STUDY UNIT 1 – What is “law”? 

KEY QUESTIONS:

1. **What is the “law”?**

   The law:
   - is a set of rules / norms that governs human behaviour / conduct.
   - should be obeyed by all of society & is binding
   - is enforced by the state / state organs &
   - when you do something wrong, you may be prosecuted & punished or be ordered to compensate the other party you have injured

2. **Identify events that have legal relevance, in other words, that has something to do with the law?**

   Examples from the story → examine legal norms to find out whether:
   - Employment → retrenchment → lawful / not lawful
   - Payment of school fees → obligation

3. **Understand the part played by law in daily life?**

   The law plays a very important role in daily life.
   - parenting → legal norms relevant to parenting → schooling / medical care
   - age of children → infant → steals → not liable for crime

4. **Divide the events that have legal relevance in divisions?**

   There are 2 methods used to divide South African law:
   - (1) 2 main divisions → Public law & Private law
   - (2) 2 main divisions → Formal (procedural) law & Substantive (material) law

   - **Public law & Private law** → deals with:
     - Public Law → relationship → state & individual
     - Private Law → relationship → individual & individual
   - **Formal / procedural law & Substantive / material law** → deals with:
     - Formal law → procedures that must be followed in legal proceedings
     - Substantive law → determines the content & meaning of different legal rules

5. **Explain the difference between legal norms and other norms?**

   Some law → norms (rules) → determine how one should interact and behave with another.
   This is what separate laws from those that are not norms.
   Therefore: A legal norm (law) binds all people.
   Other norms / other laws → law of chess → bind only those who are playing.
6. **Explain the difference between formal justice and substantive justice?**

**Formal Justice:**
- **Formal law** → deals with the procedures that must be followed in legal proceedings.
  - certain basic requirements must be met,
  - when these basic requirements are met, always applied, in exactly the same way → Formal Justice achieved
- **basic requirements:**
  - **Explicit rules** → how people must be treated in *specific cases*
  - Rules applied **generally** → all people → same circumstances
  - Rules must be applied **impartially** → judge may not apply rules unequally / no bias decisions

**Substantive Justice:**
- When there is formal justice that’s not really ‘real justice’, substantive justice is raised.
  - Concerned with → content of rule → not how rule applied
- **Substantive law** → determines content & meaning of different legal rules
  - to determine if substantive justice done:
  - content of these rules itself must be looked at.
- Often substantive law complies with the rules of formal law → but may still be unjust
- Therefore formal justice and not substantive justice are achieved.

*Example*
- Apartheid years
  - laws specific, applied to all in specific group & impartially applied
  - cannot be said that it served justice → content of rules → unjust

7. **Distinguish between the different normative systems?**

Normative systems that governs human behaviour:
- Religion / Individual Morality / Community Mores

**Religion:**
- Each religion has → code (a set of rules) to live by
  - sanction (punishment) for those disobeying
- There are many questions with regard to the relationship between religion and law. Although there are many differences and similarities, they might overlap, and cannot often be divided into separate categories.
- There are different view points in this regard:
  - Religion and law should be mutually exclusive
  - Religion and law should have the same content.

*These views may be criticised as follow:*
- There are many similarities & differences
Differences:
- Religion → 10 Commandments → not convey neighbour’s possessions
- Law → this is not enforced
- Religion → Adultery is a sin
- Law → Adultery is not a crime

Similarities:
- Western legal tradition is influenced by Christian thought (canon law)
- Canon law is the basis of:
  - Modern Matrimonial law
  - Regulation of sexual relationships
  - Contracts may be concluded by mere agreement
- Content of law & religion same → offences in: Murder / Fraud / Theft / Perjury
- Both religion & law → studied by interpreting authoritative text:
  - Ritual formalities & fixed procedure → NB role
- SA law favour Christian Religion:
  - In criminal law Blasphemy → criminal offence & pertains to Christian God
  - Christian holidays → Christmas / Good Friday

Individual morality (personal morality / ethics) → not enforced by law
- They are personal, self- inflicted rules of each individual
- Norms / standards of behaviour each person sets for himself
  - not to drink too much / honesty / not to lye
- can form part of religious convictions
  - not to tell lies (both individual & religious norms)
- May go hand in hand with certain legal rules
  - honesty is violated when crimes of fraud are committed
- Where a norm of individual morality coincide with a legal norm → only then will the law step in / intervene

Community mores
- Collective morals of a whole community / group in that community.
- Different from religion & morality → not private matters of specific individual
- Mores differ from each community → ex. Unmarried couples living together (some may accept & others not)
- Origin of some community mores → may be found in religious convictions (gay-forbidden)
- Law & community mores may coincide → possession & sale of harmful drugs (disapproved by community & criminal offence)
- Law & community mores may differ → law may not support these mores (there may not be laws good enough to prevent distribution of child pornography)
- community may feel that present censorship laws are too strict & should be relaxed
KEY CONCEPTS:

**Norm** → a standard of human conduct / a rule of human behaviour

**The law versus other laws** → Different things at different times.

→ Law → binds community (private law)

→ other laws → binds people participating (law of cricket)

**Justice** → Equality before the law

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STUDY UNIT 2 – Law and rights

**KEY QUESTIONS:**

1. **What is a right?**
   A right is how people relate to one another.
   When you have a right to something → holder of right
   Holder / legal subject → right to legal object
   → other legal subjects must respect your rights
   Right have 2 relationships → relationships between:
   - A legal subject & the legal object
   - The legal subject (holder of rights) & other legal subjects
   Therefore → a legal subject have rights against one another in respect of the object of their rights.

