words, what you will be doing is thinking of examples of constitutional issues. Remember that when we speak of “the government”, we are also speaking of government at provincial level or local level. In other words, we are speaking about government in your province or community. Try to think of at least three examples and write them down below.

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Now look at the following questions and answer them as best as you can:

- What do you expect from your government? Tell us what you think the different functions of the government are.

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
In what way do you think government’s powers in performing these functions should be regulated? In other words: How do you think these powers should be controlled? In which ways will government be able to perform its functions without intruding upon your rights unreasonably.

How can you oppose the abuse of state power and the infringement (or violation) of your rights?

Were you able to give your own examples of constitutional issues? We are sure you could!

Did you find it difficult to answer the questions that we asked? Don’t worry if you did, because these are questions that have been asked over and over again, far back through history. In the discussion that follows and in the rest of the study unit we are going to try and answer them. So, keep these questions in mind when you work through the rest of this study unit.
Introduction

The citizens of a country elect a government to run their country. They 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 wellbeing (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. If these are the expectations of the citizens, the government will need certain powers to make it possible to govern the country effectively. But these powers cannot be unlimited. There has to be some kind of balance between the powers of the state and the rights of the individual. If the government exceeds its powers or makes “unfair” laws or takes irresponsible decisions, the individual must be able to challenge this behaviour. The government is also expected to promote the development of the country. Indeed, the country’s inhabitants may demand this from their government. Therefore “government” is not something that happens on another planet. It happens right here in our own lives. You will have seen from the scenarios at the beginning of this study unit that “government” happens all the time in everyday life and that it involves all of us. We will be referring back to these scenarios throughout the rest of this study unit.

The Constitution

A country must be run like a company or a business, that is in an orderly and responsible manner. If this is not done, there will be confusion and disorder. The rules by which a country is governed are found in that country’s 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. Most countries have Constitutions that are written down. However, there are a few countries (England is an example) that do not have a single written Constitution. These countries are governed by constitutional conventions and customs that have developed over a long period of time. In South Africa we have a written Constitution that was adopted in 1996.

Where does our Constitution come from?

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.) These Constitutions were not democratic because only a small number of South Africans had the right to vote. (The people who had a right to vote were made up mainly of the whites in the country and later on of the Indians and coloureds as well.) This meant that only those citizens who had the right to vote had a say about the way in which the country should be run. This was unfair to the black majority in the country. Opposition against this “apartheid-style” government increased until it exploded in riots such as those at Sharpeville in 1960 and Soweto in 1976. There was growing pressure against apartheid from the international community and this pressure took the form of sanctions. Sanctions are a form of punishment (penalty) intended to force a government to behave in a way that is internationally acceptable. For example, it may take the form of a ban on the import of certain goods, such as weapons. Black leaders within the country also put pressure on the South African government. All of this pressure led to the release of Nelson Mandela and the unbanning of the previously banned black movements, the Pan Africanist Congress and the African National Congress, in 1990.

These actions made it possible for negotiations to begin, with the aim of establishing a full democracy in terms of an interim (temporary) Constitution. The interim Constitution was adopted in 1993. The interim Constitution came into effect on the day of the first democratic elections; that is, 27 April 1994. It was the product of negotiations which resulted in the multi-party conference at the World Trade Centre in Kempton Park. All interested political parties and political groupings participated in this multi-party conference. This Constitution was called an “interim” Constitution because it was not written by a democratically elected government and because its existence was limited to two years. It was written into the interim Constitution that a democratically elected constitution-making body, called the Constitutional Assembly, was to be given the task of writing the final Constitution. All South Africans were given the opportunity to give their views and great care was taken to write the final constitution in the kind of language that every citizen could understand. The interim Constitution also set out 34 constitutional principles and the final Constitution had to comply with these principles before it could be certified by the Constitutional Court. The final Constitution was certified by the Constitutional Court on 4 December 1996.

What is contained in the Constitution?

Our Constitution is a detailed plan (a blueprint) for the running of our country on a sound democratic basis. It is a very long document. In broad
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. The Bill of Rights, which is found in Chapter 2 of the Constitution, lists all the fundamental (basic) rights that are protected by our Constitution, for example, the right to equality, the right to life, the right to freedom of religion, and many more. We will give more time to the Bill of Rights in study units 8 and 9.
Why is the Constitution so important?

The Constitution is the foundation of our democracy. To ensure that our democracy succeeds, a number of special features have been built into our Constitution. At this stage we would like to draw your attention to a few of these:

- **Supremacy of the Constitution**
  
  The Constitution states very clearly that it is the supreme (or highest) law of the Republic of South Africa. Therefore everyone (even the President), every organisation or institution (including all government institutions and state organs), as well as all law (including legislation, common law and African indigenous law) are ruled by the Constitution. In the past, parliament was supreme or sovereign in the sense that it could make any law it wanted to, no matter how unjust or unfair, as long as the correct procedure was followed. Courts did not have the authority to question such legislation. However, in terms of our new Constitution, all state organs (that is official state organisations) — yes, even parliament — are subject to the Constitution. In other words, the new Constitution introduced “constitutionalism”, which means that our country is run according to the Constitution which is the supreme law of the land. Therefore, all legislation may be challenged in terms of the Constitution, in a court, and changed or removed if it is found to be inconsistent (in other words, it does not agree) with the Constitution.

  If we go back to our scenarios at the beginning of this study unit, we will realise that this means that the law passed by parliament abolishing religious practices in schools may be challenged and removed, if it is found to be unconstitutional. In the same way, the Tshwane municipal by-law prohibiting the sale of fresh produce at certain venues may be challenged by the groups of people or individuals concerned. If these laws are found to be unconstitutional, they may be scrapped.

- **Separation of powers**
  
  The powers of the state are separated and divided into three sections (branches), namely the legislative authority (that makes laws), the executive authority (that applies and carries out laws) and the judicial authority (that decides legal disputes). This is known as the separation of powers. The separation of powers is essential in a democratic state, because if too much power is concentrated in any one branch of the state, this may easily lead to abuse. For example, if the same branch of government made the law, applied it and carried it out, and also decided questions relating
to that law, there would be no way of questioning the application and execution or the constitutionality of that law. The state would be able to make any law it wanted to, however unjust, and have it enforced without being “checked” (controlled) at any point. By giving certain specific functions (legislative, executive and judicial) to each of the three branches of government, the separation of powers ensures that the powers of each state organ are kept in check.

We have already dealt with the issue of laws coming from the legislative authorities, which may be challenged on the basis that they are unconstitutional. Examples of official actions that may be challenged will be the refusal of the local state hospital to treat Jonathan, and the contract entered into by the government for the disposal of chemical waste. If it proves impossible to find an answer to these problems in any other way, it will be up to the courts to decide whether these actions are unconstitutional. This brings us to the third section or branch of state authority, namely the judiciary.

The Constitution sets out the structure of the judiciary and the judicial system. The judiciary deals with the courts. The main courts are the Constitutional Court, the Supreme Court of Appeal, High Courts and Magistrates’ courts. The Constitutional Court has the final say in constitutional matters, that is, any issue that relates to the interpretation, protection or enforcement of the Constitution. This means that the Constitutional Court can change or get rid of legislation made by parliament if the legislation is not consistent with the Constitution; in other words, if the legislation does not agree with the Constitution. The Constitutional Court can also make the application or enforcement (by the executive branch of the government) of a law invalid (it has no legal force), if such application or enforcement is inconsistent with the Constitution; in other words, if it does not agree with the Constitution. However, the Constitutional Court is not the only court that may hear constitutional matters. The High Courts and the Supreme Court of Appeal may also hear constitutional issues, but the Constitutional Court has the final say in these matters.

The Constitution has set up a number of state institutions to support our democracy. These institutions are the following:

- 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.

There are many issues that may be referred to these institutions. For example, The Concerned Christians in our scenario may approach The Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities regarding the prohibition on religious practices and observances at schools.

We have already referred to the Bill of Rights which is contained in Chapter 2 of the Constitution. The Bill of Rights is there to protect the fundamental rights that each person has. We will deal with the Bill of Rights in more detail in study units 8 and 9.

The spirit of the Constitution

We all expect and demand a lot from the government. However, the people also have a huge responsibility to make democracy work. Without meaningful participation and input from its people, a government cannot be expected to respond to the needs of society. Also, if the people do not insist upon and demand that their rights and freedoms be respected and protected by the government, we cannot expect our constitutional democracy to be strong. Therefore we would like to end this introduction to the Constitution with the preamble to the Constitution:

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to —

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.
Nkosi Sikele’iAfrika. Morena boloka setjhaba sa heso.
God seeën Suid-Afrika. God bless South Africa.
Mudzimu fhatsutshedza Afurika. Hosi katekisa Afrika.
(1) Answer the following multiple-choice question:

A number of special features have been built into our Constitution to ensure that our democracy succeeds.

Which one of the following features is the **odd one out**?

(1) The Constitution provides for parliamentary sovereignty.
(2) The Constitution provides for the separation of state powers.
(3) The Constitution sets out the structure of the judiciary.
(4) The Constitution contains a Bill of Rights.

(2) **Draw a diagram** to illustrate the division of the powers or functions of the state into three branches. **Now give an example of each of these functions.** You can get examples from the news on the radio or on TV, or from reports in daily newspapers. Listen or watch for statements by government ministers, members of parliament, members of your provincial government or your local council. **Also watch out for reports on court cases involving constitutional issues. You can give as many examples as you can find!**
Statement 1 is the odd one out. In the past parliament was sovereign, but the Constitution of 1996 clearly states that the Constitution itself is now the supreme law of the Republic of South Africa. Statements (2) to (4) are correct since they contain features which have been built into the Constitution to ensure democracy.

Separation of powers

Legislative → "New no-smoking law proclaimed by Parliament..."

Executive

"Police had to use rubber bullets to break up protest action..."

Judicial

"Mr X was convicted of murder and sentenced to eight years in prison..."

Conclusion

In this study unit we looked at constitutional democracy and focused on the essential characteristics of our Constitution. This will give you the necessary background for the next study unit which focuses on one of the most important chapters in the Constitution, namely Chapter 2: The Bill of Rights.
The Bill of Rights: What are fundamental rights?

This study unit focuses on the different fundamental rights contained in the Bill of Rights (Chapter 2 of the Constitution) and on how they work (operate).

Key questions

After completion of this study unit, will you be able to

- identify fundamental rights in your daily life?
- explain the nature of fundamental rights?
- name and explain the different kinds of fundamental rights?
- explain the application of the Bill of Rights?
- explain, by way of real-life examples, how fundamental rights operate in a constitutional democracy?

Activity

8.1

By now you know that the Bill of Rights is contained in Chapter 2 of the Constitution. But do you know which rights are protected in the Bill of Rights? We start this study unit with an activity in order to help you to identify these rights.

Read the Bill of Rights

Read carefully through the Bill of Rights which you will find at the end of study unit 8, and write a list of all the fundamental rights that you can identify.
Introduction

You have probably written a list of between 20 and 30 fundamental rights in the activity above! While you were doing this, you may have asked yourself the following questions: Where do all these rights come from? Who decided which rights should go into the Bill of Rights? Is this a complete list?

