

Introduction to South African Law

Fresh Perspectives 3rd Edition

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The roots of our law

Chapters in this section

- **Chapter 1** What is the law?
- **Chapter 2** History and development of South African law

You will learn about

- The characteristics of a good legal system
- The influence of Roman and Roman-Dutch law on South African law
- The influence of English law in our legal system

The nature and history of our law

From the beginning of time, when people began living together in groups, they needed rules to give them order and security. From ancient days, when respected members or elders of society came together to solve problems or settle disputes or to make rules and decisions, they would sit in a special or sacred place to do so. Often this was under a great tree like the baobab. Not only did many people get justice and protection under this tree, but the law itself came to be compared to a tree.

Just like a tree, the law has roots, a trunk, branches and flowers or fruit growing from these branches. Although all legal systems can be described in terms of a tree, what differentiates one system from another is what is contained in the roots, trunk, and the branches of the tree and the kinds of flower and fruit that grow from these branches. We often say that you will know a tree by its fruit. In our example, this is so, as the flowers and fruit are the product of the legal system. If a tree bears fruit that is bad, it is often because of some problem in its roots, trunk or branches.

In this book, we are going to take you through the beautiful and strong tree that is our law. In Section 1, we start by looking at the soil in which our law grew and has its roots. In Section 2, we explore the sources of law that are the trunk of the tree, and that give it support. Here, we also look at the roles that the court structure and legal profession play in supporting or holding up the tree of law. In Section 3, we look at the branches of law. In Section 4, we see how international law fits into our tree, and finally, in Section 5, we think about law in the 21st century.

Let us look more closely at Section 1. We start by discussing the characteristics and requirements of a good legal system in Chapter 1. In Chapter 2, we deal with the soil and roots of South African law. Our law is the product of more than 2 000 years of legal development starting in Roman times. We show how the seeds of Roman law came to be sown in Holland, and how the Roman-Dutch law came to be transplanted to South Africa. You will also discover how English law became part of our official written law and that when the first European legal system was established, the people living in South Africa already had their own unwritten law.

So the South African legal system as we know it today is a combination and development of all three of these systems. Think of our baobab tree again. It often looks as if it is made of many trunks entwined together, which indeed reflects the history and nature of our law.

Look at page 2 for a picture of our tree of law and the way that we are going to work through it in this book.

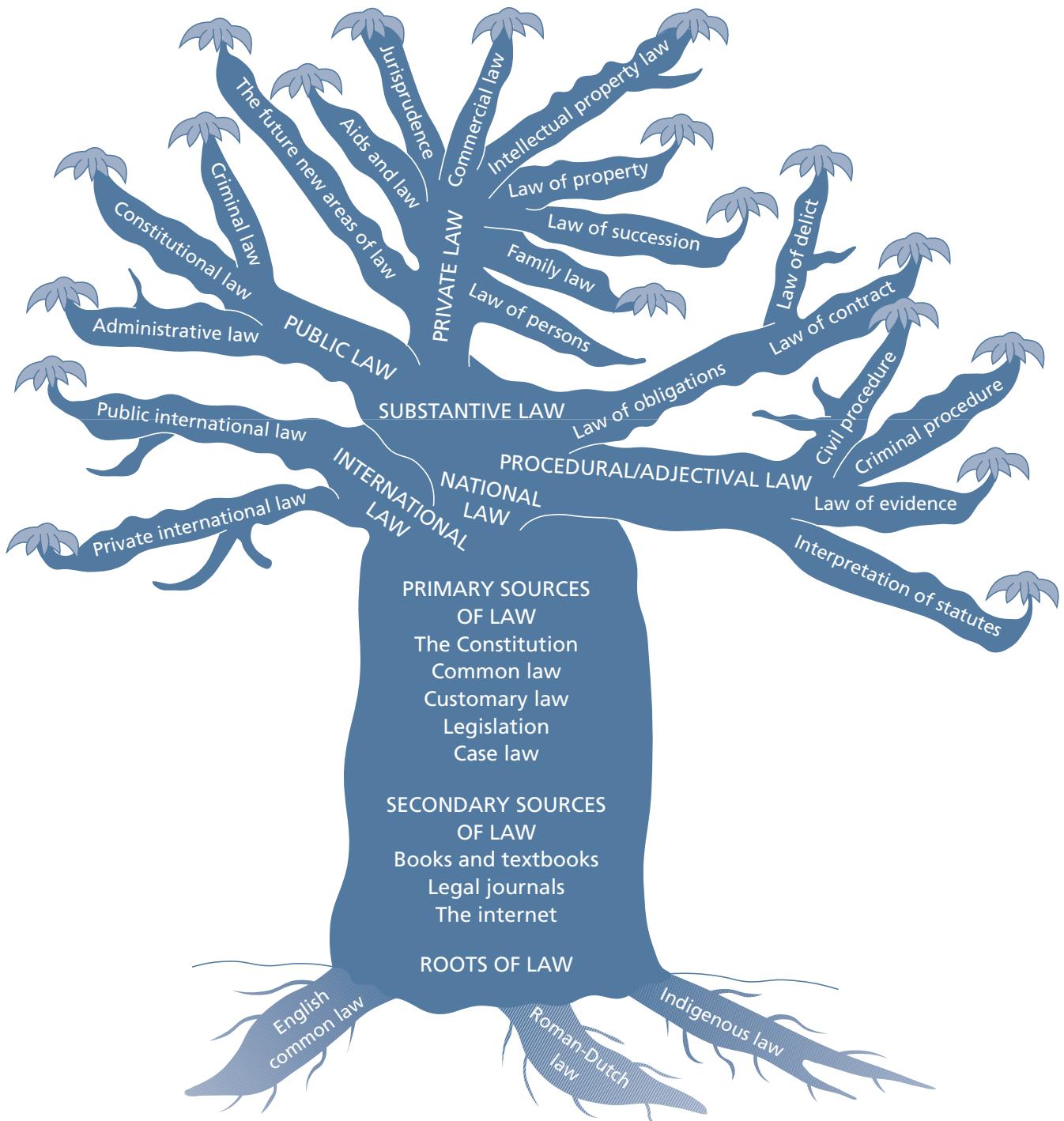


Figure 1.1 The tree of law

What is the law?