2. **Give four (4) important rights in private law?**
   Grouping rights are done by deciding what type of right it is. We can find out the type of right by finding out the object of the right.
   **4 classes of rights:**

   **(1) Real Right**
   (object: a thing) → car / pen / herd of cows / air in cylinder
   
   → Rights to physical, material things → we can touch
   → The powers we exercise → content of the right
   Examples of real rights:
   - **Ownership:** owner of property may freely use / enjoy / alienate / destroy
     → (powers which form the content of the owner’s real right of ownership)
   - **Pledge:** give movable thing for security of debt
     → pledgee (own receiving pledge thing): powers limited (only possess)
     → may not use / enjoy
   - **Servitudes:** Servitude holder has limited real right to property of another
     → Ex. right of way over another person’s land.
(2) Personality Rights
(object: personality property)

→ Rights to parts of personality
→ Ex. Right to → physical integrity / good name / reputation / honour

(3) Intellectual Property / immaterial property rights
(object: non tangible creation of the human mind)

Intellectual property rights relates to creation of human mind
→ ex. Work of art / invention / trademark
Also sometimes called immaterial property rights → copyright

(4) Personal Rights
(object: performance)

A right to performance / claim / human action → to do/ not to do something
→ ex. Delivery / payment / services / not compete

3. Explain the connection between the law & rights?
The law determines what the content of rights are (powers of the holder).
The law prescribes what the limits to the content of rights are.

4. Give examples of the connection between the law & rights?
→ example: ownership: you have the right to your property and the law prohibits one to erect a building that is higher.

KEY CONCEPTS:

The law → system of norms / rules & system of rights
Examples of rights → right to car / book / against seller of car / against all others who must respect my right to my car / book etc.
Legal subject → anyone subject to the norms of the law & may be a holder of rights & duties
Legal object → the object of a right (legal object) may be anything that is of economic value to people → costs a lot of money / useful / value to particular person
Other meaning of the word right
Powers you can exercise in terms of your rights.
ex. Right to use & sell your house.
→ Right to appear in court → not truly a right → ABILITY → CAPACITY
→ why? There must be → a legal subject & the right to an object of the right.
→ legal relationship between legal subject & other legal subject who must respect your right.
→ Therefore: right to appear in court/right to enter a contract (no legal object/relationship)
→ Ability is given by law in terms of a person’s status/legal standing and is therefore called → CAPACITY

**Law balance interest** → There are a number of things that a landowner may not do and which would be a nuisance/cause harm to the neighbour’s property.
→ ex. May not: may not build up to land boundary/dig a ditch at boundary as it could cause neighbour’s land to sink down/cause excessive smoke.
→ if commit a prohibited act → law comes into operation → force to remove nuisance/compensate the other party.

**Right & Duty** → If a legal subject has a right; other legal subjects have a duty.
STUDY UNIT 3 – The story of our Law

KEY QUESTION:

1. Explain the composition of South African law against its historical background?

The history of our legal system goes back to the Romans. It can be divided into 3 phases.

- **Phase 1**: The way Roman law formed part of the law of Europe & how roman law became part of the Netherlands. This law in Netherlands became known as Roman-Dutch law.

- **Phase 2**: Movement of Roman-Dutch law from the Netherlands to the Cape.

- **Phase 3**: The way Roman-Dutch law developed after brought to Cape.

(1) Roman law becomes Roman-Dutch Law

- 753BC – 476AD (Roman law history started & ended)
  - Latin: language of Roman Empire → today part of our legal system
  - Roman Empire gave us its legal system
- 2nd half of 1st Century BC & 1st 2 Centuries AD – Roman Empire at its height
  - Roman civilisation / culture ate height of development & Roman law reached peak
  - Efforts of Roman jurist → result of peak
  - Roman law applied → Classical Roman law
- End of 4th century AD – Roman Empire split
  - Western Roman Empire (Rome: capital) & Eastern Roman Empire (Byzantium: capital)
  - Western Roman Empire
    - Roman law decline → yet remains alive → helped reception of Roman law into Europe
    - Germanic tribes invaded W.R.Empire → Survival of Roman law → allowed Romans to be governed by Roman law. (not pure Roman law → it has a Germanic influence)
  - Role of Roman Catholic Church
    - Roman law →basis of Canon law → influence on modern law → agreement=contract
  - 6th century Eastern Roman Empire → Roman law survived successfully
    - Emperor Justinian codify the law → Corpus Iuris Civilis → kept Roman law alive → written down & made possible to be received in Europe 12th century AD.
    - Corpus Iuris Civilis → collection of earlier writings of classical jurists & all laws passed during period of emperors.
  - 12th century- renewed interest – Roman law studied at medieval schools
    - studied Corpus Iuris Civilis → law spread throughout Europe
    - Roman law received in Europe → had existing legal system → unsystematic & unscientific
    - jurists used Roman law to fulfil needs of practice.
- Reception of Roman law throughout Europe
  - Roman law as explained by medieval jurists → joined existing law → received in Europe
- Roman-Dutch law
  - Roman law received in Netherlands → creation of Roman-Dutch law
  - in Netherlands jurists wrote commentaries on Roman-Dutch law (student notes / legal practice guides). Roman-Dutch Jurists (old authorities) → H.De Groot / J.Voet: writings still consulted
(2) **Roman-Dutch law comes to the Cape**

- Dutch settlements at the Cape
  - J. v Riebeeck (employee - Dutch East India Company (VOC)) → came to cape in 1652
  - VOC at Cape→ affairs regulated→ in terms of the Artyckelbrief
  - Artyckelbrief: document→ set out rules & regulations of VOC employees
  - When Cape became settlement→ lives of people living there governed by legislation / placaten
  - Placaeten→ like posters→stuck on the walls of public places
- Roman-Dutch law becomes governing law at the Cape
  - When there were disputes→ R.D law (as discussed by old authorities) we consulted
  - Roman-Dutch law applied by courts →became part of our legal tradition
  - Writings of H. de Groot & J. Voet → still used in our courts today
  - Our Roman-Dutch law system makes it easy for SA lawyers to communicate and interact with international lawyers
  - Roman law→ basis of almost all laws of countries in western & eastern Europe / South America / Japan.