We told you in study unit 7 that our Constitution was the result of negotiations between all interested parties (stakeholders) and that every South African had the opportunity to give his or her input. Therefore we can truly say that our Constitution was written by the people (through their representatives) for the people. Maybe you were part of this process. Maybe you were directly involved by actively taking part as a member of a delegation to parliament. Maybe you were a member of a committee. Or maybe you simply made sure that you kept up to date on how the Constitution was developing. When the Bill of Rights was being written, it made a lot of sense for those who were writing it to look at the constitutions of many other countries. It also made a lot of sense for them to take into account our own history as well as a broad history of the world. In this way the writers could make sure that our Bill of Rights would prevent past human rights abuses from happening again. They also hoped that the Constitution would make possible a human rights culture for the future.

Kinds of fundamental rights

We are sure that when you wrote your list of fundamental rights, you noticed that all the rights are not the same. You probably noticed that there
different categories of fundamental rights:

rights are very exact. For example, you will see that they deal with the very basic needs of the people, like food and water. In the case of rights such as the right to human dignity or the right to freedom of religion, you will see that these are on a different level. They are the rights that safeguard democracy and protect the individual from the abuse of state power. Then there are other rights, such as environmental rights, that are the kind of rights that “groups” of people will try to achieve. As a result of these differences, fundamental rights are often divided into three categories, namely:

**first-generation rights**

First-generation rights: These rights, are sometimes called “blue rights”. They are civil rights, procedural rights and political rights. These are the rights that protect the individual from the abuse of state power. They protect us, for example, from officials who might use the power, that they have been given by the state, disgracefully. Examples of such rights are the 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 of the person.

**second-generation rights**

Second-generation rights: These rights, are sometimes called “red rights”. They are called “red rights” because they became important during the socialist revolutions. They relate to socio-economic issues, that is, issues that concern society and the economy. These rights allow people to demand that their basic socio-economic needs be examined and dealt with by the government. Examples of these rights are the right to education and the right to access to health care services and to sufficient food and water.

**third-generation rights**

Third-generation rights: These rights, are sometimes called “green rights”. They are different from first generation-rights, and have more to do with the group than with the individual. An example is the right to clean or unpolluted air.

The Bill of Rights in perspective

The nature of fundamental rights

What is a fundamental right?

We now have an idea of which fundamental rights are protected in our Bill of Rights. What we need to do now is to take a closer look at the nature of these rights. First of all, what is a fundamental right? It is impossible to give a single, correct definition, but we can say the following: 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. In some cases, these fundamental rights may be limited, but only if this is in agreement with the provisions of the Bill of Rights. (We will discuss the limitation of fundamental rights in study unit 9.) Therefore the Bill of Rights starts with the following statement in section 7:

See Bill of Rights

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

The application of the Bill of Rights

The fundamental rights in the Bill of Rights may either have vertical or horizontal application. Let us explain.

vertical application of the Bill of Rights

It is stated in the Bill of Rights that the Bill applies to all law and binds the legislature, the executive, the judiciary and all organs of the state (we discussed the organs of the state in study unit 7). This means that any legislative or executive act (see the discussion of the separation of powers in study unit 7 for the functions of each state authority) that infringes upon a fundamental right may be challenged and declared unconstitutional. (Remember that the Constitutional Court has the final say in constitutional matters.) This kind of application of the Bill of Rights is known as vertical application, which means that it applies between the state and the individual or a private institution.
Some of the rights in the Bill of Rights may also have **horizontal application**. This means that they apply between **individuals or private institutions**. To a certain extent this application takes place on the same level. For example, the right to equality may apply between individuals in the sense that one individual may not unfairly discriminate against another in a job situation.

You will understand the vertical and horizontal application of the Bill of Rights better once you have completed the activity below.

### Activity

8.2

(1) If a friend asks you what “fundamental rights” are, how will you explain them to her?

(2) Read the following facts and answer the multiple-choice question that follows:

John Small is in grade 8. One day in his mathematics class, John is battling to do one of the calculations. In the presence of the other learners his teacher calls him a baboon and tells him to write out the words “I am dumb” ten times on the board. As a result of this incident, John refuses to go back to school. His parents decide to speak to the principal.

Which **fundamental right** has been infringed?

(1) the right to physical integrity

(2) the right to a good name
(3) the right to human dignity
(4) the right to honour

Feedback

(1) In your explanation to your friend you should mention the following:

- Every person is born with human dignity, and it is this human dignity that gives a person a claim to fundamental or human rights.
- A person does not have to work for these fundamental rights or qualify in any particular way to be afforded them.
- Fundamental rights are the natural rights of every single person. Therefore, everyone has these rights.
- The state can never take these fundamental rights away.

When you read the question, did you realise that you had to explain what the nature of a fundamental right is? It would not have been enough to provide an explanation of the different categories of fundamental rights and/or examples of the fundamental rights which fall under each category.

(2) The fundamental right that has been infringed is statement (3) the right to human dignity. It is very important that here you distinguish between the fundamental rights embodied in the Bill of Rights in the Constitution and personality rights in private law (see study unit 2).

Activity

8.3

Read through the following scenarios carefully. Identify the specific fundamental right which has been infringed in every instance and show whether it involves a vertical or horizontal application of that right.

(1) Karel has now been retrenched. He sees an advertisement for a job as administrative assistant to a firm of engineers. The administrative post is a mornings-only position. Karel decides to apply for the job. He wants to start a computer business and he realises that if he works for the firm of engineers in the morning, he will have the rest of the day to spend on his computer business. He wants to run his computer business from home. Karel goes to the engineering company to get an application form. When he tells the receptionist...
why he is there, she tells him that only female candidates may apply because the company will only consider female candidates for the job. Karel feels that he is being discriminated against unfairly because his experience in the engineering field makes him a very suitable candidate for the job.

Which fundamental right has been infringed?

Does this involve horizontal or vertical application of the Bill of Rights? Give a reason for your answer.

(2) The government has given permission for the testing of nuclear weapons in a remote area of the country. The government feels that it is safe because there is no-one living anywhere near this area. The Green Party does not agree and decides to start a protest action. The Van der Merwes and Mothibes are concerned environmentalists and they decide to join in the protest. Jane is a member of the Green Party’s legal team. The legal team is seeking a court order to prevent the nuclear testing from going ahead.

Which fundamental right has been infringed?

Does this involve horizontal or vertical application of the Bill of Rights? Give a reason for your answer.

(3) An alleged drug dealer is being brought to court on drug charges, in a criminal case. Jane is representing him. The drug dealer claims that the police tortured him in order to persuade him to sign a confession. They told him that he was a criminal who did not have any rights at all.

Which fundamental right has been infringed?
Does this involve horizontal or vertical application of the Bill of Rights? Give a reason for your answer.

(4) Tom’s department at New Africa University is starting a new project. Tom has applied for the position of project leader. His head of department calls him in and warns him that the selection committee does not like his religious convictions and that this will affect his application. The reason for this is that the Mothibes are Anglican and the department hopes to receive a research grant from a company in Argentina. The company is mainly Catholic. Tom is very upset because he is the best qualified person for the job and he should be the logical choice for project leader. Tom tells his head of department that he is not prepared to give up his religious beliefs. He goes for the interview, but a junior colleague of his (who happens to be Catholic) gets the job.

Which fundamental right has been infringed?

Does this involve horizontal or vertical application of the Bill of Rights? Give a reason for your answer.

(1) The right that is infringed in this scenario is the right to equality (see s 9 of the Constitution: Bill of Rights) and more particularly discrimination on the basis of gender. Because it is a person or persons in the firm who are discriminating against Karel (in other words individuals against an individual), this is an example of the horizontal application of the right to equality.

(2) This scenario concerns a typical “green right”, that is the right to an environment that is not harmful to our health and wellbeing (see s 24 of the Constitution: Bill of Rights). In this case we are dealing with the vertical application of this right, because it does not involve individuals against one another, but it involves the state on the one
side, and a group of ordinary people, subjects of the state, on the other side.

(3) This scenario concerns more than one right. The drug dealer can rely on the right to security and freedom of the person (see s 12 of the Constitution: Bill of Rights). He can also rely on the right not to be tortured in any way (see s 12 of the Constitution). The drug dealer can also rely on section 35 of the Constitution (see Bill of Rights) which gives the rights of arrested, detained and accused persons. This section (subsection (c)) makes it clear that the drug dealer has the right not to be compelled (forced) to make any confessions that can be used as evidence against him. Because this scenario clearly involves the police and prison authorities (which form part of the executive branch of government) and an individual, this is an example of the vertical application of these rights.

(4) This scenario concerns discrimination against Tom on the basis of religion. Therefore it concerns the right to equality (s 9 of the Constitution: see Bill of Rights). Because it concerns individuals against one another, it is an example of the horizontal application of this right.

**Conclusion**

Fundamental rights are often discussed and debated. Now that you have acquired a basic understanding of what these fundamental rights are and how they operate, you will realise that they cannot operate without restriction, otherwise there would be chaos. In the next study unit we look at the possible limitations of these rights.

PLEASE NOTE:

You need not study the Bill of Rights in detail for the examination. You are only expected to study those sections of the Bill Rights that you used in doing the activities. Therefore, make sure that you study the activities related to the Bill of Rights and the feedback on these activities for examination purposes.

CHAPTER 2
BILL OF RIGHTS

7. Rights.—(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

8. Application.—(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

9. Equality.—(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

*(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

10. Human dignity.—Everyone has inherent dignity and the right to have their dignity respected and protected.

11. Life.—Everyone has the right to life.

12. Freedom and security of the person.—(1) Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and
15. Freedom of religion, belief and opinion.—(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that—

(a) those observances follow rules made by the appropriate public authorities;
(b) they are conducted on an equitable basis; and
(c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising—

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or
(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

16. Freedom of expression.—(1) Everyone has the right to freedom of expression, which includes—

(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—

(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

17. Assembly, demonstration, picket and petition.—Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

18. Freedom of association.—Everyone has the right to freedom of association.

19. Political rights.—(1) Every citizen is free to make political choices, which includes the right—

(a) to form a political party;
(b) to participate in the activities of, or recruit members for, a political party; and
(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right—
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
(b) to stand for public office and, if elected, to hold office.

20. Citizenship.—No citizen may be deprived of citizenship.

21. Freedom of movement and residence.—(1) Everyone has the right to freedom of movement.

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport.

22. Freedom of trade, occupation and profession.—Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

23. Labour relations.—(1) Everyone has the right to fair labour practices.

(2) Every worker has the right—
(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and
(c) to strike.

(3) Every employer has the right—
(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right—
(a) to determine its own administration, programmes and activities;
(b) to organise; and
(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

24. Environment.—Everyone has the right—
(a) to an environment that is not harmful to their health or well-being; and
to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

25. Property.—(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.

(4) For the purposes of this section—

(a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).
26. **Housing.**—(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27. **Health care, food, water and social security.**—(1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

28. **Children.**—(1) Every child has the right—

(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that—
   (i) are inappropriate for a person of that child’s age; or
   (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
   (i) kept separately from detained persons over the age of 18 years; and
   (ii) treated in a manner, and kept in conditions, that take account of the child’s age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child’s best interests are of paramount importance in every matter concerning the child.

