department of **JURISPRUDENCE**

introduction to LAW

only study guide for ILW1501

University of South Africa, Pretoria

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Dear Student

Welcome to the module *Introduction to Law* (ILW1501). This is one of the first-year 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 underlying principles of South African law in general. Furthermore, it aims to provide students with a basic knowledge of the nature, role and implications of transformative constitutionalism within South African law. Students credited with this module can distinguish basic legal concepts and correctly identify and apply suitable legal rules and principles to basic legal problems.**

STUDY MATERIAL

The study material for ILW1501 consists of this **study guide only**. **You must study all 12 learning units for the examination.** You will also receive **tutorial letters** in the course of the semester and these tutorial letters **form an essential part of your study material for the examination.**

AIM OF THE STUDY GUIDE

In an effort to make the law relevant to your everyday life, we have used real-life situations as a starting point for our discussions and in the activities. (Please remember that we made up all these 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 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.

OUTLINE OF THE STUDY GUIDE

As far as the **structure** of the **study guide** is concerned, you will see that **each learning unit** starts with an **overview** and **learning outcomes**. The purpose of these is to guide you when you work through the learning unit. You will notice that each learning 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 learning unit is followed by **feedback**. **You must use the feedback to assess whether you have understood and completed the activity correctly.**

Your study guide for ILW1501 consists of the following learning units:

- **Learning unit 1: What is "law"?**

In this learning unit you will be prompted by real-life situations to appreciate the relevance of law in daily life.

- **Learning unit 2: Law and rights**

After completion of this learning unit, you will be able to demonstrate your understanding of the concept "rights" and explain the connection between "the law" and "rights".

- **Learning unit 3: The story of our law**

In this learning unit you will be introduced to the composition of South African law against its historical background by focusing on five specific periods that influenced the development and composition of the South African legal system.

- **Learning unit 4: Families of law or legal cultures**

In this learning unit you will be made aware that the South African legal system is part of a world legal order by introducing you to the different legal families of the world.

- **Learning unit 5: Divisions of law**

After completion of this learning unit, you will be able to distinguish between the two main divisions of South African law, namely public and private law, and indicate how these main divisions are further divided into the different branches of the law.

- **Learning unit 6: Where to find the law**

After completion of this learning unit, you will be able to distinguish between the authoritative and persuasive sources of South African law and demonstrate their use in practical scenarios.

- **Learning unit 7: The Constitution and you**

In this learning unit you will be introduced to the South African Constitution and the concepts related to a constitutional democracy.

- **Learning unit 8: The Bill of Rights: What are fundamental rights?**

After completion of this learning unit, you will be able to identify the specific fundamental rights in the Bill of Rights, indicate to which categories of rights they belong and explain how they are applied in real-life situations.

- **Learning unit 9: Limitation of your fundamental rights**

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

- **Learning unit 10: The influence of the Constitution on South African law**

After completion of this learning unit, you will be able to demonstrate your understanding of the practical influence of the Constitution, especially the Bill of Rights, on South African law.

- **Learning unit 11: The legal profession**

After completion of this learning unit, you will be able to show that you understand the legal profession in both the private sector and the public service in South Africa, as well as the role of court officials in the public service.

- **Learning unit 12: Different legal disputes and the courts**

After completion of this learning unit, you will be able to identify and explain the different kinds of court cases and show that you understand the basic differences between civil and criminal cases in real-life examples. You will also be able to identify the most important courts in South Africa and explain important basic concepts relating to the operation of these different courts in real-life situations.

HOW TO WORK THROUGH THE STUDY GUIDE

The module ILW1501 is a **semester module**. The study material for the module is made up of 12 learning units. Therefore, you will have to divide your study time in such a way that you complete these learning units in one semester, which consists of approximately 15 weeks of study time, if you register early. This module consists of 120 notional hours, which you should divide into time for working through the learning units, completing the assignments, participating in the discussions on myUnisa, doing revision and preparing for the examination. To assist you in consistently working through the study guide in a structured manner, the lecturers and/or e-tutors will have a weekly discussion on selected issues in each learning unit on the ILW1501 myUnisa module site. These content-related discussions are regarded as an important teaching tool in addition to your study guide. We therefore cannot stress enough the importance of active participation in these discussions. They will help you to understand the study material better, which can only benefit you in completing the assignments and preparing for the examination.

Studying law is new to you, so do not hesitate to contact us if you have any difficulties with the study material.

We wish you all the best with your studies.

Your lecturers for ILW1501

What is "law"?

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

Learning outcomes

After completion of this learning unit, you should be able to:

- identify events in everyday real-life situations that have legal relevance – in other words, that have something to do with the law
- understand the role played by law in daily life
- explain what "a norm" or "a normative system" is
- identify and describe the different norms or normative systems
- name and discuss the characteristics of "the law"
- explain the differences and similarities between legal norms and other norms in everyday real-life situations
- distinguish between public law and private law
- distinguish between formal law and substantive law

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 15 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, due to financial reasons, this firm has been forced to reduce its workforce 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 Mothibes' gardener, James, works in the Van der Merwes' garden.

Setting the Scene

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, 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-care mother. Martie sees Tom driving past and realises that he has forgotten to give her a lift as they had 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 Mothibes' yard. Because of these branches, there is too much shade over the vegetable patch in Karel's garden. Mr Cutts had agreed to do the job the previous weekend, but he was sick. Karel gives Mr Cutts some hasty instructions before he and Martie leave for work. Because Karel is in such a hurry to get to work, he drives 80 km/h in a 60 km/h zone. Karel is stopped by a traffic officer who fines him R400 for speeding.

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 Mothibes' 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 Mothibes' doorbell. They apologise for breaking the window. Thomas is cross and says that they will have to speak to his father about the incident later.

Monday 16:00

Tom and Martie are back at their own homes after their working day at the university. Both have to spend some time marking their students' assignments. 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 spot in the parking lot at his place of work. Fortunately, 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 scenario which you think involve the law. In other words, which events do you think are legally relevant?

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Feedback

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

LAW AND LIFE

1.1 Introduction

We often think that the law affects only certain aspects of our lives, and that it only becomes relevant when someone commits a crime. We also 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 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 lifestyle. (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 of legal importance. 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. Conversely, the law regards (sees) a person who is 18 years old as a major. This means that an 18-year-old person is completely able to tell the difference between right and wrong. According to our law, such a person has, with certain exceptions of course, full capacity to appear in court or to enter into any contract. (See **learning unit 2** where we explain that the term "right" can also have the meaning "capacity".)

The fact that Karel, in our scenario above, has been retrenched, is also legally relevant – it has something to do with the law. We must 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. When we examine anything that affects the employment

of Sarah, Francine and James (e.g. 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 vehicle 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, does the fact that Martie takes her car to the garage for repairs have legal consequences. The legal norms relating to contracts will control Karel's arrangement with Mr Cutts as well as the arrangement that Karel and Martie have with the day-mother. Even 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 decides to divorce, it may be their "domicile" which will determine which court will hold the divorce hearing.

In our scenario, 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?

It is clear from our scenario that Karel's speeding on Monday morning has consequences in terms of criminal law, since he committed a traffic offence.

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

1.1.1 Legal norms and other norms: How do they differ?

It should be clear from reading our scenario and the discussion that follows, that the law concerns our everyday lives. However, what do we mean when we use the term **"the law"**?

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 usually refer to 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 refer to 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 an apple drops to the ground from a tree. Then there are other laws, such as the "laws" of games, like cricket and chess, which 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 that are not "norms". If being a norm or standard of human behaviour is what separates the kinds of laws that 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 a friendly game of chess or cards, for example, 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 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 could 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 that bind the whole community, 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 bound, 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, there is no legal contract binding the parties. Typically, if you give your word or promise to do something, you are morally 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/her?

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Feedback

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

- The law **governs human behaviour/conduct**.
- All of society should **obey** the law.
- **State organs enforce** the law.
- By **ignoring or disobeying the law,** we may be **prosecuted and punished** (e.g. when we ignore a red traffic light) or we may be ordered to compensate the party we have injured (e.g. 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 classed into divisions or sections? If your answer is "yes", can you identify two main divisions?

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Feedback

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**.

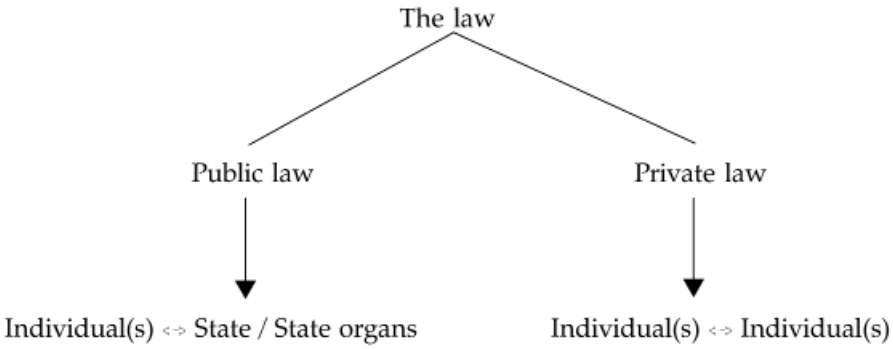
There are **two methods** which are used to divide the South African law into main divisions.

Public law and private law

Firstly, South African law can be divided into two main divisions, public law and private law. Public law deals with the relationship between **the state** and the **individual**. In our discussion, for example, the municipal elections relate 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 scenario, several events relate to private law. We only mentioned a few examples. For example, private law is applicable to the payment of the children's school fees, the repair work to Martie's motor vehicle, 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 discussed in **learning unit 5** when we deal with the different divisions of South African law.

A diagram of this division would look like this:

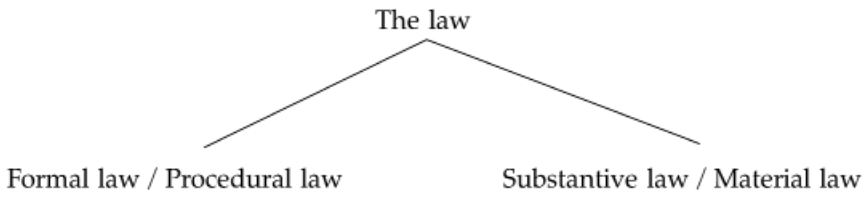


Formal (procedural) law and substantive (material) law

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. In our scenario, for example, Karel was fined for speeding because he contravened the National Road Traffic Act,[1] which is part of substantive law. Should Karel be summonsed to appear in court for committing a traffic offence, the formal law will be applied during the court proceedings.

1 National Road Traffic Act 93 of 1996.

A diagram of this division would look like this:



It is important that you understand this **division between formal (or procedural) law and substantive (or material) law** when we now look at the difference between **formal justice** and **substantive justice**:

1.2 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".

For example, 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 may seem 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

1.2.1 Introduction

Throughout history, people have questioned the justness of various legal rules. Many philosophies have been formulated to decide whether 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 justice. And that raises the question of what justice is. Many answers have been given to this question, but no single authoritative 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.

1.2.2 Formal justice

In **activity 1.3** you learned 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 must 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 1.4

You now know 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, consider the following scenario:

Martie van der Merwe is not promoted by New Africa University and she complains about the decision. The university provides her with a formal platform to raise her complaint. 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 served in this case?

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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 might have been unjust. Therefore, we have to consider the issue of substantive justice.

1.2.3 Substantive justice

It seems clear from the above that, in certain cases, there can be formal or procedural justice without there necessarily being "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 (procedure)**. Remember, in **activity 1.3** you learned that **substantive or material law is that part of the law which determines the content and 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 law and material or substantive law? We are sure you noticed that formal law is that part of the law which regulates the enforcement of substantive [material] law.)

Substantive (material) law is often applied correctly in accordance with the rules of formal law, despite the fact that the rules of substantive/material 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.

1.5

In 1950, the Group Areas Act[2] was passed into law and became another fundamental policy of the apartheid regime, the aim of which was to cause segregation (separateness) amongst different racial groups. This Act formed the legal framework that allowed the government at the time to divide and establish particular neighbourhoods, solely on the basis of race. This Act limited the property rights of all black people (Africans, Coloureds and Indians)[3] as it allowed for the demolition of property and displacement of people into designated areas. Under this Act, the different racial groups could only reside in legally defined geographical areas.[4] Assuming that the Mothibes and Van der Merwes were living in the 1950s, would they have been neighbours? Would the application of the Group Areas Act have resulted in justice being achieved?

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In our scenario, the Mothibes and Van der Merwes are neighbours in present-day South Africa. However, they would not have been able to be neighbours in the 1950s under the apartheid regime, due to the implementation of the Group Areas Act. The application of the Group Areas Act included laws that specifically outlined that different race groups could only reside in defined geographical areas. Therefore, black and white people were not allowed to live in the same areas. The laws outlined in the Group Areas Act were specific, they applied generally to all persons and the rules were applied impartially (the rules were applied equally to all persons). Thus, we can see that the requirements of formal law were achieved. Consequently, formal justice was achieved, but it

2 Group Areas Act 41 of 1950.
3 Section 1 of the Employment Equity Act 55 of 1998.
4 Johnson-Castle P (2014) "Group Areas Act of 1950" http://www.sahistory.org.za/article/group-areas act-1950 (Date of use: 26 March 2018).

cannot be said that these rules served justice! We know that formal justice is not enough to make a legal system just. In this case, the content of the rules made them unjust as the content was unfair and discriminatory. Substantive justice was therefore not achieved! The same can be said of laws that discriminate against women, as in Martie's case in **activity 1.4** above.

1.3 The law and other normative systems

On pages 3 to 9 of their book *Beginner's guide for law students*,[5] the authors 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 will now look at each of these systems and see what connection they have with the law.

1.3.1 Religion

Kleyn *et al*[6] point out that every religion has a code (a set of rules) in accordance with which the people who practice 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 around? 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 *et al*[7] explain these different views as follows:

5 Kleyn D *et al Beginner's guide for law students* 5th ed (Juta Claremont 2018).
6 Kleyn *et al Beginner's guide for law students* 6.
7 Kleyn *et al Beginner's guide for law students* 6.

On the one hand, some people are of the opinion that **religion and law should be mutually exclusive**. This is the **secular approach to law.** 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**. In terms of African legal philosophy, African law and religion are inextricably linked to one another. This also appears in Islamic fundamentalist religious states, where law and religion are equated. The Quran dictates that theft is an offence; an offender's hand must be cut off. In a fundamentalist state, the law applies this religious rule as part of the law of the land.

Both views may be criticised, as Kleyn *et al*[8] show below:

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 conservative regulation of sexual relationships, and the principle that contracts may be concluded by mere agreement without the requirement of further formalities, for example, 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, and theft that are prohibited by many different religions alike. In addition, both law and religion are studied by interpreting **authoritative texts**. In both, **ritual, formalities and fixed procedure** play an important role. We should also bear in mind that the Constitution of the Republic of South Africa, 1996 protects the right to freedom of religion in section 15. As such, there are instances where the law would respect and protect people's right to follow a religion of their choosing. In this way, the law attempts to promote tolerance of difference.

There are, however, also many **differences**. These two normative systems do not overlap completely. The Ten Commandments and the Bhagavad Gita 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 in South Africa although it may be regarded by some religions as "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. Some might argue

8 Kleyn *et al Beginner's guide for law students* 6–8.

> that this is justified as part of the accepted religious convictions of the majority of South Africans. Whether this is in fact desirable is of course open to debate in a country where respect for pluralism and difference is so important.

1.3.2 Individual morality (personal morality/ethics)

When we speak of individual morality, we refer to 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 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).

1.3.3 Community mores

Kleyn *et al*[9] 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

9 Kleyn *et al Beginner's guide for law students* 10.

> private matters concerning only a specific individual. The sanction for non-compliance is varying degrees of **disapproval by other members of society**. People ordering pizzas topped with pineapple, or people eating pasta with their hands in a restaurant, might find themselves the subject of ridicule among friends. ... 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 (i.e. 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.

1.4 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 one another. 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 moral code) are sometimes religious norms. Since the different types of norms may overlap, it should be clear that they cannot always be divided neatly into these separate categories.

Activity 1.6

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**:

	To whom are the rules applicable?	**What is the sanction for non-compliance with the rules?**	**Who enforces the sanction?**
The law			
Religion			
Individual morality			
Community mores			

(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, the Tobaccco Products Control Act 83 of 1993

(as amended)). 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?

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Feedback

(1) While completing 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 caught 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:

	To whom are the rules applicable?	**What is the sanction for non-compliance with the rules?**	**Who enforces the sanction?**
The law	Norms which the **whole community** regards as binding and that must be obeyed.	▪ **Prosecution or punishment** ▪ **Compensation to an injured party**	▪ **State organ** ▪ **State organ**
Religion	A set of rules in accordance with which the **people who practice that particular religion** live.	Every **religion has its own sanction or punishment.**	Separate **religions**
Individual morality	Norms or standards that every **individual sets for himself or herself**.	The sanction for disobeying these rules is **personal** and **self-imposed**.	**Individual**
Community mores	Norms of a **whole community** or **group** within that community.	**Varying degrees** of **disapproval/rejection /discrimination** by other members of the community.	**Community**

(2) (a) **Statement (2) is correct.** 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 correct.** 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 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.

conclusion

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 must 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 learning unit, we will discuss the law and rights in more depth.

learning UNIT 2

Law and rights

Overview

In this learning unit we explore the meaning of the concept "rights" and we look at the connection between "the law" and "rights".

Learning outcomes

After completing this learning unit, you should be able to:

- explain what "a right" is
- explain what the dual relationship of a right involves
- identify, explain and provide examples of the four classes (kinds) of rights in terms of the private law
- identify, explain and provide examples of the objects of each of the four classes (kinds) of rights in terms of the private law
- describe the terms "legal subject" and "legal object"
- explain the connection between the law and rights and give examples of this connection
- identify and explain other meanings of the term "right"

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

2.1 Introduction

You may be wondering what the above scenario 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 **learning unit 1**.) However, we can also think of the **law** as a **system of rights**.

We will now explain what we mean by "rights". After our explanation, you will find four activities that you should do.

2.2 What is a right?

In **learning 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 objects (things) and 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) must 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 must 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**
(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:

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**.

But first, who is a **legal subject**? **A legal subject is a person who is subject to (or under the control of) the norms of the law (see "norms" in learning unit 1) and who also may be the bearer (holder) of rights and duties. It is important to note** that the term **"person"** does not only refer to **ordinary human beings** or **natural persons,** but also to **associations or bodies of people** (for example, entities and companies), which are known as **juristic persons**. Just like ordinary human beings or natural persons, juristic persons can also have **rights and duties** in terms of the law. Therefore, a legal subject is a **person**, which includes a **natural person** or a **juristic person.**

In modern law every person 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 **learning unit 3** for a brief historical overview of the Roman history.)

The object of a right (a legal object) may be anything that is of economic value to a person. 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 come by, or because it is **useful** and many people wish to have it. It may be of value only to a particular person (e.g., that person's good name); or it may be of value within a particular circle of people (e.g., a painting of a family).

2.3 Four classes (kinds) of rights in terms of the private law

Rights are put into particular groups, and we do this by deciding what kind of right it is. We can find out the kind of right by finding out what the object of the right is.

We can distinguish **four kinds of rights**, each with a specific object, which we will explain in further detail below:

(1) **real rights (object: a thing)**
(2) **personality rights (object: personality property)**
(3) **intellectual property or immaterial property rights (object: a non-tangible creation of the human mind)**
(4) **personal rights (object: performance)**

(1) **Real rights.** Real rights are **rights to physical, material things,** which 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, and 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**.

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.

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** (e.g., 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**.

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.**

Now that we understand that real rights may be **limited** in certain instances, can you distinguish **real rights** from **limited real rights** in the example below?

Mr and Mrs Khumalo own a beautiful five-hectare fruit farm in the Western Cape. Mr and Mrs Venter are neighbours to the Khumalos. In order for the Venters to gain access to their own property, they share a driveway with the Khumalos, even though the driveway falls on the land that belongs to the Khumalos. This arrangement was agreed upon by the Khumalos and the Venters, and the agreement was registered at the Deeds Office. The Venters decide to erect a carport along the driveway as an additional parking space for their car. As the driveway is quite wide, the carport does not block the Khumalos' vehicles from entering or exiting their farm.

You should be able to distinguish the following **real rights** and **limited real rights** from each other:

Both the Khumalos and the Venters have **real rights** in respect of the **properties that they own.** This means that as **owners of each** property, the Khumalos and Venters may **freely use, alienate and/**

or destroy their properties, as these are the **powers** which form the **content** of an owner's **real rights of ownership**.

The Venters hold a **servitude** in respect of the driveway that falls on the land belonging to the Khumalos. This entitles the Venters to use the driveway, even though the land belongs to the Khumalos. The Venters are therefore **servitude holders** in respect of using the Khumalos' driveway. The Venters' **powers** (contents of their right as servitude holders) are therefore **limited** and they may only use the Khumalos' driveway in order to enter or exit their own property and for no other purpose. Therefore, the Venters **may not build a carport** in the driveway as they **do not own the land** on which the driveway is situated. The Venters only have **limited real rights** as **servitude holders** in respect of the driveway.

(2) **Personality rights**. Personality **rights** are the rights each one of us has **to parts of our person and 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.

(3) **Intellectual property rights**. Intellectual property **rights** relate **to** the **creations of the human mind**. A work of art, an invention, and a trademark 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 copy another person's artwork or song and present it as your own creation.

(4) **Personal rights**. A personal right is a **right to performance.** It is also called a **claim**. When we speak of performance, it refers to 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 (e.g. 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.

NOTE

You would have noticed that although personal rights and personality rights sound similar, they are, in fact, very **different** kinds of rights!

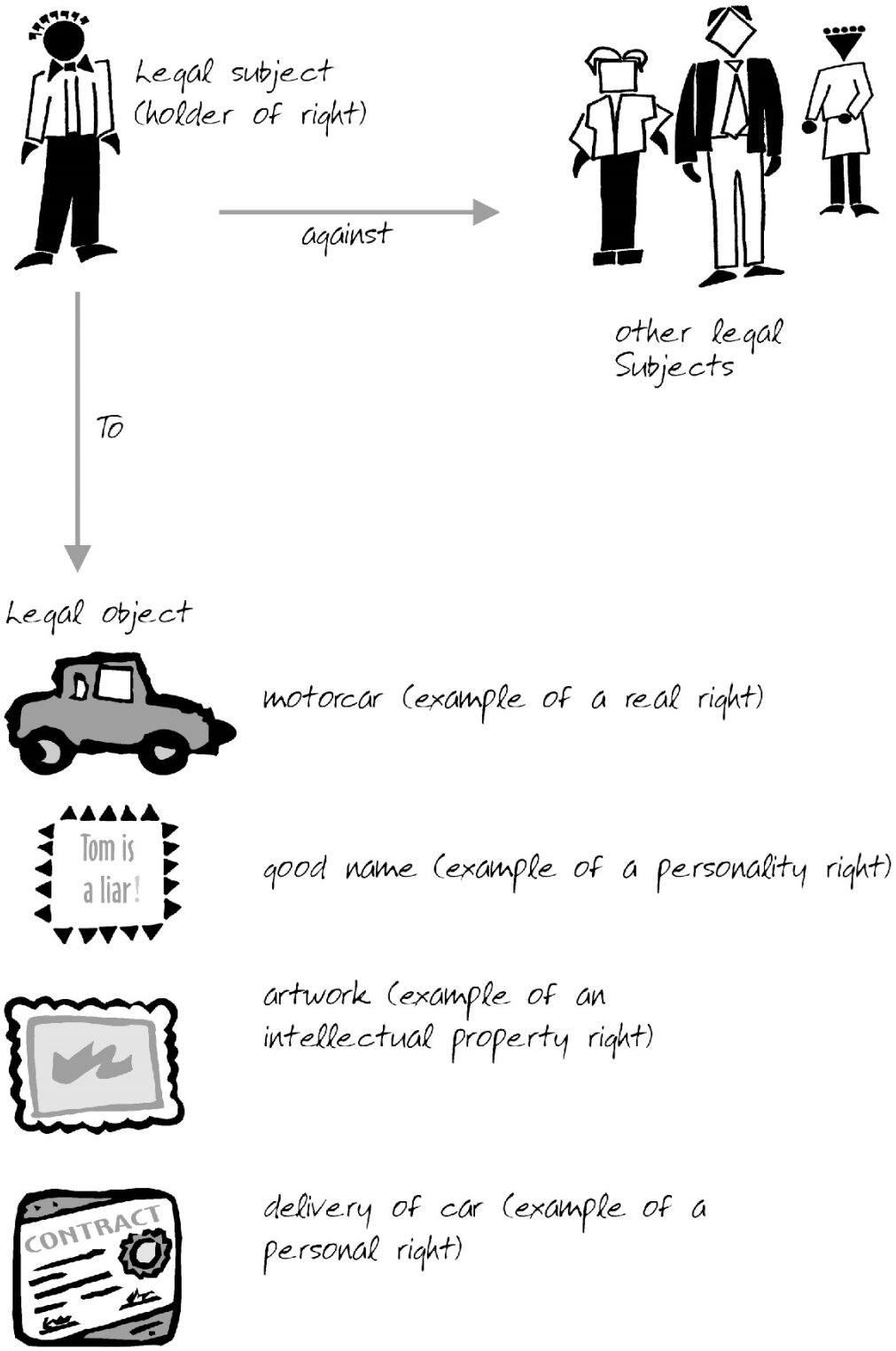
Remember that:

A **personal right** is a right to **performance** and is also called a **claim**. It deals with **human action** (an act of either doing something or not doing something). The **object** of a personal right is **performance**.

