

1.1 Street law and law in general

Outcomes

After completion of this section learners will be able to:

1. Explain the purpose and meaning of Street law and law in general

Assessment criteria

1. An explanation of the purpose and meaning of Street law and law is given.
2. The relationship between law and everyday life is identified.
3. A set of facts is examined and a decision is taken on whether or not the accused were guilty of murder.
4. The relationship between law and morality is identified.

1.1.1 What is Street law?

contact with the law

Street law tells people about laws that affect them in their everyday life “on the street”. For example, every time a person buys something, rents a house, gets married or divorced, or is accused of a crime he or she comes into contact with the law. Street law will help you understand how the law works and how it can protect you. It also explains what the law expects you do in certain cases. It tells you about the different legal problems you should watch for and how you can solve them.

getting help to take action

Most people think that only the rich can win by using the law, and that it works against the poor. The law is confusing and it seems difficult to get help from lawyers without having money. Many people do not believe that poor people renting broken down houses can get a court to order the owner to fix them. They do not think that people who buy cars that do not work properly can force the garages which sold them the cars to make repairs or refund their money. Women who are beaten by their husbands probably do not know that they can use the law to prevent their husbands from assaulting them. Others probably do not believe that people assaulted by the police can get compensation for their injuries. It is important for people renting houses (called tenants) or the buyers of motor cars (called consumers), or the women beaten by their husbands, or the people injured by the police, to know about their legal rights and where they can get help to take action.

practical advice

Apart from telling you generally about problems in criminal law, consumer law, employment law, social and economic rights and family law, the Street Law Manual will also give you advice you can use in practical situations: What to do when you are arrested. Where to get a lawyer. How to get your money back when a shop sells you something that does not work. What to do if you are unfairly dismissed from your job. How old or sick people can get a pension. How to buy or rent a house. What parents and children are expected to do for each other.

Problem 1: The case of the silent radio

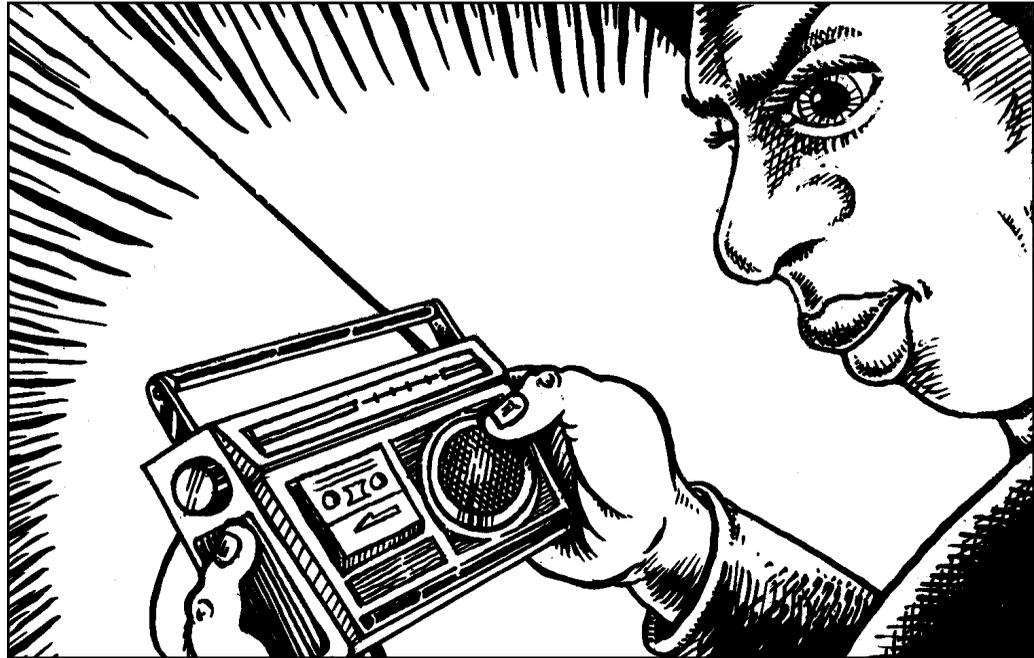
“as good as new”

Mrs Khumalo buys a second-hand radio from Ghetto Blasters Limited after the salesman had tested it for her. Her friend goes with her to the shop and hears the salesman tell her that it “works well” and is “as good as new”. Two days later the radio stops working and Mrs Khumalo takes it back to the shop.

radio was tested

The salesman refuses to do anything because the radio was tested by him when Mrs Khumalo bought it and it was working when she left the shop.

Two days after she bought it Mrs Khumalo's radio stopped working



Questions

1. What is the problem in this case?
2. If you were Mrs Khumalo what would you do?
3. What could her friend do to help her?
4. If this case went to court and you were the Judge what would you decide? Why?
5. Has anything like this ever happened to you or somebody you know? If so what was done about it?

thinking about the law

Street law also encourages you to think about the law from all sides so that you can understand how law works. For example, you would be expected to give your reasons when discussing questions like: What is the meaning of the law? Why was the law made? Do you think it is a "good" or a "bad" law? What are the arguments in favour of the law? What are the arguments against the law? Should the law be left as it is or changed? How are laws changed? If you were the person making the law how would you word the law?

understanding the law

Before you are given advice on how to use the law it is necessary for you to understand such things as: The meaning of the word "law". Where South African law comes from. How law is made. The different kinds of law. How the courts work. The types of lawyers and how they can help. What happens when you go to court? Problems you may face when going to court.

Problem 2: A few general questions

Questions

1. What is the purpose of learning Street law?
2. Should only lawyers know about the law? Give reasons for your answer.
3. Do you know anyone who has got into trouble with the law? If so what kind of trouble? Do you think that knowing about Street law would have helped them? How?

1.1.2 What is law?

rights and duties

It is not easy to answer the question: What is law? There are many definitions of law, but for our purposes, law can be defined as a set of rules used to control the behaviour of people in society. These rules tell people what they must do, what they may do and what they may not do. In other words they tell people about their legal “rights” and “duties”. They also tell people when they will be protected by the courts. This definition is not complete however because it does not answer questions like: Where do laws come from? Do we need laws? Are all laws written? Can laws be changed? If so, how? Are all laws fair? What is the difference between laws and “morals” (i.e. whether something is right or wrong)? What is certain, however, is that the law affects nearly every part of our daily activities even if we do not realize it.

laws and morals

Problem 3: Where would you change the law?

Questions

Make a list of all your daily activities (eg: washing up, eating, going to school). Next to each activity state whether you think there are any laws affecting it. What do you think is the purpose of these laws? Would you change any of these laws? Why or why not?

punishment and compensation

The law is binding on people. This means that its rules must be followed. If a person does not follow the rules, he or she may be punished by the court or be made to pay another person compensation or made to do other things. It does not mean, however, that a law must be fair or just to be a law. In the past, South Africa’s apartheid laws, which forced people of different races to live in different areas and attend different schools, were widely criticized.

some laws may be regarded as wrong

When studying the law we often have to think about the connection between laws and morals. Morals refer to behaviour that a particular society regards as right or wrong, and unless these morals have become part of the law the courts cannot be used to enforce them. For example, it may not be moral for a person to tell a lie to another, but it will not generally be against the law. (Unless it was done to cheat someone out of their property or to insult them.) Some laws, however, may be regarded as wrong by the majority of people in South Africa but they are still laws. For instance, many people think that the death penalty is moral, despite the fact that it is now unlawful. Similarly, many people think that laws that allow for abortion on demand are immoral. Other people, however, believe that these laws are justified. (These complex debates are discussed in Parts 2 and 4).

Sometimes it may be difficult to decide whether an act that appears to be obviously unlawful should be regarded as immoral or wrong. Usually what most people regard as wrong has also been made illegal. For example, murder would generally be regarded as wrong by most people in South Africa.

Problem 4: The case of the shipwrecked sailors

no food no water

Three people Dan, Sam and Bob, who worked on a ship as sailors, were floating in a small boat after a storm sank their boat. The ship sunk too soon to send a radio call for help. The three sailors were the only people who had not drowned. They had no food, no water and nothing to help them catch fish.