(3) In this section “child” means a person under the age of 18 years.
29. **Education.**—(1) **Everyone has the right**—

   (a) to a basic education, including adult basic education; and
   (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

   (a) equity;
   (b) practicability; and
   (c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

   (a) do not discriminate on the basis of race;
   (b) are registered with the state; and
   (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

30. **Language and culture.**—Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31. **Cultural, religious and linguistic communities.**—(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

   (a) to enjoy their culture, practise their religion and use their language; and
   (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

32. **Access to information.**—(1) Everyone has the right of access to—

   (a) any information held by the state; and
   (b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.
33. Just administrative action.—(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—
   (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
   (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
   (c) promote an efficient administration.

34. Access to courts.—Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

35. Arrested, detained and accused persons.—(1) Everyone who is arrested for allegedly committing an offence has the right—
   (a) to remain silent;
   (b) to be informed promptly—
      (i) of the right to remain silent; and
      (ii) of the consequences of not remaining silent;
   (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
   (d) to be brought before a court as soon as reasonably possible, but not later than—
      (i) 48 hours after the arrest; or
      (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
   (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
   (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right—
   (a) to be informed promptly of the reason for being detained;
   (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
   (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
   (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person’s—
   (i) spouse or partner;
   (ii) next of kin;
   (iii) chosen religious counsellor; and
   (iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right—
   (a) to be informed of the charge with sufficient detail to answer it;
   (b) to have adequate time and facilities to prepare a defence;
   (c) to a public trial before an ordinary court;
   (d) to have their trial begin and conclude without unreasonable delay;
   (e) to be present when being tried;
   (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
   (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
   (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
   (i) to adduce and challenge evidence;
   (j) not to be compelled to give self-incriminating evidence;
   (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
   (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
   (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
   (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

36. Limitation of rights.—(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

   (a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

37. States of emergency.—(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—
(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
(b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—
(a) prospectively; and
(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of—
(a) a declaration of a state of emergency;
(b) any extension of a declaration of a state of emergency; or
(c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—
(a) the derogation is strictly required by the emergency; and
(b) the legislation—
(i) is consistent with the Republic’s obligations under international law applicable to states of emergency;
(ii) conforms to subsection (3); and
(iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—
(a) indemnifying the state, or any person, in respect of any unlawful act;
(b) any derogation from this section; or
(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.
### Table of Non-Derogable Rights

<table>
<thead>
<tr>
<th>Section Number</th>
<th>Section Title</th>
<th>Extent to which the right is protected</th>
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<tbody>
<tr>
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<td>Equality</td>
<td>With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language</td>
</tr>
<tr>
<td>10</td>
<td>Human Dignity</td>
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<td>11</td>
<td>Life</td>
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<td>12</td>
<td>Freedom and Security of the person</td>
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<td>13</td>
<td>Slavery, servitude and forced labour</td>
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<td>Children</td>
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<td></td>
<td></td>
<td>— subsection (1) (d) and (e);</td>
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<td></td>
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<td>— the rights in subparagraphs (i) and (ii) of subsection (1) (g); and</td>
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<td>— subsection 1 (i) in respect of children of 15 years and younger</td>
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<td>35</td>
<td>Arrested, detained and accused persons</td>
<td>With respect to:</td>
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<td>— subsections (1) (a), (b) and (c) and (2) (d);</td>
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<td>— the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d)</td>
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<td>— subsection (4); and</td>
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<td>— subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.</td>
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</table>

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

(a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

(b) A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee’s name and place of detention and referring to the emergency measure in terms of which that person has been detained.

(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

(e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court
for a further review of the detention at any time after 10 days have passed since
the previous review, and the court must release the detainee unless it is still nec-
essary to continue the detention to restore peace and order.

(g) The detainee must be allowed to appear in person before any court considering
the detention, to be represented by a legal practitioner at those hearings, and to
make representations against continued detention.

(h) The state must present written reasons to the court to justify the continued
detention of the detainee, and must give a copy of those reasons to the detainee
at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same
grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens
and who are detained in consequence of an international armed conflict. Instead, the state must
comply with the standards binding on the Republic under international humanitarian law in
respect of the detention of such persons.

38. Enforcement of rights.—Anyone listed in this section has the right to approach a
competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and
the court may grant appropriate relief, including a declaration of rights. The persons who may
approach a court are—

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

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.

(2) When interpreting any legislation, and when developing the common law or cus-
tomary law, every court, tribunal or forum must promote the spirit, purport and objects of the
Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that
are recognised or conferred by common law, customary law or legislation, to the extent that
they are consistent with the Bill.
Fundamental rights may be limited under certain circumstances. In this study unit we focus on when and how fundamental rights may legally be limited.

**Key question**

After completion of this study unit, will you be able to demonstrate your understanding of the limitation of fundamental rights in real-life situations?

**Setting the Scene**

Limiting fundamental rights

Read through the following scenarios and note in each story how rights are limited.

- Francine wants to earn extra money. She sees an advertisement by the municipal council for casual workers, and she applies for one of the posts. She arrives at the council’s offices and finds that a number of other men and women are already waiting. However, when the official in charge arrives, he tells all the women to leave, because the job involves the moving of heavy equipment. They challenge him and say that this is obvious discrimination against women. They do not care what the job involves. They need to do it and they are prepared to do it. They do not want to see their children go hungry.

- Thomas wants to become a dress designer. He will be in grade 11 next year. Dress design is offered as a subject for grades 11 and 12 at his school. However, the teacher of this subject tells him that only
girls may take the subject. He is most upset and his mother decides to speak to the principal and to the school’s governing body.

Parliament has published a new bill which says that all abortion laws that are in force at present are to be replaced by a new act which allows abortion on request. The only condition is that the abortion will have to be performed by a qualified doctor. The Concerned Christians, to which Jane and Martie belong, are most upset about the bill. They decide to hold a march and to hand a petition, signed by 200 000 people, to the Minister of Health. The Concerned Christians carry placards showing pictures of abortions. They also carry surgical instruments used to perform abortions. A group of pro-abortionists join the march. The pro-abortionists are chanting: “It’s a woman’s choice!” Pro-abortion marchers and anti-abortion marchers lose their temper and there are violent fights. The police have to use rubber bullets in order to break up the crowd. The following day the Chief of Police makes a statement in the newspaper. In this statement he defends the police action. He says that the police had to act the way they did because the march was not peaceful and because The Concerned Christian marchers were carrying dangerous weapons.

Activity

9.1

Were you able, in the above stories, to identify some of the rights that clash (conflict)? Do you think that any person or any group can enforce their rights, or do you think that there are limitations? See the discussion that follows for feedback.

Discussion

Introduction

You will have to agree that democracy can never work if all rights can always be enforced in all circumstances. There will be times when certain rights will be limited or where one right will be in direct conflict with another. For example, in Francine’s case, where she applied for a job which involved the moving of heavy equipment, we cannot expect the municipal
discrimination: gender
council to employ women to do work for which they are not suited. The work may not get done, or the women may be injured. But, on the other hand, is it not for the women to decide what they want to do? Obviously they feel that they are being discriminated against because they are female. Similarly, can a school refuse to allow boys to take a subject? Are they not discriminating against Thomas because he is a boy?

right to protest
And what about the protest action against the new Abortion Bill? There are a number of rights that we have to think about here. First of all, 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.

Questions about the limitation of fundamental rights are not easy to answer. What is clear, however, is that fundamental rights may be limited in some way or another and we have to find out how this limitation should be done.

right to life versus abortion

Limitation of fundamental rights

Some of the rights contained in the Bill of Rights are limited because of the way in which they are formulated or described. Look at section 9 of the Constitution (Bill of Rights) which deals with the right to equality. Subsections (3)-(5) deal with unfair discrimination. The word unfair before “discrimination” tells us that there is a limitation because only unfair discrimination will be unconstitutional. This also tells us that, at certain times, discrimination may be regarded as fair and will therefore not be unconstitutional. We saw that the municipal council refused to employ women for a job which only men can do. This will not amount to unfair discrimination. We explained why above. However, the refusal to allow Thomas to take dress design at his school may be a case of unfair discrimination.

Let us now consider the abortion march. Section 17 of the Constitution (Bill of Rights) qualifies (explains further what is meant by and what limits it imposes on) the right to assemble, demonstrate, picket and petition. In other words, it sets limits on this right by requiring that the action is peaceful and that the participants are unarmed. Therefore, any examination of police action against anti-abortionist and pro-abortionist marchers has to ask whether the protest march was peaceful and whether the marchers...
were armed or unarmed. The police action can be seen only against this background.

right to life versus abortion

It is more difficult to come to a decision where we have two rights which are directly in competition with one another. For example, there is the right to life (on which The Concerned Christians rely) and the right to make decisions concerning reproduction (on which the pro-abortionist group relies). This is the kind of dispute that will have to be decided by a court.

state of emergency

Certain fundamental rights may also be suspended for a period of time when the state declares a state of emergency. This may happen when the country is threatened by war or invasion, or if there is a state of disorder or a threat of insurrection (revolt) within the borders of the country, or when a natural disaster (such as a flood) has occurred or there is a public emergency. However, even though the state may have wide-ranging powers during a state of emergency, you will see that certain rights, such as the rights to human dignity and life, may not be derogated (placed in an inferior position) or infringed or suspended in any way. Read section 37 (Bill of Rights) together with the Table of Non-Derogable Rights (Bill of Rights). You will see that, even during a state of emergency, a person may not be tortured.

non-derogable rights

Section 36 of the Constitution, also known as the limitation clause, sets out the criteria in terms of which a right contained in the Bill of Rights may be limited. Thus, if the state wishes to limit a right, it will have to make sure that its actions are in agreement with the criteria (or measures) contained in the Bill of Rights. Read section 36 in the Bill of Rights and study the following explanation:

- The law that limits the right must be of general application, in other words, it must apply to everyone.
- The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In other words, there must be a good reason to limit the right within the context (framework) of a constitutional democracy.
- All the relevant points must be taken into account. The questions that have to be asked are: What is the nature of the right? (In other words, what kind of right is it?) 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? (In other words, what is the nature of the limitation and what is the extent of the limitation?) How do the limitation and the purpose of the limitation relate to one another? (Is the relation between the limitation and the
purpose strong enough to justify the limitation?) And finally, could this purpose be achieved in a less restrictive way? (Is there a way to limit your right that would still achieve the same results, but would be less restrictive?)

How is this section of the Act to be applied? Let us find out in our next activity!

Activity 9.2

Karel wants to start a new computer business from home. However, he has read in the local daily newspaper, the Suburbia Sunset, that a new act has been passed by parliament, which prohibits the running of computer businesses from home. This new act was passed because so many outlets have now been established and are now being run from residential premises and it has become almost impossible to regulate and control the computer industry. A big problem is the sale of stolen goods and pirate software. There has also been a huge increase on the Internet in child pornography originating from South Africa. Karel feels that his right to freedom of trade is being unduly infringed.