The main ideas

- The law is made by the people, for the people
- Functions of the law
- How a legal system functions
- Factors that determine the effectiveness of the law
- The nature of law

The main skills

- Understand the functions of the law.
- Understand the pervasiveness of law in everyday life.
- Describe and contrast natural law and positivist theories.
- Understand the origins of and need for laws.
- Explain factors that could prevent effective dispute resolution.

Apply your mind

Imagine yourself stranded on a remote island with a group of 1 000 men, women and children. You know that you will all spend the rest of your lives on the island. Do you think the group would need to agree on a set of rules or laws? List the rules or laws that you would need to make in order to survive.

Now imagine you are alone on the island. Would you still need rules or laws?

In this chapter, we look at what the law is and why it exists. We discuss how the legal system maintains and enforces the law to combine and balance two opposing ideas: freedom and order, so that society can run smoothly. We also consider two main theories on the nature of law.

Before you start

Imagine your lecturer asks you to play the following game in class. There is a prize for the winning team. Students remain seated as they are. All rows are not of equal length. The first student in every row is given a fifty cent coin. The lecturer tells you to start playing when she says ‘Go.’ The lecturer starts the game by saying ‘Go.’ The game has commenced. Do you know what to do? Why not? Is it because you have not been given instructions on the rules of the game? Vusi asks the lecturer what the rules of the game are. You are instructed that the fifty cent coin should be passed along each row and that the row who first manages to get a fifty cent coin to the end of the row will win. You start passing the coin along the row, but before the coin reaches the eighth student, the lecturer stops the game and now tells you that the coin should be passed over your left shoulders only. The game continues for a few seconds but is then stopped again by the lecturer who now informs you that the class forgot the rule that the coin should only be passed over right shoulders! Your row is penalised and given another fifty cent coin to pass as soon as the first reaches the end. The game commences again but is stopped this time because there are three blonde girls in two of the rows. These rows are no longer allowed to participate in the game. At last the game is concluded and the winning row gets to keep the fifty cent coin.

Discuss how the game made you feel. Was it unfair? Why? What could be done to make the game fair? Would clear and consistent rules, set out at the beginning, no changing of the rules, no discriminating or arbitrary rules and applying the rules equally have made the game fair? Why do you think this game was played during your first lecture on law?

Professor says	Laws, legislation and statutes
When we talk about a law, a statute, an Act or a piece of legislation, we are really talking about the same thing. All these words simply mean a rule, or a set of rules, made by an institution with the authority to make these rules. There are also certain laws that are unwritten, but which are accepted as part of the rules that organise a group of people.	

1.1 The law is made by the people, for the people

As human communities developed, the need for rules of organised and predictable behaviour to guide the relationships between individuals became increasingly important. Behavioural rules of early social groups were based on local customs and spiritual beliefs and enforced by powerful individuals or groups. These rules were usually founded on common sense, and transmitted to new members of societies by word of mouth. As these customary rules were adopted over long periods of time, they became accepted as laws, and part of the proper functioning of the society.

As societies became increasingly complex, there was a greater need for more formal and complex behavioural rules or laws. It was common for the law to be applied and interpreted inconsistently. This development made it necessary for the legal rules of society to be formalised. This is how the process of legislation came about. The legal rules that were enacted were usually there to limit the behaviour of individuals where such behaviour infringed upon the freedom of others, or was offensive to the community at large. The legal rules of a society reflect the cultural beliefs and values of the dominant groups within the society. This would occur in a democracy. In the olden days when kings ruled on the basis that they inherited their titles, their laws would not necessarily reflect those of the majority of the people.

Professor says	Different legal rules in different countries
The administration of justice and the application of law are functions of the worldview of a community at a given time in a given place. Decisions about the laws made in one particular community would often contradict decisions in another community, even when circumstances are similar. Some countries may have laws that allow for the chopping off of hands for stealing or stoning women who are suspected of adulterous affairs.	

Every society or country has laws to govern, or control the behaviour of its people. In a democracy such as South Africa, the people vote for candidates from a specific political party to represent them in the national, provincial and local governments. The party who receives the most votes determines who our elected representatives will be. It is their job to make laws. This is why you can say that in a democracy ‘the law is made for the people by the people’.

The state and its lawmakers identify the society’s individual, social, political, economic and other needs and problems. With the laws they make and implement, they aim to meet these needs and solve these problems. If the state and lawmakers are careful in identifying and resolving the society’s needs and problems, their laws should improve the quality of life of everyone in the society. Societies continually develop and make industrial, commercial, technological and scientific progress. They need new laws to regulate, or control, these new developments and to address new problems and needs.

Another way to understand the purpose of the law is that the law aims to preserve and develop the individual’s and the community’s **interests**.

The law exists to create order and harmony in the relationships between individuals (and even other things). In other words, the law has to balance the interests of the individual and the interests of society as organised in social **institutions** within the state, and even across state boundaries.

An **interest** can be any right of a community or individual, such as the right to personal property or the right to life.

Government structures, family, sports clubs and the workplace are all **institutions**.

The law is made by the people for the people and must therefore be obeyed by the people. The law applies to everyone. No one is exempt from the law because he or she holds a position of power. Each individual should be equal before the law. In the history of the South African legal system, you will see that people have not always been treated as equals before the law. We will come back to this problem in Chapter 24. Although the South African legal system had all the qualities of a good legal system, its flaw was allowing discrimination. Some of its qualities as a legal system will be discussed below.

Activity 1.1

We say that the law applies to everyone. Do you think that this is always a reality? Give reasons for your answer.

1.2 Functions of the law

As we have said, the basic task of the law is to combine and balance the conflicting ideas of freedom and order. But how does the law achieve this? The law of a state has seven main functions:

1. setting pre-existing, impartial rules, based on criteria that can be used to judge and settle conflicts
2. protecting the rights and freedoms of the individual
3. facilitating, or making change possible
4. protecting society by serving as a framework defining orderly conduct
5. providing a mechanism to legitimise actions by the state
6. protecting and preserving the legal system
7. providing institutions and procedures to settle disputes.