A **personality right** is a right that each individual has to **parts of his/her personality**. It deals with a person's **physical and non-physical integrity**. The **object** of a personality right is **personality property**.

We can illustrate the **different classes of rights** that we have discussed above as follows:

A right: Dual relationship



2.4 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 above. We said that there must 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 must 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 frequently come across "rights" in the Constitution when 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 discuss fundamental rights and the question of a Bill of Rights in **learning unit 8.**

2.5 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 Mothibe property is registered in Jane's name and the Van der Merwe 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 may 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. 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 may not do these things either. 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 party.

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

We would like to make a final comment about rights. When a legal subject has a **right**, the other legal subjects have a **duty**. There must always 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.

Activity 2.1

Let us return to the beginning of this learning 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 scenario? Write

down your thoughts on these two classes of rights before you read the feedback on this activity.

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Feedback

In our scenario, 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 and can only enter into a binding agreement if assisted by one of his parents. Before entering into the contract, Thomas, his father 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 Tom and Thomas **and** Tom and Thomas have 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, whereby 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 scenario 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 had 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, as her home was only a few streets away. 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.

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Feedback

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.

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Feedback

(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 (has two parts): 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.

Activity 2.4

You now understand that the **connection** between the law and rights is **twofold (has two parts)**. Read the following **scenario** and see whether you can **identify** and **explain** the **connection between the law and rights**:

Conrad and George are neighbours. Conrad planted a huge tree on his property next to the fence between the neighbouring properties. The branches of the tree hang over the fence, causing leaves to fall into George's swimming pool. When George cuts off the low-hanging branches on his side of the fence, Conrad is very upset and regards this as damage to his property.

Explain the connection between the private law and Conrad's right to his tree (thus, the right to ownership).

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Feedback

The connection between the **law** (private law) and Conrad's **right** (right to ownership) is as follows:

(1) The **rules of the private law determine** (prescribe) what **powers** Conrad has in exercising his right (in other words, what the **content** of Conrad's right is).

(2) The **rules of the private law determine** (prescribe) how Conrad's powers to exercise his right is **limited** (in other words, to what extent the content of Conrad's right is limited).

conclusion

In this learning unit, we looked at different rights, 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 following learning units we are going to look at the origins and sources of South African law.

learning unit 3 The story of our law

Overview

The story of South African law spans more than 20 centuries. Different nations and their legal systems influenced the development and composition of our law during these 20 000 years. This is a very, very long time and it is therefore impossible to tell the whole story of our law here. In this learning unit, we will briefly examine the composition of South African law against its historical background by focusing on five specific periods that influenced the development and composition of the South African legal system. In this way, we shall see how our law began and came to be what it is today. As a prerequisite for your study of **learning units 4 and 6,** you need to have an understanding of the history of South African law.[10]

Learning outcomes

After completion of this learning unit, you should be able to:

- name and describe the five periods that played a role in the development, composition and contents of South African law
- explain the influence of each of the five periods on the development, composition and contents of the South African law

10 In compiling this learning unit, the study guide for the module *Historical Foundations of South African Law* (HFL1501) was used. Students whose studies include HFL1501, will learn a lot more about the history of our law in this module.

Setting the Scene

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 present 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 20 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.

Activity 3.1

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

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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

As mentioned in the overview, different nations and their legal systems influenced the development and composition of South African law. For the purposes of our discussion, we focus on the following five periods in the history of our law:

(1) Roman law becomes Roman-Dutch law
(2) Roman-Dutch law comes to the Cape
(3) English law comes from Britain to the Cape
(4) The recognition of African customary (indigenous) law
(5) The establishment of a constitutional democracy in South Africa

3.1 Roman law becomes Roman-Dutch law

Let us begin with the part where Roman law becomes Roman-Dutch law by first looking at the history of the Romans and the Roman law and then answering the question how Roman law became Roman-Dutch law.

3.1.1 The history of the Romans and Roman law

(1) The rise of the Roman Empire and Roman law

Roman law is a legal system that was developed by the Romans, an ancient civilization. The history of the Romans started when Rome (which is still the capital of Italy today) was founded in 753 BC. Rome started as a small primitive community with a primitive law found in customs. This community experienced enormous growth and development through warfare and gradually became a powerful and successful society with different political periods and structures, a sophisticated culture and language (Latin), and a complex system of law (in fact, a legal science).

In 27 BC this highly developed Roman civilization became an empire and ruled much of the ancient world. The Roman Empire included what is today known as Western Europe, parts of Britain, North Africa and parts of Asia and was governed by an emperor. **During the first two centuries AD, the Roman Empire with its culture and law reached its peak (highest state) of development. The law applicable during this time was the classical Roman law and it reached its height because of the extensive writings of the jurists**

and to some extent the legislation promulgated by the emperors (imperial legislation). One of the most important things which the Roman Empire gave us and which has lasted until today is its legal system. This will become evident in our discussion that follows.

> **NOTE**
>
> "BC" means: before the birth of Christ. "AD" stands for: after the birth of Christ.

(2) The split of the Roman Empire and the decline of Roman law

From AD 284 the decline of the Roman Empire and the Roman law started. Factors that contributed to the decline included the invasion of Germanics (also known as "barbarics"), government corruption and political instability, luxurious lifestyles, economic problems and loss of community mores.

At the end of the fourth century AD, the **Roman Empire split into two parts**: the **Western Roman Empire** with Rome as its capital, and the **Eastern Roman Empire** with Byzantium or Constantinople (today Istanbul in Turkey) as its capital. **After the split of the Roman Empire, the importance of Roman law began to decline. Yet it survived.** The old classical Roman law survived more successfully in the Eastern Roman Empire than in the Western Roman Empire. Let us look at the survival of Roman law in these empires.

(a) The Western Roman Empire

The Western Roman Empire fell in AD 476 when Germanic tribes who lived all over Western Europe took over the Western Roman Empire. As a result, government structures of the Western Roman Empire started to disintegrate (fall apart) and Germanic law influenced the classical Roman law. However, Roman law remained alive and contributed to the reception of Roman law into Europe in later centuries. **We now look at two reasons for the survival of Roman law in the Western Empire after the Germanic invasion, namely the personality principle and the role of the Roman Catholic Church.**

- **Personality principle**

  When the Germanic tribes took over the Western Roman Empire, each Germanic tribe had its own law.

During this time, the **personality principle** applied. **This meant that each person lived according to the law of his or her own tribe.** Many of the **Germanic rulers allowed their Roman subjects to continue applying Roman law. This law, however, was not the "pure" classical Roman law of the early Roman Empire, but Roman law that was influenced by Germanic law.**

NOTE

The idea that different legal systems apply to different people living in the same territory is not foreign in modern times. A good example is the administration of justice in South Africa before the constitutional era. During that time, different African customary legal systems applied exclusively to different black people. Thus, for example, a marriage between two Tswana people was regulated by Tswana law. Today, specific African customary laws are still applied in certain circumstances, even though the application of African customary law is strictly regulated by legislation.

- **The role of the Roman Catholic Church**

Another reason for the survival of Roman law after the fall of the Western Roman Empire, was the role played by the **Roman Catholic Church. The Catholic Church was a powerful and organised institution during this time**. It had its seat in Rome and was headed by the Pope. **Roman law formed the foundation of the law of the Catholic Church.**

This **church law** of the Roman Catholic Church 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 the principle that a mere agreement between two people can be enforced by law.**

(b) The Eastern Roman Empire

The Eastern Roman Empire continued to exist until 1453. The Eastern Roman Empire was a Greek civilization with a Greek culture that never adopted Roman culture. Since the law of the Eastern Roman Empire was influenced by Greek culture and not Roman culture, the law of the Eastern Roman Empire did not really influence the legal systems of Western Europe. **It was only Justinian, the emperor of the Eastern Roman Empire from AD 527 to AD 565, who played a role in the survival of classical Roman law in the Eastern Roman Empire.** Therefore, we will focus on his reign.

- **Justinian's codification of the Roman law**

  By the time Justinian became emperor in the sixth century the law was a disorganised mixture of different kinds of law, including legal opinions of different Roman jurists and legislation by several Roman emperors before him. Justinian's ideal goal was to reunite the Western Roman Empire and the Eastern Roman Empire and to restore it to its former glory.

  In order to do this, he decided to **"codify" Roman law as a whole. "Codify" meant that he decided that all the earlier writings of the classical jurists and all the laws that 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*. Justinian did not succeed in reuniting the two empires, but by codifying the law he kept Roman law alive in the Eastern Roman Empire. In this way, he contributed to the reception of Roman law in Europe many centuries later.**

3.1.2 How did Roman law become Roman-Dutch law?

(1) The revival of Roman law in Europe

After Justinian's death, his codification of the Roman law, the *Corpus Iuris Civilis*, was forgotten for many centuries. **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.

(2) The reception of Roman law in 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. 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 that which 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 no such rule existed, 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. Our focus is on the Netherlands, where 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, Simon van Leeuwen, Johannes van der Linden and Johannes Voet. Their writings are still used today as a source of reference in our courts.

NOTE

Roman law as an independent legal system no longer applies anywhere in the world today. However, it is very important to know that Roman law, for example Justinian's *Corpus Iuris Civilis*, is still relevant in our law. South African courts continue to recognise Roman law as an important part of the Roman-Dutch law which in turn forms part of our South African common law (see **learning unit 6**).

In the case of *Hendricks v Hendricks and others*[11] the Supreme Court of Appeal relied on Roman substantive law and referred to Justinian's *Corpus Iuris Civilis* with regard to personal servitudes. The Court pointed out that Justinian's view on personal servitudes was adopted by the old writers on Roman-Dutch law and then accepted in South African case law, for example, in the case of *Kidson and another v Jimspeed Enterprises CC and others*.[12]

Even the Constitutional Court illustrates the continued relevance of Roman law in our law today. In the case of *Paulsen and another v Slip Knot Investments 777 Pty (Ltd)*[13] on the historical development of a specific private-law rule, the Constitutional Court states that this rule has its origins in the classical Roman law. The rule then became part of the Roman-Dutch law as writings by the various old authorities prove and has been part of our case law since 1830.

3.2 Roman-Dutch law comes to the Cape

The Netherlands has a specific place in the history of our South African law. Roman-Dutch law was the law of the province of Holland. It was the leading law in the Netherlands in the 17th century. Let us look at how Roman-Dutch law was brought to South Africa and why it forms such an important part of the law of South Africa.

11 2016 (1) SA 511 (SCA) para [6].
12 2009 (5) SA 246 (GNP) paras [7] and [8].
13 2015 (3) SA 479 (CC) para [42].

3.2.1 Roman-Dutch law comes from the Netherlands to the Cape

The Netherlands experienced significant economic growth in the 17th century and commercial trade started between the Netherlands and the East (India and Indonesia) via the sea route of the Cape of Good Hope. The government of the Netherlands appointed the Dutch East India Company to control the Dutch colonies (territories) in the East.

Jan van Riebeeck, an employee of the Dutch East India Company, came to the Cape in 1652 to start a trading post and refreshment station for the ships on their journey from the Netherlands to the East. The Dutch East India Company applied Roman-Dutch law in all its colonies. This was also the case in the Cape. The Dutch settlement at the Cape lived according to Roman-Dutch law, because this was the law they knew and were accustomed to. **We can therefore accept that Roman-Dutch law became applicable in the Cape through custom.**

The Dutch governed the Cape from 1652 to 1795. Over these almost 150 years, the settlement at the Cape expanded and the Roman-Dutch law was further developed. **During this period, law was found in custom, legislation, the old writers on Roman-Dutch law (for example, Hugo de Groot, Simon van Leeuwen, Johannes van der Linden and Johannes Voet) and court decisions. If we look at the records of old Cape court cases, we will see that when there were disputes, judges and advocates consulted Roman-Dutch law, as discussed by these Roman-Dutch jurists.**

3.2.2 The importance of Roman-Dutch law

We mentioned above that our courts still use the writings of the Roman-Dutch jurists. This has become the practice of our courts throughout our history and so 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 because 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.

3.3 English law comes from Britain to the Cape

The British occupied the Cape, first in 1795 and then later in 1806. Under British control the Cape became an English colony. The British government decided that it would not deliberately change the law of its new colony and allowed the continued application of Roman-Dutch law. In spite of the British government's decision, the influence of English law was still felt, particularly after the 1820 settlers arrived in the Cape and the British government started a policy of Anglicization. The purpose of this policy was to replace the existing Dutch language, culture and legal administration with those of the English. Thus, for example, English became the official language in the Cape.

Since 1828, the use of the English court structure and formal law (procedural law) paved the way for the reception of English law into the existing Dutch legal administration. Although the British authorities never abolished Roman-Dutch law as the legal system of the Cape, the influence of English law on Roman-Dutch law increased, especially through courts, legislation and court decisions. Here are some examples:

- **The British Government slowly got rid of the existing court structure of the Cape and replaced it with the English court structure.**
- **Legislation introduced the English jury system (it was finally discontinued in South Africa in 1969).**
- **The English law of criminal procedure, law of civil procedure and law of evidence were received through legislation in the Cape. This led to greater focus on the use of English procedural law in courts.**
- **British statutes formed the basis of numerous Cape statutes. The Cape received, for example, the English Insolvency Act and the whole of the English Companies Act.**
- **Judges and advocates had to receive their training in England. Because of this, judges and advocates often turned to English law rather than to the old Roman-Dutch authorities (written**

in Latin or Dutch) when deciding court decisions or solving legal problems.

British influence was also felt in the legal development in English colonies outside the Cape from 1838 to 1910. English law was increasingly received in Natal and, after the annexation (take-over) of the Transvaal and Free State Republics by Britain in the 19th century, English influence spread throughout the rest of South Africa.

In 1910 the British government formed the Union of South Africa when they decided to unify (combine) the four colonies (The Cape, Natal, Transvaal and the Orange Free State). Also in 1910, the Appellate Division of the Supreme Court (today the Supreme Court of Appeal) was established. The **formation of the Union** and **specifically the establishment of the Appellate Division of the Supreme Court played an important role in merging (combining) the Roman-Dutch law and English law to form an independent and single law for South Africa. This law, known as common law, forms the foundation of our South African legal system. Common law was until the 1990s officially the only law of South Africa.**

NOTE

Keep in mind that Roman-Dutch law as influenced by the English law forms one of the components, the historical component, of one of our present-day sources of law, namely common law. Further discussion on present-day common law as a source of law will follow in **learning unit 6**, which deals with the sources of South African law.

3.4 The role of African customary (indigenous) law

3.4.1 The position of African customary (indigenous) law at the Cape when the Dutch arrived

When Jan van Riebeeck arrived at the Cape in 1652 there were many different indigenous African tribes in Southern Africa who had been living in the Cape for many centuries according to their own laws and cultures. **Their laws were unwritten because they lived in communities where writing was unknown. Their laws therefore consisted of oral traditions or unwritten customs that were handed down from generation to generation. These laws are known as African customary (indigenous) law.**

During the time of Jan van Riebeeck and the Dutch settlement, the African tribes continued to live according to their customs. **The Dutch authorities did not interfere with the different tribes' customary laws. The Dutch authorities neither interfered with nor recognised any of the customary laws of the indigenous African tribes.**

3.4.2 The position of African customary (indigenous) law from the British arrival to apartheid

When the British government took control of the Cape, they initially ignored the African customary law. **It was only during the second half of the 19th century that the British colonial authorities in Natal, the Cape and The Orange Free State officially (formally) began to recognise African customary law, each by means of its own policy in the form of a written codification or code.** These colonial policies laid the foundation for the official (formal) policy towards African customary law in South Africa in later years.

Major political transitions (changes), such as when South Africa became a Union (1910), when South Africa became a Republic (1961) and when the tricameral parliament was established (1983), brought about little or no change with respect to the customary law. **During the post-colonial period and the era of apartheid, a uniform (one) policy for the whole of South Africa regarding the recognition and application of African customary law was laid down in legislation, for example the Black Administration Act of 1927[14] and the Special Courts for Blacks Abolition Act of 1986.[15]**

During all these years, the indigenous African population's attitude towards government's policies regarding African customary law was extremely negative because government policies were (in the main) discriminatory and unjust. Consequently, official African customary law (legislation) was largely ignored and unofficial African customary law (unwritten customs) became more important.

3.4.3 The position of African customary (indigenous) law since the establishment of our constitutional democracy

From the discussion above, it is clear that African customary law has always held an inferior position in South African law and was recognised

14 Black Administration Act 38 of 1927.
15 Special Courts for Blacks Abolition Act 34 of 1986.

as a special law that only applied to the indigenous African people in South Africa. Lawyers, academics and legal administrators focused on Roman-Dutch law and English law. An important element of the discontent of the indigenous population during colonisation and apartheid was the government's refusal to give formal recognition to African customary law.

The introduction of our new constitutional democracy in 1996 brought about important changes in the recognition and application of African customary law. **The Constitution of 1996 finally recognised African customary law as part of the development and composition of South African law.** Section 211(3) of the Constitution gives it official (formal) status in South African law and provides that: "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

Today, African customary law plays an increasingly important role in the development of South African law. It still develops within indigenous communities and is largely made up of oral or unwritten customs handed down from generation to generation (living customary law), although it has to some extent been recorded in writing, for example in legislation, court decisions and textbooks (official customary law).[16] Most importantly, in terms of section 211(3) of the Constitution, courts must apply African customary law except if it is found to be contrary with the principles of the Constitution.

Further discussion on African customary (indigenous) law as a source of law will follow in **learning unit 6**, which deals with the sources of South African law.

3.5 The establishment of a constitutional democracy in South Africa

3.5.1 The apartheid regime (era)

Although the apartheid regime officially started in 1948 when the National Party won an all-white election, a policy of separating the different races was conceptualised as early as 1905. **The laws of apartheid were found in statutes of parliament (legislation) and not in the Roman-Dutch or English law, since these legal systems are known for their principles of justness, fairness and equality.[17]**

16 Kleyn D *et al Beginner's guide for law students* 5th ed (Juta Claremont 2018) 30.
17 Kleyn *et al Beginner's guide for law students* 47.

During the apartheid regime parliament was supreme and could pass any legislation, no matter how unjust, oppressive, racist or discriminatory. Go back to learning unit 1 and read activity 1.5 on the Group Areas Act of 1950 as an example of unfair and discriminatory legislation by this regime. No wonder the majority of the indigenous South African population trusted neither the law nor its application. Therefore, it comes as no surprise that the legislation of the apartheid regime was met with resistance, specifically by the national liberation movement of the 1990s. Initially the liberation movement resisted through non-violent protests, but later through an armed struggle. The history and actions of the national liberation movement played a significant role in the development and establishment of our constitutional democracy, as we will see in the discussion below.

3.5.2 South Africa's first democratic Constitution

The Constitution of 1996 is South Africa's first democratic Constitution. Before this, there were three other Constitutions: the 1910 Constitution when the Union of South Africa was formed; the 1961 Constitution when South Africa became a Republic; and the 1983 Constitution that 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 Coloured people as well.) However, Indians and Coloureds were represented inadequately and had a very limited voice with regard to the right to vote. This system was unfair to the black majority in the country and was met with resistance, specifically by the national liberation movement mentioned above.

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 accepted. 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

resistance 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 with a Bill of Rights. 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 written by the Constitutional Assembly was certified by the Constitutional Court on 4 December 1996. The adoption of the first democratic Constitution of the Republic of South Africa is an important event in the development of the history of our law. Further discussion on the Constitution follows in **learning units 7 to 10**.

NOTE

From our brief historical overview of the development and composition of South African law, it is evident that South Africa has a complex legal system and that **legal pluralism** prevails in our country. Let us explain what we mean by the concept "legal pluralism". South Africa's multi-cultural society consists of various communities – such as the Hindu, Muslim, indigenous African and, broadly speaking, Western or European communities. **Therefore, various (more than one) systems of law are applied in South Africa and results in legal pluralism prevailing in South Africa.** However, not all of these systems are officially recognised. The official state law, which still forms the foundation of

the South African legal system, is Roman-Dutch law as influenced by English law. Until the 1990s this was officially the only law of South Africa. However, since the adoption of the Constitution of 1996, African customary (indigenous) law has also been officially recognised in the Constitution as part of the South African legal system.

3.2

(1) **Name** the legal systems that **officially** played a role in the development and composition of South African law.

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(2) Several factors contributed to the reception of English law at the time of the British occupation of the Cape during 1806-1910. Which of the following did **not** form part of these factors?

(1) Judges and advocates received their legal training in England.
(2) The English jury system was received at the Cape.
(3) The English law was formally received through legislation.
(4) The English customary law governed the lives of the Dutch.

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(3) Consider the following **two** statements:

(a) Since the establishment of the Appellate Division of the Supreme Court in South Africa in 1910, African customary (indigenous) law played a role in the development and composition of South African law.

(b) Today, African customary (indigenous) law is largely recorded in writing, for example in legislation, court decisions and textbooks.

Which option is **correct**?

(1) (a) and (b) are correct.
(2) (a) and (b) are incorrect.
(3) (a) is correct; (b) is incorrect.
(4) (a) is incorrect; (b) is correct.

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(4) Indicate whether the following statement is **correct** **<u>or</u>** **incorrect** and **give a reason** for your answer:

South Africa has had numerous Constitutions during the course of the history of South African law.

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(5) **Explain** the **difference** between the interim Constitution of 1993 and the final Constitution of 1996.

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(1) **Roman-Dutch law, English law and African customary (indigenous) law officially played a role in the development and composition of South African law.**

Now you may well ask why we did not include Roman law in our list of legal systems. Roman law as an independent legal system did not officially play a role, but the Roman law that forms part of the Roman-Dutch law, in other words Roman law which was received into Dutch law to form the Roman-Dutch law, played a role in the development and composition of South African law.

(2) Options (1), (2) and (3) are all factors that contributed to the reception of English law at the time of the British occupation in the Cape during 1806–1910.

Option (4) is the option that you had to choose, because it refers to English customary law, which was not a factor that influenced the Roman-Dutch law. The influence of English law on Roman-Dutch law mainly occurred through courts, legislation and court decisions, and **not** customary law.

(3) Statement (a) is **incorrect**. Only since the **adoption of the Constitution of 1996** has African customary (indigenous) law been playing a role in the development and composition of South African law.

Statement (b) is also **incorrect**. Today, **African customary law** is still **largely made up of oral or unwritten customs** and handed down from generation to generation, and **not** largely recorded in writing, for example in legislation, court decisions and textbooks.

Since statements (a) and (b) are incorrect, option (2) is correct and the one you had to choose.

(4) This statement is **correct**. South Africa has had numerous Constitutions during the course of the history of South African law. They are the 1910 Constitution when the Union of South Africa was formed; the 1961 Constitution when South Africa became a Republic; the 1983 Constitution that established a tricameral parliament; the interim Constitution of 1993 and the final Constitution of 1996.

(5) The **interim Constitution of 1993** was **not a democratic Constitution** because it was **not written by a democratically elected government**, whereas the **final Constitution of 1996** is a democratic Constitution

because it was written by a democratically elected constitution-making body, called the Constitutional Assembly.

conclusion

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 learning units, or if you have to register for the module *Historical Foundations of South African Law* (HFL1501) in your further studies.

Families of law or legal cultures

There are many different legal systems in the world. In this learning unit we will deal with the South African legal system as part of a world legal order, consisting of different legal systems.

Learning outcomes

After you have worked through this learning unit, you should be able to:

- identify the criteria used for classifying different legal systems into legal families or cultures
- name and discuss the most important features of the different legal families
- provide examples of legal systems that belong to each legal family
- explain why the South African legal system is known as a hybrid (mixed) legal system

Setting the Scene

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 Gardener family, the Shoemaker family and the Grocer family.

All the Baker family members can be recognised on the cards because they wear a white baker's hat. Each member of the Butcher family wears a striped red and white apron and the Gardener family members are all wearing green gardening gloves. The Shoemaker family all wear shiny brown leather shoes and the Grocer family can be recognised by their black overcoats.

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.