How would you apply the tests (criteria) set out in section 36 to decide whether this act represents a “legal” limitation of the fundamental right to freedom of trade?
The first question that we must answer is whether this is a law of general application. In other words: Does this law apply to everyone? In this instance, the answer is “yes”, because it prohibits anyone from running a computer business from home. In other words, it is everyone’s right to freedom of trade (or the right of anyone who wishes to open a computer business at home) that is being limited by the act.

As far as the second test (criterion) is concerned, the two reasons for the limitation are (1) that it has become impossible to regulate and control the computer industry and (2) the problem of child pornography on the Internet. You have to decide whether these reasons are strong enough to justify the limitation of the right of freedom to trade. You also have to decide whether the same result could have been achieved by using less repressive measures. This is a difficult problem. When the protection of children in particular, is in conflict with freedom of trade, the protection of children holds a position of great importance. On the other hand, however, the question must be asked whether control over the problem of child pornography could not have been achieved in another, less restrictive way? This is the question that the court will have to decide if Karel decides to challenge the new act in court.

**Conclusion**

We have seen again the “balancing act” that the law performs when it comes to different rights and interests in our society. The balancing of different interests is not done in a haphazard way and just because an official or some authority feels like it. No, the law lays down certain rules. Therefore it is important to know what the Constitution, and more particularly the Bill of Rights, says with regard to the limitation of your fundamental rights.
This study unit focuses on the influence of both the interim Constitution of 1993 and the final Constitution of 1996 on South African law.

Key question

After you have worked through this study unit, will you be able to demonstrate, by way of real-life examples, the influence of our Constitution on our law?

Activity 10.1

By now you should have a basic knowledge of our Constitution and the Bill of Rights. We start this study unit with an activity to refresh your memory. Can you remember that you have come across two real-life examples in the study guide where our Constitution, specifically the Bill of Rights, has influenced our law? Can you name and explain these examples?

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1. [Example 1 explanation]
2. [Example 2 explanation]
Could you remember these two examples? We are sure you could!

The first example is found in Activity 6.1. This example deals with the constitutionality of the death penalty (sentence). In 1995 the Constitutional Court decided in the case of \textit{S v Makwanyane} that, in terms of the interim Constitution of 1993, the death penalty would legally 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 and an unconstitutional form of punishment. The death penalty has since been abolished. If you now read the case of \textit{S v Makwanyane}, we are sure that you will find it more understandable and meaningful.

The second example is found in Activity 6.3. This example deals with the constitutionality of section 18(4)(d) of the Child Care Act. In 1997 the Constitutional Court decided in the case of \textit{Fraser v Children’s Court, Pretoria North and Others} that, in terms of the 1996 Constitution, section 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. In 1998 parliament amended section 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. If you now read the case of \textit{Fraser v Children’s Court, Pretoria North and Others}, we are sure that you will also find it more understandable and meaningful.
Since the implementation (introduction) of the interim Constitution in 1993 and thereafter the final Constitution in 1996, we have had a democratic Constitution for nearly two decades. Can you imagine the number of cases that the Constitutional Court, the Supreme Court of Appeal and the High Courts had to decide during this time? And surely, as a result of the Constitution, specifically the Bill of Rights, there must have been a number of changes in most fields of law.

The following two scenarios are based on real-life court cases decided by our courts. In both these cases the Constitution, specifically the Bill of Rights, had an influence. You may perhaps recognise these cases since you have read about them in the newspapers or heard about them on the radio or on TV.

- Simla Naidoo, a South African teacher who is a registered voter, lives and works in the United Kingdom. She brought an urgent application to the Pretoria High Court in which she contended that certain sections of the Electoral Act 73 of 1998 are unconstitutional, since they violate the right to equal treatment and the right to vote of South Africans living abroad. It was argued that some South African citizens living abroad were entitled to vote in the April 2009 election and others were not. It was said that section 33(1) of the Electoral Act provides for special votes by certain groups of South Africans living abroad, for example government employees, but that other South Africans were excluded by this section on an arbitrary basis. The Pretoria High Court ruled that the sections of the Electoral Act referred to, are indeed unconstitutional.

  The Minister of Home Affairs opposed the application of Simla Naidoo and applied to the Constitutional Court for permission to appeal against the ruling of the Pretoria High Court.

  The Constitutional Court ruled unanimously that South Africans living abroad have the right to vote if they were already registered as voters. The court ruled that section 33 of the Electoral Act, 1998 unfairly restricted the right to cast special votes while abroad to a very narrow class of South African citizens. The Constitutional Court declared this section and other sections referred to, to be unconstitutional. As a result voters who were registered, and who would be out of the country on election day would be allowed to vote, provided they gave notice of their intention to vote before a
relevant sections of Electoral Act need to be changed by parliament certain date. Parliament was surely instructed to change these sections of the Electoral Act.

Simla was very excited about the decision of the Constitutional Court and immediately gave notice of her intention to vote in South Africa’s April 2009 election!

Friends of the Van der Merwes, John Brown and Peter Smith, have been living in a permanent homosexual (same-sex) cohabitation relationship for many years. They always dreamt of getting married one day, but unfortunately for them the definition of marriage in South African law did not include permanent cohabitation relationships. They were delighted when the Constitutional Court decided in 2005 that a permanent cohabitation relationship must be included in the definition of marriage. The court decided that the definition of marriage, in terms of the common law and the Marriage Act 25 of 1961, is unconstitutional on grounds of the right to equality (s 9 of the Constitution: Bill of Rights) and the right to human dignity (s 10 of the Constitution: Bill of Rights). The Constitutional Court gave parliament two years to change the position.

John and Peter were even more delighted when the Civil Union Act 17 of 2006 came into operation at the end of 2006. The Civil Union Act allows same-sex and heterosexual couples to enter into a marriage or a civil partnership in terms of the Act (s 11(1)). It uses the collective noun “civil union” for marriages and civil partnerships that are concluded in terms of the Act. A civil union is defined as “the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others” (s 1).

Civil union partners must choose whether they want to call their union a marriage or a civil partnership (s 11(1)). Regardless of the name they choose, the union has exactly the same consequences, which correspond to the consequences of a marriage in terms of the Marriage Act 25 of 1961, that is, a civil marriage (s 13(1)). A civil union dissolves in the same way as a marriage.

Soon after the implementation of the Act, John and Peter decided to get married. Of course they invited the Van der Merwes to celebrate the occasion with them!
In the discussion above, we only referred to a few of the cases in which the influence of our Constitution, specifically the Bill of Rights, is visible. We are sure that you know of more cases. If not, you will certainly learn more about the influence of the Constitution and the Bill of Rights in other LLB modules.
You will notice that you have received a DVD, titled “The laws of our lives”, together with the last three study units, namely study units 11, 12 and 13. Watch the DVD first, before you start studying the individual study units. The story “The laws of our lives” deals with court cases that arise from a motor car accident, the courts in which these cases are heard, and the different roleplayers who are involved in these court cases.

Key questions

After you have watched the DVD or have read the DVD text in this study unit, will you be able to

- identify and explain the legal disputes that arise from the motor car accident?
- name the different courts in which these legal disputes take place?
- indicate the different roleplayers and their functions in the different courts?
- explain legal terms such as “onus of proof” and “jurisdiction”?

PLEASE NOTE:

The DVD is in English only. However, for the benefit of Afrikaans speaking students, we have included a list of English terms and their Afrikaans translations at the end of the DVD script. English speaking
students may also find this list helpful when they read cases that are reported in Afrikaans.

We realise that there are students who do not have access to a DVD player, or who do not receive a DVD at all, or who receive a damaged DVD. For those students, we have included an edited script of the DVD text in study unit 11. You should find the DVD script quite useful and it should help you to complete the activities in the study units.

The DVD or DVD script forms an important part of the study material. You are not expected to study the storyline of the DVD script for the examination. However, you will have to be able to answer the key questions asked above. You will therefore have to study the legal principles referred to in the script for the examination.

Enjoy the DVD and the DVD script!
THE LAWS OF OUR LIVES

Dialogue

Like the weights in a delicate scale so too are the laws of our lives ...

*** A court scene ***

[The scene starts with an American movie director who is directing a court scene. It looks just like the American court scenes that you often see on TV. Then Busi comes in and tells everyone that this is not what a South African court looks like.]

MR SCOTCHBOTTLE (the accused):
I ..., its just that I was having a couple of drinks ...

PROSECUTOR:
Answer the question — yes or no.

MR COMINS (Mr Scotchbottle’s attorney):
Objection, Judge. Badgering the witness.

MAGISTRATE:
Overruled.
BUSI:
Stop! This is all wrong. This is not how our courts work.

AMERICAN DIRECTOR:
Who let her on set?

AMERICAN DIRECTOR:
Who are you?

BUSI:
I am Busi. I was just watching and I couldn’t help myself. You are doing this all wrong!

AMERICAN DIRECTOR:
What?

BUSI:
This movie. This is not what our courts look like — this is not a South African case at all!

AMERICAN DIRECTOR:
It is not suppo ...

BUSI:
First, we don’t have juries in South Africa. You guys must go.

AMERICAN DIRECTOR:
Where are you going? I am the director here. Stop ... now what are you doing?

BUSI:
Me? It is more your fault. You are the one who wants to show our courts like this.

AMERICAN DIRECTOR:
Well, if you think you are so good why don’t you direct the movie?

BUSI:
Ok, then?

AMERICAN DIRECTOR:
People, I am leaving.

AMERICAN DIRECTOR:
I said ... I am leaving.
BUSI:
Where is your robe, Mr Comins?

BUSI:
Costumes!

BUSI:
Now, both the attorney and the prosecutor must have robes.

BUSI:
And no wig — this isn’t a fancy dress.

BUSI:
Let’s see if we have got everything right.

BUSI:
Now let us see ...

BUSI:
No jury.

MAGISTRATE:
But the judge is still here.

BUSI:
You are not a judge.

MAGISTRATE:
Then what am I? I have got a robe.

BUSI:
Yes, you have a robe, but you are not a judge. You, my dear, are a magistrate.

MAGISTRATE:
What is the difference?

BUSI:
Now, pay attention. Magistrates preside in Magistrates’ Courts and judges preside over the Superior Courts.

MAGISTRATE:
What are these presiding officers? And why are there different courts with different presiding officers?

BUSI:
They are the persons who are in charge, or who preside over legal
proceedings. They consider the facts and the law and they must come to a decision. About the different types of courts, let’s leave that for later. I just want to get this one sorted out.

BUSI:
So you are the magistrate.

MAGISTRATE:
Without the wig? ...
... Without the hammer?

BUSI:
That is better. [She turns to the prosecutor.] You are the prosecutor.

PROSECUTOR:
I know that. I work for the state and it is my job to prosecute people who are accused of committing crimes.

