

**A SELF HELP GUIDE
RESEARCH METHODOLOGY
AND
DISSERTATION WRITING**

2007

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1. RESEARCH METHODS



Venter F ea *Regsnavorsing: metode en publikasie* (Cape Town 1990) 161-205 (legal historical method), 206-244 (legal comparative method), 245-281 (empirical method).

David R & Brierly JEC *Major legal systems in the world today: an introduction to the comparative study of law* (London Stevens 1978)

Zimmermann R "Synthesis in SA private law: civil law, common law and *usus modernus pandectarum* 1986 SALJ 259-264

Zweigert K and Kötz H *Introduction to comparative law* (Oxford Clarendon Press 1987)



There are various methods one can use to obtain research results. The choice of the specific method will depend on the aim that you have with your research and the results that you want to achieve. It might be that you want to give a systematical description of a specific legal problem and the legal material that might give a solution to the problem. In this you can make use of legal text books, law commission reports, legislation and court decisions. In this study you may want to purely reflect the South African legal position. This study method will be fine for an assignment of an undergraduate student who completes his or her B Juris or LLB. In achieving a master's degree a student must however be able to indicate that he or she has the ability to do higher level research and is able to use the various legal research methods and tools. One or more methods or a combination thereof can be used. One can place the research in perspective by making use of legal philosophy or the legal historical method or a combination thereof. If there is a problem in the interpretation of a specific South African legal rule or if there are problems in implementing a certain legal rule or legislation a person may make use of other legal systems to find solutions for the application of the rule or legislation. These solutions may also be found in philosophy or legal history. Again a combination of methods can be used. Since 1994 South Africa has a Bill of Rights - several fundamental rights are included in this Bill. In order to interpret these rights the courts refer to court decisions in India, Canada, Germany etc. They make use of the legal comparative method to find solutions for the South African interpretation of fundamental rights. Sometimes they adapt these interpretations to the specific South African problems created by a different legal and social history. Depending on the problem that you are going to research, you have to find the method that will help you achieve the best research results.

Three methods will briefly be referred to and hints given to help you in your research. In the end you have to do the research and find the solutions. The three methods that will be referred to are the

- legal comparative method
- legal historical method and the
- empirical method.



Choose a topic that you think you would like to research for the LLM of your choice. Even though this might not be your final topic for your research paper, use this topic as background against which you read the following material.

1.1 LEGAL COMPARATIVE METHOD



Read the following and think which legal systems would be appropriate to use with regard to your topic of research and how you would go about using the legal comparative method.

The legal comparative method is the comparison of different legal systems with each other. Different legal families can be distinguished namely (a number can be added that is not traditionally referred to in handbooks):

- Anglo-American systems (e.g. USA, Nieu-Zealand, Australia, UK)
- Roman-Germanic systems (e.g. European legal systems)
- Mixed legal systems (e.g. South Africa, Canada, Zimbabwe, Botswana, Lesotho)
- African and other traditional legal systems (e.g. African customary law, customary law of the Maori, Eskimo, Indian tribes in USA and Canada etc)
- Religious systems (e.g. Hindu, Jewish and Islamic law)
- Eastern European legal systems (e.g. Russia)
- Eastern legal systems (Chinese and Japanese law)
- South American legal systems (e.g. Brasilia, Chili etc).

The first step will be to know what the general characteristics of legal families are. Read a general book on comparative law such as David and Brierly, Zweigert-Kötz or Van Zyl and establish what the general characteristics of the specific legal family are. If you know what the general characteristics are and you know what the purpose of your research is, you can choose a legal system to compare your research to.

You have to know why you want to do comparative research - your use of the comparative legal method must have some purpose whether to see if the historical origins of the problem is the same or different, to find solutions for new legal developments or to compare similar legal rules or problems. It might be that the African law and the Anglo-American law might have some similar legal rules or the one can give a solution to the other who lacks a certain rule. The previous regime in South Africa for example made use of Israel's strict security legislation to draft the Internal Security Act of 1984 and the Australian legislation to draft legislation on sectional titles. Our Constitution is compiled from various constitutions all over the world and was adapted to South African circumstances

Once you have decided which legal systems you are going to use, you can do the following to obtain more knowledge about the legal system you are researching:

1. First read a general introduction to the specific legal system or a general handbook on the branch of law, for example the law of property. If you are working in a foreign language for example German, read a book on the German law in English before you read the German material - it will help you with your vocabulary on the topic.
2. Then read the books or articles that specifically deal with the research topic.
3. Thus depending on the topic:
 - First read books:
 - general on the law
 - that give you an idea of the cultural, social, economical, political background of the legal system
 - and articles dealing specifically with the topic.
 - use legal dictionaries for example Hiemstra, *Rechtschreibung* or Duden.
 - legislation.
 - court decisions; if your choice is an European country (including UK) you should also refer to the European Community and the European Court of Human Rights

- interviews with knowledgeable people.

It usually helps to write the South African section first, because you will then know what the problems or deficiencies in the law are. You will know what to look for in the foreign system. It will also help you to systematise the foreign law, to compare the legal systems by indicating the similarities or dissimilarities and will enable you to propose solutions.

1.2 LEGAL HISTORICAL METHOD



Read the following and think how you could introduce the legal historical method in your research. .