1.2.1 Setting pre-existing, impartial rules, based on criteria that can be used to judge and settle conflicts

At the outset of this chapter, the game with the fifty cent coin illustrated the importance of good law to set pre-existing, impartial rules based on fair criteria by which behaviour can be judged in the process of dispute resolution.

1.2.2 Protecting the rights and freedoms of the individual

For any society to survive and be successful, it needs laws to govern human interactions. However, at some points in history, many states have used laws to ensure continued positions of power of a ruling party and thereby infringed on, or violated the rights and freedoms of certain groups or individuals.

Professor says	Apartheid and our past
<p>The South African legal system enforced apartheid (separateness) from 1948 to 1994. The apartheid system legally classified people into racial groups and set out the rights of each group. This system was implemented and enforced by the law. The most important apartheid laws are listed here.</p> <ul style="list-style-type: none">• The Population Registration Act 30 of 1950: this law required all citizens to be registered as black, white or coloured.• The Group Areas Act 41 of 1950: according to this law, different population groups had to live in segregated areas. For example, an Indian person could not own land in an area that had been allocated to white people.• The Extension of University Education Act 45 of 1959: although this Act creates the impression of making tertiary education more accessible to all citizens, the effect it had in practice was that the education of different population groups was segregated. There were separate ministers for Bantu (black), Indian and Coloured affairs. Only in exceptional circumstances were white universities able to accept black students.	

Professor says (continued)

- The Black Homeland Citizenship Act 26 of 1970: according to this law, different indigenous groups were allocated separate **homelands**. For example, Mandisi, a Xhosa man, would live and work in Johannesburg, but he was only a citizen of his homeland (either the Transkei or Ciskei) and could not become a citizen of South Africa.

In South Africa today, individual rights and freedoms are entrenched, or rooted, in our Constitution. The Constitution is the **supreme law** of the country, and such infringements of basic rights and freedoms are unlikely to occur again if the Constitution is upheld.

To remember South Africa's history, the preamble, or introduction, of the Constitution of the Republic of South Africa, 1996 states:

'We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity'.

The **homelands** during the time of apartheid were Transkei, Bophuthatswana, Venda, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa and QwaQwa.

The Constitution is the **supreme law** because all laws have to be measured against the ideas and rules in the Constitution.

Activity 1.2

What do you think were the injustices of our past?

Chapter 2 of the Constitution, which is known as the Bill of Rights, has entrenched certain basic rights and freedoms. If you look at the **Bill of Rights**, you will see there are five categories of human rights, as listed below.

- Personal liberty, or freedom, and equality: The rights in this category are found in the following **sections** of the Bill of Rights – sections 9, 10, 11, 12, 13, 14, 15 and 21.
- Economic and social progress: You will find the rights in this category in sections 22, 24, 25, 26, 27, 28 and 29
- The administration of justice: The rights from this category are in sections 12, 32, 33, 34, and 35.
- Freedom of expression: The rights from this category are in sections 15, 16, 17, 30, 31 and 32.
- Political freedom: These rights are described in sections 7, 19 and 20.

You will find the **Bill of Rights** at www.concourt.org.za

Acts are divided into **sections**.

Activity 1.3

- As you look at the sections of the Bill of Rights, make a list of the rights included in each of the five categories.
- Look at section 36 of the Bill of Rights. This section deals with the limitation of the rights mentioned above. This means that these rights can be limited under certain circumstances. What are these circumstances? Do you agree with them?

1.2.3 Facilitating change

Our social, economic, political and environmental conditions are constantly changing. These changes are brought about by changes in our values, attitudes and needs, and advances in, for example, technology, science and medicine. The law has to adapt to accommodate these changes and the challenges they bring.

The law is constantly changing, as legislators enact, amend and repeal legislation or change regulations governing the implementation of legislation. The law also changes because of public pressure, or in reaction to new circumstances in society.

In the 20th century, issues associated with what was then new technology, such as wireless transmission of communication signals (television and radio), automobile transportation and air transportation, required the development of new laws and regulations to guide usage. In the 21st century, evolution of the biotechnology and information technology industries, dilemmas in healthcare (such as issues associated with HIV-AIDS, euthanasia and access to health services) and issues associated with personal privacy in the electronic age, all demonstrate the changing circumstances that force institutions to evolve in order to meet and reflect the needs and desires of society.

Over time it is necessary to amend or replace laws that are outdated, contradictory or where the reasons for the particular law have fallen away. Situations that give rise to the need for new laws, can also arise.

Read the newspaper report below.

Being harassed? New law can help

Johannesburg – No longer will you be able to send someone an anonymous SMS with sexual innuendo or constantly bully a classmate at school without facing legal consequences.

A new act to protect victims from stalking, sexual harassment, electronic abuse and school bullying has come into law.

The Protection from Harassment Act 17 of 2011 came into effect on Freedom Day. It is a law which enables all citizens to approach the courts for protection from harassment.

This includes letters, SMSes, email messages and Facebook posts.

The new legislation means people who feel they are being harassed can

apply for a protection order at their local Magistrate's Court without any legal representative.

Courts can give an order which compels service providers to provide the addresses and identity of offenders.

Previously, only people involved in a domestic relationship could seek a protection order.

According to *Women 24*, who quoted attorney Louise Bick, the harassment can be direct or indirect, so following, spying on, pursuing or accosting someone is viewed as harassment.

It also includes loitering outside or near a building where a person works or lives.

Sexual harassment includes unwelcome behaviour, suggestions, messages or remarks of a sexual nature.

A child under the age of 18, or an adult on behalf of a child, may apply for a protection order. This can be done without the assistance of a child's parents.

A person can also apply for protection on behalf of someone else. This is to protect those with disabilities, says Bick.

Courts can grant interim protection orders and issue warrants of arrest.

If the protection order is not followed, the perpetrator can be fined or jailed for a maximum of five years.

Source: <http://www.iol.co.za/news/crime-courts/being-harassed-new-law-can-help-1508522>

1.2.4 Protecting society by serving as a framework defining orderly conduct

The law defines relationships and creates authority. The law is required to define the status, functions and powers of individuals and government, social and administrative **organs**.

Just as the body has **organs**, such as the heart and lungs, the government has organs or institutions, such as the police, to do its work.