BUSI:
That’s good. It sounds like you have got it. [She turns to the attorney.] And you are the attorney.

BUSI:
Just some advice, no more jumping up shouting “objection!” You must refer to the magistrate as “your worship”, not “judge”. This is South Africa — not America.

BUSI:
That is it then.

BUSI:
We have the magistrate, the prosecutor and the attorney.

INTERPRETER:
What about us?

BUSI:
Who are you?

INTERPRETER:
I am the interpreter. I make sure that everyone understands the proceedings in the language of their choice.

BUSI:
And who are you?
COURT ORDERLY:
I am the orderly, I keep order in court and I also call witnesses.

BUSI:
Who are you?

WITNESS:
We are witnesses.

BUSI:
Ok, so we have everyone.

BUSI:

BUSI:
Someone is missing. Can you tell who it is? ... The accused.

MR SCOTCHBOTTLE:
I was taking a smoke break.

BUSI:
Great. Now we must have everyone. I am not going to call out who they are. You should know by now. That is better — much more South African. Now see if you can tell the difference between this ... and this.
Now, let us see where this court case began.

*** How the court case started ***

BUSI:
Imagine that you are standing at the side of a busy road. You can see the movement of the cars as they rush by to destinations unknown. This is where our story begins — at a busy intersection. Imagine two cars travelling in opposite directions approaching the intersection. Can you feel the tension mounting up? Suddenly the two cars collide. Moments later people stumble out of the car, dazed. After the shock wears off they begin blaming each other; a fight ensues. The police and paramedics arrive. The police take statements and the paramedics take the injured to hospital. Accidents like this are happening all over South Africa as we speak. Our story today is about one such accident. Let us meet the people involved.

BUSI:
We have met this man before in the courtroom. He is the accused ... Mr ...

MR SCOTCHBOTTLE:
Scotchbottle. We met in the court before. I was driving drunk when the accident happened, but I don’t care. Because I did not cause the accident ...

MRS VAN DER MERWE:
That is not true.

BUSI:
Excuse me, madam, can you tell us who you are?

MRS VAN DER MERWE:
I am Martie van der Merwe. I was driving the car when the accident
happened and I am angry. My husband is seriously injured and I did not cause the accident.

MR SCOTCHBOTTLE:
Rubbish.

BUSI:
Hang on! Hang on! Well it looks like these introductions have caused quite a commotion here. I believe that the police took blood tests from you Mr Scotchbottle?

MR SCOTCHBOTTLE:
Ja.

BUSI:
It seems like I will have to end with the introductions here. That was where this whole legal matter began. One car accident caused this whole court case. Now let us follow the events as they unfold. Join me as I speak to one of the police officers involved in investigating the matter.

*** The investigation ***

[Busi talks to the investigating officer, Inspector Tshabalala.]

BUSI:
Can you give us some background? How do you fit into the picture?

INSPECTOR TSHABALALA:
Well, I am the investigating officer for this matter. It is my job to investigate whether a crime has been committed. I collect all the evidence and then submit it to the public prosecutor who decides whether we should charge the person.

BUSI:
Can you explain to us how you collect the evidence?

INSPECTOR TSHABALALA:
Sure, I can explain it to you, but I need to collect some more evidence and take some statements. I can show you how I do it. Would you like to come along?

BUSI:
Great. Inspector Tshabalala spent some long days collecting all the information. It was difficult to keep up. He spoke to witnesses about what
happened in the accident. He also got the blood tests that showed Mr Scotchbottle was driving over the limit. He then sent all the information to the public prosecutor who drew up the summons.

*** Serving the summons on Mr Scotchbottle ***

BUSI:
So what is the next step? What is going to happen next?

INSPECTOR TSHABALALA:
Now I am ready to serve the summons on Mr Scotchbottle.

BUSI:
Can we have a look at it?

INSPECTOR TSHABALALA:
Yes, these are the accused person’s details. Here are the charges and these are the details of where the accused person must appear.

BUSI:
Are you going to arrest him?

INSPECTOR TSHABALALA:
I do not think that will be necessary. I could if I wanted to. There are basically three ways of securing the attendance of the accused in the Magistrate’s Court. Arrest is one way, another is by a notice issued by a peace officer, but I am going to use the summons which is issued by the clerk of the Court and is served — by me — on the accused. In the High Court the process is different. There the accused is sent a notice of trial and an indictment. It looks like this. In the matters that come before the High Court I work with the state advocate but in this case, because it is in the Magistrate’s Court, I work with the state prosecutor. I am on my way to drop off the summons now.

*** At Mr Scotchbottle’s flat ***

[Mr Scotchbottle is at his flat, having drinks with a friend.]

FRIEND:
So where is your car now?
MR SCOTCHBOTTLE:
I have got a buddy who is going to fix it up there by his house.

FRIEND:
That is much cheaper.

MR SCOTCHBOTTLE:
Ja, I am not worried about it. I am also not worried about those cops; they will never catch me ... no ways.

FRIEND:
But what about the blood tests?

MR SCOTCHBOTTLE:
Ja, they took blood tests and the stupid policeman took a statement from me, but you know what the cops are like. They will never do the paperwork.

FRIEND:
They are too lazy.

MR SCOTCHBOTTLE:
And besides that woman went right through the stop street ... [There is a knock on the door.] Who can that be?

INSPECTOR TSHABALALA:
Are you Mr Scotchbottle?

MR SCOTCHBOTTLE:
Yes?

INSPECTOR TSHABALALA:
Here is a summons.

MR SCOTCHBOTTLE:
A summons?

INSPECTOR TSHABALALA:
The charges are on there and so are the details of when you must appear in court. Please sign here.

FRIEND:
I hope you have a lawyer.

MR SCOTCHBOTTLE:
I will have to get one.
Mr Scotchbottle goes to his attorney, Mr Comins

MR SCOTCHBOTTLE:
... And then the investigating officer brought me the piece of paper — so I came to you.

MR COMINS:
I see. Tell me what happened.

MR SCOTCHBOTTLE:
When I came to the intersection, I swear I wasn’t driving fast. The woman just jumped through the stop street. She wasn’t watching the road. When the cops came, you should have seen how they treated me. They said I was in trouble; they took my statement; they were treating me like scum.

MR COMINS:
The piece of paper is a summons. Let me show you. This summons has your details here. Over here are the charges that the state has brought against you. Driving under the influence of an intoxicating substance, alternatively driving while blood alcohol was more than 0,05, reckless and negligent driving and failing to stop at a stop sign. Over here are the details of when and where you must appear in court.

MR SCOTCHBOTTLE:
But why is the state involved? I mean this accident had nothing to do with the state, it was between me and the people in the other car.

MR COMINS:
That may be true, but 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 you have committed a crime. The public prosecutor will have to prove, beyond a reasonable doubt, that you committed these acts.

MR SCOTCHBOTTLE:
What?

MR COMINS:
It means that the public prosecutor will have to show that you did these things so that there is no doubt that you did them. In other words, he must prove them beyond a reasonable doubt. Don’t worry. It is very hard to prove. It is much harder than the onus of proof in civil matters where the person bringing the action — the plaintiff — must prove his case on the balance of probabilities.
MR SCOTCHBOTTLE:
You mean that even if I go to jail, those other people can still sue me? So, that is why she is next door at the other attorney.

MR COMINS:
Is she?

MR SCOTCHBOTTLE:
Yes. As I was coming into your office I bumped into her again. I saw the woman from the other car go into the lawyer’s office next door.

MR COMINS:
That means that they might be considering bringing a civil case against you.

MR SCOTCHBOTTLE:
Oh no!

MR COMINS:
Don’t worry about that now. First, we must prepare for your criminal case.

*** Mrs Van der Merwe goes to her attorney, Mrs Mothibe ***

MRS MOTHIBE:
What can I do to help?

MRS VD MERWE:
Well, thanks for offering your help. We didn’t know who to turn to.

MRS MOTHIBE:
It is always a pleasure to help my neighbours. Is this about that motorvehicle accident you had recently? How is your husband? I hope he is out of hospital.
MRS VD MERWE:
Karel is getting better. He is at home now, but naturally he is upset about the whole incident.

MRS MOTHIBE:
Well, I will see what I can do to help.

MRS VD MERWE:
I am very worried because I saw the man who crashed into us going to his lawyers next door. I hope he is not going to sue us.

MRS MOTHIBE:
Tell me exactly what happened, from the beginning.

MRS VD MERWE:
Karel and I were going to the shops [Mrs van der Merwe tells the whole story.] ... and so I came to see you. Karel wants to know if he can sue this man and send him to jail?

MRS MOTHIBE:
I am not sure what he means. But let me explain to you a little bit about the types of cases that can follow from this accident that you have had. There are civil cases and criminal cases. It is usually only criminal cases that result in people going to jail. It is the state’s job to investigate crimes and charge people with crimes and to prosecute them. So I am afraid Karel will not be able to “sue someone to send him to jail”. That is the job of the state.

MRS VD MERWE:
You mean like the policeman who came to collect my statement?

MRS MOTHIBE:
Yes, the police investigate the crimes and the public prosecutor decides what charges to bring, and then prosecutes the accused in court. Both the police and the prosecutor represent the state. That is why, in criminal cases, the two parties are referred to as the state and the accused.

MRS VD MERWE:
But then, what can we do? The man was driving while drunk. He has ruined my car and Karel has huge medical expenses. He has been off work and has not been paid, not to mention his pain and suffering.

MRS MOTHIBE:
I will help you to bring a civil claim against this man, Mr...?
MRS VD MERWE:
Scotchbottle.

MRS MOTHIBE:
... Mr Scotchbottle for the damage he has caused you.

MRS VD MERWE:
So we can sue him?

MRS MOTHIBE:
Yes. From what you have told me, I think you have a good case. I'll start the work immediately and will let you know when we need to meet again.

*** Criminal case in Magistrate’s Court ***

BUSI:
I don’t know about you, but I found all of that quite confusing.
Why don’t we go back to the courtroom and see if we can sort all this new information out there ... 

That is better. I thought I would meet you back here at the Magistrate’s Court because we have met everyone here before. This is the criminal case that the lawyers were talking about earlier. You remember that the parties involved in a criminal matter are the state — represented here by the public prosecutor, and the accused — Mr Scotchbottle, represented by his attorney, Mr Comins. And of course, the presiding officer in the Magistrate’s Court — the magistrate.

BUSI:
Perhaps you can tell us, your worship, who has the onus of proof in criminal matters.
MAGISTRATE:
The onus of proof rests with the state.

PROSECUTOR:
Yes, as the representative of the state I must prove the case beyond a reasonable doubt.

BUSI:
OK. So that is the position in criminal matters ...

MRS VD MERWE:
But what about my civil matter?

MRS VD MERWE:
What about the money I have lost?

BUSI:
Good question — let us stay in the Magistrate’s Court for the moment. But let us change the scene from one of a criminal case to one of a civil case.

*** Civil case in Magistrate’s Court ***

MRS VD MERWE:
Yes. Let’s say that I am suing Mr Scotchbottle for the damage to my car.

BUSI:
Ok, good idea.