Legal reform implies knowledge of the history of the legal development and legal institutions in the law that has to be reformed. The question is, however what will be needed by legal reformers to accomplish this task.

As has been stated above, in legal science theory and practice are interdependent. Legal theories are tested in practice and the practice of the theory. Adjustments are made on both sides. Through the centuries legal measures were tested against the requirements of for example the Bible, the law, authority, nature, reason and the sense of justice. The law gradually became scientific and the lawyers became blind mechanical appliers of the law. Although the law may be applied technically correctly, the possibility exists that it was based on a number of wrong assumptions or on an uncritical take-over of legal norms. To a lay person the law has become strange and confusing.

If a lawyer has knowledge of his or her own legal system only, it is easy to sit down and praise the virtues of the existing legal system. That which is wrong, is never seen. The German experience should be regarded as a lesson. Initially after the codification of the German law in 1900, academic lectures were still based on a study of the private law with reference to the Roman law, Pandectists and the Germanic law used as comparative basis.

Since 1918 legal education has focused only on the national law and the legal historical and comparative possibilities that are available to adapt the law, was forgotten. Students were not able to critically analyse the law or to be able to resist the German socialist-nationalism. They had no value system against which their own legal system could be tested.

Legal history is more than the study of the development of material legal norms. It also includes the analysis of these rules in the light of the external legal history (the economical, cultural, political, social, philosophical and religious development). The development provides answers as to why a legal system has certain characteristics. The lawyer should not be taught only to use the legal history to find the sources of the present day law, but he or she must be able to use his or her knowledge to propose alternatives for legal development - he

or she must be able to break through the boundaries of the history as is stated by prof Visser of the University of Cape Town.

The purpose of legal historical research is therefore to establish what the development of legal rules are and to propose solutions or amendments to the existing law based on historical facts. This method can be used in isolation or can be combined with other methods. Sometimes a brief history of a legal rule or legislation is given whereafter the application of the rule in the South African law is discussed or the rule is compared to other legal systems or the development within those legal systems.

If you research the development of for example a rule of the South African common law, the following method can be used:

1. Establish what the periods in the legal history of South Africa are and establish what the characteristics, main writers and sources of each period are. Make use of your knowledge of legal history or introduction to the law.
2. Establish what the present-day position with regard to the rule in the South African law is.
3. Check the footnote references in South African handbooks and get references to old authorities.
4. Establish what the court decisions are and write down the sources referred to by the courts - old authorities and other court decisions - work through these decisions as well as to find other references.
5. Systematise the old authorities you were referred to in the relevant time periods e.g. Classical law, Justinian law, Middle Ages - Glossators etc.
6. Find the old authorities:
 - 6.1 Look up the specific texts, starting with the Roman law.
 - 6.2 Look in the word register of these sources for other texts dealing with the subject.
 - 6.3 Look in the index on the *Corpus Iuris Civilis* (CIC) to find
 - catchwords which will refer you to other texts in the CIC.
 - the reference of a text if you only have a brief reference to it or only part of the text.
 - 6.4 Then look up the books of the Middle Ages. The books of the Middle Ages only refer to the first words of the specific text in the *Corpus Iuris Civilis* on which the commentary is

written (e.g. not to D 9.1.3.2) and therefore you have to use the indexes on the CIC to find the specific text. Always keep the original CIC text with you when studying the sources of the Middle Ages.

- establish who wrote the glossary or commentary.
- use the Accursian Glossary
- then the works of the School of Orléans (e.g. De Bellaperica, De Revigny)
- then the Post-Glossators (e.g. Bartolus, Baldus)
- then the Canon law (e.g. Durantis).

6.4 16th century +

- see if the 16th century writers of the *mos italicus* had anything to say as well as the humanists
- the German schools are also referred to by our courts and have to be studied (the *Usus Modernus Pandectarum*, Historical school and the Pandectists)
- the French national law (e.g. Pothier especially with regard to law of contract, insurance law and negotiable instruments)
- the writers of the 16th, 17th and 19th centuries in the Netherlands.

6.5 South African law

- period before 1652
- 1652-1806
- 1806-1828
- 1828-1910
- 1910-1994
- 1994-1996
- 1996+

The periods that you distinguish in the South African law will depend on your topic.

If you want to establish what the history of a specific piece of legislation or practice was, you can use the following method:

1. First read the relevant Act or establish what the practice is.
2. Establish the date of introduction of the Act or practice as well as the dates of amendments thereto.
3. Write the legal position as it is on date of your research.
4. Then read the Hansard in which the debate on the specific Act took place as well as the memorandum to the Bill. This will give you the reasons that were stated as to why the specific Act was introduced. Establish if the Act is the result of a White Paper process or Law Commission Report and find the White Paper or Commission reports.
5. Read the history of the specific period and the periods before the Act and establish what the social, political, economical, philosophical background of the specific period was. This will also give you ideas as to why the Act was introduced.
6. Then divide your research into periods for example:
 - Before introduction of the legislation
 - social background
 - political background
 - economical background
 - philosophical background
 - reasons for the introduction of the Act
 - law commission/White Paper
 - Hansard
 - other
 - Introduction of the legislation
 - Discussion of first version
 - amendments
 - reasons for the amendments
 - discussion of amendment
 - etc.

1.3 EMPIRICAL METHOD



See also study unit on Quantitative and Qualitative Research.