Laws relating to issues such as marriage and other partnerships, **custody** of children and labour relations, are all examples of laws that regulate our social relations and behaviour. The law does not only regulate relationships between parents and children, but also between domestic partners. A business partnership, as well as the relationship between a company and its shareholders, must be regulated. The law also determines when a person can be held responsible for his or her crimes or place age restrictions on the performance of certain actions, for example when he or she qualifies for a driver's licence or when it is legal to use alcoholic beverages.

Custody of children is the protective care of children by a legal guardian.

This helps the state to maintain order. There are instances where there will be tension or conflict between laws that function as protection of the freedom of the individual and laws as a mechanism of control for the orderly functioning of the state. Of course you would have preferred to be driving legally from the age of fourteen, but the need for order and the protection of society have an interest in allowing only individuals who are eighteen years old and who are considered to be more responsible drivers, to qualify for a licence after testing. In time 16-year olds may be considered to be mature enough to be driving a motor car legally.

1.2.5 Providing a mechanism to legitimise actions by the state by enforcing accountable administrative action

The law must also order the ways in which the state should function. All states have legal organs and officials who make, administer, interpret and enforce the law. According to the Constitution, the state should strive to be open and should take responsibility for the actions of these organs.

The law defines what powers these organs and officials have, and what procedures they must follow in exercising these powers. The legal system attempts to control the misuse and abuse of these powers.

Public law and procedural law also play an important role in founding legitimacy for state actions and legal procedures.

1.2.6 Protecting and preserving the legal system

Once a legal system is in place, it is important to ensure that the system can use the law to protect itself from internal or external threats. As mentioned above, the Constitution is the supreme law of the land and regulates the entire legal system. The Constitution can only be changed by a two third majority of the National Assembly and six provinces in the National Council of Provinces. Respect for the law is guaranteed by *inter alia* making the following criminal acts:

- Contempt of court: A person is in contempt of court if he intentionally disobeys or disregards a court order, or is guilty of misconduct in a court.
- Perjury: This is the crime of making a false statement under oath.

1.2.7 Providing institutions and procedures to settle disputes

Another important function of the law is to put in place institutions, people, procedures and processes to settle conflicts or disputes between individuals, between individuals and the state and between states.

1.3 How a legal system functions

As we discussed briefly, the law is driven by a legal system. It consists of the many people and institutions responsible for:

- law-making
- **legal interpretation**
- **adjudication**
- law enforcement
- legal administration
- giving legal advice and representation.

Legal interpretation
means deciding the meaning of phrases, words and legal terms for legal purposes.

Judges and magistrates are responsible for **adjudicating**, or resolving disputes.

1.3.1 Law-making

The Constitution is the supreme law of the country and **binds** all legislative, executive and judicial organs of the state at all levels of government.

- The **legislative**, or law-making, **organs** are Parliament, the provincial legislatures and the municipal councils.

To **bind** means to compel a person or institution to follow a set of rules.

The **legislative organs** are also known as legislatures.

To **repeal** a law means to cancel or revoke a law.

Schedules are annexures or additions, usually containing listed items, and are found in legislation for easy access.

The Constitution specifies how the legislatures should conduct the law-making process.

Parliament has the power to pass new laws, amend existing laws and **repeal** old laws on a national government level. Repealed laws are sometimes replaced with new laws. The provincial legislatures exercise the same power on a provincial level, and municipal councils on a local level.

Schedules 4 and 5 to the Constitution list areas in which Parliament and the provincial legislatures are competent, or able, to make laws. Schedule 4 lists those areas in which the two legislatures share the power to make laws (for example, agriculture, consumer protection, health, housing, public transport, and regional planning and development). Schedule 5 lists the areas in which the provincial legislatures make laws (for example, libraries, liquor licences and veterinary services). Part B of schedule 4 and part B of schedule 5 list the areas in which municipal councils make laws (for example, markets, noise pollution, traffic and sanitation services). The Constitutional Court has a testing right for legislation.

1.3.2 Interpretation and adjudication

The courts and their judges and magistrates are responsible for adjudicating and interpreting the law.

In terms of section 165 of the Constitution, the judicial authority in South Africa is vested in, or placed in the hands of, the courts. The courts are independent; they are only subject to the Constitution and the law. Section 39(2) of the Constitution specifically grants law-making powers to every court

'[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

When adjudicating and interpreting the law, judges and magistrates should be independent of the state. They should not be influenced by their personal feelings or beliefs when they have to make decisions.

1.3.3 Law enforcement

The task of seeing that the law is enforced in the country lies with the South African Police and other law enforcement agencies, such as the Directorate for Priority Crime Investigations (DPIC), known as the Hawks.

Read the following newspaper report.

Gunmen involved in over 1 000 murders the focus of SA's 'biggest ever' firearms investigation

Cape Town – A gun smuggling investigation said to be the biggest in South Africa, which has been hampered by murders, an information leak and tensions among some of the Western Cape's top police officers, has been handed over to the Hawks and is back on track.

Investigators are now said to be focusing on, among other aspects,

gunmen who carried out more than a thousand murders.

However, the investigation, which sources with knowledge of say is the biggest in the country and which they say was initially being handled by Gauteng and Western Cape organised crime policing units, still faces hurdles.

Several sources say during a period when the future of the probe was

uncertain, some suspects were murdered and others fled.

Gunmen have therefore become the focus of the investigation, but tracking them could prove tricky as firearms pass many hands.

Over months, sources have said the investigation, which included probing how guns stolen from police were sold to gangsters, was set to

lead to high level arrests in at least three provinces.

Info leak and infighting

But the mammoth investigation into illegal gun networks, which started a few years ago, has been hindered by several events.

These include that:

- It emerged in May that a confidential investigation diary in the matter was leaked. News24 understands it was apparently to lawyer Noorudien Hassan before he was murdered in November 2016. News24 also understands that the leaked information, relating to the case and with details about an informant, was apparently found in Hassan's offices after he was killed. Hassan was part of a legal team representing an accused who allegedly sold guns to gangsters. No arrests were made for his killing.
- The Western Cape's Crime Intelligence division became embroiled in the court aspect of the matter, with a court ordering its head to see to it that the lawyer of an accused handed over leaked confidential documents to the State by June 9, 2017. It was not immediately clear if this happened.
- High-ranking Western Cape policeman Jeremy Vearey, who was instrumental in the investigation, in May told News24 that police and crime intelligence officers were conspiring with politicians and gangsters in an ongoing attempt to derail critical investigations. While Vearey did not detail which investigations, News24 understands the firearms matter is one of these.
- In June 2016 Vearey and another top policeman deeply involved in the guns investigation were suddenly shifted from their positions within the police.