Discussion

4.1 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. For now, however, we shall mention only some of the criteria that have been suggested for the purpose of grouping (classifying):

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

4.2 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 different legal families. We will limit our discussion to the following **legal families**:

- Romano-Germanic or civil-law family
- Anglo-American or common-law family
- Socialist family
- Religious family
- Indigenous family
- Hybrid or mixed family

4.2.1 Romano-Germanic or civil-law legal 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.**

4.2.2 Anglo-American or common-law legal 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.

4.2.3 Socialist legal 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.**

4.2.4 Religious legal family

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

4.2.5 Indigenous legal family

This group includes African customary (indigenous) law. Legal systems in this grouping mainly comprise **unwritten customary laws**. The **focus** in these systems is on the **community**.

4.2.6 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 **learning unit 3** that the South African legal system is made up of various parts. The first part is the **Roman-Dutch law**, 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.[18]

Another part of the South African legal system is the **English law,** 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.[19]

Finally, there is **African customary (indigenous) law**, which forms part of the **indigenous legal tradition**. We have told you already in **learning unit 3** that African customary (indigenous) law was initially not recognised as part of the general South African legal system. It was a special law which only applied to indigenous African people. It did not form part of our common law. Now, however, it has been recognised by our Constitution and the courts must apply it where it is applicable.[20] African customary (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.[21] We have no doubt that the influence of the African customary (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 some legal systems that belong to the family. Give reasons why South African law is classified as a hybrid system.

18 See learning unit 2.
19 See learning unit 6.
20 Section 211 of the Constitution of the Republic of South Africa, 1996.
21 We will explain the concept ubuntu in learning unit 7.

LEGAL FAMILIES	MOST IMPORTANT FEATURES
Romano-Germanic/civil law	
Anglo-American/common-law	
Socialist	
Religious	
Indigenous	
Mixed/hybrid	

Feedback

LEGAL FAMILIES	MOST IMPORTANT FEATURES
Romano-Germanic/civil law	All these systems have a **strong Roman-law basis** since Roman law played a very important role in their development. Examples: the French, German and Dutch legal systems.
Anglo-American/common-law	**Case law** 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.
Socialist	The development of these legal systems has been influenced by historical and political elements. The law is there to **serve social and economic policies in these legal systems**. The doctrine of Marxism is common to all of these legal systems. Examples: the former USSR and Communist China.
Religious	These systems have their origin in **religious sources**. Examples: the Islamic, Hindu and Jewish legal systems.
Indigenous	The legal systems in this grouping are mainly made up of **unwritten customary laws**. In these systems the focus is on the community. Example: African customary (indigenous) law.

Mixed/hybrid	**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 customary (indigenous) law** (which forms part of the **indigenous legal family**) all played a role.

conclusion

It is important to realise that the South African legal system forms part of a greater world legal order. We trust that you now know how we fit into this global order.

learning unit 5

Divisions of law

Overview

This learning unit introduces you to the different **divisions** (branches/ fields) of South African law. We divide South African law into **two main divisions**, namely **public law** and **private law**, and we explain these **two main divisions**. We also explain how public law and private law are further divided into different **divisions**, and some of these divisions into **subdivisions,** and some of these subdivisions into **further subdivisions**.

Learning outcomes

After completing this learning unit, you should be able to:

- distinguish between the two main divisions of South African law, namely public law and private law
- identify, name and describe the main divisions, public law and private law, in everyday real-life scenarios
- identify, name and describe each of the divisions, subdivisions and further subdivisions of public law in real-life scenarios
- identify, name and describe each of the divisions, subdivisions and further subdivisions of private law in real-life scenarios
- identify, name and describe each of the other areas of law in real-life scenarios
- set out schematically (that is in a diagram) the main divisions, divisions, subdivisions and further subdivisions of law, as well as the other areas of law.

Setting the Scene

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 strolls in 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

5.1 A diagram of the 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. Jane starts with her research and comes across the following diagram outlining the different divisions of South African law in a textbook, which she used as a first-year law student. Jane is grateful that her lecturers made this diagram available to her, as it maps out the different divisions of South African law.

IMPORTANT NOTE

Keep this diagram next to you when you work through the learning unit, as it illustrates that South African law has **two main divisions**, namely, **public law** and **private law**. It also shows that public law and private law are **further divided** into different **divisions**. Some of these divisions are then again subdivided into **subdivisions,** and some of these subdivisions, into even **further subdivisions.**

LAW

PUBLIC LAW

(Main division)

(1) **International law** (division)

(2) **Constitutional law** (division)

(3) **Administrative law** (division)

(4) **Criminal law** (division)

(5) **Law of procedure** (division)

- (a) *Civil procedure* (subdivision)
- (b) *Criminal procedure* (subdivision)
- (c) *Law of evidence* (subdivision)

PRIVATE LAW

(Main division)

(1) **Law of persons** (division)

(2) **Family law** (division)

(3) **Law of personality** (division)

(4) **Law of patrimony** (division)

- (a) *Law of property/things* (subdivision)
- (b) *Law of succession* (subdivision)
  - (i) Testate succession (further subdivision)
  - (ii) Intestate succession (further subdivision)
- (c) *Law of obligations* (subdivision)
  - (i) Law of contract (further subdivision)
  - (ii) Law of delict (further subdivision)
  - (iii) Enrichment (further subdivision)

OTHER AREAS OF LAW

(1) **Mercantile law** (division)

(2) **Labour law** (division)

(3) **Conflict of laws** (division)

(4) **Legal philosophy** (division)

5.2 The main divisions of South African law

5.2.1 Public law and private law

Two of the **main divisions** in our law are **public law** and **private law.**

Public law regulates relationships that are concerned with **public interests** (that is, the **interests of the community**). **Public law therefore deals with the relationship between the state and the subject of the state (the citizen).** 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**.

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**.

In some instances, **both the public law and the private law** may be applicable to a set of facts: If the same act harms (infringes) the **interests of not only the community, but also of a private person,** the act becomes the concern of **both public law and private law**. For example, if A steals B's property, A will be **prosecuted and punished by the state** because theft is a crime and is not in the interests of the community. 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.

5.3 The divisions of public law

(1) **Public international law.** Public international law is concerned with relations between states (e.g. 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 (e.g. 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. It is important to know that **our criminal law provides a legal definition for every act that is regarded a crime** in South Africa. These definitions **prescribe certain elements** for every crime. In principle, **at least all three of the following elements have to be present for the commission of a crime:** an **action (act)** or **omission** (i.e. the failure to act) that is **against the law (unlawful)** and where the **accused was at fault**.

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

(a) **Law of civil procedure.** There are certain processes (proceedings or methods) by which private-law disputes are brought before the courts. The rules of civil procedure are concerned with these processes. These rules prescribe, for example, how the summons must be served on the defendant, how and when pleadings must be drawn up and lodged, how someone can approach the court for a court order, what the jurisdiction of each court is, the fact that each party must have an opportunity to be heard, and so on.

(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. Thus, it prescribes how witnesses must give their evidence in court and what kinds of evidence are admissible.

5.4 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 refer to whatever a person possesses 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[22] 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.

(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 law of succession can be divided into two further** subdivisions**:**

22 See learning unit 2 on the classification of rights.

- **Testate succession**. A 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. Therefore, testate succession will apply to a person who has left a will on death.
- **Intestate succession**. 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.

(c) **Law of obligations.** An **obligation** is a **legal relationship between two (or more) parties** in terms of which **each party has a mutual right against the other party for performance and each party has a corresponding duty to perform.** There are **three** ways in which obligations arise, namely through **contract, delict** and **unjustified enrichment**. Law of obligations can therefore be divided into **three further subdivisions**. Let us briefly look at each of these **further subdivisions**:

- **Law of contract**. A contract is an **agreement** between two (or more) parties in terms of which **mutual obligations** (a **right to performance** and **a corresponding duty to perform)** come into existence. For example, if Tom wants to buy a car from Jane, Tom (the buyer of the car) has a **right to delivery** of the car and Jane (the seller of the car) has a **duty to deliver** it. Simultaneously, Jane has a **right to receive payment** for the car and Tom has a **duty to pay** for the car. The law of contract therefore deals with the requirements for the conclusion of contracts, rights and duties created by a contract, as well as the termination of contracts.
- **Law of delict**. A delict is an **unlawful act** by one party that **causes damage** to another party. The **party who suffers** the damage **will want to claim damages** or **compensation** from the one who caused it. A delict therefore also creates an **obligation**, namely a **right to claim compensation** and a **corresponding duty to compensate**. For example, if Tom breaks a valuable statue in my garden, I have a **right to claim compen-**

sation and Tom has a **corresponding duty to compensate** me. Tom would, for example, either have to replace the statue or pay me for it. Thus, the law of delict determines what a delict is, and which rights and duties arise from it.

- **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.

5.5 Other areas of law

There are areas of law that do not strictly belong to the public or private law. Depending on the circumstances, **they may fall under the private law or public law or even both**. These are called **other areas of law**.

(1) **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.

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

(3) **Conflict of laws (private international law)** 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.

(4) **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.

5.1

When you have worked carefully through this learning unit, read the scenario in *Setting the Scene* and then **name** the

(1) **main division** of law which Jane will have to consult in order to advise Mr Brown. **Explain** why this main division is applicable.

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(2) **division** and **subdivision** of your answer in (1) which Jane will have to consult in order to advise Mr Brown. **Explain** why this subdivision is applicable.

_____

_____

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(1) The **main division** of the law that Jane will have to consult in order to advise Mr Brown, is **private law**, since private law deals with the relationship between individuals. In this scenario, it is the relationship between Mr Brown and Mr Green.

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

Activity **5.2**

When you have read through the story and considered all the facts, try to:

(1) **identify** the specific **main divisions**, **divisions**, **subdivisions and further subdivisions** of law (discussed in this learning unit) which may apply to this scenario.

(2) **explain** what each of the **main divisions**, **divisions**, **subdivisions** and **further subdivisions** deal with.

(3) **explain why** the specific **main divisions**, **divisions**, **subdivisions and further subdivisions** apply to the scenario.

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 screaming 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 crowd has gathered outside the shop, curious about the commotion. 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 lying, but she is so angry about being fired that she wants to ruin Kgomotso's reputation.

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Feedback

(1) ***Main division* of law:**

Public law

(2) The **public law** deals with the **relationship** between the **state** and the **subject of the state** (citizen).

(3) As Robin and Ann Steel committed the **crimes** of theft, assault and damage to property, their criminal actions are **not in the interests of the community** and the state will **prosecute/punish** them. The **public law** is therefore applicable.

(1) ***Division* of public law:**

Criminal law

(2) **Criminal law** deals with **what acts are crimes** and what **penalties/punishments** will be imposed by the **state** for the commission of these crimes.

(3) **Criminal law** will apply because Ann and Robin Steel **committed crimes**:

- 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.

(1) ***Division* of public law:**

Law of procedure

(2) The **law of procedure** deals with the **specific processes/rules** that must be followed when a matter is **brought before the courts.**

(3) If Ann and Robin Steel are prosecuted in a **court of law**, the **law of procedure** will apply.

(1) ***Subdivision* of law of procedure:**

Law of criminal procedure

(2) The **law of criminal procedure** deals with the way in which someone who is **suspected** of **committing a crime** is **prosecuted and tried by the state.**

(3) Should Ann and Robin Steel be **prosecuted for their crimes** of theft, assault and damage to property, the **law of criminal procedure** will apply if their **criminal cases** are brought before the courts.

(1) ***Subdivision* of law of procedure:**

Law of civil procedure

(2) The **law of civil procedure** deals with the **processes** that must be followed when **private law disputes** are brought before the **courts**. For example, how a summons must be served on the defendant and what the jurisdiction of the court is.

(3) Should Ann and Robin Steel institute **divorce proceedings** against each other, the **law of civil procedure** will apply if their divorce case (**a civil case**) is brought to court.

(1) ***Subdivision* of law of procedure:**

Law of evidence

(2) The **law of evidence** deals with **how evidence** must be **presented** before the court.

(3) Should Ann and Robin Steel appear before the court, the **law of evidence** will apply if **evidence** has to be **put before the court**. For example, if a witness testifies in their cases, the law of evidence will apply with regard to the type of evidence that the witness may provide the court.

(1) ***Main division* of law:**

Private law

(2) **Private law** deals with the **relationship** between **individuals/ persons/legal subjects.**

(3) Ann and Robin Steel's actions also concern the private law. **Private law** will be applicable because the purpose of private law is to ensure that the **interests of individuals/persons/legal subjects** are **protected**.

(1) ***Division* of private law:**

Family law

(2) **Family law** deals with **the legal relationship** between **spouses, the consequences of marriage and** the **relationships within the family** (for example, relationships between parents and children).

(3) **Family law** will apply to this scenario as Ann Steel is **married** to Robin Steel and she wants to **divorce** him.

(1) ***Division* of private law:**

Law of personality

(2) The **law of personality** deals with what we call **personality rights**. For example, the rights that we have to our bodily integrity, our reputation and our dignity.[23]

(3) The **law of personality** will apply here, because:

- 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**.

(1) ***Division* of private law:**

Law of patrimony

(2) The **law of patrimony** deals with **persons** and their **means** (thus, their **things** or their **property**) with a **value in money.**

(3) The law of patrimony will apply, as Ann Steel damaged Bob Zwane's **property** (his till).

(1) ***Subdivision* of the law of patrimony:**

Law of property (Law of things)

(2) The **law of property (law of things)** deals with **movables** (things that can be moved from one place to another without being damaged, for example, a book or a car) and **immovables** (things that cannot be moved and that are fixed, for example, a house or land).

(3) The **law of property (law of things)** will apply here because, 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 property (law of things).**

(1) ***Subdivision* of the law of patrimony:**

Law of obligations

(2) The **law of obligations** deals with a **legal relationship** between two (or more) parties in terms of which one party has a **right**

23 See learning unit 2.

against another party for performance and the other party has a **corresponding duty to perform**.

(3) The **law of obligations** will apply here, because Ann Steel has a right to have her hair done by the hairdresser (**right to performance**) and the hairdresser has a **corresponding duty** to perform by doing Ann's hair. Similarly, the hairdresser has a right to receive payment (**right to performance**) from Ann, who has a corresponding duty to pay the hairdresser (**duty to perform**).

(1) ***Further subdivision* of the law of obligations:**

Law of contract

(2) The **law of contract** deals with a **legal relationship** between two (or more) parties, where one party has a **right to claim** delivery of a thing and the other party has a **duty to deliver** the thing. The law of contract creates a **legal obligation** between parties.

(3) The law of contract will apply, because Ann Steel has **contracted (reached an agreement)** with the hairdresser to do her hair. The hairdresser has an obligation to do Ann's hair and Ann has an obligation to pay her. Ann has a right to claim her hairdo and the hairdresser has a duty to do Ann's hair.

(1) ***Further subdivision* of the law of obligations:**

Law of delict

(2) **The law of delict** deals with a situation where one person can **claim compensation** from another person for **damages** suffered.

(3) The law of delict will apply here, because 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 the **till,** which is his **property**.

Within public law and private law/Other areas of the law

(1) ***Division***

Labour law

(2) **Labour law** deals with the **relationship** between **employer** and **employee** and includes all labour legislation.

(3) 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 **main divisions**, **divisions**, **subdivisions and further subdivisions** 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 learning 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.

learning UNIT 6 *Where to find the law*

Overview

In this learning unit you will be introduced to the sources of South African law. In other words, you will learn where to find South African law.

Learning outcomes

After completing this learning unit, you should be able to:

- explain what a "source of law" is
- explain why South African law is not codified (i.e. does not consist of a single code)
- name and distinguish between the **two kinds of sources** of South African law
- name and give examples of **each kind of source** of law
- explain the use of the different **sources** of law in practical scenarios
- explain the following concepts:
  - system of judicial precedent
  - *ratio decidendi*
  - *obiter dictum*

Setting the Scene

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 argue against the death penalty. Thomas knows what the moral arguments are against the death penalty. (Go back to **learning 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** that 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".[24]

As you know, we now have our Constitution[25] that was drawn up by our lawmakers 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 in section 11 is

24 See learning unit 3 again for an explanation of the "common law".
25 The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution). See learning units 3 and 7 to 10.

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 (section 12).

> *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***[26] 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.

Activity 6.1

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

IMPORTANT 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 learning units 3, and 7 to 10 for more information on the Constitution.

26 *S v Makwanyane and Another* (CCT 3/94) 1995 (3) SA 391 (CC) (hereafter *S v Makwanyane*).

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 emperical 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 acknowledgement 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 enforceable 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 three sentences.

_____

_____

_____

_____

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Feedback

Legally, the death penalty would be regarded as "cruel, inhuman and degrading". Therefore, it is in direct conflict with the provisions of the Constitution as set out in the Bill of Rights. The death penalty is an infringement on the right to life and the right to human dignity, as enshrined (included) in our Constitution.

Discussion

6.1 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.[27] 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 sources of law to find out what the law says about the kind of case they are dealing with**.

27 We discussed this in learning unit 1.

6.1.1 What is a source of law?

Kleyn *et al*[28] speak about **sources of law** as the "places" where the law originates (comes from) and where it can be found.[29] These sources of law give weight (power) to a lawyer's arguments. In other words, lawyers use the information they find in the sources of law to support their arguments.

6.1.2 South African law is not contained in a single code

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.[30] 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 (similar to 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 source of law. We have a number of sources of law**. It is important for a lawyer to know all the sources of law and to identify 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 **(1)**, **(2)** and **(3)** 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. From this example, it is clear that not all

28 Kleyn D *et al Beginner's guide for law students* 5th ed (Juta Claremont 2018).
29 Kleyn *et al Beginner's guide for law students* 50.
30 See learning unit 7 for information on the specific topics that the Constitution deals with.

our sources of law have the same authority. Some sources have **binding authority**, whereas others have a merely **persuasive authority**. Let us now look at these **two kinds of sources of law** and the different types of examples that fall under each kind.

6.2 Kinds of sources of South African law

6.2.1 Authoritative sources of South African law

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

- legislation/statutes/acts of parliament and the Constitution
- court decisions/case law/court cases/judicial precedent
- common law
- custom
- African customary (indigenous) law

NOTE

It is important for you to recognise that the process of adopting the Constitution, was a political negotiation process between different parties, which took place between 1994 and 1996 (see learning unit 3). Therefore, unlike other legislation, the Constitution was not adopted through the usual parliamentary process. The Constitution serves as a standard or benchmark against which all other laws are tested. However, this does not mean that the Constitution should be consulted first, for every legal matter. For example, a contractual dispute may not necessarily involve constitutional issues. Similarly, in our example above, we saw that the Divorce Act is the first piece of legislation consulted when a divorce is requested. It is very important for you to understand that different types of scenarios will require the use of different legislation and/or different sources of law. You will learn more about the Constitution and constitutional issues in learning units 7 to 10.

(1) Legislation / statutes / acts of parliament and the Constitution

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 the three levels of government, 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 Choice on Termination of Pregnancy Act 92 of 1996 and the Children's Act 38 of 2005 are examples of statutes which have been written down and passed by parliament.

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.**[31]

The acts (laws) that 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.

(2) Court decisions / case law / court cases / judicial precedent

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 (or the so called "precedent system")**.

■ **Principle of 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.**

There are **two requirements** for the operation of the precedent system:

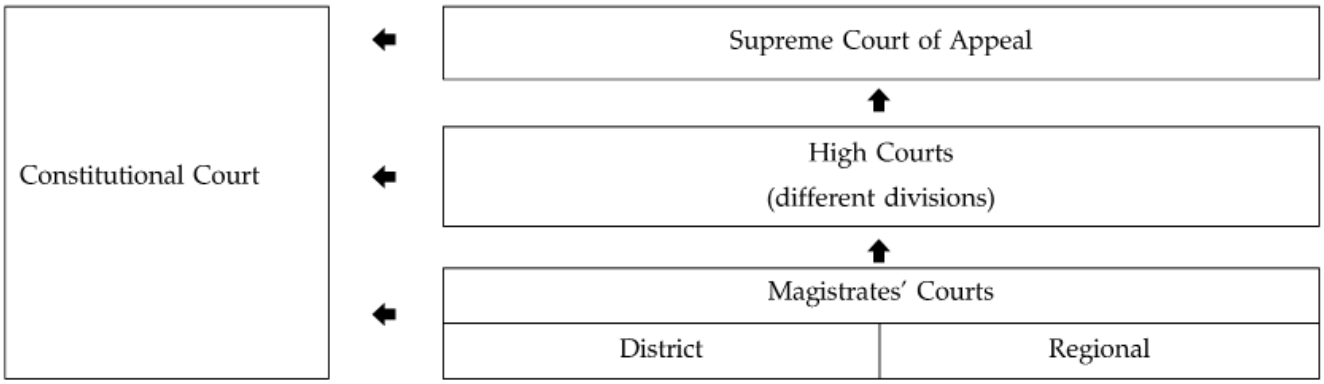
(1) A **hierarchy of courts** (in other words, the courts are divided into ranks, each court being bound by the decisions of the courts above it).
(2) An **effective system of law reporting** (to enable the lower-ranking courts to see what the higher-ranking courts have held).

31 You will learn more about this in learning units 7 to 10.

In South African law, both these requirements for the operation of the precedent system are complied with.

- **Hierarchy of courts**

We can explain the **hierarchy (or levels) of the different courts** by means of the following diagram:



- **Effective system of law reporting**

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 (see the diagram above). 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 decisions of the Constitutional Court bind all other courts. (See **learning unit 12** for a further discussion of the South African 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:

- the principle of a case is more broadly formulated by the judge than is necessary to cover the facts
- the judge makes an incidental remark
- the judge asks and then answers a hypothetical set of facts
- the judge quotes a similar case or gives an illustration

(3) Common law

Common law consists mainly of the **Roman-Dutch law**, as influenced by **English law**, and as **adapted** over the centuries by **South African legislation** and **case law**.[32] Although the common law is the source of law that includes the historical component of our law, it is a **living or changing source** of our law because the Constitution compels the courts, in several of its provisions, to develop the common law. Section 173 of the Constitution is one of these provisions and states that: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and **to develop the common law**, taking into account the interests of justice." Therefore, where the need arises, courts adapt or abolish the rules and the principles of the common law to suit the changing values of our society and to adhere to our present-day constitutional principles.

(4) Custom

Custom is not made up of written rules, but develops from customs within the community. Custom is therefore unwritten law which is carried down from generation to generation. African customary (indigenous) law also forms part of the broad definition of custom. However, because African customary (indigenous) law has a more formal status under South African law, it will be dealt with separately as a source of law under **(5)** below.

32 See learning unit 3.

Usually, a custom must 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 (i.e. may be considered as a legal rule).

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.

(5) African customary (indigenous) law

African customary (indigenous) law is **largely unwritten law**. We mentioned above that this 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, African customary (indigenous) law was recognised as a special law which could be applied only to African people. **However, it has now been recognised as a source of law by the Constitution. In terms of the Constitution, South African courts must apply African customary (indigenous) law where it is applicable.**[33]

33 See learning unit 3.

Kleyn *et al* point out that African customary (indigenous) law displays the following characteristics:[34]

- It is usually made up of **unwritten** customs that are passed on orally from generation to generation. This form of indigenous law is referred to as 'living' indigenous law, and can be changed to accommodate changing conditions. However, in some instances indigenous law has been recorded in writing, for example, in legislation, court decisions (case law) and text books. This is known as 'official' indigenous law. It is difficult to change or adapt this form of indigenous law and it is not always regarded as a correct version of indigenous law.
- It **differs** on a tribal and territorial basis.
- It mainly regulates the **relationships between individuals**, and not relationships between individuals and the state. The reason for this is because it was not developed within a strongly organised state structure.
- It is a communal or **group-orientated** system, in contrast with the more individualistically-orientated Western law.

You should now understand that **legislation**, **case law**, **common law**, **custom** and **African customary (indigenous) law**, all of which we have just mentioned, are the **main authoritative sources of our law**. However, there are also what we may call "**persuasive influences**" which make up the **persuasive sources** of South African law. We will now discuss these.

6.2.2 Persuasive sources of South African law

Persuasive sources of South African law include:

- other legal systems
- foreign law
- the views of modern legal writers

(1) Other legal systems

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 that

34 Kleyn *et al Beginner's guide for law students* 30.

are historically related to ours (because of a common Roman-law basis,[35] 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.

(2) Foreign law

Section 39(1)(c) of 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.

(3) The views of modern legal writers

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 progress 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.

NOTE

Sometimes **authoritative** and **persuasive** sources of South African law may be referred to as **primary** or **secondary** sources of law. Humby *et al*[36] describe primary and secondary sources of law as follows:[37]

"Primary sources refer to law generated by institutions vested with law-making authority, for example parliament and the provincial legislatures, or to judgements of the courts. Secondary sources of law essentially provide further information on primary sources of law. They are not binding, but serve as supplementary authority only."