There are several ways to obtain information that is not necessarily available in books or journals. To obtain this information methods of the natural sciences are applied. **Different forms of empirical research can be distinguished:**

- descriptive: for example the number of divorces in South Africa or the number of houses built since 1994.
- experimental research that deals with the establishment of a laboratory situation, for example the land redistribution programmes - various pilot programmes have been instituted in for example KwaZulu-Natal to see what the problems and advantages are.
- quasi-experimental research of field research - in this research you are not able to change the variables, for example an investigation into the influence of alcohol on crime. The Green Paper on Land Reform for example, refer to the case where an investigation of all the land tenure forms existing on the ground is envisaged and to monitor upgrading of these rights.
- opinion polls - various opinion polls are published in newspapers, for example who is the most favourite political leader, possible voting results and the reintroduction of the death penalty.

What are the advantages and the disadvantages of empirical study?

Empirical study is relatively unknown in legal research - most researchers keep to a study of the relevant sources. The advantages of empirical study are that you have new data on which you can base your decisions and these decisions may bring about legal reform. The disadvantages are that the research relies on the professional and ethical integrity of the researcher. Such a researcher is sometimes influenced by this mandator, the lack of funds etc. It is important to know which method you are going to use. Are you going to act positivistically or are you going to interpret the information in the light of social, political and economical factors. Sometimes data is interpreted without taking these circumstances into account and a misinterpretation is given. The method that you apply, for example random test, observation, statistical processing. objectivity and reliability play an important role. The HSRC for example had an opinion poll a few years back. They only talked to persons with phones living in Soweto and they projected these views to all Blacks in South Africa giving a misrepresentation of the research. All they could have said is that people with phones in Soweto have the following opinion...

What are the elements of empirical research?

1. An overview on the literature dealing with the topic - this should be limited. You also have to give the background to your research.

2. Planning of the empirical research:

- Identify, restrict and formulate your problem statement.
- List your hypotheses and compile your questionnaire. It is wise to already consult a statistical consultant at one of the universities to help you with this.
- Work out a strategy for the compilation of the data.
- Process the data and interpret the results.
- Generalise the results.
- Write down the results by referring to above-mentioned in your research paper.

Problem identification, restriction and formulation:

The problem as well as the questions must be stated clearly. There should be no uncertainty about the questions - the person asking the questions should not be asked to explain the questions (otherwise he or she can give their own interpretation of the question and it might influence the reliability of your results). Sometimes you have to ask 4-5 questions to achieve the answer you want. Think of the composition of your group. Do you want to ask questions to the students at the University of the North or do you want to have results regarding all students in South Africa.

You have to formulate your hypotheses clearly as you are going to test your results against your own hypotheses.

As has already been stated, you have to define your choice group (for example all females in rural areas) and then use proper techniques to determine the group (for example voter's list - every 10th person). In this you would also need someone from statistical services to help you. You must have certainty that your choice group will give valid results. You can determine fault variants but they should be restricted.

Observation

Field study may be regarded as unreliable as you use your senses to obtain results. Anthropologists for example live with a community but can become such a part of the community that they lose their objectivity.

Quantification of data

Levels and scales

You can use different levels and scales of distinction, for example ordinal - relative position to each other - Mandela is 99% more popular than Eugene Terreblanche. Or you can distinguish intervals and classes - for example the support for a specific political party. You can determine the highest level of measure by making use of the absolute nil from which you can make deductions, draw up statistics etc.

Requirements for good measure instruments

Your measuring instrument should be reliable - it should be consequent and must be able to present the information accurately. You should establish whether your measuring instrument is valid - in other words does it measure what it should. It should be objective - all subjective evaluations should be eliminated. The measuring instrument should be useful - it should be effective within the constraints of time, trouble, costs and applicability. The discrimination value should be reliable and valid, and the measuring instrument should contain the ability to objectively distinguish information on the basis of certain characteristics.

Questionnaires and test samples

Questionnaires could be structured or unstructured. Test samples/random tests as has been stated before, should reflect a cross section of the group that you want to research. Your test sample should be representative - the number of questionnaires may have an influence on your results. You should also define an aim population and a reachable population. The extent of the research will depend on what result you want to achieve. To use a test sample has the advantage that you can deduct results with lesser people but you have to know what you are doing. There are various forms of test samples that can be used:

- randomised test

A target group is statistically determined - the same questions should be asked to all the people. The result has a high scientific value and the results can be generalised (depending on the target group).

- non-randomised test

The target group is not established statistically. You ask for example every third person who enters Checkers on a Saturday morning. The reliability of such a test is less as it is not necessarily representative of the community. The results may therefore be unreliable. You decide for example that you are going to question the private law 1 class, by using a quota: an interview with 10 students - they are not determined scientifically.

- panel

You can ask a panel of experts and ask them to make deductions. You can be present or observe them through intransparent glass

Interviews

Interviews are a way of getting information. There are various problems with interviews namely that it is difficult to determine the reliability of the interview. You have to do proper planning especially with regard to the questions you are going to ask. You have to give training to the people who is going to do the interviews. This way of obtaining data has costs and time implications.

Interviews can be structured for example telephone interviews/postal questionnaires/individuals or groups. Interviews can also be unstructured where there is no structured questionnaire - use is made of the open technique. You can make use of standardised questionnaires (e.g. IQ tests) or another way of observation.