These events are said to have derailed the investigation as a team probing the matter fragmented and focus was diverted.

Back on track

News24 understands, however, that the team has since reassembled with the sole task of probing the gun smuggling matter.

Members are also no longer stationed where they were before.

It is understood they were recently moved to work with the Hawks.

Western Cape Hawks spokesperson Captain Lloyd Ramovha confirmed this, telling News24 last week: "The matter is with us."

The court case aspect of the mammoth gun smuggling investigation is now also back in focus – the Western Cape's head detective has until the end of Monday, July 31, to hand over 3 028 dockets to the prosecution team in the matter.

This was ordered by the Western Cape High Court in May.

News24 understands the 3 028 dockets are linked to stolen guns and are for murders, attempted murders and illegal firearm possession.

National police spokesperson Brigadier Vishnu Naidoo said because the last date of compliance on the court order, being July 31, had not yet lapsed, he was not prepared to comment on whether the dockets had been provided to the prosecution.

"In view of the fact that the matter is still pending SAPS will not discuss the matter of compliance thereof in the public domain at this point in time," he said.

Guns to gangs court case

High profile arrests in the investigation so far include that of Rondebosch businessman Irshaad "Hunter" Laher,

Vereeniging arms dealer Alan Raves, and ex-police colonel Chris Prinsloo, who has since been convicted.

They are linked to the alleged selling of firearms, meant to have been destroyed by police, to gangsters around the Western Cape.

In June 2016, Prinsloo was sentenced to 18 years behind bars after entering a plea and sentence agreement with the State.

Prinsloo was in charge of the police armoury and stole 2 400 guns over almost a decade.

These weapons had to be kept locked in sealed steel boxes at the confiscated firearms store in Silverton, Gauteng, before being destroyed.

According to an amended indictment, Laher allegedly offered Prinsloo R2m in exchange for stolen firearms and ammunition that were meant to be destroyed.

Raves, a Gauteng arms dealer, was arrested in Vereeniging in August 2015 and was charged in Bellville.

It is understood the State believes Raves started working with Prinsloo in 2007.

Laher and Raves, who missed previous court appearances due to health problems, are expected back in the Western Cape High Court in September.

'Sidelined'

Vearey and Major-General Peter Jacobs were previously instrumental in the investigation.

In June 2016, Vearey, who was deputy provincial commissioner for detective services, was suddenly shifted to a position he had previously filled – commander of the Cape Town cluster of police stations. Jacobs, who headed the province's crime intelligence unit, was appointed Wynberg cluster commander.

They have taken on police management in the Cape Town Labour Court over this.

1 066 murders and counting

Jacobs, in an affidavit in the labour court matter, said 888 of 2 000 firearms Prinsloo supplied, were forensically connected to 1 066 murders.

This was for the period between 2010 and May 31, 2016.

News24 understands that many firearms stolen from the police are yet to be located.

One source said it was believed 28 gang members in Cape Town were in

Gang shootings have recently surged in several parts of Cape Town, including in gang hot spot, Bishop Lavis, about 18 km from the city centre and a 28s stronghold.

Source: <http://www.news24.com/SouthAfrica/News/gunmen-involved-in-over-1-000-murders-the-focus-of-sas-biggest-ever-firearms-investigation-20170731>

The law enforcement agencies can use the law to bring offenders to a court of law.

1.3.4 Legal administration

The Constitution determines how the government and government **administration** should operate. The Constitution also includes a Bill of Rights that all citizens and the state (including those in government and administration) must obey.

Administration refers to the organs and officials that run the national, provincial and local authorities.

1.3.5 Legal advice and representation

The legal system is organised around the legal profession, which consists of attorneys and advocates. The legal profession is responsible for giving legal advice to people who need it.

Subsidised means that the costs for legal services are partly supported by financial support of the state or other financial grants.

Many people in our society cannot afford legal services. South Africa has a system of legal aid. Legal aid refers to legal consultation or representation provided to financially needy clients at no charge or at **subsidised** rates. Legal aid clinics at universities play an important role in providing advice and legal assistance to the poor.

1.4 Factors that determine the effectiveness of the law

A number of factors determine how well particular laws achieve the objectives discussed above.

These factors include:

- public awareness, understanding and acceptance of the law
- enforcement of the law
- consistency in the law
- clarity in the drafting of law
- changes and stability in the law.

1.4.1 Public awareness, understanding and acceptance of law

It is important for us, as a society, to understand how the law regulates certain aspects of our lives.

We have to be aware of our rights and duties. Awareness campaigns such as *Arrive Alive*, which reminds motorists of their responsibilities when driving, can be seen as an example.

There is no doubt that to enjoy rights under the law one has to be aware, have knowledge of such rights and be aware of which institutions can be approached to enforce these rights. One cannot enjoy or enforce rights that one is not aware of. In January–February 2003 a survey was conducted to determine the level of public awareness and perceptions regarding the protection of constitutional rights in South Africa. Of those surveyed 46% knew about the Bill of Rights and the Constitution. This was lower than any in previous surveys.

In a follow-up survey conducted in Gauteng, Mpumalanga and the Northwest in 2016, 62% of the 1200 respondents had heard of the Constitution and 60% of the Bill of Rights.

For the law to be effective, the majority of citizens should also accept the law. Law that negates, or takes away, the rights of citizens or gives little legal protection will not be accepted. In a democratic society such as ours, citizens will not vote for a government where such laws are found and in such an instance the governing party may not receive the majority vote in the next election.

1.4.2 Enforcement of the law

People can be informed about the law, understand it and give support to it, but law that is not enforced will not operate effectively. If people do not see the law being enforced in their interests and for their protection, there will be chaos. The following factors complicate law enforcement:

- It is difficult to effectively detect breaches of the law.
- Violations are not reported by the public.
- It is difficult to gather evidence of the crime.
- The sanctions or punishments that are imposed are inappropriate.
- The time between the dispute arising and the conclusion of the trial is too long.