(3) **English law & African customary law**

- British occupations of the Cape: Influence of English law
  - British occupied Cape first in 1795 and later in the 1806
  - British government don’t want to deliberately change law→influence of English law was still felt→ particularly after the 1820 settlers arrived in South Africa
  - Influence felt in both the administration of justice & in the rules of law.
  - Example → Court structure replaced by English court structure
  - English became the official language at Cape.
  - Also decided that judges & advocates had to receive training in England.
  - These judges and advocates often turned to English law rather than to Roman-Dutch authorities when resolving a legal problem.
  - English law was more formally received through legislation:
    - English law of procedure & evidence / jury system / company law
    - English law received in Natal & after annexation of Transvaal & Freestate Republics by Britain (1838-1910) spread throughout rest of SA.
- Indigenous African law / African customary / indigenous law
  - Unwritten laws → during 2nd half of 19th century→ these laws were officially recognised by the colonial authorities
  - Today→ still largely unwritten → in KwaZulu-Natal much of the indigenous law is now contained in a code, which is formally recognised.
  - In past→ indigenous law → recognised as a special law → only applied to blacks
  - This has changed→ In Constitution of 1996→ courts must apply indigenous law where applicable
  - Indigenous law→ community based→ regulates individual relationships between members of the family → a dynamics system that is capable of change
- In 1996→ the first democratic Constitution of the republic of South Africa was adopted.
STUDY UNIT 4 – Families of law or legal cultures

KEY QUESTIONS

1. Why are the various legal systems in the world grouped together in different legal families / different legal cultures?
   → there are many different cultural groups in the world.
   → Different Cultural groups have different ways of life and have certain characteristics to identify them.
   → The different legal systems reflects the different culture groups.

2. How are the various legal systems in the world grouped together in different legal families / different legal cultures?
   → There are standards / criteria to be used to classify / group the different legal systems in the world into families / cultures.
   → Criteria for grouping:
     ● **Style & technique** → of particular system
     ● the sources of law & the weight of the different sources
     ● **Ideology** → philosophy (system of beliefs) / ideology → on which system based
       → Ex.: system of values in Western world → based on → rights of the individual
       → Ex.: system of values in African systems → based on → rights of the community
     ● **Economic elements**
       → If we have to decide whether particular legal system belongs to the:
        → Socialist family / capitalist system
        → because these systems are based on certain economic theories

3. Explain why the South African legal system is known as a mixed / hybrid legal system?
   → Various components / legal systems played a role in its development.
   → It consists of:
     ● Roman-Dutch law (civil legal family)
     +
     ● English law (common-law legal family)
     +
     ● African Indigenous law (indigenous family)
5. Name the most important features of the different legal families & in each case give a legal system belonging to that family? (most NB 1-3) & (other 4-6)

(1) Romano-Germanic / Civil-law family
→ All these systems have a strong Roman Law basis
→ Roman law played NB role in development
Ex.: French / German / Dutch → legal systems

(2) Anglo-American / Common-law family
→ Case law played NB role in development of these legal systems
→ Court decisions → still NB part in their application
Ex.: England / America / Australia / New Zealand

(3) Socialist Family
→ development influenced by historical & political elements
→ the law is there→ to serve social & economic policies in these legal systems
→ Doctrine of Marxism→ common to all these legal systems
Ex.: former USSR / Communist China

(4) Religious Legal Family
→ origin in religious sources
Ex.: Islamic / Hindu / Jewish → legal systems

(5) Indigenous Legal Family
→ legal systems→ mainly made up of unwritten customary laws.
→ focus is on the community
Ex.: African Indigenous Law

(6) Hybrid / Mixed Legal Family
→ Various components / legal systems played role in development
Ex.: South Africa / Scotland / Sri Lanka

KEY CONCEPTS:

Cultural Diversity → Many different cultures / cultural groups.
STUDY UNIT 5 – Divisions of law

KEY QUESTIONS:

1. Distinguish between the 2 (major) main divisions, public law & private law?
   
   **Public Law** → regulates relationships concerned with public interest.
   
   (interests of community)
   
   → someone commits crime → against community’s interest
   
   → must be punished
   
   → deals with relationship between state & citizens

   **Private law** → ensures that individual interest are protected
   
   → deals with the relation between individual & individual

   EXAMPLE: If A steal B’s property
   
   → A : prosecuted + punished by state → (public law action)
   
   → B : claim damages/ compensation from A → (private law action)

2. Name & describe each of the divisions of public law? (state → citizens)

   **Public International law**
   
   → relations between states
   
   Ex → law of war & peace / law of international organisations / law of international treaties

   **Constitutional law**
   
   → Concerned with the institution of the state (how formed) & its organisation
   
   → Governs powers of organs of state (parliament / courts / cabinet )

   **Administrative law**
   
   → Controls administration of state → rules: to ensure powers used fairly
   
   → (state bodies / state departments / boards / ministers
   
   → Determines the way they should exercise their powers → relationships with citizens

   **Criminal law**
   
   → States which acts = crime & punishment (by state) → for these crimes

   **Law of procedure**
   
   → May be divided into 3 subdivisions:

   (1) **Law of civil procedure**
   
   → Process / method how private-law disputes should be brought before court
   
   → How: summons must be served / pleadings drawn up / court jurisdiction

   (2) **Law of criminal procedure**
   
   → Concerned with how accused are prosecuted & tried

   (3) **Law of evidence**
   
   → How evidence should be presented to court
3. Name & describe each of the divisions of private law?