If you make use of the telephone the problems are that not everyone has a phone, people are not at home, the length of the questionnaire should be restricted as not to annoy the person being interviewed and the subjectivity of the interviewer may influence the person who is interviewed. The advantages are that you have a higher response rate, it is easier to process and control and you need not do technical finishing touches to the final questionnaire.

Postal questionnaires have the advantage that it has a low budget, time limit and is not bound to geographical areas, it is reliable, fast and can be easily processed. The disadvantages are that people do not always send back questionnaires they received by mail. The questionnaire cannot be adapted to individual needs, it is impersonal, the public has a negative attitude to these type of questionnaires, not everyone can read in South Africa, there is no control, people take their time to respond or do not answer all the questions. In an individual interview you have more personal contact and you can be more flexible. An individual interview on the other hand costs a lot of money, is time-consuming. You need to have extensive control over your interviewers and you have to take people's cultures into account.

The processing of data entails desk work. The data should be prepared and controlled, statistically processed by way of a computer. After the data has been processed you have to interpret and generalise your data. You have to bring the answers into relation with each other and have to give them a generalised meaning. In the interpretation process you have to make use of logic and place the answers in context.

Afterwards you have to write your report dealing with your initial hypotheses, research method and your variables. Other people must be able to establish the scientific value of your research.

Unstructured interviews with experts, government officials etc.

You may also want to interview experts on a specific topic or to test your ideas against such a person. You may do so. You have to state in a footnote with whom you had the interview, when and where. For example

Interview P Molefe (1998-08-20) Mafikeng

You also have to mention these interviews in your bibliography under a separate heading Interviews.

Your interviews can be used as such but cannot be generalised. If you asked two or three officials on their view of for example traditional leaders you cannot generalised their ideas and state that all government officials have the following opinion on the matter of traditional leaders. You can refer to them as single sources as you would refer to a book or a journal.

2. RESEARCH PLANNING AND RESULTS



Venter F ea *Regsnavorsing: metode en publikasie* (Cape Town 1990) 99-117, 301-324.



Each person has his or her own research method. There are, however, a few things that one has to keep in mind while doing research. The following discussion is based on Venter above but also on the practical experiences of the compiler of the study guide. By using these hints you will save time and tears later.



Read the following and work out a research plan that will suit your research topic best.

Research is a planned activity that relies on speed, quality and effectiveness. Any person can publish an article, note or case note. You can publish alone or in conjunction with other authors. The question, however, is how you decide on a topic for the research. It is important to choose a topic that you are interested in. If you are not interested in the topic it is most likely that you will never complete the study or that you will work with difficulty and a heavy heart. You can do a quick literature survey to see whether you would be interested in the topic and whether there exist any material in this regard. Your topic may be one or the other

contentious issue or it might be your personal preference. It is important that you are happy with your choice.

2.1 TITLE

The title should be brief, enlightened, honest and realistic. You should not create expectations that you are not going to meet. The title should also be linguistically correct.

Once you made a choice make sure that no one else is working on the same topic. You can establish this by making use of the database of the HSRC. Most universities have a direct link to this database. You might be required to pay an amount for this research. You can also visit the offices of the HSRC in Pretorius Street (Pretoria) and ask them to conduct the search for you.

2.2 FORMULATE A PROBLEM STATEMENT

Remember that you have to establish whether the topic you want to research is researchable and whether a scientific input is necessary. Your problem statement should not be worded too widely. Limit your research to what you want to investigate. Someone who has no idea of the topic should be able to understand your problem statement. See in this regard the guidelines for a research proposal in study unit 5.

In your problem statement you have to formulate hypotheses. Until now you have been referred to hypotheses several times. Your initial hypotheses may not need to be proved correct but it helps you to make certain suppositions. For example

- There exists a right to information.
- This right is a fundamental right.
- No restrictions should be placed on this right.
- This right should be limited in the case of privacy etc.

In your last chapter or section you will have to establish whether your research proved your hypotheses right or wrong and you have to give you own solution.

2.3 TABLE OF CONTENTS

Decide on a provisional table of contents for example

1. Introduction
- 2.
- 3.
4. Conclusion

The beginning and end are easy as each research paper should include these. To compile a table of contents needs some creative and original thinking. Begin with the main points and then refine the chapters. You might want to include a theoretical foundation of your topic or give an historical exposition and then discuss the rules. Or you can discuss the law according to the law of the countries you studied or your division could be according to themes. It is, however, very important that your division into chapters or sub-divisions should follow logically and there is a logical overlap from one topic to another. Your initial chapter division will serve as guideline. As soon as you start your research you might find it more logical divisions to change or add divisions or to add other sub-divisions. Feel free to do so but always ensure that there is a golden thread going through your research paper. Always keep your research topic in mind and do not deviate from your research goal. You are going to read a lot of interesting things that will give you background but you do not necessarily need to add them to your paper.

2.4 RESEARCH METHOD

Decide which research method or methods you are going to use and discuss it with your supervisor.