35 See learning units 3 and 4.
36 Humby T *et al Introduction to law and legal skills in South Africa* (Oxford University Press Southern Africa 2012).
37 Humby *et al Introduction to law and legal skills in South Africa* 124.

Activity 6.2

(1) Draw a diagram in which you set out the **different kinds of sources** of South African law.

(2) 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

(3) 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

Feedback

(1) This is what your diagram, setting out the **different kinds of sources** of South African law, should look like:

Sources of South African law

Authoritative sources
(**authoritative power**: **binding authority** in court; **create precedents**)

- legislation/statutes/acts of parliament/ Constitution
- court decisions/case law/court cases
- common law
- custom
- African customary (indigenous) law

Persuasive sources
(**persuasive influence** only: **do not bind** the court; **do not create precedents**)

- other legal systems
- foreign law
- views of other modern legal writers

(2) 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.**

(3) 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 that merely have persuasive influence in court and do not bind the court. **Thus, statement (4) is the correct statement.**

Activity 6.3

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 further modules that you may register for. 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 that had previously heard the case, namely the Transvaal Provincial Division (in other words, that 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 from 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 that 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.

> **IMPORTANT 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.**

NAUDE AND ANOTHER v FRASER

G

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.* H I

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-* J

A *mate 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.*

B *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*

C *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*

D *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

E *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.*

F

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)

G 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

H 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

I 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

J and thus contrary to s 8 of the interim Constitution (see *Fraser v Children's*

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)f 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)f 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 (*per* Smalberger 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

A 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 B 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 C 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.)

D *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 E 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 F 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 G 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 H 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 I 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: J 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.) A

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. B

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 C

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 D

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 E

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) (1997 (2) BCLR 153): dicta in paras [21] and [47]–[49] applied

Fraser v Naude and Others 1997 (2) SA 82 (W): referred to F

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 G

Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A): considered

Reyneke v Wetsgenootskap 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 H

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

The Child Care Act 74 of 1983, Regulations, Government Notice R2612 of 1986, regs 4, 21: see *Government Gazette* 10546 of 12 December 1986 at 23, 30 I

The Constitution of the Republic of South Africa Act 200 of 1993, ss 8, 101(5): see *Juta's Statutes of South Africa 1996* vol 5 at 1-134, 1-149

The Constitution of the Republic of South Africa Act 108 of 1996, Schedule 6 item 17: see *Juta's Statutes of South Africa 1997* vol 5 at 1-215. J

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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 *C 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:

Administrateur, 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 Lekhethoa 1949 (1) SA 183 (T)

Doody v Secretary of State for the Home Department and Other Appeals E [1993] 3 All ER 92 (HL)

Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC) (1996 (5) BCLR 658)

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 H *and Another* 1980 (3) SA 476 (T)

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)

I *Lehr v Robertson* 463 US 248 (1983)

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; Chule v Minister of J *Justice, KwaZulu, and Another* 1992 (4) SA 349 (N)

Oberholzer v Padraad van Outjo en 'n Ander 1974 (4) SA 870 (A) 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) B
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) C

Cur adv vult.

Postea (June 26).

Smalberger JA: D

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 E 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 F ('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, G 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* H 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 I 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 J

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A 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'.

B 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 C 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 D 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 E 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 F 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 insofar as it does not require the father's consent for the adoption of an G 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.'

H 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 insofar as I 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).

J

Jurisdiction A

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)[1] 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)). B C

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. D E F G

The common-law position of an unmarried father H

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'. I

As a consequence, current South African law does not accord a father an inherent right of access to his illegitimate child. It does, however,

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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 B 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

C 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 D 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 E 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 F "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 G 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 H 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. Adoptions are currently statutorily regulated by ss 17–27 of the Act, and I 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 J 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-

A tant'). 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 unconstitu-
B tional. (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*)
C 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
D 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
E 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
F 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.'

G 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
H 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
I 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
J 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 Wetsgenootskap 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 B 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 C 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 E application and make an order without giving a hearing to any person.

(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 G 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 H 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 J 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).' A

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). B C

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. D

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.' E

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). F G H I J

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A 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 B 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 C 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 D 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 E 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 F 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 G 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.

H 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)? I 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 J 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 thereof. 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

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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 B 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

C 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 D 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 E 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 F 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 Plewman JA concurred in the judgment of Smalberger JA.

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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 H 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 I 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 (Pty) 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:

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> '. . . (I)t 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 C 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 D 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 E 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 F 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, G 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 H 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 I 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 J 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 B 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 summonsed 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 C 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 D 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 E 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 F 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 G 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.

H 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 I 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 J 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. A

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 summonsing 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*'. B C D E F G H

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 I J

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 B 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 errs 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- C 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 D 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 E 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- F 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 G 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 H 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 imperfect I 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 J that, if there are imperfections in detail, the remedy is legislation.

Melunsky AJA suggests that some obviously undesirable consequences of allowing the unreigned 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: *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G. As the proposition itself indicates there is no magic in naming numbers. The significance is that the other party should be told what he is facing.

Another manifestation of the general principle is to be found in the decision in *Administrator, Transvaal, and Others v Theletsane 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:

A '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 Melunsky AJA that 'the essence' of Fraser's case was that he had the right B 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 construc- C tion 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 D keep the procedure 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 E have had any effect on a past course of events, that the proceedings would in any event have ground 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 F 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 G 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 H 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 I 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 J 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 & Heunis*, Ladysmith; *Naudes*, Bloemfontein. Respondent's Attorneys: *Soller & Manning*, Johannesburg; *McIntyre & Van der Post*, Bloemfontein.

Feedback

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

- References to "common law" and, more particularly, to 17th century Roman-Dutch law. In terms of this law, an illegitimate child was under the parental authority of its mother and its father had no such authority.
- References to decided cases, for example *B v S* 1995 (3) SA 571 (A); *T v M* 1997 (1) SA 54 (A); *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A). (You may wonder why in some of the names, only initials are used instead of full names. This is sometimes done to protect the identity of the parties, especially, for example, where children are involved.)
- References to statutes, in this case the Constitution of the Republic of South Africa 200 of 1993 and the Child Care Act 74 of 1983. (**Note** that the references to the Constitution are to the *interim* Constitution of 1993, in other words, the pre-final Constitution. The reason for this is that this case started before the Constitution was finalised in 1996).[38]

(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

38 See learning units 3 and 7 to 10 for further information on the Constitution.

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 that 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 Children's Act 38 of 2005 came into effect. On 1 April 2010 all the provisions of the Children's Act came into effect. The Children's Act brought about major changes, especially with regard to the parent/child relationship. The Children's Act, for example, repeals the Natural Fathers of Children Born out of Wedlock Act of 1997 and has also changed the meaning of certain terminology that relate to the parent/child relationship.

Thus, if a similar case had to be brought before court now, the judge will first have to consult the Children's Act 38 of 2005. Only then will the judge 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 was an Act that covered 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 were concerned, case law was consulted: see for example, the reference to *Administrator, Transvaal, and Others v Theletsane and Others* 1991 (2) SA 192 (A). Cases often provide clarity on the interpretation of statutes. In other words, they make the statutes easier to understand.

(3) When you read the case, did you spot that the constitutionality of 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 [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 you will learn that the Constitutional Court is the highest court in South Africa.[39] Therefore, the Supreme Court of Appeal cannot overrule a decision of the Constitutional 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. In 2010, the Children's Act 38 of

39 See learning units 7, 10 and 12.

2005 came into effect, which repealed (nullified) the Child Care Act. The Children's Act now governs the position with regard to adoption.

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. We also hope that you recognise that the law is constantly developing, which may result in the creation of new legislation, or in the amendment and improvement of existing legislation. 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. In the activity which follows, you will

- consult a particular statute/Act that 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 (e.g. 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)
↓	↓	↓	↓
Section	sub-section	paragraph	sub-paragraph

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 of her pregnancy."

IMPORTANT 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)

long title

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;

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"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.

section 2

sub-section (1)

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;

paragraph (b)

sub-paragraph (iii)

(*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.

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*.

Schedule

No. and year of law	Short title	Extent of repeal
Act No. 2 of 1975	Abortion and Sterilization Act, 1975	In so far as it relates to abortion.

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?

_____

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_____

(4) What is the underlying philosophy of this Act? Where did you find this in the Act?

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(5) What is the purpose of section 1 of this Act?

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(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.

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(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.

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(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.

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(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.

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(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.

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(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?

_____

_____

_____

Feedback

(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 Sterilisation 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** 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 foetus. Therefore, you could have argued that Eileen can have a legal abortion if her continued pregnancy would result in a severe malformation of the foetus (s 2(1)*(c)*(ii)) 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 [i.e. limitation of a person's freedom] will always constitute a more drastic measure of punishment than a fine.)

conclusion

You should now have a good idea of where to find South African law and the authority that every source carries. In the next four learning units, we shall be looking at the supreme source of law in South Africa, namely the Constitution.

learning unit 7

The Constitution and you

Overview

In **learning unit 3,** we explained how it came about that a constitutional democracy was established in South Africa. In this learning unit, we introduce you to the concept "constitutional democracy". You will learn more about the South African Constitution[40] and the way in which a democratic country is governed. We attempt to make this even clearer with examples of typical "constitutional issues".

Learning outcomes

After you have worked through this learning unit, you should be able to:

- identify constitutional issues from given scenarios and give your own examples
- explain what a constitution is
- name and explain the essential characteristics (features) of the South African Constitution
- explain the following concepts:
  - constitutionalism
  - supremacy (sovereignty) of the Constitution
  - rule of law
  - separation of powers
  - transformative constitutionalism
  - restorative justice
  - ubuntu

40 Constitution of the Republic of South Africa, 1996 (hereafter the 1996 Constitution).

Setting the Scene

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 not heard from him since. A few months ago, parliament passed a new law which said that state hospitals must 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 gives as its reason 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 any provision stating 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, 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 state: "Save our

environment!" "Do not destroy our children's future!" Other placards state: "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 that 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, such as vegetables and fruit, on pavements and at street markets. Certain groups have expressed concern about whether this fresh produce, which was being sold at open-air venues, could be healthy. They are 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 while he is setting up his stall, the police arrive and order him to remove the stall.

Discussion

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

Let us look at the problems in the scenarios.

- Sarah needed 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.
- In disposing of chemical waste, 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.
- The act which prohibits religious practices in schools, concerns the freedom to practise religion in schools. You might ask whether the government may limit this freedom.
- James may think that the municipal by-law which prevents him from selling fresh produce is unnecessarily restrictive because it limits his freedom to trade his products where he wants to. However, other people living in Pretoria may welcome this by-law.

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

> Section 167(7) of the 1996 Constitution describes a **constitutional issue (matter)** as "any issue involving the **interpretation, protection** or **enforcement** of the Constitution".

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", it involves government at national level, provincial level or local level. In other words, we speak about national government, government in your province or government in your community (city or town).

Try to think of at least three examples and write them down below.

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_____

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 unreasonably intruding upon your rights?

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

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Feedback

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

Did you find it difficult to answer the questions that we asked? Do not worry if you did, because these are questions that have been asked through the ages. In the discussion that follows and in the rest of the learning unit, we attempt to answer them. So, keep these questions in mind when you work through the rest of this learning unit.

Discussion

7.1 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 well-being (or interests) of the country's inhabitants and to regulate matters such as health, the environment, education, tourism, housing and population development. These are only a few of the matters which concern the government.

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 these actions. The government is also expected to promote the development of the country. Indeed, the country's inhabitants may demand this from their government. You will have seen from the scenarios at the beginning of this learning unit that "government" happens all the time in everyday life and that it involves and affects all of us. We will be referring back to these scenarios throughout the rest of this learning unit.

7.2 What is a "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 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.**[41]

7.3 What is contained in the 1996 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,**

41 See learning unit 3 for a brief discussion on where our Constitution comes from.

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.[42]

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42 See learning units 8 and 9 for a further discussion on the Bill of Rights.

7.4 Why is the South African Constitution so important?

7.4.1 The spirit and aim of the 1996 Constitution

- **Transformative constitutionalism**

One of the main aims of the Constitution is to address the social and economic injustices of the past.[43] South Africa's Constitution may therefore be characterised (described) as a "transformative constitution".

The concept **"transformative constitutionalism"** means that the **Constitution drives the process of social and economic transformation by making provision for measures to address the injustices and inequalities of the past.** Some of these measures include affirmative action, the protection of socio-economic rights and the prohibition of unfair discrimination.[44] The 1993 interim Constitution illustrated this transformative role of the Constitution clearly by stating that it (the 1993 Constitution) provides

> a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[45]

Although this metaphor (i.e. the image of the Constitution as a "bridge" between the past and the present) has not been included in the 1996 Constitution, it also aptly (appropriately) describes the transformative aim of the current Constitution and specifically the Bill of Rights in Chapter 2.

- **Transformative justice**

All the transformative measures taken to eradicate the social and economic injustices of the past, encapsulate (express) the theory of **"restorative justice"**. According to restorative justice, **reconciliation, rather than retribution (punishment), is the focus in addressing the injustices of the past dispensation.**[46]

43 Humby T *et al Introduction to law and legal skills in South Africa* (Oxford University Press Cape Town 2012) 32.
44 Humby *et al Introduction to law and legal skills* 39.
45 Constitution of the Republic of South Africa 200 of 1993 (hereafter the 1993 Constitution). Under the heading *National Unity and Reconciliation*.
46 Humby *et al Introduction to law and legal skills* 39.

■ ***Ubuntu***

In any discussion on transformation and reconciliation, mention must be made of the concept "ubuntu". Literally, ubuntu means that "a person is a person because of others". It is, however, not easy to provide an all-encompassing definition of ubuntu[47] and different meanings have been ascribed to this African philosophical concept.

In *S v Makwanyane*,[48] Justice Yvonne Mokgoro described ubuntu as follows:

> Generally, uBuntu translates as **humaneness**. In its most fundamental sense, it translates as **personhood** and **morality**. Metaphorically, it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa ubuntu has become a notion with particular resonance in the building of a democracy.[49]

Simply put, ubuntu is "the African world-outlook that one only becomes complete when others are appreciated, accommodated and respected".[50] As such, the concept is closely connected to transformative constitutionalism and restorative justice, which aims to address the injustices of the past.[51]

NOTE

In contrast with the interim 1993 Constitution that included the concept of ubuntu,[52] it is not explicitly mentioned in the 1996 Constitution. The South African courts have, however, in a number of cases applied this concept in their interpretation of the Bill of Rights.

■ **The role of the citizens**

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

47 Mokgoro JY "Ubuntu and the Law in South Africa" 1998 *Potchefstroom Electronic Law Journal* 2-3.
48 *S v Makwanyane and Another* (CCT 3/94) 1995 (3) SA 391 (CC).
49 Paragraph 308. Our emphasis.
50 *City of Tshwane Metropolitan Municipality v Afriforum* CCT 157/15, para 11.
51 Radebe SB and Phooko MR '*Ubuntu* and the law in South Africa: exploring and understanding the substantive content of *ubuntu*' (2017) 36 *South African Journal of Philosophy* 373.
52 Under the heading *National Unity and Reconciliation*, "a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation" is expressed.

be expected to respond to the needs of society. Also, if the people do not insist upon and demand that the rights and freedoms of all people be respected and protected by the government, we cannot expect our constitutional democracy to be strong.

Therefore, we would like to end this discussion on the spirit and aim of the Constitution with the *preamble* to the 1996 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 Sikelel' iAfrika. Morena boloka setjhaba sa heso.*
> *God seën Suid-Afrika. God bless South Africa.*
> *Mudzimu fhatsutshedza Afurika. Hosi katekisa Afrika.*

7.4.2 Special features of the 1996 Constitution

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

(1) Supremacy (sovereignty) 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.** This notion that the law applies to everyone equally, is known as the **"rule of law"**.[53]

53 Humby *et al Introduction to law and legal skills 27.*

In the past (i.e. before the adoption of the 1993 interim Constitution and the 1996 final Constitution), **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 the 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 ruled according to the Constitution, which is the supreme (highest or sovereign) law of the land. Therefore, all legislation may be challenged in terms of the Constitution, in a court, and changed or removed by parliament, if it is found to be inconsistent** (in other words, it does not agree) **with the Constitution**.

If you go back to our scenarios at the beginning of this learning unit, you 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 **changed** or **removed.**

NOTE

It is important for you to understand that the **Constitutional Court** has the final say on the **constitutionality of legislation** (i.e. whether the legislation is consistent with the Constitution). However, it is then the task of **parliament** to **change or remove the legislation in accordance with the decision of the Constitutional Court.** The Constitutional Court may not change (rewrite) or remove the legislation by itself as this is within the powers of parliament. You will understand this better once we have discussed the doctrine of "separation of powers" here below.

(2) Separation of powers

The powers of the state are separated and divided into the following three sections (branches):

- **The legislative authority** that makes laws
- **The executive authority** that applies and carries out laws
- **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 issued by 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.

(3) Structure of the judiciary (courts)

The 1996 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.**[54]

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 decide that parliament must change or remove legislation, if the legislation is not consistent with the Constitution** (i.e. if the legislation does not agree with the Constitution). The Constitutional Court can also make the application

54 We explain the structure of the courts in learning unit 12.

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 (i.e. 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.** When we say that the Constitutional Court has the "final say" in all constitutional matters, it means the following:

- The Constitutional Court is the final court that one would be able to appeal[55] to in a constitutional matter.
- In terms of section 167(5) of the 1996 Constitution, the Constitutional Court makes the **final decision** on whether **legislation is constitutional.** Therefore, if a High Court or the Supreme Court of Appeal makes an order that certain legislation is unconstitutional, such an **order will only have force** once it has been **confirmed** by the Constitutional Court.

> Do you now better understand why the Constitutional Court (which is part of the judicial branch) has the final say on the constitutionality of legislation, but that parliament (which is part of the legislative branch) must change or remove the legislation, in accordance with the decision by the Court?

(4) State institutions supporting democracy

In Chapter 9 of the 1996 Constitution, a number of **state institutions are identified that were set up 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

55 We explain the concept "appeal" in learning unit 12.

These institutions are independent, and their function 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.

(5) The Bill of Rights

The Bill of Rights in Chapter 2 of the 1996 Constitution protects the fundamental rights that each person has.[56] In the next learning unit, we will focus on this important chapter in the South African Constitution.

7.2

(1) Answer the following multiple-choice question:

A number of special features have been built into the 1996 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 will find examples from the news on the radio or on television, 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 may give as many examples as you can find!

56 We will deal with the Bill of Rights in more detail in learning units 8 and 9.

(3) Answer the following multiple-choice question:

The Eastern Cape Parliament has published legislation in which it states that fishermen must in future obtain a permit in order to sell fish to tourists on the beach. The fishermen are very upset and regard this as an infringement on their right to freedom of trade.

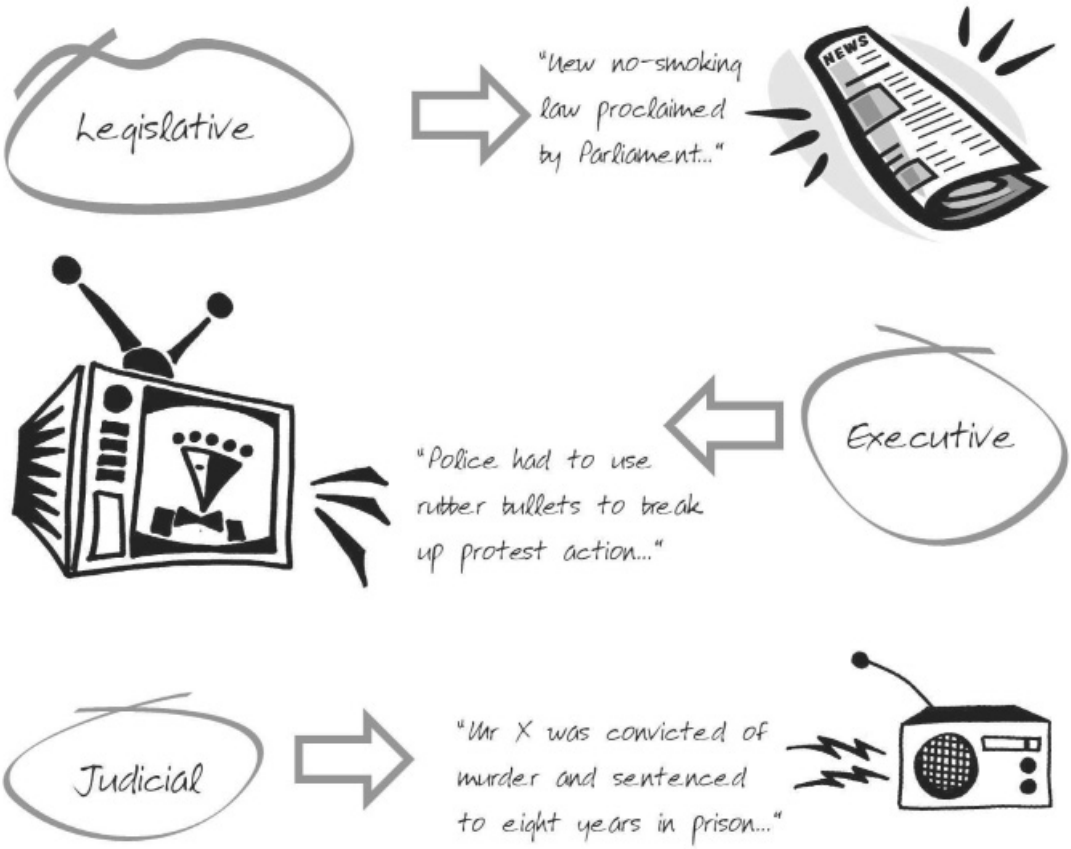
Which **level of government** is applicable in this scenario?

(1) national level
(2) provincial level
(3) local level
(4) executive level

Feedback

(1) **Statement 1 is the odd one out.** In the past, parliament was sovereign, but the 1996 Constitution 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.

(2) ***Separation of powers***



(3) Since it is the Eastern Cape provincial parliament that adopted the legislation, the provincial level of government is applicable in this scenario. **You thus had to choose option (2).**

conclusion

We trust that you now understand the most important concepts related to a constitutional democracy and that you are familiar with the essential characteristics of the South African Constitution.

learning UNIT 8

The Bill of Rights: What are fundamental rights?

Overview

This learning unit focuses on the different **fundamental rights** contained in **the Bill of Rights** (Chapter 2 of the Constitution) and on how they are applied.

Learning outcomes

After completion of this learning unit, you should be able to:

- make a list of the fundamental rights protected in the Bill of Rights and briefly explain what each right guarantees
- identify applicable fundamental rights in real-life scenarios
- explain the nature of fundamental rights
- name and explain the different categories (kinds) of fundamental rights
- indicate to which category (kind) of fundamental rights a specific right belongs
- explain the application of the Bill of Rights
- explain, by way of real-life examples, how fundamental rights are applied 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 learning unit with an activity in order to help you to identify these rights.

Read carefully through the Bill of Rights that you will find at the **end** of **learning unit 8** and make a list of all the fundamental rights that you can identify.

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Discussion

8.1 Introduction

You have probably made 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 be included in the Bill of Rights? Is this a complete list of fundamental rights?

We explained to you in **learning unit 3** that the South African 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 the 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, or 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 instil a culture of human rights for the future.

8.2 Categories (kinds) of fundamental rights

We are sure that when you made your list of fundamental rights, you noticed that there are many different fundamental rights. Some of the 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, these rights safeguard democracy and protect the individual from the abuse of state power. Then there are other rights, such as environmental rights, that "groups" of people will try to realise. Because of these differences, **fundamental rights** are often **divided into three categories (kinds),** namely:

- **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 disgracefully use the power that they have been given by the state. 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:** 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:** These rights are sometimes called **"green rights"**. These rights have more to do with the **group** than with the individual. An example is the **right to clean or unpolluted air.**

8.3 The Bill of Rights in perspective

8.3.1 The nature of fundamental rights

We now have an idea of the different fundamental rights protected in the Bill of Rights and the categories to which they belong. **We will now take a closer look at the nature of these rights.**

> **What is a fundamental right?** It is impossible to give a single, all-encompassing 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 as we are all born with these rights.**

Every person has fundamental rights and the state can never take them away. However, in some cases, these fundamental rights may be **limited**, but **only if this is in agreement with the provisions of the Bill of Rights**.[57] Therefore the Bill of Rights starts with the following statement in section 7:

(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.*

8.3.2 The application of the Bill of Rights

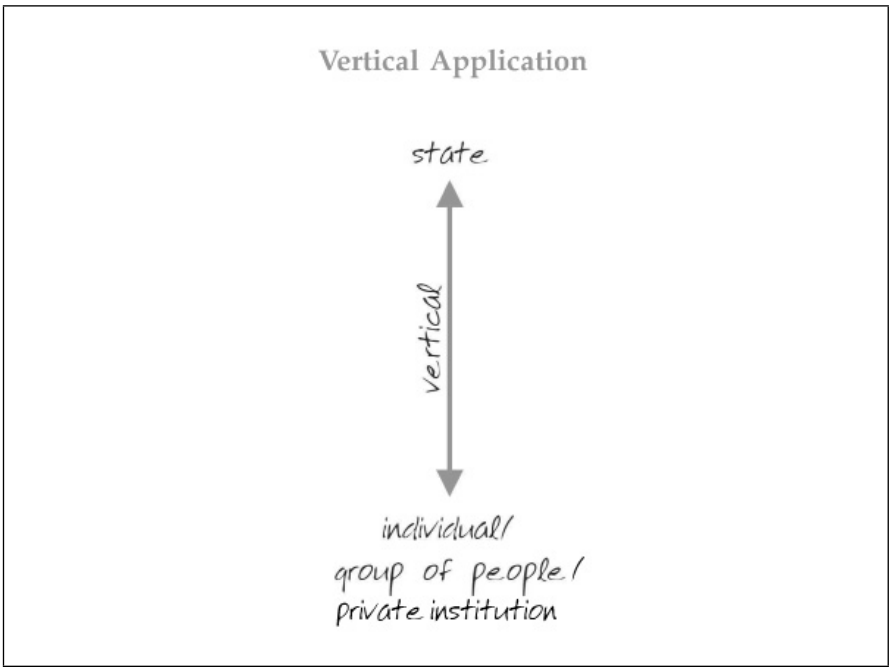
The fundamental rights in the Bill of Rights may either have **vertical** or **horizontal** application. Let us explain.