**Law of persons**
- Concerned with persons as subjects of the law
- Legal subject's: beginning / status / end (in the eyes of law)

**Family law**
- Concerned with the legal relationship between: spouses / parent & child / guardian
- It covers: marriage + its consequences & relationships within family (parent&child)

**Law of personality**
- Concerned with personality rights
- All have → rights to: our body / good name / reputation / dignity
- If infringed → claim money (in terms of law of personality) as satisfaction.

**Law of patrimony**
- Concerned with relationships between persons & their means
- "means": whatever a person has that can be given the value in money
- Can be divided into 3 subdivisions:

1. **Law of things / property**
   - Movables: Things that can be moved without being damaged (book / car)
   - Immovables: Things that cannot be moved & are fixed (land / house)
   - Ownership: Most comprehensive right in property (real-right)

2. **Law of succession**
   - Who inherits property of deceased
   - If deceased left valid will: Testate Succession (carried out as stated in will)
   - If no/ invalid will: Property divided in terms of rules of Intestate Succession

3. **Law of obligation**
   - Legal relationship between 2 or more parties
   - One have Right to performance & the other has duty to perform
   - Obligations can arise by: an agreement / a delict / justified enrichment.
   - Law of obligation divided into 3 subdivisions:
     a. **Law of contract**
        → Buyer: right to delivery (claim for thing bought)
        → Seller: duty to deliver
     b. **Law of delict**
        → If delict committed: compensate injured party
        → Injured party: claim compensation
     c. **Unjustified Enrichment**
        → One’s estate (wealth) may not increase at the expense of another without a legally valid ground justifying the enrichment.
4. Name & describe the other areas of law?

**Mercantile law** (commercial law)
- large & NB field of law → It's a bit of both private & public law
- Includes all laws in field of commerce: company law / insolvency law / tax law

**Labour law**
- Has connections with both private & public law
- Concerned with employer - employee relationships & including all labour legislation

**Conflict of laws**
- Concerned with question: which private-law system applies if more than 1 involved
- Both public and private law becomes involved:
- If A enters into contract with B (Finland) & case comes before SA court… which law should be followed?
- International conventions between states may also play role in conflict of law.

**Legal Philosophy** (jurisprudence)
- Field of law → looks at law from philosophical perspective
- Different perspectives: positivism / natural-law approach / feminism …
- Philosophical evaluation of law:
- gives better understanding to law & critical approach acquired
- can be of value to determine need for legal reform

**KEY CONCEPTS:**

**Field / Branch of law** → divisions & subdivisions of our law → easier to deal with & understand
KEY QUESTIONS:

1. What is the legal position in the S v Makwanyane case?
   → This case has to do with the death penalty.
   → Decided in 1995 by our Constitutional Court
   → Legal position in terms of the death penalty:
     ● Legally the death penalty would be regarded as “cruel, inhumane & degrading”
     ● Therefore→ in conflict with provisions of Constitution as set out in the Bill of Rights

2. Analyse the Naude and Another v Fraser case?
   Full reference: *Naude and Another v Frazer 1998 (4) SA 539 (SCA)*
   Following information from reference:
   → Case heard in Supreme Court of Appeal (SCA)
   → Appellant(s): Naude and Another (appealing against TPD’s decision)
   → 1st appellant: Naude & 2nd appellant: Another
   → Respondent: Fraser (he must answer why appellants should not succeed)
   → Case reported in the 1998 Law Reports
   → (SA): South African Law Reports
   → Volume 4 of the 1998 Law reports
   → (4)
   → Report starts on page 539 of the 4th volume of 1998 law reports
   → (539)

Before appeal: *Fraser v Children’s Court, Pretoria North, and Others 1997 (2) SA 218 (T)*
→ Case heard in: Transvaal Provincial Division of the High Court (T)
→ court a quo (from where court case comes to Supreme Court of Appeal)

From court decision: (on appeal)
→ J (Judge) / JA (Judge of Appeal) / AJA (Acting Judge of Appeal)

Sources the judge consulted→ referenced made to:
→ Common law / 17th century Roman-Dutch law
→ Mother of illegitimate child had parental authority, father not
→ Cases: B v S… / Administrator, Transvaal, and Other v M…
→ Statutes: Interim Constitution / Child Care Act 74 of 1983

Legal matters on which judge had to decide:
→ The legal position of an unmarried father
→ Adoption
3. Name & explain sources of South African law? (where to find the law)

In SA law: authoritative & persuasive sources of law.