MR SCOTCHBOTTLE:
I don’t think so.

BUSI:
First, in a civil matter the parties are not the state and the accused.
BUSI:
They are the plaintiff and the defendant.

BUSI:
You will have to go. There are no prosecutors in civil matters.

MRS VD MERWE:
What about my lawyer?

BUSI:
Good point. The plaintiff is represented by an attorney.

BUSI:
Plaintiff’s attorney — where is the plaintiff’s attorney? Oh, there you are.

BUSI:
And of course we have the defendant’s attorney.

BUSI:
I said “defendant’s attorney”. Come on people, work with me, work with me.

MR SCOTCHBOTTLE:
So, have I changed from being an accused to being a defendant? That makes me feel a lot better.

MRS MOTHIBE:
I wouldn’t be so sure.

MR SCOTCHBOTTLE:
What do you mean?

MRS MOTHIBE:
Well, you might not be facing criminal charges in this civil court but the onus of proof in the civil case is easier.

MR COMINS:
It is true that in a civil case the plaintiff has to prove her case on the balance of probabilities and in a criminal case it is beyond a reasonable doubt. But she still has to prove her case and she does not have a chance.

MRS MOTHIBE:
We will see about that.
BUSI:
Ok, ok, that’s enough. So this is everybody in the scene, and these are the characters involved with a civil case in the Magistrate’s Court.

MAGISTRATE:
What about me?

BUSI:
What about you?

MAGISTRATE:
Do I change into anyone else?

BUSI:
No! The magistrate remains the magistrate in the Magistrate’s Court.

MAGISTRATE:
Well, can I wear the wig?

BUSI:
No! You cannot wear the wig.

BUSI:
Titles.

BUSI:
This, ladies and gentlemen, is a typical South African courtroom scene.

MRS VD MERWE:
Tell them it is a civil matter.

BUSI:
Ok.

MAGISTRATE:
In the Magistrate’s Court.

BUSI:
Ok, ok. This is a typical scene for a civil matter in the Magistrate’s Court in South Africa.

So let us recap ... See if you can spot the differences between these two pictures.
*** Difference between criminal and civil cases in a Magistrate’s Court ***

BUSI:
How did it go? Can you tell the difference? I can tell the difference. Can you? I hope so. Now I want to take you to the High Court.

*** Civil case in High Court ***

MRS VD MERWE:
Why has Busi brought us here?

MRS MOTHIBE:
Well, this is the High Court. I suppose she wanted to show the viewers the difference between the High Court and the Magistrate's Court.

MRS VD MERWE:
Is there a big difference between the two?

MRS MOTHIBE:
Yes, there is, especially in the types of cases that they hear.
MRS VD MERWE:
You mean like civil and criminal cases?

MRS MOTHIBE:
No. Both the Magistrate’s Court and the High Court hear both criminal and civil matters. What I mean by type of case is the type of criminal case and the type of civil case. For example, the criminal offence of high treason can never be heard in the Magistrate’s Court. Also, the sentence that can be given in the Magistrate’s Court is limited. The same with civil matters. If a large amount is involved then the Magistrate’s Court may not be able to hear the matter. That is why we will probably sue Mr Scotchbottle, here, in the High Court because from what I have worked out, the amount we can claim is a lot.

MR SCOTCHBOTTLE:
Did you hear that?

MR COMINS:
Yes, don’t worry. As I said before, they will still have to prove their case even if it is on a balance of probabilities.

MR SCOTCHBOTTLE:
But why must they come to the High Court? I mean what is wrong with the Magistrate’s Court?

MR COMINS:
Nothing, I suppose. They just want to claim an amount that is too high for the jurisdiction of the Magistrate’s Court.

MR SCOTCHBOTTLE:
The what of the Magistrate’s Court?

MR COMINS:
**Jurisdiction.** The *competence of the court to hear the matter.* For example a court, be it a Magistrate’s Court or a High Court, cannot hear a matter unless there is some factor that connects the persons before the court to the geographical area that the court covers. Like in your case, the accident happened in the geographical area where this High Court and the Magistrate’s Court we were in have jurisdiction.

MR SCOTCHBOTTLE:
Oh I see, but she was not talking about jurisdiction in terms of geographical area. She was talking about amount of money?
MR COMINS:
Yes. There are a lot of factors that determine a court’s jurisdiction. In criminal matters the type of offence and the sentence determine a court’s jurisdiction. In civil matters the nature of relief claimed and the amount claimed can also determine the jurisdiction. The Magistrate’s Court cannot hear a matter if the amount claimed is too high.

MR SCOTCHBOTTLE:
How much is too high?

MR COMINS:
It changes from time to time. Listen, we will worry about it when we get to it. For now, we will focus on the criminal case against you.

MRS VD MERWE:
... but what if we do not win our case?

MRS MOTHIBE:
Then we will appeal.

MRS VD MERWE:
You mean there is a higher court than the High Court?

MRS MOTHIBE:
Yes, of course. Look, at the bottom are the Magistrates’ Courts. They are divided into district and regional courts. We call those the lower courts. Then we have the higher courts. They are above the lower and are made up of the High Courts. Above them, the Supreme Court of Appeal and the Constitutional Court.

MRS VD MERWE:
What?

MRS MOTHIBE:
Let me draw it for you. First, there is the Constitutional Court, which only hears constitutional matters. Then, below that is the Supreme Court of Appeal which only hears appeals. Below the Supreme Court of Appeal are the High Courts which have different divisions all over the country. They hear criminal and civil matters and constitutional matters. Those are the higher courts. The lower courts are the Magistrates’ Courts and they are divided into regional and district courts. Magistrates’ Courts also hear criminal, civil and constitutional matters.
MRS VD MERWE:
Ok. I see. So if we lose in the High Court we can appeal to the Supreme Court of Appeal?

MRS MOTHIBE:
That is right, but we will not need to appeal, because we are going to win.

[Busi comes running into the court.]

BUSI:
Why didn’t you guys wait for me?

BUSI:
Mrs van der Merwe, can you remind us of where we are, and what we are doing here?

MRS VD MERWE:
Yes, this is the High Court and I am going to sue the pants off that ... that ... monster.

BUSI:
That’s right. Now I remember that I was going to show you what a High Court looks like. Let’s see. In the civil case we have the plaintiff and defendant. They each have their legal representatives and there is the judge ... [The magistrate tries to put on the wig.]

BUSI:
What the ... What are you doing?

MAGISTRATE:
Nothing.
MAGISTRATE:
Nothing. Surely the magistrate in the High Court wears a wig — I saw it on TV.

BUSI:
First, the presiding officer in the High Court does not wear a wig — no presiding officers wear wigs in South Africa. Second, presiding officers do not use little gavels. But all of that pales into insignificance when you consider that there are no magistrates in the High Court. In the **High Court** we have judges ... so you will have to go.

BUSI:
Now that we have got rid of the magistrate we can bring in the judge.

JUDGE:
You heard her, leave now.

BUSI:
So this is a typical civil matter in the High Court. Plaintiff and attorney, defendant and attorney and judge.
BUSI:
Now, let’s move on to the criminal case in the High Court. We have the judge. [Busi turns to Mr Scotchbottle.] You can stay, but you are not the defendant. Instead, you are the accused again.

BUSI:
[To the Prosecutor] ... But I am afraid you will have to go. Where is the state advocate?

MR SCOTCHBOTTLE:
I don’t just want an attorney, I want an advocate. Can I have an advocate? Where is my advocate?

BUSI:
You can have an advocate if you want to have one. But attorneys can also appear in the High Court now.

MR SCOTCHBOTTLE:
Well, I want an advocate.

MR COMINS:
Ok, I will work out the additional costs of an advocate.

MR SCOTCHBOTTLE:
The what? On second thoughts, I think you will do just fine.

BUSI:
Attention everyone!
We have the judge, the accused and his attorney ...

MR SCOTCHBOTTLE:
... or advocate ...
BUSI:

... or advocate ... and the state advocate. The judge's clerk, interpreter and court orderly. Let us compare that with the civil case in the High Court.

*** Difference between ***

Criminal case in Magistrate's Court and

![Diagram of Magistrate's Court]

Criminal case in High Court

![Diagram of High Court]
Civil case in Magistrate’s Court and

![Diagram of Magistrate's Court](image)

Civil case in High Court

![Diagram of High Court](image)

BUSI:

In our story the criminal matter will be heard in the Magistrate’s Court and the civil matter will be heard in the High Court. But we want you to know the difference between the criminal cases in the Magistrate’s Court and the High Court, see if you can compare the two criminal cases — one in the Magistrate’s Court and the other in the High Court. And the two civil cases — one in the Magistrate’s Court and one in the High Court.

BUSI:

Well, that was fascinating and I am sure that you are all well informed about our courts but let us get back to the story. Will Mr Scotchbottle be convicted? Will Mrs and Mr van der Merwe succeed in their civil claim? Remember, in our story the criminal matter will be heard in the Magistrate’s Court and the civil matter will be heard in the High Court, even though we have shown you the parties in the Magistrate’s Court and in the High Court for both the
civil and criminal matters. To find out what happened, we join Mr Scotchbottle in the Magistrate’s Court.

*** Criminal case in Magistrate’s Court — judgment ***

MAGISTRATE:
After weighing up all the evidence presented by the state, I find the accused not guilty on the charges of reckless and negligent driving and failing to stop at a stop street and guilty on the charge of driving with a blood alcohol level of more than 0,05.

BUSI:
This was the scene at the Magistrate’s Court two weeks ago. A distraught Mr Scotchbottle left the courtroom before I could ask him for his reaction. But a visibly pleased public prosecutor made his way back to his office, no doubt to start work on the next trial. So there you have it. The public prosecutor discharged the onus of proof, which you know in criminal matters is “beyond a reasonable doubt”, with regard to the drunken driving charge, but was not so successful with the reckless and negligent driving charge. Let’s cross over now live to the civil claim in the High Court and see if Mrs Mothibe has been more successful. The question on everyone’s lips is whether she has been successful in discharging the less burdensome onus in civil cases — that of proving your case on a balance of probabilities.

*** Civil case in High Court — judgment ***

JUDGE:
... In this matter, I find for the plaintiff ...

BUSI:
In a remarkable turn of events we see that Mr Scotchbottle got off the reckless and negligent charge but still lost his case in the civil trial. Sorely disappointed and visibly angry, Mr Scotchbottle makes a dash for the courtroom doors, with his attorney in tow.

MR SCOTCHBOTTLE:
I am going to appeal this matter. I am going to take this matter all the way to the Constitutional Court.
BUSI:
That is another rude outburst from the defendant, typical of his behaviour throughout the trial. As you all know, the defendant will not be able to take this to the Constitutional Court as that Court only has jurisdiction over constitutional matters. He can certainly appeal to the Supreme Court of Appeal, but word on the ground indicates that such an appeal would not be successful. I am sure the defendant and his attorney are glad to be out of the High Court where they suffered under the relentless vigour of the plaintiff’s attorney, Mrs Mothibe. Mrs Mothibe, a victory for you and your client — how does it feel?

