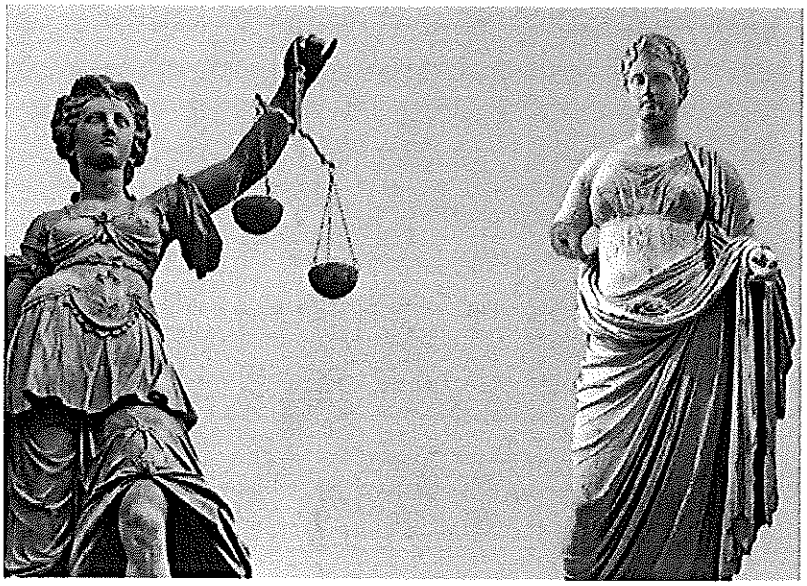
Unit 0: Getting Started

0.1: Welcome and overview of the module



Welcome to Social Dimensions of Justice, module code: SJD1501.

This module will introduce you to the South African context in which you will be required to perform as future legal and criminal justice functionaries. The focus is to allow you to develop a basic understanding of what shapes our legal system, the nature of the South African law and criminal justice system and how the law is applied and justice administered. You should also develop an awareness of how you, as legal and criminal justice functionaries, can contribute towards building a safer and more just society in conformity with the South African Constitution.

Outcome of the module

After the completion of this module we hope that you would be able to:

- demonstrate an understanding of the South African legal and criminal justice systems.
- demonstrate an understanding that South Africa's constitutional, legal and criminal justice systems function within a global community.
- articulate a personal philosophy of justice with specific reference to the principles of restorative justice, on which a legal or criminal justice professional's service to humanity is based.

Click on Next at the bottom of this page, to go on to the following section.

0.2: How will this module be offered?

The module is delivered online, through myUnisa. All learning materials and activities are found on and will take place on the myUnisa platform and through the internet. There will be NO printed material provided for this module. Your lecturer(s) and teaching assistance will interact and communicate with you by means of myUnisa and e-mail. You will also interact with your peers via myUnisa.

At the time of registration, you received a printed letter called tutorial letter 101. (It is also available on myUnisa, under Official Study Material if you want to read it online.) This is one of the few tutorial letters that you will receive in the post regarding this module. The rest of your study materials will be available on myUnisa and activities will take place online, with myUnisa, email and the internet.

In Tutorial Letter 101, you are informed that this module will only be offered online. This means that there are some changes in the way we teach, and some changes in the way you will learn. In this section, we will start to explain some of these differences.

Overview of the online tools

For this module, we are going to be using the following tools on myUnisa to guide you in your studies:
Home page / Welcome

Announcements
Schedule
Learning Units
Discussions (This is an online discussion forum)
Additional Resources

Inside the Discussions Tool (when you are online) at the top, left of the webpage, there are several Forums where you will be asked to discuss ideas and post your views on a particular topic. As part of this space, you will also have a Forum where you can talk with your fellow students on a more social level -- we call this "Law Talk".

You will also see that there is a forum called "Talking with your Lecturer". Use this forum to post questions to the lecturer about the module. Your lecturer or Teaching Assistant will provide you with feedback. Remember, these discussion forums are public places and everybody will be able to see your questions and answers. If you want to ask a private question, use your myLife email or use Course Contact.

You can also ask questions on the Questions and Answers Tool. If your question is relevant to everybody, it will be published for the whole group. (This can only happen when you are online).

Submission of your assignments

Assignments will be provided on the *myUnisa* module site. Typed wriited assignments are submitted through *myUnisa* on the assignment tab while discussions are submitted under the discussion tab on your group site.

Submission of your Portfolio

Your portfolio must be submitted electronically via *my*Unisa. Portfolios may not be submitted by fax or e-mail. To submit via *my*Unisa please do the following:

Go to *my*Unisa.

- Log in with your student number and password
- Select the module
- Click on "Assignments" in the menu on the left-hand side of the screen
- Click on the assignment number you wish to submit
- Follow the instructions.

In order for your portfolio to be marked onscreen (no printing of your portfolio), you need to submit your written portfolio online ***(in PDF format)*** via *my*Unisa. Software to convert Word documents to PDF is available on *my*Unisa. You can also download a free PDF convertor from http://www.primopdf.com/index.aspx . Please note the free version is sufficient for the purposes of the submission of your portfolio. The advantage of submitting your portfolio **in PDF format** is that the assignment is marked onscreen by your lecturer or teaching assistant and represents a far more environmentally-friendly way of submitting your portfolio for this module or assignments in other modules. In addition, when assignments are submitted electronically feedback on the assignment is emailed immediately to your *my*Life student email address.

Click on Next at the bottom of this page to move on to the following sections.

Assignment 1

Assignment 1: Discussion forum

2. Under the discussion forum introduce yourself to fellow classmates. Also identify the group you are in by posting the group number and the name of your TA. Lastly create your mylife e-mail account and post it on the discussion forum as part of your assignment.
4. What is Ubuntu?

TOTAL: 10 MARKS

INSTRUCTION: DO NOT CREATE A NEW TOPIC

Assignment 2

Assignment 2: Discussion forum

Up to this point, we have spoken about justice quite a bit and we have discussed and argued the complexity thereof.

1. Now, after you have taken part in the discussions, we would like you to reflect on the following:

   - What is the difference between law and justice?
   - Is the law always fair? please motivate your answer with examples.

2. Share a case where you have experienced that the law can contribute to a harmonious and peaceful society(500 words).

TOTAL: 10 MARKS

INSTRUCTION: DO NOT CREATE A NEW TOPIC

Assignment 3

Assignment 3: Written assignment

The Assignment for Unit 3 has three sections. **Section 1 deals with four case scenarios and each scenario has a number of questions you need to answer.**

Section 2 and 3 deal with the Activities for unit 3 you completed earlier. You have to submit all three sections as part of your Assignment 3.

Section 1

Read the following and write short notes on the questions related to the each dispute.

Dispute 1

You have been living next to Mr Nkosi and his family for many years. Since you moved in, he has been unhappy about where you park your car. He says that you are trying to annoy him by parking right in front of his entrance, but you are of the view that you are parking inside your own property. The feud between you is so serious that you do not talk to each other.

Yesterday morning you went outside only to find that your car, which was worth R180 000, had been damaged beyond repair. Mr Nkosi admitted that he was responsible for the damage. He said that he had warned you many times that if you continue to park in front of his entrance, you will be sorry "... because your car will pay for your stupidity".

You are furious. You know that you cannot discuss this with Mr Nkosi, but you want him to be responsible for the damage to your car.

Dispute 1: Questions

1.1 In your opinion, which of the alternative dispute resolutions would be appropriate in these circumstances? Provide reasons for your answer.
1.2 In your opinion, is going to court an option in this matter and if so, which court?

Dispute 2

Your friend Suzy borrows your laptop to do a university project. However, when she returns it a few days later she tells you that "... it just stopped working". You do not believe her story and you suspect that she has damaged it in some way.

You take the computer to the store, and they establish that there is water damage. They inform you that it will cost R7 000 to have the laptop fixed. You talk to Suzy but she insists that she did not cause the damage.

You discuss the problem with your father. He suggests that together, you should find a solution and solve the problem. You follow his advice. After a lot of talking and crying, Suzy offers to pay you R700 a month for the next 10 months. You accept her suggestion.

Dispute 2: Questions

2.1 What method was used to resolve this dispute?
2.2 Suppose that the dispute had not been resolved, could it have been resolved by the courts? If so, which court would be most suitable and why?

Dispute 3

Mary and her husband decide to get divorced. Mary wants the divorce to be as amicable as possible and avoid a lengthy and expensive court case. On several occasions Mary and her husband have tried to talk and come to an agreement on the division of the assets, but they were unable to come to an agreement. It seems that they need an objective person to help them with their decisions.

Dispute 3: Questions

3.1 What method of dispute resolution have they already attempted unsuccessfully?
3.2 Besides going to court, which Mary wants to avoid, what other method or methods of dispute resolution are available to them?

Dispute 4

Mr Baloyi a builder and you entered into a contract in terms of which he would build your house. The contract stated that you would pay a deposit of R20 000, after which the building would commence immediately. The rest of the money would be payable upon completion of the project.

You paid the deposit, but six months later Mr Baloyi still had not started with the work. You eventually decided to take him to court to claim back the deposit you paid him. You go court, but the court decides that you had not given Mr Baloyi enough time to start the work, and rejected your claim.

Dispute 4: Questions

4.1 In which court would this matter been heard? Provide a reason for your answer.
4.2 What other options do you have to get your money back or does the decision of the court mean that you now have to wait until Mr Baloyi decides to start building?

Section 2

In the Activity on Legal disputes: Civil or Criminal? You were asked to complete a table. Attach your completed table to this section of the Assignment. The table can be found under additional resources or follow the link below:

https://my.unisa.ac.za/portal/site/SJD1501-16-Master/page/385f7211-5a9b-4e9c-b2d7-86a3f071e349

Section 3

In the Activity on The nature of legal disputes, you were asked to give legal advice in Alex's column.

Attach your completed responses to the letters to this section of the Assignment.



Dear Alex,

I borrowed my best friend's motorbike. While I was in the shop, the bike was stolen from the parking lot. My friend is now taking me to court to claim money from me to buy a new motorbike.
Confused

Dear Alex,

I borrowed my boss' car. After a night of partying and drinking, I was involved in an accident and arrested by the police. The police now say that I will be charged with driving under the influence of alcohol.
JP

Dear Alex,

My son, Gordon, is a student. He was involved in a fight with a fellow student, Tommy, recently. He broke Tommy's nose. Tommy's mother has gone to the police. They have told us that a case of assault is being investigated against my son.
Sad mom from Jhb

Dear Alex,

I am a plumber. I was involved in a fight two weeks ago. My neighbour hit me with a cricket bat and broke my arm. As a result, I have been unable to work and the doctor says that I shall only be able to go back to work in two months' time. Because I am unable to work I do not have money to buy food for my family.I am thinking of taking my neighbour to court to get some money from him .
Need help

TOTAL: 20 MARKS

Assignment 4

Assignment 4 Discussion forum

Go to the South Africa Police, Department of Correctional Services and the National Prosecution Authority websites and explain their visions, missions, mandates and roles in the criminal justice system.

TOTAL: 15 MARKS

Assignment 5

Assignment 5: Written assignment

1. In Unit 0 we explained that law and justice form an intrinsic part of our daily lives. In order to explore these concepts, we have provided you with the contextual background to the most pertinent issues; we have you engage with newspaper reports and have requested you to reflect on our own experiences and those of others. With this in mind, we now want you to read any of the daily newspapers available to

you so that you may develop a sense of the status of crime in our society and of the work of functionaries in the criminal justice system.

2. From your reading above, choose any 5 examples of reports (articles) on criminal activities that you have found interesting and then do the following:

NB: At least 3 articles must be South African and all articles must not be older than 3 months.

Compile a document based on each of the 'cases' you have selected:

- Provide us with the source of the story, in other words, the title of the report/article in the newspaper, the page number, the name of the newspaper, and the date it was published. E.g.

  LAWYERS OF SHAME Pretoria News, p.1, Monday February 20: 2012
  PRISONER SHOT DURING HOSPITAL ESCAPE Sowetan. p.2, Tuesday August 28: 2012. (5)

- Provide a brief summary (about 150 words for each article) of what is described in the report and why you have chosen this example. Explain why you find it interesting and give reasons why you believe this story is related to our criminal justice system. (10)
- Identify the key role players in the article and explain their involvement in the incident from a criminal justice perspective. (10)

3. Write short comments on how you perceive the involvement of the functionaries representing the criminal justice system in these cases. In what way do you think these individuals have served justice? If you feel that justice was not served, provide reasons for this view. (5)

TOTAL MARKS: 30

Assignment 6

Assignment 6: Discussion forum

In the activities of Unit 6 you have been asked to remember and analyse some of your own decisions in the past. You were also asked to consider your learning journey through this module.

1. Go to "Discussions" and click on the Forum named **Assignment 6.** Reply to the post and share in approximately 300-400 words, your personal opinion and motivation on the following:

- What influences you on a personal level? (4)
- How do you make decisions when you deal with ethical issues? (4)
- How has doing this module changed your ethical stance in your personal life? (4)

2. Read the views of one of your fellow students and comment on it.(3)

Total: 15 marks (calculated towards year mark)

INSTRUCTION: DO NOT CREATE A NEW TOPIC

Final portfolio

FINAL PORTFOLIO FOR SJD1501

The module you have just completed can be regarded as the first step to eventually fulfilling a role in the justice system. Now we would like you to reflect on what you have learned and how this knowledge has affected your view of the law, the justice system and the people who uphold the law in this country. In other words we want you to begin to formulate your personal philosophy of justice.

Compile a document of between 1800 and 2200 words in which you reflect on the issues below.

1. Consider how you see your future career. Do you picture yourself working in the justice system one day? Give a reason for your answer. Reflect on your learning experiences in this module and how these may have influenced your answer. Identify the highlights of your journey through this module considering the following guidelines:

- Experiences with online learning

- Group communication and discussions

- Communication with your TAs

- Working with other students

- Contents of the module

2. In the activities of this last study unit you have been asked to remember and analyse some of your own decisions in the past. You were also asked to consider your learning journey through this module. Consider the following:

- What influences you on a personal level?
- How do you make decisions when you deal with ethical issues?
- How has doing this module changed your ethical stance in your personal life?

3.In the course of this module you reflected on the ethos of the Constitution of the Republic of South Africa and uBuntu. Keep these issues in mind and imagine that you are already working in the justice system.

- How do you think the two elements mentioned above (the Constitution of the Republic of South Africa, and uBuntu) should influence your personal code of ethics and conduct as a functionary in the justice system?
- Think of a role model whom you believe embodies the qualities that are vital to being ethical. This does not have to be a famous person. Say who this person is and why you look up to him/her for ethical guidance.
- Discuss your views on the importance of ethics as a functionary in the workplace. How will ethical stance influence your work ethics in the justice system? Include the qualities of an ethical person in the justice system.

Total: 100% (of examination mark)

ACTIVITY 0: ICEBREAKER

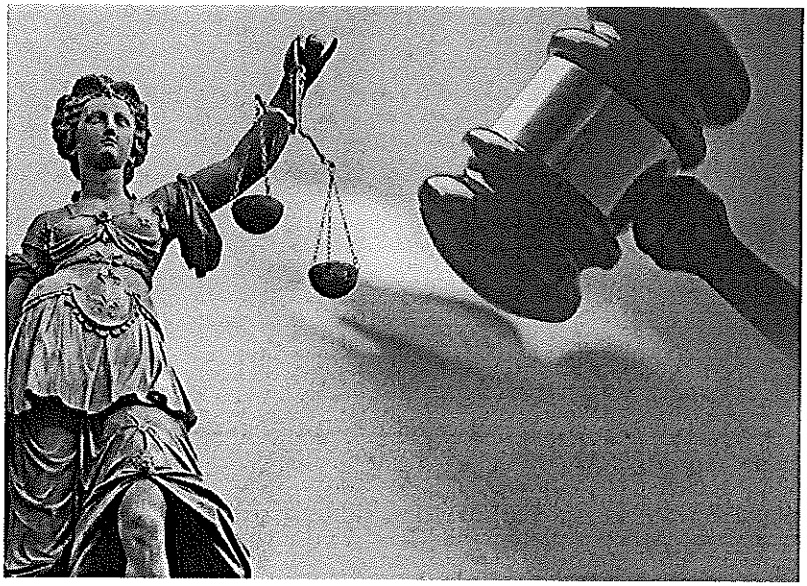
On this activity briefly explain what your expectations are from this module.

Switch to Full View

Unit 1: Law and Justice: Living together in harmony

1.1 Overview of Unit 1

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Law and justice

Before we start with the key theme of this unit, namely law and justice, let us consider the image of Lady Justice.

Make notes for yourself about the image of Lady Justice and consider whether this symbol still has meaning for us in the 21st century on the African continent, in our fairly young democracy. Should she be replaced, adapted (changed), or plainly be discarded as a symbol of justice?

Early reflections

At this point, with the knowledge you currently have of law and justice, what would your reaction be if:

- you are being treated unfairly at work?
- your friend's cellular phone has been stolen?
- you know someone who is being abused by her/his partner?
- you have signed a contract that was unfair to you?

Would you feel frustrated and helpless? Would you like to know what you could do to right the situation or make things better? Whatever your feelings are, once you start thinking about these scenarios, a logical process takes place and one considers the concepts of "right" and "wrong". Do the questions make you feel that these people were "wronged" in one way or another?

Furthermore, if the situations make you feel that they are "wrong", why? How do we as a society deal with issues that are "wrong"? Do we try to solve the problem ourselves? In other words, how do you think we can resolve a situation fairly, or how can we ensure that justice has been served?

Whenever we are faced with a problem, we form a personal opinion of whether the outcome was fair. As a society we need rules to help us with issues of right and wrong. Rules give us structure and allow us to keep order. We will now introduce you to those rules that have a very specific purpose – they regulate the relationships between the State and members of our society to allow us to live together peacefully. This is what the law entails.

Law and justice - are these words synonyms?

Are law and justice the same concept, in other words do they mean the same thing?

As you may already know, the law is a set of norms that distinguish right from wrong. The law also informs us of what our rights and duties are. However, other aspects, such as the values, personal views and morals of people, also influence the functioning and effectiveness of our legal system. These

personal differences may stand in the way of a just society. Justice can be served only if we take all these matters into account.

In this learning unit, we are going to look at these individual differences and how they impact on our striving towards justice. We also introduce you to the concepts of law and justice. We will explore the following critical questions:

- What is the law?
- Where do we find the law?
- What is justice?
- How do we achieve justice?
- Are law and justice the same?

Our learning strategy

In this unit we expect you to take part in rigorous discussions on the function of the law in our communities. In the beginning of this discourse (critical discussion) you may feel uncertain, but the more you communicate with your fellow students, the easier it becomes.

Participation in discussions is most important and will help you with your assignments. Many times you will be required to cut and paste your discussions into your assignments.

1.2: What is the law?

When we speak of "the law", it has many meanings. The law that we refer to in this module is a ***body of rules intended to order society in a fair, equitable, and objective manner***. This means that the law rules the relationships between private individuals, as well as the relationships between private individuals and the State. Nobody is above the law and we are all equal before the law. The law is a set of rules that prescribe the way in which we, as members of society, are required to behave. It also helps us to resolve conflict and govern society, and it provides certainty to all. Certainty that the law will prevail. In other words, the law is there to serve the people. Adherence to these rules (or "laws") is called the rule of law.

The law is always alive, meaning it is always evolving and changing as our circumstances and society change. For example smoking in public is now a crime. In the past people smoked wherever they like. In other words, the law today is different from the law in the past. Social conditions, beliefs and values determine the changes to social rules.

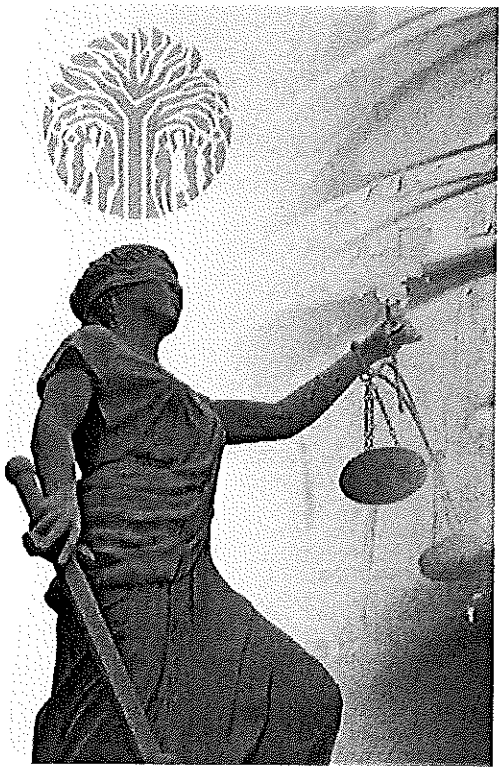
What happens if society's members do not adhere to laws? This is where we implement sanctions or even punishment in some instances. You will learn more about these sanctions in later learning units.

1.3 Where is our law situated?

In our country we have a mixed legal system. This means that the law is not simply written down in one big, long document. The obvious question now is: Where is our law situated? In this learning unit we provide you with a basic understanding of where our law comes from.

Before we start – have you ever heard of the Constitution? We're sure that you have and you'll learn a little more about it in the next learning unit. At this stage, however, we need you to understand that all South African law is subject to the Constitution. In other words, if any law is in conflict with the Constitution, the Constitution takes preference. The Constitutional Court, where all constitutional matters are heard, can amend any legislation or, if it is inconsistent with the Constitution, declare it to be invalid. A matter can be taken to the Constitutional Court in order to clarify any issue requiring the interpretation, protection or enforcement of the Constitution. We discuss Constitutional issues in more detail a little later.

Now, let us look at the main sources of our law:



Legislation

Much of our law can be found in legislation or Acts of Parliament (also called statutory law). These laws are written down and approved by Parliament (also known as the legislature). Legislation is where a great part of the law is found and it is the most important source of our law. As already mentioned, no law may be in conflict with the Constitution. Also be aware that there are various kinds of legislation – you will learn more about them as you further your studies. If you would like to see an example of an Act of Parliament, go to the website of the Department of Justice and Constitutional Development at http://www.justice.gov.za/. Once on the site, click on "Legislation" followed by the link to "Acts".

Court decisions

Court decisions, or case law, are the practical application of our laws. When a matter ends up in court, the court has to consider the law, apply it and make a judgment. When a court delivers such a judgment, its decision may be binding on other courts as well. This means that a decision by the Supreme Court of Appeal, for example, has to be followed by the High Court or any other court.

If a similar case later goes to court, the lawyers involved will look at the previous decisions – and the court may have to consider a previous judgment on a similar matter before it makes a decision. In other words, subject to certain rules called judicial precedent, previous judgments are binding on courts – they are, therefore, also a source of the law. You will learn more about this if you continue with your studies in law.

Common law

Not all our laws are found in legislation. Some laws are not written down in an Act – an example being murder. You will not find any legislation that tells you that murder is a crime. This legal principle comes from common law. Our common law is found in Roman-Dutch law (Roman law and Dutch law), as influenced by English law and interpreted by our courts. Common law can be changed by court decisions and, although common law still forms an important part of our legal system, some common-law crimes, such as adultery, are no longer viewed as crimes.

Customary law

You may have heard of customary law. In broad terms, this is when the way in which people in a community live is determined by certain unwritten practices that are not recognised by the law as binding, but that have been in existence for a long time. In other words, these practices have been carried down from one generation to the next and the people regard them as law. If they fulfil certain requirements, these customs may be recognised as legal rules.

Customary law is no longer an important source of our law, except for one very important part – indigenous law or African customary law. Many communities in South Africa live according to the laws, cultures and practices of their tribes that apply to their specific communities. These laws are mainly unwritten. Indigenous law, which is recognised in many Acts, has been recognised as a source of our law since 1994 when South Africa became a democracy. It is also protected by the Constitution and South African courts have to apply indigenous law where it is applicable.

1.4 Different branches of our law

It is not possible to divide the law into exact areas as the various branches of the law often overlap. It is also not our intention in this module to provide you with all the information you would need in order to know what all the various divisions of our law are. However, we would like you to understand that the law is divided into different areas, and that the two main divisions are public law and private law.

- Public law deals with the relationship between the State and the individual – for example, when a crime is committed and an individual is prosecuted by the State, or when the State has to award tenders for government contracts.
- Private law deals with the relationship between individuals and other persons, for example when someone buys a house or a bicycle, or when someone writes a will.

1.5 Is the law always fair?

Now that you have a better idea of what the law is and entails and its origin, return to and reflect on the newspaper articles that you read earlier. At this point we must look at the issue of whether the law is always fair.