Authoritative Sources of law

→ Authoritative sources of law are used to find out what the law says about a particular case.
→ It’s called authoritative sources as it gives weight / power to argument / it is binding

Authoritative sources of SA law:

● Legislation / statutes / Acts of parliament
● Court decisions / case law / court cases
● Common law
● Custom
● African indigenous law / Indigenous African law

(1) Legislation (Statutory law)
→ most NB authoritative source of law (to find out what law is)
→ What is legislation?
→ It’s made up of rules laid down by, for example:
  → national parliament, provincial legislatures & local authorities
  → These legal rules→ contained in→ Acts, provincial ordinance & municipal by-laws
  → Legislation & all law subject to Constitution(supreme law of land)→ no conflict of laws
  → Acts / laws passed by parliament contained in→ Government Gazette

(2) Court Decisions
→ if no legislation on subject→ turn to previous court decisions of SA courts
→ if legislation→ still consider court decisions→ choose authoritative decision

>> by applying the: principle of judicial precedent
(lower courts bound to decisions of higher courts)

→ 2 requirements for operation of precedent system: (in SA law both complied with)
→ (1) an Effective system of law reporting
→ (2) a Hierarchy of courts

Example of how this works:

Cases of higher courts reported in different law reports→ SA Law Reports
These published decisions contains: → the facts of case
→ Arguments the lawyers put before court
→ Reason court based its decision on

When court gives reason: it sets out relevant legal rules relating to dispute.

This will create a precedent & binds lower courts dealing with same kind of dispute.
This part of the court decision is called→ ratio decidendi [reason(s) for the decision]
To find Ratio decidendi: know law applicable to case

In Contrast Obiter dictum: only persuasive (remark in passing by judge) not binding
Can find obiter dicta when:

→ principles of case are more broadly formulated than necessary to cover facts
→ judge makes incidental remark
→ judge asks & answers hypothetical set of facts
→ judge quotes a similar case / gives an illustration

(3) **Common law**

→ Generally: law of a country / not written down in acts / not contained in legislation
→ SA common law → writings on law by 17th & 18th century Roman-Dutch Jurists
→ Roman law / Roman-Dutch law / English law / Indigenous law

(4) **Custom**

→ not made up of written rules / develops from customs within community / carried down from generation to next
→ Requirements to be recognised as legal rule → The custom must:
  → be reasonable
  → have existed for a long time
  → be generally recognised & observed by the community
  → be definite and clear (its content)

Example of custom recognised as rule:

Case: *Van Breda v Jacobs* → decided 1921

If fishermen saw fish first and already casted their nets, no other may cast their nets ahead of fishermen who saw fish first, and prevent them from catching fish.

Plaintiffs proved: custom existed

Court satisfied: custom well-tried / reasonable & purpose to prevent disputes

(5) **Indigenous African law**

→ Largely unwritten law → more formal status in SA → recognised in various statutes & not measured against customs requirements
→ In past: only applied to blacks
→ In terms of Constitution → SA courts must apply Indigenous law where applicable

**Persuasive sources of law**

After consulting all authoritative sources and nothing found on topic, turn to these sources to help decide case.

They are not binding / only influence

→ other legal systems: Roman-law basis / English law (company / maritime law)
→ Foreign law: often when dealing with Bill of Rights
→ Textbooks / Articles
5. Analyse the Termination of Pregnancy Act 92 of 1996?

(1) When did the Act come into operation?
→ 1 February 1997

(2) What’s the short title of this Act? Where did you find this in the Act?
→ Choice on Termination of Pregnancy Act 92 of 1996
→ The short title is at the beginning of the Act and is usually also found in the last section of the Act, in this case Section 12.

(3) What’s the purpose of the Act? Where did you find this purpose in the Act?
→ 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) What’s the underlying philosophy of this Act? Where did you find this?
→ The underlying philosophy of this Act 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: 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.
→ The underlying philosophy of an act is found in the "preamble". 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.

(5) What’s the purpose of Section 1 of this Act?
→ Section 1 is called a definition clause.
→ The purpose of the definition clause is to define difficult / comprehensive terms / phrases used in the Act.

(6) One of Martie’s friends had a blood transfusion and found out afterwards that the blood was infected with AIDS. The friend is now HIV positive. She is advised by her doctor to be sterilized. Does this Act apply to her situation? Give reasons for your answer.
→ 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) 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.
→ The three periods during which termination of a pregnancy can be performed S 2(1):
→ 1st 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) 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. (Refer to the relevant sections.)
(a) Advise Janet if she can have an abortion in terms of the Act.
→ Yes, Janet can have an abortion
(b) Substantiate your answer by referring to
(i) The circumstances in which a pregnancy may be terminated
→ In terms of S 2(1)(b) of the Act, an abortion may be performed up to & 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)).
NB: State that S 2(1)(b) was applicable: Janet is in her 20th week of pregnancy.
(ii) Consent as a legal requirement
→ S 5(1) or (2): only the informed consent of the pregnant woman is required.
NOTE: If a person under the age of majority (18), enters into a valid marriage, that person's minority ends> therefore, because she is married, Janet is no longer a minor)
(iii) The person who can perform the abortion
→ S 2(2): only a medical practitioner (doctor) may perform the abortion.
→ or a registered midwife / nurse 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) 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.
→ No. Eileen cannot have a legal abortion. Although she is 21 weeks pregnant, none of the exceptions provided in S 2(1)(c) apply to her circumstances. (Please note that S 2(1)(b) cannot be applied, because Eileen is more than 20 weeks pregnant. Also note that the set of facts does not comment on the physical condition of the fetus. Therefore you could have argued that Eileen can have a legal abortion if her continued pregnancy would result in a severe malformation of the fetus (s 2(1)(c)(ii)) or would pose a risk of injury to the fetus (s 2(1)(c)(iii).)
(10) 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.
→ No. She cannot have a legal abortion. Although she is 24 weeks pregnant, none of the exceptions provided for in S 2(1)(c) apply to her circumstances.
Note: Incest is a ground for the termination of a pregnancy only up to & 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) What is the highest sentence that can be imposed in terms of this Act? Which section did you use in order to work out your answer?