MRS MOTHIBE:
Well, it is always good to succeed but it is important to remember that this case was not about personal victory or an attempt to punish Mr Scotchbottle. The aim of this, and any other civil case is simply to compensate the person making the claim. So I am pleased that the Van der Merwes were able to get back all the money they spent as a result of Mr Scotchbottle’s actions.

BUSI:
What do you have to say about that, Mrs van der Merwe?

MRS V D MERWE:
I just want to say to all those driving drunk on the roads — watch out! If the criminal case does not get you, the civil one will.

BUSI:
That was Mrs van der Merwe having the last word. Let us join the winning team back at Mrs Mothibe’s office to find out how they made this all happen.

*** How legal sources are used ***

BUSI:
Well, we have almost come to the end of this programme. All that is left is to join Mrs Mothibe, attorney for the Van der Merwes, in her office to find out how exactly she managed to discharge her onus of proof in the High Court. Mrs Mothibe, what is your secret?

MRS MOTHIBE:
Ironically, Busi, the secret is no secret, besides hard work which I believe is the key to any success. In law, you must make good legal argument.
BUSI: And how do you do that?

MRS MOTHIBE: You must find the law to support your case.

BUSI: Where do you find all this law? In the library?

MRS MOTHIBE: Yes, you might find it in a library, but usually only specialist law libraries keep all the legal information that I need. Most lawyers, like me, try and keep the legal information in their offices, either as books or on the computer.

BUSI: So, when people ask where they can find the law, they are not just talking about the physical place like a library, but also where the law comes from.

MRS MOTHIBE: That is right. We call it the sources of law.

BUSI: In other words where the law comes from?

MRS MOTHIBE: That is right. In South Africa we have many sources of law. The basis for any good legal argument is sources of law, especially authoritative sources of law. Let me show you.

MRS MOTHIBE: The first place in which I always look when looking for an authoritative source of law, is legislation. This is law that the state makes. An example of an organ of state that makes legislation is parliament. Parliament passes legislation. Let me get an example for you.

BUSI: But I thought parliament passed acts. I have heard people say: “Today an act of parliament was passed.”

MRS MOTHIBE: Yes, that is correct. Legislation is known as “acts” or sometimes “statutes”. It is basically different names for the same thing. Unfortunately there is no
statute that related directly to our case, but look I found an example of a statute.

BUSI:
But what about the case that you won? Why must we look at this Act first?

MRS MOTHIBE:
We will look at the case later, but for now I want to show you where I start looking for law. I start with legislation because it is an important authoritative source of law, after that I look at case law. So let’s look at this Act first.

*** See Study unit 6, Activity 6.4 ***

MRS MOTHIBE:
Every year parliament passes hundreds of acts. Each act has a short name as indicated here in bold “Choice on Termination of Pregnancy Act”. They all have a number; this is the chronological number: “92” and this is the year in which the Act was passed: “1996”. In other words this was the 92nd act of 1996. These acts are made known to the public through a publication called the Government Gazette. Commercial publishers, however, collect all the statutes and publish them in a form like this so that we can have them all together.

BUSI:
This is obviously when the President signed the Act and this is when it came into force. So this Act was passed in 1996 but only came into effect in February 1997.

MRS MOTHIBE:
Yes.

BUSI:
What is this in bold, under the word “Act”?

MRS MOTHIBE:
That is called the long title of the Act — it states what the purpose of the Act is — so, in this case the purpose of the Act is “To determine the circumstances in which and conditions under which the pregnancy of a woman may be terminated; and to provide for matters connected therewith”. 
BUSI: And what is the preamble for?

MRS MOTHIBE: The preamble sets out the underlying philosophy of the Act.

BUSI: And all these numbers?

MRS MOTHIBE: Those are the numbers of the sections of the Act. Every act is divided up so that it can be referred to easily. This whole part here is section 2. The part that follows this “1” which is in brackets is sub-section one. This part that follows the “a” in brackets is called a paragraph and these roman numerals indicate subparagraphs.

BUSI: I see. So if I wanted this part of the Act I would say I am looking at section 2 subsection (1) paragraph (b) subparagraph (iii) of Act 92 of 1996.

MRS MOTHIBE: That’s right.

BUSI: What is this section with all the words about?

MRS MOTHIBE: Good question. That is called the definition section. It is usually the first section of the Act and is called the definition section. The purpose of this section is to define some of the words as they are used in the Act. And this last section gives the short title of the Act and the day of commencement.

BUSI: Why did you say that you always start by looking for legislation?

MRS MOTHIBE: Because legislation is a powerful source of law. Some say that it is the most powerful source of law.

BUSI: But I thought the Constitution was.

MRS MOTHIBE: The Constitution is a special type of legislation. Let me see if I can show you.
MRS MOTHIBE:
It was passed by parliament; its short title is: The Constitution of the Republic of South Africa. It is Act 108 of 1996. But you are right that it is the highest source of law even above other legislation as all legislation must be consistent with the Constitution.

BUSI:
Ok, I see. So if legislation is a very powerful source of law, what are the other sources?

MRS MOTHIBE:
The next source of law is one that you should be familiar with.

BUSI:
Me! How would I know?

MRS MOTHIBE:
Because you have already seen it — court decisions.

BUSI:
Of course.

MRS MOTHIBE:
You might be in luck. It has been some time since the cases occurred so the decisions of the cases we were involved in may have been reported.

MRS MOTHIBE:
Let me see if I can find them ... Ah, yes we are in luck. They have been reported. Not all cases are reported you know.

BUSI:
I believe so — only important cases in the High Courts — no Magistrate’s Court decisions are reported.

MRS MOTHIBE:
Here, this is the civil case.

[Mrs Mothibe shows Busi a copy of the case: *Van der Merwe v Scotchbottle.*]

MRS MOTHIBE:
Since 1947 cases have been reported in South Africa by commercial publishers. To find the case law, you need to buy the publications where the cases are regularly reported.
BUSI:
This is the “name” of the case; I recognise the names of the parties. Van der Merwe and Scotchbottle.

MRS MOTHIBE:
That is right — the plaintiff and defendant. This is the court where the matter was heard — Natal Provincial Division. And this is the name of the Judge who heard the matter — Makgabo J.

BUSI:
What is her first name — Joan?

MRS MOTHIBE:
No. The J does not stand for her name; it stands for “Judge”.

In other cases, judges have AJ for “Acting Judge” or JP for “Judge President” behind their names. There are a lot of other letters that indicate the judicial status of the judge.

Now where were we? Oh yes, this is the date when the case was heard — 21 May 2000. This section here contains the main points or catch phrases of the judgment — the publishers put it in to help us quickly see what happened in the case. You can see it has all these dashes because it is in telegraphic style.

BUSI:
What is this then? It does not look like it is telegraphic, but it still looks like a summary.

MRS MOTHIBE:
Yes, it is a summary. It is called the headnote. The publishers also write this for our convenience so you cannot always rely on it, you should read the judgment itself which is over here, after these two Latin phrases *cur adv vult* and *postea*.

BUSI:
What?

MRS MOTHIBE:
*Cur ad vult* which is short for *Curia adversari vult* which means “the court wishes to consider its verdict” and *postea* which means “afterwards”.

BUSI:
What is that all about?
MRS MOTHIBE:
Well, the court heard the matter. Then it needed time to think about what its decision was going to be. Then after it had considered, it gave its verdict.

BUSI:
Does a criminal case look the same?

MRS MOTHIBE:
Almost. The only difference is in the name of the case. In the civil case the parties were Van der Merwe and Scotchbottle. Here they are the state — as indicated by the S — and the accused Scotchbottle.

BUSI:
Oh I get it.

BUSI:
That seems like a lot of law for such a small case.

MRS MOTHIBE:
Well that is not all. There are other sources of law. There is common law, and custom, and indigenous law. These are all places where you can go to find law to support your legal argument.

BUSI:
Wait — say that again.

MRS MOTHIBE:
Indigenous law, custom, common law, court decisions and legislation.

BUSI:
But is all indigenous law written down?

MRS MOTHIBE:
No, indigenous African law is not all written down, it lives in the heart of the people and is essentially oral. Custom is also not all written down, after all it is certain actions and behaviours of people.

BUSI:
So not all law is written down?

MRS MOTHIBE:
Exactly. Even the law that is written down still has to be applied. As we all know the law in the books and the law as it is actually applied are two different things.
BUSI:
Yes, I suppose that must be true. But does the law that is written down in these books have an order of authority? Are these books stacked in order, with the most powerful on the top and the least powerful at the bottom?

MRS MOTHIBE:
Not really, it is not that simple. The sources of law interact in different ways. Indigenous African law and common law should be on the same level, at least that is what the Constitution says. Legislation is often interpreted by case law, but at the same time can sometimes override existing decisions of courts.

BUSI:
That sounds interesting and complicated.

MRS MOTHIBE:
Yes, it is. But we don’t have time to go into it right now. I have another case to prepare for.

BUSI:
Thank you for all your help, Mrs Mothibe. We certainly have learnt a lot from you.

MRS MOTHIBE:
It’s a pleasure.

BUSI:
Wasn’t that an exciting journey? We met some wonderful people along the way, and like most journeys we also met some not so wonderful people. At times it was hard, but it was worth it. Now that you know more about the South African legal system you can confidently explore it further. You can start by watching this programme again if you did not catch it all the first time. Well it has been fun for me, I hope you enjoyed it. From me, Busi, it’s goodbye.
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statement
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(form of address in high court)
“your worship”
(form of address in magistrate’s court)

akte van beskuldiging
tolk
onderzoekbeampte
reger
regtersklerk
uitspraak
jurie
jurisdiksie
juris, regsgeleerde, regspraktisyn
regsverteenwoordigers
laer howe
landdros
landdroshof (enkelvoud)
landdroshowe (meervoud)
mosie
aard van (regs)hulp
kennisgewing van verhoor
kennisgewing uitgereik deur ’n vredesbeampte
oortreding
op ’n oorwig van waarskynlikhede
beceyslas
eiser
voorsittende beampte
aankla, vervolg (werkwoord)
aanklaer (naamwoord)
staaatsapproofer
streekhof
vonnis
’n dagvaarding beteken
staatsadvokaat
staatsaanklaer
verklaring
dagvaar, geregtelik vervolg
dagvaarding
hoër howe
Hoogste Hof van Appêl
verhoor
getuie (enkelvoud)
getuies (meervoud)
“u edele”
(aanspreekvorm in Hoë Hof)
“u edelagbare”
(aanspreekvorm in landdroshof)
In this study unit we will look at the different kinds of legal disputes that may arise from everyday events, namely civil, criminal and constitutional disputes. We will pay particular attention to civil and criminal cases and the difference between these two kinds of cases.

Key questions

After you have watched the DVD or have read the text, and have completed this study unit, will you be able to

- identify the different kinds of legal disputes?
- show the difference between civil and criminal cases by paying special attention to the different nature (or basic qualities) of the proceedings in the DVD?