Go to the following links:

http://www.sowetanlive.co.za/news/world/2011/10/25/euthanasia-campaigner-on-trial

http://www.iol.co.za/the-star/mercy-killer-son-sentenced-1.1185942

http://www.derebus.org.za/judges-ruling-in-assisted-suicide-case-divides-south-africa/

Read the article about Sean's trial for attempted murder again, as well as the second article where you can read about the legal consequences of Sean's actions. In the second article, dated 24 November 2011, Sean is quoted as saying that "[t]his trial was not about justice, it was about getting a conviction at all costs. I feel the law should be about humanity". The third article deals with the case of Robin Stransham-Ford. While delivering his judgement, Judge Fabricius made it clear that it was time that the topic of assisted death be canvassed by the Constitutional Court and the government. He quoted case law where it was said: "The right to life is more than existence, it is a right to be treated as a human being with dignity. Without dignity human life is substantially diminished. Without life, there cannot be dignity."

From this example, would you say that the law was fair? Go to the next activity to enter the discussion on whether the law is always fair or not.

1.6 Understanding the link between law and justice

Can you see how Sean's decision to assist his mother to die might have been what she wanted, but that Sean's actions also did harm to society because he broke the law?

Sean was in a very difficult position. On the one hand, he clearly knew that what he did was against the law. On the other hand, he loved his mother and he could not bear the thought that she was in so much pain. You may have empathy for Sean's situation, or not. My idea of what is right and what is wrong may differ from yours.

Furthermore, the reality is that people cannot just take matters into their own hands, even when they think they have been wronged. That is why we have laws. Other examples of people taking the law into their own hands is when communities stone and kill alleged rapists and murderers because they feel that the offenders will escape the justice system (Vigilantism).

Realistically, not everyone views the application of law as fair. As illustrated clearly by the case of Sean Davison no outcome would meet the approval of all members of society. Some would see his assisted killing as murder and others as a way of helping his mother out of her suffering and as a noble deed.

If however, we did not have laws, it would lead to a totally disorganised and lawless society that would be unable to protect individuals.

When we have a diverse society these diffences make it harder for us to live in unity. In South Africa we live in a multiracial, multicultural and multireligious society. Because we come from different backgrounds, resulting in different values, morals and interests, and our value systems also differ. Our ethical beliefs differ from community to community and this influences our actions and decisions. Can you see how complex it is for law and justice to be served?

Let us look at another example

Our Constitution, instituted in 1996, set the scene for a level playground, in other words it created a framework for a just society. This document granted us, as a society, with certain rights. One of these

rights, addressed in section 9, is the right to equality. It includes the right not to be unfairly discriminated against on any ground, including the ground of a person's sexual orientation.

This section of the Constitution addresses the wrongs of the past. One such example was the view that marriage was legal only if it was between one man and one woman. The law was changed and now allows same-sex couples to marry. Some people may not agree that marriage between people of the same sex should be legal, but whether you agree or not, – the law allows it. The point is that we as a society may experience a conflict between the law and our personal convictions as a result of our morals, values, beliefs, culture or religion.

We have already explained that all laws in our country have to be tested against the Constitution to determine whether they are fair or not (or legal or not) . The Constitution therefore ensures that there is justice in our legal system – and you will learn more about it in the next learning unit.

Think back to the debate in the discussion forum on **"Is the law always fair?"** There we dealt with a mercy killing. In this example we address equality and discrimination. Can you see that the law must deal with complex issues and different views of fairness, as well as maintaining a continual balance between law and justice?

1.7 Justice: what is it?

We believe that justice is served if the law is fair. There is no point in having laws if they do not result in justice.

We want you to revisit our two examples in **Activity 1.1 'Law and order'** in which we looked at the law as a mechanism to restore order in our society. Now let us look at this 2 almost similar cases.

First we look at the case of Sindisiwe Manqele who was found guilty of the murder of rapper Nkululeko 'Flabba' Habedi and sentenced to 12 years imprisonment. Judge Solly Sithole says an assessment of her actions shows that she intended to kill Habedi. The judge has found her account that she stabbed Habedi in self-defence cannot be taken to be reasonably possibly true. He says the force she used to plunge a steak knife into his chest does not match the extent of the threat she claims he posed to her life. In addition the Judge said it was a crime of passion and a relationship characterised by unhealthy disputes.

https://www.enca.com/south-africa/manqele-guilty-murdering-flabba

Next up is the matter of Donald Sebolai. Even after he has been sentenced to 20 years imprisonment, the former radio DJ maintains he is innocent and that his former girlfriend Dolly Tshabalala stabbed herself. "I did not take the knife and stab her, it was a fight and I was trying to disarm the deceased. It's the truth." He was found guilty of killing Dolly Tshabalala and defeating the ends of justice. He was convicted of defeating the ends of justice after going on the run for over a week after the crime, with the court finding he had cleaned the blood stained floor and removed the murder weapon from the scene.But Judge Cassim Moosa says Sebolai is a violent and abusive man who deserves the harsh sentence. The Judge also said the sentence is appropriate and that he hopes this will deter other offenders from gender based violence.

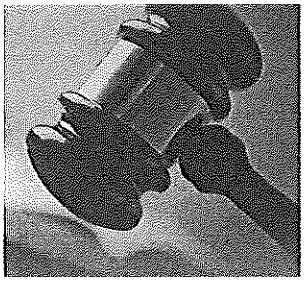
http://www.news24.com/Tags/People/donald_sebolai

1.8 How do we achieve justice?

What makes social justice a difficult concept to define and to understand is the relativity thereof. What does this mean? There are many opinions of what justice is. Personal values, morals, and cultures – as well as factors such as race, sex and religion – influence our ideas of what justice is, or make it relative to our personal circumstances and views. The ethical beliefs and standards that guide a person in both his or her personal and professional life will contribute to the role that he or she will play in achieving justice.

Our South African society consists of a melting pot of different nationalities and cultures. Cultural beliefs, values and morals, differ from group to group. In order to achieve justice, all people have to be treated equally by the law, regardless of all these factors.

1.9 Conclusion



In this learning unit we introduced you to law and justice, and to the very important relationship between the two concepts. You learnt that we all have to adhere to the law, and that the law and justice need to work together to achieve a livable, peaceful and harmonious society or environment. When justice is served, the law is fair. What this means, is not that the law can ever be ignored, but that it must be enforced in an unbiased, reasonable way, always keeping justice in mind.

Now that you have an idea of how law and justice affect society and how they are affected by society, we shall explore this relationship further. In the next learning unit, you will learn more about our Constitution.

ACTIVITY 1.1: "Law and order"



In the following activity we want to show (illustrate) how the law creates or contributes to social order.

1 Read the following newspaper reports by clicking on the two URLs (blue text). After reading them, consider the following questions:

- What emotions are evoked while you read the reports? Think of your own emotions as well as those of all the parties involved.
- How and why do the emotions and feelings of all people involved differ?
- How, if at all, did the stories make you feel? For instance, did they make you happy, angry, sad or concerned?
- Did your reactions to the two stories differ?
- In your personal opinion, who did wrong and, if so, why do you think that it is wrong?
- Do you think that the two stories should have the same outcome? What do you think the outcome(s) should be?

http://www.sowetanlive.co.za/news/world/2011/10/25/euthanasia-campaigner-on-trial
http://www.sowetanlive.co.za/news/2010/12/07/shrien-plotted-wife-s-murder-western-cape-prosecutor

2 After reading both newspaper reports, you probably realise that the articles have common themes – both involve conflict and death, but the circumstances in each case are very different. We look at how society deals with conflict situations like these individually.

Take part in the discussion forum on how society deals with conflict situations and how the law acts as a mechanism which creates order in our society.

Click on "Discussions" on the left of this webpage and post your views under the topic ***Law and order***

After you have posted your comments under the Discussions forum, proceed to Learning Units and click on **What is the law?**

ACTIVITY 1.2: Is the law always fair?

At this point we would like you to take the discussion on **Law and Order** a little further by looking at the fairness in the outcome thereof. Go to Discussions and in the Forum named Activity **"Is the Law always fair?"**, share your views on the fairness of the court's decision in the case of Sean Davison. Go to the topic: **"Fairness of the court decision"** and share your views.

Consider these following questions:

- Do you think that strict adherence to the law leads to a fair or just result?
- How do you interpret Sean's statement about humanity?
- Do you think that Sean was treated fairly or justly? In other words, do you think that justice was served?

ASSIGNMENT 1

Assignment 1: Discussion forum

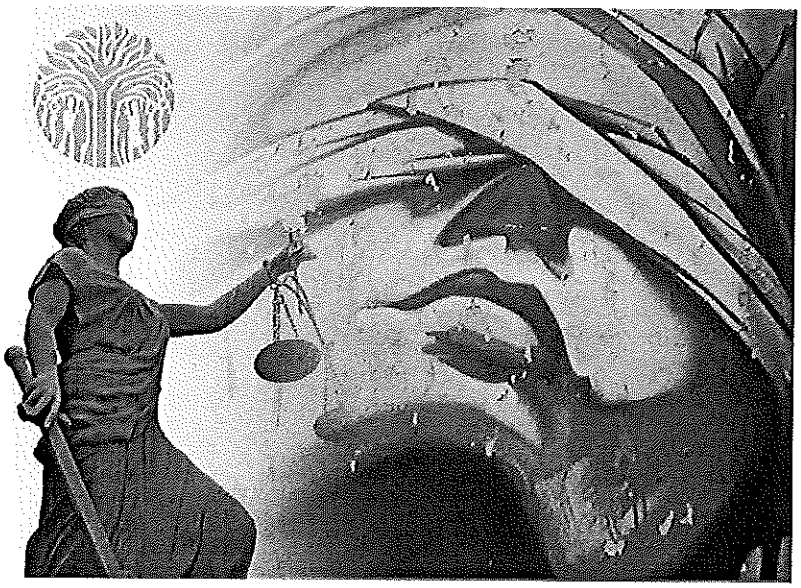
2. Under the discussion forum introduce yourself to fellow classmates. Also identify the group you are in by posting the group number and the name of your TA. Lastly create your mylife e-mail account and post it on the discussion forum as part of your assignment.
4. What is Ubuntu?

TOTAL: 10 MARKS

Switch to Full View

Unit 2: An African Way of Being

2.1 Overview of Unit 2



A fair society?

Before we start with the key theme of this unit let us consider the new image of Lady Justice. You will note it differs from the one in the previous unit.

Activity: "Good morning Lady Justice. Please, come inside."

1. Carefully study our image of Lady Justice. Make notes for yourself on the various objects that you see and what, according to you, the deeper meaning of these objects may be. While doing so, try to compare the image of Lady Justice in this unit with those of the previous units.
2. Go to the Discussion Forum: "Good morning Lady Justice. Please, come inside" and do the following:
• Comment on how our image of Lady Justice has change and once again, share your ideas in the debate: Does symbols, such as Lady Justice, still have meaning for us living in the 21nd century on the African continent, in a fairly young democracy? Should she be replaced, adapted, or plainly be discarded?

Early reflections

In the previous learning unit you were introduced to the concepts of law and justice. Before 1994 there were many laws, but not all of them were fair to everyone in this country. In 1996, however, our Constitution, the Constitution of the Republic of South Africa, 1996, was adopted.

As you may remember, we said that the Constitution is our supreme or most important law, and that it helps us to ensure that our laws are fair and just. In this learning unit we shall explore the Constitution. We are going to look at how our Constitution is there to protect us all and to ensure that we live in an environment where we are all equal before the law. We shall also look at uBuntu, a concept that underlies our Constitution.

Think about the following issues:

• Should there be rules telling us how many children we are allowed to have?
• Should we be told whom we are allowed to associate with?
• Should anyone be allowed to just walk into our home and go through our property for no reason?
• Should we be allowed to decide when someone else must die?

The questions above may appear to be random and unrelated, yet they share a common thread. Let us reconsider these issues:

- Should there be rules telling us how many children we are allowed to have?
- Should we be told whom we are allowed to associate with?

- Should anyone be allowed to just walk into our home and go through our property for no reason?
- Should we be allowed to decide when someone else must die?

What was your reaction when you read these issues? Did you have any reaction at all? Did you experience a feeling of unfairness? Maybe some of these made you uncomfortable, but you did not know why.

Now go to Activity 1.2: 'Do we have freedom to choose?' by clicking on "Next" at the bottom of this page.

2.2 "All animals are equal"

Some of you may have heard of – or may even have read – the 1945 George Orwell novel "Animal Farm". This magnificent novel, which addresses corruption, wickedness, indifference, exploitation, ignorance and greed, is about animals that live together on a farm and, after a revolution, run the farm. They decide on seven commandments or laws which are designed to keep order and to unite them. The most important of these commandments is: "All animals are equal".

In the story, not everyone is satisfied with the commandments, and things go horribly wrong when corrupt pigs start doing things for their personal gain. The commandments are gradually changed and eventually replaced by one single commandment, namely "All animals are equal, but some animals are more equal than others".

The novel illustrates that a fair system of rules is essential to organise society, to ensure equality and rights. The example of the animals in Animal Farm is used as a metaphor to illustrate what can go wrong if society does not have rules, has unfair rules, or has rules that are abused or not applied. If you have not read Animal Farm, you do not have to do so for this module. Just remember what we said above.

South Africa, as a constitutional democracy

South Africa, as a constitutional democracy, strives towards ideals. Our Constitution is a system of fundamental principles according to which the country is ruled. The commandments of the animals in Animal Farm were changed to advance the personal agendas of the pigs. Our Constitution, however, prevents this from happening. It arms us with several rights which protect us.

The first of these is the right to equality. This makes everyone equal before the law, which means that no one may be unfairly discriminated against. In this learning unit, we shall explain to you why we do not have to be concerned that "some animals are more equal than others".

At this stage we want you to reflect on your personal views and understanding of the Constitution. Consider the following questions:

- What is the Constitution? What meaning does the Constitution have to you personally? Have you ever read this document?
- Why do you think we have a Constitution? How does the Constitution contribute to a fair and equal society?

In 1996, on the occasion of the adoption of the Constitution, the then-deputy president, Mr Thabo Mbeki, delivered his now-famous "I am an African" speech. Using one of these links, please read the speech or watch the video of it:

www.soweto.co.za/html/i_iamafrican.htm

www.info.gov.za/aboutgovt/orders/new2002_mbeki.htm

www.youtube.com/watch?v=wWTixmmtamE

2.3 Towards fairness and equality

Why did we want you to identify similarities and differences in the people in the photographs? The images were specifically chosen to show how people are different. We come from different backgrounds, have different values, different cultures and different life perspectives. Some of the people in the photos

may even be victims of discrimination and be marginalised members of society.

Views of what is fair are based on ethical, religious, political, social, moral, and economic convictions. Most probably we all identified with the photos in different ways. Our attitudes towards other people are based on personal value systems. For instance, what you identified with, or similarities or differences you saw in the photos, are probably not the same as the perceptions of your fellow students.

Our personal convictions influence all of us. However, even though we are all different, we are all entitled to experience fairness and equality. This is why the Constitution is so important. It guides us, the people living in this country. It allows the law-makers and those applying the laws to ensure that we live in a just society.

2.4 The ethos of the Constitution

The Constitution starts with a Preamble and contains 243 sections that are divided into 14 chapters. The Preamble states the purpose of the Constitution; in other words, it gives you an idea of what our Constitution is all about. Below is an extract from the Preamble:

We, the people of South Africa ... *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 - ... 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 ... May God protect our people. Nkosi Sikelel' iAfrika. God bless South Africa.*

If you would like to learn more about the history of the Constitution, click on the following link: http://www.constitutionalcourt.org.za/text/constitution/history.html.

The Constitution protects everyone, irrespective of their differences. It incorporates certain values – human dignity, for example, along with the achievement of equality, the advancement of human rights and freedom, non-racialism and non-sexism. This idea of fairness is thus more than just a personal conviction – it is also found in and protected by the Constitution. The Constitution embodies the interconnectedness of humanity, and the need to live according to certain values and principles.

In Learning unit 1, in "Where do we find the law?" we explained that all our laws are subject to the Constitution, and that if any law is in conflict with the Constitution, the Constitution takes preference. Section 2 of the Constitution provides that the Constitution is the supreme law of the country and that any law or conduct that is inconsistent with it is invalid. This means that all other laws have to be in line with the Constitution to be valid, or, as we said above, that all other law in South Africa is subject to the Constitution. It also means that everybody, including government and the courts, has to act in accordance with the Constitution. They cannot simply do what they like.

If you are interested in reading the Constitution, you can find it at:
http://www.justice.gov.za/legislation/constitution/constitution.htm

2.5 What is the Bill of Rights?

We have spoken about the rights in the Constitution that protect all of us. These rights are contained in chapter 2, called the Bill of Rights. With a few exceptions, such as the right to vote and the right to a passport, which are reserved for citizens, and certain rights that are reserved for children, these are rights that everyone in South Africa is entitled to. The rights are based on a respect for human life and we refer to them as fundamental rights or human rights.

Examples

If you go back to the first activity in this unit, "Do we have the freedom to choose?" you will see that the extracts that you read relate to the following fundamental rights:

- China's one child policy: Section 12 - Freedom and security of the person
- Taxi driver beaten and jailed: Section 14 - Privacy
- Euthanasia: Section 11 - Life

With rights come responsibilities. It is important to understand that responsibilities and rights go hand in hand. We all have the rights guaranteed in the Constitution, and we all have a corresponding responsibility or duty to respect the rights of others. You can find a list of all the rights in the Bill of Rights in the document we referred you to earlier. We want you to go through the Bill of Rights so that you can comfortably take part in the rest of the discussion. To access the Bill of Rights click on the following link:
http://www.info.gov.za/documents/constitution/1996/96cons2.htm

The PDF version of the document is also available under Additional Resources.

In section 9 of the Bill of Rights we find the first right, the right to equality. In terms of this right, everyone is equal before the law and neither the state nor anybody else may unfairly discriminate against anyone on any ground, including: race, gender, sex, pregnancy, marital status, ethnic or social origin, age, disability, religion, conscience, belief, culture, language and birth. This is why we told you after your last activity that the Constitution is there to ensure that our country is a just society. If you now think of the example of same-sex marriage we gave you in the previous learning unit, you should understand why people of the same sex may marry. It is because unfair discrimination is not allowed.

When can discrimination be allowed?

Have you noticed that we do not say that discrimination is not allowed? We say that unfair discrimination is not allowed. This is because discrimination is allowed, as long as it is not unfair. So, for instance, a man cannot be appointed as a model for women's clothing. There is discrimination against the man, but it is not unfair. Another example is that a person who is 90 years old cannot be appointed to perform a job that requires a degree of fitness and stamina, such as that of a fireman.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 amongst others aims to prevent and prohibit unfair discrimination and to promote equality. If you want to read more about unfair discrimination go to the following link: http://www.justice.gov.za/legislation/acts/2000-004.pdf

You may not exercise your rights in a way that causes harm to others. To illustrate this: everyone has the right to freedom of religion, but you may not act on it if your religion requires you to physically hurt someone else. Not only will this cause harm to the person, but it also affects that person's right to freedom and security of the person, which is also a right protected in the Bill of Rights.

Conflict and limitations

This brings us to a further issue, namely rights that are in conflict. Can you see from the example in the previous paragraph that your rights may be in conflict with the rights of another? A further example of rights that are in conflict is that the right to freedom of expression of one person and the right to privacy and human dignity of another person might be irreconcilable. This might happen, for example, when an artist paints a portrait of someone else without that person's permission – especially if the portrait portrays the person in an undignified way.

Fundamental rights, thus, are not absolute which means that they may be limited under certain circumstances. As much as the Constitution guarantees certain rights for all the people in our country, it also sets limits to those rights.

It is not only the rights of different people that may be in conflict. It could also be that different rights of one person are in conflict or irreconcilable. We find an example in intercultural adoption. Everyone has the right to participate in the cultural life of their choice, and a child has the right to family or parental care, or to appropriate alternative care when removed from the family environment. If an orphaned child has the opportunity to become part of a family from a different culture, one of these rights might have to be limited.

Section 36, which is known as the limitation clause, deals with the limitation of rights. There are very specific requirements in section 36 for circumstances under which rights may be limited. If these requirements are met, the Constitution allows the limitation.

2.6 Reconsidering equality

In the case of Sean, we explored the complexities of different rights and the link to justice. In Activity 2.4: "Through my eyes: are we really all equal?" you were confronted with individuals from different cultural backgrounds and most probably with different value systems.

Now that you have an understanding of the implications in the Bill of Rights, have your views on these images changed?

2.7 Exploring uBuntu and the law

If you are a South African, you may be aware of the notion of uBuntu! When we think of humaneness, fairness and social justice, the concept of uBuntu comes to mind. In this learning unit, we wish to introduce you to this rather abstract concept, and explore how the principles of uBuntu may contribute to justice in our society.

What is uBuntu? Can you think of examples of uBuntu in your community?

Very few people in society show more insight into justice, compassion and uBuntu than former president Nelson Mandela. As a victim of many social injustices, he talks about the spirit of uBuntu as the basis of a sound and just society. Click on the video link below to watch the vidoe and hear what Mr Mandela has to say:

http://www.youtube.com/watch?v=I-RUPwI5edA

2.8 Reflecting on how uBuntu fits into our society

There is clearly no single definition of uBuntu. It is a way of life. However, certain principles feature predominantly, and uBuntu is characterised by a few overarching themes. These are:

- acceptance of our differences
- mutual understanding of one another
- respect for each other
- treatment of each other with dignity
- reconciliation and unity
- value of human life
- spirit of selflessness or sharing
- environment of trust

UBuntu, just like the rights in the Constitution, is not just about what it does for you. It is also about responsibility. As much as you, for instance, have a right to be respected and treated with dignity, you also have the responsibility to respect others and treat them with dignity.

2.9 African values

UBuntu is a concept that is firmly entrenched in our legal system. The spirit of fairness, respect, etcetera, as highlighted above, is clearly illustrated in the Preamble to the Constitution. It is further evident when you look at case law.

Do you remember that we told you in Learning unit 1 that case law is a source of our law? In the Constitutional Court, in *S v Makwanyane* 1995 (3) SA 391 (CC), the court made reference to uBuntu as a concept which underlies our Constitution. The court explained that uBuntu recognises a person as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community that such a person is part of. This is an extremely lengthy, but very important, case. It deals with the constitutionality of the death penalty (capital punishment). In its judgment, the court held that the death penalty was not consistent with the value of uBuntu. It declared legislation that allows for capital punishment unconstitutional and invalid. If you are interested, you may read the whole case, but it will be sufficient if you read the relevant parts of the judgment that we refer you to.

When you click on the link below, you will see the case. When you start reading the judgment (that is, the decision that the court came to) you will notice that at the beginning of every paragraph, there is a number in square brackets. This is called the paragraph number and you must use these numbers to find the relevant parts of the case that we refer you to.

In the matter of *'S v Makwanyane'* the following paragraphs make reference to uBuntu. Please read them carefully. This should provide you with a further perspective on the concept of uBuntu.

- Paragraphs 130-131, 223-227, 237, 307-313, 316.

The PDF document is available under Additional Resources.

2.10 uBuntu and the Constitution – doing it the African way!

In this Unit we introduced you to our Constitution and to the concept of uBuntu. We taught you how these concepts are interrelated, and we got you to think about how uBuntu is part of our lives. In the next learning unit you will learn that some legal differences, or legal disputes, cannot be solved without the assistance of the courts. You will learn that such disputes have to be dealt with according to specific procedures, and that the relevant procedure will depend on the nature of the issue.

ACTIVITY 2.1: Do we have freedom to choose?

Please read the following extracts and then write you own ideas about the following:

fairness or unfairness of each situation
the lack of freedom to make personal choices
the burden that societal rules can place on individuals
Keep your notes for Assignment 2.

