

Department of Jurisprudence

Introduction to Research Methodology

Only study guide for IRM1501

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PREFACE

Introduction to Research Methodology for Law and Criminal Justice provides you with basic skills and knowledge of research and how to conduct research on various sources of law and criminal justice by using diverse research database tools. It also aims to empower you with knowledge and research skills that are applicable to both the study of law and criminal justice. Additionally, you will be taught how to infuse your research findings with principles of transformative constitutionalism and social justice. Accordingly, this module provides you with the skills necessary to apply the relevant law in given scenarios, following the correct or suitable method of referencing in law and criminal justice.

The outcomes for each specific study unit of this module are contained in the study guide. The outcomes are designed to assist you in achieving the following cognitive skills:

- to apply relevant sources to a given scenario through researching various fields of the South African legal system
- to apply basic principles of transformative constitutionalism
- to conduct basic research in global and comparative contexts

Prescribed material

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There are no prescribed books or material for this module.

Additional/recommended books

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We recommend that you read the following material:

Books

- Babbie E *The practice of social research* (Cengage Learning Boston 2015)
- Babbie E *The practice of social research* 11th ed (Thompson Wadsworth Belmont 2007)
- Beauchamp TL and Childress JF *Principles of Biomedical Ethics* 4th ed (Oxford University Press New York 1994)
- Creswell JW *Educational research: planning, conducting and evaluating quantitative and qualitative research* 4th ed (Boston Pearson 2014)
- Davies P, Francis P and Jupp V *Doing criminological research* 2nd ed (Sage Publications London 2011)
- De Vos AS *Research at grass roots for the social sciences and human service professions* (Van Schaik Pretoria 2002)
- Du Plessis LM *An introduction to law* (Cape Town Juta 1999)
- Hagan FE *Essentials of research methods in Criminal Justice and Criminology* (Pearson Education Boston 2005)
- Kleyn D and Viljoen F *Beginner's guide for law students* (Cape Town Juta 2010)
- Maisel P *Introduction to law and legal skills* (Durban Butterworths 2001)
- Mbingi L and Maree J *Ubuntu: the spirit of African transformation management* (Sigma Press Johannesburg 1995)
- Mill JS *Utilitarianism, liberty and representative government* (Dent London 1910)

- Neuman WL *Social research methods: qualitative and quantitative approaches* 4th ed (Allyn and Bacon Boston 2000)
- Palmer R and Crocker A *Becoming a lawyer: fundamental skills for law students* (LexisNexis Durban 2007)
- Tutu D *No future without forgiveness* (Rider London 1999)
- Wheeldon J and Ahlberg MK *Visualizing social science research: maps, methods & meaning* (Sage publications Thousand Oaks 2014)

Chapters in books

- Barratt A “Chapter 4 Researching in the law library” in Barday A et al (eds) *Skills for law students* (Pearson Prentice Hall Cape Town 2008) 134–139
- Davies P and Francis P “Preparatory criminological research” in Davis P, Francis P and Jupp V (eds) *Doing criminology research* 2nd ed (Sage Publications London 2000) 7–15
- Hurka T “Aristotle on virtue – wrong, wrong and wrong”, in Peters J (ed) *Aristotelian ethics in contemporary perspective* (Routledge New York 2013) 9–26

Journal articles

- Klare K “Legal Culture and Transformative Constitutionalism” 1998 (14) *South African Journal on Human Rights* 146–179
- Langa P “Transformative constitutionalism” 2006 (3) *Stellenbosch Law Review* 351–360
- Mokgoro J “Ubuntu and the South African law” 1998 (1) *Potchefstroom Electronic Law Journal* 15–26
- Wangerin P “Skills training in ‘legal analysis’: A systematic approach” 1986 (40) *University of Miami Law Review* 409–485
- Williams C “Research methods” 2007 (5) *Journal of Business & Economic Research* 65–72

Method of study

- Study unit 1 contains an introduction to law research.
- Study unit 2 discusses document-based or qualitative research. You study the meaning and components of document-based research in this study unit.
- Study unit 3 discusses empirical or quantitative research. You learn what is meant by empirical research. Furthermore, the components and relevance of empirical research in law research are illustrated.
- Study unit 4 illustrates the ways of accessing information for legal research purposes. You learn how to use the library and the accepted manner of referencing.
- Study unit 5 discusses the importance of transformative constitutionalism in research. You study the basic principles of transformative constitutionalism and the relevance of ubuntu and social justice in law research.
- Study unit 6 studies ethics in research. It illustrates why ethics are essential to research. Furthermore, study unit 6 discusses the effects that plagiarism, in all its forms, has on research in law and criminal justice.

Notional hours: Students are required to devote 120 hours to this module. This includes study periods, reading of the material and additional material, engaging in discussion forums, communication with respective lecturers, consultation with lecturers, where necessary, telephone discussions with lecturers and time spent on myUnisa.

STUDY UNIT 1

Introduction to Law Research



Study unit 1: Introduction to Law Research

- 1.1 What is research?
- 1.2 Why is research important?
- 1.3 Scientific and non-scientific research
 - 1.3.1 Scientific research
 - 1.3.2 Non-scientific research
- 1.4 Basic research methods
- 1.5 Referencing in research

LEARNING OUTCOMES

At the end of this study unit, you should be able to

- define research
 - know why research is important
 - distinguish between scientific and non-scientific research
 - understand basic research methods
 - do proper referencing
-

1.1 WHAT IS RESEARCH?

Most people have a very specific picture in mind when they hear or think about the word “research”. On the one hand, this brings to mind serious people in the laboratory wearing white laboratory coats doing complicated things with microscopes, tubes and Bunsen burners. On the other hand, people will use the term “research” in a completely non-academic way, for example: “Before I bought my new car, I did a lot of research on the market.” Unfortunately, neither of these two examples captures what we mean by the term “research” in the context of this module.

If you are going to, for example, buy a new car and you read magazines, talk to your friends, listen to salespeople and so forth, you are gathering information, but you are not doing research. The reason we say this will become clear to you during your study of this module. Similarly, not all researchers wear laboratory coats and conduct a scientific study. Researchers in education are far more likely to have a book in the hand than

anything else! Just like the natural sciences (geology, physics, chemistry, etc.) tell us more about the natural world, so the human sciences (of which law is one) tell us more about humans and human society.

*The Free Dictionary*¹ defines research as “the systematic investigation to establish facts or principles or to collect information on a subject”. On the other hand, Creswell² states that research is a “process of steps used to collect and analyze information to increase our understanding of a topic or issue”. It consists of three steps, namely posing of a (research) question, collecting information or data in order to answer the question, and presenting an answer or answers to the question.

In your studies of law and criminal justice, you will learn that research is generally a process that has to do with assessing existing knowledge, criticising existing knowledge, expanding existing knowledge or contributing to the development of existing knowledge.

ACTIVITY 1.1

Generally, you will establish that there are many definitions of the term “research”. Please find at least three (3) other definitions that are of interest to you and explain how these definitions are aligned with those in paragraph 1.1 above.

Definitions of the term “research” and a critical explanation.

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FEEDBACK

One of the important things about the exercise above is that there is not necessarily one correct answer to what research really is. This implies that you could have found

¹ <http://thefreedictionary.com> (Date of use: 4 September 2012).

² Creswell JW *Educational research: planning, conducting and evaluating quantitative and qualitative research* 4th ed (Boston Pearson 2014).

your definitions from different sources, for example textbooks, journals or the internet. The definitions might or might not align with those that are provided in paragraph 1.1 above. However, this does not mean that they are not acceptable and proper.

1.2 WHY IS RESEARCH IMPORTANT?

Research is important because it helps you to have a detailed analysis of everything that forms the basis of your research. For example, it is only when you conduct a proper in-depth analysis on any topic that the result(s) that come(s) out of your research can be fruitful and also enhance knowledge.

The other benefits of research are as follows:

- Research enhances your knowledge by continuously keeping you up to date with new information.
- Research increases your knowledge of the topic of your research. The more you read, the more you learn and the more you will know.
- Research clarifies possible confusion when reading expert opinions.
- Research assists in the proper understanding of the subject.
- Research helps in learning about the methods and issues that require investigation.
- Research introduces you to publishing. The more you read, the more familiar you will become with writing skills.
- Research enables you to do work collaboratively with others.

ACTIVITY 1.2

Please answer the questions below.

1. Generally, there are countless reasons why research is essential. Discuss why, in your opinion, research is important.

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2. Describe instances where your reasons in paragraph 1 above were used in practice.