Bob, Dan and Sam agreed that one of them should be killed and eaten by the other two. But when it turned out to be him Bob wasn't so keen anymore



if one died the others could eat him

The three men spoke about their problem: Dan who knew about how ships travel, said they were about 1 600 kilometers from land, and that no ships were likely to pass near them. Sam, the ship's doctor, said that they could not live more than 30 days without food. They might be lucky and get some water from rain. He also said that if one of them died before the others, the other two could live for longer by eating the body of the dead person.

they killed and ate him

On the 25th day, Bob who was very weak suggested that the three should toss a coin and the loser should be killed and eaten by the other two. Dan and Sam agreed. Bob lost the toss and then refused to consent to being killed. Dan and Sam decided that Bob would die soon anyway and killed and ate him.

on trial for murder

Five days later Dan and Sam were rescued by a passing ship and brought to land. They were then put on trial for murder. The law states: Any person who intentionally and unlawfully kills another is guilty of murder.

Questions

1. Should Dan and Sam be charged with murder?
2. If you were the lawyer for Dan and Sam what would be your argument?
3. If you were the lawyer for the State (the prosecutor) what arguments would you make?
4. If they were found guilty (convicted) what should their punishment be?
5. What would be the purpose of convicting Dan and Sam?
6. What is the connection between law and morality in this case? Was it morally wrong for Dan and Sam to kill Bob? Explain your answer.
7. Can someone act legally, but immorally? Can an act be morally right but unlawful?

the courts enforce the laws

Parliament is the main law making body in South Africa. It can make new laws, change laws, give new rights or take people's rights away. In general, the courts enforce the laws that are made by Parliament. Parliament cannot, however, make laws that conflict with the Constitution. The Constitution contains a Bill of Rights and is the supreme law of South Africa. If Parliament makes a law that conflicts with the Constitution, certain courts, such as the Constitutional Court, have the power to rule that that law is invalid. In this way the courts protect peoples' rights.

unfair laws that conflict with the Constitution can be changed

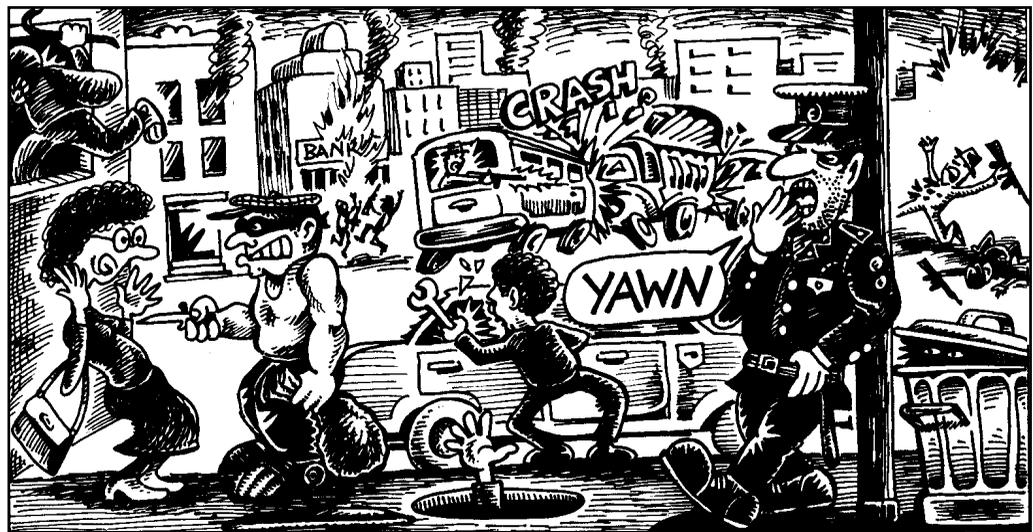
Laws may act harshly on people. A law can be unfair and still be the law. Judges cannot change laws made by Parliament because they believe them unjust or unfair. However certain courts in South Africa may change unjust or unfair laws that conflict with the Constitution.

laws are necessary

Every society has recognized the need for some law even if the laws were not written – as was the case in South Africa before the European settlers arrived. People governing a society need rules to control the conduct of the community. Without laws there would be confusion, fear, and disorder. This does not mean that all laws are fair or even good; but imagine how people could take advantage of one another without some set of rules.

Problem 5: Imagine there were no laws

Imagine the chaos in a large city if there were no laws



Questions

1. If cities did not have traffic lights what would happen? What if they had traffic lights but no laws against going through a red light? What would happen?
2. What would happen if there were no laws against stealing?
3. Do you think people always need laws to make them do what is moral or fair?

1.2 Where law comes from, how it is made and the different kinds of law

Outcomes

After completion of this section learners will be able to:

1. Demonstrate an understanding of where law comes from, how it is interpreted, and the different kinds of law.

Assessment criteria

1. An explanation is given of where South African law comes from and how it is made.
2. A set of facts is examined and a decision is taken on how the court would interpret the law.
3. A set of facts in a case is examined and a decision is taken on whether the judge calculated the damages correctly.
4. An explanation is given of how the Constitution operates.
5. A set of facts in a case is examined and a decision is taken on whether the Constitutional Court should have abolished corporal punishment for juvenile offenders.
6. A set of facts is examined and a decision is taken on which acts were criminal and which were civil wrongs.

1.2.1 Where South African law comes from

Before the European settlers arrived at the Cape, the people of South Africa had their own law and rulers. The pre-colonial rulers used Customary law to govern the people. The law was based on traditions and customs.

In 1652 Jan Van Reibeeck arrived at the Cape. He brought with him the law of Holland. This was called Roman-Dutch law. For the next 150 years, Roman-Dutch law was the official law of the Cape.

In the early 1800's the British took over the rule of the Cape from the Dutch. They brought English law with them. This led to the influence of English law, but Roman-Dutch law remained dominant and continued to develop.

In 1948 the National Party introduced apartheid, a political policy of racial segregation and discrimination. These laws were made by Parliament and were not part of Roman-Dutch law or English law.

In 1990, Nelson Mandela was released and the African National Congress was unbanned. All political groupings then participated in the negotiation of a Constitution for South Africa. The drafters of the Constitution were influenced by the constitutions of many other countries. In 1993 the Interim Constitution was passed and it came into effect in 1994. In 1996 the Final Constitution was passed. South African law cannot conflict with the Constitution. If it does, it is invalid.

The position in South Africa today is as follows:

1. The application of Customary law is usually limited to the courts of the Chiefs and Headmen, which preside in areas where communities still

Customary law	live according to Customary law. In general, Customary law has not been very important in South African law. Since 1994, however, in keeping with the Constitution's emphasis on tolerance of diversity, the courts have sometimes taken note of indigenous concepts such as ubuntu.
Roman-Dutch law	2. Roman-Dutch law has remained the basis of the South African legal system.
English law	3. English law has had an influence on South African law as it does today, especially in many of the Statutes (see para 1.2.2.1) that Parliament has passed regarding commercial and court procedures.
South African law	4. South African law is mainly Roman-Dutch with some English law and Statute law (law made by Parliament) influences, and limited recognition of Customary law. Importantly, all South African law is subject to the Constitution, which is the supreme law of South Africa.

Problem 1: The origin of South African law

Questions

1. Where does South African law come from?
2. Which legal system has had the greatest influence on South African law?
3. Why do you think Customary law is not so important in South Africa? Do you think that it should be more important?
4. What does the history of South African law tell us about where laws come from?

1.2.2 How South African law is made

In 1910, the four colonies of South Africa, the Cape Colony, the Orange Free State, Transvaal and Natal joined together to become the Union of South Africa. This created one central system of government with the former colonies as provinces. The central government was given the supreme law-making power.

Under the 1996 Constitution, South Africa now has nine provinces: the Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape, Limpopo, North West and Western Cape.

Levels of government

Nowadays, South Africa also has three levels of government: national, provincial and local. At the national level, South Africa is governed by Parliament, which consists of a National Assembly and a National Council of Provinces. The provinces are governed by provincial legislatures. Finally, at the local level, municipal areas are governed by municipal councils.

Legislation

Each of these bodies, Parliament, provincial legislatures and municipal councils, have the power to make laws. Laws passed by these bodies are called legislation. These laws are written. If a law is made by Parliament it is called a statute or an act. If a law is made by a provincial legislature it is called a provincial act. Finally, if a law is made by a municipal council it is called a by-law.