2.5 TIME SCHEDULE

Draw up a realistic time schedule and discuss it with your supervisor for example

Chapter 2: End March 2002

Chapter 3: End June 2002

Chapter 4: End September 2002

Chapter 1 and conclusion: End October 2002

Corrections: December 2002 and January 2003

2.6 FACILITIES

It is important to decide on what facilities you are going to use. Are you going to type the material on the computer yourself, are you going to make use of a typist or are you going to dictate. It is proposed that you type the research paper yourself as it gives you the opportunity to rephrase your sentences and to add and amend as you proceed with the research paper. Even if you yourself is not going to use the computer, make sure that your typist types your work into a computer and not on a typewriter. It will save you a lot of time as it is easier to amend and change your text. Remember that your supervisor is going to write a lot of comments on your work which you will have to amend at a later stage. Use the method that is going to save you time, pain and suffering.

2.7 FIND SOURCES

Use the databases in the libraries and find all the information on your topic. Sometimes it is easier to go to the relevant book stack and quickly page through the books to see whether it contains information you need - use the word index at the back. You cannot always establish from the title whether the book will be useful or not. If you are working on a socio-economic problem also make use of books of other disciplines and use your public library - you might find sources not available in the library.

If you are going to make use of the empirical method, make an appointment with your supervisor and a statistical expert. Take your compiled questionnaire along and refine it during your deliberations.

Remember you are going to use a lot of material. Immediately when you use a book - even if you are unsure whether you are going to use it in the final instance, take down all particulars. From experience it is known that you cannot always trace a book after you have used it. Take down the following particulars - write it on catalogue cards and immediately place them in alphabetical order. If you make use of a computer - type them in the correct style and immediately alphabetically.

BOOK

Author: Surname and initials

Title of the book

Edition (if first not necessary)

place of publication

publisher

date of publication

place where you find it and the reference number

You could also indicate in the corner above some words giving you an idea what the book is about.

If it is a journal:

Author: surname and initials

Title of the article

Name of the journal

Pages (if numbered throughout) otherwise first the volume (number): beginning page -end page.

If a court decision the full particulars - put it in your bibliography under court decisions.

Legislation refer to the number and the date.

Government Gazettes: Proc and reg number in GG xxxx of 19xx-xx-xx.

Also refer to study unit 4 for examples of how to refer to certain sources.

If you use the correct style from the beginning it will again save you time, money and pain.

2.8 COMPILATION OF THE CONTENTS

Firstly, again remember that when you handle a book/decisions/proclamation etc., write down all its particulars!

Sort your material under broad topics and write on the photocopy or flag the material with the topic. Use large pieces of paper and divide the paper into the different topics for example: (You can do the same on your computer by opening different files and type the information in the different files with distinguishable file names.)

Definition of development	Socio-economic factors	Housing	Land problems	Critical analysis of development
should be encompassing - Scheepers '98:3; Dlamini 12	shortage of housing - Balatseng 3		White Paper 4-6	
should contain development management - Mojela 4	definition - Pieters 2			
			land tenure	
DFA				Water Act

While reading through the material give a brief sentence to give you an idea of what is written in the book and give the name of the author and page number. You can use different colours when writing this framework. There are two ways to complete this framework. Either by doing it comprehensively as set out or by only referring to the author and page number. The advantage of the first is that you would be able to immediately write from the framework. The disadvantage is that you in any case might have to refer to your source as you do not understand your own abbreviations anymore. If two or more writers said the same thing, add the name of the additional writer so that you can remember to add him or her in the footnote.

Although this method may appear to be long-winded you might find that you will save a lot of time in the end. It would help you to systematise your work in a sensible manner.

Once you have read through the material and systematised it under separate headings and sub-headings, write all the headings down. Systematise these headings under each other by sorting them and you will find that you have a very nice framework in which you can start writing your research paper. Immediately use the correct style!!!! This framework can still be adjusted. You might find that something you thought important when writing the framework does not fit in the overall framework.

Some people have the ability to work from different sources and immediately type in the result on the computer. If you are able to do so, you are welcome to use your own method. This would not be suggested if you do not have much experience in research work. Remember to give authority for everything you say. Refer to the sources in the footnotes.

USE THE CORRECT STYLE FROM THE BEGINNING – IT WILL SAVE YOU TIME AND LOTS OF PAIN AT THE END OF YOUR STUDY!!!

IMMEDIATELY WRITE THE SOURCE IN THE CORRECT STYLE IN YOUR BIBLIOGRAPHY!!!

If you use something from one book in one sentence and another for the following sentence - refer in footnotes at the end of each sentence to the source you used. If a whole paragraph is based on one or more sources refer to these sources at the end of the specific paragraph. If you say something like the following:

Scheepers¹ states that..... - you place the footnote immediately after the name of the writer you refer to - your reader can immediately establish who Scheepers is or where he or she could read more about what was said. The important thing is not to let your reader be confused as to what you are doing or what or to whom you are referring to.

¹ Scheepers 1993 *THRHR* 3-4.

Write theme by theme -sometimes when you read the material again you might find that you have to add it elsewhere. Do so immediately. Be consequent - if you use an abbreviation for a certain Act for example DFA for Development Facilitation Act do so right through. Do not use them interchangeably. If you decide to use italics to highlight the name of a book do so with all the books. Place a full stop after each footnote in order to avoid that you have full stops at some footnotes and not at others. There is nothing that irritates an examiner more than a student who uses different styles. Use a logical numbering system for example

1

1.1

1.1.1

1.1.1.1

If you use a long quotation decide whether you are going to use " or not - do that throughout. Do not use abbreviations in the text except if specified. Give a list of all abbreviations used at the beginning or end of your research paper. If you refer to section in the footnote as s - do so but do not use it only sometimes.