Case study	Ineffective law enforcement
Read the newspaper article below and answer the questions that follow.	
<p>Cape court strikes a blow for city's sex workers</p> <p>Cape Town sex workers won a significant court victory this week when the Western Cape High Court interdicted the police from arresting them unless it was with the intent to prosecute.</p> <p>Too many sex workers were arrested so that the police could 'harass, punish or intimidate' them, with at least one sex worker claiming to have been arrested about 200 times in the past six years 'but never prosecuted', said The Sex Workers' Education and Advocacy Task Force (Sweat).</p> <p>Judge Button Fourie said evidence also showed that the police generally did not even open case dockets for sex workers arrested.</p> <p>Police dockets are normally handed to prosecutors to enable them to decide whether or not to prosecute.</p> <p>Fourie said the purpose of an arrest was to bring someone before a court. If the police were to arrest a sex worker when they 'knew with a high degree of probability that no prosecution would follow' it would be an unlawful arrest.</p> <p>The police had not 'seriously disputed' sex workers in Cape Town were 'rounded up, arrested, detained and, virtually without fail, thereafter discharged without being prosecuted for any offence'.</p> <p>Fourie agreed with Sweat's argument that the police were targeting the public manifestations of sex work and not its illegality.</p> <p>'The arrests of sex workers therefore amount to a form of social control. This clearly infringes on the sex workers' rights to dignity and freedom,' he said.</p> <p>Fourie was also not convinced by the arguments by the police that officers wished that sex workers were prosecuted, but that this was outside of their control because the decision to prosecute or not was made by the public prosecutors.</p> <p>'Even if the arresting officers wished to have the sex workers prosecuted, they knew with a high degree of probability that it would not happen,' he said.</p> <p>Fourie said that it was already well established in law that a person should not be arrested for an ulterior purpose. He therefore would not grant a declaratory order to that effect.</p>	<p>Ineffective law enforcement</p>

Source: <http://www.lrc.org.za/lrc-in-the-news/934-sweat-#1>

Case study (continued)	Ineffective law enforcement
<ol style="list-style-type: none"> 1. Why was the police prevented (interdicted) from arresting the sex workers? 2. Why are people usually arrested? 3. Which rights of the sex workers were infringed? 4. Why was the arrest under the circumstances ineffective law enforcement? 	

1.4.3 Clarity in drafting the law

Imagine your university has a rule: No animals on campus. The rule seems clear, but there have been certain disputes about the interpretation of the rule.

Remember the following:

1. To interpret a rule or law is to apply it to a new situation.
2. The interpreter looks at the written words of the rule or law and decides how to apply it to that particular situation.
3. The interpreter looks at the wording of the rule.
4. The purpose and effect of the rule is usually taken into consideration.



You are asked to interpret the rule in the following situations:

- Lauren brings her dog to lectures.
- The Department of Veterinary Science keeps pigs for research purposes.
- During graduation celebrations the crowd is controlled by police officers on horseback.
- Lungisi keeps a fish in his residence room.
- The secretary of the Department of Public Law has a pet miniature dog in her coat all day.
- The Department of Ethno-Musicology slaughters a goat for the opening of their new building.
- Sasha, a visually impaired student, comes to university accompanied by her guide dog.

In coming to your decision, try to be fair to the university and the individuals or those affected by the rule. Was it easy to come to a decision?

If the law is not drafted in a clear and **unambiguous** way, it cannot be used or applied effectively and people affected by that law will find it difficult to regulate their conduct accordingly. As you continue with your legal studies, you will find that laws which have too many exceptions or loopholes or are too complex for people to understand, will be less effective in their day-to-day effect and operation.

When something is **unambiguous**, there can be no confusion about what it means.

Lawmakers are faced with two conflicting principles. The first is to draft or write the legislation simply enough to be understood by the majority of people. The other is to provide for all the situations where the law may be applicable.

1.4.4 Consistency in the law

Given the huge number of laws, lawmakers are faced with the additional problem of ensuring that laws:

- do not contradict each other
- do not affect the efficient operation of other laws
- maintain a connection between how serious a breach of law is and the sanction (penalty) that is imposed for that breach.

If laws are inconsistent, they will be less effective, because the community and courts will have to resolve the conflict between two or more laws.

1.4.5 Changes and stability in the law

In a country such as South Africa, which is still going through a process of transformation, there is bound to be tension between stability and change. There is tension between the need for law to be stable,

and the requirement that law should also be responsive to new demands and different legal questions. On the one hand a certain level of stability is required for the sake of certainty while on the other hand the law needs to keep up with current needs. To ensure that law is kept up to date, all legal systems must have an effective method of changing and amending laws. The Law Reform Commission in South Africa plays an important role in this regard. Law that is changed many times within a short period of time can affect the citizens' confidence and knowledge negatively.

Read the following newspaper report.

Row as ConCourt legalises adultery

Johannesburg – For many years, if you cheated on your spouse in South Africa, you could end up being sued by the innocent partner. Not anymore.

The Constitutional Court ruled on Friday that adultery was no longer part of South African law.

The judges ruled unanimously that a wronged spouse could no longer sue for damages, reasoning that marriage was based on the concept of two willing parties and it did not seem appropriate in this day and age to have the law intervene in personal affairs.

The court said you could not attach a monetary value to marital fidelity and the third party involved in the infidelity could not be sued for damages.

In a unanimous judgment written by Judge Mbuyiseli Madlanga, the highest court in the land said it "recognised that, when developing the common law, courts must have regard to societal values which are based on constitutional norms. The central question in this case, then, was whether society would still regard it as legally unacceptable for a third party to commit adultery with someone's spouse."

The judgment found that the global trend was moving towards the abolition of civil claims based on adultery.

"Even in South Africa, it is clear that attitudes towards the legal sanction of adultery have been softening.

"Marriages are founded on love and respect, which are not legal rules, and are the responsibility of the spouses themselves.