1. China's one child policy

The one child policy is a population control policy in China which restricts married, urban couples from having more than one child. It was introduced in China in 1978 to alleviate social, economic and environmental problems. Some people were exempt from this policy – rural couples, ethnic minorities and parents without any siblings. In rural areas, families may apply to the authorities to have a second child if the first is a girl.
(Reworked from http://en.wikipedia.org/wiki/One-child_policy)

2. Taxi driver beaten and jailed – cops must pay

A taxi driver's home was unlawfully broken into while he was sleeping and he was unlawfully arrested. Police entered his home without a warrant for arrest. His arrest was accompanied by assault. He was detained for almost three days, and released without being charged.
(Reworked from article by Z Venter in the Pretoria News, 4 June 2012)

3. Euthanasia

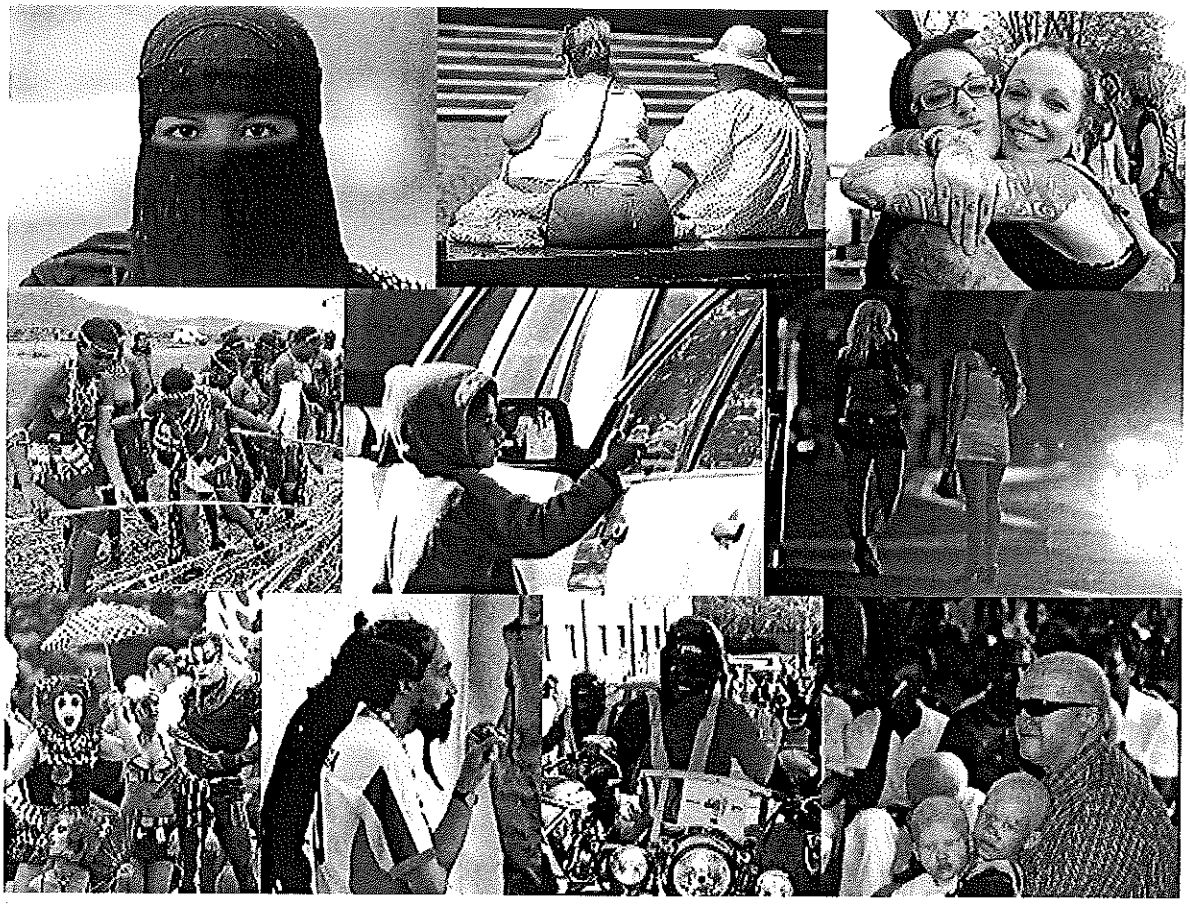
Sean Davison was sentenced to home detention for helping his terminally ill mother to die.
(taken from http://www.iol.co.za/the-star/mercy-killer-son-sentenced-1.1185942)

ACTIVITY 2.2: Through my eyes: Are we really all equal?

In the previous activity we asked you to reflect on our freedom to choose. We have also learnt about the importance of equality before the law. The reality remains, however, that we are all different and that these differences often lead to various levels of conflict in our society.

In this activity we want you to reflect on social differences and its influence on the law.

1. Look at the images below.



2. How did you respond to these photos? Write down your initial reactions and feelings.

Consider the following questions:

- Can you identify with any of the people in the photos?
- Do the people in the photos have anything in common with you or each other?
- Do these people differ from you or each other in any way?
- Do you think that any or all these people need protection or that they should be protected

Also read:

http://www.dailymaverick.co.za/article/2014-10-30-op-ed-inequality-before-the-law-is-south-africas-criminal-justice-system-punitive-to-the-poor/#.V_Yb1Pl96Uk

ACTIVITY 2.3: The complexity of rights

In the activity "Is the law always fair?" in Unit 1 we asked you to read the newspaper articles about Sean Davison and to reflect on the fairness and justice of what happened. The links below take you to these articles again. We have added a third article.

1. Read all three the articles below and use the instructions that will guide you further.

http://www.sowetanlive.co.za/news/world/2011/10/25/euthanasia-campaigner-on-trial

http://www.iol.co.za/the-star/mercy-killer-son-sentenced-1.1185942

http://www.iol.co.za/capetimes/no-more-tears-says-davison-1.1288054

2. Let us pretend that Sean's mother died in South Africa. Revisit the rights detailed in the Bill of Rights and then go to Discussion (left of this webpage) and post your arguments for and against the legalisation of euthanasia, as mentioned in the third article listed above. Post your arguments in the Forum named: the complexity of rights.

Consider the following:

- the rights of all relevant parties that may have been affected
- any conflict of rights that you have found
- your views on whether and how justice is served by either allowing euthanasia or not
- whether you think the sentence for Sean was appropriate.

Post your arguments for and against the legalisation of euthanasia, as mentioned in the third article listed above by replying to this post.

After you have done this go back to Learning Units and click on reconsidering equality.

ASSIGNMENT 2

Assignment 2: Discussion forum

Up to this point, we have spoken about justice quite a bit and we have discussed and argued the complexity thereof.

1. Now, after you have taken part in the discussions, we would like you to reflect on the following:

   - What is the difference between law and justice?
   - Is the law always fair? Please motivate your answer using examples.

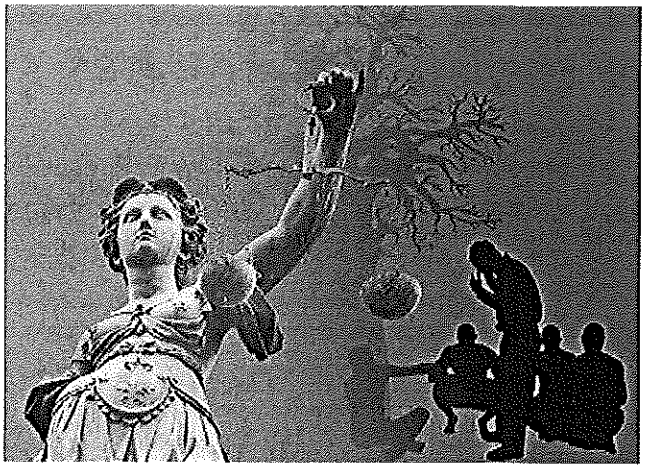
2. Share a case where you have experienced that the law can contribute to a harmonious and peaceful society (500 words).

TOTAL: 10 MARKS

Switch to Full View

Unit 3: Different Problems, Different Procedures

3.1 Overview of Unit 3



Before we start with the key theme of this unit let us consider the image of Lady Justice.

Carefully study our image of Lady Justice. Make notes for yourself on the various objects that you see and what, according to you, the deeper meaning of these objects may be. While doing so, try to compare the image of Lady Justice in this unit with those of the previous units. Also make notes on how our image of Lady Justice has changed: Does symbols, such as Lady Justice, still have meaning for us living in the 21nd century on the African continent, in a fairly young democracy? Should she be replaced, adapted, or plainly be discarded?

Early reflections

In this learning unit we want to show you how some of the many challenges and conflicts we face as a society are dealt with by our legal system. To return to what we said earlier, we introduce you to a system that we as a society have created to protect ourselves and that holds offending persons accountable for their behaviour.

Key themes are:

- different kinds of legal disputes
- the difference between criminal cases and civil cases
- an understanding of different ways to deal with legal disputes
- the people involved in the court process
- different courts that hear different matters

We are concerned with the legal disputes that we as a society face. These disputes are either of a criminal nature or of a civil nature. What do we mean by this? In a criminal case, the offender has broken the law and has harmed the victim and the community. The State has both a legal and moral responsibility to step in and intervene by charging the offender and ensuring that justice takes place. In civil matters however, the State does not intervene. The dispute is between two parties and they settle the matter – often with the court as a type of "referee".

We also introduce you to the law of criminal procedure and the law of civil procedure. We show you that they are very different, both in their nature and in the relevant procedures.
At this stage you should already have an idea of what the law is about and what human rights are. But what if the laws and your rights are not enough to protect you? You have learnt that some legal differences, or legal disputes, cannot be solved without intervention by an independent, objective third party. Where someone has broken the law by committing a crime, the State will prosecute that person. Such disputes are known as criminal disputes. It could also be that someone has not broken the law, but has violated the rights of another person. Such a case we refer to as a civil dispute.

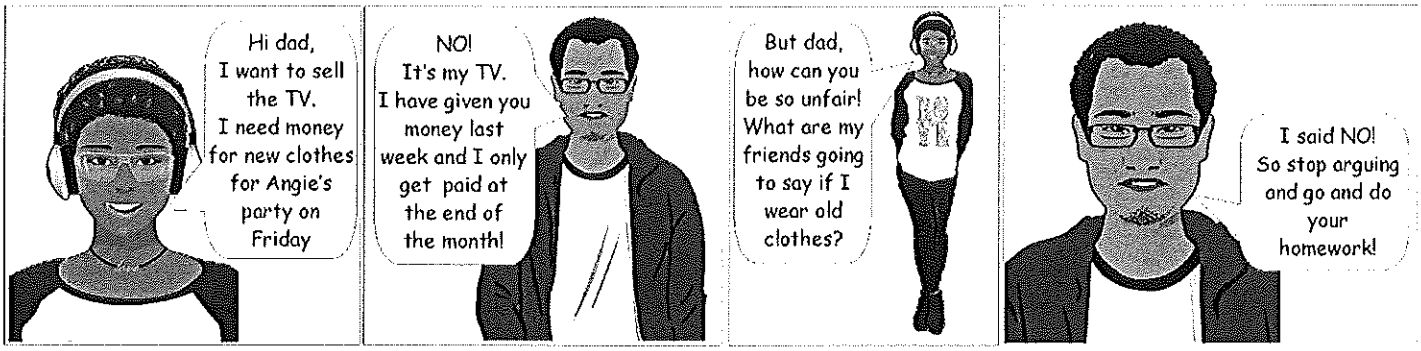
3.2 When is a dispute a legal dispute?

As a dynamic, mixed society, we are all very different. Our society is made up of diverse people with different views and perspectives. We also have different morals and beliefs that guide our ethical convictions. Being different is not a problem. Where differences lead to conflict there may be a dispute – but people generally talk about their differences and come to an understanding or find a solution. In other words, they resolve their disputes. We refer to them as *social disputes*.

Sometimes a dispute is of such a nature that people cannot solve it on their own, either because the people who are

involved need help to resolve the issue, or because someone has broken the law. This is when we talk of a *legal dispute*. Now consider the following examples.

Social dispute: No grounds for negotiation



You ask your father whether you may sell his television set because you need money. He may not – in fact, probably will not – give his consent. It is his television set. You may try to convince him and even argue about it, which could lead to conflict, but your father will make the decision and you will have to accept it. There is not much you can do about it.

Social dispute: Reach an agreement



You and your partner want to buy a television set. You disagree on which one to buy and even argue about it, but eventually you make a decision and resolve this conflict. The two of you discussed your problem until you found a solution.

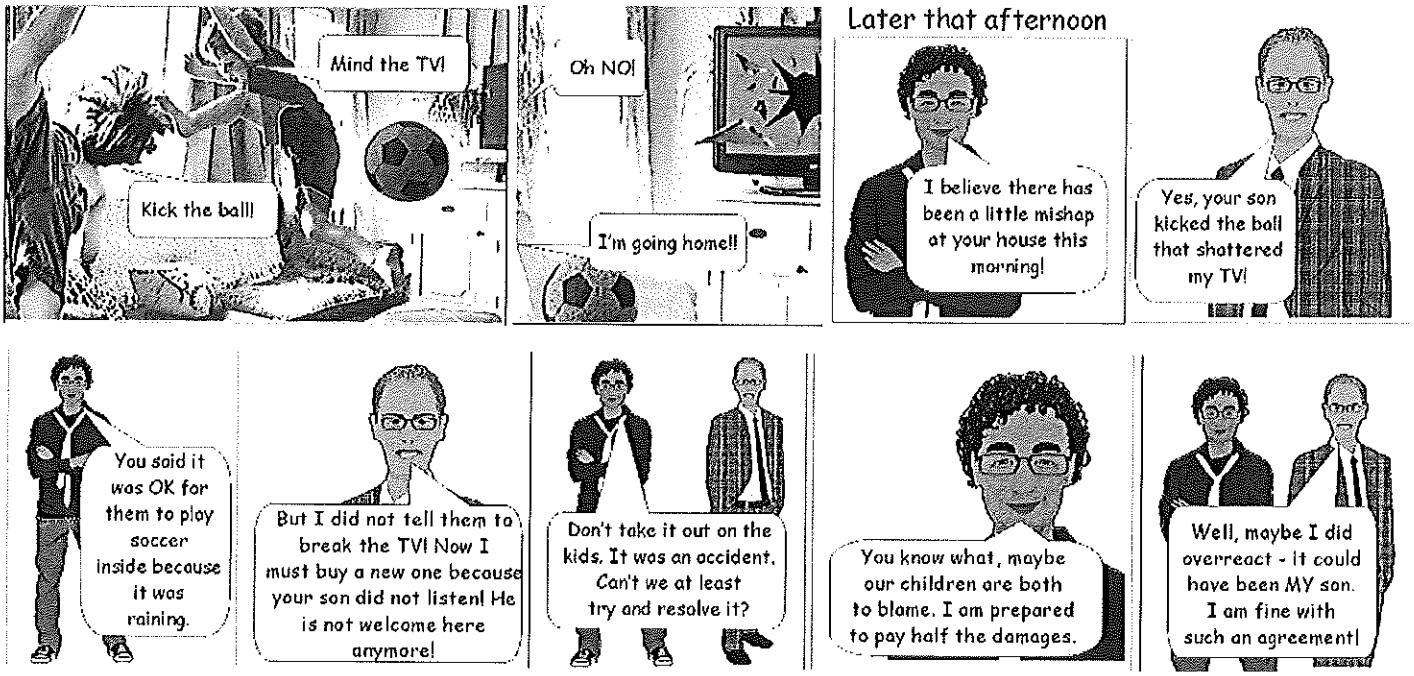
3.2.1 Dispute with legal implications

Dispute with legal implications

Your neighbour's son and his friend are playing soccer in your neighbour's living room. During their game, your son kicks the ball and breaks your neighbour's television set. How do you resolve this issue? In other words, who will pay for the damages? You can discuss the incident with your neighbour, offer to pay for the damages and so settle the matter amongst yourselves. However, the dispute could also be resolved using the following alternatives:

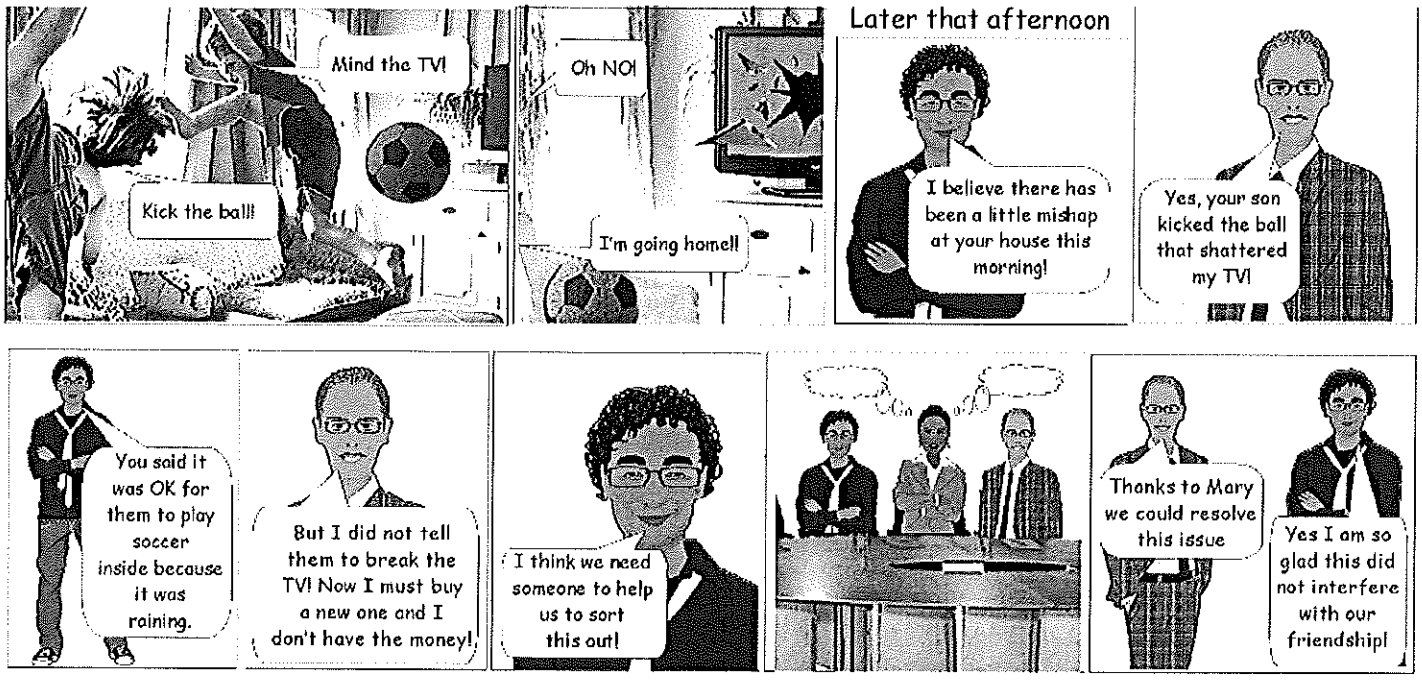
- Negotiation
- Mediation
- Arbitration

Informal dispute resolution: Negotiation



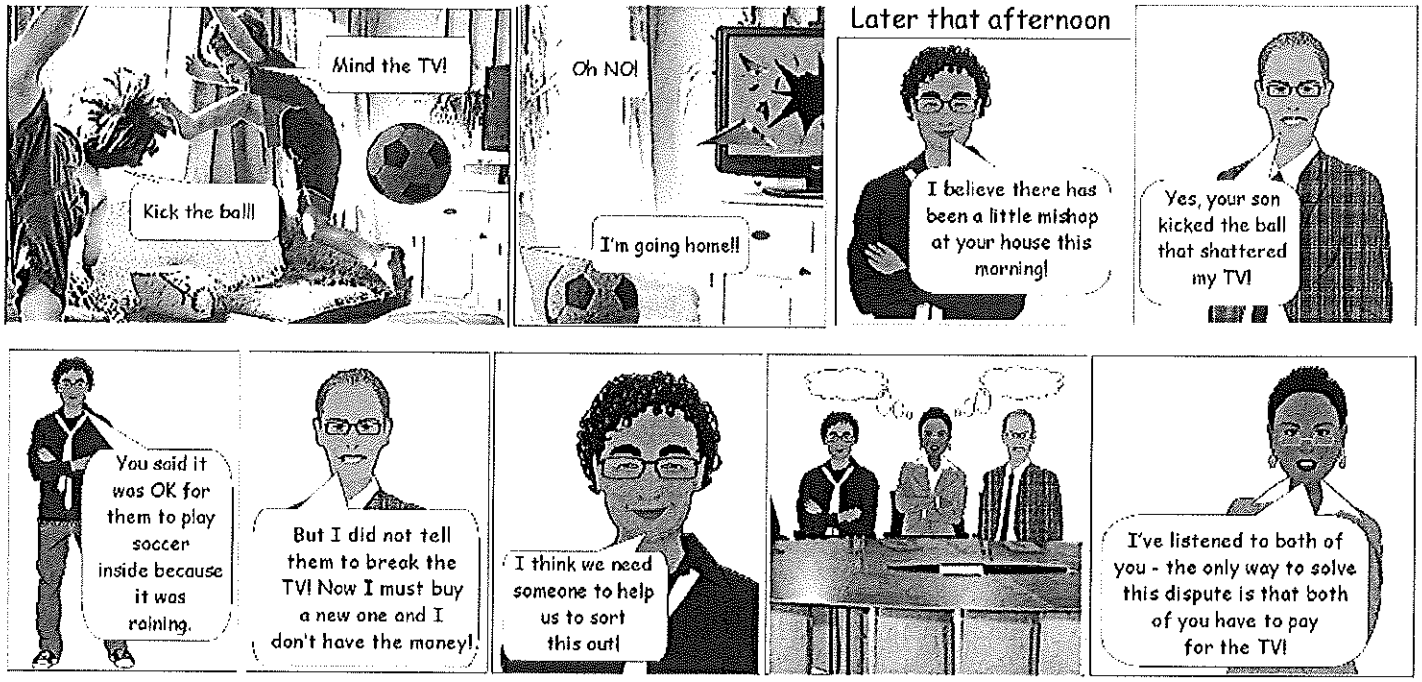
You may think that your neighbour is partly to blame for allowing the children to play soccer in his living room. You may then try to negotiate with your neighbour to pay only a portion of the damages.

Informal dispute resolution: Mediation



You may ask someone, for instance your mutual friend or a community leader, to listen to the issue and to help you so that you and your neighbour can reach an agreement that will satisfy both of you.

Informal dispute resolution: Arbitration

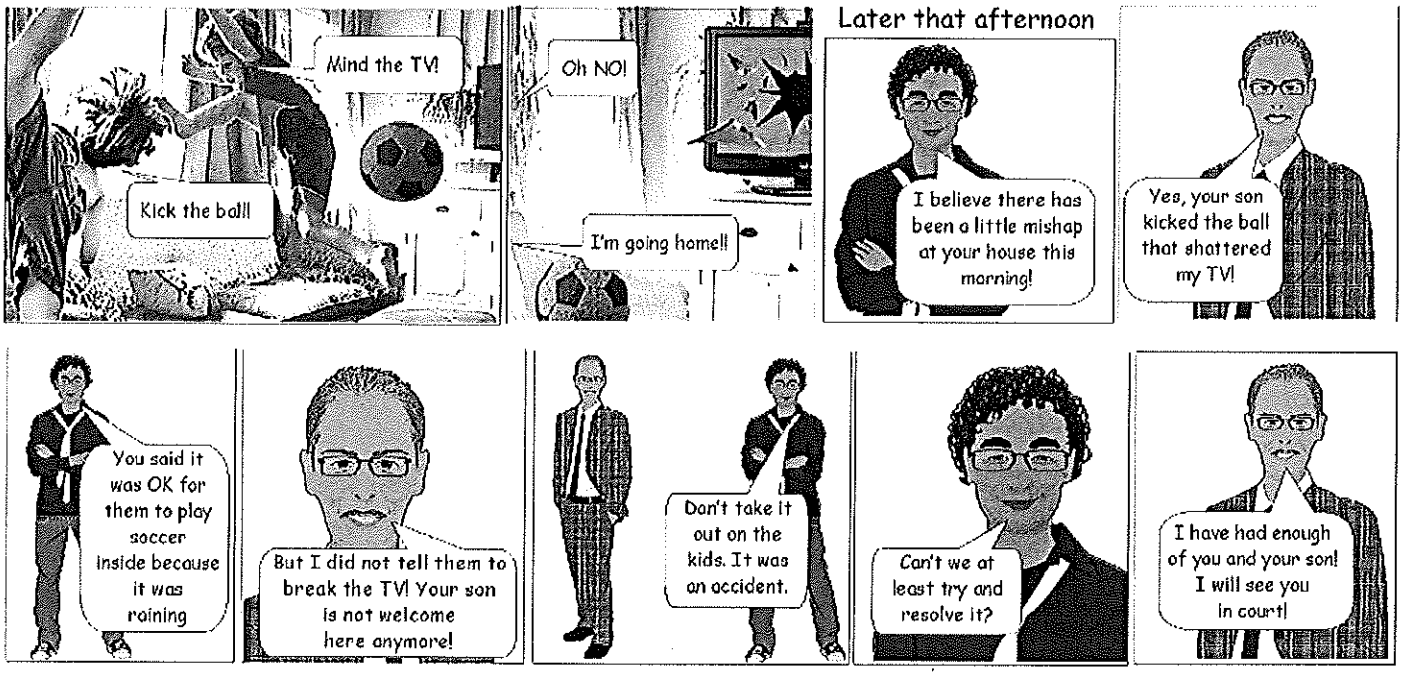


You may ask someone else to listen to you and to make the decision about who should pay for the damages.

3.2.2 Formal dispute resolution

Formal dispute resolution

If the parties were unable to resolve the dispute through any of the options discussed above the people involved have to go to court to formally resolve the dispute.



Next, consider the following example of a crime:

You take your grandmother's television set without her permission and sell it because you want money for new clothes. Your father finds out and is probably very disappointed in you and angry with you for the way you acted, so there is conflict between you and your father. But more than that, your act was also against the law. You have broken the law by stealing the television. When you took it, you committed a crime and became guilty of theft.