Give cross-references to something you refer to now but has already been discussed or something that you are going to discuss in more detail later. Initially refer to xx.xx as you can fill it in at a later stage. But put in the cross-reference as you will later forget what you wanted to do. Do not refer to pages but refer to paragraph numbers. Pages differ on depending the printer you use. You can fill in the paragraph numbers after you have completed the whole research paper. This will avoid you having to change your cross-references all the time when you want to add a paragraph or delete another.

Do not rewrite the other person's book or statements. Formulate sentences in your own words. Use brief and simple sentences.

Introduction

The introduction should be brief and to the point. It usually contains a brief exposition of the problem statement and may contain definition and explanation of words or phrases. It also contains the hypotheses and a reference to the research method and your reason for choosing it. You must also state what you are going to do in each of the chapters or subdivisions. Your introduction has a close connection with your conclusion.

Conclusion

The conclusion should not contain new information - it is a brief summary of your research paper and contains your proposals or view on the future. Your proposals cannot be grabbed

from the air - it should be based on that what you have stated in your previous chapters or subsections. Refer to the proposals in the main part of your research paper. You also have to state which hypotheses were proved and which not.

2.9 PROOF-READING AND LANGUAGE

As soon as a chapter is typed, proof-read the entire section. Check your

- formulation
- spelling (use the computer's spell check programme but beware of the differences between United Kingdom and USA spelling methods)
- whether you were consistent in the use of abbreviations, comma's, full stops, long quotations etc.
- style - that is whether you referred correctly to your sources.

This is one of the most important steps during your research - it might not be the most exciting but it is necessary. You might fail on your style, language and lack of consistency. If English is not your first language and sometimes even then, give your research paper to someone whose work it is to check your language and grammar. It is sometimes also useful to give your research paper to someone who has no knowledge of the particular subject to read - they will find mistakes you would no longer see as well as formulation problems as they would tell you if they do not understand a sentence.

2.10 SUPERVISING

You and your supervisor are a team. The supervisor, however, cannot write or do the research for you. That is your obligation. The best will be to make definite appointments with your supervisor to see him or her at least once a month or once in two months. As soon as you have completed a section of the research paper, send it immediately to your supervisor for his or her commentary. They are going to write some commentary on it and make suggestions. Get used to the idea - if you do not agree, discuss it with your supervisor but do not ignore their commentary. As soon as you have reworked the paper, proof-read it again and hand it back to the supervisor with the previous paper on which he or she wrote his or her commentary. That would avoid that you have to keep changing your research paper. Remember that each time a supervisor reads with a new vision and you might find new commentary. Smile and do it - in the end you are going to put a better product on the table.

Remember your title page - make sure that it complies with all the requirements. Add your bibliography, table of contents, list of abbreviations, summary and whatever else the university might require from you.

In the end the research paper is your product! Be proud of it. You have to take the initiative to arrange appointments with your supervisor and also to make an arrangement with him or her when he or she is going to give back your work. Supervisors are also people who might have a lot of other work to do - they sometimes also need "a stick" or a reminder to read your material! Do not be shy to remind them!

Once you have completed your research paper and once it is accepted, publish it in a journal - do not let all your work be done for no-one to read. You can publish it on your own or in conjunction with your supervisor. Remember if you are not going to publish it, the various universities have the right to publish it.

3 RESEARCH PROPOSAL

3.1 RESEARCH PROPOSAL

You have to write a research proposal that has to be accepted by the Research Unit of the Faculty. There will be formal gatherings of your co-students as well as lecturers to listen to your research proposal, to ask you questions on it and to make further suggestions. After approval of your proposal by the group, your proposal and title must be handed in to be approved by the Research Unit. Write a proposal and send it to your supervisor first before you address the whole group. Correct it and hand it in again. Your proposal should be in accordance with the following structure. Keep in mind what has been stated in previous study units.

REMEMBER THAT THE SUBJECT THAT YOU CHOOSE SHOULD BE LINKED AS FAR AS POSSIBLE TO THE MAIN THEME OF THE LL M YOU HAVE CHOSEN. If you are writing a LL M by way of dissertation this is of course not applicable.

Please note that your research topic should fall within the scope of the Research Unit of the Faculty namely: Development in the South African Constitutional State. Within this Research Unit various sub-projects exist – see paragraph 4 “Research Unit” of this guide.

GUIDELINES FOR THE STRUCTURE OF RESEARCH PROPOSALS FOR MASTER'S AND DOCTORAL STUDENTS (INCLUDING LL M STUDENTS DOING COURSE-WORK MASTER'S COURSES)

The *extent* of the proposal must, in the case of a dissertation for a structured LL M, be approximately one easily legible typewritten page, in the case of a dissertation for a research LL M, four pages and in the case of a LLD thesis, five pages.

The most important components of a research proposal are:

-
1. **The title**
 2. **Research question**
 3. **Problem statement**
 4. **Points of departure, assumptions and hypotheses (only applicable if you do a LLD thesis and research LLM dissertation)**
 5. **The framework of the dissertation**
 6. **Description of the research methods to be used**
 7. **Relevance/topicality for the Research Unit theme**

In the formulation of a research project it must be kept in mind that the decision-making readers thereof may not be expert in the particular discipline concerned, or may not have given much thought to the specific problem. The reader must therefore be given as much information as possible, in the most intelligible and convincing manner and in as little space as possible. Long, wordy, technical and "learned" motivations do not promote this purpose. From this it emerges that, even before the theme is chosen and the motivation of the project is written, much study must take place and thought be given to the matter, and usually quite a substantial measure of research must already have been done.