Common law

If a specific matter is not governed by legislation then the Common law applies. The Common law is not made by Parliament, or any of the bodies mentioned, and is not written down in statutes. Instead, it derives mainly from Roman-Dutch law. We will discuss Statute law and Common law separately.

1.2.2.1 Statute law

Statute law is made by Parliament, provincial legislatures and municipal councils

Statute law is written law. It is made by Parliament, provincial legislatures and municipal councils. However, Parliament, provincial legislatures and municipal councils may not make laws about anything: The Constitution states what each body may make laws about. Parliament may make laws about almost any matter. There are some matters, however, such as provincial roads, that only provincial legislatures may make laws about.

All South Africans over the age of 18 years may vote

Parliament is the most important body, and so we will focus on how it makes laws. A parliament should always consist of representatives of the community, chosen through elections that are held regularly, in which all adult citizens may vote. In the past, due to the South African government's apartheid policy, non-white people were not allowed to vote and were not represented in Parliament. Now all South Africans over 18 years of age are entitled to vote, and have a say in who makes the laws that govern South Africa.

Bills are introduced by Cabinet Ministers

When a need for a law arises, a Bill is introduced in the National Assembly by the Cabinet Minister responsible for that matter (Ministers run the different government departments). The Bill is debated by the members of the National Assembly, who may propose amendments to the Bill. Eventually, the members vote on whether the Bill should be passed.

The National Council of Provinces must approve all bills

If the Bill is approved by the National Assembly it is referred to the National Council of Provinces for approval. The purpose of the National Council of Provinces is to ensure that the provinces have a say regarding national legislation that affects the provinces. The Bill is also debated, and voted on, in the National Council of Provinces. If it is rejected, and the two houses are in disagreement, the Constitution says how the dispute must be resolved. If the National Council of Provinces approves the Bill it is referred to the President, who signs it. The bill is now a statute or an "Act".

Bills signed by the President become Acts

Acts are published in the *Government Gazette*

Acts are published in a Government newspaper called the Government Gazette. The statutes of South Africa are collected in Butterworths Statutes of South Africa and Juta's Statutes of South Africa that are available in most university law libraries. Some examples of Statute law are: The Criminal Procedure Act of 1977, which sets out the procedures in the criminal courts and the Credit Agreement Act of 1980, which controls what must be done when people buy on credit.

Statutes may allow Ministers of Government departments to make regulations

Sometimes a statute may give power to a person (e.g.: a Minister) or a body (e.g.: the Department of Correctional Services) to make "regulations" (rules). These regulations are not written in the Act, but are published in the Government Gazette and other newspapers. The most important regulations can be found in most university law libraries.

Acts that conflict with the Constitution are invalid

As mentioned, if Parliament passes legislation that conflicts with the Constitution, which is the supreme law of South Africa, that law is invalid. To give effect to this principle, the Constitution states that certain courts may test legislation against its provisions. If legislation conflicts with the Constitution, those courts may declare the legislation invalid.

When a statute does not conflict with the Constitution, the court must apply the statute. To do so, the court must interpret the statute. Often, to do this, the court must look at the intention of Parliament or the law-making body. The following problem shows the difficulty of deciding what a law intends.

Problem 2: No vehicles in the park

Are skateboards, bicycles and prams also vehicles?



A place of peace and quiet

The town of Tandi has established a lovely park in its centre. The town council wishes to preserve the feeling of nature, undisturbed by city noise, traffic, pollution and crowding. It is a place where people can go and find grass, trees, flowers and quiet. In addition, there are playgrounds and picnic areas. At all entrances to the park, the following sign has been posted:

“NO VEHICLES IN THE PARK”

The law seems clear, but some disputes have arisen over the interpretation of the law. Interpret the law in the following cases, keeping in mind what the law says (called “the letter of the law”) and what the lawmakers intended (called “the intent of the law”) Note: The dictionary defines a “vehicle” as something on wheels that carries people or things.)

Questions

1. John Reddy lives on one side of town and works on the other side. He will save ten minutes if he drives through the park.
2. There are many rubbish bins in the park so that people can deposit litter there and keep the park clean. The sanitation department wants to drive in to collect the rubbish.
3. Two police cars are chasing a suspected bank robber. If one cuts through the park, it can get in front of the suspect car and trap the robber between the police cars.

Are the police allowed to drive through the park?



4. An ambulance has a dying car accident victim in it and is racing to hospital. The shortest route is through the park.
5. Some of the children who visit the park want to ride their bicycles and skateboards there.
6. Mrs Dube wants to take her baby to the park in a pram.
7. A memorial to the town's citizens who died in the Second World War is being constructed. An army truck donated by the government, is to be placed beside it.

1.2.2.2 Common law

Common law is not made by Parliament

The Common law comes mainly from Roman-Dutch law, English law, and some times even ancient Roman law. The Common law is the law not made by Parliament, a provincial body or a municipal council. Since 1993, in keeping with the spirit of the Constitution, the courts have also taken note of Customary law and law brought to South Africa by other communities, such as the Islamic community. Like all law, the Common law may not conflict with the Constitution. The judges are required to develop the Common law to make it fit in with the Constitution. The judges in South Africa have developed the Common law, by interpreting and applying it to individual cases. Common law therefore develops from the rules made by judges in court decisions and written down in their judgments. Sometimes new decisions are taken by judges as to what the Common law means. These decisions state how the law must be interpreted in future and are called "precedents".

Decisions by judges are called judgments

The way in which the Common law has been developed is written down in the decisions of Judges in the High Court. In the High Court the people involved in a dispute (called the "parties") each present their case by calling witnesses and arguing about the law. The Judge then makes a decision about the case. This decision is called a judgment.

Problem 3: Statute law and common law

Questions

1. What is the difference between Statute law and Common law?
2. Who can change the Common law?
3. Who can change the Statute law?
4. If a town passes an unfair by-law how do you think the law can be changed?

A court decision or judgment is made in one of three ways:

Judgments and precedents

1. The Judges look at the law to see if there is a rule which covers the facts of the case. If there is a rule, they apply it to the case.
2. Sometimes there is no rule which covers the facts of the case. Then the Judges must make a decision based on their own opinion. They do this by looking at the facts of the case and the existing law. The judgment sometimes includes a new rule of law. This is called a "precedent".

a rule of law

3. Sometimes there is a rule which covers the facts of the case, but it has always been applied in a particular way. A person may argue that the rule can be applied in a different way.

a "precedent"

The Judge must then decide if this new approach is correct. If the Judge decides that the new approach is correct, he or she has given a new interpretation or explanation of the law. This judgment can also be called a precedent.

a new precedent

precedents are used to guide the courts

In law the courts are guided by precedents. A court must follow precedents set by courts that are higher than it. The highest courts in South Africa are the Supreme Court of Appeal (the highest court in all matters except constitutional matters) and the Constitutional Court (the highest court in constitutional matters). If a precedent has been set by the Supreme Court of Appeal on a non-constitutional matter, only the Supreme Court of Appeal or Parliament can change that precedent. If, however, a precedent has been set by the Constitutional Court on a constitutional matter, even Parliament may be bound by it and only the court itself can change it. Precedents set by these courts must be followed by all the High Courts and Magistrates' Courts. Similarly, precedents set by the High Courts must be followed by the Magistrates' Courts.

Problem 4: A case of pain and suffering

Radebe and his friends threw stones at Hough and his friend. Hough went to fetch a gun



Radebe was seriously injured

In 1949 a case called Radebe v Hough was argued in the Appellate Division. (The Supreme Court of Appeal was previously called the Appellate Division.) Radebe, an African, had been shot and injured by Hough, a White person. Radebe and some friends had thrown stones at Hough while they were out walking. Hough went to fetch a gun and he and his friend chased Radebe and his two friends into a room where shots were fired. Radebe was seriously injured. He was in hospital for 10 days and suffered severe pain in his private parts for three months. The Witwatersrand Local Division of the Supreme Court (now called the High Court) found Hough liable for assault and gave Radebe compensation of R32. The court took into account that Radebe was a poor man and an African for whom R32 in those days would have been a lot of money.