→ The highest sentence the court can impose in terms of this Act is imprisonment for a period of ten years (s 10(1)).

Note: Imprisonment (i.e. limitation of a person’s freedom) will always constitute a more drastic measure of punishment than a fine.}

KEY CONCEPTS:

Government Gazette → an official publication containing notices to the public.

→ Few issues of GG published weekly → keep people informed on variety topics.

Codification → When the law is written down & found in 1 source → codification

SA law not contained in one single code → SA law not written down → therefore not found in a single codification of law. SA law has a number of authoritative sources of law.
KEY QUESTIONS:

1. Identify Constitutional issues and give examples? (from example)
   → Health care / disposal of chemical waste / sale of fresh produce / religion

2. Explain what a Constitution is?
   → a long document setting out the structures & functions of government
   → Also sets out the standards to protect individuals from state abuse
   → Rules by which a country is governed→ contained in constitution
   → SA’s constitution: adopted→ 1996

3. Explain where the Constitution comes from?
The Constitution of the Republic of South Africa of 1996 follows the interim Constitution of
1993 & is our 1st democratic Constitution.
   → before there were 3 Constitutions:
   → (1) 1910 Constitution: when Union of SA was formed
   → (2) 1962 Constitution: when SA became a Republic
   → (3) 1983 Constitution: a tricameral Parliament
   → These were not democratic Constitutions→ only a small number of South Africans had the
right to vote→ black people not allowed.
   → This was unfair to black people and resulted in riots such as Sharpville (1960) & Soweto
(1976).
   → Pressure was growing internationally against apartheid and took the form of sanctions.
   → (Sanction=punishment intended to force government to behave in an internationally
acceptable way→ example by banning exporting of goods). Black leaders also put pressure
on the South African government.
   → This led to the release of Nelson Mandela & the un-banning of the previously banned black
   → Negotiations began & the interim Constitution was established with the aim of establishing
a full democracy. It was adopted in 1993 and came into effect on 27 April 1994.
   → It’s called Interim as it’s not written by a democratically elected government and because it
existence was limited to 2 years.
   → it was written into the Constitution by the Constitutional assembly and all Sa citizens had a
chance too give their views. It was written in a language understandable to all.
   → all section of the Interim Constitution had to be com-billioned with. It came into effect and
certified by the Constitutional Court on 4 December 1996 and called the Final Constitution.

4. What is contained in the Constitution? 133
   → In Broad Terms The Constitution Covers The Following:
   → Governing Of The Country At National / Provincial / Local Level
   → Legislative Powers & Processes Of These Levels
   → Administration Of Justice By All The Different Courts
   → Functions Of Police / Army / Other Security Services
   → Financial Management
   → Provisions Of Traditional Leaders’ Powers
   → Establishment Of Institutions To Support Our Constitutional Democracy
   → 9 Provinces
   → 11 Official Languages
   → National symbols: flag
   → Bill of Rights
5. 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.

6. Name and explain what the essential characteristics of our Constitution are?

(The special features built into the Constitution)

● Supremacy of the Constitution
→ The Constitution is the supreme (highest) law
→ everyone & all law are ruled by the Constitution / subject to the Constitution
→ the new Constitution introduced “Constitutionalism” → our country is according to the Constitution → supreme law of the land
→ If legislation is inconsistent with the Constitution → it may be changed / removed

● Separation of powers
→ The powers of the state are separated & divided into 3 sections namely the:
→ Legislative authority
→ Executive authority
→ Judicial authority
→ separation of powers is essential in a democratic state → if too much power is vested in one branch of state, it may easily lead to abuse
→ By giving specific functions to each branch of government, the separation of powers ensures that state organ’s powers are kept in check.

● 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
→ Supreme Court of Appeal
→ High Courts & Magistrates courts.
→ The Constitutional court has the final say on constitutional matters & may change / remove inconsistent legislation
→ The High Courts & Supreme court of Appeal may also hear constitutional issues, but the Constitutional Court has the final say on these matters

● Institutions supporting democracy
→ The Constitution has set up a number of state institutions to support democracy:
→ Public Protector
→ Human Rights Commission
→ Commission for Promotion & Protection of the Rights of Cultural / Religious & Linguistic Communities
→ Commission for Gender Equality
→ Auditor-General
→ Electoral Commission
→ Independent Authority to Regulate Broadcasting
→ These institutions are independent and their job is to: protect the people from abuse of state power & to ensure that the government does its work properly

● Bill of Rights
→ It’s contained in Chapter 2 of the Constitution
7. What are the functions & responsibilities of government?
As citizen of a country elect a government to run their country, they'd expect government to:
→ protect their rights
→ to develop & advance country politically / economically
→ look after the citizen's interests / wellbeing
→ regulating matters: health / environment / education / tourism / housing

STUDY UNIT 8 – What are Fundamental Rights?

KEY QUESTIONS:

1. What are fundamental rights?
NOTE: This question is the same as: Explain the nature of fundamental rights?
→ Every person is born with human dignity and it is this human dignity that gives a person a claim to fundamental / human rights
→ You don’t have to work / qualify to get these fundamental rights
→ Fundamental rights are the natural rights of every single person which everyone has
→ The state can never take these fundamental rights away

2. Identify fundamental rights in daily life?
Rights to:
→ Housing / water / security / food / shelter / good name / privacy / equality
→ Freedom of speech / religion / expression / opinion / not to be treated unfairly

3. Name and explain the different kinds of fundamental rights?
Fundamental Rights are divided into 3 categories:
● First - generation rights (“blue rights”)
  → Civil rights / procedural rights / political rights
  → These are rights that protect the individual from the abuse of state power.
  Examples → The right to: equality / human dignity / life / freedom of expression & security.
● Second - generation rights (“red rights”)
  → Socio-economic issues: Issues that concerns society & the economy.
  → These rights allow people to demand that their socio-economic needs be examined and dealt with by government
  Examples → The right to: education / access to health care services / sufficient food & water
● Third - generation rights (“green rights”)
  → Have more to do with the group than with the individual.
  Example → The right to: clean / unpolluted air
4. Explain the application of fundamental rights?