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FEEDBACK

Your answers to Activity 1.2 may include that research is generally important because it assists in the discovery of answers to questions through the application of scientific processes. It helps in finding out the truth that has not yet been discovered, and making it available to the general public. By doing scientific research, researchers become familiar with particular facts or phenomena; are able to describe with complete specificity the facts or phenomena; are capable of diagnosing the facts or phenomena and the frequency with which they are likely to occur in the future; and are able to test the accuracy of this likelihood using established variables, that is, *hypothesis testing*.

1.3 SCIENTIFIC AND NON-SCIENTIFIC RESEARCH

1.3.1 Scientific research

It is usually difficult to provide a specific understanding of the term “scientific research”. One hopes that, by detailing some of the views on what “science” really means, the meaning of scientific research will become clear. The first view is that science is always facts based. Such facts can be observable (empirical) or non-observable (non-empirical) facts, for example principles or values. The second view is that science is logical and objective. In other words, the facts from which science is founded are a product of a rational process. The third is that science is informed by the desire to provide certainty. The fourth view on science is that the answers provided by science or through a scientific inquiry or investigation are always precise and measureable.

Having regard to what is said about science in the section above, scientific research can be understood to mean a systematic investigation of scientific theories and certain propositions. Because scientific research is systematic, a particular process or processes should be followed.

ACTIVITY 1.3(A)

Discuss the process or processes that are involved in carrying out scientific research. Compare your answer(s) with the one provided in the feedback below.

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FEEDBACK

In law, scientific research is a process. This process must be logical and rational. It involves an investigation or examination of facts in order to acquire new knowledge or to expand or develop existing knowledge. In summary, scientific research is a logically stepped process used for investigating and acquiring or expanding our understanding. The findings of scientific research can be reproduced and demonstrated to be consistent.

Therefore, scientific research makes use of scientific methods and techniques in order to study a particular phenomenon in a manner that seeks to acquire new knowledge, or to improve on and/or incorporate existing knowledge.

1.3.2 Non-scientific research

If we accept the explanation of scientific research in paragraph 1.2.1 above, it should then follow that non-scientific research refers to the opposite of scientific research. So what does this “opposite” really mean?

Non-scientific research can be referred to as “pseudo research”. This implies research that is collected haphazardly or carelessly and is often based on casual observations and statements that are not logically supported. It produces findings that cannot be “reproduced and are based upon the researcher’s faith or hopes”.³ These findings, which are non-scientific in nature, are generally not used for proper research purposes.

ACTIVITY 1.3(B)

1. Think of ways in which people can obtain information without using a scientific methodology.
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2. Why is scientific research, as opposed to non-scientific research, important?
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3 Mc Nabb DE. *Research methods in public administration and non-profit management* 3rd ed (Routledge London 2013) 21.

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1.4 BASIC RESEARCH METHODS

The method that one uses in doing research differs, depending on the field of study. As a result, the method that is used in law differs from that followed in other fields, such as criminal justice or engineering. In law, research is usually document based. By this we mean that the research usually involves reading, analysing and comparing various documents and other sources of law. Your research will therefore be mostly about finding the sources of law, reading, analysing and evaluating them and then synthesising your findings into one coherent report. However, it is also possible for a researcher to use other methods of research. For example, a researcher may choose a combination of document-based and empirical research.

When doing research of this kind, it is important to note and remember the various sources of law and their status in legal research. This is also dealt with in ILW1501 (Introduction to Law) and SCL1501 (Skills course for law students).

We indicated above that legal research is generally document based. So what exactly is “legal research”? By legal research we mean a process of finding an answer to a legal question or searching for a legal precedent that can be referenced in pleadings or at trial. Sometimes, legal research can help determine whether a legal issue is a “case of first impression” that is unregulated or lacks legal precedent. Virtually every lawsuit, appeal, criminal case, and legal process generally requires a degree of legal research.

From your perspective, legal research forms that part of your undergraduate studies where you are no longer confined to textbooks but are rather asked to identify, analyse, critique and report on a certain aspect of the law as a tool of social interaction and regulation of human conduct. Legal research is conducted for a variety of reasons, but in essence, the purpose behind legal research is to identify the sources of law applicable to understanding a legal problem and then to find solutions to the identified problem.

ACTIVITY 1.4

Go to the Unisa website (<http://www.unisa.ac.za>) and click on **Library**. Then click on **Research Support** under library services. Now click on **Research Skills LibGuide** and then on **Finding Legal Information**.

Using this information and your knowledge from other modules, specifically Introduction to Law, make a brief summary indicating the difference between primary and secondary sources.

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FEEDBACK

Once you have a list of primary and secondary sources, it is important to know what their significance is and which source is more authoritative. This implies that you must fall back on your knowledge of the hierarchy of legal sources.⁴

1.5 REFERENCING IN RESEARCH

It is important to remember that, as soon as you have consulted all your research sources, you need to keep a proper record of them in order to reference them in a prescribed format as per the College of Law style of referencing. For the prescribed method of referencing in the College of Law, you are advised to go to myUnisa, then click on IRMW1502 module, and click on **Additional Resources**. There, you will find a number of documents. You are then requested to look out for a document entitled **Modes of Citation**. Click on it and open to see examples of how referencing is done for various sources, such as journal articles, books, case law and theses in the footnotes and bibliography.

⁴ If you can no longer remember the hierarchy of sources of law, you may consult one of the following textbooks: Maisel P *Introduction to law and legal skills* (Durban Butterworths 2001); Du Plessis LM *An introduction to law* (Cape Town Juta 1999); Kley D and Viljoen F *Beginner's guide for law students* (Cape Town Juta 2010). These books are all available in the library.

STUDY UNIT 2

Document-Based Research



Study unit 2: Document-Based Research

- 2.1 Introduction
- 2.2 What is document-based research?
- 2.3 Why is document-based research important?
- 2.4 Components of document-based research
- 2.5 The research process
 - 2.5.1 Planning research
 - 2.5.2 Doing the research
 - 2.5.3 Reporting on your research
- 2.6 Conclusion

LEARNING OUTCOMES

At the end of this study unit, you should be able to

- define document-based research and know why it is important
 - distinguish between the different components of document-based research
 - understand the research process and know how to plan your research
 - conduct research and report on it
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2.1 INTRODUCTION

In study unit 1, you were introduced to the notion of research. In that unit, the term “research”, for both scientific and non-scientific purposes, was defined and discussed. In addition, the reasons why research is important were demonstrated. Lastly, the basic methods that you may use in doing research and the importance of referencing in research were illustrated. In this study unit, a method of research known as “document-based research” is discussed. The manner in which this research is carried out as well as its importance for your research purposes is illustrated. The reason for doing this is to ensure that you will be able to do research using the basic document-based research skills that are discussed in this study unit.

2.2 WHAT IS DOCUMENT-BASED RESEARCH?

In this module, document-based research is also referred to as the qualitative method of research or quantitative research. They are synonyms. Whenever mention is made of qualitative research, you should know that the research is document based and vice versa. Document-based research has to do with the reviewing of sources that are mostly sourced from or found in the library. These sources include law reports, legislation, textbooks, law journals, and so forth.⁵ Basically, researchers assess the available literature in an attempt to find the required answer or what has been written on a specific subject. In doing all this, researchers seek to “immerse themselves in the subject matter” and cultivate contemporary concepts that significantly enhance their understanding and clarification of reality.⁶

Hancock, Ockleford and Windridge state that document-based research

... attempts to broaden and/or deepen our understanding of how things came to be the way they are in our social world. If the research question involves exploring how people experience something, or what their views are, exploring a new area where issues are not yet understood or properly identified (e.g. before developing questionnaire items), assessing whether a new service is implementable, looking at ‘real-life’ context, or a sensitive topic where you need flexibility to avoid causing distress, your team probably needs to discuss using qualitative methodology.⁷

In doing research of this nature, researchers seek to answer or respond to the question “why?”. According to Black,⁸ researchers do all this in order to “study things in their natural setting, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them”.⁹ Specifically, they attempt to describe and explain certain phenomena or positions within a wider context. Accordingly, words (written or unwritten), objects, and pictures are collected. Thereafter, a researcher would do a review of literature, for example case law, statutes and other sources, such as textbooks and journal articles.

2.3 WHY IS DOCUMENT-BASED RESEARCH IMPORTANT?

Generally, any form of research is important when one is searching for an answer to a legal problem. In this context, document based-research is important because of the following:

- It provides current answers to the legal problem being researched.
- It provides information about what other scholars have written on the subject.
- It indicates whether anyone has written on the subject yet.
- It indicates whether the subject being investigated has been fully explored and has thus become saturated.

5 Williams C “Research methods” 2007 (5) *Journal of Business & Economic Research* 65–72 67.

6 Hagan FE *Essentials of research methods in Criminal Justice and Criminology* (Pearson Education Boston 2005) 19.

7 Hancock B, Ockleford E and Windridge K “An introduction to qualitative research” https://www.rds-yh.nihr.ac.uk/wp-content/uploads/2013/05/5_Introduction-to-qualitative-research-2009.pdf (Date of use: 2 August 2017).