3.3 How do these examples differ?

All these examples show us different forms of conflict or, to put it differently, disputes we can be faced with. Can you see that the four examples are very different though?

- The first two examples deal with interpersonal disputes on a social level.
- The last two examples deal with conflict situations that may (see the third example) or will (see the fourth example) involve the law.
- The third example shows us that there are various ways to resolve a dispute, which might include going to court (in other words, involving the law).
- The last example describes actions that are clearly against the law and will lead to criminal charges against the offender.

At this point we hope that you understand what we have explained thus far and that you are able to identify that not all legal disputes are the same. The cartoons were included because we wanted you to see and understand that there are different ways of dealing with legal disputes. There is the formal court process, but there is often also another way. When there is a legal dispute, it does not necessarily mean that it has to go to court – it may be that the matter can be resolved without court intervention. This is known as alternative dispute resolution, where court involvement is avoided. Alternatively, the matter may go to court where we differentiate between criminal matters and civil matters.

We are going to explore legal disputes in a bit more detail so that you will not forget the differences or confuse criminal and civil disputes. Next, we give you a few interesting activities, each based on a different kind of dispute.

3.4 Legal disputes: the difference between criminal and civil disputes

In section 3.2: When is a dispute a legal dispute? we explained that legal disputes can be resolved in different ways. There are informal ways to solve disputes, but also more formal ways. Your activity focused on examples of formal dispute resolution where court involvement was required. The more informal method is known as alternative dispute resolution. This alternative will be dealt with in "3.7: A less adversarial process".

When a dispute goes to court a chain of events is set in motion and a trial commences. We describe this as a process of litigation. Litigation is the formal legal procedures that are followed in a court case. The presiding officer, who acts as the "referee" in the process, will be a judge, commissioner or magistrate, depending on the kind of trial over which he or she is presiding. This official listens to all the people, who are called witnesses, and considers all the information about the case. This information is called the evidence. The presiding officer also looks at the physical proof, for example, a knife, a contract or a photograph. These are called exhibits in the trial. After this, he or she makes a decision called a judgment.

A distinction has to be made between criminal and civil matters, not only because the purpose of each is different, but also because the procedures are not the same. This unit is devoted to explaining the different procedures to you.

3.5 Role players in the court process

You now know that there is a presiding officer in any court case. He is not the only person involved in a case though. Besides the individuals directly involved – the accused and the State in the case of a criminal matter, or the plaintiff and the defendant in the case of a civil matter – there are other role players, or functionaries, who are usually part of the process. Who are these people? Depending on whether it is a criminal or a civil matter, the people involved in a court case will differ:

The functionaries or role players in a criminal court case are:

- the police who have investigated the particular crime and gathered enough information for a successful prosecution

- the National Prosecuting Authority – the body responsible for instituting criminal proceedings against a person on behalf of the State
- the State prosecutor, who represents the State, presents evidence in court and argues the case in order for the presiding officer to reach a just verdict and impose a fair sentence
- the presiding officer, who is either a magistrate or a judge, depending on the court in which the case is heard, and who is responsible for coming to a decision about the guilt or innocence of the accused based upon all the evidence placed before him or her in the trial
- the legal practitioner, who can be either an attorney or an advocate, who represents the accused in the court case

The functionaries or role players in a civil court case are:

- A presiding officer who, once again, can be a judge, a magistrate, or possibly a commissioner, depending on which court the matter is heard in. This person listens to and considers all the evidence and makes a decision or judgment in the matter or dispute. A judge decides cases in the Constitutional Court, the Supreme Court of Appeal and in the High Courts. A magistrate decides cases in the Magistrate's Courts. A commissioner presides over the proceedings in a small claims court.
- A legal practitioner, who can be either an attorney or an advocate, depending on the kind of dispute as well as on the court the matter is heard in. These are the people who represent the opposing parties in a dispute. They are also called officers of the court. In principle, every person may represent him or herself in court but this does not happen often – except if the case is heard in the Small Claims Court, which you will learn more about in "3.10: Different cases, different courts". Let us have a closer look at the two different kinds of legal disputes that we have been referring to, namely criminal and civil disputes.

3.5.1 Criminal disputes

In Unit 1, section1.5: Different branches of our law, we explained the difference between public law and private law. Just to remind you – public law basically deals with the relationship between the State and the individual, while private law deals with the relationships between individuals. Considering what you have learnt in this unit so far, you should be able to identify that criminal disputes or offences form part of public law. These disputes are subject to the rules of criminal procedure. You may ask what the rules of criminal procedure involve – and we look at criminal procedure next.

What is a crime?

In order for us to live in a harmonious society, and in the interests of peace, the State prescribes certain rules by which we all have to live, or which are binding on all of us. If someone does not abide by these rules, that person breaks the law and commits an offence against society. This is known as a crime.

A crime is unlawful conduct that is prohibited by the State. Before any conduct can be regarded as a crime, there are four requirements which have to be met:

- there has to be conduct, which can be either an act or an omission
- the conduct has to comply with the definitional elements of a crime
- the conduct has to be unlawful
- the conduct has to be performed with a blameworthy state of mind (called culpability)

A legal process

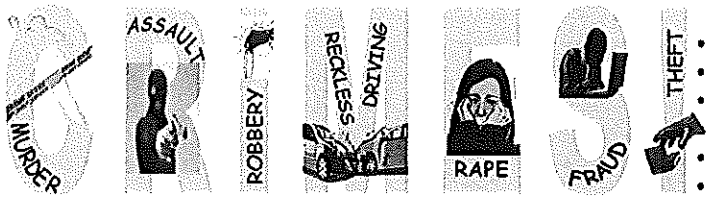
If a crime has been committed, a formal process is set in motion and the State will take steps to punish the offender. These steps will take the form of a trial. The State is always involved in a criminal matter and we say that the State prosecutes the accused person on behalf of society, ensuring that the outcome of the case is fair, impartial and in the best interests of the victim and the community. The State acts on behalf of the victim. Instead of the victim having to exact justice for him- or herself, the State does so. Thus, the two parties are the State, which is represented by the state prosecutor, and the accused (the person suspected of committing the crime). The presiding officer – who is either a magistrate or a judge, depending on the court in which the case is being heard – sits as a "referee" between the prosecutor and the offender. The accused is assisted by an attorney or advocate, unless he or she refuses this assistance.

In order to be successful, the State (represented by a prosecutor) has to prove the case beyond a reasonable doubt. This means that the magistrate or judge must have no reservations or doubt about the guilt of the accused. The aim of a criminal case is thus to protect society and to punish the offender, and the result is either an acquittal where the

accused is not found guilty, or a finding of guilt – called a conviction – and a penalty. This is where the presiding officer, after careful deliberation of the facts of the case as well as any mitigating and aggravating factors, passes an appropriate sentence on the offender. Note, it is only now, after a finding of guilty, that we can call the person a criminal or offender. We can put this label on a person only if he or she has been tried and convicted in a court of law. This is known as the criminal justice process.

From a legal perspective, criminal justice points largely to the activities of the court and the process from the commencement of the trial to the sentencing of the offender. To a criminologist, however, criminal justice has a broader meaning and also refers to the treatment of offenders by the police, the prosecutors, the courts, the correctional institutions and the Department of Social Development.

Examples of crimes include:



- murder
- assault
- reckless driving
- robbery
- rape
- fraud
- theft

Think back to the first learning unit, where we introduced you to Sean Davison and Shrien Dewani. In both of these instances the issues were of a criminal nature. We focus in more detail on this criminal justice process and the role players or functionaries in the criminal justice system in learning units 4 and 5. We tell you a little more about the different courts in "3.10: Different cases, different courts".

3.5.2 Civil disputes

Civil disputes are subject to the law of civil procedure and form part of private law. What this means is that these matters involve private disputes between individuals or legal subjects. These disputes may even involve companies which, obviously, need individuals (people) to act for them. Note that the State is not involved so there is no state prosecutor in this process.

Furthermore, not all civil disputes will necessarily end up in court, and we tell you a little more about the alternative ways to resolve disputes in "3.7: A less adversarial process". Resolving a civil dispute through the court process is voluntary. In other words, unlike a criminal matter where the State decides to prosecute someone for breaking the law, the person who wants to take a civil case to court has a choice whether to do so or not. We are not going to go into any detail with regard to the procedure that is followed in a civil case, but we do want to explain what a civil matter is.

There are two kinds of civil cases, namely summons (or action) procedures and application procedures. If you study law, you will learn more about the different procedures followed in civil cases. We shall focus on summons procedures, as these are about disputes which include a violation of rights.

The parties to a civil case are called the plaintiff, (who feels "wronged" and institutes the action) and the defendant (against whom the action has been instituted). The aim is to establish whether the defendant is liable to the plaintiff. This means that the aim is to settle disagreements between persons and to find out whether the defendant has to pay damages or compensation to the plaintiff. These damages are not necessarily for monetary loss that the plaintiff has suffered. They may be for physical harm such as a broken arm – or they may be for any psychological harm, for example pain and suffering suffered due to the defendant's action or omission. To win the case, the plaintiff has to prove to the magistrate or judge that his or her case is more probable than the case of the defendant. In the court they say that the case must be proved on a "balance of probabilities". If the plaintiff is successful, the result will be that money is awarded to him or her – but if the plaintiff does not prove his or her case, nothing is awarded to anyone.

Examples of civil cases include claims for:

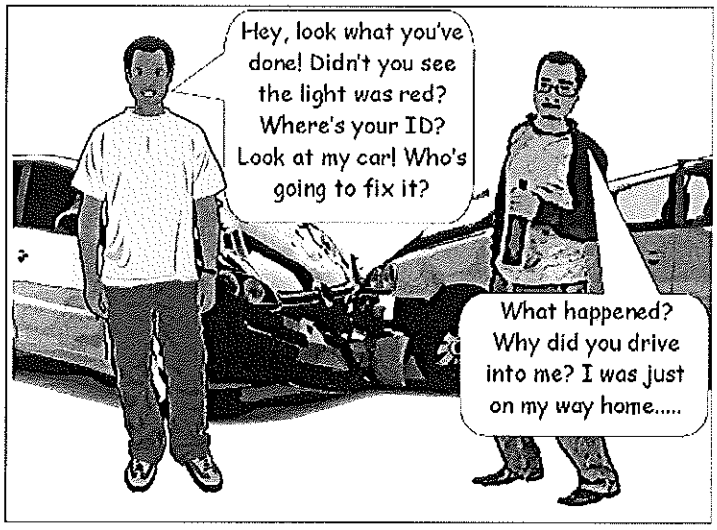
- defamation of character
- breach of contract
- pain and suffering

- loss of wages or outstanding wages
- medical costs after an accident

An example

From what we have discussed up to this point it seems easy to decide whether a case is civil or criminal. If someone has broken the law and the State prosecutes that person, it is a criminal case. However, it can be that one incident can result in both criminal and civil action. Consider the following example.

X is involved in a car accident. The driver of the other car, Z, is drunk. X's car is badly damaged. He also suffers a serious back injury. In a criminal case, the State will prosecute Z for reckless or drunk driving and, if he is found guilty, he will be punished. X can also sue Z for the damage to his car, for his medical expenses as well as for loss of earnings if he has to be away from work – and maybe even for pain and suffering. This will be a civil matter.



Have you noticed that the burden of proof is different in criminal and civil matters? It is far more difficult to prove something beyond a reasonable doubt, as is required for a criminal conviction, than it is to prove it on a balance of probabilities, as is required for a civil matter. As a result it is possible that, in our example, the court may suspect that the driver was guilty of the charge, but there may not be enough evidence to prove it beyond a reasonable doubt, resulting in the driver being found not guilty and acquitted. On the other hand, the plaintiff in the civil matter only has to prove the case on a balance of probabilities. So, if his version of events sounds more likely than that of the defendant, he will be successful and the defendant will be liable in the civil matter.

Different court cases

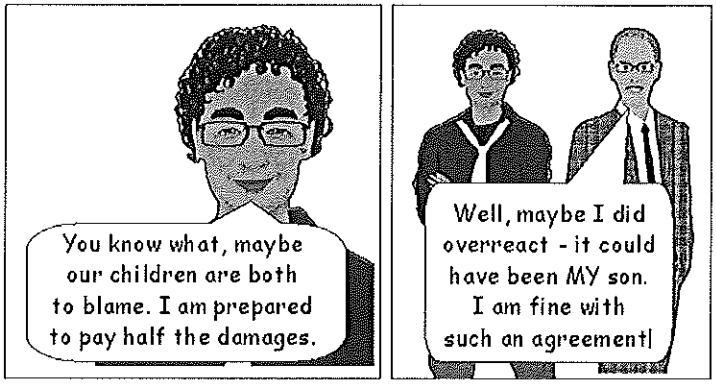
How is it possible that the same incident can lead to two different results? Does this confuse you? You should understand that we are dealing with two different court cases, a criminal case and a civil case, that are heard separately. The State initiates a criminal matter, whereas a private person initiates a civil matter. The magistrate or judge in a criminal matter must have no reservations or doubt about the guilt of the accused and, if there is doubt, the accused cannot be convicted. With a civil matter though, a decision must be made either in favour of the plaintiff, or in favour of the defendant, and to do this the magistrate or judge has to decide which version he or she believes. Think of the two sides of a scale. The decision will go in favour of the side that weighs heavier.

In learning units 4 and 5, you will learn more about the criminal justice system.

3.6: A less adversarial process

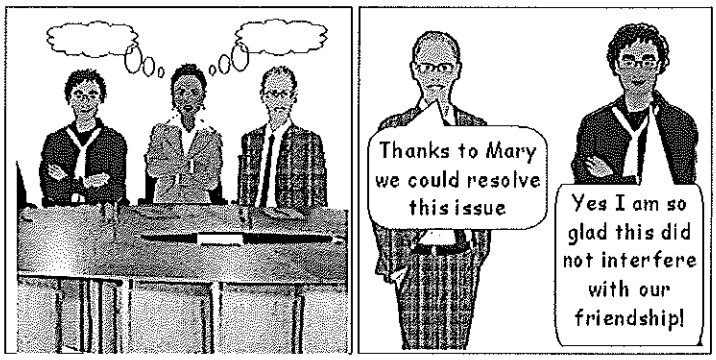
The law is there to assist us with legal disputes. Going to court is often unavoidable and the process is usually lengthy and expensive. Fortunately, going to court is not necessarily the only way to solve a legal dispute. As we have already mentioned, many civil disputes are resolved without the intervention of the courts. Sometimes the parties involved in the dispute manage to solve it themselves. Sometimes they need help, but sometimes they can manage to solve a civil dispute without court intervention. We refer to methods of dispute resolution that take place outside the court system as "alternative dispute resolution". The advantages of alternative dispute resolution are that it is normally quicker and cheaper than the court process. In learning unit 5 you will learn how alternative dispute resolution is used in the criminal justice system. The following explanations are the main forms of alternative dispute resolution as applied in the case of civil disputes.

Negotiation



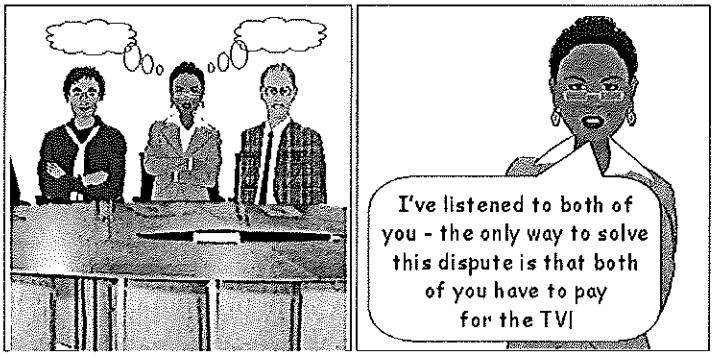
The parties may try to reach agreement in order to solve their differences. In other words, they talk to each other – or negotiate about their problem – and try to solve it by coming up with a solution that suits both sides.

Mediation



The parties may go for mediation, a process in which people agree to negotiate in a non-adversarial way. They agree to have an impartial third party, called a mediator, act as a go-between or facilitator to help them settle their dispute. The mediator has no decision-making powers. The parties still decide the outcome of the dispute themselves. Mediation is becoming a very important part of dispute resolution, as the Department of Justice is in the process of preparing rules that will make mediation compulsory in civil proceedings where the defendant indicates that he or she intends to defend the claim.

Arbitration



The parties may attempt arbitration, where people agree to have an independent third person, called an arbitrator, listen to their arguments and make a decision that both parties agree in advance to accept as binding on them. Note, however, that whereas negotiation and mediation are not binding on the parties (which means the matter may still go to court if they are not satisfied with the outcome) the decision of an arbitrator is usually final and binding and has to be accepted and followed by the parties. To you, this may sound similar to a court decision. The difference between arbitration and a court case, however, is that, in arbitration, the parties have far more control over the entire process because they select the arbitrator and choose the rules that apply to the matter. This does not happen in a court case. Arbitration is also usually cheaper than a court case.

3.7: A few tips about the court process

Alternative dispute resolution is not always an option and, where it is, it is not always successful. In such a case, the parties have to go to court in order to solve the dispute.



By now you should understand that different kinds of disputes are dealt with differently, but what happens when a dispute ends up in court, and who are the people who are involved in the court process?

When a dispute of a civil nature goes to court, it has to be dealt with according to specific procedures. Civil law attempts to right a wrong, settle a dispute, or ensure that an agreement is honoured. This is a voluntary process – in other words, the person who feels wronged has a choice to pursue the matter – that is, go to court or not.

Prescription

A person who wants to take a civil matter to court has to be aware that there are time limits involved with a claim. In other words, there comes a time when the law says that the issue is too old to pursue. When this happens, we say that the matter has prescribed. In other words, if a civil claim is brought too late, it prescribes and the court will not hear it. There are many rules about prescription, but remember that all civil claims lapse (fall away) after a certain period.

Legal Aid

Going to court and paying for an attorney can be very expensive. However, if someone cannot afford to pay for an attorney, there is no need to despair. Our legal system aims to help achieve justice and, to this end, section 34 of the Constitution affords every citizen access to the courts. Such a person may apply for legal aid (which is financial help, to pay attorneys' fees). A value of Legal Aid South Africa is respect for human dignity (uBuntu), and their objective is to render (make available) legal representation to poor or indigent persons at the State's expense.

Any person applying for legal aid has to pass a means (financial) test. The first thing that will be considered in deciding whether the applicant qualifies for legal aid or not is their income. If their income is more than the amount fixed by Legal Aid South Africa, they will not qualify for legal aid. The means test also considers other assets such as money in a savings account or a house.

Information on Legal Aid South Africa, including contact information and information on who qualifies for help and on what someone can do do if they do not qualify for legal assistance is available at http://www.legal-aid.co.za/index.php/FAQs.html.

More detailed information on qualifying for assistance and on what types of cases are given priority by Legal Aid South Africa is to be found at http://www.legal-aid.co.za/index.php/Legal-Aid-Board-Handbook.html.

3.8: Different cases, different courts

You are now aware that there are different ways to resolve disputes. Once a matter goes to court, though, we say that it is being dealt with in the formal system of dispute resolution. It means that the presiding officer will hear all the evidence and then come to a decision, called a judgment. There are rules about which court will hear which dispute. Let us explain.

Different kinds of disputes go to different courts. There are also rules about which courts have authority or are competent to decide which matters – we call this "jurisdiction". In terms of the Constitution, everyone has the right to have a legal problem decided by a court or an independent body. The Constitution also tells us how our judicial or court system is made up. If you continue your studies in law you will learn about this in detail. If you ever need to go to court, you will be able to get legal advice about this from a legal representative.

The various courts and their functions can be quite confusing and it also involves a lot of very detailed learning about which matter will be heard in which court. Because it is so complex, we shall merely give you an overview of our often scary court system. However, to provide a concise orientation, we want to briefly introduce you to the different courts, starting with the lowest courts and finishing with the highest court.

Magistrates' courts

Nature: Magistrates' Courts normally deal with less serious criminal and civil matters. It is something that the student who wishes to become a lawyer will learn about in detail in later studies.

Amount: This court can hear matters only where the amount of the judgment will be less than the legally specified amount. This amount differs depending on whether it is a criminal or a civil matter. In the case of criminal matters, district courts can sentence someone to a maximum of three years in prison or a maximum fine of R120 000. Regional courts deal with more serious crimes such as murder, rape and armed robbery and can sentence a person to imprisonment for life or up to 20 years, depending on the type of offence, or impose a maximum fine of R600 000. In the case of civil matters, district courts can hear cases for claims of less than R200 000. Regional courts can hear civil claims of between R200 000 and R400 000 for matters such as divorce, credit agreement disputes and road accident fund claims.

Location: The country is divided into many magisterial districts and regions and each of these is served by a particular Magistrate's Court. For example, the Pretoria magisterial area is served by the Pretoria Magistrate's Court. However, note that the names of the magisterial districts are not always the same as the name of the courts. For example, the magisterial district of Klip River in KwaZulu-Natal is served by the Ladysmith Magistrate's Court.

If a matter is brought to the Magistrate's Court, it has to be heard in the one that has jurisdiction. There is a link between the location of a specific Magistrate's Court and the person involved in the matter. Cases have to be heard in the Magistrate's Court that has jurisdiction. If the court does not have the jurisdiction to hear a matter, the matter will not be heard. If you are interested in finding a specific magisterial district or Magistrate's Court, you can do an Internet search.

The presiding officer of a Magistrate's Court is called a magistrate. In court he is addressed as "Your Worship". Magistrates' Courts are lower courts and are divided into two groups: district courts and regional courts. They may hear only matters that they are permitted to hear in terms of the Magistrates' Courts Act and the Magistrates' Courts Rules. Whether a claim may be heard in a Magistrate's Court will depend on the following factors: the nature of the claim (in other words, the kind of case that can be heard in a specific court), the amount of the claim and the location of the court.

High Courts

There are various High Courts across the country. A new system of individual High Courts was introduced with the 1996 Constitution and these courts hear both criminal and civil matters. Unlike the Magistrates' Courts, the only limitation with regard to these courts' ability to hear a matter is its location. In other words, their jurisdiction is limited to matters arising in a specific area. The presiding officer is a judge, and he is addressed as "Your Honour" in court. High Courts hear cases that are outside the jurisdiction of the Magistrates' Courts. This means that the Magistrates' Courts are not allowed to hear them because they are too serious. The High Court, however, may hear any kind of matter, and there is no limit with regard to the amount of money that it may award to a successful party. The High Court also hears matters that are on appeal from the Magistrate's Court. (If you lose a trial you can lodge an appeal – that is, you can ask a higher court to change the decision of the original or trial court.)

You can find details, including contact details, for the High Courts at http://www.justice.gov.za/master/contacts.htm

Supreme Court of Appeal

There is only one Supreme Court of Appeal and it is situated in Bloemfontein. It hears only appeals from any High Court across the country. The presiding officers are called judges. A case in this court will always be heard by at least three judges.

Constitutional court

The Constitutional court, situated in Braamfontein in Johannesburg, is the highest court in the country. The persons presiding in this court are called judges. A matter can go to the Constitutional court to clarify any issue requiring the interpretation, protection or enforcement of the Constitution. This court thus only hears constitutional issues.

Other (speciality) courts

The explanation above only outlines the basic court structure. There are various other courts that deal with specific problems. To learn more about which courts function in our legal system – and about how the courts work – you can go to http://www.info.gov.za/aboutgovt/justice/courts.htm
or do a general search using Google. We would like to mention only four of the speciality courts – we want to tell you a little more about Small Claims Courts, Equality Courts, Children's Courts and Child Justice Courts.

Small Claims Courts

These courts were introduced into our legal system in 1985 to bring the administration of justice more within the reach of every South African. They deal with minor civil disputes where the value of the amount claimed is not very high. Small Claims Courts provide an easier and cheaper way for people to settle civil disputes. Besides a small fee to cover the cost of the summons and the fee of the Sheriff of the Court, there is no charge to have a matter heard in the small claims court. Currently the limit for claims in this court is less than R15 000.