The court awarded Radebe R32

Radebe went to the Appeal Court

Radebe appealed to the Appellate Division saying that he had not been awarded enough damages. He also argued that it was wrong to take his race and the amount of money he earned (R4 a week) into account when compensating him for pain and suffering.

Hough argued that the courts in Southern Rhodesia (now Zimbabwe) and Natal (now KwaZulu-Natal) had previously said that poor people like Africans for whom a little money meant a lot should only receive a small amount in these cases. Hough argued that this was the correct approach in pain and suffering cases.

rich or poor - the pain is the same

The Appellate Division held that the earlier cases were wrong and that when giving damages for pain and suffering a court should not look at the race, or culture or financial position of the injured person. Both rich and poor people of different races and cultures suffer the same amount of pain if they are injured. The Appellate Division awarded Radebe R400 damages, a lot of money in those days. (Radebe was also entitled to his lost wages.)

Questions

1. What was the precedent set in this case?
2. Which courts have to follow this precedent?
3. Which courts would have to follow this precedent if it had been set by the Natal Provincial Division of the High Court?
4. Which body can change a precedent made by the Supreme Court of Appeal (previously the Appellate Division)?
5. If you were a Judge would you have decided in favour of Radebe's or Hough's argument? Why?

1.2.2.3 The Constitution

The Constitution sets out how the country is governed

A Constitution sets out the basic laws according to which a country is governed. There are different types of Constitutions. Some Constitutions are unwritten. This means that the country's basic laws are not set out in a single written document. Instead, they can be found in statutes made by Parliament, and in practices that have arisen over time. This was the position in South Africa before 1994, the year in which the Interim Constitution came into effect. Since then, however, South Africa has had a written Constitution. This means that the South African Constitution is a single document in which the framework for governing the country is set out.

If Parliament makes a law that conflicts with the Constitution the Constitutional Court can declare it invalid

In some countries, Parliament can change the Constitution whenever it wants to. These countries have "sovereign" Parliaments. This means that there are no limits on the types of laws that the Parliament can make. Before 1994, South Africa had a sovereign Parliament. This meant that the courts, and ordinary people, could not challenge the laws made by Parliament. Since 1994, however, Parliament has not been sovereign. Instead, the Constitution is the supreme law of South Africa. This means that if Parliament makes a law that conflicts with the Constitution certain courts can declare these laws invalid.

Since 1994 South Africa has had a democratic Constitution

The 1993 Interim Constitution and the 1996 final Constitution were South Africa's first democratic Constitutions. Before 1994 (the year in which democracy was introduced) the rules according to which South Africa was governed were racist. For example, black people could not vote and people of different races had to live in different areas. South Africa's Constitution is now democratic; for example, all South Africans over the age of 18 may vote and all South Africans are guaranteed basic rights, such as the freedom to live where they want.

Most people are aware that the Constitution gives them basic human rights (see below). However, not everyone is aware that the Bill of Rights is only 1 out of 14 chapters in the constitution. The remaining chapters mainly set out

Democratic countries have a "separation of powers" between Parliament, the Executive and the Judiciary

the law for how the country should be governed. The Constitution describes the laws for the main parts of government, namely Parliament (which makes laws), the Executive (which consists of the President and his Ministers and which executes laws) and the courts (which resolve legal disputes by interpreting the law). This is called the "separation of powers" and is found in democratic countries to prevent dictatorship by making sure that too much power is not held by the Executive. The Constitution also sets out laws for other important parts of government, such as the police and defence force, and independent bodies that protect human rights such as the Human Rights Commission and the Public Protector.

Problem 5: Some questions on the Constitution

Questions

1. Is the South African Constitution written or unwritten? What does this mean?
2. What is a "sovereign" Parliament? Is the South African Parliament sovereign? What, do you think, are advantages and disadvantages of having a sovereign Parliament?
3. What is meant by the "separation of powers". What are the main parts of government? Explain what each of them does. Why is the separation of powers important?
4. Do you feel that having a Constitution and a Bill of Rights makes any difference to your life? How do you think that your life may differ from what it might have been if you had lived when South Africa had a "sovereign" Parliament? Give reasons for your answer.

The Bill of Rights sets out basic human rights

The Bill of Rights sets out basic human rights. All South Africans are entitled to these rights. These rights protect citizens in their dealings with the State, (e.g., the Bill of Rights gives rights to people who have been arrested - see Part 2). However, these rights also protect people in their dealings with one another, (for instance, you cannot be fired from your job just because your employer does not like your race). If legislation or any part of the Common law violates a human right certain courts may declare that law invalid.

The Constitution contains the following types of rights:

Civil and political rights

1. Civil and political rights. These rights protect people against the state and against one another. Important examples of these rights in the Constitution are the rights to equality (i.e. freedom from discrimination); dignity; life; freedom and security of person; privacy; freedom of religion; belief and opinion; freedom of expression; freedom of association; freedom of movement and residence; and freedom of trade, occupation and profession.

Economic and social rights

2. Economic and social rights. These rights require the state to take positive action to improve peoples' standards of living. The Constitution includes a right to basic education. It also includes rights of access to adequate housing and access to health care services. This means that the State must take steps to realise these rights but is not expected to do so immediately.

Environmental, cultural and developmental rights

3. Environmental, cultural and developmental rights. These rights relate to groups of people. For example, the Constitution contains a right to an environment that is not harmful to one's health or well-being. The Constitution says that this is also for the benefit of "future generations."

Rights may only be limited if the limitation is reasonable and justifiable

All these rights are indivisible and may only be limited under certain circumstances. First, there must be a law that applies to all people. Second, that law must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Finally, a right may only be limited if it serves an important goal, and there is no other way to achieve that goal that would limit the right less.

Problem 6: A case about corporal punishment

Whipping of juvenile offenders was held to be unconstitutional

The Criminal Procedure Act used to allow for juvenile criminals (i.e. criminals under the age of 18) to be whipped. However, in 1995, after the Interim Constitution was passed, the Constitutional Court was asked to decide whether this type of punishment was unconstitutional. First, the court considered whether whipping violated any of the rights in the Bill of Rights. The Court held that it violated the rights to dignity, not to be subjected to torture and not to be subjected to cruel, inhuman or degrading punishment. Next, the court asked whether the violation of these rights was justifiable. The court held that other more humane forms of punishment could achieve the same goals as whipping. Also, whipping would not deter juveniles from committing crimes more than other forms of punishment. The Court held therefore that whipping juvenile criminals was unconstitutional, and the relevant sections of the Criminal Procedure Act were removed.

Questions

1. What rights did the Constitutional Court say were violated by sentencing a juvenile criminal to be whipped?
2. Why did the Constitutional Court say that the violation of these rights was not justifiable?
3. Do you agree with the judgment of the Court? Do you think juveniles should be whipped for certain crimes? Why or why not?

1.2.3 Kinds of law

There are two main kinds of law, criminal and civil.

the state brings criminal cases to court

Criminal law controls how people in society behave and what they are expected to do. In South Africa the "State" brings a legal action against a person charged with a crime. If he or she is found guilty by the court the person concerned can be imprisoned, fined (made to pay money), or punished in some other way. Therefore we can say: "A crime is a wrong against the State for which the wrongdoer (criminal) is punished by the State".

a civil case is usually brought by private person

Civil law controls how individual people or groups of people behave towards each other. The State is generally not directly involved as a party to cases that result from disputes between private people. (It may, however, be involved as a party if it is suing, or being sued, like a private person for a wrongful act. For example, if government property is damaged, or a government official injures somebody without good cause.)

A civil case is usually brought by a person (called the "plaintiff") who feels that he or she has been wronged (eg: injured, or his or her property damaged) by another (called the "defendant"). If the plaintiff wins the case, the defendant will usually be ordered by the court to pay compensation. Sometimes the court may also order a defendant to do, or stop doing, something (e.g.: to deliver something he or she has sold, or to stop damaging the plaintiff's property).