- **Vertical application**

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.[58] This means that any legislative or executive act[59] 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

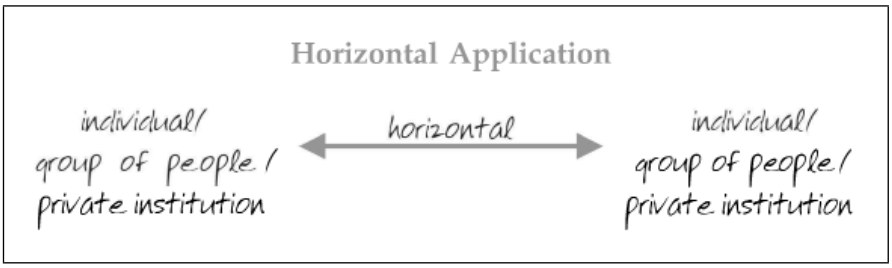
57 We will discuss the limitation of fundamental rights in learning unit 9.
58 We discussed these organs of state in learning unit 7.
59 See the discussion of the separation of powers in learning unit 7 for the functions of each state authority.

application, which means that it applies between the state and the individual or a private institution.



■ **Horizontal application**

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 an employment 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 this to him or her?

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_____

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(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 struggling 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 explaining 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 the **right to human dignity.** You thus had to choose statement (3) as your answer. The rights in statements (1), (2) and (4) are **private-law rights**.

> **NOTE**
>
> It is very important that you **distinguish** here between the **fundamental rights** embodied in the Bill of Rights in the Constitution and **personality rights** in private law (see again **learning unit 2**).

Activity 8.3

Carefully read through the following scenarios. Identify in each instance the **specific fundamental right** which has been infringed, the **category of fundamental rights** that this right belongs to 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 an 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.

1.1 Which **fundamental right** has been infringed?

_____

_____

1.2 Name and describe the **category** of fundamental rights that this fundamental right belongs to.

_____

_____

1.3 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 considers it 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.

2.1 Which **fundamental right** has been infringed?

_____

_____

2.2 Name and describe the **category** of fundamental rights that this fundamental right belongs to.

_____

_____

2.3 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.

3.1 Which **fundamental** right has been infringed?

_____

_____

3.2 Name and describe the **category** of fundamental rights that this fundamental right belongs to.

_____

_____

3.3 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 best qualified 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.

4.1 Which **fundamental right** has been infringed?

_____

_____

4.2 Name and describe the **category** of fundamental rights that this fundamental right belongs to.

_____

_____

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

_____

_____

1.1 The right that is infringed in this scenario is the **right to equality**, as provided for in section 9 of the **Bill of Rights**, and more particularly the right to not be discriminated against on the basis of gender.

1.2 The right to equality belongs to the category of **first-generation (or blue) rights**. These rights are **civil rights, procedural rights and political rights** and are aimed at **protecting the individual from the abuse of state power.**

1.3 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.

2.1 This scenario concerns the **right to an environment** that is not harmful to our health and well-being, which is protected in section 24 of the **Bill of Rights**.

2.2 The right to an environment that is not harmful to our health and well-being belongs to the category of **third-generation (or green) rights. These rights have more to do with the group than with the individual.**

2.3 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.

3.1 This scenario concerns more than one right:

- The drug dealer can rely on section 12 of the Bill of Rights, which provides for the **right to security and freedom** of the person and **the right not to be tortured in any way.**
- The drug dealer can rely on section 35 of the Bill of Rights, which protects 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.

3.2 All of the above-mentioned fundamental rights belong to the category of **first-generation (or blue) rights. These rights are civil rights, procedural rights and political rights and are aimed at protecting the individual from the abuse of state power.**

3.3 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.

4.1 The right that has been infringed, is the right to **equality** in section 9 of the Bill of Rights, and more particularly the right to not be unfairly discriminated against because of one's religion.

4.2 The right to equality belongs to the category of **first-generation (blue) rights.**

4.3 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. In the next learning unit, we discuss the possible limitation of fundamental rights.

Chapter 2 of the Constitution of the Republic of South Africa 108 of 1996: Bill of Rights

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

(*c*) not to be subjected to medical or scientific experiments without their informed consent.

13. Slavery, servitude and forced labour.—No one may be subjected to slavery, servitude or forced labour.

14. Privacy.—Everyone has the right to privacy, which includes the right not to have—

(*a*) their person or home searched;

(*b*) their property searched;

(*c*) their possessions seized; or

(*d*) the privacy of their communications infringed.

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

(*b*) 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

(*o*) of appeal to, or review by, a higher court.

(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 (5); 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

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

(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 necessary 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 customary 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.

learning UNIT 9

Limitation of your fundamental rights

Overview

Fundamental rights may be limited under certain circumstances. In this learning unit we focus on when and how fundamental rights may legally be limited.

Learning outcomes

After completion of this learning unit, you should be able to:

- explain, with reference to examples, the different ways in which fundamental rights may be limited
- explain, with reference to section 36 of the Bill of Rights, the limitation of fundamental rights in real-life situations.
- identify non-derogable rights in real-life situations and explain to which extent these rights are protected in terms of section 37 of the Constitution.

Setting the Scene

Limiting fundamental rights

Read through the following scenarios and note how fundamental rights are limited in each instance.

- 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 violent fights break out. The police are forced to use rubber bullets 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 to identify some of the rights that clash (conflict) in the above scenarios? Do you think that any person or any group can enforce their rights, or are there limitations? **See the discussion that follows for feedback.**

Discussion

9.1 Introduction

You will have to agree that democracy can never work if all fundamental 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 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? They obviously 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?

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.

9.2 Limitation of fundamental rights

Fundamental rights may be limited in different ways:

- **Internal 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 in the particular section.

Read section 9 of the Constitution **(Bill of Rights)**, which deals with the **right to equality**. Subsections (3) to (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** (i.e. 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.

- **Limitation of fundamental rights that are in competition with one another**

Sometimes the different fundamental rights of people may be in direct competition with one another.

In such instances it is more **difficult** to come to a decision on which of these fundamental rights should be limited. 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). It is clear that the fundamental rights of these two groups are in direct opposition. **This is the kind of dispute that must be decided by a court.**

- **Limitation of fundamental rights during a 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.

> **NOTE**
>
> In order to understand which fundamental rights may not be derogated, infringed or suspended, you must study the **Table of Non-Derogable Rights** in **section 37** of the **Bill of Rights**.

- **Limitation of fundamental rights in terms of section 36 of the Bill of 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 considered. The **questions** that **must 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 Bill of Rights to be applied in practice? Let us find out in our next activity!

9.1

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, that 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 and decides to challenge the new act in court.

How would a court use the Constitution to determine whether the new act represents a "legal" limitation of the fundamental right to freedom of trade?

_____

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- A court will have to apply the **limitation clause** in **section 36** of the **Bill of Rights** to determine whether the limitation imposed by the new act is legal. In order to determine this, a court has to apply the following **criteria** in section 36:
- The **first question** that it 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.

- 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. A court must decide whether these reasons are **strong enough to make the limitation of the right of freedom to trade reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.** The **court will take relevant factors into account** to make its determination. For example, **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, conflicts 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 that the law must balance the different rights and interests in our society. This is not done haphazardly 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 about the limitation of your fundamental rights.

learning UNIT 10

The influence on the Constitution on South African law

Overview

This learning unit focuses on the influence of both the interim Constitution of 1993[60] and the final Constitution of 1996[61] on South African law.

Learning outcomes

After you have worked through this learning unit, you should be able to:

- discuss, with reference to relevant case law and legislation, the influence of both the 1993 and 1996 Constitutions on South African law
- discuss and apply the constitutionality of certain legal positions to real-life scenarios

Discussion

10.1 Introduction

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 three decades. Can you imagine the number of cases that the Constitutional Court, the Supreme Court of Appeal and the High Courts have had to decide during this time? As a result of these

60 Constitution of the Republic of South Africa 200 of 1993 (hereafter the 1993 Constitution).
61 Constitution of the Republic of South Africa, 1996 (hereafter the 1996 Constitution).

Constitutions, specifically their Bills of Rights, there have been a number of changes in most fields of law. In this learning unit we will discuss a few selected cases where the influence of the 1993 and 1996 Constitutions on South African law is clearly illustrated. You may perhaps recognise these cases since you have read about them in the newspapers or heard about them on the radio or on television.

10.2 The unconstitutionality of the death penalty

In 1995, the Constitutional Court had to decide, in the case of ***S v Makwanyane***,[62] on the **constitutionality of the death penalty**. The case was brought before the Court after the two accused in this matter were sentenced to death after committing murder.

The Court decided that, in terms of the **1993 interim Constitution**, the death penalty would legally be regarded as **"cruel, inhuman and degrading"**. The death penalty is an infringement on the **right to life** and the **right to human dignity**. 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.

> **NOTE**
>
> Do you remember that we also dealt with the *Makwanyane* case in **activity 6.1 of learning unit 6?** Rereading the case of ***S v Makwanyane*** in **learning unit 6**, we are sure that you will find it even more understandable and meaningful.

10.3 The unconstitutionality of section 18(4)(d) of the Child Care Act 74 of 1983

In 1997, the Constitutional Court had to make a decision on the constitutionality of section 18(4)(d) of the Child Care Act, which determined that **only the consent of the mother of a child born out of wedlock (a child born outside marriage) was required in order to adopt the child.**

The **Constitutional Court** decided in the case of ***Fraser v Children's Court, Pretoria North and Others***[63] that section 18(4)(d) of the Child Care

62 *S v Makwanyane and Another* (CCT 3/94) 1995 (3) SA 391 (CC) (hereafter *S v Makwanyane*).
63 *Fraser v Children's Court, Pretoria North and Others* 1997 (2) SA 261 (CC).

Act was **unconstitutional** since it **infringed on the right to equality**, 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,[64] which came into operation on 4 February 1999, **both the mother and the father of a child born out of wedlock had a say in the adoption of their child**. However, in 2010, the Children's Act 38 of 2005 came into effect, which repealed (nullified) the Child Care Act. **The position with regard to adoption is now governed by the Children's Act.**

> **NOTE**
>
> Do you remember that we also dealt with the Fraser matter and the legislation adopted as a result of this case in **activity 6.3 of learning unit 6**? You should find it more understandable and meaningful if you do this activity again.

10.4 The unconstitutionality of certain sections of the Electoral Act 73 of 1998

Willem Richter, a South African citizen, lived and worked as a teacher in the United Kingdom. In 2009, he brought an urgent application to the Pretoria High Court in which he contended that **certain sections of the Electoral Act 73 of 1998 were unconstitutional, since they violated the right to vote and the right to equal treatment of South Africans living abroad.**

It was argued before the Court 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 provided 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.

In the case of ***Richter v Minister of Home Affairs***, **the Pretoria High Court ruled that sections 33(1)(b) and (e) of the Electoral Act (and some regulations made in terms of the Act) were indeed unconstitutional. It therefore ordered that the Electoral Commission ensure that those**

64 Adoption Matters Amendment Act 56 of 1998.

registered voters absent from South Africa on polling day be given an opportunity to vote by means of a special vote.[65]

The High Court also ordered that **its order declaring the sections of the legislation unconstitutional, be confirmed by the Constitutional Court.**

> **NOTE**
>
> Do you remember that we explained in **learning unit 7** that an order by the High Courts and the Supreme Court of Appeal **declaring legislation unconstitutional**, will only have legal force once it has been **confirmed by the Constitutional Court**?

The **Constitutional Court confirmed the decision by the High Court** and **ruled unanimously that South Africans living abroad have the right to vote if they were already registered as voters.**

The Constitutional Court held that **section 33(1) (b) and (e) of the Electoral Act of 1998 (and some regulations made in terms of the Act) unfairly restricted the right to cast special votes while abroad to a very narrow class of South African citizens**.[66] The Court therefore declared these sections 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 certain date. **Parliament** was instructed to change these sections of the Electoral Act in accordance with the order made by the Court.

> **NOTE**
>
> Do you remember that we explained in **learning unit 7** that the **Constitutional Court** has the **final say on the constitutionality of legislation**, but that it is then the task of **parliament** to **change or remove the legislation** in accordance with the decision of the Constitutional Court?

65 *Richter v Minister of Home Affairs and Others* (4044/09) [2009] ZAGPHC 21; [2009] 2 All SA 390 (T) (9 February 2009).

66 *Richter v Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* (CCT03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) (12 March 2009).

10.5 The recognition of same-sex marriages

Previously, **the definition of marriage in South African law did not include permanent cohabitation relationships** such as same-sex relationships. This issue came before the Constitutional Court in 2005 when Marie Adriaana Fourie and Cecelia Johanna Bonthuys, a same-sex couple, contended that the **common-law definition** of **marriage** as **"a union of one man with one woman, to the exclusion, while it lasts, of all others"** and the reference in the **Marriage Act 25 of 1961** to **"wife"** or **"husband"** excluded same-sex couples from getting married. As a result, they approached the Constitutional Court for an order declaring that the law recognise their right to marry, and that the Minister of Home Affairs and the Director-General be ordered to register their marriage in terms of the Marriage Act.

In the case ***Minister of Home Affairs v Fourie***, the Constitutional Court therefore had to decide whether the fact that no provision was made for this couple, and all those in a similar situation, to marry each other, amounted to a **denial of equal protection of the law and unfair discrimination by the state** against them because of their **sexual orientation**.

The **Constitutional Court decided that a permanent cohabitation relationship must be included in the definition of marriage**. The Court held that the **definition of marriage,** in terms of the **common law** and the **Marriage Act 25 of 1961**, was **unconstitutional** on grounds of the **right to equality** in section 9 of the Constitution and the **right to human dignity** in section 10 of the Constitution. The Constitutional Court gave **parliament** two years to change the position.[67]

At the end of 2006, the **Civil Union Act 17 of 2006 came into operation**, allowing **same-sex and heterosexual couples** to enter into a **marriage or a civil partnership** in terms of section 11(1) of the Act. 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 in section 1** 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.

In terms of section 11(1) of the Act, civil union partners must choose whether they want to call their union a **marriage** or a **civil partnership**.

67 *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

Regardless of the name they choose, section 13(1) determines that the union has exactly the **same consequences** as a civil marriage in terms of the Marriage Act. A civil union also **dissolves** in the same way as a civil marriage.

Activity

10.1

Read the following two scenarios and answer the questions with reference to the Constitution and relevant legislation and/or case law.

(1) Thabo and Sipho are friends and enthusiastic soccer supporters. Thabo supports the Sparrows and Sipho is a supporter of the Panthers. One Saturday evening, they are at their local sports bar, watching a soccer match between these two teams. The Panthers wins the match by one goal. After the match, Thabo and Sipho have a heated argument on whether the referee made the correct decision in awarding the winning goal to the Panthers. Thabo gets so angry that he punches Sipho several times during their argument. Sipho sustains severe head injuries and dies a few days later in hospital. Thabo is arrested and charged with committing murder. Thabo's elderly grandmother is very concerned that he may be given the death penalty, if found guilty of murder. Is her concern valid? Motivate your answer.

(2) John and Stephen have been in a same-sex relationship for the past six years. They want to get married, but are not sure what their legal position is in this regard. One of John's colleagues told them that the South African law only makes provision for a marriage between a man and a woman. They approach you, their attorney, to explain their legal position to them.

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(1) In 1995, the Constitutional Court decided in ***S v Makwanyane*** that, in terms of the 1993 (interim) Constitution, the death penalty was a **cruel, inhuman and degrading** form of punishment that infringed on the **right to life** and the **right to human dignity**. It therefore decided that the death penalty was in conflict with the provisions of the **Bill of Rights** and thus an **unconstitutional form of punishment**. As a result, the death penalty was **abolished** in South Africa. Consequently, Thabo's grandmother does not need to be concerned that he will be given the death penalty, if found guilty.

(2) In 2005, the **Constitutional Court** decided in ***Minister of Home Affairs v Fourie*** that the **definition of marriage** in terms of the **common law** and the **Marriage Act** was **unconstitutional** on grounds of the **right to equality** and the **right to human dignity**. The Court held that permanent cohabitation relationships of **same-sex and heterosexual couples** had to be **included in the definition of marriage**. As a result of the order by the Constitutional Court,

parliament adopted the **Civil Union Act** that now a**llows same-sex couples to enter into a civil union**. Partners to a civil union must **choose** whether they want to call their union a **marriage** or a **civil partnership**. A **civil union** has exactly the same **consequences** as a civil marriage, regardless of whether it is called a civil partnership or a **marriage**, and it also **dissolves** in the same manner. John and Stephen may therefore enter into a civil union in terms of the Civil Union Act.

conclusion

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 will become aware of more cases as our courts continue to report on these matters.

learning UNIT 11

The legal profession

Overview

In this learning unit you will be introduced to the **legal professions** in both the **private sector** and the **public service** in South Africa. You will also be introduced to **court officials in the public service**. All the members of the different legal professions and the court officials play an important role in the administration of justice in South Africa.

Learning outcomes

After completing this learning unit, you should be able to:

- name and discuss the legal professions in the private sector
- name and discuss the legal professions in the public service
- describe the court officials in the public service and explain their functions

Setting the Scene

Members of the legal profession

Thato Nkone graduated with her LLB degree from UNISA in early 2018. The LLB degree is a four-year law degree in South Africa and can be used to enter all legal professions. She is delighted when she is offered a position as a candidate attorney (aspirant attorney)[68] at J&J Attorneys. However, she is well aware that she must first comply with all the admission requirements prescribed by law before she can practise as an attorney. This includes practical vocational training, a programme of structured course work and passing the attorneys' admission examinations. Jane Mothibe, who heads the litigation section at J&J Attorneys, is the attorney who trains and supervises her. In her first week at J&J Attorneys, Thato accompanies

68 Kleyn D *et al Beginner's guide for law students* 5th ed (Juta Claremont 2018) 339.

Jane to court to listen to a case in which Jane is representing one of her firm's clients. During her first week at the firm, Thato also finds time to listen to cases in some of the other courts. She soon realises that there are many different people who are involved when a case is brought to court. After a week in court, Jane asks Thato to identify and explain the role of the different members of the legal profession and the different types of presiding officers and court officials.

Discussion

11.1 Introduction

Thato will certainly appreciate some assistance in the task that Jane has given her! However, before we assist her with a discussion, let us help her to briefly identify the most important role players in the administration of justice in our courts:

- **Members of the legal profession who practise law privately (that is, for their own account) and are called private legal practitioners, namely attorneys and advocates.**
- **Members of the legal profession in the public service (civil servants), who practise law on behalf of the state, for example, public prosecutors and state advocates, state attorneys and state legal advisers.**
- **Presiding officers who are also members of the legal profession in the public service, for example, magistrates and judges.**
- **Court officials who take part in court proceedings, for example, the court orderly, the court interpreter and the family advocate.**
- **Court officials who are responsible for administrative matters that relate to courts and the law, for example, the master of the high court, the registrar of the high court, the clerk of the court and the sheriff.**

11.2 Legal professions in the private sector

11.2.1 Introduction

We start our discussion with the legal professions in the private sector. Traditionally in South Africa, lawyers have followed two legal professions to become private legal practitioners. They have become either attorneys or advocates.

It is important for Thato to know that these two legal professions in the private sector are undergoing a process of restructuring and change since the Legal Practice Act 28 of 2014 (as amended)[69] (hereafter referred to as the Legal Practice Act) came into full effect on 1 November 2018.[70] Therefore, if Thato wants to keep updated with the restructuring process and changes, she will have to read the Legal Practice Act together with subsequent (later) legislation or subordinate legislation that may change the Act, or provide information left out in the Act because the information was not available at the time it came into operation. This may include later amendments to the Act, rules and regulations (notices) promulgated in terms of the Act and published in the Government Gazette. It is important for Thato to ensure that she always consults an amended (updated) version of the Legal Practice Act, if she wants to know the latest developments regarding the position of private legal practitioners in South Africa.[71]

Before we continue our discussion on the legal professions in the private sector, let us pause for a moment and briefly look at the reasons for the implementation of the Legal Practice Act, to whom the Act is applicable and the establishment of a new, single regulatory body to which all legal practitioners must belong.

11.3 Legal Practice Act 28 of 2014

11.3.1 Reasons for the implementation of the Act

In **learning unit 6**, you learnt that the preamble of an act reflects the underlying philosophy of that act and gives the reasons for the implementation of the specific act. **The preamble of the Legal Practice Act provides the following reasons for its implementation:**

69 As amended by the Legal Practice Amendment Act 16 of 2017 (that came into effect on 18 January 2018).
70 Kleyn *et al Beginner's guide for law students* 338.
71 Kleyn *et al Beginner's guide for law students* 66–67 339 341. See also, www.lssa.org.za (Date of use: 20 May 2019).

- Section 22 of the Bill of Rights of the Constitution of South Africa[72] establishes the right to freedom of trade, occupation and profession, and provides that the practice of a trade, occupation or profession may be regulated by law. (The right to freedom of profession and the regulation of the legal professions of attorneys and advocates by law is therefore in line with section 22 of the Constitution.)
- Different laws on the legal profession in different parts of South Africa resulted in the legal profession being fragmented and divided.
- Access to legal services is not a reality for most South Africans.
- The legal profession is not broadly representative of the demographics of South Africa.
- Existing legislation restricts entry opportunities into the legal profession.

11.3.2 Purpose of the Act

Do you still remember where to find the purpose of an act? If your answer is "long title", your answer is of course correct. Let us look at the long title of the Legal Practice Act and determine the **different purposes of this Act**:

- to provide legislation for the transformation and restructuring of the legal profession into a profession that
  - is in line with constitutional imperatives and values
  - is broadly representative of the Republic's demographics
  - facilitates (makes it easier) and enhances (strengthens) an independent legal profession
- to establish a single regulatory (governing) statutory body, the South African Legal Practice Council and Provincial Councils, that will regulate the affairs of legal practitioners and will set norms and standards for them
- to provide requirements for the admission and enrolment of legal practitioners
- to regulate the professional conduct of legal practitioners and the accountability of the legal profession to the public
- to ensure that legal services are accessible to the public
- to ensure that entry into the legal profession is unrestricted

72 Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).

11.3.3 To whom is the Act applicable?

This Act is applicable to all legal practitioners and all candidate legal practitioners.[73] We find the meanings of legal practitioner and candidate legal practitioner as well as other important words in this regard in section 1 (the definition clause) of the Legal Practice Act.

> **NOTE**
>
> **"Legal practitioner"** refers to an **advocate** or an **attorney** admitted to the High Court and enrolled on the Role of Legal Practitioners by the Legal Practice Council.
>
> **"Candidate legal practitioner"** refers to a **person undergoing practical vocational training (PVT), either as a candidate attorney or as a pupil.**
>
> **"Practical vocational training"** means **training** required **in terms of the Legal Practice Act to qualify as a candidate attorney <u>or</u> pupil** in order **to be admitted and enrolled** as an **attorney or advocate.**
>
> ("Practical vocational training" is a new concept. Prior to the Legal Practice Act, the concept "articles of clerkship" was used in the case of attorneys and "pupillage" in the case of advocates.)
>
> **"Candidate attorney"** means a **person undergoing practical vocational training** with a view t**o being admitted and enrolled as an attorney.**
>
> **"Pupil"** means a **person undergoing practical vocational training** with a view **to being admitted and enrolled as an advocate.**

11.3.4 The Legal Practice Council

In terms of section 4 of the Legal Practice Act, **the Legal Practice Council (LPC) is a single national regulatory body that regulates the affairs of all legal practitioners (attorneys and advocates) and candidate legal practitioners.** The **mandate** of the Legal Practice Council includes the following:

- to establish provincial councils and delegate some if its powers to the provincial councils
- to set norms and standards for all legal practitioners
- to provide for the admission and enrolment of legal practitioners
- to regulate the professional conduct of legal practitioners to ensure accountability by way of a code of conduct

73 Section 2 of the Legal Practice Act.

Now that you know more about the background to the Legal Practice Act and the Legal Practice Council, we continue our discussion of the private legal practitioners who practise law for their own account, namely attorneys and advocates. We focus on the admission requirements for legal practitioners in South Africa, as prescribed by the Legal Practice Act and the Rules and Regulations promulgated in terms of the Act, their respective functions in legal practice, their right of appearance in courts as well as their membership to the Legal Practice Council.