The presiding officer, called a Commissioner, is usually a practicing advocate or attorney. The procedure is easier than in other courts, and you represent yourself. In fact, none of the parties are allowed to have legal representation and the Commissioner asks all the questions. If you would like to learn more about the Small Claims Court, including the kinds of cases that may be heard in this court, you can go to http://www.justice.gov.za/scc/scc.htm

Equality Courts

In learning unit 2 you learnt about the right to equality that is guaranteed in section 9 of the Constitution. As a result of this right, the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 was enacted and came into operation in September 2000. Does this Act sound familiar? You also learnt about it in learning unit 2, where the right to equality was discussed. Equality Courts were established in terms of this Act. You do not need an attorney to have a case heard in this court, where they hear cases about unfair discrimination, hate speech and harassment. To learn more about equality courts, go to http://www.justice.gov.za/EQCact/eqc_main.html

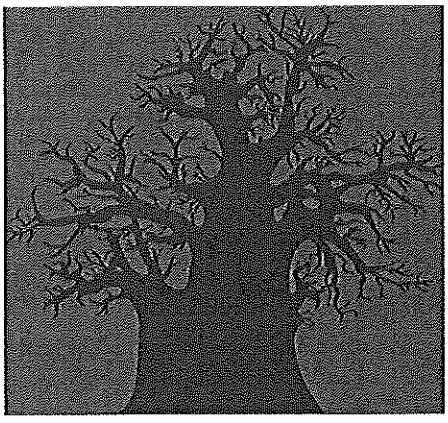
Children's Courts

In South Africa, a child is someone under the age of 18 years. Because of their vulnerability, children need special protection which is found both in the Constitution and in other legislation, such as the Children's Act 38 of 2005. This very comprehensive Act deals with many aspects related to children, including children's rights and the care and protection of children. Children's courts can decide on any matter that arises as a result of the application of the Children's Act. Examples of cases that can be heard in this court are determination of the paternity of a child, the adoption of a child and the protection of a child. To find out more about this Act and how to bring a matter to the children's court, go to http://www.justice.gov.za/vg/children.html

Child Justice Courts

The aim of the Child Justice Act 75 of 2008 is to set up a child justice system for children in conflict with the law. Children who are suspected of having committed a crime are thus not dealt with in terms of the normal criminal procedures that are used for adults.

3.9: Pulling the threads together



In this Unit, you have learnt not only about the difference between criminal disputes and civil disputes, but also about the people involved in the process, the different ways that may be used to resolve a legal dispute and the various courts that hear different disputes. This unit thus contains a lot of very detailed information. Before you continue with the next unit, please make sure that you have a good understanding of the content of this unit and, if necessary, go through it again.

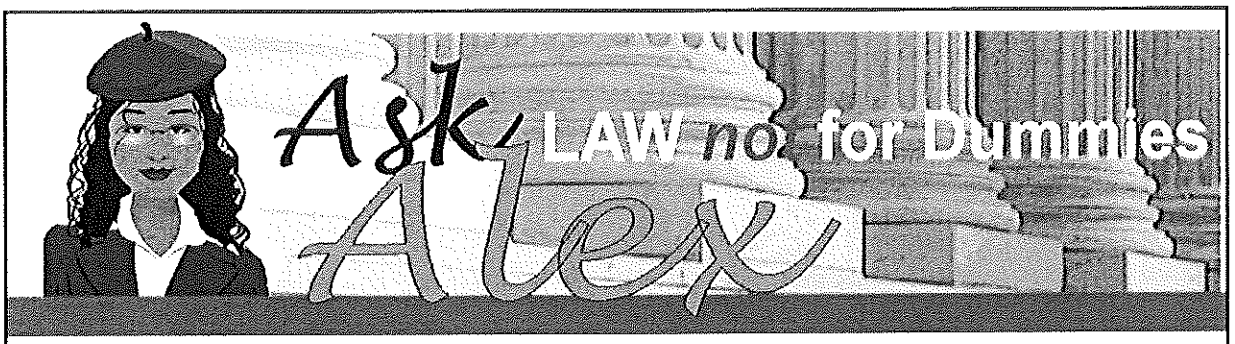
In learning unit 4 we take you into the criminal justice system. We begin with a crime being committed, lead you through the chain of events that follows, and bring you to a point where balance and harmony are restored.

ACTIVITY 3.1: Legal disputes: Civil or Criminal?

In this activity we want you to reflect on legal disputes and how criminal and civil disputes differ. We have created a table with two columns. In the first column we have listed the qualities of criminal disputes. We want you to complete the column on the right with information pertaining to the civil dispute process in a similar manner as the column on the left. You will find the information you need to complete this table in Alex's forum, and below Alex's column we explain to you how to access the table.

Alex is a legal advisor and writes a weekly column in the magazine "Law not for dummies", in which she advises readers about the nature of their legal disputes.

Read the letters and Alex's responses to the letters below.



Dear Alex,
I have been married for nine years. I am very unhappy, so I would like to get a divorce, but I do not what the procedure is. Please can you give me some advice?
Anonymous

Dear *Anonymous*,
A divorce is a civil matter. This is because it is a private dispute between individuals. It does not involve the State. The Divorce Act 70 of 1979 regulates divorce, and provides for three grounds of divorce. If you wish to obtain a divorce, you will have to prove that one of these grounds exists. You can approach an attorney to give you advice.

Dear Alex,
My father recently died. He had a will in which he left all his belongings to me. However, it was not properly signed and his partner now says that the will is not valid and everything has to go to her. What should I do?
XP from Gauteng

Dear *XP from Gauteng*,
A will is a legal document in which anybody over the age of 16 years can decide what will happen to his or her property when he or she dies. If the will is valid, it has to be adhered to, which means you will inherit everything. If it has not been signed properly, we say that all the formalities have not been complied with. This does not necessarily mean that the will is not valid, but in such a case the matter may go to court for the validity of the will to be decided. Because this is a matter involving individuals and not the State, it is a civil matter.

Dear Alex,
My sister was arrested recently. The security guard said that she stole a lipstick from a shop. The police have told us that she will appear in court, but they have not given us any more information. Can you please tell me what she was arrested for and which court she will appear in?
Desperate

Dear *Desperate*,
Your sister was arrested for shoplifting, which is a criminal offence. It is not an offence against a specific person, but rather against society. The State will bring the matter to court to decide if your sister is guilty. We say that the State prosecutes the accused. Because this is a less serious offence, your sister will appear in the magistrate's court, where the State will prosecute her for shoplifting.

You may have picked up that Alex refers to different kinds of legal disputes in her responses to the letters, namely criminal disputes and civil disputes.

Go to the Additional Resources Tool. In the Activity folder you will find a document named: **Legal disputes Criminal versus Civil.**

Download and open the file. Complete the table by following the above instructions. Save the document with the name: Legal disputes Criminal versus Civil.

Please Note: This activity will form part of your Assignment for Unit 3.

ACTIVITY 3.3: The nature of legal disputes

Earlier we introduced Alex who gives legal advice in a magazine. Read the following letters sent to Alex, then give advice to each of the authors of these letters as Alex would have done. In your answer indicate whether the dispute is of a criminal or of a civil nature.

Start each of your responses addressing the writer of the letter, for example: Dear Confused, Dear Sad Mom, and so on.

Save the document with your responses with the name :The nature of legal disputes.

Please Note: This activity will form part of your Assignment for Unit 3.



Dear Alex,

I borrowed my best friend's motorbike. While I was in the shop, the bike was stolen from the parking lot. My friend is now taking me to court to claim money from me to buy a new motorbike.
Confused

Dear Alex,

I borrowed my boss' car. After a night of partying and drinking, I was involved in an accident and arrested by the police. The police now say that I will be charged with driving under the influence of alcohol.
JP

Dear Alex,

My son, Gordon, is a student. He was involved in a fight with a fellow student, Tommy, recently. He broke Tommy's nose. Tommy's mother has gone to the police. They have told us that a case of assault is being investigated against my son.
Sad mom from Jhb

Dear Alex,

I am a plumber. I was involved in a fight two weeks ago. My neighbour hit me with a cricket bat and broke my arm. As a result, I have been unable to work and the doctor says that I shall only be able to go back to work in two months' time. Because I am unable to work I do not have money to buy food for my family.I am thinking of taking my neighbour to court to get some money from him .
Need help

Activity 3.2: Self-assessment : Legal terms

In this Unit you were introduced to many legal terms. We want you to check if you understand some of the more important terms. Therefore, in this activity you need to match each legal term with the correct description for the particular term. Complete the table by writing the appropriate description next to the term.

Go to the Additional Resources Tool. In the Activity folder you will find a document named **3.6 Activity: Legal terms and descriptions**.

Download and open the file. Complete the table by following the instructions above.

Note: You do not need to submit this activity as it is for self assessment.

ASSIGNMENT 3

Assignment 3: Written assignment

The Assignment for Unit 3 has three sections. **Section 1 deals with four case scenarios and each scenario has a number of questions you need to answer.**

Section 2 and 3 deal with the Activities for unit 3 you completed earlier. You have to submit all three sections as part of your Assignment 3.

Section 1

Read the following and write short notes on the questions related to the each dispute.

Dispute 1

You have been living next to Mr Nkosi and his family for many years. Since you moved in, he has been unhappy about where you park your car. He says that you are trying to annoy him by parking right in front of his entrance, but you are of the view that you are parking inside your own property. The feud between you is so serious that you do not talk to each other.

Yesterday morning you went outside only to find that your car, which was worth R180 000, had been damaged beyond repair. Mr Nkosi admitted that he was responsible for the damage. He said that he had warned you many times that if you continue to park in front of his entrance, you will be sorry "... because your car will pay for your stupidity".

You are furious. You know that you cannot discuss this with Mr Nkosi, but you want him to be responsible for the damage to your car.

Dispute 1: Questions

1.1 In your opinion, which of the alternative dispute resolutions would be appropriate in these circumstances? Provide reasons for your answer.
1.2 In your opinion, is going to court an option in this matter and if so, which court?

Dispute 2

Your friend Suzy borrows your laptop to do a university project. However, when she returns it a few days later she tells you that "... it just stopped working". You do not believe her story and you suspect that she has damaged it in some way.

You take the computer to the store, and they establish that there is water damage. They inform you that it will cost R7 000 to have the laptop fixed. You talk to Suzy but she insists that she did not cause the damage.

You discuss the problem with your father. He suggests that together, you should find a solution and solve the problem. You follow his advice. After a lot of talking and crying, Suzy offers to pay you R700 a month for the next 10 months. You accept her suggestion.

Dispute 2: Questions

2.1 What method was used to resolve this dispute?
2.2 Suppose that the dispute had not been resolved, could it have been resolved by the courts? If so, which court would be most suitable and why?

Dispute 3

Mary and her husband decide to get divorced. Mary wants the divorce to be as amicable as possible and avoid a lengthy and expensive court case. On several occasions Mary and her husband have tried to talk and come to an agreement on the division of the assets, but they were unable to come to an agreement. It seems that they need an objective person to help them with their decisions.

Dispute 3: Questions

3.1 What method of dispute resolution have they already attempted unsuccessfully?
3.2 Besides going to court, which Mary wants to avoid, what other method or methods of dispute resolution are available to them?

Dispute 4

Mr Baloyi a builder and you entered into a contract in terms of which he would build your house. The contract stated that you would pay a deposit of R20 000, after which the building would commence immediately. The rest of the money would be payable upon completion of the project.

You paid the deposit, but six months later Mr Baloyi still had not started with the work. You eventually decided to take him to court to claim back the deposit you paid him. You go court, but the court decides that you had not given Mr Baloyi enough time to start the work, and rejected your claim.

Dispute 4: Questions

4.1 In which court would this matter been heard? Provide a reason for your answer.
4.2 What other options do you have to get your money back or does the decision of the court mean that you now have to wait until Mr Baloyi decides to start building?

Section 2

In the Activity on Legal disputes: Civil or Criminal? You were asked to complete a table. Attach your completed table to this section of the Assignment. The table can be found under additional resources or follow the link below:

https://my.unisa.ac.za/portal/site/SJD1501-16-Master/page/385f7211-5a9b-4e9c-b2d7-86a3f071e349

Section 3

In the Activity on The nature of legal disputes, you were asked to give legal advice in Alex's column.

Attach your completed responses to the letters to this section of the Assignment.



Dear Alex,

I borrowed my best friend's motorbike. While I was in the shop, the bike was stolen from the parking lot. My friend is now taking me to court to claim money from me to buy a new motorbike.
Confused

Dear Alex,

I borrowed my boss' car. After a night of partying and drinking, I was involved in an accident and arrested by the police. The police now say that I will be charged with driving under the influence of alcohol.
JP

Dear Alex,

My son, Gordon, is a student. He was involved in a fight with a fellow student, Tommy, recently. He broke Tommy's nose. Tommy's mother has gone to the police. They have told us that a case of assault is being investigated against my son.
Sad mom from Jhb

Dear Alex,

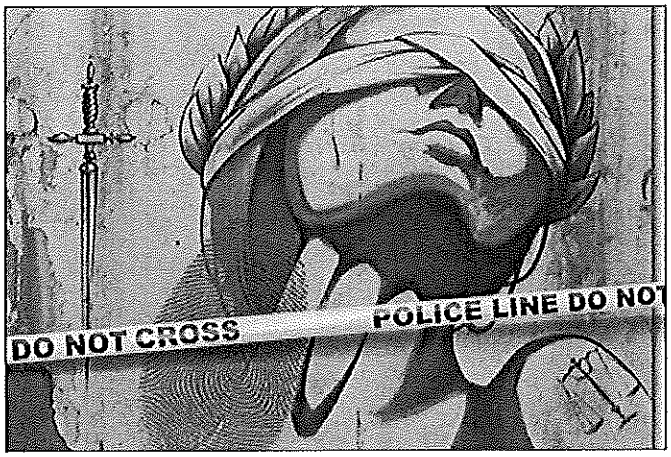
I am a plumber. I was involved in a fight two weeks ago. My neighbour hit me with a cricket bat and broke my arm. As a result, I have been unable to work and the doctor says that I shall only be able to go back to work in two months' time. Because I am unable to work I do not have money to buy food for my family.I am thinking of taking my neighbour to court to get some money from him .
Need help

TOTAL: 20 MARKS

Switch to Full View

Unit 4: Making sense of the criminal justice system

4.1 Overview of Unit 4



Before we start with the key theme of this unit let us once more consider the image of Lady Justice.

Carefully study our image of Lady Justice. Make notes for yourself on the various objects that you see and what, in your opinion, the deeper meaning of these objects may be. While doing so, try to compare the image of Lady Justice in this unit with those of the previous units. Make notes on whether symbols, such as Lady Justice, still have meaning for us in the 21st century on the African continent, in a fairly young democracy? Should she be replaced, adapted (changed), or plainly be discarded?

Remember to keep these notes because your impressions will influence your contribution to the discussion forums

Early reflections

Consider the following scenarios:

- When under the influence of substances a young drug addicted mother frequently hurts her baby. Nobody intervenes or reports her to the police.
- During a trial the father of a young rape victim tells the rapist that he wants him to rot in jail forever.
- One night a group of robbers breaks into a school and steals television sets and computers from the library. The next morning the excited children all gather around the window where the thieves entered the library. When the police arrive on the scene there is very little evidence left for the police to gather to build a strong case.
- A very wealthy woman is involved in a hit and run accident. Based on strong evidence the State decides to prosecute. The case however has to be thrown out of court, because, under very strange circumstances, the case docket disappears.

What is the common theme linking all these scenarios together? They are all problems which may occur within our criminal justice system and which complicate the process. They also show the uniqueness of each scenario and therefore, the complexity of the context in which different role players or functionaries within the criminal justice system have to do their jobs.

It is important for ordinary members of the community to have a basic understanding of the criminal justice system, even if their only involvement is as a witness to a crime. Even more important of course is that you as students in the College of Law, who would be more likely to get involved in the criminal justice system in the course of your studies and in your future careers, should have a basic understanding of the criminal justice system. We will focus specifically on the functionaries within the criminal justice system, in other words, those officials that play a critical role in ensuring that alleged criminals are dealt with expeditiously and that justice is served. These individuals are tasked by society to facilitate the justice process. When the law is broken and a crime is committed, it becomes their duty to ensure that justice is served.

We also want you to become aware of the trauma that contact with these cold, clinical and often intrusive formal processes may cause.

Now go to **4.2 A brief reflection of the restorative justice approach** by clicking on "Next" at the bottom of this page.

4.2 A brief reflection of the restorative justice approach

Those of you who have followed the news reports since South Africa became a constitutional demoracy, may recall the important role that the Truth and Reconciliation Commission (TRC) played in the transformation of our society since the 1990s. The TRC emphasised the restorative justice approach. A restorative justice approach was adopted to promote a more peaceful transition and to acknowledge the various wrongs committed by many of the political parties and leaders. Many of these atrocities took place over a long period, making it almost impossible to find sufficient documentary evidence to investigate and prove some of these cases.

What do we mean when we refer to restorative justice?

Unlike retributive justice, that sees the offence committed as an act against the State, restorative justice is based on a concept of justice that regards crime and wrongdoing as an offence against the individual and the community, with less emphasis on the involvement of the State.

Restorative justice is an approach to justice that focuses on the needs of both offenders, victims, and the community that is affected directly by the crime. You will see that the focus of retributive justice and restorative justice is therefore different.

Can you see the difference?

You may recall that in learning unit 3, we explained that it is the State that prosecutes those who commit crimes and these acts are seen as acts against the State. In restorative justice the State steps back to allow the community, the victim and the offender to collectively deal with the matter and avoid State sanctioned punishment.

How would this be practically applied in the criminal justice system?

One example of the restorative approach includes mediation between a victim and the offender as a requirement of the rehabilitation of an offender. This approach attempts to restore the imbalance and harm to society as a result of the crime. It also aknowledges that both the offender and the victim are harmed by the crime.

4.3 A crime is reported... and the system responds

By now, you will realise that the criminal justice system is a combination of interrelated, interdependent and interacting components of a very complex system.

When a crime is committed a series of actions are triggered, from the moment that either the crime is discovered or reported. This is where one by one each component of the criminal justice system is activated. In other words, the criminal justice system prepares itself to deal with the crime that has taken place. When this happens, the cogs of justice are set into motion. Some of the functionaries or role players which we referred to in Unit 3, now come into the picture.

The functionaries that are responsible for these actions are

- members of the South Africa Police Service
- the prosecution, in other words representatives of the National Prosecution Authority
- the courts, including the presiding officer (judges or magistrates); and those people who have to present the case to the presiding officer such as the public prosecutor, and those legal representatives defending the offenders such as lawyers and advocates; and
- members of Correctional Services.

When these cogs are set in motion this activates the criminal justice process. If we look at these processes, we see that each group of functionaries has very specific role and responsibilities linked to the componant of the criminal justice system in which they work...in other words each group performs a spesific function within the system.

The result is that each component is dependent on the previous one. For example, if the police do not respond promptly and prepare a strong case against the accused, the prosecutor cannot successfully prosecute the offender, and if the magistrate ultimately makes an error in judgement, an innocent person may be convicted or a guilty person let off without punishment. If the prosecutor does not make a strong case against the accused the magistrate may be unable to find the accused guilty. If the magistrate does not find the individual guilty, he cannot hand down a sentence or punish the accused.

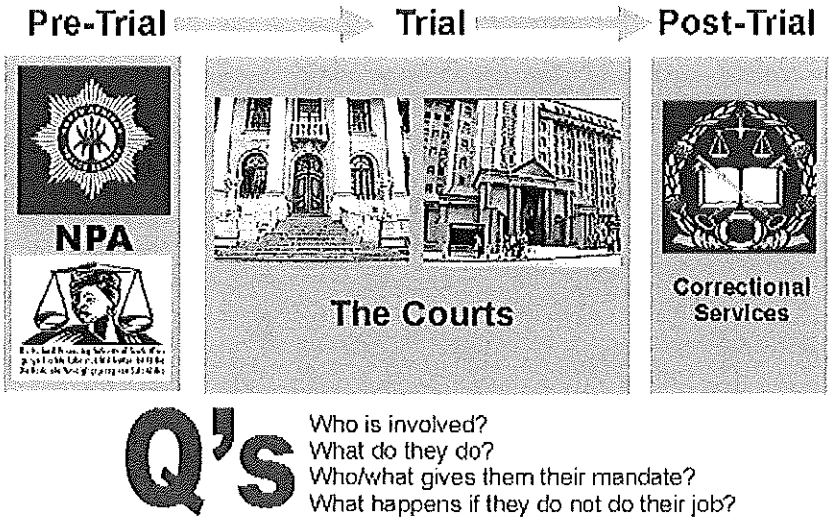
We will explore these complex interactions in more depth in the rest of unit 4 and 5.

4.4 The phases of the Criminal Justice System

When the cogs of justice are activated three successive phases come into play:

- the pre-trial phase,
- the trial phase, and
- post-trial phase.

In the following diagram the different phases in the criminal justice process are shown.



In this learning unit (unit 4) we look at the pre-trial phase of the criminal justice system (CJS). The trial phase and the post-trial phase are dealt with in following learning unit (unit 5).

We will start by looking at those role players who set the wheels of justice in place. These functionaries ie the Police (SAPS) are responsible for the enforcement of the laws that we discussed in unit one and for the protection of society. The following role players are the prosecution or our National Prosecuting Authority (NPA). They all function on a pre-trial level. This means that they do all the work necessary to bring a matter to court. After this we talk about the trial phase.

4.5 The role of the South African Police Service (SAPS)

We are going to use a story to show the process that is put in motion once a crime is committed. The story is based on a crime that takes place in one of our suburbs, a very common occurrence in our society. Keep the following questions, to which we will return again in this unit, in mind when watching the story:

- Who are the role players in the story?
- What role do they play in the criminal event?
- In the case of official role players, who or what gives them their mandate to do their work?
- What happens if they do not fulfil their roles properly?

4.5.2 The reactive functions of the South African Police Service

You were asked to explore the web site of the SAPS. After browsing this website, you may have a clearer picture of the role and functions of the SAPS. The web site shows some of the proactive functions of the SAPS as:

The website shows SAPS proactive functions such as:

- the prevention of crime
- the dissemination of information with regards to crime
- the implementation of safety measures in society.

Thus we see that the proactive function includes all those duties of the police which attempt to **prevent crimes** from taking place. On the other hand, the reactive function of the police involves all those activities that take place **after a crime** has occurred. Because in our story the crime has already taken place we will only focus on the processes that will still take place. In the next section we will explore how the SAPS reacts to crime.

Let us return to our question on who or what the SAPS is: You may have noted from the proactive functions of the SAPS that it serves the entire nation and every member of society. The SAPS is a government agency and is organised into different divisions. The popular image of the policeman patrolling an area is only one small part of the functions of the SAPS, namely that function that relates to visible policing.

The SAPS consists of many divisions, which include, amongst others:

- crime intelligence
- detective services
- criminal record and forensic science services, and
- a national inspectorate.

The head of the SAPS is called the National Commissioner. This is the most senior rank in the SAPS.

Dealing with crime

The focus of our discussion on the reactive functions of the police looks at the following themes:

- How should the police deal with evidence in a professional and ethical way, and why?
- How should the police deal with victims, and why is it so important to engage with victims in a humane way?
- How the interdependent relationship between the police and the community works?

- What other role players are involved in the prevention of crime? Why do we need them in our society?
- Which guidelines regulate what the police does?

In our story we have shown you a very simplistic snapshot of the immediate reaction of the police to a crime scene. We have asked you to reconstruct the events by making notes considering certain questions. **It will be a good idea to add to your notes as you work through the next sections.**

Although we generally refer to the police as if they are a homogeneous group, you may have noticed the many roles and responsibilities that they have from the previous discussion. We see that the wide range of functions that the SAPS fulfils, includes and necesitates the involvement of many different disciplines and specialities. This is also clear from the crime scene in our story. The SAPS employs many specialised people, each fulfilling a unique function and have a spesific role to play, such as investigating officers, forensic experts, profilers, and psychologists, to mention a few.

Some interesting reading

Two interesting biographies have been published of South Africans who have been involved in the police. The one is a book about the professional career of *David Klatzow*, a forensic scientist. The other is based on the story of *Piet Byleveld*, according to the publisher, one of the best detectives in the history of the South African Police Service. These two books may introduce you to alternative views of the world of our police service.

Another interesting and informative book about the role of the police in our criminal justice system is **Thin Blue – The unwritten rules of Policing South Africa**, written by *Jonny Steinberg*.

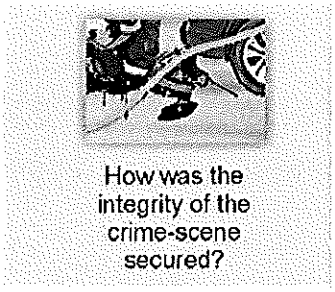
When we said in our introduction to our crime story above that it shows a very simplistic depiction of the police in action, we meant that the real position is far more dynamic and complex than one can imagine. This becomes clear from the three non-fiction books by Klatzow, Retief and Steinberg.

The importance of evidence

Now back to our story. As soon as the police arrive at a crime scene, they secure the scene. By this we mean that:

- they ensure the safety of the scene for all involved; and
- preserve evidence or potential evidence at the scene, ensuring that it is not tampered with, damaged or destroyed.

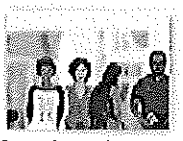
These are all pro-active measures aimed at ensuring that the evidence can be used to prove guilt, or establish the truth or falsehood of claims, if necessary later in the trial process.