8 Black N “Why we need qualitative research” 1994 (48) *Journal of Epidemiology and Community Health* 425–426.

9 Black 1994 *Journal of Epidemiology and Community Health* 426.

- It indicates whether there is a gap in the available literature that still needs to be explored.
- It indicates whether there is a need to conduct further study of the subject.

ACTIVITY 2.1

Please put your study guide in a separate room. Take a notebook and proceed to your study room. Answer these questions:

1. What is your understanding of document-based research? Please discuss critically and give examples to substantiate your answer.

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2. Mention any of the five key issues that should be considered important for document-based research.

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FEEDBACK

Once you have done all this, take your study guide and find out whether what you have written in your answer sheet is similar to that which is contained in your study guide. If the answers are the same, it means that you have an idea of what document-based research is and why it is significant for one to do it before attempting to solve any legal problem. If your answers differ to a large extent from the ones in the study guide, keep on studying until you get it right.

2.4 COMPONENTS OF DOCUMENT-BASED RESEARCH

From what we have said above, you will realise that research is generally never a simple matter. To do proper legal research, you will have to master a set of intricate skills.¹⁰

¹⁰ See Wangerin P “Skills training in ‘legal analysis’: A systematic approach” 1986 (40) *University of Miami Law Review* 409–485 426.

However, to make it more practical, we have broken the process of conducting document-based research into the following elements:

1. Planning of research
2. Doing the research
3. Reporting on your research

In other words, what you will be doing is:



We will now look at these steps in detail in paragraph 2.5 (“the research process”) below.

2.5 THE RESEARCH PROCESS

2.5.1 Planning research

(a) The systematic approach

When you start your research, it is easy to feel overwhelmed by the prospect of trying to find a solution to a legal problem. As with any other big project, the secret of success lies in proper planning and a systematic approach. In the case of law and legal problems, we suggest a three-step system. It is easy to remember with the acronym **FIA (Facts-Issues-Applicable law)**. In your research, you will therefore first establish the **FACTS**, then identify the legal **ISSUES** or legal questions involved and then find the **APPLICABLE LAW**.

Thus, you must remember to do the following:



NOTE that the abovementioned helps you limit your study or research. You do not have to study the legal system as a whole. You only need to examine the rules applicable to your issues and facts.

Now, let us look at the three steps of research in a bit more detail:

1. The first step is to **establish the facts**. By this, we mean that you should firstly look at all the legally relevant facts that you are provided with. Just like a judge in a court case, you first have to set out the facts that will influence your conclusion. You will have to use the knowledge you have acquired during your studies in order to decide which facts are relevant and which are not. You have to ask yourself the following questions:
 - Where do I find the sources for the research?
 - How do I find the sources for the research?
 - How do I ensure that the sources relate to the research?
2. The second step is to analyse these facts so that you can identify the **legal issues**. This means that you need to decide what the **legal problem** is. For example, are

you dealing with the Law of Contract, the Law of Delict, Criminal Law or maybe Family Law? The facts that you established in step 1 will help you to answer this question.

Thus, your analysis of the legal issues, as referred to above, must demonstrate the following attributes:

- Specific and clear research objectives
- Consistency
- Hypothesise imaginative ideas
- Clear techniques for accessing research information
- Interpretation of information in a scientific manner
- Operational research framework

3. The final step is to determine what the **applicable law** is. For this, you will also have to refer to the knowledge you acquired over the course of your studies (i.e. four years for a LLB degree and three years for a Diploma in Law). For example, if it is a divorce matter, you deal with Family Law, or if it is an accident, you might deal with Criminal Law or the Law of Delict.

ACTIVITY 2.2(A)

You are an attorney and have a client who came to see you regarding her marriage and the possible post-divorce benefits. She wants to divorce her multimillionaire customary law husband on the basis that the marriage has irretrievably broken down. She also wants to claim half of her husband's estate. The reason why she wants an end to the marriage is that she has recently learnt that her husband is also a party to a civil union that was entered into prior to her entering into a customary marriage with him. You have to write a legal opinion setting out what her chances of success are.

Now use the FIA approach to answer the following questions:

1. What are the **relevant facts**? Is it important that there is a civil union marriage elsewhere that was entered into prior to the customary marriage?

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2. What are the **legal issues**? Is this a private law or public law matter? Will you consider the customary marriage valid? Is she entitled to any benefits?

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3. What is the **applicable law**? Customary law or common law? In addition, what is the role of indigenous law? How would the Constitution¹¹ be relevant?

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FEEDBACK

You will probably not be able to answer all of these questions fully. However, do consult your study guide for Introduction to Law for more information on the various divisions of the law.

(b) Keeping track

You will immediately realise that you need to accumulate a lot of information during the research process. The problem is how to keep track of everything. There is nothing more frustrating than finding important information and then forgetting where you found it. So, it becomes important to clearly document all the sources you are using. This has the added benefit that if you keep track, your bibliography will be easier to compile at the end of your report. A bibliography is a list, compiled in alphabetical order, of all the sources that you used when doing your research for an assignment. The bibliography should be included on a separate page right at the end of your assignment. For an example of a bibliography, see the document **Modes of Citation**, which can be found under **Additional Resources** on the myUnisa site.

There are various ways of keeping track and you will have to decide which method best suits your way of thinking and way of working or researching. Here are three suggestions you can choose from:

- You can make use of old-fashioned index cards. These are rectangular paper cards, which can be either blank or ruled, used for recording, organising and storing information. You can, for instance, capture each source that you use on a separate index card and then arrange them alphabetically as you go along. These have the advantage that they are inexpensive and simple to use. The disadvantage is that you will have to re-type all the information on them once you get to the final phase of your research.
- Most word-processing programs (like Microsoft Word) have a function where you can type in a source once and the program then compiles a bibliography for you. It is really simple to use but, like most electronic resources, it requires that you make regular backups of all your work. A computer malfunction could result in you losing all your hard work. There are also a number of web-based resources that will keep an electronic copy of your sources. Programs like *EndNote* and *RefWorks*¹² can be accessed on the internet and have the advantage of not being dependent on your

¹¹ Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

¹² Training for and access to *RefWorks* can be obtained through the **Library** website: go to <http://www.unisa.ac.za> and click on library. See Palmer R and Crocker A *Becoming a lawyer: Fundamental skills for law students* (LexisNexis Durban 2007) 182–183.

computer's hard drive. There is also free computer software that can help with this, like *Mendeley*.

ACTIVITY 2.2(B)

Make a list of the advantages and disadvantages of the methods of keeping track of research. Then decide which one you prefer and why.

1. Advantages of keeping track of research, and why:

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2. Disadvantages of keeping track of research, and why:

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FEEDBACK

This will itself require you to do some research. Have a look on the internet (yes, we are talking about Google!) and investigate some of the available options.

(c) The problem statement

A problem statement can be short (one paragraph) or very long (35 pages), depending on what research you are doing. Typically, for an assignment, you will start by setting out the problem in one paragraph. This serves a dual purpose: it shows your lecturer that you understood the problem and it will guide you through the rest of the process of answering the question. In essence, the problem statement is the culmination of the **FIA** process.

In order to formulate your problem statement, consider the following:

- What area of law would I like to research?
- What are the current issues in the field that interest me?
- What specific issue in the list of issues identified in the field would I like to address?

Furthermore, it is important that your problem statement should include the following:

- A brief summary of the **facts**. If you look at various cases, this section will be a summary of what the cases are about. Where you are required to analyse a problem, this section will be your understanding of what the problem is about and what the relevant facts are.
- An exposition of the **issues** that you will be addressing. Where you read several cases, you need to indicate here what they all have in common and where they differ

from one another. Where you deal with a problem, this will be an indication of the central question you will be researching.

- Then you need to indicate what **law is applicable** to your problem. This can be very simple and basic. However, if you can already at this stage give a preliminary bibliography, it will assist you.
- Finally, you need to provide a “road map” to the eventual answer. By this we mean that you need to say how you will deal with the problem and in what order. This will usually be in the form of something like this: “This study will firstly analyse the relevant case law before moving on to a study of common law principles. This will then be critically evaluated against the background of new developments in the law.”
- It is important to remember that at this point you should already use the correct system of referencing. We will deal with this later and that is why you need to read through all the module units before you start working. If you do not follow the correct method of referencing from the start, you will have to redo a substantial part of your research project and waste a lot of time and effort. Students often want to know how many sources they should refer to. This question is difficult to answer with any degree of certainty. However, you need to show that you have read enough to be able to at least understand what the problem is.