**Application of the Bill of Rights may be a vertically / horizontally:**

**Vertical Application:** applies between the state → and individuals, organisations or groups

→ Example: where an act of the state infringes fundamental rights it may be declared unconstitutional

**Horizontal Application:** applies between individuals → & individual / private institutions

→ Example: (Right to equality) No individual may unfairly discriminate against another in a job situation

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**STUDY UNIT 9 – Limitation of your fundamental rights**

**KEY QUESTIONS:**

1. **Why must rights be limited?**
   → A democracy cannot work if all rights can be enforced all the time.
   → There will be times where one right will be in conflict with another.
   → Some of the rights contained in the Bill of Rights are limited because of the way in which they are formulated or described.

2. **How are rights limited?**
   → Fair versus unfair discrimination:
     
     Example:
     
     S9 of the Constitution (Bill of Rights) → Right to equality / Ss(3)-(5) → unfair discrimination
     Only "unfair" discrimination = unconstitutional so sometimes discrimination may be fair
   → Limits on protest action:
     
     Example:
     
     S17 of Constitution (BoR) → qualifies the right to assemble, demonstrate, picket & petition
     Limits → require action to be peaceful & participants must be unarmed
   → Right to life versus abortion:
     
     Example:
     
     It's more difficult when 2 rights are in direct conflict with one another & this kind of dispute will have to be settled by a court.
   → State of emergency
     
     Example:
     
     Certain fundamental rights may also be suspended for a period of time when the state declares a state of emergency → even though the state has many powers during this time, certain rights (right to human dignity & life) may not be derogated / infringed / suspended.
   → Non-derogable rights
     
     Example:
S37 of the Bill of Rights & Table of Non-Derogable Rights (BoR)

Even in state of emergency → a person may not be tortured

3. **Set out the criteria in which rights may be limited?**

Section 36 of the Constitution (“limitation clause”) → sets out the criteria in terms of which a right contained in the Bill of Rights may be limited. If the state wants to limit a right, there action must agree with the criteria / measures contained in the Bill of Rights.

**The limitation clause (criteria):**

→ The Law that limits the right must be of general application (apply to everyone)

→ The limitation must be reasonable and justifiable in an open and democratic based society based on human dignity, equality and freedom (there must be a good reason)

→ All the relevant points must be taken into account. Questions to be asked:

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

**STUDY UNIT 10 – The influence of the Constitution on South African law**

**KEY QUESTIONS:**

1. **Give 2 examples of where the Constitution, especially the Bill of Rights, has influenced our law? 166**

   (1) Constitutionality of the death penalty sentence

   → S v Makwanyane case: in 1995 the Constitutional Court decided:

   In terms of the interim Constitution 1993, the death penalty would legally be regarded as “cruel, inhuman & degrading”. Therefore it’s 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.

   (2) Constitutionality of s18(4)(d) of the Child Act

   → Fraser v Children’s Court, Pretoria North and Others: in 1997 the Constitutional Court decided:

   In terms of the 1996 Constitution, s18(4)(d) was unconstitutional and had to be changed by parliament within 2 years. In 1998 parliament amended / changed this section. It came into operation on 4 February 1999. In terms of this amended Act both the mother & the father of a child born out of wedlock have a say in the adoption of their child. The amendment on the Child Care Act is called the Adoption Matters Amendment Act 56 of 1998 and must be kept in mind when there’s a case before court that relates to the adoption of a child born out of wedlock.
2. Give examples where the Bill of Rights influenced court decisions?

(1) Simla Naidoo (a registered SA voter) lives & works in UK. She brought an urgent application to the Pretoria High Court in which she contended that certain Sections of the Electoral Act are unconstitutional since they violate the right to equality and right to vote of South Africans abroad, and that provides only for certain groups of SA groups living abroad (government employees). The Pretoria High Court ruled sections to be unconstitutional. The Minister of Home Affairs opposed to her application and applied to Constitutional Court to appeal against the High Court’s ruling. Constitutional Court also declared sections of Electoral Act unconstitutional. As a result registered voters, out of country on Election Day, allowed to vote provided that they give notice of their intention to vote before a certain date. Relevant sections of Electoral Act need to be changed by parliament.

(2) Two partners, living together, have been in a permanent homosexual relationship together for years. They wanted to get married for years but could not as the definition of marriage in SA law did not include permanent cohabitation relationships. In 2005 the Constitutional Court decided that a permanent cohabitation relationship must be included in the definition of marriage. The court decided that the definition of marriage in terms of common law & the marriage Act 25 of 1961 is unconstitutional on the grounds of rights to equality & human dignity. The Constitutional Court gave parliament 2 years to change the position. The Civil Union Act 17 of 2006 came into effect end of 2006 which allows same-sex & heterosexual couples to enter into a marriage / civil union partnership in terms of this Act. Civil union partners must choose they want to call their union a marriage / civil partnership. Regardless of the name, it has the same consequences of a marriage.

STUDY UNIT 11 & 12!!