The requirements of the *house style* of the Faculty must already be satisfied when the research proposal is written.

Footnotes are not to be used in the research proposal.

1 **Proposed title**

The title of a dissertation or thesis must reflect the research theme in concentrated form. A well-formulated title should satisfy the following requirements:

- 1.1 It must be *brief and concise*: the title of the project is not the place for extensive explanations for the extent and limitations that have been decided upon; sub-titles such as " ... with specific reference to ..." are not appropriate; a useful aid in the conception of a title is to think of the limited space available on the back of a book.
- 1.2 It must be *as informative as possible*: this means that the title must at least say what field (and where appropriate which discipline) the project is concerned with. Ideally the title should also suggest the nature of the problem with which the project is concerned.

-
- 1.3 It must be *honest and realistic*: stated differently, the title should be borne out by the content. The title must not create the impression that more may be expected from the research report than what will indeed be found therein.
 - 1.4 It must be *linguistically pure* and the spelling must be impeccable.

2 The problem statement

Research is intended to answer questions to which scientific answers can be provided in a scientific manner. Before the research can be commenced, the issue or problem that will be investigated must therefore be considered, clearly delimited and explained. Before a compact formulation of the problem statement can be done, an explanatory exposition must be given.

Firstly a case must be made that the issue is indeed a scientific problem and secondly that it is worth the research and calls for resolution. The formulation of the problem statement must convince the reader that the project should be undertaken. In formulating the problem it must be kept in mind that it must serve as guideline for the research throughout the whole of the project. This makes the following demands upon the formulation of the problem statement -

- 2.1 the *extent* of the question or problem must be *appropriate* for the proposed project: the problem statement determines the parameters within which the project will be carried out;
- 2.2 the *problem must be soluble*: although it cannot be expected of the researcher at the time of the formulation of the problem statement to know what the conclusions are going to be, enough must already be known by the researcher to be satisfied that this is a viable project;
- 2.3 it must be *understandable*: the problem statement must be outlined with sufficient clarity in order that the researcher would not in the course of the project start wondering what exactly is being undertaken, and secondly, that a reader of the problem statement need not have any doubt as to the direction that the project will take.

At the end of the exposition of the problem statement the essence thereof must be set out in a single sentence, frequently in the form of a question.

If you are using the legal comparative method you should also refer to the law of that specific country – in other words the reader should see how the law of this specific country will assist you in your research. You cannot only say I am going to compare the South African position with the position in the Netherlands. It should be clear what rules in the Netherlands will assist you in your research and why.

3 **Points of departure, assumptions and hypotheses (only applicable if you do a LLD thesis and research LLM dissertation)**

No research or scientific activity is done neutrally in a vacuum. Therefore the points of departure, assumptions and hypotheses of a research project must also be founded in the problem statement.

It is important for the success of the research that the **points of departure** relevant to the project are systematised and formulated. The value of the conscious formulation of one's point of departure is found in the fact that it provides a test of consistency throughout the course of the research and that it gives direction to the making of basic scientific (especially theoretical) choices.

To facilitate the delimitation of the project, but specifically also to make it possible to take material decisions on the direction and extent of the project, it is frequently necessary to make certain **assumptions**. Usually the making of an assumption entails that a certain state of affairs is taken as given. The assumptions must be made after due consideration. They may be utilised to exempt the researcher from the presentation of exhaustive additional proof, to exclude some parallel fields of research from the work, to allow for the use of previous research results as givens, for the formulation of hypotheses, etc.

An **Hypothesis** is an unproven statement, the truth of which is provisionally assumed, but with a view to subjecting it to scientific analysis in order to determine its truth. Whereas an hypothesis should not be confused at all with a conclusion or a research result, it is on the other hand not merely a wild guess or what the Americans would call a "hunch." An hypothesis is formed on the strength of prior knowledge and rational anticipation of the answers expected to be found to the research problem. The intention is not to prove the truth of the hypothesis at all costs, but to test it to the utmost with scientific honesty before it can be included in a theory or be accepted or rejected as a conclusion. The development of hypotheses therefore also require thorough consideration and precise formulation.

The formulation of your assumptions, hypothesis and point of departure should be stated in clear, single sentences e.g.

- Everyone has a right to human dignity.
- In South Africa human dignity is not recognised. Etc etc.

4 **The framework of the thesis or dissertation**

It speaks for itself that there must be an introductory chapter in which for example the points of departure, hypotheses and limitations are dealt with, the choice of theme is explained and where the field is explored. It is furthermore to be expected that the project will close with a

concluding chapter in which for example concluding remarks, the conclusions of the research and perhaps recommendations will be contained. The "body" of the dissertation or thesis however requires most of the planning.

An effective approach to the planning of the framework, is to start with the main items and to refine them "inwards". The planning broadly entails consideration of the following:

- 4.1 How to communicate *information regarding the research process* cogently to the readers;
- 4.2 Designing a well ordered *overview of the source material* that was used to achieve the results, and
- 4.3 How to *present the arguments* relevant to the development of the findings.