To repeat: you need to have taken the following steps:



Once you understand the problem you must deal with, you can move onto the next step.

2.5.2 Doing the research

At this stage in your research, you should have a clear understanding of what the problem is and you should also have collected quite a bit of information. Nevertheless, just like a pile of bricks is not a house, a collection of facts is not research. For this reason, it is expected of you to evaluate, understand and organise information or facts relating to your legal research.

(a) Sources of law

The sources that a researcher will consult will always differ, depending on the area or field that is being researched. Because legal research is usually document based, this research involves the reading, analysing and comparing of various documents and sources of law. In other words, legal research is typically about finding the sources of law, reading, analysing and evaluating them and then synthesising your findings into one coherent report.

(b) Summarising a case

Because of the nature of South African law, case law is an important source. It is therefore crucial in the research process to read and summarise cases. This by no means implies that you can merely summarise a case and think that your research is done. On the contrary, writing a case summary serves two important functions. Firstly, it helps you to understand the case by forcing you to engage with key legal issues that are applicable

to the case. Secondly, this is a way of keeping track of what was decided in a case and provides an easy way of recalling information.

The following section briefly indicates how cases should be summarised. In general, a case summary starts with the citation (name) of the case at the top, and should contain the following four headings:

Name of case

- Summary of the facts
- Legal question
- *Ratio decidendi*
- Finding

By addressing these different elements of the case in this specific order, you are systematically arranging the different parts of the judgment in a manner that makes it easy to understand. You should familiarise yourself with the structure and content of a case summary **before** you read and start summarising the case, as this will influence the way in which you read the case. Once you are familiar with the structure of a case summary, make notes as you read the case so that you know where a specific section will fit into the summary.

The following should be addressed in each of the four parts:

- A summary of the facts: Judges usually include a fairly detailed discussion of the facts before the court in the judgment. Your summary should not be nearly as detailed. Students tend to “get lost” in the detail and you should only stick to the facts that are most relevant to the legal issues. What is included in the facts is thus dependent on the subject field you are addressing. Sometimes the facts are scattered throughout the whole case and you will have to read the whole judgment before you will be able to identify the most relevant facts. If you are dealing with the contract law aspects of a case, it might not be necessary for you to also address possible constitutional law implications. In general, your summary of the facts should not exceed one paragraph.
- The legal question: You need to move away from the facts now and clearly articulate the legal question that is addressed in the judgment. Keep in mind that the court often raises and addresses more than one legal question and that you will sometimes need to deal with all of these questions. In such a case, your summary will contain more than one legal question. A legal question will normally be only one sentence, for example: *Can a written contract be amended verbally?*
- *Ratio decidendi* (The court’s reason for its decision): This section will be the biggest part of the summary because legal research is more interested in the reasoning of the court than in the outcome of one particular case. Because of the system of judicial precedent, this is the part of the judgment that will be used in other cases. The principle of judicial precedent means that lower courts are bound by the previous decisions of the higher courts. When giving the reasons for the court’s decision, you must find the law (legal principles) that the court used to decide the case. You will need to find the essence of the argument used, and summarise that. Here it is very important to distinguish between *ratio decidendi* and *obiter dicta*. *Ratio decidendi* refers to the reasons for the court’s finding, while *obiter dicta* refers to remarks made in passing by the judge and which are not directly relevant to the specific legal question addressed in the judgment. When you read a court case, you will not find a clear indication of where the *ratio decidendi* and where the *obiter dicta* are, and it is sometimes hard to distinguish between the two. This will become easier with practice and as you gain

more knowledge of the law. For a further discussion of the distinction between *ratio decidendi* and *obiter dicta*, refer to your study guide for Introduction to Law.

- The finding/judgment: This will be a one-line summary indicating how the case was ultimately decided, stating for example that “the court found in favour of the plaintiff”.

The temptation for most students is to not read the whole case, but to only read the headnote or summary. This is a big mistake! You might be able to get some of the facts and the finding from that, but you will not be able to get the *ratio decidendi*. For that, you will have to do the hard work and read the whole case.

ACTIVITY 2.2(C)

Find the case of *Molefe v Mahaeng* 1999 (1) SA 562 (SCA). Read this case and then summarise it in the following manner:

1. The facts of the case

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2. The legal question

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3. *Ratio decidendi*

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4. The decision of the court

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FEEDBACK

It is important that you make sure that you have included all four aspects set out above in your summary.

Do you still remember the stages of research that we discussed earlier?



You are now ready to get to the final stage of your research.

2.5.3 Reporting on your research

(a) Contextual differences

The most important part of your research is the report you write to set out your findings. After all, if no one ever knows what you have discovered, what is the point of doing the research? However, you should keep in mind that the way in which you report will differ depending on whom you are reporting to. An office memo is different from a legal opinion and a first-year assignment is different from a postgraduate dissertation. So, keep that in mind when you write. You will learn how to write other kinds of reports once you are in a specific environment.

For now, you may use the structure set out below as a general guideline.

(b) Basic structure

In most of the English-speaking countries of the world, legal research is presented in an almost universal way known by the acronym **IRAC**. IRAC indicates what should be in your research report and it stands for **I**ssues, **R**ules, **A**pplication and **C**onclusion.

- Your research finding should start with an analysis of the **ISSUES** at stake in the study. In essence, this will be a refinement of the problem statement we discussed above. Therefore, if you did your problem statement correctly and thoroughly, you will have completed part of the report already.
- The abovementioned should be followed by a summary of the legal **RULES** applicable to the issues at hand. This can take the form of common law principles, legislation, case law, indigenous law and any combination of these. This needs to be set out in an integrated fashion in order to show that you understand how they relate to one another.
- The crucial part of **APPLICATION** must now be undertaken. You now need to apply the rules you identified to the issues at hand. This is the aspect of the report that students find most difficult. Remember to make sure that the rules are indeed applicable to your specific problem, otherwise it makes no sense to discuss them. At all times, you need to give reasons for your applications.
- Finally, you need to come to some kind of **CONCLUSION**. It is important to remember that you need not solve the problem at hand. If the only conclusion you can come to is that there is a problem that has not been resolved by case law or legislation, that is a legitimate conclusion. Pointing out problems is a large part of the work of any researcher – it helps other researchers to know where to focus their energies on.

We have now completed study unit 2. Make sure you have done all the activities and contact your lecturers should you not understand any of the content covered in this unit.

2.6 CONCLUSION

In this study unit, you were introduced to document-based research. We explained why this type of research activity is important. You were also taught the essential components of document-based research and the research process leading to the reporting of your research findings was illustrated. By way of testing yourself, you were given activities in order to evaluate your understanding of the various concepts that you studied in this study unit.

In study unit 3, you will be introduced to another form of research, referred to as the empirical or qualitative research method. We will explain exactly what is meant by qualitative research.

STUDY UNIT 3

Empirical Research



Study unit 3: Empirical Research

- 3.1 Introduction
- 3.2 What is empirical research?
- 3.3 Components of empirical research
 - 3.3.1 Descriptive research
 - 3.3.2 Exploratory research
 - 3.3.3 Explanatory research
 - 3.3.4 Evaluation research
- 3.4 Why is empirical research important?
- 3.5 Generic steps of empirical research
- 3.6 Conclusion

LEARNING OUTCOMES

At the end of this study unit, you should be able to

- define empirical research and know its components
 - distinguish between descriptive, exploratory, explanatory and evaluation research
 - know why empirical research is important
 - understand the generic steps of empirical research
-

3.1 INTRODUCTION

In study unit 2, you were introduced to a research method referred to as “document-based research”. It was indicated that this document-based research is research from sources that are found in or sourced from the library. Examples of these sources are statutes or legislation, case law, books or journal articles. Study unit 3 introduces you to a method of research that involves the collection of data from people, that is, human participants. For our purposes, this research method is referred to as empirical research. Importantly, study unit 3 illustrates or seeks to illustrate that legal research is not only limited to document-based research. Thus, a legal researcher can also use other sources of data, such as those gathered from interviews or questionnaires, to carry out legal research.

In order to provide meaning to this study unit, the discussion below contains a study of the meaning of empirical research. It also contains the components of empirical research.

3.2 WHAT IS EMPIRICAL RESEARCH?

In this module, empirical research is also called quantitative research. It refers to a process in terms of which data is collected and analysed. For the sake of completeness, the term “data” is generally used in scientific research for numeric or verbal information that is collected during the research process. Thus, data assist in ensuring that a specific process or methodology that is best suited to investigate the topic is followed. The previously mentioned process or methodology must be focused and structured. In doing empirical research, a researcher would rely on experience or observation. This reliance sometimes has no regard for systems and certain theories. Because this research is data based, the conclusions, if any, that a researcher arrives at should be capable of being verified by observation or experiment. Primary data in the form of, for instance, surveys, experiments and case studies, or an analysis of existing information can be used.