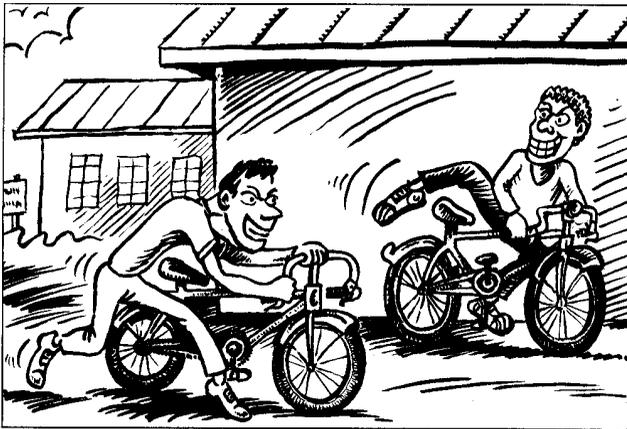
Civil cases usually deal with actions for damage to property, injuries to people, consumer problems, employment troubles, family problems, etc. We can summarise this by saying: "A civil wrong is a wrong against an individual for which the wrongdoer must pay compensation to the injured person".

sometimes an act may be both a civil wrong and a crime

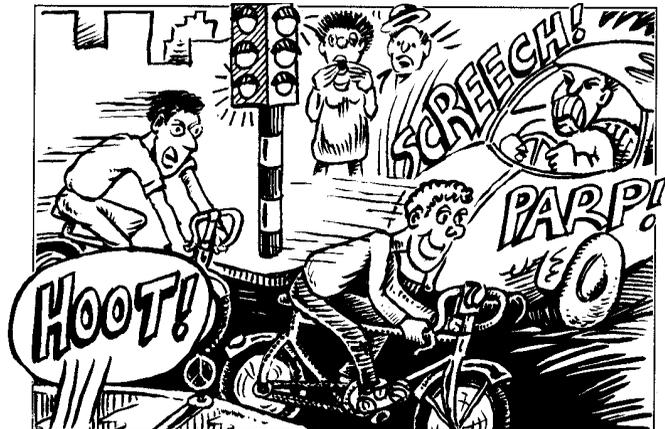
Sometimes a persons' act may result in both criminal and civil actions. For example, a person who assaults (wrongfully and intentionally injures) someone can be prosecuted by the State and if convicted punished for committing a crime. (Crimes and Criminal Law will be discussed in Part 2.) He or she could be sued for damages by the person injured in the assault and made to pay compensation for medical expenses, lost wages and pain and suffering. The criminal action for assault will be brought in a different court from the one where the civil action for damages is heard.

Problem 7: The case of the juvenile delinquents

John and Peter are bored. For excitement they steal bicycles belonging to people at their school. They decide to go into town and on their way ride through a red traffic light. They go into a radio shop and use their savings to buy a small radio. The shop-keeper sells them a radio which he knows does not work properly. The radio works for a couple of hours and stops. John and Peter become angry and hurry back to the radio shop. On their way John knocks over an old woman and injures her. The boys go into the shop and angrily assault the dishonest shop-keeper.



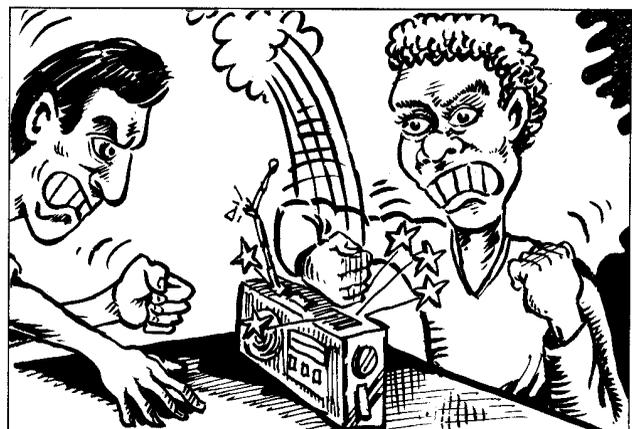
1. John and Peter steal bicycles belonging to people at their school.



2. On their way to town they ride through a red traffic light



3. The shopkeeper sells them a radio which he knows does not work properly.



4. The radio works for a couple of hours and then stops. They become angry.



5. On their way back to the shop John knocks over an old lady and injures her.



6. The boys go into the shop and angrily assault the dishonest shopkeeper

Examine the pictures and answer the questions below. Give reasons for your answers.

Questions

1. Which of these acts are unlawful?
2. List the acts that you think are crimes.
3. List the acts that you think are civil wrongs.
4. List the acts that you think may be both crimes and civil wrongs.

1.3 The courts and settling disputes outside of the courts

Outcomes

After completion of this section learners will be able to:

1. Demonstrate an understanding of how the courts and other dispute resolution mechanisms work

Assessment criteria

1. An explanation of the different courts in South Africa is given.
2. A decision is taken on how magistrates should be appointed.
3. A set of facts in a case is examined and a decision is taken on whether people were entitled to take the law into their own hands.
4. A stated problem is solved using mediation.
5. Sets of facts are examined and a decision is taken on the best method of resolving different disputes.

1.3.1 The different courts in South Africa

A civil court:
Clockwise from left:
plaintiff, advocate
for plaintiff, clerk,
judge, judge's
registrar, advocate
for defendant,
defendant



**courts decide
disputes**

The courts are used to make people obey the law. They do this by deciding disputes brought to them. In civil cases they order compensation by law-breakers. In criminal cases they order punishment of law-breakers. Another function of the courts is to interpret and apply the law to individual cases. Sometimes when the higher courts make new decisions these are called "precedents" (see para 1.2.2.2).

There are the following courts in South Africa:

Magistrates Courts

Magistrates' Courts: These are the lower or inferior courts which deal with less serious criminal and civil cases. There is usually a Magistrate's Court in every town. It is cheaper to bring cases in the Magistrate's Court than the High Court.

High Courts	High Courts: These are the higher or superior courts which usually hear more serious criminal or civil cases. There are only a few High Courts. They do not hear as many cases as the Magistrates' Courts. It is more expensive to bring an action in the High Court than in the Magistrate's Court.
Supreme Court of Appeal	Supreme Court of Appeal: This is the highest court in South Africa in all matters except constitutional cases. The court does not conduct trials, but only hears appeals (see below para 1.3.1.5).
Constitutional Court	Constitutional Court: This court is the highest court in South Africa for constitutional matters and may only hear constitutional matters.
Small Claims Courts	Small Claims Courts: These are the newest courts in South Africa and have been set up in a few of the major towns. These courts deal with small civil claims of less than R3 000.
Courts of Chiefs and Headmen	Courts of Chiefs and Headmen: In some areas, the chiefs and headmen of certain African communities have their own courts. These courts apply the Customary law of the specific community.

We will first look at the courts that can hear disputes between all people in South Africa.

1.3.1.1 Magistrates' Courts

There are many Magistrates' Courts but their powers are limited. They may not rule on the constitutionality of any legislation (statute) or the conduct of the President. Magistrates' Courts can be divided into different groups: criminal courts (regional and district) and civil courts.

1.3.1.1.1 Criminal courts

Regional Magistrates' Courts

serious crimes

The Regional Magistrates' Courts have more power than the ordinary Magistrates' Courts. The Regional Magistrates' Courts may hear all criminal offences, except treason. They may sentence a person to a maximum fine of R200 000 or 10 years imprisonment. They usually hear cases involving serious crimes like murder, rape, armed robbery and serious assaults.

District Magistrates' Courts

less serious crimes

The District Magistrates' Courts have less power than the Regional Magistrates' Courts. They may sentence a person to a maximum fine of R20 000 or one year's imprisonment. Some statutes may extend these powers (e.g.: laws dealing with drug crimes). They may not try cases of murder, rape, and, of course, treason.

1.3.1.1.2 Civil courts

ordinary magistrates' courts

In civil cases the ordinary Magistrates' Courts cannot usually hear claims involving more than R100 000. They also cannot hear certain actions like divorce, interpretation of wills (documents saying how people want their property distributed after their death) and whether someone is insane. In the Magistrates' Courts all matters are heard by Magistrates. Magistrates are civil servants who are usually appointed from people who have worked as prosecutors and clerks in the Department of Justice. In the past magistrates were appointed by the Minister of Justice. In order to achieve greater independence, a Magistrates' Commission has been established that deals with matters such as the appointment or removal from office of Magistrates.