"In the present case, the breakdown of the marriage was as a result of a failure by the spouses themselves to sustain their marriage and thus it would be inappropriate for the courts to intervene.

"In contrast, maintaining the claim in our law would infringe on various rights of adulterous spouses and the third parties, including the rights to dignity and privacy. Accordingly, adultery should no longer be punished through a civil damages claim against a third party," the judgment said.

A concurring judgment by Chief Justice Mogoeng Mogoeng and Justice Edwin Cameron (concurring) emphasised that marriage hinged on the commitment by the parties to sustain it, rather than the continued existence of a claim for damages for adultery by an 'innocent spouse'.

When a similar announcement was made in South Korea, the share price surged in the country's biggest condom maker, Unidus.

Author and professional marriage

counsellor Dr Buti Makwakwa said the precedent set by the Constitutional Court was a can of worms, opened to destabilise the sanctity of a marital union.

"The court is permitting adultery to be fashionable outside the ambit of our justice system. The court no longer has jurisdiction pertaining to perpetrators who forcefully and intentionally aim at breaking marriages," said Makwakwa.

"We need to stand as a radical army of God in enforcing marriage to reflect the sacredness of the holy matrimonial union as God intended it to be in the garden of Eden."

Former Cosatu secretary-general Zwelinzima Vavi, who was involved in an extramarital affair with a junior staff member, is allegedly being threatened by Jacqueline Phooko and her husband, who want R2 million for their silence.

Vavi has laid charges of extortion against Phooko, who he claimed was his lover.

Phooko's husband, who was the innocent spouse, demanded the money as compensation.

The late South African boxing world champion, Baby Jake Matlala, was in a similar situation and allegedly paid nearly R1m to the husband of a mistress.

Source: <http://www.iol.co.za/news/crime-courts/row-as-concourt-legalises-adultery-1874113>

1.5 The nature of law

You have learned that in a democracy rules of law are made by the people, for the people to balance the need for freedom with the need for order. We also looked at the law's functions and the factors that may impact upon its effectiveness. All of this may seem quite reasonable and logical and you should be able to enumerate and explain each point covered.

However, there is still one huge question about the nature of law. How you answer this question will influence your answers to questions such as: Are unjust laws laws at all? Can one disobey unjust laws? Can someone who obeys unjust and immoral laws be excused for atrocious and wicked deeds committed in the name of the law? Is the ultimate authority behind the law the fact that it is posited or laid down in legislation by rulers or does the legal and moral authority of the law come from other values or norms that are universal?

If you believe the latter you will be a supporter of natural law and if you argue for the former you will be a supporter of positivism. Natural law and positivism are important **ideologies** that form the foundation of the law. Courts and academics often use these ideologies to determine the rightness or wrongness of issues related to the law. However, the ideas that make up the ideologies of natural law and positivism are complex.

Throughout history, many people have had different opinions on the status of natural law and positive law.

An **ideology** is a system of ideas or theories that form the basis of political theory.

1.5.1 What is natural law?

Natural law theory has had widespread support throughout the history of law. Supporters of the natural law theory have regarded natural law as **fundamental** and better than any other theory of law. Some people have seen natural law as being made up of universal and eternal norms, or acceptable standards of behaviour, that arise from humankind's **reason**. This is why natural law is also called normative law. Other people have thought that natural law comes from a God figure.

Fundamental refers to a principle of law that serves as the basis of an idea or system.

According to supporters of natural law:

- there are unchanging principles of law that define what is right, just, and good (these principles should govern our actions)
- if we use our reason, we will discover these principles of law, since the principles are accessible to everyone
- principles of natural law apply to everyone, for all time and in all circumstances, and
- man-made laws (for example, those made by the state) are just and authoritative only if they are in accordance with the principles of natural law.

We can learn about natural law by using our intellect or **reason**.

Being honest, keeping promises, honouring your parents, being faithful to your life partner and caring for the young, weak and old are all examples of behaviour that develop from natural law. The human rights protected in the Bill of Rights reflect the basic, universal and eternal norms of natural law.

Natural law acts as a guide when the written law is not clear on a specific issue. Let us take another example. A doctor is experimenting with a deadly virus. Through no fault of the doctor, the virus begins to spread. The only way to prevent the spread of the virus is to seal the room and, in effect, leave the doctor to die. Is it fair to say that the person who seals the room must be convicted of murder? Followers of natural law theory would argue against the conviction of murder, because valid exceptions may be made. Why? According to natural law, someone may be killed to save the lives of many human beings. In other words, natural law is applied to fill the gaps in the written law.

In many cases, natural law has been used to criticise and address gross human rights **violations**. Let us look at two examples in the case study below – one from Germany and the other from our own country – where it can be argued that the norms of natural law were not followed. Once you have read through the case study, answer the questions that follow.

Human rights **violations** are deliberate attacks on the human rights of people, such as their right to life.

Case study	Natural law and crimes against humanity
	<p>The Nuremberg trials were held in Germany just after the end of World War II. The Nuremberg trials investigated and prosecuted those in the German military who were responsible for violating basic human rights.</p> <p>During World War II, the Germans implemented a deliberate policy to kill Jews. A policy of deliberately killing a particular nationality or racial, religious or cultural group is known as genocide. You could argue that the German generals responsible for the genocide were following the law of Germany. In other words, they could not be guilty of a crime if an act was in line with the law of their country. This argument belongs to positive law theory. However, according to natural law theory, the laws of a nation are not superior to the norms of natural law.</p> <p>Even if the law does not state that genocide is a crime and should be punished, the act of genocide is a crime that carries a harsh punishment. In other words, natural law theory states that there are universal norms that people have, not only a moral duty, but also a legal duty to obey.</p> <p>Our own Truth and Reconciliation Commission (TRC) reflects a natural law approach. The TRC was established in 1996 to investigate apartheid human rights violations. Although some individuals brought before the TRC had acted within the law of the South African government, the TRC found that they committed serious human rights violations.</p> <ol style="list-style-type: none"> 1. Prepare a paper for the class on other examples in recent history where you feel that natural law norms have been ignored. 2. Do you think people can differ on the norms of natural law? Discuss this in class.
1.5.2 What is positive law?	<p>Unlike supporters of natural law, positivists rely on the written law as the only authority. For example, if a law does not hold, or say, that dealing in drugs is a crime, no one can be found guilty if they sell drugs. Positivists also state that, in a legal dispute, it does not matter if a certain act is right or wrong. The issue in a legal dispute is whether the law says that a certain act is right or wrong. In other words, legal authority must come from written law and not from other sources, such as religion, morality, philosophy or science.</p> <p>Supporters of natural law would say that dealing in drugs, which has a serious effect on the drug abuser and society in general, is a crime, because our reason tells us that it is wrong. Since the beginning of time, the law has always been there for the protection of the individual. Positivists would say that dealing in drugs is a crime because the law says so. Humans make the law; therefore it has not existed since the beginning of time. Positivists would add that the content of the law can change over time. In other words, what is right today may not be right in ten years' time. Positivists would also say that under Brazilian law, for example, an action may be illegal. However, the same action may not be illegal in Australia. The positivists also view the law as a product of the state.</p>
Professor says	Ignoring natural law
	<p>During the time of apartheid, the state passed many laws that we can say ignored natural law norms. Judges were expected to interpret legislation in a strictly positivist way. This meant that they were bound by the law – unfair as it often was – contained in the legislation. In Chapter 24 the legal system of South Africa is used as a point of departure to discuss some of the most important theories of law.</p>