Objective and subjective evidence

- **Objective evidence:** is hard evidence that is easily substantiated by forensic testing. Thus objective evidence is fact-based such as blood that can be matched by DNA testing and fingerprints on the firearm that can be matched to the accused persons.
- **Subjective evidence** is based on personal observations, opinions and feelings and is therefore open to interpretation. Thus the reliabilty of witness testimony should always be considered carefully. For example, what the witness hears someone saying may influence their recall of the incident. It may even be subject to human error and therefore, a twisted view of what has really happened may influence important decisions.

Criminal cases may stand or fall on the grounds of evidence and manner in which evidence is gathered during the pre-trial phase.



What data that could be used as evidence, should the police officials have collected at the scene of the crime?

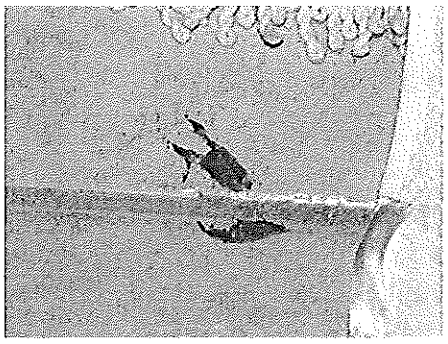
An example of a poorly investigated case

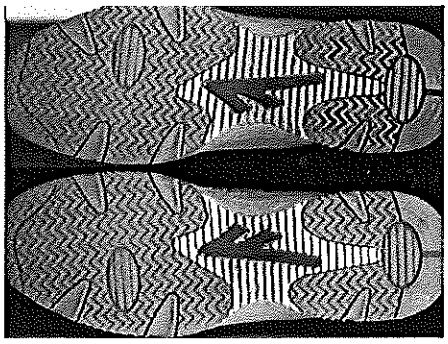
The murder case of the top Stellenbosch student, Inge Lotz, who was found murdered in her apartment in 2005, attracted a lot of media attention, as the accused in this case was the boyfriend of Inge Lotz, Fred van den Vyver.

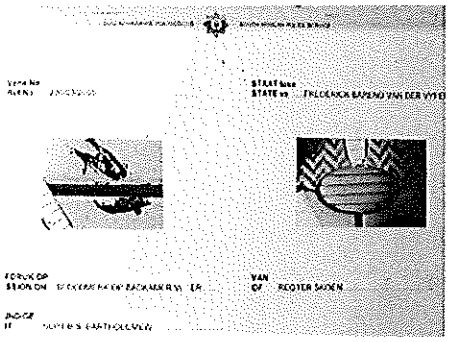
The particular manner in which evidence was handled in this case, both during the pre-trial and trial stages, was severely criticised.

Let us look at images of some of the evidence in this case. The cause of death was found to be that of blunt force trauma. The search of the crime scene revealed very interesting evidence as you will see in the images below.

One of these pictures shows a bloody shoe impression left on the bathroom floor. As mentioned, Fred van den Vyver was charged with Lotz's murder. It was alleged that he killed Lotz with an ornamental hammer that the Lotz family had given to him as a gift. A police examiner testified that the shoe impression left in the bathroom was that of Van den Vyver's athletic shoe. Van den Vyver was later acquitted of the charge of murder.







(Source: http://www.evidentcrimescene.com/consulting/sa/sa.html) This link is no longer available and is only included for reference purposes.

Despite a defence account of more than 10 million Rand, the Lotz case, described as a "forensic fiasco" by the author of "Steeped in blood", Klatzkow (see above), was said to have failed justice to both parties. Many accusations were made of the unethical conduct during the criminal investigation process. For example, it was claimed that police officers deliberately lied about certain facts, which, if known, would have meant that Van den Vyver would not have been prosecuted.

The following link provides some detail in this regard:

http://www.timeslive.co.za/local/2011/08/21/the-murder-case-that-s-haunting-the-cops

Also read the story of Mr Hilton Botha who was the first investigating officer assigned to the Oscar Pistorius case. It later emerged that he mishandled evidence.

http://mg.co.za/article/2014-03-14-pistorius-trial-cop-admits-to-evidence-botch

Also read the following article:

http://www.iol.co.za/news/crime-courts/report-on-botched-prosecutions-ready-1829381

Admissible and inadmissible evidence

At this point it is also important to note that the above kinds of evidence are not the only types of evidence that are relevant in the criminal justice process. Although this unit focuses on the pre-trial process, we would like to point out that when a court actually considers the evidence in a criminal case, a distinction is made between admissible (allowed) and inadmissible (not allowed or irrelevant) evidence.

One example of inadmissible evidence is hearsay evidence. As witnesses may testify only about facts that they themselves experienced, hearsay evidence which is information that others have told them, will as a rule not be admissible in criminal

cases.

For example: A rumour that Mr A has bought a new BMW from the proceeds of illegal activity will not be admitted as evidence in court, but may be relevant during the pre-trial phase as part of an investigation into Mr A's, as a suspect's, alleged criminal activity.

When Mr A is formally charged of a crime, he will in addition to being a suspect, now be refered to as the accused.

The term "accused" is new and we need to explain this to you. The term "accused" is a formal legal term that refers to a person who is charged with a crime in formal criminal proceedings (the criminal trial). In order to be an accused, the person so charged must be formally charged and accused of committing a crime. A crime, as you will recall from unit 3, is conduct which is punished by the State on behalf of the community and which is regarded as a transgression of legal rules which bind an entire community.

ACTIVITY 4.1: Early reflections on the effectiveness of the police

Compile a document of between 800 and 1 200 words in which you reflect on the issues below.

2. Make a few notes of your impression of the Lotz case and the Pistorius case and the manner in which the evidence was handled. Do you think that the case may have had a different outcome if the evidence was handled and presented differently? Provide reasons for your answer.
4. After reading the discussion on the Lotz case and the Pistorius case, briefly write about your view on the way in which the police fulfilled their obligations to society in this case.

   Remember to keep your notes because your impressions will influence your contribution to the discussion forum and your **final assignment** at the end of this module.

4.6 Victims of crime

Earlier we asked you to identify the possible victims in our story. When ordinary community members come into contact with the criminal justice system for the first time, the experience may be daunting and the processes difficult to understand. This contact may be as

- a victim
- a person suspected of a crime (suspect)
- an accused of a crime (term explained above), or
- a witness to a crime.

The experience may even be that of an offender, the person who perpetrated the crime.

Primary victims

In our story, the guard, Thomas, who is killed, is an example of a primary victim. His death is the direct result of the punishable conduct (crime of murder) of the offenders. A primary victim is hence the relevant person who suffers directly as a result of the commission of the crime.

Secondary victims

All those who witnessed the crime in our story, namely Peter, Sue, George, Thandi and Moitsadi, community members who were all busy with their early morning workout at the time of the crime, are secondary victims. They may all experience possible trauma in their own unique way. Some more sensitive persons may be terribly traumatised while others may have experienced previous trauma and may desensitised. The trauma may be compounded if they have to testify in the criminal case that may follow in our story. They may be retraumatised by having to relive the crime that they experienced through their testimony.

Let us look at some examples of secondary victimisation in the criminal justice process. Secondary victimisation often starts long before the court process starts, for example already when the victim first reports the crime to the police.

- Victims, especially women and children who are victims of sexual assault (among other crimes), may face the disbelief of the police to whom they report the crime.
- Victims may be blamed for the crime such as woman walking alone late at night or wearing revealing clothing.
- Both police officials or friends and family may discourage secondary victims from reporting the crime.
- The victims may be further traumatised if officials fail to provide them with private waiting or report-taking facilities.
- If victims are not informed of court procedures and are left uninformed about court procedures and evidence, this may further cause stress, not to mention the stress of being confronted with the presence of the offender in court.

Acknowledging the victims of crime

The trauma resulting from a crime may affect victims in such a manner that they struggle to cope with and recover from the experience, in other words, crime often disempowers victims of crime. The effects of trauma will differ from individual to individual, depending on the type of crime, life experience and resilience of the victim, as well as coping mechanisms within the victim. Victims are also often further disempowered by the cold and clinical nature of the justice system and its processes.

This trauma must be acknowledged and addressed by the criminal justice system. The Bill of Rights, which is contained in the second chapter of our Constitution, enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom, even for victims of crime and for those who offend against society. You can return to Unit 2 (2.7) to refresh your memory if you wish.

On the other side, we have our offenders, victims of their own deeds (crimes), who nonetheless are still affected by the negative conditions in the criminal justice system, such as deprivation of their freedom, loss of their loved ones and contact with the most hardened and dangerous members of our society. Stories about the rape and assault by other inmates are well known.

The trauma referred to in the section above is often hard to counteract, as how does one lessen the trauma of being robbed, or raped or having a loved one murdered?

The unethical and callous behaviour of criminal justice functionaries may contribute to or increase the trauma experienced by victims. However, the ethical handling of cases by the police and the courts can lessen the traumatic effect of the criminal justice system. If they function as mandated by their different institutions and as supported by their specific codes of conduct and work ethics, they will treat victims, offenders and colleagues in a just and ethical manner and lessen the trauma associated with the criminal justice system. Let us now look more closely at the role of ethics in the SAPS.

4.7 The role of ethics in the police function

Ethical policing demands that the South African Police Service act with integrity and respect for people's diversity and the law, thereby enhancing service excellence which meets the approval of society as a whole. Thus they must not only be visible to communities but more importantly, must treat those communities with respect and dignity.

As we alluded to earlier, the police are bound by an ethical code, entrenched within the Constitution, which elevates their role as a protector in society to a higher level. As the "watchdog" of the State and the community, the South African Police Service must not only investigate a complaint or a charge on behalf of the State and society, they must act with honesty, be responsible, truthful, and perform their duty to society with noble motives. They should set an example to the communities they serve, and respect the cultural and other diversities in their respective communities.

All people should be treated equally and not discriminated against. It is therefore very disturbing when one reads of examples of police officers who do not serve the best interests of a community and especially those found guilty of corruption.

When the police let society down!

A newspaper headline that caused a sensation in 2012 revealed that 600 police officers were arrested for corruption. You can read more about this by clicking on the link below:

http://www.sowetanlive.co.za/news/2012/05/02/over-600-police-arrested-in-gauteng?service=print

A personal ethical commitment

It is clear that the ethical commitment of each individual or functionary is required to work towards a just system. If members of the SAPS become involved in criminal activity, it severely undermines and compromises the success of the entire criminal justice system. However, achieving a just system is not the work of these functionaries alone, but requires the commitment of the community. In the next section we will look at the relationship between the SAPS and the community and the dynamics of this volatile relationship.

4.8 The relationship between the South African Police Service and the community

Let us return to our story to identify the various role players. You may have identified the following groups of people, namely:

- the police
- private security
- victims
- witnesses and the
- offenders

Beside these persons, we also have a fourth role player that is not as visible, but that plays just as important a supporting function to the police. Can you think who this role player is? It is the community as a watchdog!

The importance of the **community** becomes very clear when we look at our story. If it were not for Mrs Malema, a concerned citizen, watching television, the perpetrators may never have been traced. Her vigilance and concern for her community prompted her to call to report her suspicion that the men she had seen earlier that day were indeed the men who had committed the robbery.

How can the community become involved in the fight against crime?

Community members can assist within the criminal justice system by becoming involved with their local Community Policing Forums and attending meetings at their local police stations. Here they can participate and discuss action plans with the local police and the sector commander in order to deal with crime in the area. The public can participate in neighbourhood initiatives to safeguard the area in which they live, work and play. Communities can take ownership of community policing and support the SAPS in the enforcement of the law. However, they can also just act in their personal capacities and fulfil their moral

obligations to report a crime.

In the past a volatile relationship existed between the police and communities. However the SAPS has a social responsibility besides the cold, clinical functioning as specified by the Criminal Procedure Act. It has a softer, more humane side in dealing with people, specifically with vulnerable members of our society such as women, children and victims of crime who are traumatised. The police have a Teddy bear project which supports SAPS initiatives in the fight against crimes against women and children. It also aims to build a relationship with the youth of South Africa. SAPS aims to proactively project a positive image to all the communities it serves to protect.

4.9 Other role players in the struggle against crime

That there are other role players in the struggle against crime is clear from our story. Two of the role players that emerge in the scenario are

- the SAPS and the Private Security industry.

Other role players are the police reservists and the Metro Police. A critical question that may arise when looking at both the police and the private industry is:

- How did the police and private security react and respond to crime?
- How does private security support or supplement police initiatives?

Read more about these services by clicking on the link Other role players in our fight against crime.

4.10 Guidelines determining what SAPS does and how they do it

We must note that neither the SAPS, nor the private security industry, work randomly or in a haphazard fashion. Both the SAPS and the private security industry have laws that determine what they do and what they are permitted to do. They have guidelines or, in other words, specific legislation and departmental policies that determine what they do and how they do it.

The roles and functions of the SAPS are determined by specific legislation and departmental policies, which give the SAPS legal instructions and provide official powers. These are the:

- Constitution of the Republic of South Africa,
- Police Services Act 68 of 1995 and
- the Criminal Procedures Act 51 of 1977.

There is, however, a lot more to the SAPS as a key role player in the criminal justice system and we will further explore these other dimensions.

4.11 The Pro-active functions of the SAPS

With the adoption of the Constitution, the old South African Police Force became known as the South African Police Service. With this name change, a new ethos emerged, and rather than a role as a "force" in society a shift was made, based on the philosophy of the Constitution, namely to deliver "service" to society. Thus they became a visible service within society.

One of its biggest responsibilities to society is the SAPS efforts towards preventing crime in society. It focuses on social crime prevention and visible policing. This is a pro-active function to which we very briefly alluded to previously.

What does the social prevention of crime mean?

SAPS develops and implements measures to reduce the levels of crime in society by providing police emergency services and optimising visible policing services. Thus, it is important for the police to be visible within the community. It is believed that a clear and visible presence discourages crime and that by being "more" visible these functionaries are able to provide proactive and responsive policing in their communities.

An interesting social dimension of the work of the SAPS is its involvement in children's issues, Crime Stop, community policing, woman and children projects, information regarding missing and wanted persons, youths and firearms.

The web site of the SAPS contains information on how to deal with problems, threats and gives tips for the anonymous reporting of crime. Valuable guidance is given on how the community can assist in the fight against crime.

Legal certainty

The website clearly shows the efforts of the SAPS to portray its image as a protector of society and their efforts to develop a report and a relationship of trust with communities. The SAPS also strives to carry across the message of legal certainty, a message that they can be trusted to ensure that they protect the integrity and security of all members of society.

A further certainty is that those who break the law will be dealt with strictly according to the law. As crimes are clearly defined in law, as well as the punishment (eg the sentences passed down by the court) that may follow if these acts are

committed, we may say that the SAPS plays in instrumental role in ensuring and promoting legal certainty, which is an important requirement for the maintenance of peace and order in society generally.

ASSIGNMENT 4

Assignment 4 Discussion forum

Go to the South Africa Police, Department of Correctional Services and the National Prosecution Authority websites and explain their visions, missions, mandates and roles in the criminal justice system.

TOTAL: 15 MARKS

4.12 The public prosecutor

As the wheels of justice turn our discussion now turns to another role player in the pre-trial process, namely the public prosecutor. Who is the public prosecutor and where does he or she fit into the criminal justice system?

As an important functionary in the criminal justice process, the public prosecutor works on two levels:

- before the trial takes place,
- and during the trial.

During the pre-trial phase, the public prosecutor has to decide whether there is sufficient evidence to prosecute the suspect or not.

How is this decision made?

The decision whether to prosecute or not depends on the answer to the question whether a reasonable (fair) person, when looking at the evidence for the first time, thinks that there is enough evidence to prove the case against the suspect. If so, the public prosecutor will give the go ahead to prosecute the offender, or release him or her if there is not a strong enough case against them.

A prosecutor also plays an important role by guiding the police in the collection of appropriate evidence to put into the police docket. The evidence obtained will determine whether the matter will be prosecuted or not. We hope you will realise the importance of the proper criminal investigation of a case, where sufficient evidence is collected to convince the prosecutor that there is enough evidence against an accused person to institute a criminal case.

Before the trial begins, the prosecutor formulates the charge against the accused. The trial starts with the prosecutor putting the charges to the accused. During the trial, the prosecutor presents the evidence and guides the witnesses to ensure that they do not leave out anything of importance that may assist the State in proving the guilt of the accused. We will return to the role of the prosecutor during the trial below.

Where does the public prosecutor fit in?

The prosecutor, as a functionary or role player that works for the State (specifically the National Prosecuting Authority), carries out the mandate of the NPA. The NPA is tasked with the responsibility of instituting criminal proceedings on behalf of the State against someone who has committed a crime. This authority derives directly from the Constitution of the Republic of South Africa. The prosecutor is hence a crucial link in the criminal justice process.

More about the NPA

After browsing through the NPA's web site, you may note that the Constitution and the National Prosecuting Authority Act 32 of 1998 provides the prosecuting authority with the power:

- to institute criminal proceedings on behalf of the State
- to discontinue criminal proceedings on behalf of the State, and to
- to carry out any necessary functions incidental to instituting criminal proceedings.

The role of the case docket

After a crime has occurred, a case docket is opened by the SAPS. This step is followed by:

- the registration of the case docket
- transfer of the docket to the detective unit and the
- transfer of the docket to a detective or a team of detectives.

Once the docket is allocated to a team of police detectives, they need to carry out the investigation. The detectives in charge of a case will complete the investigation and present the docket to the public prosecutor, who will then channel it to the relevant court for prosecution, if it is found that there is sufficient evidence to prosecute a suspect.

The police docket contains the necessary information to prosecute an offender, such as:

- objective evidence including physical evidence gathered from the crime scene (in our story: cable ties, money box, foot prints, blood on glass, the recovered money, the vehicle, the camera footage)
- forensic evidence such as an autopsy report, ballistics report, finger prints and foot print experts reports
- subjective evidence such as witness testimony from the witnesses.

In order to collect evidence that may be used in the criminal trial that may follow in our crime story, all the witnesses of the armed robbery at the jewellery store must be questioned. These include Peter, Sue, George, Thandi and Moitsadi, who were all busy with their early morning workout at the time when the crime was committed. Vusi, the police reservist, must also be questioned. The testimony of the private security guard, Thomas's partner, must also be taken, as well as the tape that belongs to the owner of the jewellery shop, who owns the camera containing the footage of the events.

What happens during the preparation of a docket?

In our story, the police have done the following during their investigation of the shooting that led to the death of the security guard. They have

- found and secured evidence
- identified witnesses and interviewed them
- gathered data, and
- identified the suspect or suspects.

After these steps are taken, this often leads to the arrest, detention and perhaps the release on bail of the accused if he or she is not a threat to the victim or the community.

In our story, Detectives Van Heerden and Mathabathe are responsible for the docket. All enquiries are directed to these detectives and they must gather sufficient and proper evidence to ensure a successful prosecution.

The role of the prosecutor during the trial

During the trial, the prosecutor presents the evidence against the accused in court, and argues the case on behalf of the State. Unless the prosecutor proves the guilt of the accused "beyond reasonable doubt", the accused will be acquitted. The term "beyond reasonable doubt" is important. You may want to refer back to unit 3 (3.5.1 under "A legal process" and 3.5.2 under "An example") where we introduced you to this concept. It will be explained in more detail in unit 5.

He or she is also responsible to ensure that victims and witnesses are treated fairly. They must keep the victims and witnesses informed of any progress in the case, including when it is necessary for them to attend the court hearings.

A diversion of procedures



Christiaan Pringle

The prosecutor may **divert** cases for rehabilitation or for alternative dispute resolution, especially in the case of children in conflict with the law and first offenders. This means that the prosecutor channels certain cases (such as those involving first offenders) to extra-judicial programmes. Extra-judicial means a programme that falls outside the formal legal process (eg the trial). Community service programmes are one example of such an extra-judicial programme. Thus the prosecutor plays an important role as he or she helps the presiding officer (the magistrate or judge) to make a just verdict and to impose a fair sentence. We will learn more about this in unit 5.

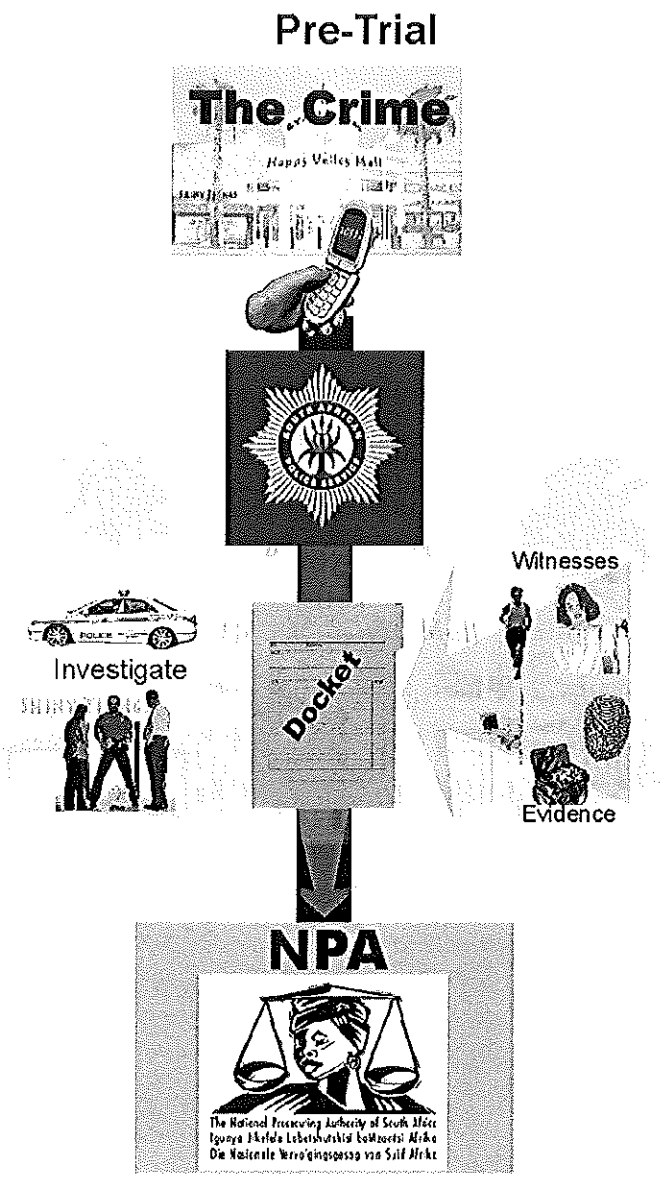
4.13 A system that relies on synergy

Synergy in a system requires that each functionary fulfils his or her function so well that they are able to work together with all the other role players, each doing their job so efficiently that a criminal case can be processed smoothly and efficiently.

Can you see why we talk about a criminal justice "system"? Thus when the cogs of justice turn each cog or each part of the system should work together, not in isolation but in a close partnership. If this ideal is realised then we have a synergised and effective criminal justice system.

Let us briefly recap the pre-trial process and its dynamic interactions.

In the diagram we have tried to illustrate the interdependence and interactions of the different components of the criminal justice system as they unfold during the pre-trial phase.



- Following the commission of a suspected crime (which may be reported to the SAPS), the police respond by visiting the crime scene and making sure that the crime scene is secured so that the evidence is protected.
- Satisfied that a crime may have been committed, the SAPS opens a case docket. The docket is registered and the docket is transferred to the relevant detectives for a criminal investigation.
- During this investigation, the detectives may search and interrogate potential witnesses and may collect various types of evidence. All the evidence and findings that they collect form part of the case docket.
- The case docket is then sent to the public prosecutor, who has to decide whether a strong enough case exists in terms of which criminal proceedings may be instituted against the suspect(s).

4.14 Conclusion

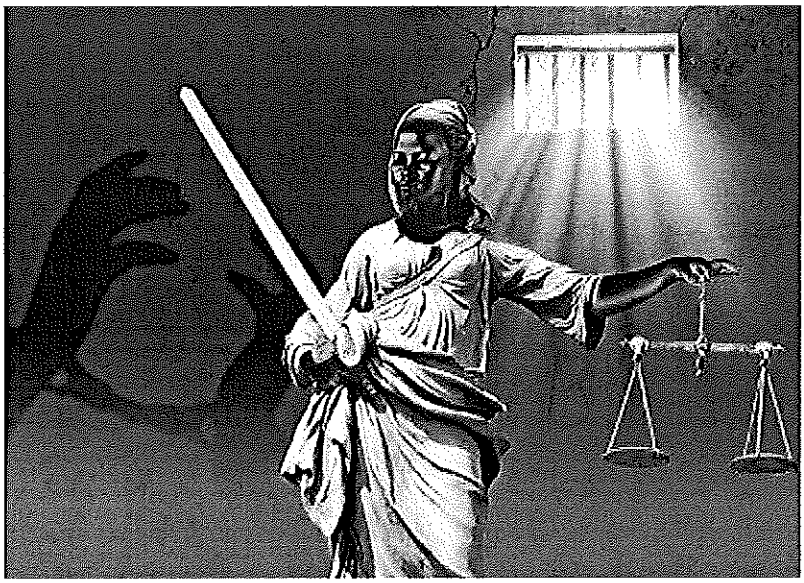
In this learning unit, we have introduced you to our criminal justice system and explained the importance of the functionaries responsible for creating a synergy in the criminal justice system. We have also provided you with a story to illustrate how the functionaries play their roles in the fight against crime to ensure a just and safe society for all of us. We have acknowledged the possible trauma experienced by those involved, be they the functionaries, victims or offenders, as well as the long lasting effects this system can have on them.