Problem 1: How should Magistrates be appointed?

Some people say that Magistrates cannot give fair decisions because they are paid by the Government. People also say that most Magistrates have only worked as prosecutors and should spend some time doing ordinary legal work as lawyers. Others defend the system by saying that Magistrates are trained to be independent. Furthermore, prosecutors get good experience in criminal cases which is useful when they later sit as Magistrates to decide the truth. Most ordinary lawyers do not do much criminal work.

Questions

1. Do you think that it is better for Magistrates to be appointed by the Magistrate's Commission instead of the Minister of Justice? Why or why not?
2. Give arguments in favour of the present system of appointing Magistrates through the Magistrate's Commission.
3. Give arguments against the present system of appointing Magistrates.
4. Should the system be changed? Why or why not?

appeal and review

A person involved in a criminal or civil case can ask the High Court to examine the decision of the Magistrate's Court and decide whether it was correct. The person asks the High Court to change the decision of the Magistrate's Court. This is called an "appeal". If a person believes that the proceedings in the Magistrate's Court were unlawful or unfair he or she can bring the case to the High Court. This is called a "review".

We will now look at the High Court.

1.3.1.2 High Court

Unlimited powers except to declare Acts or the conduct of the President unconstitutional

A High Court can hear any type of criminal or civil case. Usually, however, the High Court will only hear criminal cases that involve serious forms of punishment (imprisonment of more than 10 years or a fine of more than R200 000). A charge of treason must always be heard by the High Court. As for civil actions, the High Court will hear those involving claims of more than R100 000. There are also certain civil matters that must be heard by a High Court (e.g. divorce, interpretation of wills, declaration of a person as insane). A High Court can also decide any constitutional matter, except for some matters that can only be heard by the Constitutional Court. A High Court can, however, rule on the constitutionality of an Act of Parliament, a Provincial Act or the conduct of the President. Such a ruling will only come into effect once it is confirmed by the Constitutional Court. Finally, High Courts hear appeals and reviews from the Magistrates' Courts.

Cases are heard by Judges

All cases in High Courts are heard by Judges. In the past all Judges were appointed from the ranks of senior advocates. However, in 1995 the first advocate who had not obtained senior status was appointed as a Judge. In the same year the first attorney was appointed as a Judge. University lecturers and Magistrates may now also be appointed as Judges. The President appoints Judges on the advice of the Judicial Service Commission, an independent body established for this purpose.

Civil and criminal cases are usually only heard by one Judge. However, if the case is on appeal it must be heard by at least two Judges.

Judges may be helped by assessors

In complex matters a Judge may be helped by one or two other people called “assessors” who are not Judges. Assessors are usually retired lawyers, Magistrates and University lecturers.

Previously, there was a division of what was called the Supreme Court for each of the four provinces of South Africa. Under apartheid there was also a Supreme Court in each of the so-called independent African “homeland” states. There are now nine provinces and the “independent” states no longer exist. However, in terms of the transitional arrangements of the Constitution each division of the former Supreme Court is now regarded as a High Court. The situation is under review but currently the following High Courts exist:

Provincial divisions

Provincial Divisions: The Cape Provincial Division (Cape Town); Eastern Cape Division (Grahamstown); Northern Cape Division (Kimberley); Natal Provincial Division (Pietermaritzburg); Orange Free State Provincial Division (Bloemfontein); Transvaal Provincial Division (Pretoria); and a Division for each of the former “independent” states (i.e. Transkei, Bophutatswana, Venda and Ciskei).

Local divisions

Local Divisions: The Durban and Coast Local Division (Durban); Witwatersrand Local Division (Johannesburg); and the South Eastern Cape Local Division (Port Elizabeth).

Permission to appeal

People in a High Court case can get permission to appeal from the Provincial or Local Division to the Supreme Court of Appeal.

1.3.1.3 Supreme Court of Appeal

the highest court in the country for non-constitutional cases

The highest court of appeal in all matters (except constitutional matters) is the Supreme Court of Appeal in Bloemfontein. This is a court of appeal only. It does not hear trials; it hears appeals from the High Courts. The court can decide appeals on constitutional matters. There are, however, certain matters that only the Constitutional Court can decide. In addition, although the court can declare an Act of Parliament, a Provincial Act or the conduct of the President unconstitutional, such an order will only take effect once it is confirmed by the Constitutional Court. All cases in the Supreme Court of Appeal are heard by three or five judges. These judges are appointed from the ordinary judges who sit in the High Courts.

1.3.1.4 Constitutional Court

the highest court in the country for constitutional cases

The Constitutional Court is in Braamfontein, Johannesburg. The court consists of 11 judges. It can only hear constitutional matters and issues connected with such matters. For constitutional matters, it is the highest court in South Africa. The Constitutional Court is, in part, a court of appeal and hears appeals against constitutional judgments of the High Courts and the Supreme Court of Appeal. However, there are certain issues that only the Constitutional Court can decide and, because no other court can hear these matters, in this regard it does not function as a court of appeal. For example, only the Constitutional Court can decide on the constitutionality of an amendment to the Constitution. Finally, as mentioned, when a High Court or the Supreme Court of Appeal declares that an Act of Parliament, a Provincial Act or the conduct of the President is unconstitutional, the order will only come into effect once it has been confirmed by the Constitutional Court.

1.3.1.5 Trials, Appeals and Reviews

1.3.1.5.1 Trials

the court considers evidence

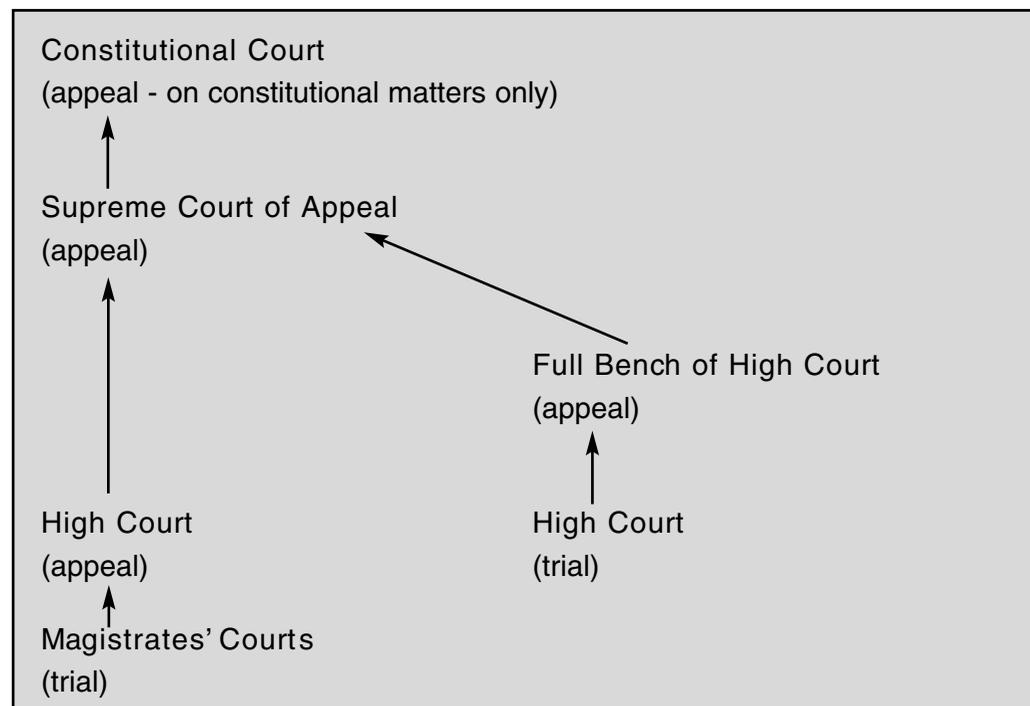
Trials are very different from appeals (see below). During trials the court listens to evidence from witnesses and sees physical evidence (like a weapon used to commit a murder), considers the evidence and decides the facts that are in dispute. The Judge or Magistrate makes a decision called a “judgment”. The losing party may be able to appeal to a higher court. The Magistrates’ Courts and the Provincial and Local Divisions of the High Court act as trial courts.