ACTIVITY 3.1

Think of instances where legal research can also make use of empirical data. Provide reasons for your answer.

1. Instances where legal research can also make use of empirical data:

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2. Reasons for the answer in 1 above:

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FEEDBACK

One example that comes to mind relates to that of a researcher who is doing legal research in property law. This research may involve the conducting of interviews with different sheriffs of the courts to understand the procedures that are followed in execution sales. Furthermore, in family law a researcher could explore, inter alia, the success rate of mediation in divorce cases. In such a study, questionnaires may be completed in order to evaluate whether the participants thought the mediation process was effective or not.

There are many more such examples and these examples can become clearer if you start to think critically about collecting data in addition to using documents-based research.

3.3 COMPONENTS OF EMPIRICAL RESEARCH

Generally, empirical research falls within the field of social sciences. Wheeldon and Ahlberg¹³ provide meaning to the term “social science research”. They state that social science research seeks to “understand, explain, and predict human behaviour by observing, reflecting, and/or measuring social phenomena”.¹⁴ This explanation of social science research demonstrates that empirical research should meet certain criteria. These are that:

- empirical research should have a specific purpose
- empirical research should follow a particular method of collecting data

The aim or purpose of empirical research can fall within any of the four components, namely:

- to describe the research topic
- to explore the research topic
- to explain the research topic
- to evaluate the research topic

Below is a straightforward analysis of the above-mentioned components of empirical research:

3.3.1 Descriptive research

Descriptive research aims to define or describe a particular social problem. Its primary purpose is to describe the topic being researched. Questions such as “how” and “why” are normally asked in descriptive research.¹⁵ The examples of the questions asked vary from, for example: “How many sexual offences courts are there in South Africa?” to “Why are preliminary enquiries used to determine whether a child who committed an offence can be diverted or not?”

3.3.2 Exploratory research

Exploratory research is usually used in circumstances where fewer or no legal research has ever been done on a particular topic. This type of research seeks to find out “what is (really) going on?” An example of such research may have to do with exploring the opinion of journalists regarding certain limitations which a particular legislation, for example the Protection of Personal Information Act 4 of 2013 (POPI Act), places on the constitutional right of the freedom of speech in South Africa. In this instance, a researcher would be more inclined to conduct interviews with legal journalists with a view to exploring their opinions.

13 Wheeldon J and Ahlberg MK *Visualizing social science research: maps, methods & meaning* (Sage publications Thousand Oaks 2014).

14 Wheeldon and Ahlberg *Visualizing social science research*.

15 De Vos AS *Research at grass roots for the social sciences and human service professions* (Van Schaik Pretoria 2002).

3.3.3 Explanatory research

Explanatory research is normally carried out in cases where legal research has already been done about a topic, but a researcher wishes to explore the reason(s) why things are the way they are. It strives to answer questions such as: “What are the perceptions of magistrates regarding the use of a restorative approach in child justice?” or “How effective is the Child Justice Act in diverting children away from the formal justice system?”

3.3.4 Evaluation research

Evaluation research aims to explore the impact of a specific form of intervention. In this research, questions, for example, how effective a policy or programme is in achieving its goals or outcomes, are asked. In addition, evaluation research is a form of explanatory research because it deals with the cause and effect of explanatory research. However, it is a unique form of research insofar as it specifically aims to evaluate the effect of policies or programmes. An example of evaluation research could be to establish whether the procedures used to determine the criminal capacity of children are effective or not.

ACTIVITY 3.2

Write down what you think is the type of information or data that is or can be collected in both qualitative and empirical research.

1. Qualitative research

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2. Empirical research

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FEEDBACK

An easy way of distinguishing between data collected when using either a qualitative and quantitative approach, is to remember that quality refers to the essential character or nature of data. However, quantity connotes the extent, size or sum of countable events that can be addressed as a numerical value. Therefore, qualitative research is a form of

3.5 GENERIC STEPS OF EMPIRICAL RESEARCH

- **Step 1: Identifying the research problem**

Before commencing with legal research, you must recognise and define the research problem. This, in turn, assists you in narrowing the focus of the research to the problem, issue, policy, legal rules or principles necessary for your study. Therefore, it is important that you frame the target of your research. By so doing, it may be possible to focus on relevant data instead of spending unnecessary time and effort on data that do not contribute anything positive to your research.

- **Step 2: Research design**

Research design deals with structuring the approach (experimental or non-experimental approach) to be used in gathering the data. It may be necessary for you at this stage to place potential participants into groups, depending on the urgency and importance of the data needed for your research.

- **Step 3: Data collection**

The third step involves the actual gathering of data. In this step, it is required that you analyse meaningfully the existing literature by using theories, other studies and methodological literature. These theories play an important role in that they inform what is referred to as a “perceived theoretical path”. The aforesaid can be explained in the following manner:



- **Step 4: Analysis and presentation of findings**

Step 4 generally involves summarising, reporting and presenting your final research findings.

- **Step 5: Conclusions, interpretations, and limitations**

Step 5 is probably the most difficult of the steps. In most cases, researchers underestimate the amount of work required in this step. Therefore, it is important for you to note that “The conclusions of research will be credible and plausible only to the extent to which the questions and problems they address are clearly formulated and expressed and followed through in a consistent manner during the inquiry.”¹⁸

3.6 CONCLUSION

In this study unit, you were introduced to the concept of empirical research. The meaning and manner in which this form of research is done was explained. It was explained that empirical research should generally be done with a specific purpose in mind, and that

18 Davies P and Francis P “Preparatory criminological research” in Davis P, Francis P and Jupp V (eds) *Doing criminology research* 2nd ed (Sage Publications London 2000) 7–15 14–15.

it should follow a particular method of collecting data. In addition, you were informed that you can either elect to describe, explore, explain or evaluate the research topic.

In study unit 4, you are introduced to the various ways of accessing information for research-related purposes. These methods are not only limited to those applicable offline, that is, visiting the library. They also relate to those methods of accessing information online.

STUDY UNIT 4

Accessing Information



Study unit 4: Accessing Information

- 4.1 Introduction
- 4.2 Accessing various research databases
- 4.3 Using the library
- 4.4 Referencing
 - 4.4.1 What is referencing?
 - 4.4.2 How to reference
- 4.5 Conclusion

LEARNING OUTCOMES

At the end of this study unit, you should be able to

- access various research databases and use the library
 - know what referencing is and apply it
-

4.1 INTRODUCTION

In study unit 3, you were introduced to a research method referred to as empirical research. You learnt that empirical research focuses on gathering and analysing data as opposed to scrutinising documents (see document-based or quality research in study unit 2). In this study unit, you will be educated in the various methods of accessing information or sources of the law for research purposes, either by visiting the Unisa library or by clicking your computer mouse. You will also be taught the method or styles of referencing. Examples will be used in order to demonstrate the way in which you must do referencing.

Before we go any further in explaining the way you should access research information, we would like you to do the activity below:

ACTIVITY 4.1

Think of the two styles of referencing that you know or have come across. Indicate the referencing styles in the space below and illustrate what each is.

1. Example one.

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2. Example two.

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4.2 ACCESSING VARIOUS RESEARCH DATABASES

In this study unit, we will show you how to access information for legal research purposes. We will demonstrate that you could access this information in what is referred to as the “authoritative and persuasive sources of law”. Thus, if you are confronted with a legal problem, you need to find the correct authoritative and persuasive sources of law in order to give an answer. So what exactly are authoritative or persuasive sources of law? When we talk about “authoritative sources of law”, we are referring to the sources that contain the legal rules and principles applicable to your research topic. Examples of the authoritative sources of law in South Africa include the following:

- Legislation
- Case law
- Common law
- Customary law
- African indigenous law

In turn, when we talk about the “persuasive sources of law”, we mean sources that are not considered as authoritative, but have persuasive or influential value in circumstances where there are no authoritative sources of law available. These include:

- Other modern legal systems (foreign law)
- Modern legal writers (law textbooks, articles in law journals)

NOTE: Some sources of information, for example “Wikipedia”, do not fall under any of these categories and should therefore not be used as sources in your research paper. For legal research purposes, please visit the sources that are listed above. For further interesting reading on the sources of law (both authoritative and non-authoritative or persuasive sources), please consult your study material for the Introduction to Law.

Now that you understand what we mean by authoritative and persuasive sources of law, the question is: where can these sources be found? You can obtain several authoritative and persuasive sources of law freely on the internet. Some of these sources can only be accessed by subscribing to the specific law database containing these sources. As a student at Unisa, you do have access to some of these subscription databases. Below is a list of the most important South African law databases that you should use when researching your topic. There are many other databases available that you may encounter and use when doing research. You will also notice that some of these databases contain more sources and information than listed below. If you have questions about them, you are welcome to post them in the myUnisa discussion forum for this module or you can ask your designated lecturer or e-tutor should you require assistance.