KEY CONCEPTS:

Different Courts & their role-players

<table>
<thead>
<tr>
<th>Legal Disputes</th>
<th>Magistrates Court</th>
<th>High Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presiding Officer</td>
<td>Magistrate</td>
<td>Judge</td>
</tr>
<tr>
<td>Role Players</td>
<td>Attorneys / Advocate</td>
<td>Attorneys / Advocate</td>
</tr>
<tr>
<td>State Prosecutor</td>
<td>State Advocate</td>
<td></td>
</tr>
</tbody>
</table>

Presiding officer → persons who are in charge / who preside over the proceedings
→ they consider the facts / the law & they must come to a decision
Prosecutor → works for the state → prosecute people who are accused of committing crimes

Orderly → keeps order in the court and calls witnesses

Investigating officer → collects all evidence → then gives it to the public prosecutor who decides whether the person should be charged

Summons → served by investigating officer. It contains:
→ the accused persons details
→ the charges
→ details regarding his appearance in court.

→ In Magistrate’s Court → There are 3 ways of securing the attendance of the accused:
1) arrest
2) notice → issued by a peace officer
3) Summons → issued by the clerk of the court.

→ Process in High Court → the accused is sent a notice of trial and an indictment

Different Legal Disputes

→ In criminal cases: the state is involved
→ A constitutional matter involves:
Any issue requiring the interpretation, protection / enforcement of the constitution.
It may also involve fundamental rights.
The state, individuals or private institutions may be parties in a constitutional case

<table>
<thead>
<tr>
<th>Civil Case</th>
<th>Criminal Case</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Parties</strong></td>
<td>Plaintiff / Defendant</td>
</tr>
<tr>
<td><strong>Onus of proof</strong></td>
<td>Prove case on a preponderance / balance of probabilities</td>
</tr>
<tr>
<td><strong>Purpose of proceedings</strong></td>
<td>To claim financial damages &gt; medical/ car damage..</td>
</tr>
<tr>
<td><strong>Role-players</strong></td>
<td>plaintiff &amp; defendant: with their legal representatives, the presiding officer: a magistrate or a judge</td>
</tr>
</tbody>
</table>

Criminal offences of high treason can never be heard in the magistrate’s court.

A Magistrate courts sentencing power is limited

**Jurisdiction** → the power to hear a case / dispute.
A court cannot hear a matter unless there is some factor that connects the persons before the court to the geographical area
In criminal matters: the type of offence & sentence determines a court’s jurisdiction.

In civil matters: the nature of relief claimed & amount claimed determines jurisdiction.

STUDY UNIT 13- The legal profession and the courts

KEY QUESTIONS:

1. Name some of the members of the legal profession and explain what they do?

Attorneys
- They are trained lawyers who can advise clients and represent them in court.
- Attorneys have to apply to the High Court to be admitted to the legal profession.
- Requirements: LLB degree, practical legal training for at least two years at a private firm of attorneys, a legal-aid clinic / 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
- All practicing attorneys must belong to the Law Society in their province.
The Law Society is what the professional body for attorneys is called.
- In terms of section 3(2) of the Right of Appearance in Courts Act 62 of 1995, all attorneys who want to appear in the High Court may apply for such a right to appear. Section 3(3) of the Act determines that attorneys who have acquired the right of appearance in the High Court may also appear in the Constitutional Court.

Advocates
- Advocates have an automatic right to appear in all the courts (lower, as well as superior courts).
- The main function of advocates is to represent clients in court
- Practicing advocates usually belong to one of the professional Bar Councils, which are linked to the divisions of the High Court.
- If you want to practice as advocate at one of the Bar Councils, you will first have to do practical legal training with one of the already qualified advocates (i.e. pupilage for a prescribed period) and then successfully complete the Bar Council's examination.

State Prosecutor
- Also called a public prosecutor → represents case(s) in Magistrate’s Court

State Advocate
- Represents case(s) in High Court
- State advocates also serve as legal advisers to the state & may even be involved in drafting legislation

Magistrate
- The presiding officer in charge in a Magistrate’s Court, whether a civil / criminal case, is called a magistrate.

Judge
The presiding officer in charge in the High Court, whether a civil / criminal case, is called a judge.

2. Name the most important courts in South African and make use of a diagram to show where they fit in?

In terms of the Constitution of the Republic of South Africa 108 of 1996 our Judicial System is made up of the following courts:

**CONSTITUTIONAL COURT**
(Only constitutional matters)

**SUPREME COURT OF APPEAL**

**HIGH COURTS**

**MAGISTRATES’ COURTS**

District ↔↑↔ Regional

NOTE:
→ 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.

3. Name & explain the 3 basic legal principles that forms part of SA’s legal process?

(1) the principle of judicial precedent (*explained in study unit 6*)

(2) appeal

(3) review

**Appeal:**
→ in civil matters: when a party feels that the court has made an error in its decision that party can appeal to a higher court.

→ In criminal matters: the appeal may be lodged against the conviction / against the sentence or both.

→ On appeal the court does not listen to all the oral evidence about the facts of the case.

→ The court studies the typed record of the court, which originally made the decision (*court a quo*) and then listens to arguments made by the legal representatives.

→ When the appeal is upheld it means that the decision by the court *a quo* is set aside.

→ If the appeal is dismiss the decision of the court *a quo* is confirmed

→ When a matter is on appeal the parties are called: appellant / respondent

**Review:**
→ If there has been an irregularity in the procedure, the case can be reviewed by a Higher Court.
Example: proceeding not translated properly by interpreter / accused not given chance to represent own case

→ In these circumstances the person is complaining about the way the proceedings have taken place and not about the decision