1.3.1.5.2 Appeals

appeal to a higher court

In an appeal, one party who has lost in a trial court presents arguments asking the appeal court to change the decision of the trial court. The other party presents arguments supporting the decision of the trial court. The losing party can appeal to an appeal court only if the trial court has made a mistake about the facts or the law in the case.

If a case is heard in a Magistrate’s Court, it may go on appeal to the nearest High Court. From there, it may go on appeal to the Supreme Court of Appeal. Finally, if the case deals with a constitutional matter it may go on appeal to the Constitutional Court. Similarly, if a case is heard as a trial by a High Court (by one Judge - not as an appeal) it may go on appeal to a “Full Bench” of the High Court (i.e. three Judges), and/or to the Supreme Court of Appeal and, if it is a constitutional matter, then to the Constitutional Court. In certain rare cases it is possible to go from a Magistrate’s Court or High Court directly to the Constitutional Court. The Constitutional Court has to give permission for this to happen. In general, however, the appeal process can be shown as follows:



a lawyer should be employed when making an appeal

Legal documents have to be drawn up for an appeal and a lawyer should be employed. The person who loses the appeal usually has to pay the costs of the party who wins. It is very expensive to take a case on appeal.

Case Study: An appeal against a mistake by a Magistrate

Mafu was arrested for breaking the curfew laws when his car broke down at night



charged with breaking curfew laws

In the case of *State v Mafu* in 1966, Mafu was charged with being in a public street when a curfew law said that nobody should be on the street at that time. Mafu would have been home in time, but his car had broken down and the only way he could get home was to walk.

guilty

The Magistrate found Mafu guilty of breaking the curfew laws.

expecting the impossible

Mafu appealed to the Supreme Court (this is what the High Court used to be called) saying that the Magistrate had made a mistake about the law, because the law does not expect a person to do something that is impossible. Because his car had broken down it was impossible for him to get home before the curfew.

The Appeal Court agreed with Mafu and he was found not guilty.

In most cases the courts can assist people who are expected to do something impossible. Usually the law does not make it a crime for people not to do something that is impossible.

1.3.1.5.3 Review

If a person believes that the procedure followed in a Magistrates' Court or High Court was unfair (e.g.: the Magistrate or Judge was biased) or not according to the law he or she can take the case on review to a higher court.

automatic review

In criminal cases where an accused without a lawyer is sentenced to a period of imprisonment of more than 3 months or a fine of more than R2 500 by a Magistrate of less than 7 years' experience the sentence will be automatically reviewed by a Judge. Sentences imposed on an unrepresented person by a Magistrate of more than 7 years experience will only be automatically reviewed if they exceed 6 months of imprisonment or a fine exceeding R5 000. The clerk of the court must send the Judge all the relevant documents.

1.3.1.6 Small Claims Court

claims under R3 000

no lawyers allowed

Small Claims Court
Commissioners

do it yourself

Small Claims Courts were introduced in 1985. They allow people to go to court without lawyers for civil claims of not more than R3 000. Very few documents are needed. No lawyers are allowed. There is no appeal against a decision by the court. If the court has been biased or did not allow one of the parties to give his or her side of the case it can be taken on "review".

In the Small Claims Court, cases are heard by Commissioners who are appointed by the Minister of Justice. Commissioners are usually practising advocates and attorneys (see below para 1.4.1.2) who hear cases in the evenings after work. It is very cheap to go to the Small Claims Court because people can bring or defend the cases themselves (see below para 1.5.2) Most claims in the Small Claims Court usually involve consumer complaints, labour disputes (mainly involving unpaid wages), and damages for motor collisions.

The Small Claims Court is much more informal than other courts. From left: the plaintiff, the commissioner and the defendant



1.3.1.7 Courts of chiefs and headmen

special courts for
disputes between
Africans

In some areas, the chiefs and headmen of certain African communities have their own courts. These courts have restricted civil and criminal jurisdiction. This means that there are limits on the type of cases they may hear. They apply the Customary law of the community in question. No legal representation is allowed. If a person involved in a case before one of these courts is unhappy with the decision, he or she may start afresh in, or appeal to, the Magistrate's Court.

Problem 2: Should there be a separate court for Africans?

Questions

1. Do you think there should be separate courts for Africans? Why or why not? Give reasons for your answers.
2. Should the system be changed? If so, how?

Problem 3: Which court should be used?

1. Mary is caught shoplifting a cheap dress in Durban.



2. John is charged with raping a woman in Pretoria.



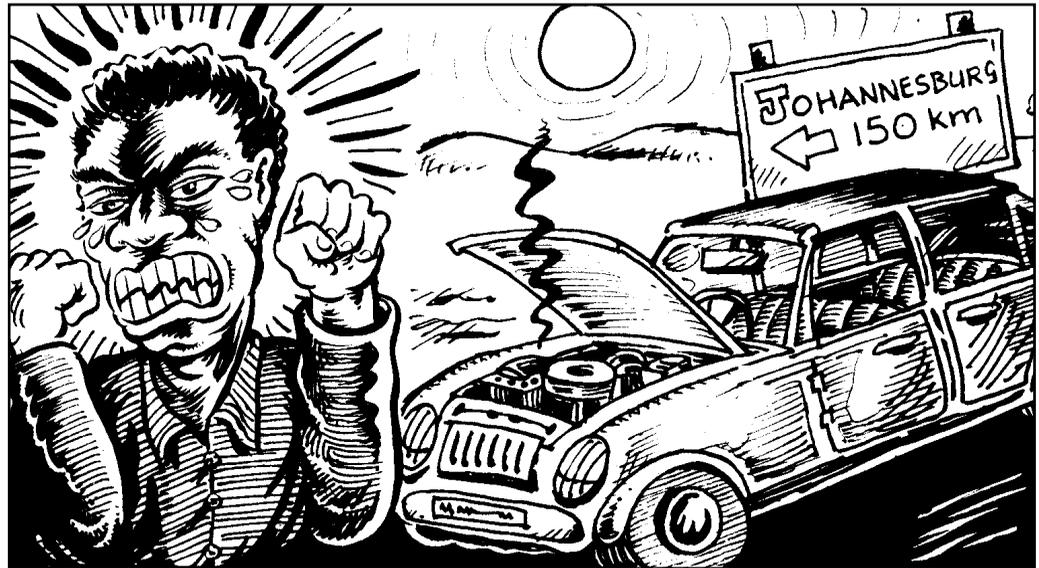
3. Govan murders his wife in Pietermaritzburg



4. Bheki buys a TV that does not work from a shop in Port Elizabeth for R3 000.



5. Peter buys a car from a garage in Johannesburg for R25 000. It breaks down 3 days later.



6. Vusi and Ernest who live in a village in KwaZulu-Natal have a dispute about who owns certain cows.



Questions

Answer the following questions, giving reason for your answers.

1. Mary is caught shoplifting a cheap dress from a shop in Durban. In which court is she likely to appear? If she is convicted to which court should she appeal?
2. John is charged with raping a woman in Pretoria. In which court will he appear? If he is convicted, to which court should he appeal?
3. Govan murders his wife in Pietermaritzburg. In which court will he appear? If he is convicted and wishes to appeal, which court should he approach?
4. Bheki buys a TV that doesn't work from a shop in Port Elizabeth for R3 000. If the shop refuses to refund his money, which court could he approach? Where can he appeal if he is not satisfied with the court's decision?
5. Peter buys a car from a garage in Johannesburg for R25 000. It breaks down 3 days later. Which court must he use to get his money back if the garage refuses to refund him? Where should he appeal if he is not happy with the court's decision?
6. Vusi and Ernest, who live in a village in rural KwaZulu-Natal, have a dispute about who owns certain cows. Which court should they approach about their problem? What can they do if they are not satisfied with the court's decision?
7. Maria who lives in Cape Town wishes to divorce her husband who also lives there. Which court should she use?
8. Siphso, a high-powered advocate in Kimberley, thinks that part of a statute conflicts with the Bill of Rights and is thus unconstitutional. He wants a court to rule that these parts of the statute are invalid. Which court should Siphso approach? If the court rules that the provisions in question are unconstitutional, will this ruling come into effect immediately? If Siphso is unhappy with the decision of the court, which courts can he appeal to?