Now let us look at what authoritative and persuasive sources of law are available, or you can consult in the library:

TABLE 4.2

LEGISLATION	
Acts Online	Full text
Jutastat	Full text
My LexisNexis	Full text
Sabinet	Full text
CASE LAW	
Court websites	Full judgments/court documents
Jutastat	Full judgments
My LexisNexis	Full judgments
SAFLII	Full judgments
TEXTBOOKS	
Google Books	Index of books, but also full access or limited access in some cases.
SACat	Index of books available in South Africa.
Unisa Library catalogue	Index of books available in the Unisa library. All these books can be requested, if needed for your research, and the Unisa library will post it to you.
JOURNAL ARTICLES	
ISAP	Index of journal articles in South Africa. These articles can also be requested from the Unisa library.
HeinOnline	Index and full access to international law journals (including certain South African law journals).
SA ePublications	Index and full access to South African journals (including certain South African law journals).
Google Scholar	Index of journal articles internationally (including South Africa), but also full access or limited access in some cases.
Unisa e-journals	Links to electronic journals (by name).

Below is an alphabetical list of all the databases listed above and where you can find each of them:

Law database	Link/where to find
Acts online	http://www.acts.co.za
Court websites	Certain South African courts have their own websites where they publish their judgments. For example, the Constitutional Court website can be found at http://www.constitutionalcourt.org.za . (You can search for other court websites on the internet.)
Google Books	http://books.google.co.za
Google Scholar	http://scholar.google.co.za
HeinOnline	Go to the Unisa library website (http://www.unisa.ac.za). Click on the Subject Databases link under Online Collections . Click on Law and then click on the HeinOnline link.
ISAP	Go to the Unisa library website (http://www.unisa.ac.za). Click on the Subject Databases link under Online Collections . Click on Law and then click on the ISAP (Index to Southern African periodicals) link.
Jutastat	Jutastat can only be accessed from a computer on any Unisa campus. Click on the Wincdnet icon on the desktop. When the window opens, click on Law . A list of law databases will appear in the window on the right. Click on the relevant database.
My LexisNexis	My LexisNexis can only be accessed from a computer on any Unisa campus. Click on the Wincdnet icon on the desktop. When the window opens, click on Law . A list of law databases will appear in the window on the right. Click on My LexisNexis Law Library .
Sabinet	Go to the Unisa library website (http://www.unisa.ac.za). Click on the Subject Databases link under Online Collections . Click on Law and then click on the Sabinet Legal Products (new search interface) link.
SACat	Go to the Unisa library website (http://www.unisa.ac.za). Click on the Subject Databases link under Online Collections . Click on Law and then click on the SACat link.
SA ePublications	Go to the Unisa library website (http://www.unisa.ac.za). Click on the Subject Databases link under Online Collections . Click on Law and then click on the SA ePublications link.
SAFLII	http://www.saflii.org/
Unisa e-journals	Go to the Unisa library website (http://www.unisa.ac.za). Click on the E-journals link under the heading Online Collections .
Unisa library catalogue	Go to the Unisa library website (http://www.unisa.ac.za). Click on the Find the Library Catalogue link under the heading Find Information .

4.3 USING THE LIBRARY

In general, being able to use any library is a skill that you will learn over time. It is expected that the more you visit the library, whether online or physically, the better the chances that you will possess the skills on how to use the library. The Unisa library currently has a printed book collection totalling over 1.5 million items, and stocks over 300 000 other items as well as 4 000 current periodical titles. Both the authoritative and persuasive sources of law are part of this collection. Thus, it will be difficult for you to access the sources in the library without having the ability to use the Unisa library. The best time to start using the library, whether online or offline, is always **NOW**.

We urge you to take a tour of the Unisa library by following the link: <https://www.youtube.com/watch?v=rPDMg6ptU20>. This tour will give you a glimpse of the Unisa library and where you can access and locate the sources law of law. As soon as you have completed the tour of the Unisa library, please do Activity 4.3 below. The answers to this activity must be submitted and will become part of your Assignment 01.

ACTIVITY 4.2

Using the databases given above, you now need to find certain sources of law. In each case, give the full detail required in this activity.

1. Find three Acts (legislation) dealing with the protection of children. In each case, provide the following:
 - (a) Name of the Acts

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 - (b) Number of the Acts

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.....
 - (c) Year of the Acts

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2. Find three court cases dealing with the protection of animals. In each case, provide the following:
 - (a) Names of the parties

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 - (b) The court in which the cases were heard

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(c) The year in which the cases were decided

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3. Find three **legal** books/textbooks that deal with the crime of rape in South Africa. In each case, state the following:

(a) Surname and initials of the author(s)

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.....
.....

(b) Title of the books

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.....

(c) Publisher of the books

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.....

(d) Place of publication

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.....
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(e) Year of publication

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4. Find three articles in **legal** journals dealing with the role of ubuntu in South African law. In each case, provide the following:

(a) Surname and initials of the author(s)

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.....
.....

(b) Title of the articles

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.....
.....

(c) Name of the journals in which the articles were published

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(d) Year in which the journals were published

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- (e) Pages on which the articles can be found
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-
-

Note: These are the most important pieces of information that you need for every source you use or wish to use in your research. You will see in the next study units why this is important!

4.4 REFERENCING

4.4.1 What is referencing?

Referencing is an important research tool or technique. This technique is normally used to separate or create a separation between a writer's ideas, thoughts or arguments and those obtained from another source. Generally, the more sources of law, for example legislation, case law, books and journal articles you refer to or consult, the better your understanding of the topic will be. In addition, the more sources you consult and refer to, the better your chances of getting a good mark for your research. You may have noticed above that referencing has to do with the following:

- To refer to a source – that is, to quote the source very briefly in a footnote¹⁹ or quote in a footnote some of the significant words of the author or judge.
- To consult a source – that is, to read the source, for example an Act, judgment, portion of a book or journal article.
- To create a footnote: click where you want your footnote to be and press **ctrl alt delete**. Your footnote will now appear next to your sentence and at the bottom of the page.

NOTE: The general rule is that you must **NEVER** refer to an Act, a judgment, a journal article, a book or any other source unless you have consulted it yourself.

4.4.2 How to reference

You must always remember that referencing should follow a particular pattern. In other words, you should reference the sources you used in your legal search by consistently adhering to the referencing style that is accepted in the School of Law, University of South Africa (Unisa). Table 4.2 below demonstrates this style of referencing that you must use and follow. In addition, it gives you examples of how you **must** do your referencing or how to reference a source, whether the reference is in the text or in the bibliography.

THEREFORE, your duty as a student is to ensure that that you diligently “keep an eye” and follow the examples as demonstrated in Table 4.2 below:

¹⁹ Footnotes are the brief notes that appear either at the bottom of each page or at the end of an article or legal text. They provide information without interrupting the flow of the argument in the article or legal text.

NOTE: Generally, when you refer to a source in the footnote, you must use the “shortened version” of reference. However, in circumstances where you refer to a source in the bibliography, you must use the “full reference”.

TABLE 4.2

SOURCE	SHORTENED VERSION	FULL REFERENCE
1. Constitution	Constitution	Constitution of the Republic of South Africa, 1996
2. Legislation or Acts	Electronic Communications and Transactions Act	Electronic Communications and Transactions Act 25 of 2002
3. Case law	<i>S v Makwanyane and Another</i> <i>KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd</i>	<i>S v Makwanyane and Another</i> 1995 (3) SA 391 (CC) <i>KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd</i> 2016 (5) SA 485 (WCC)
4. Books	Smith <i>Insolvency</i> Neethling, Potgieter and Visser <i>Delict</i> Njotini <i>E-crimes and e-authentication</i>	Smith C <i>The law of insolvency</i> 3rd ed (Butterworths Durban 1988) Neethling J, Potgieter JM and Visser PJ <i>Law of delict</i> (Butterworths Durban 1990) Njotini M <i>E-crimes and e-authentication – a legal perspective</i> (LLD thesis Unisa Pretoria 2016)
5. Chapters in books	Pound “The passing of mainstreetism”	Pound R “The passing of mainstreetism” in Sythoff AW (ed) <i>XXth Century comparative and conflicts Law</i> (Brill Leyden 1961) 3–14
6. Journal articles	Njotini “Anti-terrorism measures in South Africa: Suspicious transaction reporting and human rights”	Njotini MN “Anti-terrorism measures in South Africa: Suspicious transaction reporting and human rights” 2015 (15) <i>African Human Rights Law Journal</i> 515–536
7. Conference proceedings	Kahn “Crime”	Kahn E “ <i>Crime</i> ” in <i>Criminal Law</i> (Paper delivered at the Third Annual Congress of the South African Association of Criminologists, 21–26 July 1961, Juba Cape Town) 221–228
8 Internet sources	Adjas https://www.businesslive.co.za/ (Date of use: 11 July 2017)	Adjas CKD “African governments must do more to grow intra-African trade” https://www.businesslive.co.za/ (Date of use: 11 July 2017)

4.5 CONCLUSION

In this study unit, the ways in which you could access information using the library and some of its online databases were demonstrated. Activities were also given to you in order to test and assess your ability to do research using the library and its databases. In addition, the importance of referencing in research was revealed. Accordingly, it was stated that you must not only consult a source, but also refer to it in your research.