In the next unit, we will focus specifically on those functionaries who play a critical role in ensuring that the prosecution of alleged suspects (who pose a potential threat to society), are dealt with in a fair, reasonable and consistent manner. We will also look at the courts that are tasked by society to ensure that the processes are followed and that justice is served when laws are contravened or crimes take place. We will also look at the role of Correctional Services in carrying out the orders of the courts to ensure that an offender is punished and rehabilitated.

Switch to Full View

Unit 5 : Making sense of the criminal justice system: The trial and post-trial phases

5.1 Overview of Unit 5



Before we start with the key theme of this unit let us consider the image of Lady Justice.

Carefully study our image of Lady Justice. Make notes on the various objects that you see and what, according to you, the deeper meaning of these objects may be. While doing so, try to compare the image of Lady Justice in this unit with those of the previous units.
Make notes on how our image of Lady Justice has change and once again, share your ideas in the debate: Does symbols, such as Lady Justice, still have meaning for us in the 21st century, on the African continent, in a fairly young democracy? Should she be replaced, adapted (changed), or plainly be discarded?

Early reflections

In the previous unit (Unit 4) we ended our journey on "making sense of the criminal justice system" at the point where a decision is taken by the NPA to prosecute or not. Unit 4 dealt with mainly the pre-trial phase, in which the police (complemented by the private security industry) and NPA are the main role players.

Remember that while the NPA is one of the main role players in the pre-trial phase, the role of the NPA does not end in the pre-trial phase. In fact, the public prosecutors (who are employed by the NPA) are role players in the courts throughout the trial phase.

Some of the questions that will be answered in this unit are:

- What happens when the public prosecutor decides to prosecute?
- Who are the role players during the trial phase?
- What happens during a criminal trial?
- What role can victims of crime play during the trial and post-trial phases?
- What happens after an accused is convicted and sentenced?
- What is the position regarding crime committed elsewhere in the world and how does South Africa deal with this?

Unit 5 continues the discussion of unit 4 by turning to the trial and post-trial phases. In this unit we will look at the important role of the judiciary, in other words the magistrate or judge, who is responsible for adjudicating in the trial of offenders, and other functionaries who contribute to the decision of whether the offenders are guilty or not.

Now go to '5.2 The judicial process' by clicking on "Next" at the bottom of this page

5.2 The judicial process

In this unit we will look at the important role of the judiciary, in other words the magistrate or judge, responsible for adjudicating in the trial of offenders, as well as the other functionaries who contribute to the decision of whether the offender is guilty or not.

Remember that while the NPA is one of the main role players in the pre-trial phase, the role of the NPA does not end in the pre-trial phase. In fact, the public prosecutors (who are employed by the NPA) are role players in the courts throughout the trial phase. Their role, as you have seen in unit 4, already starts during the pre-trial phase.

5.3 A first encounter with the court ...

In the previous unit you watched a short story of how four men were arrested for an armed robbery that they committed. Click on the link named Robbery of Shiny Things Jewellery Store and do the following:

2. If you wish to recap on what happened you can quickly read Chapter 1: The event.
4. Then read Chapter 2: Early preparations

When you are done with your reading go to: 5.3.1 Reflections on our story

The story is also available under Additional Resources: Robbery of Shiny Things Jewellery Store.

5.3.1 Reflections on our story

Let us reflect on the initial court appearance and the trial phase.

Important functionaries in the trial phase of the criminal justice process

A number of key role players or functionaries emerge from our story of the four accused above. Each of them is an important link in the chain of the criminal process.

Which of the role players stood out for you?

Chances are good that you may say that Alyce played a very important role, both during the pre-trial and the trial phase. You are correct. We will look more closely at Alyce's functions below. Before we do so, we would like to make a few remarks about the following role players:

- The prosecutor and The National Prosecuting Authority
- Witnesses
- The defence lawyer or legal representative for the accused
- The presiding officer (magistrate or judge).

We will in the final instance explore the issue of bail in more detail, followed by the individualisation of offenders, punishment and the human rights of offenders.

The public prosecutor

The public prosecutor plays an important role both during the pre-trial and the trial phases.

The prosecutor, in a nutshell, has the following responsibilities, as have emerged from Alyce's role in our crime story during both the pre-trial and trial phases:

- to assist the SAPS in gathering appropriate and sufficient evidence for the purpose of a criminal trial
- to decide whether an offender should be prosecuted or not
- to present evidence in court on behalf of the State (in an attempt to secure a successful conviction)
- to argue the case on behalf of the State
- assist the court in arriving at a just verdict
- in the case of a conviction, to arrive at a fair sentence; and ultimately,
- to promote justice by assisting the state to fight crime.

Although Alyce represents the State on behalf of the community during the pre-trial and trial phases, she should also be accountable to the community that is represented, namely to ensure that the interests of victims and witnesses are promoted.

What would the impact be if Alyce performs her functions inefficiently or poorly?

The most obvious result would be that:

- a guilty accused may be acquitted of a charge against him. In addition to this, the impact will be far more widely, namely:
  - cases that are slowly processed, may increase the number of awaiting trial prisoners, causing overcrowding in the correctional facilities;
  - it becomes difficult for the Department of Correctional services to rehabilitate existing sentenced prisoners;
  - on an even wider level, it may foster an impression that "crime pays", because the system is unable to address the fight against crime.

Alyce represents the State in the criminal proceedings. You may perhaps wonder why the State is so dominant in a criminal case.

The reason for this is because the crime that has allegedly been committed is punished by the State on behalf of the community. The crime is regarded as a breach of legal rules, which the community regards as binding. Criminal proceedings are hence instituted by the State (who is charge of the criminal proceedings) and an accused is charged to answer to the relevant criminal charges. Despite the strong role of the State, the Constitution specifically protects the rights of detained, arrested and accused persons.

The National Prosecuting Authority

It is the NPA (through the public prosecutor) that decides whether there is a prima facie case that would justify proceeding with prosecution. This is term you may have heard before. That is, a decision has to be made whether there is sufficient evidence "at first sight" or "at face value", prior to that evidence being tested in court, to justify proceeding with a case in court. In other words, there should be sufficient evidence to justify an expectation that conviction is possible if such evidence would stand. To simplify, we can say that the NPA decides whether a case against a person (based on the untested evidence) is strong enough to proceed with prosecution in a criminal court.

It needs to be understood that a case which is already doubtful even before evidence is tested or contested in court, would probably not succeed. As a matter of principle the NPA should not prosecute cases where they are to depend solely on a possible admission by the accused during the trial.

An example:

An example of the issue of prosecuting an offender or not based on the available evidence was the NPA's decision a few years ago not to charge President Jacob Zuma in the Shabir Shaik trial, despite a claim made in August 2003 by the then Director of the NPA, Bulelani Ngcuka, that there was a prima facie case against President Zuma. A lot have since been written about the damage this statement caused to the reputation of the President.

Witnesses

A witness can be anyone of the following:

- the victim;
- anyone else who knows what happened or
- who knows something about the crime; or
- a police officer; forensic expert or another expert.

After each witness has given evidence, the accused or his or her legal representative may question the witness. This is to test the truthfulness or correctness of the evidence of the witnesses. This also gives the accused or his or her legal representative the chance to give their version of the events.

The defence lawyer or legal representative for the accused

The legal representative for the accused is tasked with countering the claim and evidence provided by the prosecutor (on behalf of the State). In instances where the State fails to provide sufficient evidence to support a finding that the accused is guilty beyond reasonable doubt, the legal representative of the accused may ask the court to discharge the accused. The legal representative of the accused has the right to cross-examine the witnesses that testify on behalf of the State and also presents evidence in support of the case of the accused. He or she may also call witnesses to testify on behalf of the accused.

The presiding officer

In the closing argument, the prosecutor summarises the case. The prosecutor gives reasons why the accused should be found guilty. The accused or the legal representative of the accused also summarises and submits closing arguments and explains to the court why the accused should not be found guilty.

This is the moment when the presiding officer gets the opportunity to decide whether the accused is guilty or not.

The role that the Magistrate or Judge (see unit 3 again for the difference between these two role players) plays in the criminal justice process is critical to ensure that a fair trial results. As part of this process, this functionary objectively views the criminal event and comes to a decision of guilt or innocence.

If the accused is found guilty, the prosecutor has proved the guilt of the accused "beyond reasonable doubt". If the accused is found not guilty, it is because the presiding officer has reasonable doubt as to whether the state has proved the case "beyond reasonable doubt". If there is reasonable doubt, the court has to acquit the accused. This means he or she goes free. The phrase "beyond reasonable doubt" will be explored in more detail below.

Bail

Let us now briefly consider the issue of bail, as this came up during the initial court appearance of the accused in our story, whose application for bail was denied.

Legislation in South Africa (the Criminal Procedure Act 51 of 1977) stipulates that no person who has been arrested, may be detained for longer than 48 hours unless he or she has been brought before a court which orders further detention. In order to determine whether it is in the best interests of justice to release an accused on bail or not, five factors are considered:

- The likelihood that the accused may endanger an individual or society at large
- The likelihood that the accused will not present him- or herself for the trial
- The likelihood that the accused will threaten the prosecution by interfering with witnesses or destroying evidence
- The likelihood that the accused will undermine the objectives of the criminal justice system
- The likelihood that the release of the accused will disturb public order.

Do you agree with Judge Koen's finding regarding the issue of bail for the three accused?

If you argued that this should be considered, you are correct. The Criminal Procedure Act distinguishes between certain crimes. In the case of serious crimes and extremely serious crimes, an accused may only be released if he or she produces evidence to convince the court that the interests of justice supports his/her release (in the case of serious offences), or if he/she (in the case of extremely serious offences) produces evidence to satisfy the court that exceptional circumstances exist, which in the interests of justice, permits his or her release.

Human rights in the criminal justice system

Let us pause for a moment to recap what we have said about the Constitution and rights in unit 2. Just as all members of society have rights, so do both victims of crime and offenders. Section 35 of the Constitution outlines the rights of arrested, detained and accused persons in the criminal justice process.

Each role player involved in the criminal justice process has rights which ensure that they are fairly and equally treated. Even an accused has certain rights and they have further rights when they are being criminally prosecuted.

Rights of accused persons

Accused persons have the following rights, which include the right:

- to be told what the charge is
- to a quick and public trial
- to appear in court within 48 hours after arrest
- to a trial by an unbiased court, usually in the area where the crime was committed
- to question any witnesses that gives evidence during the trial and evidence used against them
- to ask for a lawyer. If a lawyer cannot be afforded, the State must help to apply for Legal Aid to pay for a lawyer.

If an offender is denied any of these rights, he or she may be able to take the court's decision on appeal. This means that a higher court has to reconsider the case on the basis of asking whether the accused had a fair trial.

Individualising the offender

In courts every day in South Africa, the hundreds of "faceless" offenders become known to society and we see them as individuals for the first time. It is sometimes hard for the community to accept that these perceived "monsters" come from their very own communities. However, the court must individualise them and find an appropriate way of dealing with them. The court does not deal with them as alleged criminals in a general sense or from a general point of view, but as individuals. Each particular case heard by a court of law must be dealt with in accordance to its own merits and particular surrounding circumstances.

5.5 The trial phase

During this stage of the trial we see the critical parties involved.

To read what happens when the trial begins, go to p 12, Chapter 3: The trial begins by clicking on the link named: Robbery of Shiny Things Jewellery Store

When you are done with your reading go to: 5.5.1 Beyond reasonable doubt.

5.5.1 Beyond reasonable doubt

The main question that the presiding officer has to consider in arriving at a final decision is whether the prosecution has proven "**beyond a reasonable doubt**" that the crime(s) were committed by the accused. If not, the accused must be acquitted and be freed. Obviously, in such case, no sentencing can occur.

However, if the judge comes to the conclusion that guilt has been proved beyond a reasonable doubt, the accused are found guilty and convicted. Such a verdict will then be followed by the sentencing of the convicted offenders. This is what was meant with one of the requirements of a crime namely that "the act or conduct must be punishable by law".

Sentencing is the sanction that the State (through the mandate of the courts) imposes due to the offender being found guilty of "breaking the law" in the form of committing a crime. You will remember from unit 3 that a crime is conduct that is punishable by the State and which is regarded as a breach of defined legal rules. It is important to note that not only the definition of a crime should be clearly described, but also the punishment thereof.

After the accused are **convicted**, the prosecution generally addresses the court on the kind of sentences that the State have in mind for the accused. "Convicted" does not mean the same as sentenced, as it merely refers to the verdict of guilty or not guilty. Sentencing follows a conviction and a verdict of guilty.

The legal representative of the accused may also address the court on the kind of sentence that he deems fit for his client. In cases that involve serious crimes, including violent crimes or sexual offences, the prosecution often presents evidence on the impact of the crime on the victim(s) and the community, as well as any relevant previous convictions that the offenders may have.

5.6 An important moment in the trial

Normally, sentencing (which can obviously only occur after conviction) is not dealt with immediately after conviction and finding the accused guilty. In most instances, a postponement is allow for both the prosecution and defense to prepare their arguments and to lead evidence for the purpose of sentencing. In our story, the case is postponed, for the reason that is explained below.

The judge has to consider an individualised sentence for each of the individuals in our story. This, in general, means that each convicted offender's unique circumstances are taken into account when the judge passes sentence. We will refer to the individualisation of offenders throughout this unit, as you will note.

To read what happens during the sentencing, go to p 14, Chapter 4: Our accused are sentenced, by clicking on the link named: Robbery of Shiny Things Jewellery Store

When you are done with your reading go to: 5.6.1 More about punishment and sentencing

5.6.1 More about punishment and sentencing

Different forms of punishment can be handed down in a court of law.

They range from:

- **Punishment**, where the offender is deprived of his or her freedom for example when a prison sentence is passed down. Correctional supervision (house arrest) is also an option
- The payment of money (*a fine*) or the loss of property (forfeiture of property or paying compensation to someone)
- Providing a free service such as *community service*
- A *loss of privileges*, such as the cancellation or suspension of one's driver's license.

Mitigating and aggravating factors

The judge or magistrate also considers mitigating and aggravating circumstances when sentencing an offender. Aggravating factors are those factors that aggravate or magnify the crime and mitigating factors those aspects that lessen the severity of a crime."

In our story, the previous convictions of two of the offenders were considered as an aggravating factor. If we look at our four offenders, each one has unique life circumstances, each poses a different risk to society and they all have distinct needs when they are punished.

Let us consider another example:

The case of Cezanne Visser, better known as "advocate Barbie", who was convicted of charges relating to the sexual abuse of children, is a case in point. Follow the following link:

http://www.iol.co.za/news/south-africa/calls-for-visser-to-be-given-a-harsh-sentence-1.460955?ot=inmsa.ArticlePrintPageLayout.ot

Write a few lines on whether, in your opinion, the fact that Visser, who was a LLB graduate and who received her degree with distinction, was a factor that should have been a factor to be considered in her sentencing. Keep your notes for your final assignment.

Rights of victims and witnesses

Victims and witnesses also have rights which protect them and ensure that they are not unfairly treated of further traumatised by the justice process. Due to the nature of the court process, individuals

testifying may feel they are being harshly treated.

The National Prosecution Authority works hard to make sure that all victims and witnesses appearing in court are treated with respect and dignity. State Prosecutors will do their best to protect their interests and make sure that witnesses not cross-examined unfairly. There is right to cross examine and a prosecutor can, amongst others, object to intimidation of witness or rudeness towards them.

5.7 What happens to Christiaan Pringle, our 15-year old accused?

To know what happens to Christiaan Pringle we need to understand diversion.

Although we made reference to diversion earlier, we didn't look at the purposes of this approach very closely.

The objectives of diversion are to:

- Deal with a child outside the criminal justice system in appropriate cases
- Encourage the child to be accountable for the harm caused by him or her
- Promote the reintegration of the child into his or her family and community
- Promote reconciliation between the child and the person or the community harmed by the child's actions
- Prevent the child from having a criminal record.

5.8 What happens if things go wrong?

Although legislation and policies govern the criminal justice process that guide the legal process and give role players their mandate, things may go wrong. One commonly cited problem relates to the criminal docket.

5.8.2 Discussion of the Mduli case

From the articles it becomes evident that because key evidence was destroyed, Richard Mdluli, could not be charged with ordering the murder of his ex-lover's husband.

According to first the newspaper article after an inquest, it was found that there was not enough evidence to charge Mdluli and three other suspects with a 13-year-old murder. The State argued that Crime Intelligence chief Mdluli, who commanded the Vosloorus police station's detective branch between 1997 and 1999, instructed his junior officers to assist him to hunt down, kidnap and kill his ex-girlfriend's new husband, Oupa Ramogibe, in the late 1990s.

Mdluli was suspended last year in connection with the 1999 kidnapping and murder. He was also charged with defrauding the police and a Pretoria car dealership of more than R90 000, and for causing it to lose a further R1.28 million. However, all the charges were withdrawn and Mdluli was reinstated at his place of work.

The second article reports on the missing dockets which have allegedly been found by Mdluli's successor as head of detectives at the Vosloorus police station. At the time of writing of this unit, it was still not known whether new criminal charges would be filed against Mdluli and his alleged accomplices.

ACTIVITY 5.2: Missing or stolen dockets

In unit 4 we have introduced you to the importance of ethical behaviour of functionaries within the criminal justice system.

2. Click on the following links to read an interesting case which clearly shows what happens when dockets are stolen. The second link is the most recent development regarding the issue of the missing dockets in this case:

   http://www.iol.co.za/the-star/mdluli-may-escape-trial-1.1273137

   http://mg.co.za/article/2012-09-25-missing-dockets-found-in-mdlulis-safe-says-witness

Apart from the main issue that justice may not be served in this case, list three examples (or allegations) from these two reports that point not only to illegal transgressions, but to unethical police conduct.

5.9 The post-trial phase

The final cog in the post-trial phase of criminal justice process is the Department of Correctional Services. You will recall that both Robert Blom and Calvin Sibanda in our story have been sentenced following their convictions and are now in the custody of the Department of Correctional Services.

To read what happens to Robert and Calvin, go to p 16, Chapter 5: Entering the Correctional System, by clicking on the link named: Robbery of Shiny Things Jewellery Store

When you are finished reading go to: 5.9.1 The role of the Department of Correctional Services.

5.9.1 The role of the Department of Correctional Services

The Department of Correctional Services involves those functionaries responsible for carrying out the orders of the presiding officer (magistrate or judge) and the sentence imposed on the offender during the trial.

An important task of the Department of Correctional Services is to provide a safe and healthy environment for all inmates. Functionaries within Correctional Services are tasked to ensure the safety of inmates, as well as the security of all personnel and society. Another important task is to assist offenders in their rehabilitation process.

Apart from correctional officials, there are also experienced professional officials, such as social workers, psychologists, and educationists. They have to provide need-based care programmes and services.

Individualised correctional sentence plans

In the discussion above we refer to an individualised approach to offenders during the trial and sentencing phase. This approach does not stop there. When an offender enters the correctional environment, he or she undergoes an assessment phase. The purpose of the assessment is to determine the offender's security risk and criminal profile.

After determining the offender's level of risk to him- or herself and others and when his or her criminal profile has been put together, a needs-based correctional sentence plan is drawn up, together with individualised interventions that may be required.

Correctional efforts target all elements associated with offending behaviour and focus on the offence for which a person was sentenced.

Robert is placed in an anger managment programme and has to consult a clinical psychologist on a regular basis. Calvin is placed in a training programme to equip him with the necessary skills to be able to find a job upon his release. He also needs to attend an anger management programme. All needs-based programmes and services are aimed at improving their chances of social acceptance and effective reintegration back into their communities.

These programmes and services for Robert and Calvin will also work towards maintaining their personal wellbeing and they can use the gym for physical fitness. Certain programmes also aim to improve their social functioning, health care as well as spiritual, moral and psychological wellbeing.

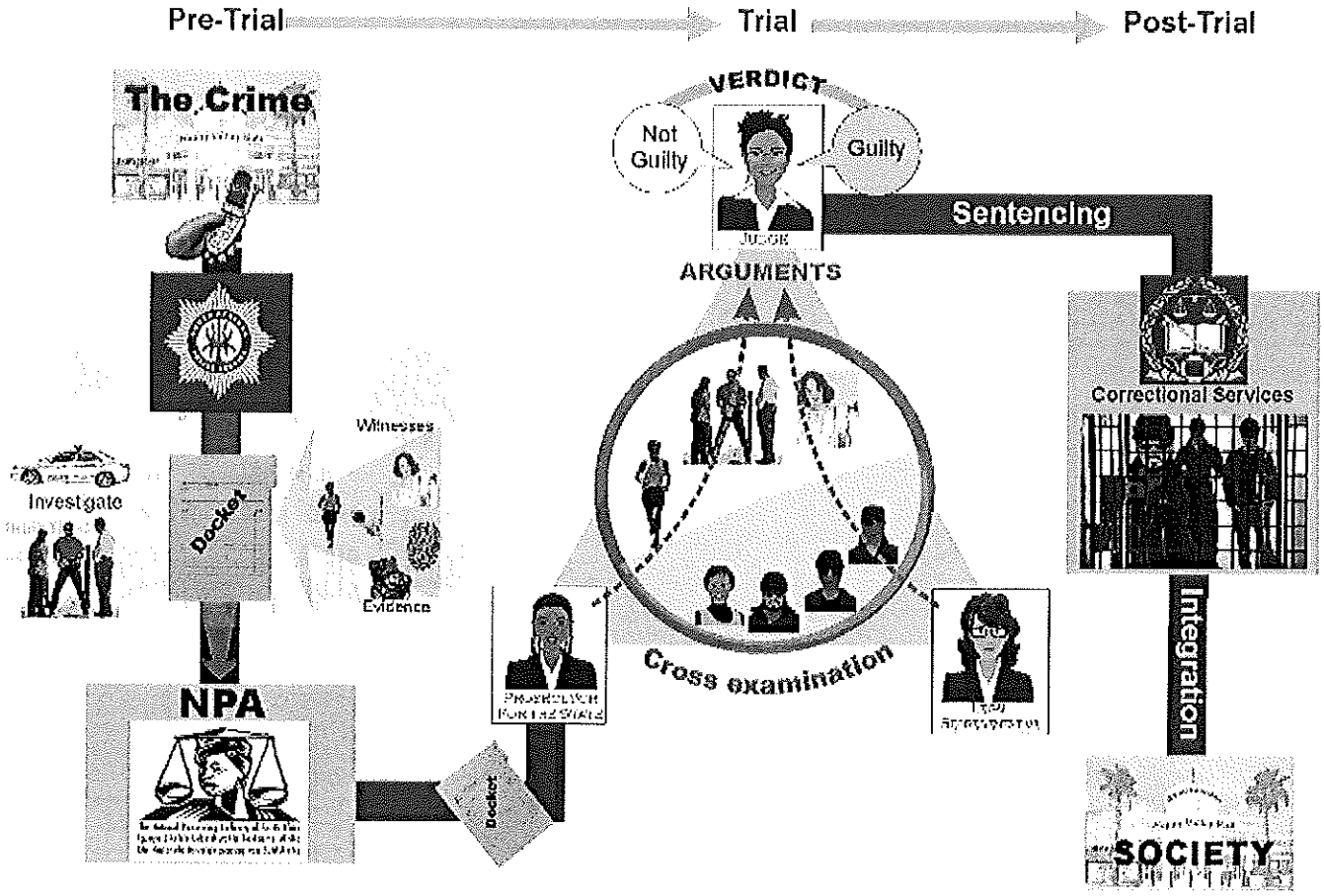
All correctional efforts are aimed to target all elements associated with offending behaviour and focus on the offence for which a person was sentenced. Relationships with their families also receive attention and forms part of the process of preparation for reintegration into the community. In this regard, social reintegration programmes are important. These programmes prepare offenders for their eventual release.

Click on the link below and have a look at some of these programmes that the Department of Correctional Services offers. Keep your notes regarding these programmes, as you will be referring to these when you do your assignment:

http://www.dcs.gov.za/AboutUs/Programmes.aspx

An overview of the criminal justice process

Now you have experienced the criminal justice system through the telling of a story and have met all the important functionaries that contribute towards building a safer and more just society. See the diagram below which depicts this story.



5.10 Global challenges regarding crime

Up to this point, we discussed synergy within the South African criminal justice system and we looked at the importance of each component in the system working towards a mutual goal of dealing with crime.