1.5.3 Learn to think critically about natural law and positive law theories

Natural law and positive law provide us with important insights into the law. As you progress with your legal studies, you will continually need to ask these questions:

- Must we (always) follow the law as it is written?
- Must we apply natural law to assist where the written law is vague?
- Must the law be in line with fundamental natural law principles?
- What are these natural law principles?

What do you think?

Now that you have worked through this chapter, what do you consider to be the most important functions of the law? Give reasons for your answer.

Chapter summary

In this chapter, we learned the following about the law:

- A state creates laws to maintain order in society.
- Legal rules are made by the people, for the people.
- Legal rules develop and change in response to individual, social and economic problems and society's needs.
- The purpose of the law is to preserve and develop the individual's and the community's interests.
- The law provides a framework for orderly conduct.
- The law orders the way in which the state must function.
- The law serves to protect and preserve the legal system.
- The legal system provides institutions and procedures to settle disputes.
- The law balances the rights and freedoms of individuals.
- The law regulates the way we live together.
- The law facilitates change.
- The law defines relationships and creates authority.
- The law provides for and controls accountable administrative action.

We have learned the following about the legal system:

- The law is driven by a legal system.
- The Constitution is the supreme law of the country and binds all legislative, executive and judicial organs of the state at all levels of government.

- The courts are responsible for interpreting and adjudicating the law.
- The legal system provides ways to enforce the law.
- The Constitution determines how the legal administration should be run.
- The legal system also gives everyone equal access to justice.

We also learned that the objectives of a legal system include:

- for individuals to know and to have access to the law
- efficient and affordable dispute resolution
- consistency
- fair hearings
- rights of appeal
- order and harmony in society.

We saw that the law can only be effective if there are:

- public awareness, understanding and acceptance of the law
- enforcement of the law
- consistency in the law
- clarity in drafting of the law
- changes and stability in the law.

Natural law and positive law are two important theories that influence our thinking on the nature of law:

- Natural law is based on universal and eternal norms. We use our reason to discover these norms, or they are given to us by a God figure.
- Natural law helps us to fill the gaps in written law.
- According to natural law theory, the laws of a nation are not superior to the norms of natural law.

- Positive law is different from natural law.
- Positive law theory relies on the written law as authority and separates law from norms.
- Both positivism and natural law theory have their disadvantages, but they give us important insights into the nature of law.

Review your understanding

1. ‘Laws are the result of the activity of people’. Make a list of laws that illustrate this statement.
2. One of the most important functions of the law is to facilitate dispute resolution, or to help people settle their disputes. Mention the factors that would prevent the legal system from carrying out this task efficiently.
3. Imagine that you are an unemployed single mother. Three weeks ago, you were involved in a taxi accident. As a result, you have permanently lost the use of your legs. You want to sue the taxi driver and the other driver involved in the accident, but you cannot afford to pay a lawyer to help you.
What can you do? You might find www.legal-aid.co.za a good starting point.
4. You are a supporter of the theory of natural law. Read the set of facts in Question 5, then decide whether you agree with the traffic official’s decision. Give reasons for your answer.
5. Mr Peterson parks his car in a one-hour parking zone. A notice clearly states that anyone who parks his car for more than an hour will be fined R200. After fifty minutes, Mr Peterson arrives at his car, only to find that municipal workers have parked him in to repair a hole in the road. He cannot remove his car from the parking zone. After two hours, a traffic official notices that Mr Peterson’s car has been parked for more than an hour in the parking zone. She issues a fine of R200.

Mr Peterson tries to explain that he could not remove his car, because the municipal workers had parked him in. The traffic official replies that she is only doing her job; she has no other choice but to apply the law.

6. Collect articles from newspapers, magazines and the internet that illustrate a specific function of the law, or why a given law is not working effectively. Choose two articles that you think best illustrate the issue concerned. Write a brief report to explain the area of the law concerned, the issue involved and why it is a good example of the issue.
7. Prepare a paper for the class on other examples in recent history where you feel that natural law norms have been ignored.
8. One day on First Street, Juju Vilakazi, who was seven, was riding his bicycle. He almost got hit by a car. The car was going very fast and did not have a chance to stop. Juju was riding his bike in the middle of the street where cars drive by. Juju got out of the way just in time. He was lucky. The people who lived on First Street knew that there was a problem. They didn’t want any children on bikes to be hit by cars. Propose three rules to would make things safer.
Which of the rules do you think we should use? Give reasons why you think a specific rule is good or why it is bad. If you think a specific rule is bad, create rules that would solve the problem.

Further reading

Constitutional Court website, <http://www.concourt.org.za>
(This site gives information regarding the history and functioning of the Constitutional Court as well as Constitutional Court judgments.)

Legal Aid Board website, <http://www.legal-aid.co.za>
(Visit this site for your general interest.)

Legal Resources Centre website, <http://www.lrc.org.za>
(The LRC promotes human rights and socio-economic development in South Africa.)