11.4 Attorneys

11.4.1 Admission requirements

If a person wants to practise law as an attorney, he or she must apply to the High Court to be admitted as an attorney.[74] If attorneys are admitted to the High Court, **they must apply to the Legal Practice Council for enrolment of their names on the Roll of Legal Practitioners**.[75]

Regulations applicable to the Legal Practice Act[76] regulate the minimum legal qualifications and practical vocational training requirements for candidate attorneys before they can be admitted by the court as legal practitioners. **A candidate attorney must meet the following requirements before he or she can be admitted as an attorney:**

- must obtain an LLB degree
- must complete practical vocational training (PVT) for 24 months **and** a programme of structured course work of a minimum of 150 notional hours

  OR

  must complete practical vocational training (PVT) for 12 months **and** a programme of structured course work of a minimum of 400 notional hours

- must be a fit and proper person to be admitted as an attorney
- must successfully complete a competency-based examination as determined by the Legal Practice Council, in other words, the attorneys' admission examinations[77]

74 Section 24 of the Legal Practice Act.
75 Section 30 of the Legal Practice Act.
76 See the Regulations in terms of section 109(1)(a) of the Legal Practice Act that were published in the *Government Gazette* of 31 August 2018.
77 Kleyn *et al Beginner's guide for law students* 339.

NOTE

Candidate attorneys may **complete their practical vocational training** with attorneys practising alone, in a firm of attorneys (consisting of partners), at a commercial juristic entity, with a state attorney, or at law clinics.

The **programme** of **structured course** work refers to the attendance of a standardised and uniform training course presented at a Practical Legal Training School of the Law Society of South Africa. This training course consists of a specific number of prescribed compulsory modules.[78]

11.4.2 Functions in practice

Attorneys are trained lawyers who can advise clients and represent them in court. Thato notices that clients approach the attorneys in J&J Attorneys for advice on a variety of legal problems. Therefore, their **functions** deal with various matters, such as:

- providing legal advice in divorce matters
- drafting of wills
- drafting of other legal documents (e.g. antenuptial contracts and purchase contracts)
- transferring property from one person to another
- administration of deceased estates
- legal advice with regard to claims as a result of motor accidents

Thato realises that **some attorneys are actually legal administrators, because the largest part of their daily work is of an administrative nature**. Now she understands why attorneys are often referred to as the **general practitioners of the legal profession**. Clients approach attorneys directly and the attorneys do the initial work or investigation on a case. If necessary, the attorney will refer the case to an advocate. Since Jane prefers litigation, she appears in court to represent clients, but she refers most of her cases to advocates for court appearances, as advocates are specialists in litigation. However, Jane tells Thato that attorneys are more frequently becoming specialist litigators and appear in court more often, especially at bigger firms of attorneys.[79]

Since the functions of practising attorneys have always included providing services for a fee and the handling of clients' funds, certain financial

78 Kleyn *et al Beginner's guide for law students* 339.
79 See Kleyn *et al Beginner's guide for law students* 339 342.

responsibilities have been imposed (placed) on the attorney. **The Legal Practice Act still regulates these financial responsibilities by way of the Fidelity Fund and requires legal practitioners to apply for a Fidelity Fund certificate.** The purpose of the Fidelity Fund is to reimburse or compensate clients who may have suffered financial loss due to misappropriation by a legal practitioner.

11.4.3 Right of appearance in courts

In the past, attorneys only had the right to appear in the lower courts (magistrates' courts). They did not have a right of appearance in the High Court (previously referred to as the "Supreme Court"). Since the enactment of the Right of Appearance in Courts Act 62 of 1995, attorneys could apply to the registrar of a provincial division of the High Court to be granted the right of appearance in the High Court. Attorneys, who acquired the right of appearance in the High Court, could also appear in the Supreme Court of Appeal and the Constitutional Court. **However, the Right of Appearance in Courts Act has now been repealed by the Legal Practice Act.**[80]

Section 25 of the Legal Practice Act now regulates the right of appearance of attorneys in court. **In terms of the Act, attorneys still do not have an automatic right of appearance in the high courts and must apply for such a right.** Attorneys who want to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court, must apply to the Registrar of the Division of the High Court in which he or she was admitted and enrolled as an attorney, for a prescribed certificate in order to obtain a right of appearance.[81]

11.4.4 Membership to Legal Practice Council

In the past, attorneys were regulated and represented by their own independent professional body, the Law Society of South Africa (LSSA). **However, under the Legal Practice Act, attorneys must belong to the Legal Practice Council as the statutory (regulatory) body that regulates the affairs of all legal practitioners.**[82] The Legal Practice Act did not abolish (do away with) the Law Society of South Africa. **The Law Society**

80 See section 119 of the Legal Practice Act, as well as the SCHEDULE (Laws repealed or amended by section 119) at the end of the Act.

81 Section 25(3) of the Legal Practice Act.

82 See Phakati B *New Legal Practice Council will regulate all legal practitioners and juristic entities* Business Day 04 September 2018 https://www.businesslive.co.za/bd/national/2018-09-04-new-legal-practice-council-will-regulate-all-legal-practitioners-and-juristic-entities/ (Date of use: 9 May 2019). See also https://www.lssa.org.za/about-us/history (Date of use: 9 May 2019).

of South Africa (LSSA) continues to exist in the Legal Practice Act dispensation as a voluntary, representative, professional body that promotes the interests of attorneys.[83]

11.5 Advocates

11.5.1 Admission requirements

If a person wants to practise law as an advocate, **he or she must apply to the High Court to be admitted as an advocate.**[84] Once they have been admitted to the High Court, **they must apply to the Legal Practice Council for enrolment of their names on the Roll of Legal Practitioners.**[85]

Regulations to the Legal Practice Act[86] regulate the minimum legal qualifications and practical vocational training requirements for pupils (aspirant advocates) before they can be admitted by the court as legal practitioners. **A pupil must meet the following requirements before he or she can be admitted as an advocate:**

- must obtain an LLB degree
- must complete service under practical vocational training for 12 months
- must complete a programme of structured course work of not less than 400 hours
- must be a fit and proper person to be admitted as an advocate
- must successfully complete a competency-based examination as determined by the Legal Practice Council, in other words, the bar examinations [87]

83 Whittle B *Legal Practice Council has not replaced Law Society – LSSA* https://www.politicsweb.co.za/politics/legal-practice-council-has-not-replaced-law-society 8 November 2018 (Date of use: 9 May 2019). See also Kleyn *et al Beginner's guide for law students* 344.
84 Section 24 of the Legal Practice Act.
85 Section 30 of the Legal Practice Act.
86 See the Regulations in terms of section 109(1)(a) of the Legal Practice Act that were published in the *Government Gazette* of 31 August 2018.
87 Kleyn *et al Beginner's guide for law students* 341.

NOTE

Pupils may complete their **practical vocational training** under a practising advocate, an advocate employed at a law clinic, or under any institution approved by the Legal Practice Council.[88]

The **programme** of **structured course** work refers to the attendance of a standardised and uniform training course that may be offered by a society of advocates, the National Bar Council of South Africa or the General Council of the Bar. This training course consists of a specific number of prescribed compulsory modules.[89]

11.5.2 Functions in practice

Like attorneys, advocates work for their own account. Advocates are specialist litigators and spend most of their time representing clients in court. Traditionally, clients have never approached advocates directly. Clients rather approached attorneys who did the initial work or investigation on a case. If necessary, the attorney may have referred the case to an advocate. The advocate will then take the case further, write opinions and appear in court. Thus, in the past, only attorneys accepted instructions directly from members of the public. Advocates were not allowed to do so. This separation between the attorneys and advocates professions indicated that attorneys and advocates played specific roles in servicing a client's interests.

The Legal Practice Act[90] has changed this traditional position and now distinguishes between two kinds of advocates, namely:

- **advocates**
- **Fidelity Fund advocates**

This means that clients may now approach Fidelity Fund advocates, who are in possession of Fidelity Fund certificates, directly without an attorney. These advocates can provide legal services for a fee. Therefore, clients will no longer have to approach Jane directly for legal assistance. They may approach an advocate directly, without consulting with Jane. However, as in the case of attorneys, the **Legal Practice Act also regulates the position of advocates by way of the Fidelity Fund and a required Fidelity Fund certificate.**

88 Kleyn *et al Beginner's guide for law students* 341.
89 Kleyn *et al Beginner's guide for law students* 341.
90 Section 34(2)(a)(ii) of Legal Practice Act.

11.5.3 Right of appearance in courts

Advocates have always had an **automatic right of appearance in all the courts (lower, as well as higher courts) and section 25 of the Legal Practice Act does not change this position**. Advocates still have the automatic right of appearance in all courts.

11.5.4 Membership of a professional body

Practising advocates usually belonged to one of the **professional Bar Councils** linked to the divisions of the High Court. An example of a Bar Council is the "Johannesburg Bar". **The General Council of the Bar of South Africa used to be the umbrella body of the Bar Councils** that regulated the profession of advocates. **However, under the Legal Practice Act, advocates must belong to the Legal Practice Council as the statutory (regulatory) body that regulates the affairs of all legal practitioners.**[91]

The Legal Practice Council did not replace the General Council of the Bar of South Africa. Like the Law Society of South Africa (LSSA), **different Bar Councils under the General Council of the Bar of South Africa may continue to exist in the form of voluntary associations that promote the interests of advocates.**[92]

Activity **11.1**

Now that you have a basic understanding of the legal professions in the private sector and the Legal Practice Act regulating these private legal practitioners, answer the questions that follow:

(1) Indicate the **correct** statement:

Attorneys and advocates are referred to as private legal practitioners because they

91 See Phakati B *New Legal Practice Council will regulate all legal practitioners and juristic entities* Business Day 04 September 2018 https://www.businesslive.co.za/bd/national/2018-09-04-new-legal-practice-council-will-regulate-all-legal-practitioners-and-juristic-entities/ (Date of use: 9 May 2019). See also https://www.lssa.org.za/about-us/history (Date of use: 9 May 2019).

92 Whittle B *Legal Practice Council has not replaced Law Society – LSSA* https://www.politicsweb.co.za/politics/legal-practice-council-has-not-replaced-law-society 8 November 2018 (Date of use: 9 May 2019). See also Kleyn *et al Beginner's guide for law students* 344.

(1) act on behalf of the state.
(2) practise for their own accounts.
(3) perform similar functions in court.
(4) train candidate attorneys and pupils.

(2) **Identify <u>and</u> explain** the most important change that the Legal Practice Act has on the functions of advocates as private legal practitioners.

(3) Indicate whether the following statement is **true** or **false**:

In terms of section 25 of the Legal Practice Act 28 of 2014, both advocates and attorneys now have an automatic right of appearance in all courts in South Africa.

(4) **Consider** the following **two** statements:

(a) The South African Legal Practice Council is a single statutory body that regulates the affairs of all legal practitioners (attorneys and advocates) and candidate legal practitioners.
(b) The Legal Practice Act abolished the Law Society of South Africa and the General Council of the Bar of South Africa as associations that used to regulate the affairs of attorneys and advocates respectively.

Choose the correct option:

(1) (a) and (b) are correct.
(2) (a) and (b) are incorrect.
(3) (a) is correct; (b) is incorrect.
(4) (a) is incorrect, (b) is correct.

(1) **Statement (2) is the correct statement.** Remember that attorneys and advocates are members of the legal profession who practise privately (that is, for their own accounts). This is why they are referred to as private legal practitioners.

(2) The Legal Practice Act distinguishes between **two kinds of advocates**, namely:

- **advocates**
- **Fidelity Fund advocates**

This means that clients can now approach Fidelity Fund advocates, who are in possession of Fidelity Fund certificates, directly without an attorney. These advocates can provide legal services for a fee.

(3) The statement is **false**.

Position of advocates: Advocates have always had and still have an **automatic right of appearance in all the courts** (lower as well as higher courts). Section 25 of the Legal Practice Act has not changed their position.

Position of attorneys: In terms of section 25 of the Legal Practice Act, attorneys still **do not have an automatic right of appearance in the high courts and must apply for such a right**. Attorneys who want to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court, must **apply** to the Registrar of the Division of the High Court, in which he or she was admitted and enrolled as an attorney, for a prescribed certificate in order to obtain a right of appearance.

(4) **Statement (a) is correct.** The South African Legal Practice Council is a single statutory body that regulates the affairs of all legal practitioners (attorneys and advocates) and candidate legal practitioners.

Statement (b) is incorrect. The Law Society of South Africa and the General Council of the Bar of South Africa continue to exist in the Legal Practice Act dispensation as voluntary, representative, professional bodies that promote the interests of attorneys and advocates respectively.

Since statement (a) is correct and statement (b) is incorrect, option (3) is the correct option that you had to choose.

You should now understand that **attorneys** and **advocates** are examples of **private legal practitioners** who **practise for their own accounts** and **are involved in the administration of justice**. You should also have a **basic understanding of the influence of the Legal Practice Act** on the legal professions of attorneys and advocates. Let us now discuss **public legal practitioners** who **do not practise for their own accounts**, but who are **employed by the state** and are involved in the **administration of justice**.

11.6 Legal professions in the public service

In the public service, the Department of Justice and Constitutional Development and other government departments offer different legal professions and careers that relate to the administration of justice in South African courts. Let us look at these professions and careers.

11.6.1 Prosecutors: public or state prosecutors and state advocates

When Thato was observing the court proceedings, she noticed that in criminal proceedings, there were certain members of the legal profession who were acting on behalf of the state. As far as the law is concerned, every crime that is committed, is a crime committed against the **state**. Therefore, it is usually the state that institutes proceedings to enforce criminal law. **It is the responsibility of the Director of Public Prosecutions (DPP) to institute criminal proceedings. He or she delegates this authority (gives this power) to institute criminal proceedings to**

- **public prosecutors or state prosecutors** (in the lower courts) or
- **state advocates** (in the higher courts)

Prosecutors will decide whether an individual will be prosecuted in terms of the criminal law, after looking at all the evidence that has been presented to them, by the police. If a public prosecutor decides to prosecute the individual, then the public prosecutor or state prosecutor will represent the state in the lower courts. Similarly, a state advocate will represent the state in the higher courts. Prosecutors spend most of their time in court.[93]

NOTE

We said above that it is *usually* the state that institutes proceedings to enforce criminal law. However, if the state decides not to prosecute the offender, the Criminal Procedure Act 51 of 1977 makes provision for the institution of a private prosecution to enforce the criminal law. For example, a victim of assault could prosecute the offender in his or her personal capacity.[94]

93 Kleyn *et al Beginner's guide for law students* 344.
94 Humby T *et al Introduction to Law and Legal Skills in South Africa* (Oxford University Press Cape Town 2012) 223.

11.6.2 State attorneys

State attorneys do the same work as ordinary attorneys. The only difference is that their clients are the different government departments and not private individuals or private institutions. The state attorney's major function is to **protect the interests of the state** by acting for all government departments and administrations in civil matters, and for officials sued in their official capacity as employees of the state.[95]

11.6.3 State legal advisors

State legal advisors are state advocates who provide specific legal services to government departments at national, provincial and municipal level. These services include legal research, legal advice, checking of existing legislation and drafting of new legislation. They can also hold positions in international organisations such as the African Union and the United Nations.[96]

You should now understand that public or state prosecutors, state advocates, state attorneys and state legal advisors are public legal practitioners who play an essential role in the judicial arena and in the administration of justice. Now let us discuss the role of presiding officers who are also members of the legal profession in the public service, but who are responsible for making decisions in court cases.

11.7 Presiding officers

11.7.1 Judges

Thato observes that presiding officers are called by different names in the higher and lower courts. **Judges are presiding officers in the higher courts** (that is, the Constitutional Court, the Supreme Court of Appeal, and the High Court). A judge is required to have an excellent knowledge of the theory and practice of the law. Judges are **appointed for life** and **may come from any of the branches (sections) of the legal profession.** They **are officials paid by the Department of Justice.** The **President of the country** (the head of the executive branch of government) appoints judges, after consultation with, among others, the **Judicial Service Commission**.

95 Kleyn *et al Beginner's guide for law students* 344. See also http://www.justice.gov.za/about/sa-courts.html (Date of use: 8 April 2019).
96 Kleyn *et al Beginner's guide for law students* 344–345.

This Commission mainly consists of members of the legal profession and is independent of both the legislative and executive branches of government.

11.7.2 Magistrates

Magistrates perform a similar function to judges. However, they **preside over the lower courts** (that is, the district and regional magistrates' courts). Magistrates are also required to have a solid knowledge of the theory and practice of law. **Magistrates are appointed by the Magistrates' Commission.**

NOTE

Presiding officers (magistrates and judges) are the persons who ***preside*** over legal proceedings in court (in other words, who are in charge in court and maintain order), and ***decide*** a legal case.

Their role in court is to conduct full, fair and impartial hearings without unnecessary delays. This duty requires presiding officers to:

- **consider the facts of the case**
- **consider the arguments and evidence put before court by the legal representatives of the different parties**
- **find <u>and</u> apply the relevant law to the facts of the case**
- **come to a decision** about the matter

Activity 11.2

Now that you have an understanding of the different members of the legal profession in the public service, answer the questions that follow:

(1) Indicate the **correct** statement

State advocates are also known as:

(1) public prosecutors
(2) private legal practitioners
(3) public legal practitioners
(4) presiding officers

(2) **Consider** the following **two** statements:

(a) Judges are presiding officers in the higher courts.
(b) Magistrates perform a similar function to judges, however, they are presiding officers in the lower courts.

Choose the **correct** option:

(1) (a) and (b) are correct.
(2) (a) and (b) are incorrect.
(3) (a) is correct; (b) is incorrect.
(4) (a) is incorrect, (b) is correct.

Feedback

(1) **Statement (3) is correct.** State advocates (in the higher courts) and public or state prosecutors (in the lower courts) are involved in the administration of justice and act on behalf of the **state**. They are therefore known as **public legal practitioners**.

(2) **Option (1) is correct because both statements (a) and (b) are correct.** Magistrates and judges are presiding officers who are in charge, or who preside over legal proceedings in court.

11.8 Court officials

In addition to members of the legal profession in the public service who provide legal advice to clients and the state, who represent clients and the state in court, and presiding officers who make decisions about legal disputes, there are also **different personnel who are responsible for carrying out other official duties in the courts.** They are known as **court officials.** We will now discuss the different types of court officials. Some are involved in **court proceedings**, whilst others are involved in **administrative matters** that relate to courts and the law.

11.8.1 Court officials involved in court proceedings

11.8.1.1 Court orderly

The court orderly is usually a police officer appointed by the South African Police Service. Some of the **functions** of the court orderly include:

- maintaining order, silence and decency in and around the court
- ensuring the safety of the presiding officer(s) (e.g. judge(s) or magistrate(s)) and other court personnel, accused, witnesses, as well as members of the public attending court

- escorting accused or witnesses to the court room and placing them in the witness or accused dock[97]

11.8.1.2 Court interpreter

In terms of section 35 of the Constitution, all citizens have the right to a fair trial and this right includes the right to a trial in the language of their choice.[98] Since we have 11 official languages in South Africa, persons with a sound knowledge of the different official languages, especially of the indigenous languages, are in high demand and play an increasingly important role in our court system as court interpreters. This demand is also true for other foreign languages.[99] **The function of the court interpreter is to provide language interpretation in court for those who are not proficient in English. A court interpreter must make sure that all parties to a case understand the legal proceedings in a language of their choice.**[100]

11.8.1.3 Family advocate

The position of family advocate was created by the **Mediation in Certain Divorce Matters Act 24 of 1987**. In terms of this Act, **the function of the family advocate is to protect the interests of children in divorce disputes.** The court may decide to refer a case to the family advocate when the court is of the opinion that the **interests of the child or children** in a dispute are at stake. **The role of the family advocate is then to evaluate the circumstances of the parties to the dispute and make a recommendation to the court.** One of the parties to the dispute may also **request the court** to refer the matter to the family advocate for a recommendation.[101]

11.8.2 Court officials involved in administrative matters that relate to courts and the law

11.8.2.1 Registrar of the High Court

A Registrar of the High Court is appointed for every High Court. This official (similar to a secretary)[102] is **responsible for the administration**

97 See www.khayelitshacommission.org.za/.../122-3-standing-orders-201-300.html?...1420 (Date of use: 8 April 2019).
98 Kleyn *et al Beginner's guide for law students* 372.
99 See Lebese SJ *The undefined role of court interpreters in South Africa* (MA dissertation University of South Africa 2013); Moyo CS *The growing need for foreign language court interpreters in South African courts* (MA dissertation University of Witwatersrand 2006).
100 See http://www.justice.gov.za/juscol/f-lqj-03.html (Date of use: 8 April 2019).
101 Kleyn *et al Beginner's guide for law students* 346.
102 Kleyn *et al Beginner's guide for law students* 345.

and documentation in the High Court. Some of the Registrar's **functions** include:

- receiving, filing, safekeeping and distribution of legal documents
- receiving of fines
- issuing of summonses for people to appear in court
- finalising the court roll [103]

> **NOTE**
>
> **A summons** is a document which usually initiates (starts) a case. It is the first document that begins the litigation (legal action) process.[104]
>
> **A court roll** is a list that may include the following information of a specific court: the date; the different cases that will be heard on the specific date; the court in which the case will be heard; the case number and name of the case; as well as the judge (or magistrate) who will hear the case.[105]

11.8.2.2 Clerk of the Court

The clerk of the court is an official appointed for every Magistrate's Court. The clerk of the court is r**esponsible for the administration and documentation in the Magistrate's Court**. Therefore, the clerk of the court fulfils the **same functions** in the Magistrates' Courts as the Registrar of the High Court.[106]

11.8.2.3 Master of the High Court

An important official in the service of the state is the Master of the High Court. **A Master is appointed for each provincial High Court.** Some of their **functions** include:

- to control and supervise the administration of deceased and insolvent estates
- to control the liquidation of companies
- to control trust funds on behalf of minors
- to control the property of others who are physically or mentally unable to manage their own affairs and for whom curators (or "caretakers") have been appointed[107]

103 Kleyn *et al Beginner's guide for law students* 345; Humby *et al Introduction to law and legal skills* 273.
104 See learning unit 12 for more information on a summons as a document used in both civil and criminal disputes.
105 See, for example, https://johannesburgbar.co.za/court-rolls/ (Date of use: 8 May 2019).
106 Kleyn *et al Beginner's guide for law students* 345; Humby *et al Introduction to law and legal skills* 273.
107 Kleyn *et al Beginner's guide for law students* 345.

Although people are sometimes inclined to regard the control exercised by the Master of the High Court as a nuisance, this office ensures state protection of individual rights.

11.8.2.4 Sheriff

The Sheriff is an impartial and independent official appointed in both the High Court and the Magistrate's Court. The Sheriff or the Deputy Sheriff of the court must **serve all documents issued by the court**. These include **summonses, notices, warrants and other court orders**. The South African Board for Sheriffs monitors the service of Sheriffs and their Deputies, ensuring that they exercise their duties in a humane manner.[108] (The Sheriff of a Magistrate's Court was previously known as the Messenger of the Court.)

11.3

Now that you have an understanding of the different types of court officials, answer the multiple-choice questions that follow:

(1) Indicate the **correct** statement:

The Master of the High Court's office provides services in relation to the

(1) administration of deceased estates, control of trust funds and liquidation of companies.
(2) administration of deceased estates, control of curators and registration of companies.
(3) administration of deceased estates, registration of deeds and control of insolvent estates.
(4) administration of deceased estates, registration of bonds and antenuptial contracts.

(2) Indicate the **correct** statement:

(1) The Sheriff is an impartial and independent official appointed only in higher courts.
(2) The Registrar of the High Court serves summonses on people to appear in court.

108 Humby *et al Introduction to law and legal skills* 274. See also http://www.sheriffs.org.za/ (Date of use: 8 May 2019).

(3) The Clerk of the Court supervises the administration of the High Court.