We said that synergy is involved, as each functionary should fulfil his or her function so well that he or she is able to work together with all the other role players in the criminal justice system, each doing their job so efficiently that a criminal case can be processed smoothly and efficiently. Now let us take this idea a little further. Not only can we talk about synergy within our own criminal justice system, but just think about the benefits of achieving synergy between different criminal justice systems across the world!

Why we need this international synergy

Crimes committed in South Africa have a knock-on effect and the ripple effect is felt in other countries. On the other side, crimes committed in other countries also have an impact on us in South Africa. When assessing the impact of crime on our society, we have to accept that this cannot be done by focusing on the local context only, as we do not live in isolation.

What do we mean when we say that we do not live in isolation? Let us look at crimes or actions that affect those closest to us first. Think of the following examples. If you kill someone, it has immediate

repercussions for you. Depending on where you live, these repercussions may differ. Here in South Africa, you will probably go to prison for the rest of your life. If you live in another country and commit the same crime there, you may be executed. In most of the Asiatic countries, including Singapore and Malaysia, the penalty for drug trafficking is a death sentence.

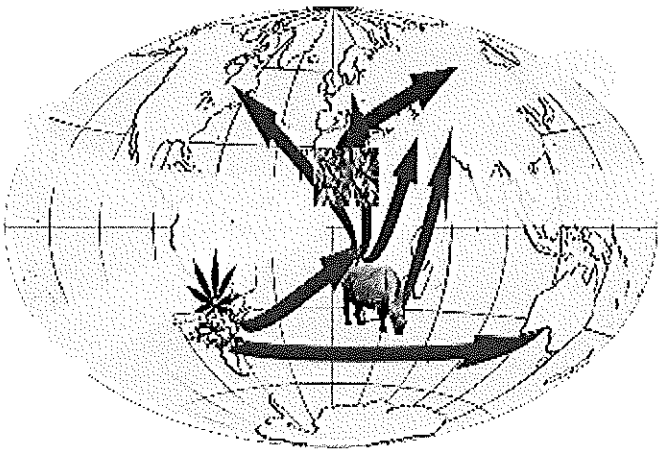
Let us pause for a moment to look at some of the issues and problems that South Africa face.

- Drug smuggling is a worldwide problem that also affects South Africa, because of South Africa's locality in the trade routes. South Africa is on the route of the cocaine trade from South America and the opium trade from the East. This influx of drugs has increased our drug addiction statistics, making our communities more vulnerable to the negative effects of drugs. There is a strong link between drug use, abuse and crime.

Besides drug smuggling, South Africa has problems dealing with the illegal trade in rhino horn and human trafficking, both further examples of global crime. In this unit we will look at the illegal trade in rhino horn.

5.10.2 Interpol

One gets a better picture of the international synergy between justice systems by looking at Interpol. The International Criminal Police Organization (ICPO), also known as Interpol is an organisation which brings about international police cooperation. Interpol can be seen as a system of 190 countries who work together in the fight against the global threats of crime.



To provide you with an overview of what Interpol is, go to the following link and click:

http://www.interpol.int/

Interpol focuses primarily on the following universal problems, namely public safety, terrorism, organised crime, crimes against humanity, environmental crime, genocide, war crimes, piracy, illicit drug production, drug trafficking, weapons smuggling, human trafficking, money laundering, child pornography, white-collar crime, computer crime, intellectual property crime and corruption.

Interpol has a database on international crime and they track criminals and crime trends around the world. They maintain collections of fingerprints and mug shots, lists of wanted persons, DNA samples and travel documents. They analyse all data and release information on crime trends to the member countries.

Now that you have had the opportunity to learn a little about the kind of crimes that have an impact not only on our country, but the entire world, can you see how events that take place in South Africa also have an effect on the rest of the world and vice versa? We live in an era where technology has brought us all so close, no matter where we live. We speak to people wherever in the world they live. We travel across the globe in a matter of hours. That is why we often refer to it as a "global village". A message can be sent in a matter of seconds to any destination in the world.

It is impossible for us to know the laws of every country, but understanding that crime, wherever it happens, will be punished, is important, and understanding how the laws of the different countries may be applied and punished differently, is equally important. This emphasises our remark above that we do not live in isolation from the rest of the world.

Up to this point in our studies we have looked at our unique culture, our norms and values and an African way of being. We have tested our knowledge and understanding of how our communities function in an effort to have a just society where members can live in safety. We have looked at our Constitution and how it provides the foundation on which all our laws stand. We have also looked at crimes in our country that our criminal justice system must deal with and we have gone beyond this, by considering the commission of crime in a global context.

ACTIVITY 5.3: Global challenges

In the video the girl speaks to many issues and asks for the preservation of species.Go to YouTube and click to watch and listen to the following video, The girl who silenced the world for 5 minutes:

http://www.youtube.com/watch?v=TQmz6Rbpnu0&feature=related

She makes an emotive plea to the adults and decision makers. Her plea to adults to take responsibility for the harm being done is very emotional.

Let us now take a look at one issue she raises, namely that of the smuggling of rhino horn and the global implications of this criminal activity:

http://m.news24.com/news24/SouthAfrica/News/Power-struggle-in-rhino-poaching-fight-20120126

The global implications of illegal ivory and rhino horn trafficking were examined during the United States Senate Committee on Foreign Relations Hearing in 2012. Senator Kerry remarked and said how "destructive and historically shameful it would be if we did nothing while a great species was criminally slaughtered into extinction". Beside the conservation implications it has grave safety implications for collections and visitors.

ASSIGNMENT 5

Assignment 5: Written assignment

1. In Unit 0 we explained that law and justice form an intrinsic part of our daily lives. In order to explore these concepts, we have provided you with the contextual background to the most pertinent issues; we have you engage with newspaper reports and have requested you to reflect on our own experiences and those of others. With this in mind, we now want you to read any of the daily newspapers available to you so that you may develop a sense of the status of crime in our society and of the work of functionaries in the criminal justice system.

2. From your reading above, choose any 5 examples of reports (articles) on criminal activities that you have found interesting and then do the following:

NB: At least 3 articles must be South African and all articles must not be older than 3 months.

Compile a document based on each of the 'cases' you have selected:

- Provide us with the source of the story, in other words, the title of the report/article in the newspaper, the page number, the name of the newspaper, and the date it was published. E.g.

  LAWYERS OF SHAME Pretoria News, p.1, Monday February 20: 2012
  PRISONER SHOT DURING HOSPITAL ESCAPE Sowetan. p.2, Tuesday August 28: 2012. (5)

- Provide a brief summary (about 150 words for each article) of what is described in the report and why you have chosen this example. Explain why you find it interesting and give reasons why you believe this story is related to our criminal justice system. (10)
- Identify the key role players in the article and explain their involvement in the incident from a criminal justice perspective. (10)

3. Write short comments on how you perceive the involvement of the functionaries representing the criminal justice system in these cases. In what way do you think these individuals have served justice? If you feel that justice was not served, provide reasons for this view. (5)

TOTAL MARKS: 30

5.12 Conclusion

As part of our journey into the realm of the social dimensions of justice, we have introduced you to the concepts of law and justice. In Unit 1 we have discussed how as a society we need rules to help us right wrongs and to maintain peace and order in society. Thus in order to regulate our society, we have laws that we have to adhere to. The law also balances the interests of individual members of society with the interests of other members and with those of the community as a whole.

Our justice system, comprising of a criminal justice system and a civil justice system, is the mechanism by which these rules are applied or enforced and forms the focus of our next unit. In unit two we explored the concept of uBuntu and we discovered the Constitution. It is important to remember that the principles infused within the Constitution should influence the function of our justice system.

As students in the College of Law, we assume that you may be interested in pursuing a career in our justice system or more specifically, our criminal justice system. We hope that this unit may have contributed to your understanding of the criminal justice process, by understanding the role of functionaries as mandated by their different institutions and as supported by their specific codes of conduct and work ethics.

Alyce is compelled to follow the provisions of the Child Justice Act, which requires that a preliminary pre-trial assessment of the minor who is alleged to have committed an offence, must take place. This assessment is done by a probation officer. At the first court appearance, Alyce arranges that Christiaan be sent to a place of safety, pending the outcome of the assessment.

The purpose of this assessment is, amongst others, to gather more information on the child and his background, to consider if the child was used by adults to commit the crime (as may be argued in our crime story); what the prospects of diversion are.

At the place of safety, the probation officer, Vanessa Njotini, makes contact with Christiaan. She arranges for a meeting with him, his parents and a social worker. After the session, Christiaan and his parents are reconciled. After eight sessions, the Restorative Justice Centre reports back to the court that Christiaan has been reintegrated into his family, is back at school and accepts responsibility for his behaviour. It also reports that Christiaan is an impressionable child and that he was strongly influenced by Robert Blom and Calvin Sibanda.

On the day of Christiaan's appearance at the Pretoria magistrate's court (which sits as a child justice court if a criminal matter relating a minor child arises), the relevant magistrate notes the contents of the report of the Restorative Justice Centre. Christiaan receives a suspended sentence. The magistrate remarks that the crime in which Christiaan was an accomplice is a serious one and that the suspended sentence is an appropriate sentence under the circumstances. Christiaan is also remorseful and takes responsibility for his actions.

ACTIVITY 5.1: Do people who break the law have rights?

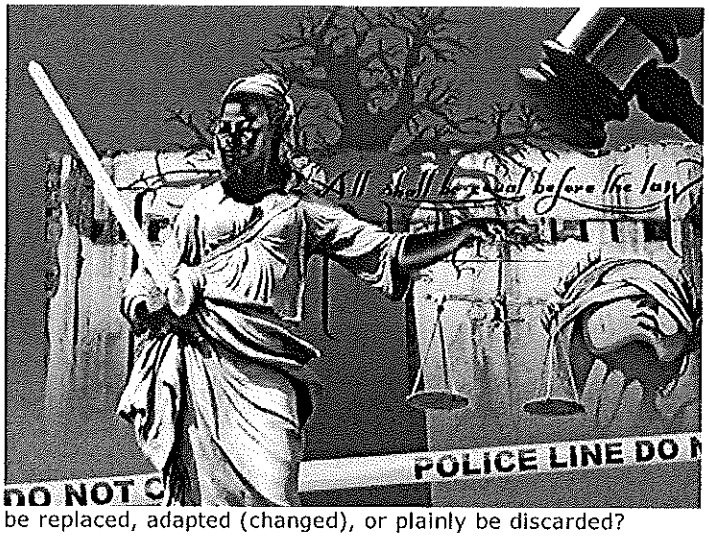
Earlier in this section we have argued that just as all members of society have rights, so do victims of crime and even offenders.

2. Read Section 35 of the Constitution which outlines the rights of arrested, detained and accused persons in the criminal justice process (Unit 2).
4. Share your opinion on this issue with your fellow students in the discussion named: Do people who break the law have rights?

Switch to Full View

Unit 6: "My Life is my Message ..."

6.1 Ethical contemplations



Before we start with the key theme of this unit let us consider the image of Lady Justice.

Activity: "Good morning Lady Justice. Please, come inside."

1. Carefully study our image of Lady Justice. Make notes on the various objects that you see and what, according to you, the deeper meaning of these objects may be. While doing so, try to compare the image of Lady Justice in this unit with those of the previous units.
2. Go to the Discussion Forum: "Good morning Lady Justice. Please, come inside" and do the following:

• Comment on how our image of Lady Justice has changed and once again, share your ideas in the debate: Do symbols, such as Lady Justice, still have meaning for us in the 21st century on the African continent, in a fairly young democracy? Should she be replaced, adapted (changed), or plainly be discarded?

Early reflections

In this final learning unit we explore certain issues pertaining to ethics. Throughout this module we have stressed the importance of an ethical justice system and the importance of ethics to all those role players within this complex process.

We explain what ethics is about and highlight the significance of ethics for this module. (We introduced you to the need for an ethically functioning criminal justice system in learning units 4 and 5.)

We make decisions every day of our lives. Sometimes the decisions seem rather unexciting, like choosing what soda you would like to drink or what sweater you want to wear to work. Sometimes the decision is a bit harder, especially when your decision will directly affect not only yourself, but the people around you. Think of Sean Davison's decision to assist his mother to die.

Consider the following:

- On your way home after work a traffic officer pulls you over to inspect the licence disc of your car and finds that the licence has expired. He offers to let you go if you pay him R150 cash. What would you do?
- Imagine that you are a judge. A family member of one of the accused in a trial approaches you and offers to buy you a brand new Mercedes-Benz sports car if you acquit the accused of the charges against him. How would you react?

It is exactly these kinds of situations that call our ethical existence into question. Similarly, the people responsible for the functioning of the justice system must act honestly and keep ethical guidelines in mind when performing their duties. As we emphasised in Study Units 4 and 5, there is an important ethical dimension to the roles of these functionaries.

Now go to '6.2 How should I be living my life?' by clicking on "Next" at the bottom of this page

6.2 How should I be living my life?

Ethics deals with the issue of what you should do or what you ought to do. It is important to note that some academics draw a distinction between ethics and morality. For the purposes of this learning unit, however, such a distinction is not necessary. Both ethics and morality fundamentally concern the same question: "How should I be living my life?" Because the issues that we will be examining all relate to this question, we do not have to differentiate between ethics and morality.

Hopefully we can all agree that it is important to live an ethical life. This striving towards an ethical existence is an ongoing process. The question, then, is what kind of person must I be in order to lead an ethical life? This is not an easy question to answer and there is certainly not only one right answer to the question.

An ethics of ubuntu

By now you should be familiar with the concept of uBuntu. Archbishop Desmond Tutu gave a beautiful explanation of the concept when he said:

"uBuntu ... speaks of the very essence of being human. A person with uBuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they are less than who they are." (Desmond Tutu (1999) No future without forgiveness, page 31)



(Source: http://news.cnet.com/8301-10784_3-9937566-7.html)

From Archbishop Desmond Tutu's words, we can clearly see the emphasis that an ethic of uBuntu places on other people. As we are all part of a larger community, the way we act does after all affect the people around us, doesn't it?

We live in a diverse society with people from different races with different cultures, religions, sexual orientations and interests, to name but a few examples. Often these people confront us with a different ethical perspective. In order to live in a harmonious society, we have to respect people's differences and cooperate with each other in an ethical manner.



6.3 Different philosophical perspectives

Whilst we have placed specific emphasis on uBuntu in this module, it is important to note that this is only one philosophy or approach to ethics.

People have been debating for centuries about what makes an action right or wrong and we consequently find various approaches and answers to this question.

Some people find ethical guidance in the codes of a religion or spiritual belief system. Some people subscribe to cultural beliefs and practices and others follow a specific philosophical school of thought like utilitarianism (which focuses on the consequences of an action) or virtue ethics (which places great emphasis on a person's character and his or her commitment to leading an ethical life). Some people even feel that ethical behaviour is "natural" in that people just instinctively know what is "right and wrong". These people will, for instance, argue that everybody "knows" it is wrong to murder another person. Ultimately our ethical beliefs are linked to a personal way of being.

6.4 We are, therefore I am



The French philosopher René Descartes famously said "I think, therefore I am" and thereby proclaimed at least one thing that he believed to be an absolute truth: that you do indeed exist! Drawing on this expression, some people have used the words "we are, therefore I am" to explore and explain the relationship between an individual and a larger community. Once again, think of uBuntu and the notion that "a person is a person through other people". There is an African proverb that says "it takes a whole village to raise a child". This proverb illustrates interconnectedness and the responsibility that one has towards others.

The point is that we are all part of a larger community. As the famous poem by John Donne goes, "No man is an island". As part of a bigger community we interact with others and share resources. Therefore we have to take others and this world that we inhabit into consideration.

An advantage of leading an ethical life is that it usually makes this whole process of interacting with others a lot easier. People who act in an ethical manner usually have less conflict with those around them than those who follow unethical practices that are

to the detriment of other people. This means that ethical behaviour is in your own interest. In other words, being an ethically constructive member of society, one who contributes to a harmonious society, will make your life less complicated and confrontational.

It may, however, be very difficult to stand by your convictions and to stand up to pressure when others do not share your ethical beliefs. This is where your own strength of conviction comes in. Are you prepared to stand up for what you believe to be right? Consider the following quote by Mahatma Gandhi who fought for the civil rights of, amongst others, Muslims and Hindus.



"I care so deeply about this matter that I'm willing to take on the legal penalties, to sit in this prison cell, to sacrifice my freedom, in order to show you how deeply I care. Because when you see the depth of my concern, and how civil I am in going about this, you're bound to change your mind about me, to abandon your rigid, unjust position, and to let me help you see the truth of my cause".

Gandhi's words illustrate that it is sometimes very hard to follow through on your beliefs and that we might even suffer severe consequences for doing so. Gandhi's life provides one example of a striving to live according to ethical principles. When asked to deliver a message to the people, he often replied: "My life is my message". Living an ethical life means that you, too, can proudly say that your life is your message.

Ethical behaviour therefore also benefits you on a more personal level. To be ethical means to live a life full of integrity and demonstrates a striving towards the person that you want to be, in other words towards an ideal state of being. It shows that you have a sense of the person you ought to be. You can experience great personal satisfaction from being able to measure your life against this ideal way of living and being able to honestly say that you are an ethical person.

Now consider the example set by Professor Dani Nadudere, a Ugandan academic, author, political activist and development specialist. The teachings, publications, and projects of the late scholar, who passed away in 2011, contributed significantly to the self-development, self-emancipation and transformation of African society. As a holistic thought leader, he focussed on the restoration of damaged relationships, promoting awareness of "the spirit of uBuntu".

(If you want to read more about Professor Dani Nadudere, click on his name at the beginning of this paragraph.)

Grapic sources:

René Descartes

http://www.google.com/search?q=free+graphic+rene+descartes&start=10&hl=en&sa=N&rls=com.microsoft:en-za:IE-SearchBox&rlz=1I7AURU_enZA499&prmd=imvnso&tbm=isch&tbo=u&source=univ&ei=u7R2UI28J8yAhQestIDABw&ved=0CDAQsAQ4Cq&biw=1199&bih=607

Mahatma Gandhi

http://northernstar-online.com/blog/five-of-the-most-inspirational-speeches-in-human-history/

6.5 Ethical implications

We have introduced you to certain legal principles and principles of justice and we have shown you that law and justice are not necessarily synonyms. Similarly, ethics and the law (or legality) are also two different concepts. The law sometimes allows us to do things that some people think are unethical. Some people however feel that homosexuality is a "disease" and that a sexual relationship between two people of the same sex is unethical.

Consider the issue of homosexuality, as discussed in the article. Our Constitution recognises and protects different sexual orientations and grants gays and lesbians equal rights when it comes to issues like marriage and adoption.

There are several other examples that demonstrate the difference between ethics and legality in our South African legal context. A lot of people feel that it is unethical to cheat on your partner with whom you are romantically connected. Yet there aren't any laws that forbid adultery nor will any legal sanction or punishment be passed should you cheat on your partner.

Our legal system furthermore allows women who are pregnant to have abortions. This is another contentious issue and some people feel that this is unethical and should not be allowed.

6.6 Ethics and the justice system

The concepts of legality and ethics can never be the same thing. If this was the case, it would mean that all laws would necessarily be ethical and no ethical act would ever be illegal. Clearly this cannot be the case.

But whilst law and ethics must be understood as two different concepts, it is important to understand that you, as a functionary within the legal system, always have to act in a professional manner and uphold certain ethical standards. Think back on your journey through this module. We explored the ethos of our Constitution, the notion of uBuntu, the relationship between law and justice and the functions that the various role players fulfil in the justice system. When you fulfil any of these functions, you have to act within the parameters of the law and this will sometimes require that you treat certain people that you may regard as unethical in a professional manner and without using your position to advance your personal ethical stance.

Consider the following scenarios:

- A magistrate, whose daughter was raped one day on her way back from school, is the presiding officer in a rape trial.

- A police officer, whose wife was killed by a drunken driver, pulls over a motorist and finds that he is driving under the influence of alcohol.
- An advocate consults with a client who is accused of molesting a child. During the consultation, the client tells the advocate that he did indeed molest the child.

Most of you have probably seen the movie Spider-Man and are familiar with the famous quote from the film: "With great power, comes great responsibility". In each of the above scenarios we find a functionary who fulfils a specific role in the justice system. Because of the roles that these functionaries fulfil, they hold a certain amount of "power" and must indeed exercise this power with great responsibility!

These functionaries have to adhere to certain ethical standards when executing their duties. It can be argued that these positions require even more ethical rigour than your personal life, as certain professions are accompanied by further ethical standards and responsibilities. This is because these functionaries have a significant impact on society.

The magistrate in the above scenario has to adhere to a prescribed procedure during the rape trial and, should the accused be found guilty, the magistrate has to pass a sentence that is sanctioned by the law. Similarly, the police officer has to follow protocol when dealing with the drunken driver and the advocate has to recognise that everyone, including child molesters, has a right to legal representation in court.

These scenarios clearly illustrate the high ethical standards that are demanded of these functionaries.

6.7 Pulling the threads together

In this Unit we started off by confronting you with a few ethical dilemmas and explaining why ethics is a rather complex subject. We then explored the importance of ethical behaviour and highlighted some of the advantages that ethical behaviour holds. Finally we contrasted ethics and legality and explained why it is important for functionaries within the justice system to have an ethical grounding.

ACTIVITY 6.1: Ethics begins with you

We have all been confronted with situations that challenge our personal ethics and require us to make difficult decisions.

2. Go to "Discussions" and click on the Forum named: **Ethics begins with you,** and describe any ethical dilemma that you have found yourself in. Consider the following when you relate your story:
    - Why you consider this to be an ethical dilemma and explain why you acted in the way that you did.
    - Carefully think about what guided you in your choices and write it down.
    - Explain why you think it is important to be ethical and what the advantages of ethical behaviour are.
4. Read the discussions of at least three fellow students and comment on each of their contributions.

ACTIVITY 6.2: Ethics and the law

Read the following article from the Sowetan newspaper. It clearly illustrates that the law protects interests and freedoms that are not necessarily aligned with everyone's views, ethical values and belief systems.

http://www.sowetanlive.co.za/news/2011/10/25/shock-of-corrective-rape-uncovered

Different groups of people, most probably with different world views, were mentioned in the article. Consider the actions of each group and then reflect on the following questions:

Do you think these people acted in an 'ethical' way? Why or why not?
Do you think these people acted in a 'legal' way? Why or why not?
What is your own position in this case?

1. Go to "Discussions" and click on the forum named:: **"Ethics and the law"** and share your views on the newspaper report by replying to the post.

ASSIGNMENT 6

Assignment 6: Discussion forum

In the activities of Unit 6 you have been asked to remember and analyse some of your own decisions in the past. You were also asked to consider your learning journey through this module.

1. Go to "Discussions" and click on the Forum named **Assignment 6.** Reply to the post and share in approximately 300-400 words, your personal opinion and motivation on the following:

- What influences you on a personal level? (4)
- How do you make decisions when you deal with ethical issues? (4)
- How has doing this module changed your ethical stance in your personal life? (4)

2. Read the views of one of your fellow students and comment on it.(3)

Total: 15 marks (towards calculated year mark)

FINAL PORTFOLIO

FINAL PORTFOLIO FOR SJD1501

The module you have just completed can be regarded as the first step to eventually fulfilling a role in the justice system. Now we would like you to reflect on what you have learned and how this knowledge has affected your view of the law, the justice system and the people who uphold the law in this country. In other words we want you to begin to formulate your personal philosophy of justice.

Compile a document of between 1800 and 2200 words in which you reflect on the issues below.

1. Consider how you see your future career. Do you picture yourself working in the justice system one day? Give a reason for your answer. Reflect on your learning experiences in this module and how these may have influenced your answer. Identify the highlights of your journey through this module considering the following guidelines:

- Experiences with online learning

- Group communication and discussions

- Communication with your TAs

- Working with other students

- Contents of the module

2. In the activities of this last study unit you have been asked to remember and analyse some of your own decisions in the past. You were also asked to consider your learning journey through this module. Consider the following:

- What influences you on a personal level?
- How do you make decisions when you deal with ethical issues?
- How has doing this module changed your ethical stance in your personal life?

3.In the course of this module you reflected on the ethos of the Constitution of the Republic of South Africa and uBuntu. Keep these issues in mind and imagine that you are already working in the justice system.

- How do you think the two elements mentioned above (the Constitution of the Republic of South Africa, and uBuntu) should influence your personal code of ethics and conduct as a functionary in the justice system?
- Think of a role model whom you believe embodies the qualities that are vital to being ethical. This does not have to be a famous person. Say who this person is and why you look up to him/her for ethical guidance.
- Discuss your views on the importance of ethics as a functionary in the workplace. How will ethical stance influence your work ethics in the justice system? Include the qualities of an ethical person in the justice system.

Total: 100% (of examination mark)

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