1.3.2 Settling disputes outside of court

Most problems can be settled without going to court



avoid taking the law into your own hands

Many legal problems can be settled without going to court. Usually court procedures are slow and expensive. Most people solve their problems without going to court. If a person's dog barks all night so that a neighbour cannot sleep, the neighbour will usually complain to the owner before consulting a lawyer. It would be difficult to live in a society if people asked lawyers to go to court every time there was a problem or a dispute. However, it is often better for people to approach lawyers when a problem cannot be settled outside of court than to take the law into their own hands. If everybody took the law into their own hands there would be chaos in society. The law does, however, allow self-defence if a person is defending himself or his family from an immediate attack on them or their property (see below para 2.7.3).

Problem 4: If people took the law into their own hands

Consider what would happen to society if people took the law into their own hands in the following cases:

Questions

1. Steven, a storekeeper, sold a stove which did not work to Paul. When Paul demanded his money back Steven refused to give it to him. Instead of getting legal help Paul burns down Steven's store "to pay him back for cheating people". Do you think that Paul did the right thing? What else could Paul have done to get his money back? Where could Paul have got legal help?
2. Ahmed's dog keeps going onto Benny's property and attacking his chickens. Benny tells Ahmed to control his dog but Ahmed does nothing about it. Benny poisons Ahmed's dog. Do you think that Benny acted lawfully? What could Benny have done instead of killing the dog?
3. People in a certain community know that Bob is involved in organised crime and sells drugs. They complain to the police but the police say that they cannot do anything because they have no evidence. The people concerned suspect that Bob is paying the police money not to investigate him. The people wait outside Bob's house one night and, when he comes out, they shoot and kill him. They say they were forced to take the matter into their own hands because the police were not doing anything. Were the actions of these people justified? What else could they have done?
4. People from one political group in a township threaten to burn down the house of people belonging to another political group. The second group lay a complaint with the police. The police tell them that there is nothing that can be done as there is no proof that the first group will burn down the house. What should the second group do to protect themselves if the police cannot help them?
5. Logan is afraid that he might be hijacked so he buys a gun to protect himself. One day a man comes up to his car at a traffic light and pulls out a knife. He tells Logan to get out of the car. He also tells Logan that if he co-operates he will not be hurt. Logan pulls out his gun, shoots and kills the man. Were Logan's actions justified? Do you think people should carry guns to protect themselves?
6. Bob is attacked by Dan who pulls out a knife and threatens to stab him. Bob tries to run away but Dan catches up. Bob picks up an iron bar and hits Dan on the head, killing him. Do you think that Bob is guilty of a crime?

solving disputes out of court

There are a number of ways that people can solve disputes without going to court and without taking the law into their own hands. The most common ways are by “negotiation”, “arbitration” and “mediation”.

Solving problems through negotiation can be a lot cheaper and more effective than going to court



1.3.2.1 Negotiation

people talk

Negotiation means that the people in dispute talk to each other about their problem and try to solve it by coming up with a decision which is acceptable to both sides. Sometimes people cannot settle a dispute on their own and hire attorneys to negotiate for them. For example, people involved in motor accidents sometimes hire attorneys to negotiate with insurance companies over payments for injuries or damage to their cars. People who hire attorneys to negotiate for them must approve any agreements made by the attorneys. Sometimes attorneys begin court proceedings and then try to work out a “settlement” so that the case does not go to court. A settlement is an agreement between the parties to end a dispute. Most civil cases are settled this way, saving time and money. Poor people who cannot afford lawyers ask legal aid clinics (see below para 1.4.1.4) to negotiate for them.

attorneys may negotiate

a “settlement” may be reached

1.3.2.2 Arbitration

a third party makes the decision

Arbitration takes place when both parties to a dispute agree to have a third party (“an arbitrator”) listen to their arguments and work out a decision. The arbitrator acts like a judge and the parties usually agree to follow his or her decision. The parties cannot appeal if they do not like the decision. The advantages of arbitration are that it is quicker, less expensive and less formal than a court case. Arbitration is usually quicker and more informal than a court case.

1.3.2.3 Mediation

a third person acts as a “go-between”

Mediation happens when a third person acts as a “go-between” to persuade people arguing to settle their problem. For example, a parent who sees two children arguing over which TV programme to watch acts as a mediator when assisting the children to agree on a particular programme. Citizen advice offices and some newspaper columns often settle disputes by acting as mediators or go-betweens. Church leaders and social workers often act as mediators in their communities.

1.3.2.4 Special provisions for labour disputes

the CCMA tries to resolve labour disputes

Labour law statutes require that an attempt must be made to resolve labour disputes (i.e. arguments between workers and employers) through negotiation, arbitration or mediation before going to court. For this reason the Commission for Conciliation, Mediation and Arbitration (CCMA) has been established (see below para 6.10.1). The purpose of the CCMA is to try to resolve labour disputes through mediation and, if that is unsuccessful, arbitration.

the CCMA handles unfair dismissals

The CCMA also handles cases of unfair dismissal – where people think that they were dismissed from their job without good reason (see below Part 6). If a person thinks that he or she has been unfairly dismissed from their job, the person can visit the CCMA, which will be able to provide assistance free of charge. (The telephone number of the CCMA can be found in the telephone directory).

Steps in a Mediation

Step 1. Introduction

Step 1. Introduction

The mediator makes the parties relax and explains the rules. The mediator's role is not to make a decision but to help the parties reach an agreement. The mediator explains that he or she will not take sides.

Step 2. Telling the story

Step 2. Telling the story

Each party tells what happened. The person bringing the complaint tells his or her side of the story first. No interruptions are allowed. Then the other party explains his or her version of the facts.

Step 3. Identifying the facts and issues

Step 3. Identifying the facts and issues

The mediator attempts to identify facts and issues agreed upon by the parties. This is done by listening to each side, summarising each party's views, and asking if these are the facts and issues as each party understands them.

Step 4. Identifying alternative solutions

Step 4. Identifying alternative solutions

Everyone thinks of possible solutions to the problem. The mediator makes a list and asks each party to explain his or her feelings about each solution.

Step 5. Revising and discussing solutions

Step 5. Revising and discussing solutions

Based on the expressed feelings of the parties, the mediator revises possible solutions and attempts to identify a solution to which both parties can agree.

Step 6. Reaching agreement

Step 6. Reaching agreement

The mediator helps the parties reach an agreement with which both can live. The agreement should be written down. The parties should also discuss what will happen if either of them breaks the agreement.

Problem 5: A dispute between political parties

the parties argue about holding a meeting

the party leaders agree to mediation

Students should be selected to play the roles of parties A and B and the mediator

Members of political party A wish to hold a public meeting in a town area controlled by party B. Party A manages to get permission from a priest to hold the meeting in a church hall. Members of party B who are very opposed to party A's policies threaten to break up the meeting. Party A believes that the local people should be free to choose whether or not they wish to attend the meeting. The leader of party B says he knows that none of the local people will want to attend the meeting as they will support his party. Eventually the leaders of parties A and B agree to allow a mediator to help them resolve the dispute.



Roleplay

Learners should be selected to play the roles of the leaders of parties A and B and the mediator. Each learner may bring two senior party members to the meeting. Learners should also be selected to play these roles. The mediator should follow the steps outlined above.

Problem 6: Which is the best method of settling the dispute?

Consider each of the situations below and decide the best way of settling the dispute. In each case decide whether the problem would be best handled by an informal discussion between the parties, negotiation, mediation, arbitration, by going to court, or by some other method. Discuss the reasons for your answer.

Questions

1. A father agrees to pay all his daughter's university expenses but later changes his mind.
2. A tape recorder Zo buys stops working after two weeks and the salesperson refuses to get it fixed or give Zo his money back.
3. A town council will not repair a council house because it believes that the tenant (the person renting the house) caused the damage.
4. A trade union and an employer disagree over wages and conditions of employment.
5. A married couple want a divorce.
6. Mogani accuses Angela, a domestic worker, of having stolen things from her home and promptly fires her. Angela says that she did not steal the things in question. Angela says that she was unfairly dismissed and either wants her job back or to be compensated.