(4) A court interpreter must make sure that all parties to a case understand the legal proceedings in a language of their choice.

(1) **Statement (1) is correct**, as the Master of the High Court's office provides services in relation to the administration of deceased estates, control of trust funds and liquidation of companies.

(2) Statement (1) is incorrect because the Sheriff is an official appointed in both the High Court and the Magistrate's Court, not only in higher courts.

Statement (2) is incorrect because the Registrar of the High Court ***issues***, and **not** ***serves***, summonses on people to appear in court. **The Sheriff is the official who serves summonses to people to appear in court.**

Statement (3) is also incorrect. The Clerk of the Court supervises the administration of the Magistrate's Court, **not** the administration of the High Court.

Therefore, statement (4) is the correct statement and the one that you had to choose. The function of a court interpreter is indeed to make sure that all parties to a case understand the legal proceedings in a language of their choice.

11.9 Ethical conduct

You should now be aware that there are different members of the legal profession who perform specific functions in legal practice. All the professionals above are subject to a high duty of care and trust, as the legal profession functions as a system of service to the public. **It is very important that these professionals are ethical, competent, act with integrity (honesty) and do not abuse their positions.**

The Legal Practice Act requires the Legal Practice Council to provide a **Code of Conduct** that applies to all legal practitioners (attorneys and advocates), candidate legal practitioners as well as juristic entities. This

Code of Conduct was published on 29 March 2019.[109] **It is a written code setting out rules and standards relating to ethics, conduct and practice for legal practitioners.**

If any legal practitioners contravene the Code, their conduct may be found unethical or unprofessional, and there can be different consequences. This may include disciplinary hearings and fines. In the case of serious misconduct, legal practitioners may even be struck off the Roll and may not be allowed to practise as legal practitioners any longer.

conclusion

Now that you understand how the different members of the legal profession, presiding officers and court officials participate in the administration of justice in South Africa, we will turn to discuss the different types of cases that you will find in court and the different courts that are applicable to the South African legal system.

109 See https://www.lssa.org.za/legal-practitioners/advisories/misc/legal-practice-act-28-of-2014/misc/legal-practice-act (Date of use: 20 May 2019).

learning UNIT 12

Different legal disputes and the courts

Overview

In this learning unit, we will look at the different **kinds of legal disputes** that may arise from everyday events, namely **civil, criminal and constitutional disputes**. Our focus will be on civil and criminal disputes. We will also explore the court system in South Africa, and briefly look at how it operates.

Learning outcomes

After completing this learning unit, you should be able to:

- identify, describe and distinguish between the different legal disputes that may arise from everyday events
- make a list of and describe the courts in South Africa, and illustrate by means of a diagram where they fit into the hierarchy of courts
- describe basic legal concepts and principles that relate to the different legal disputes and the operation of the courts, and identify these concepts in practical examples.

Setting the Scene

The accident

One 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. 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 Mr Scotchbottle. When Mr Scotchbottle gets out of his car, he is so drunk that he is barely able to stand. He shouts at Martie that it is all her fault because she did not stop at the four-way stop. The people who are standing around, watching, manage to keep him away from Martie. One of the eyewitnesses calls the police. The police arrive and take sworn statements from the eyewitnesses. 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 appears to be badly damaged and is towed away. Martie is in a state of shock and continuously whispers that it is Mr Scotchbottle's fault because he did not stop at the four-way stop. Someone calls one of Martie's friends to come and fetch her. Two weeks later, the Van der Merwes are informed that hospital costs for Karel amount to R500 000, and that the damages to Martie's car will cost them R30 000.

Discussion

12.1 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. Of course, this will have to be proved in a court of law, because Mr Scotchbottle and Mrs Van der Merwe differ on who caused the accident. Due to the accident, Karel Van der Merwe 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 Merwes' car has also been damaged and they will have to pay for its reparations at a panel beater. Do you see that the Van der Merwes now have these costs to pay because of Mr Scotchbottle's drunken, and probably reckless and negligent driving? So, what about Mr Scotchbottle? Driving under the influence of alcohol is a crime in South African law. Surely, he cannot drink and drive under the influence of alcohol and get away with it?

12.2 Different kinds of legal disputes

Do you see how one scenario can give rise to more than one legal dispute? It is clear that **different kinds of legal disputes** may arise from everyday events. **In South African law, there are mainly three kinds of disputes, namely civil, criminal and constitutional disputes.** For purposes of our discussion, **we will focus on civil and criminal disputes**, as these kinds of cases will arise from our story about the Van der Merwes' accident. Although our story does not include a constitutional dispute, it is important for you to know what a **constitutional matter** is. Since we have discussed the Constitution in detail in **learning units 7 to 10**, we will only briefly refer to this kind of dispute again.

12.3 Civil disputes

12.3.1 Introduction

In **learning unit 1**, you learnt that the state prescribes certain **norms or rules of conduct that bind all members of society** and that these rules are **legal rules or the law**. The state prescribes the law in the interest of society as a whole. Therefore, someone cannot simply infringe on another person's private interests. If one party infringes (violates) the private interests of another party or threatens to do so, the law may become applicable, specifically the **private law**.

A **civil case is a private-law dispute between ordinary people or individuals** (legal subjects[110]), and the **state is not involved**. The parties to a civil case have to decide whether they want to initiate proceedings. One party will take the initiative and institute proceedings. The other party will then have to decide whether to oppose and defend the claim or not.

The **purpose** of a civil case is to grant a remedy or relief to a person. A person can, for example, institute a claim for performance, such as the payment of damages (money).

A civil case usually takes place between **two parties**: the **plaintiff and the defendant** (in **action proceedings**) and the **applicant and respondent** (in **application proceedings**) as explained below. Their **legal representatives** may be **attorneys or advocates**.

110 See learning unit 2.

The **outcome** of a civil case is that the **action or application is allowed or dismissed**.

Civil cases may be heard in **lower courts** (district and regional magistrates' courts) and **higher courts** (the High Courts, the Supreme Court of Appeal and the Constitutional Court).

In our story, both Martie and Karel can sue for or 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**.

12.4 Processes in civil disputes: action and application proceedings

12.4.1 Introduction

When we deal with civil disputes, the **law of civil procedure** regulates the **processes** (proceedings) that legal practitioners must use to bring private-law (civil) disputes before the courts. **There are two types of civil proceedings that legal practitioners can use to institute civil cases, namely action proceedings and application proceedings.**

These proceedings are complicated and legal representatives must assist the parties to take the required steps to collect evidence and bring the case before court. Although civil procedure in the high courts and magistrates' courts is more or less the same, differences do exist. Since action and application proceedings are complicated, we will only briefly explore these kinds of proceedings, as you will come across them in your further LLB studies.

12.4.2 Action proceedings ("trials")

In **action proceedings (proceedings by way of summons)**, there are **fundamental differences between the parties with regard to the facts of the case**. There are **two opposing parties** involved in action proceedings, the **plaintiff and the defendant**. The **plaintiff** is the party who **initiates** (starts) **the case and institutes an action.** The **cause** (reason) for instituting the action can be a delict if a party has suffered damages to property or has been physically injured. It can be a contract, if there is a breach of contract by a party, or it can be a divorce. The **defendant** is the party

against whom the action is instituted and who may raise a defence against the action instituted by the plaintiff.[111]

In the **name of a civil case** instituted by way of the action proceedings, the plaintiff's name comes first, followed by the letter "v" which represents "versus" ("against") and then comes the defendant's name. For example: **Bauling (plaintiff) v Nortjé (defendant)**.

NOTE

The **plaintiff** starts the action proceedings with a **summons and particulars of claim**, which are written documents in which the plaintiff informs the defendant of the claim against him or her. The particulars of the plaintiff's claim follow on the summons and contain the following information:

- the names of the parties involved
- the facts of the case (what happened)
- the extent of the claim (what the plaintiff claims)
- the remedy or relief that the plaintiff asks from the court

The plaintiff usually also demands the defendant to pay the costs of the law suit.[112]

Before the trial starts, there is a **pre-trial stage** during which the **parties exchange further documents** (e.g. notices and affidavits) to disclose to one another what evidence they plan to use during the trial, a pre-trial conference may be held (where applicable) and a trial date is set.

NOTE

An **affidavit** is a written statement given under oath before an official who has the authority to certify the statement, for example a commissioner of oaths.[113]

The **trial stage** refers to the **proceedings in court**. In the case of action proceedings, where the parties differ fundamentally with regard to the facts of the case, the plaintiff and the defendant present oral evidence to prove the facts of the case and to establish what exactly happened.

111 Humby T *et al Introduction to law and legal skills in South Africa* (Oxford University Press Cape Town 2012) 246.
112 Kleyn D *et al Beginner's guide for law students* 5th ed (Juta Claremont 2018) 243; Humby *et al Introduction to law and legal skills* 247.
113 Humby *et al Introduction to law and legal skills* 249; Kleyn *et al Beginner's guide for law students* 250.

NOTE

In a civil case the party who alleges, bears the onus of proof (burden or duty of proving). This is usually the **plaintiff**. The plaintiff must satisfy the onus of proof **on a balance or preponderance of probabilities. This means that the plaintiff must be able to prove that it is more likely that what he or she says is true than not true**. The onus of proof in a civil case is not quite as heavy as in a criminal case.

The **trial in action proceedings ends** with the court evaluating all the arguments and evidence, and then handing down a **judgment** (finding). If the party, against whom judgment is obtained, does not voluntarily comply with the court order, **execution of the court's order or ruling** follows. Execution is a method by which the court's order or ruling is enforced.

If either of the parties is **not satisfied with the court's decision** (judgment), he or she can lodge an **appeal** (apply for leave to appeal). If any of the parties is **not satisfied with the process followed during the trial**, he or she can apply for a **review**.[114] See our more detailed discussion of appeal and review that follows later in this learning unit.

12.4.3 Application proceedings (motion proceedings)

There are **two types of application proceedings**, namely **applications with notice of motion** or ***ex parte* notice of motion applications**:

- **Applications with notice of motion**

Application proceedings are used when there are no fundamental differences between the parties regarding the facts of the case. The only real issues to be decided are points of law. There are **two parties** involved, namely the **applicant and the respondent**, because the legal relief required by the applicant affects the rights of the respondent.

In the **name of the case** instituted by way of motion proceedings, the applicant's name comes first followed by the letter "v" which represents "versus" ("against") and then comes the respondent's name. For example: **Bester (applicant) v Nkosi (respondent)**.

Application proceedings are instituted by way of a notice of motion. In the notice of motion, the **applicant applies for a form of relief or a court order**. The notice of motion is served on the respondent. An

114 Kleyn *et al Beginner's guide for law students* 249.

affidavit must accompany the notice of motion. An example of a case where motion proceedings is appropriate is where someone applies for an interdict compelling his or her neighbour to stop the noisy welding business that he runs from home every day of the week. Another example of a case where an application is appropriate is where a landlord cuts off the tenant's electricity and the tenant brings an application to court to have the electricity restored. In such a case, there is no dispute that the landlord cut off the electricity supply. The main issue is whether the landlord was entitled, in law, to do so.[115]

- ***Ex parte* notice of motion applications**

***Ex parte* motion proceedings are used when there is no opposing party involved,** for example, when the legal relief required by a person does not affect the rights of someone else. In an *ex parte* application, there is **only an applicant and no respondent**. The applicant usually applies for a **declaratory order**, for example, when the applicant wants to be admitted as an attorney or advocate.[116]

The **name of an *ex parte* notice of motion** application starts with the words *ex parte* followed by the name of the applicant. Do you remember how delighted Thato Nkone was when she joined J&J Attorneys as a candidate attorney under the guidance and supervision of Jane Mothibe? Well, when she complies with all the admission requirements, she can apply for a court order to be admitted as an attorney. The name of the ex parte notice of motion application will be ***Ex parte Nkone***.

NOTE

A **notice of motion** is a document similar to a summons. In applications on motion, it contains the details of the applicant and the respondent (if there is one) and the relief that the applicant is asking.[117]

At the end of application proceedings, the **court will either grant or dismiss the application**. It is also possible to apply for leave to appeal or review in application proceedings. See our more detailed discussion of appeal and review that follows later in this learning unit.

115 Kleyn *et al Beginner's guide for law students* 252–254; https://www.bregmans.co.za/actions-and-applications-forms-of-court-proceedings/ (Date of use: 8 June 2019).
116 Kleyn *et al Beginner's guide for law students* 250–251.
117 Humby *et al Introduction to law and legal skills* 250.

12.5 Criminal disputes

12.5.1 Introduction

In our discussion of civil disputes, we reminded you that the state prescribes the law in the interest of society as a whole. Consequently, anyone who disobeys the law and commits an offence (a crime) must be punished. Although crime is usually committed against another person, a criminal act threatens the whole community and infringes public interests. The state will therefore use its power to prosecute and punish the offender (criminal) and is involved in **criminal disputes**.

A criminal case takes place between two parties: the state and the accused. In the name of a criminal case, the name of the first party will always be the letter "S" which refers to the state. Then the letter "v" follows which represents "versus" ("against") and lastly the name of the other party, the accused, follows. For example: S (state) v Makwanyane (accused). A **state advocate will prosecute the accused on behalf of the state**. The **legal representatives** for the accused may be an **attorney or advocate**.

The **purpose** of a criminal case is **to prosecute and punish someone (the accused) for a crime** in order to protect the community as a whole. Therefore, if the accused is convicted, he or she will, for example, pay a fine or go to prison.

The **outcome** of a criminal case is for the court to find the accused **guilty** or **not guilty**.

Criminal cases may be heard in lower courts (in other words, district and regional magistrates' courts) and higher courts (in other words, the High Courts, the Supreme Court of Appeal and the Constitutional Court).

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 be involved and **prosecute** Mr Scotchbottle for **drunken driving** and also, probably, for **reckless and negligent driving**.

12.5.2 Process in criminal disputes

In criminal disputes, **the law of criminal procedure prescribes the process of how a suspected criminal is prosecuted (brought before court) and tried**. The process is quite complicated and consists of different phases and specific steps within these phases. Therefore, legal practitioners must

assist and represent the accused in court. We will simply provide you with a very basic outline of the process that consists of a pre-trial, a trial, and an after-trial.

■ **Pre-trial**

During the pre-trial, the following happens:

– *Committing and reporting of a crime*

The police will start the investigation of an alleged crime once a crime has been committed and someone reports the crime to the police. The person who reports the crime may be the victim of the alleged crime and who has been directly affected by the crime. A member of the public, for example an eyewitness or a passer-by, may also report the alleged crime to the police. In our story, one of the eyewitnesses phones the police and reports the accident.

NOTE

The **person who is directly affected** by a crime is the **victim**.

The **person who reports the alleged offence (crime) to the police** is the **complainant**. The complainant can be the victim or any other person who witnessed the crime.

A **witness** is a person who **gives a sworn testimony to the police or** the **court**.

The c**omplainant reports** the crime to the South African Police Service (SAPS).

The **process of lodging the complaint** with the SAPS is referred to as **laying a charge against the accused**.

The **person thought to be guilty of a crime** or offence is a **suspect**.

The **person who is charged for allegedly committing an offence (a crime)** is the **accused**.

A **charge** is a **formal allegation** made about the accused by the state and it sets out the offence/s (crime/s) that were allegedly committed by the accused.

NOTE

You will notice that we use the words **"alleged offence (crime)"** and **"allegedly committing an offence (crime)"** above. We do so, because these words describe something that someone claims is a crime but which has not been proven in court yet. **Surely, you have heard the saying: "Every person is presumed to be innocent unless or until proven guilty in a court of law." This is not just a saying but an important legal principle in our criminal trial procedure.**

– *Investigation by police*

It is the task of the police to investigate a complaint or charge. The investigating officer assigned to the case first opens a **police docket**. This is a file which relates to a particular case under investigation by the police. Then **the investigating officer starts to investigate the charge/s (allegation/s) against the accused by gathering as much information and evidence as possible to prove the case in court**. The officer files all the information and evidence in the docket. **Evidence** can include sworn statements made by the complainant or eyewitnesses, searching of a suspect's person or property with a search warrant to find clues to solve the crime or prove the case, or blood samples of motorists driving under the influence of alcohol sent to an expert for analysis.[118]

NOTE

A **search warrant** is a legal document that authorises a member of the South African Police Service to enter and to search a person's property or premises.[119]

In our story, the investigation by the police starts when they arrive at the accident scene. They take sworn statements from the eyewitnesses and immediately take Mr Scotchbottle away in order to get blood samples to test his blood-alcohol level.

– *Decision to prosecute*

When the investigating officer is satisfied that the information and evidence in the docket is sufficient to prove the case against the accused in court, the officer hands the docket to the **Director of Public Prosecutions (DPP)** (previously known as the Attorney-General (AG)). **The DPP uses the information and evidence in the docket to decide whether to prosecute the accused or not.** The police are not involved in taking the decision to

118 Kleyn *et al Beginner's guide for law students* 288–289.
119 Humby *et al Introduction to law and legal skills* 401.

prosecute. **Since there are too many criminal cases for the DPP to decide in each case whether to prosecute the accused or not, the DPP delegates this power to decide to public prosecutors in the lower courts and state advocates in the higher courts.**[120]

In terms of section 35(3) of the Constitution, an accused has a constitutional right that the state must formulate a detailed charge against him or her. Therefore, in the **lower courts, public or state prosecutors draft a charge sheet (a document with detailed information of the charge against the accused) and lodge (file) it with the clerk of the court. In the High Courts, state advocates prepare an indictment (also a document setting out the particulars of the charge against the accused) and lodge (file) it with the registrar of the High Court**.[121]

The following information appears in a charge sheet or an indictment:

- the particulars of the alleged crime (in other words, the relevant **conduct**)
- **where** and **when** the alleged crime was committed[122]

– *Accused brought before court in different ways*

When the police's investigation is completed and the charge sheet is drafted, the accused can be brought before court in different ways. In a **criminal case** in the **magistrate's court**, attendance of the accused is secured in the following ways:

(1) Arrest

When the police seize (apprehend) the suspect and take him or her into police custody, we refer to this as arrest. The police will make an arrest on the strength of a warrant of arrest, for example, if there is reason to believe that the accused will try to escape. The police may also make an arrest without a warrant of arrest, for example, when they witness a person committing a crime.

NOTE

A **warrant of arrest** is a legal document issued by a judge or magistrate after application of a prosecutor. This document authorises a member of the SAPS to make an arrest.[123]

120 See learning unit 11.
121 Kleyn *et al Beginner's guide for law students* 289–290.
122 Kleyn *et al Beginner's guide for law students* 290.
123 See https://hsf.org.za/publications/hsf-briefs/arrest-and-warning-statements-a-primer (Date of use: 1 June 2019).

(2) Summons

A summons is a document issued by the clerk of the Court and delivered to the accused by a person authorised to do so, for example a police officer.

It contains the following information:

- all the **details of the accused**
- all the **charges** that the state brings **against the accused**
- an **order to the accused to appear in a specific court on a specified day and time**

A summons will usually be given in cases where the accused is not arrested because the prosecutor believes that he or she will appear in court as ordered in the summons.

(3) Written notice issued by a peace officer

A written notice is usually given in minor offences, for example, where a police officer stops a driver of a motor vehicle for exceeding the speed limit, which is a criminal offence. The police officer will issue the written notice and give it directly to the driver of the motor vehicle (accused).

In a **criminal case** in the **high court**, attendance of the accused is secured by sending the accused a **notice of trial and an indictment (charge)**.

– *First appearance in court: bail*

The first appearance of the accused before the court usually deals with an application for bail. **Bail is an amount of money that the accused pays the court to be released until the trial begins.**

- **Trial**

The trial is that part of the process that takes place in the court itself. A criminal trial consists of two stages, the **trial on the merits of the case** and the **trial on sentence or punishmen**t.

– *Trial on the merits of the case*

Purpose

The purpose of the trial on the merits of the case is **to determine whether the accused is guilty or not guilty**.

State's charges against accused

The trial on merits starts when the **state prosecutor or state advocate puts the charges (allegations) in the charge sheet or indictment to the accused.**

Accused's plea

The **accused must then plead guilty or not guilty**. A **plea** is the accused's formal answer to the charges (allegations) brought against him or her. It can be an **admission** (a plea of guilty) or a **denial** (a plea of not guilty).

State and accused state their cases

Then the state and the accused's legal representative receive the opportunity to put their cases to the court respectively. They present evidence and arguments to prove the facts of the case.

NOTE

It is at this stage of the trial, where the state makes one or more allegations that the accused has committed a crime and is therefore guilty, that we come across a very important legal concept in a criminal trial, namely onus (burden) of proof.

The responsibility for proving the allegation that the accused is guilty is called the onus (burden) of proof.[124] In a criminal trial, the onus of proof always **rests on the state**. It is quite a heavy burden of proof, as the state must prove beyond reasonable doubt that the accused is guilty.

Beyond reasonable doubt does not mean that the state must fully (100%) prove that the accused is guilty, but rather means that the court must be satisfied that there is no reasonable explanation other than the guilt of the accused. **Beyond reasonable doubt is the extent to which the state, as the party who alleges that the accused is guilty, must prove a case.**[125] At the end of the trial, the court will always have to decide whether the state has proved the guilt of the accused beyond reasonable doubt.

Judgment

The trial on merits ends with the **court evaluating all the evidence and handing down a judgment (finding or conviction) whether the accused is guilty or not guilty**. The magistrate or judge always gives reasons for the court's decision. If the court finds the accused guilty, the trial may

124 Humby *et al Introduction to law and legal skills* 230–398.
125 Humby *et al Introduction to law and legal skills* 230–401.

proceed to the next phase (described below) or sometimes has to start all over again. If the court finds the accused not guilty, the accused is free to go, and the trial is over.

– *Trial on sentence (punishment)*

After its judgment, the **court must decide on an appropriate sentence (punishment)**. The court will take into account the previous convictions of the accused, if any. The court will also hear further evidence put to the court by the state for a harsher sentence and by the accused's legal representative, for a lighter sentence. In its finding on an appropriate sentence, the court will also give **reasons** for imposing the specific sentence. The sentence can for example be a fine and/or imprisonment.

■ **After trial**

– *Execution follows*

After sentencing the accused, the court adjourns and the criminal trial is over. The execution of the sentence then follows. **The execution refers to administrative procedures that must take place to ensure that the sentence is complied with.** If the court granted the accused bail, the accused will receive the bail money back on producing the bail receipt. If the convicted person received a fine, he or she must pay the fine to the clerk of the Court. If the convicted person received a prison sentence (to go to jail), the officials of the Department of Correctional Services are responsible for the execution of the sentence of imprisonment and will take the convicted person to prison.

– *Possibility of appeal and review*

In any criminal dispute, the convicted person does not have to comply with the court's decision immediately. **If the convicted person is not satisfied with the court's decision (judgment), he or she can lodge an appeal (apply for leave to appeal).** The state as a party to an appeal is limited and cannot always appeal.

If the convicted person suspects an irregularity in the procedure during the trial, he or she can apply for a review.

See our more detailed discussion of appeal and review that follows later in this learning unit.

12.6 Constitutional disputes

Section 167(7) of the Constitution describes a **constitutional issue (matter) as any issue involving (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[126] in Chapter 2 of the Constitution.

All higher courts (the High Courts, the Supreme Court of Appeal and the Constitutional Court) may hear constitutional cases. The presiding officers in these courts are judges. The **state, individuals or private institutions may be parties in a constitutional dispute**. In constitutional cases, the parties are called the **applicant** and the **respondent**. The applicant's name is given first. Then the letter "v" follows which represents "versus" ("against"). This is followed by the respondent's name. For example: Fraser (applicant) v Children's Court, Pretoria North, and Others (respondents). If the matter is on appeal, the appellant's name will appear first, followed by the respondent's name. Their **legal representatives** may be **attorneys or advocates**.

Activity **12.1**

Read the following scenarios and answer the questions that follow on each scenario:

(1) Thomas Ndima 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 private school, Perfect High School. However, the principal of the school and the teacher of this subject tell him that only girls may take the subject. Thomas is most upset and his mother, Mrs Ndima, wants to take the matter to court.

(a) What **kind of dispute** may arise from this scenario? Explain why.
(b) What is the **purpose** of this kind of dispute?
(c) Who will be the **opposing parties** in this kind of case?

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126 See learning unit 8.

(2) Mr Crook has been an employee with Best Bank for many years. During this time, he defrauded the company of millions of rand.

(a) What **kind of dispute** may arise from this scenario? Explain why.

(b) What is the **purpose** of this kind of dispute?

(c) Who will be the **opposing parties** in this kind of case?

(d) What is the **onus of proof** in this kind of case and **on whom** does it rest?

(3) Junait Makola has instituted legal proceedings against the management of the private soccer team, Orlando Lions, of which he is a member. Junait claims that he has not received his salary for the past three months, which amounts to R500 000. The management of Orlando Lions denies this allegation.