Setting the Scene

The accident

On Saturday morning Martie and Karel van der Merwe set off for town to do their shopping. Martie is driving the car. As she approaches a four-way stop Martie slows down, because she knows that this intersection is particularly busy on a Saturday morning. She stops at the stop sign and waits for other cars to cross, until it is her turn. When the Van der Merwe’s car is in the middle of the intersection, another car crashes into it. The driver of the other car is called Mr Scotchbottle. When Mr Scotchbottle gets out of his car he is so drunk that he cannot stand up properly. He swears at Martie and wants to hit her. The people who are standing around, watching, manage to keep him away from Martie. Someone calls the police. The police arrive. Two policemen immediately take Mr Scotchbottle away in order to get blood samples to test his blood-alcohol level. Martie suffers only a few scratches and bruises in the accident, but Karel is injured quite severely and
the ambulance takes him to a hospital nearby. The Van der Merwe’s car is so badly damaged that it has to be towed away. Martie is in a state of shock. Someone calls one of Martie’s friends to come and fetch her.

Discussion

Introduction

A number of things have happened in our story. It appears that the accident was caused by Mr Scotchbottle who did not stop at the four-way stop (this will have to be proved, of course, in a court of law). As a result of this Karel has suffered severe injuries. He will have to spend some time in hospital and therefore he will have medical expenses to pay. The Van der Merwe’s car has been damaged and they will have to pay for it to be fixed. But, the Van der Merwe’s now have these costs to pay as a result of Mr Scotchbottle’s drunken, and probably reckless and negligent driving. So, what about Mr Scotchbottle? Surely, he cannot drive under the influence of liquor and get away with it?

Different legal disputes

Different kinds of legal disputes may arise from everyday events, namely civil, criminal and constitutional matters. Let us now look at these different kinds of cases.

Civil cases

In our story both Martie and Karel can claim damages from Mr Scotchbottle. Martie can claim damages (money) from Mr Scotchbottle for the damage to her car. Karel can claim damages (money) from Mr Scotchbottle for his medical expenses. These cases are called civil cases because in each incident the dispute is between people (legal subjects: see study unit 2), and the state is not involved.

Criminal cases

In criminal cases the state is involved. In our story it appears that Mr Scotchbottle was driving under the influence of alcohol. This is something that cannot be tolerated by the community. Therefore the state will prosecute Mr Scotchbottle for drunken driving and also, probably, for reckless and negligent driving. This will be a criminal case.

Constitutional cases

Although our story in the DVD does not include a constitutional matter, it is important for you to know what a constitutional case is. A constitutional
matter involves any issue requiring the interpretation, protection or enforcement of the Constitution. It may also involve issues on fundamental rights; in other words, any issue that may arise from the Bill of Rights in Chapter 2 of the Constitution. The state, individuals or private institutions may be parties in a constitutional case. The parties are called the applicant and the respondent (on appeal: the appellant and the respondent). Their legal representatives may be attorneys or advocates. The presiding officer will be a judge. Constitutional cases may be heard by High Courts, the Supreme Court of Appeal and the Constitutional Court. Remember that the Constitutional Court has the final say in constitutional matters.

### Activity 12.1

Watch the DVD or read the text of the DVD script again. Then try to indicate the differences between civil and criminal cases in the following diagram:

<table>
<thead>
<tr>
<th>Who are the parties?</th>
<th>CIVIL CASE</th>
<th>CRIMINAL CASE</th>
</tr>
</thead>
<tbody>
<tr>
<td>How must they prove their different cases?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>What do they want to achieve by means of their different actions?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Who are the other roleplayers?</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

How did you do? Did you identify the most important differences, for example the different roleplayers and the nature of the proceedings? We shall explain all of this further on. You should have identified at least the following:
Different parties: In a civil case the parties are ordinary people or individuals and they are called the plaintiff and the defendant. 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 that it is more likely that what she says is true than not true. In law we would say that she has to prove her case on a preponderance of probabilities or a balance of probabilities. The duty of proving (or onus of proof) in a civil case is not quite as heavy as in a criminal case. In a criminal case the state must prove its case beyond reasonable doubt.

Purpose of proceedings: In a civil case the main aim is usually to claim financial damages, for example, medical expenses, damage to a car, etcetera. (There are also other kinds of civil proceedings which you will learn about later, such as orders to stop [prohibit] someone from publishing defamatory statements about you, that is statements that are likely to damage your reputation, etc.) In a criminal case the state usually wants to punish someone for a crime and therefore, if the accused is convicted, he or she will, for example, pay a fine or go to prison.

The roleplayers: In a civil case we have the plaintiff and the defendant with their legal representatives, who may be attorneys or advocates. Whether they are attorneys or advocates will depend on the nature or seriousness of the issue. The presiding officer may be a magistrate or a judge. This will depend on the court in which the case is heard. In a criminal case we have the state prosecutor (public prosecutor) or state advocate who conducts the state’s case. Again, this will depend on the court that hears the case. We also have an attorney or advocate who represents the accused. This will depend on the nature and seriousness of the crime. The presiding officer may be a magistrate or a judge. This will depend on the court in which the case is heard.

Conclusion

You should now know that there are civil, criminal and constitutional cases. You should also know what the basic differences between civil and criminal cases are. In the last study unit we are going to look at the legal profession and the court structure in South Africa to see how civil and criminal cases fit into these structures.
In this study unit we look at some of the members of the legal profession, as well as at the court structure in South Africa.

**Key questions**

After completion of this study unit you, will you be able to

- name some of the members of the legal profession and explain briefly what they do?
- name the most important courts in South Africa and indicate by means of a diagram where they fit into the hierarchy of courts (that is, what their level of importance is)?

**Activity 13.1**

After the accident Martie goes to see her neighbour, Jane Mothibe. Jane is an attorney and can advise her. Martie wants to find out what she can do to sue Mr Scotchbottle. In the meantime, a summons has been served on Mr Scotchbottle. Mr Scotchbottle goes to see his attorney, Mr Comins, to find out what he must do about the criminal charge. Later, both the civil and criminal actions go to court. Watch the DVD or read the DVD script again and see if you can identify the different members of the legal profession who take part in the DVD.
Were you able to identify some members of our legal profession? We are sure you were! Now study the discussion that follows. This will provide you some feedback.

We are going to look at members of the legal profession who practise privately (that is, for their own account), such as attorneys and advocates. We are also going to look at those who are involved in the administration of justice, namely state prosecutors (public prosecutors), state advocates, as well as magistrates and judges. If you are interested in knowing more about career paths and opportunities for members of the legal profession, visit the link of the College of Law on the website of Unisa at www.unisa.ac.za.

Attorneys Martie and Mr Scotchbottle go to attorneys for legal advice. 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. They have to fulfil certain academic and professional requirements which are laid down by law in order to be admitted to the legal profession as attorneys. These 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 centre (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. When attorneys are admitted, their names are recorded in a register (called a “roll”). The court acts as a watchdog over these attorneys. What this means is that, in cases of serious misconduct by the attorneys, the court may order that their names be struck from the roll. All practising attorneys must belong to the Law Society in their province. The Law Society is what the professional body for attorneys is called. Attorneys are subject to the rules laid down by the Law Society in their province. Representing clients in court is not the only thing that attorneys do. They perform a wide variety of other functions as well. For example, they do transfers of property from one
person to another, drafting of wills and other legal documents (such as antenuptial contracts), administration of deceased estates, et cetera.

In the past, attorneys were only allowed to appear in the lower courts (magistrates’ courts). This has changed. Attorneys may now appear in the High Court as well. However, it is important to know that attorneys do not have an automatic right to appear in the High Court. 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. Section 4 of the Act provides for a specific application procedure that an attorney, who wants to apply for the right of appearance in the High Court, must follow.

Mr Scotchbottle says that he wants an advocate to represent him in the High 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. They are also admitted to the profession by the High Court, provided that they comply with certain statutory requirements. One of these requirements includes a four year LLB degree obtained from any university in South Africa. However, this does not mean that you can immediately practice as advocate at one of the Bar Councils when you have obtained the LLB degree. Practising advocates usually belong to one of the professional Bar Councils which are linked to the divisions of the High Court. An example of a Bar Council is the “Johannesburg Bar”. 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 (ie pupillage for a prescribed period) and then successfully complete the Bar Council’s examination.

You will have seen in our DVD, that the state’s case against Mr Scotchbottle is conducted in the magistrate’s court by a state prosecutor, also called a public prosecutor. The state’s case in a High Court would be presented by a state advocate. State advocates also serve as legal advisers to the state and may even be involved in drafting legislation.

You will have seen in the DVD that the presiding officer (that is the officer in charge) in both the civil and criminal actions in the magistrate’s court is a magistrate. In the High Court, whether it is a civil or a criminal matter, the presiding officer will be a judge.
You will have seen in the DVD there are civil and criminal courts, and that there are differences in the levels of these courts. The level is that of either a lower court or a superior court. Try to explain, by using a diagram, how these different courts, as well as the Constitutional Court, fit into the court structure.

In terms of the Constitution of the Republic of South Africa 108 of 1996 our judicial system is made up of the following courts:

- the Constitutional Court
the Supreme Court of Appeal
- the High Courts
- the magistrates’ courts
- other courts that may be established or recognised in terms of an act of parliament, including any court which has a status similar to that of either the High Courts or the magistrates’ courts.

We can explain the hierarchy (or levels) of the different courts by means of the following diagram:

It is important to note that, 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. All judgments given on or after this date will be dealt with in terms of the new system.

There are three basic legal principles that form part of the legal process and which you should bear in mind when working with the hierarchy of courts. The first of these principles, namely the principle of judicial precedent (the precedent system), we have briefly discussed in study unit 6. The other two principles are “appeal” and “review”.

Discussion

There are three basic legal principles that form part of the legal process and which you should bear in mind when working with the hierarchy of courts. The first of these principles, namely the principle of judicial precedent (the precedent system), we have briefly discussed in study unit 6. The other two principles are “appeal” and “review”.

Appeal

In a civil matter when a party feels that the court has made an error in its decision, in other words if the party is unhappy with the decision, that party can appeal to a higher court. In criminal matters an appeal may be lodged...
against the conviction, against sentence or both. A court higher up in the hierarchy of courts will then reconsider the decision.

On appeal, the court does not listen to all the oral evidence about the facts of the case. In other words, the witnesses do not have to repeat all the evidence again to the judge. 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 of the *court a quo* is set aside. If the appeal is dismissed the decision of the *court a quo* is confirmed.

When a matter is on appeal the parties are called the **appellant** and the **respondent**. So who the appellant is, depends on who thought the decision was incorrect and wanted it reversed.

**Review**

If there has been an irregularity in the procedure, the case can also be reviewed by a higher court, for example, when the proceedings have not been translated properly by an interpreter or the accused has not been given an opportunity to present his or her own case. In these circumstances the person asking for a review is complaining about the way the proceedings have taken place and not, as in appeal, about the decision itself.

**Conclusion**

Now you should have a basic understanding of the structure within which the legal process takes place. You will learn a lot more about the processes in the different courts and different cases later on in your studies.