In study unit 5, you will learn about the idea of transformative constitutionalism, ubuntu and social justice. It will be illustrated to you how these ideas are significant in research.

STUDY UNIT 5

Transformative Constitutionalism in Research



Study unit 5: Transformative Constitutionalism in Research

- 5.1 Introduction
- 5.2 What is transformative constitutionalism?
- 5.3 Basic principles of transformative constitutionalism
- 5.4 African research methodology
 - 5.4.1 Ubuntu
 - 5.4.2 Social justice
- 5.5 Conclusion

LEARNING OUTCOMES

At the end of this study unit, you should be able to

- define transformative constitutionalism
- know the basic principles of transformative constitutionalism
- explain the concept of ubuntu and social justice in the context of African research methodology

5.1 INTRODUCTION

In study unit 4, you were taught the ways in which you can access information for research-related purposes. This accessing applies whether the information is sourced online or offline. It was stated that accessing information is necessary because it equips you with the requisite skills of searching for information and helps you to know where you may find authoritative and persuasive sources of law. Accordingly, certain databases were demonstrated for your use in finding the aforementioned sources of law. In this study unit, you will learn about transformative constitutionalism and its importance in research. In addition, you will be taught about the notions of ubuntu and social justice.

5.2 WHAT IS TRANSFORMATIVE CONSTITUTIONALISM?

Transformative constitutionalism is generally a new concept. Specifically, the latter concept finds its basis in the Constitution.²⁰ For example, the Preamble to the Constitution refers to the “past” and “future”. It states, amongst others that:

We, the people of South Africa, recognise the injustices of our past; ... heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; (and) 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 the law.

Klare introduced this concept in 1998 in his article “Legal culture and transformative constitutionalism”.²¹ To date, this concept has received considerable attention and has provoked debate in legal research. However, the question one would be more interested in asking, is what exactly is transformative constitutionalism?

You will be disappointed to note that there is currently no precise or uniform definition of this concept. Specifically, legal researchers diverge in relation to what transformative constitutionalism really means. However, you should note that transformative constitutionalism is broader than the notion “to reform” or “reforming”. In the same vein, it implies something different to or short of a “revolution”. Klare states that transformative constitutionalism refers to the following:

A long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political development) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian society.²²

Furthermore, it concerns social or communal adjustment. This is the case because it involves a combined and serious promise to transform society in a more significant manner. The latter undertaking to transform must be done in a manner that induces “large-scale social change through non-violent political processes (that are) grounded in law”.²³

5.3 BASIC PRINCIPLES OF TRANSFORMATIVE CONSTITUTIONALISM

Transformative constitutionalism is founded or has its basis in the Constitution. By its design and nature, the Constitution is transformative in various ways.²⁴ Specifically, Chief Justice P Langa (as he then was) states that the Constitution is different from constitutions of other countries in that:

It represents a decisive break from, and a ringing rejection of, that part of the (apartheid) past which is disgracefully racist, authoritarian, insular, and repressive

20 Constitution of Republic of South Africa, 1996.

21 Klare K “Legal culture and transformative constitutionalism” 1998 (14) *South African Journal on Human Rights* 146–179 150.

22 Klare “Legal culture and transformative constitutionalism” 150.

23 Klare “Legal culture and transformative constitutionalism” 150.

24 Langa P “Transformative constitutionalism” 2006 (3) *Stellenbosch Law Review* 351–360 351.

and a vigorous identification or commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.²⁵

The vision of the Constitution is to create a South Africa that is based on democratic values, social justice and fundamental human rights. In addition, the Constitution enjoins everyone to be involved in a process to transform South Africa. Particularly, the words “we, the people of South Africa” in the Preamble to the Constitution suggests this collective responsibility to transform. Therefore, transformative constitutionalism has to take place in an environment that promotes the democratic values of human dignity, equality and freedom.

Certain basic principles are inherent to transformative constitutionalism. These are that:

- Legal researchers must provide a clear understanding of the applicable law or legal principle.
- Legal researchers must analyse the applicable law or legal principle.
- Legal researchers must implement the democratic values of human dignity, equality and freedom to the law or legal principle.

The abovementioned principles are important to the process of transformative constitutionalism because:

- They ensure that legal researchers engage critically with law or legal principle.
- They guarantee that the democratic values enshrined in the Constitution form part of the critical engagement with law or legal principle.

The Constitutional Court case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*²⁶ is an example of how transformative constitutionalism can be applied. The facts of this case were briefly that the Constitutional Court was requested to intervene to infuse the law of contract with certain constitutional values. Everfresh Market Virginia (Pty) Ltd (Everfresh) leased premises (property) from HR Geeringh CC. In terms of the contract of lease, Everfresh had an option to renew the lease on its expiry on the same terms and conditions, subject to an agreement being reached between the parties on the rental. Before the expiry of the contract of lease, Shoprite (Pty) Ltd (Shoprite) bought the premises from HR Geeringh CC. At the time when the contract of lease expired, Shoprite refused to renew the contract. Furthermore, it started a process to and successfully evicted Everfresh from the property. In deciding on a proper judgment, the Constitutional Court was divided in its decision. The minority judgment was of the view that the court had to interpret the Constitution in a way that develops the common law by infusing constitutional values such as ubuntu, and fairness.²⁷ The majority decision only differed from the minority decision because the issues relating to the infusing of the law of contract with constitutional values were only raised and contended in the Constitutional Court.²⁸

NOTE: The important point to note in this case involves issues relating to the law of contract. Commonly, laws or principles governing a contract were to be applied. However, the court went beyond such laws and invoked the concept

25 *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

26 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

27 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers* 23, 24 and 39.

28 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers* paras 71–73.

of ubuntu and fairness. The introduction of these concepts marked a departure from and constituted something that was unusual in the law of contract.

ACTIVITY 5.1

1. Find the case of *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* 2014 (1) SA 585 (SCA). Read the case carefully, and state briefly the facts of the case. Use Tutorial Letter 310 and this study guide as guidance.

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2. State the law or legal principle that was applicable to the dispute.

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3. Did the court apply the applicable law or legal principle? Please elaborate.

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4. In your view, did the court apply transformative constitutionalism in this case? If so, give reasons for your answer.

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5.4 AFRICAN RESEARCH METHODOLOGY

5.4.1 Ubuntu

The notion of ubuntu is difficult to explain with accuracy. Firstly, there is currently no direct English translation for this notion. Secondly, ubuntu concerns how people (human beings) relate to one another. It means the opposite of “victimisation”.²⁹ It is something you recognise when you see it. Ubuntu particularly expresses itself in words such as *umntu ngumntu ngabantu / motho ke motho ba batho ba bangwe*.³⁰ In addition, it “speaks of the very essence of being human”.³¹ Specifically, ubuntu finds its essential meaning in the fact that “my humanity is caught up, is inextricably bound up, in yours. We belong in a bundle of life”.³² Hence, the saying that “a person is a person through others”.³³

From the abovementioned, we can deduce that ubuntu is an African perception of personhood “in which the identity of the self is understood to be formed interdependently through community”.³⁴ Ubuntu has to do with the “love”, “care” and “compassion” that one person has towards others.

ACTIVITY 5.2(A)

1. Find the case of *S v Makwanyane and Another* 1995 (3) SA 391 (CC). Read it carefully, and state the facts of the case.

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2. State the legal question the Constitutional Court had to answer in this case.

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3. In your view, was the notion of ubuntu applied in this case? If so, give reasons for your answer.

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29 See the Preamble to the Constitution of South Africa, 1993 (hereinafter referred to as the Interim Constitution).