(a) What **kind of dispute** may arise from this scenario? Explain why.
(b) What is the **purpose** of this kind of dispute?
(c) Who will be the **opposing parties** in this case?
(d) Which **kind of proceeding** will a legal practitioner use to institute this case? Explain why.
(e) Who will be the **legal practitioner** in this case?
(f) What is the **onus of proof** in this case and **on whom** does it rest?

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Feedback

(1) (a) A **constitutional dispute** may arise from this scenario, because it deals with the infringement of a fundamental right, more specifically the right to equality.

(b) The purpose of a constitutional matter is **to deal with any issue involving the interpretation, protection or enforcement of the Constitution**. It may also deal with issues on **fundamental rights**.

(c) The opposing parties in a constitutional matter are the **applicant** (Thomas Ndima) and the **respondent** (Perfect High School).

(2) (a) A **criminal case** may arise from this scenario because Mr Crook committed the crime of fraud by stealing millions of rand from his employer. This case is a criminal case because it takes place between the **state** and the **accused** (Mr Crook).

(c) The purpose of a criminal case is **to prosecute and punish someone (the accused) for a crime in order to protect the community as a whole**.

(d) The opposing parties in the case will be the **state and the accused (Mr Crook)**.

(e) The onus of proof in a criminal case rests on the **state** to **prove that the accused is guilty beyond reasonable doubt**.

(3) (a) A **civil case** may arise from this scenario, since Junait Makola wants to institute a claim for R500 000 against Orlando Lions because he has not received his salary for the past three months. This case is a civil case because the dispute is between an **individual** (Junait Makola) and a **private institution** (Orlando Lions, a private soccer team), and the **state is not involved**.

(b) The purpose of a civil case is **to grant a remedy or relief to a person**. A person can, for example, institute a claim for performance, such as the payment of damages (money).

(c) The opposing parties in a civil case are the **plaintiff** (Junait Makola) and the **defendant** (Orlando Lions).

(d) A legal practitioner will institute **action proceedings**, because there are **fundamental differences between the parties regarding the facts of the case**. Junait Makola claims that Orlando Lions owe him R500 000 and they deny his allegation.

(e) The legal practitioner in a civil case may be an **attorney or an advocate**.

(f) The onus of proof in a civil case rests on the **plaintiff** to **prove his or her allegation on a balance of probabilities.**

12.7 Most important courts in South Africa

12.7.1 Introduction

Do you remember our discussion of the separation of state powers into three sections (branches) in **learning unit 7**? There you learnt that the **judiciary (judicial system/judicial branch of government) in South Africa vests in the courts that decide legal disputes**.[127] Chapter 8 of the Constitution deals with the courts. In this chapter, section 165 states that the judicial authority vests in the courts, and section 166 lists the South African courts in the following order of authority:

- Constitutional Court
- Supreme Court of Appeal
- High Courts
- 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 (known as special courts)

The Constitutional Court, the Supreme Court of Appeal and the High Courts are superior courts (higher courts), whereas Magistrates' Courts are lower courts.

12.7.2 Constitutional Court

Section 167 of the Constitution deals with the Constitutional Court. In the past, the Constitutional Court could only hear constitutional matters and was the highest court of appeal in constitutional matters. This position has changed. **The Constitutional Court is now the highest court in all matters.**

Section 167 of the Constitution has been amended, which changed this position. This section now states that the **Constitutional Court may decide "(i) constitutional matters; and (ii) and any other matter."**[128] In the case of "any other matter", the following conditions must be met: (1) the Constitutional Court must grant leave to appeal; and (2) the matter at hand must raise an arguable (debatable or questionable) point of law that is important to the public in general which ought to be considered by

127 See learning unit 7.
128 See specifically section 167(3)(b) of the Constitution.

the Constitutional Court. Thus, although the Constitutional Court only heard constitutional matters in the past, it is now, in theory, the highest court of appeal in South Africa in **all matters, subject to the Court granting leave to appeal to hear a matter**. This means that the decisions of the Constitutional Court are final and bind all courts.[129]

The Constitutional Court has **exclusive authority to decide disputes about the powers and constitutional status of branches of government. The Constitution refers to six specific matters**. Two of these matters are the constitutionality of any amendment to the Constitution and the question whether parliament or the President has failed to fulfil a constitutional duty. The Constitutional Court also has the final decision in whether an Act of Parliament, a provincial Act or the conduct of the President is constitutional.[130]

A person may approach the Constitutional Court directly without approaching any other court first. This is called **"direct access"**. An application for direct access will only be granted if the **interests of justice** requires it.[131]

The Constitutional Court can function as a **court of first instance** or a **court of appeal**. It hears appeals from the Supreme Court of Appeal.

12.7.3 Supreme Court of Appeal

Section 168 of the Constitution deals with the Supreme Court of Appeal (SCA). The SCA has jurisdiction (authority) to decide appeals within the whole geographical area of South Africa.

The SCA may decide civil, criminal and constitutional matters on appeal. In its judgement, the SCA may declare an Act of Parliament, a provincial Act or the conduct of the President of South Africa, unconstitutional. **It is compulsory for the SCA to refer such a court order to the Constitutional Court for confirmation before it will come into force.**

The Supreme Court of Appeal **functions only as a court of appeal and never as a court of first instance**. The Court hears appeals from the High Courts. From the SCA, a further appeal can be made to the Constitutional Court.[132]

129 Kleyn *et al Beginner's guide for law students* 327.
130 Kleyn *et al Beginner's guide for law students* 328.
131 Kleyn *et al Beginner's guide for law students* 328.
132 Kleyn *et al Beginner's guide for law students* 326–327.

12.7.4 High Courts

Section 169 of the Constitution deals with the High Court. The Superior Courts Act 10 of 2013 regulates the jurisdiction (authority to hear cases) of the High Court. **Each High Court has jurisdiction to hear cases within a specific provincial area.** For example, the seat of the High Court in Pretoria is called the North Gauteng High Court, while the seat of the High Court in Johannesburg is known as the South Gauteng High Court.

The High Court may decide any civil and criminal matter (which is not assigned to another court) and any constitutional matter, except a matter that only the Constitutional Court may decide. Although we say that the High Court may decide all civil and criminal matters, the Court may be **limited** to do so in practice. For example, in civil cases, the High Court may only hear cases where substantial (large) amounts of damages are claimed and in criminal cases, it will only hear serious cases. Similar to the Supreme Court of Appeal, the High Court may declare an Act of Parliament, a provincial Act or conduct of the President of South Africa, unconstitutional. **It is also compulsory for the High Court to refer such an order to the Constitutional Court for confirmation before it will come into force.**

The High Court can function as **a court of first instance, a court of appeal or a court of review**. As a court of appeal, it can hear appeals of cases that were first heard by the magistrates' courts. From the High Court, a further appeal can be made to the Supreme Court of Appeal.[133]

12.7.5 Magistrates' Courts

There are **two types of magistrates' courts**, namely **district courts** (with jurisdiction in a specific magisterial district) and **regional courts** (with jurisdiction in a specific regional division). Magistrates' courts are also known as **lower courts**.

Section 170 of the Constitution deals with magistrates' courts and states that **these courts may hear any matter determined by an Act of Parliament.** Magistrates' courts **may hear civil and criminal cases, but they are restricted in their jurisdiction to decide these kinds of cases.** In civil and criminal cases, the **jurisdiction** of district courts and regional courts differ. In **civil cases**, the amount of damages that may be claimed in district courts is smaller than in regional courts. In **criminal cases**, district courts

133 Kleyn *et al Beginner's guide for law students* 325–326.

hear less serious offences (like drunken driving) than regional courts that may hear any criminal offence, but not treason. The **sentences and fines** that district courts and regional courts may impose, differ too. A court with a lower status than the High Court, in other words all magistrates' courts, **may not enquire into** or **rule** on the **constitutionality of any legislation** or any **conduct of the President**.

Both district and regional courts function as courts of first instance. From a magistrate's court, a further appeal or review can be made to the High Court.[134]

12.7.6 Special Courts

The **other courts** that may be established or recognised in terms of an Act of Parliament **are known as the special courts** and they are established or recognised for specialised litigation. These courts may decide any matter determined by an Act of Parliament. Some special courts have the same status as the magistrate's court, while others have the same status as the High Court. The following courts are special courts: Chiefs' and Headmen's Court, Small Claims Court, Children's Court, Maintenance Court, Labour Court and Labour Appeal Court, Land Claims Court and Equality Court.[135]

12.8 Basic concepts relating to the operation of courts

12.8.1 Introduction

Some obvious questions now arise: How do you determine which court will hear a specific case? How do you determine which court decision to follow if you want to solve a legal problem? Which court will hear a divorce case? Which court will prosecute an accused for theft? To which court can you appeal if you are not satisfied with the court's decision? What can you do if you feel that the presiding officer in your case was biased? Which courts can declare legislation unconstitutional?

The answers to these questions depend on basic legal concepts relating to the operation of our courts, namely the **hierarchy of courts** and the **precedent system, jurisdiction of courts to hear cases, courts of first instance**, and **appeal and review**. Let us explore these basic, but very

134 Kleyn *et al* Beginner's guide for law students 324–325.
135 Kleyn *et al* Beginner's guide for law students 328–331.

important, legal principles or concepts that form part of the operation of and the legal processes in our courts.

12.8.2 Hierarchy of courts and the precedent system

According to section 166 of the Constitution, we clearly have a **hierarchy of courts** in South Africa, in other words a division of courts into ranks (levels of authority). Do you remember that you learnt about the hierarchy of courts in **learning unit 6**? Do you also remember that the hierarchy of courts is one of the requirements for the operation of the precedent system? Let us revise **the principle of judicial precedent** quickly. It is a very important legal principle in the operation of the court system in South Africa. In its judgment, a court gives the reasons for its decision and sets out the relevant legal rules relating to the dispute it heard. These legal rules create a precedent and bind other courts dealing with the same kind of disputes. The importance given to a particular precedent in a court decision is based on how senior the court is which handed down the decision within the hierarchy of the courts. **Thus, in a nutshell, judicial precedent means that the lower courts are bound by the decisions of the higher (superior) courts.**[136]

Activity **12.2**

(1) Draw a diagram by means of which you illustrate where the most important courts fit into the hierarchy (or levels) of courts. For this activity, you do not have to include the special courts.

(2) Indicate by way of arrows how the precedent system operates within the hierarchy of courts.

(3) Indicate by way of arrows how the legal principle of appeal operates within the hierarchy of courts.

136 See learning unit 6.

Feedback

We explain the hierarchy (or levels) of the different courts, the precedent system (P) and the process of appeal (A) by means of the following diagram:

CONSTITUTIONAL COURT
↓ **(P)** ↑ **(A)**
SUPREME COURT OF APPPEAL
↓ **(P)** ↑ **(A)**
HIGH COURTS
↓ **(P)** ↑ **(A)**
MAGISTRATES' COURTS (District and regional courts)

12.8.3 Jurisdiction

When we talk about **jurisdiction**, we mean the **competence (authority/ power) of a court** to hear a case. In most cases the main **factors** that decide the **jurisdiction of a court to hear cases** are:

- **type of case**
- **geographical area**
- whether the case appears before the court for the **first time or not** (this factor concerns courts of first instance, appeals and reviews)

12.8.3.1 Type of case

We learnt that there are three kinds of legal disputes, namely civil, criminal and constitutional disputes. If you want to determine whether a court has jurisdiction to hear a specific dispute, it is a good idea to start by identifying the type of case at hand. In each type of case, the decisive factors in determining the court's jurisdiction are different.

In a **civil case**, the two factors are:

(1) **amount** claimed (for example for damages)

(2) **nature of the relief** sought (here jurisdiction concerns matters of status, such as a presumption of death order)

In a **criminal case**, the two factors are:

(1) type of **offence** (crime)
(2) possible **sentence**

We explained above that **constitutional matters** concern any issue involving (requiring) the interpretation or enforcement of the Constitution. These issues may involve the **alleged infringements of human rights, the constitutionality of conduct of an organ of state**, or the **constitutionality of legislation and other law**. This classification is important in determining whether a court has jurisdiction to hear a constitutional case or not.[137]

12.8.3.2 Geographical area

Each court has jurisdiction within a specific geographical area in South Africa (this means in certain regions [parts] of the country). There must be some **connecting factor between the persons before the court and the court's geographical area of jurisdiction**. For example, in **civil cases**, the place where the cause of action arose (where the accident happened) or the defendant's domicile (permanent home), is generally used to determine which courts could have jurisdiction over the dispute. In **criminal cases**, the trial of the accused usually takes place in a court in the area where he or she has committed the crime.[138]

12.8.3.3 Courts of first instance

The term "court of first instance" (*court a quo*) becomes relevant if you deal with a case that must be heard by the court for the **first time**. Then the question should be asked whether the particular court may hear the specific case for the first time. In other words, may the case **start in that particular court**? Thus, the term "court of first instance" is used to indicate **the court in which the case starts or is heard for the first time.**[139]

12.9 Appeal

In our discussion of the procedures that courts follow in civil and criminal disputes above, we referred to the possibility of appeal. **If either of the parties in a case is not satisfied with the court's decision, they may take the decision on appeal.** An appeal may be lodged against the **findings of a court on any point of the law and/or the facts.**

137 Kleyn *et al Beginner's guide for law students* 320–321.
138 Kleyn *et al Beginner's guide for law students* 322.
139 Kleyn *et al Beginner's guide for law students* 322–333.

If one of the parties in a **civil dispute** is of the opinion that the court has made an **error in its decision**, in other words if the party is not satisfied with the decision, that party can lodge an **appeal** (apply for leave) **to a higher court**.

If the convicted person in a **criminal case** is **not satisfied with the court's decision** (judgment), he or she may lodge an **appeal** (apply for leave to appeal) **against the conviction, the sentence or both**. The state can only appeal in certain circumstances.

On appeal, the court does not listen to all the oral evidence of the witnesses about the facts of the case again. **The court only studies the typed record of the proceedings of the court that originally made the decision and then listens to arguments made by the legal representatives.** The higher court considers whether the lower court made the correct decision on the facts and the law. If the court of appeal decides to **uphold the appeal**, it means that the decision of the original court is set aside, and the appeal is successful. If the court of appeal **dismisses the decision**, it means that the decision is confirmed, and the appeal is unsuccessful.[140]

When a matter is on **appeal**, the **parties are called** the **appellant** and the **respondent**. Thus, who the appellant is, depends on who thought the decision was incorrect and wanted it reversed.

12.10 Review

According to Peté *et al*[141] the usual meaning of the term **"review"** is the process whereby the proceedings of lower courts in both civil and criminal cases are brought before the High Court in respect of **irregularities occurring during the course of such proceedings**.[142]

If a party is not satisfied with the **method** or **procedure** used by the court in arriving at its decision, then the case may be taken on **review**.[143] Section 22 of the Superior Courts Act 10 of 2013 sets out the grounds upon which the proceedings of the lower courts may be reviewed by the higher courts. These grounds include:

- The **absence of jurisdiction** of the court to hear the matter.

140 Humby *et al Introduction to law and legal skills* 260.
141 Petés *et al Civil procedure: a practical guide* 3rd ed (Oxford University Press Southern Africa 2017).
142 Peté *et al Civil procedure: a practical guide* 374.
143 Peté *et al Civil procedure: a practical guide* 339.

- **Interest in the cause, bias** (prejudice/favouritism), **malice** (ill will) or **corruption** of the presiding officer.
- **Gross irregularities** in the proceedings.
- The **admission of inadmissible (invalid) or incompetent (in-effective/inferior) evidence** or the **rejection of competent or admissible evidence, by the lower court**.

For example, when the proceedings of the lower court have not been translated properly by an interpreter or if the accused has not been given an opportunity to present his or her own case, these constitute gross irregularities in the proceedings, which are grounds for review. Do you see that in these circumstances the person asking for a review is complaining about the **way the proceedings** have taken place and not, as in an appeal, about the decision itself?

In a review, the court may go beyond the record of the original court, as the irregularity may not be apparent from the recording. **If the higher court finds that there have been irregularities, it will usually refer the case back to the original court to hear the case again using the correct proceedings. In certain circumstances, it may decide the case itself.**[144]

A review is an application process and the parties are called the **applicant** and the **respondent**.

12.3

Now that you are aware of the differences between the processes of appeal and review, read the scenarios below, and answer the questions that follow:

(1) Priscilla, who supplies Wholesome Foods (Pty) Ltd with fresh produce, institutes a civil case against the company for breach of contract. During the trial, Priscilla repeatedly requests an interpreter, as she cannot understand English, however, no interpreter is provided. The Judge rules in favour of Wholesome Foods (Pty) Ltd and dismisses Priscilla's case, with costs.

(a) Does the law provide Priscilla with **any remedy** in this instance?

144 Humby *et al Introduction to law and legal skills* 260.

(b) **Provide a reason** for your answer.

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(2) Bongiwe Mtupi is 20 years old and wishes to open a hairdressing salon. In order to get her business going, she must enter into an agreement with Beautiful Heads, a supplier of hair salon equipment and products. Beautiful Heads supplies the hair salon equipment and products according to the agreement, but Bongiwe fails to pay back her instalments. Beautiful Heads sues Bongiwe for breach of contract and institutes a claim for the outstanding instalments. The North Gauteng High Court rules in favour of Beautiful Heads and orders Bongiwe to pay the amount of the outstanding instalments. Bongiwe is not satisfied with the Court's decision.

(a) Does the law provide Bongiwe with **any remedy** in this instance?

(b) **Provide a reason** for your answer.

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(1) (a) **Yes,** the law does provide Priscilla with a remedy. She may apply for a **review** of the case.

(b) Priscilla can complain about an **irregularity in the procedure** or a **gross irregularity in the proceedings** or the **way the proceedings have taken place**. Being denied an interpreter amounts to a gross irregularity in the proceedings and is a ground for review.

(2) (a) **Yes,** the law does provide Bongiwe with a remedy. She may take the court's decision on **appeal**.

(b) If one of the parties in a **civil dispute** is of the opinion that the court has made an **error in its decision**, in other words if the party is not satisfied with the decision, that party can lodge an appeal (apply for leave) to a higher court. An appeal may be lodged against the findings of a court on any point of law and/or facts.

12.11 Evidence

Finally, we need to look at the important legal concept of evidence, as we referred to it several times in our discussion above. Humby *et al*[145] describes evidence as "any information, item, document, or spoken account made by a witness that is presented to the court during the trial that will help the court to make a decision on the case." **The law of evidence prescribes how the facts of a case may be proved in a trial, what evidence is allowed (in other words is admissible), what evidence is not allowed (in other words is inadmissible), the qualification and privileges of witnesses, and the specific manner in which evidence must be presented in court.**[146]

145 Humby *et al Introduction to law and legal skills* 253.
146 Humby *et al Introduction to law and legal skills* 253.

NOTE

For purposes of our discussion, we refer to four types of evidence. There are many more which you will learn later in your LLB studies.

Oral evidence: this is the most common form of evidence and refers to a witness's sworn testimony in court, in other words the witness's oral statements in court about the facts of the case.

Documentary evidence: this is written documentation presented to court as evidence, for example affidavits, results of blood tests, books, letters, maps and computer printouts.

Real evidence: this is evidence in the form of objects. Examples are a murder weapon, clothes, fingerprints, maps, photographs and videos that are relevant to the case.

Electronic evidence: electronic data and data messages, such as e-mails, may be presented as evidence in court.[147]

Activity 12.4

Read the story about the Van der Merwes' accident again and answer the following question:

(1) Identify the **two kinds of disputes** that may arise from our story. Give **reasons** for your answer.

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Feedback

(1) **Two civil disputes** and a **criminal dispute** may arise from our story. Let us look at the different disputes:

Civil dispute 1: Due to the accident, Karel Van der Merwe suffers severe injuries. He has to spend time in hospital and therefore receives an account of R500 000 for medical expenses.

Civil dispute 2: The Van der Merwes' car is damaged and they have to pay R30 000 for reparations at a panel beater.

These cases will be **civil cases** because, in each incident, **the dispute is between ordinary people or individuals, and the state is not involved**. In our story, the civil cases are between the Van der Merwes and Mr Scotchbottle. Both Martie and Karel may sue for or **claim damages** from Mr Scotchbottle. Martie may claim damages (money) from Mr Scotchbottle for the damage to her car. Karel may claim damages (money) from Mr Scotchbottle for his medical expenses.

Criminal dispute:

Mr Scotchbottle was driving under the influence of alcohol. This is something that cannot be tolerated by the community. Driving under the influence of alcohol is **a crime** in South African law. Therefore, **the state will be involved and prosecute Mr Scotchbottle for drunken driving and also, probably, for reckless and negligent driving**. A criminal case takes place between two parties: **the state and the accused (Mr Scotchbottle)**.

Activity 12.5

Now that you have identified the different kinds of disputes that may arise from our story, answer the following questions that relate to your answer in (1) and our story:

(1) Answer the following questions on civil dispute 1:

(a) In which **court** can the claim of R500 000 be instituted? **Give a reason** for your answer.
(b) Who is the **presiding officer** in this court?
(c) What will the **name of the case** be?
(d) Suppose that Mr van der Merwe hears after the trial that the presiding officer who decided the case is an uncle of Mr Scothchbottle. Does Mr van der Merwe have **any legal remedy** at his disposal? **Give a reason** for your answer.
(e) If the court grants the legal remedy in (1)(d), how do we refer to the **parties** involved in the legal dispute that will follow?

(2) Answer the following questions on civil dispute 2:

(a) In which **court** can the claim of R30 000 be instituted? **Give a reason** for your answer.
(b) Which l**egal proceeding** will the legal practitioner use to institute the claim of R30 000? **Give a reason** for your answer.
(c) Who will be the **opposing parties** in this dispute?
(d) Who is the **presiding officer** in this court?
(e) What is the **burden of proof** in this kind of legal dispute and **on whom** does it rest?

(3) Answer the following questions on the criminal dispute:

(a) Name the **two decisive factors** that will determine the court's **jurisdiction** in this criminal dispute.
(b) In which **court** will the prosecution of Mr Scotchbottle take place? **Give a reason** for your answer.
(c) List **three ways** in which the **attendance of an accused** party in a **criminal case** can be secured in the court that you have identified in (3)(a).
(d) What is the **purpose of the trial on merits of a case**? List the **four phases** of the trial on merits.
(e) What will the **name of the case** be?

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(1) (a) The amount claimed is R500 000. Therefore, the case will be heard in the **High Court**, as High Courts hear actions for civil claims of substantial (large)amounts.

(b) The presiding officer in a High Court is a **judge**. Make sure that you know what the role of a presiding officer in a court case is.

(c) *Van der Merwe v Scotchbottle*

(d) **Yes**, Mr van der Merwe has a remedy. The case may be **reviewed** by the same or higher court if there has been an **irregularity in the procedure**. In this case, the judge may have been biased as he is the uncle of Mr Scotchbottle, the defendant.

(e) When a matter is taken on review, the **application process** is used and the parties are referred to as the **applicant and the respondent**.

(2) (a) The claim of R30 000 can be claimed in the **magistrate's court**, specifically the **district court**. In civil cases, the amount of damages that may be claimed in district courts is smaller than in regional courts and the High Court.

(b) The legal practitioner will use the **action proceedings** to claim the R30 000, because in our story there are **fundamental differences between the parties regarding the facts of the case**. Mrs Van der Merwe (the victim) submits that Mr Scotchbottle (the wrongdoer/accused) did not stop at the four-way stop, while Mr Scotchbottle maintains that he did.

(c) The opposing parties in this case will be the **plaintiff (Mrs Van der Merwe) and the defendant (Mr Scotchbottle)**.

(d) The presiding officer in a magistrate's court is a **magistrate**. [Make sure that you know what the role of a presiding officer in a court case is.]

(e) The onus of proof in a civil case rests on the **plaintiff** (Mrs van der Merwe) to prove her allegation that the defendant

(Mr Scotchbottle) did not stop at the four-way stop, **on a balance of probabilities**.

(3) (a) In a criminal case, the two decisive factors are: the **type of offence (crime)** and the **possible sentence**.

(b) The prosecution of Mr Scotchbottle will take place in a **magistrate's court**, specifically the **district court,** because in criminal cases the district court hears less serious offences, like drunken driving.

(c) The three ways in which the attendance of an accused party in a criminal case can be secured in the magistrate's court are **arrest, summons, and a written notice by a peace officer**.

(d) The purpose of the trial on the merits of the case is **to determine whether the accused is guilty or not guilty**.

The **four phases** of the trial on merits are:

- State's charges against accused
- Accused's plea
- State and accused's legal representative state their cases
- Judgment

(e) *S v Scotchbottle*

conclusion

You should now know that different types of disputes result in South Africa, that a hierarchy of courts exists and that different processes operate within this hierarchy. You have now reached the end of the learning units to the only study guide for the module, Introduction to Law!