30 See Mokgoro J “Ubuntu and the South African law” 1998 (1) *Potchefstroom Electronic Law Journal* 15–26 2.

31 Tutu D *No future without forgiveness* (Rider London 1999).

32 Tutu *No future without forgiveness*.

33 Mbingi L and Maree J *Ubuntu: the spirit of African transformation management* (Sigma Press Johannesburg 1995) 1–7.

34 Battle M *Ubuntu: I in you and you in me* (Seabury Books New York 2009) 1.

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5.4.2 Social justice

Generally, it is difficult to define the term “social justice”. Because of this difficulty, some writers say that its meaning appears to “float in the air, as if everyone will recognise an instance of it when it appears”.³⁵ However, Mill provides the following in relation to social justice:

If it is a duty to do to each according to his deserts, returning good for good as well as repressing evil by evil, it necessarily follows that we should treat all equally well (when no higher duty forbids) who have deserved equally well of us, and that society should treat all equally well who have deserved equally well of it, that is, who have deserved equally well absolutely. This is the highest abstract standard of social and distributive justice; towards which all institutions, and the efforts of all virtuous citizens, should be made in the utmost possible degree to converge.³⁶

Accordingly, it is possible to understand social justice in terms of the following principles:

- **need**
- **desert**
- **equality**

ACTIVITY 5.2(B)

Please find the book: Miller D *Principles of social justice* (Harvard University Press London 2001). Read this book carefully and answer the following questions:

1. What is your understanding of the term “social justice”?
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2. Demonstrate by means of examples how **need**, **desert** and **equality** are related to social justice.
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35 Novak M “Defining social justice” <https://www.firstthings.com/article/2000/12/defining-social-justice> (Date of use: 17 July 2017).

36 Mill JS *Utilitarianism, liberty and representative government* (Dent London 1910).

5.5 CONCLUSION

In this study unit, you were introduced to transformative constitutionalism, which is described as a process of change. This adjustment is made or must be made for the common good of society. Concepts such as ubuntu and social justice were discussed in order to give meaning to the need to transform society within the context of the Constitution.

In study unit 6, you will be taught the required ethics in research. In other words, it will be demonstrated to you how you should apply the research skills you learnt in this module in an ethical manner.

STUDY UNIT 6

Ethics in Research



Study unit 6: Ethics in Research

- 6.1 Introduction
- 6.2 Ethics in research
 - 6.2.1 Ethics in general
 - 6.2.2 Research ethics
 - 6.2.3 Ethical principles
- 6.3 Plagiarism
 - 6.3.1 What is plagiarism?
 - 6.3.2 Forms of plagiarism
- 6.4 Conclusion

LEARNING OUTCOMES

At the end of this study unit, you should be able to

- define ethics in research
 - understand what plagiarism and the forms thereof are
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6.1 INTRODUCTION

In study unit 5, you were introduced to the concept “transformative constitutionalism”. It was stated that the aforesaid notion is essential to your research. We therefore advise you to bear it in mind when preparing and carrying out your research. Furthermore, it was revealed in study unit 5 that the study of African research methodology is significant to doing research in law and criminal justice. Concepts such as ubuntu and social justice were described as fundamental for this purpose. In this study unit, you will be introduced to what is referred to as “ethics in research” or “research ethics”. Importantly, these ethics apply to both document-based research and empirical research. The aim of this study unit is to give you a general overview on how to conduct research in a manner that meets the required ethical principles. We therefore demonstrate the boundaries within which research can be or is ethical or not.

Most people think of ethics as simply implying the rules for distinguishing between right and wrong. These rules can be found, inter alia, at home, church, school or in other

social settings. It is important for you to note that when we talk of ethics in research, we do not necessarily refer to law or legal principles. Therefore, a clear separation must be made between research ethics and law.

6.2 ETHICS IN RESEARCH

6.2.1 Ethics in general

The idea of ethics can be traced back to, amongst others, Aristotle (384–322 BC). Aristotle specifically talked of “virtue ethics”. Virtue ethics have to do with the common good. This common good relates to the inherent virtuous and encompasses shared and acceptable attitudes. It manifests itself in situations where there is a “higher-level moral concept, involving a relation to items falling under other, independently applied moral concepts”.³⁷

Simply put, ethics is “science”. This is the case because it implies a collection of organised, systematised, and coherent ideas that explain or rationalise the morality of human acts.³⁸ In the aforesaid sense, it is “a generic term for various ways of understanding and examining moral life”.³⁹

6.2.2 Research ethics

Generally, research must meet or adhere to certain ethical considerations or principles before it can be said that it is ethical and credible. These considerations will sometimes differ, depending on whether you are conducting document-based research or empirical research. If you are conducting qualitative research, for example, it is essential that you ask yourself the following questions:

- Does the research conform to the principle of informed consent?
- Does the research cause direct harm to research subjects?
- Does the research promote anonymity?
- Does the research deal with the manipulation of information?
- Does the research potentially tamper with the research field for other researchers?

In turn, the principles as mentioned above are discussed in paragraph 6.2.3 below.

6.2.3 Ethical principles

- **Informed consent**

Informed consent is a basic ethical philosophy of scientific research on human participants. Generally, research that involves human participants must always be conducted with the necessary informed consent. If the research involves minors, that is, persons under the age of 21 years, prior consent from parents or legal guardians must be obtained.

37 Hurka T Aristotle on virtue – wrong, wrong and wrong”, in Peters J (ed) *Aristotelian ethics in contemporary perspective* (Routledge New York 2013) 9–26.

38 Davies P, Francis P and Jupp V *Doing criminological research* 2nd ed (Sage Publications London 2011).

39 Beauchamp TL and Childress JF *Principles of Biomedical Ethics* 4th ed (Oxford University Press New York 1994).

- **No harm to participants**

One of the common ethical challenges is to have the ability to weigh the potential benefits from doing research against the possibility of harm to the people being studied (participants).⁴⁰ However, the cardinal rule is that participants must be protected from any conceivable discomfort or emotional distress emanating from the research project.⁴¹ Thus, it is your duty as a researcher to inform the participants of the general purpose of the study. Furthermore, you must indicate to the participants their role in your research project.

- **Anonymity**

Anonymity addresses many potential ethical difficulties. Firstly, it relates to the duty to ensure that it is impossible to identify the participants in a research project. This is normally achieved by separating the identity of the participants from their responses. Secondly, anonymity can be associated with privacy and confidentiality. On the one hand, it may be necessary to allow the participants the right to decide to how, where and to what extent their “attitudes, beliefs and behaviour will be revealed”.⁴² On the other hand, information may have names or codes attached to it, but the researcher will have to keep the names or codes secret from the public.⁴³

- **Voluntary participation**

It is your duty as a researcher to ensure that the participants participate in your research voluntarily. Factors such as coercing, undue influence or deceiving the participants indicate the absence of or negate voluntary participation. This means that participants generally have the right to agree or refuse to participate in your research. Accordingly, you must always respect this right.

6.3 PLAGIARISM

6.3.1 What is plagiarism?

The term “plagiarism” is debated vastly in academia. What we seek to do here is to show you some of the accepted definitions of this term. The *Oxford English Dictionary* defines plagiarism as the “action or practice of plagiarising; the wrongful appropriations or purloining, and publication as one’s own, of the ideas, or expression of the ideas ... of another”. Furthermore, it is “fraud that occurs when a researcher steals the ideas or writings of another or uses them without citing the source”.⁴⁴

ACTIVITY 6.1

Find other definitions of plagiarism. Write these definitions in the space below and properly cite the source from which you accessed the information.

40 Babbie E *The practice of social research* 11th ed (Thompson Wadsworth Belmont 2007).

41 Babbie *The practice of social research*.

42 De Vos AS *Research at grass roots for the social sciences and human service professions* (Van Schaik Pretoria 2011)

43 Neuman WL *Social research methods: qualitative and quantitative approaches* 4th ed (Allyn and Bacon Boston 2000).

44 Neuman WL *Social research methods: qualitative and quantitative approaches*.

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6.3.2 Forms of plagiarism

Plagiarism manifests itself in various forms. Below are examples of cases of plagiarism:

1. It arises in situations where a researcher fails or omits to indicate clearly, for example with quotation marks or indent and different font, phrases or passages taken *verbatim*, that is, word for word, from a published or unpublished text, without crediting the original text and author.
2. It occurs in cases where a statute, case law, book, article, or electronic text is paraphrased without acknowledging the source or sources and the author thereof.
3. It arises in circumstances where more than a substantial part of or the entire statute, case law, book, article, or electronic text is used.

6.4 CONCLUSION

In this study unit, you were introduced to ethics in research. Specifically, it was demonstrated to you that you have a duty as a researcher to adhere to certain ethical principles. In addition, it was stated that conforming to the previously mentioned principles would often depend on whether you are doing document-based research or empirical research.

Consequently, we hope that you have learnt that the research process does not necessarily end as soon as you have collected or accessed the required information. Conversely, it is still necessary to ensure that your research is ethical before you can be granted a positive or pass mark.

Thank you to Dr M Njotini for his contribution to this study guide in 2017.