This process of framework development requires original, creative thought. To rely mechanically on examples of other research proposals is not recommended – each project is unique.

When the main arrangement of chapters is made, the creation of a sound theoretical basis, the course of the argument, the meaningful coherence of subjects and the logical transition or continuation of one topic to the following, must be kept in mind.

At least the titles of the chapters must be set out in the research proposal.

5 Description of the research methods to be used

Under this heading the methods according to which the research will be undertaken, are set out, e.g. comparative, historical, empirical, etc. Almost inevitably the research will largely be characterized by literature study. The nature of the material (legislation, decided cases, journal material, monographs and text books, electronic sources, material of other disciplines, sources in other languages, etc) that is expected to be of greatest significance for the research, may also be indicated here. The proposed methodology must be suitable for the resolution of the problem statement.

6 Relevance/topicality for the Research Unit theme

Under this heading the researcher must indicate within which research project of the **Research Unit** *Development in the South African Constitutional State* the study will fall and how it fits into the project. The intention is that the dissertation or thesis that will be produced, must be presented as part of the output of the relevant focus area project. This matter must be discussed with the supervisor or promoter in advance. See paragraph 4 "Research Unit."

7 Projected time scale [all LLMs and LLDs]

It is essential that all the relevant factors regarding the research project be considered in its planning and then to decide upon a realistic time for the completion of the project. A useful method for this purpose is first to decide upon a realistic completion date and then to budget time backwards from there to decide when each section or phase will be completed.

For a structured LL M dissertation not more than one year, for a research LL M dissertation not more than two years and for a thesis not more than three years should be budgeted.

8 Preparatory study and research [only research LLMs and LLDs]

The particulars of past academic achievements and relevant experience of the researcher are given under this heading.

Furthermore a concise description may be given of the nature and extent of the research that was done for the preparation of the research proposal.

4 RESEARCH UNIT

A focus area, **Development in the South African Constitutional State**, was recognised by the University in 1998. It was designed and formulated against the background of the established research culture that already existed in the Faculty of Law. In 2007 the Focus Area was recognised as a Research Unit.

Mission statement: The high quality, topicality and volume of output of legal research and postgraduate teaching are to become one of the salient features of the North-West University. This is to be achieved by means of a coherent and well co-ordinated research programme composed of group projects, focused upon the utilisation of juridical science for the purposes of contributing to the solving of developmental problems in South Africa as a constitutional state.

The descriptive title of the research programme is: *Utilisation of juridical science and the law in the constitutional state as a contribution to the solving of developmental problems of South Africa.*

Research question of the Research Unit: How can juridical science and the law in the constitutional state be utilised as a contribution to the solving of developmental problems of South Africa?

Projects

The following projects flowing from the problem statement were approved by the Research Unit's management committee: Your research may relate to any of the projects or fit into the larger research theme of the Faculty.

1. **Poverty, social exclusion and social rights** (Project leader: Linda Jansen van Rensburg)

Brief description:

The research entails an analysis of policy, legislation and other measures in the realisation and implementation of social rights that are entrenched in the Constitution and corresponding state duties.

In *per capita* terms South Africa is an upper-middle-income country, but despite this relative wealth, the experience of most South African households is that of outright poverty or of continuing vulnerability to being poor. In addition, the distribution of income and wealth in South Africa is among the most unequal in the world, and many households still have unsatisfactory access to education, health care, energy and clean water, as well as to wealth-

generating assets and opportunities. Addressing these poverty-related problems is one of the main policy priorities of the South African government.

There is however little substantial and developing jurisprudence available in South Africa on the scope and core content of socio-economic rights and especially poverty rights. Taking into account the lack of substantial jurisprudence in this regard, section 39(1)(b) of the *Constitution of the Republic of South African* 108 of 1996 compels a court, tribunal or forum, when interpreting the Bill of Rights, to consider international law. The *Constitution* further provides for special social, economic and cultural rights as justiciable fundamental rights in the Bill of Rights. An example thereof is section 27(1)(b) and (c) of the *Constitution* which state that everyone has the right to have access to sufficient food and water; and to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

The research aims to:

- Analyse the obligations of the state in terms of the Constitution;
- identify and analyse the obligations of the state in terms of international instruments which South Africa has signed and ratified;
- evaluate current policy and legislation of the state in terms of the international and constitutional obligations on the state;
- develop new policy as well as legislative and other measures and
- propose mechanisms and structures to implement and adjudicate the above proposed measures.

2. Modern day impact of religious family systems in South Africa (Project leader: Christa Rautenbach)

Brief description:

Perhaps the most striking feature of South Africa is the fact that it consists of a pluralistic society in which various religious communities or groups live according to their own customs and usages. The law of South Africa generally does not, at present, recognise the validity of some of these customs and usages. The result is that adherents to religious legal systems, such as Judaism, Hinduism and Islam, live under state law (which is the common law) in the public sphere, and according to non-state law with regard to their private lives. In 1994 South Africa entered into a new constitutional dispensation. Section 15 of the Constitution of South Africa, 1996 recognises freedom of religion and makes provision for the recognition of religious systems of personal and family law. Such recognition is, however, subject to the

other provisions of the Constitution. The aim of the project is to determine the impact of the Constitution on religious customs and usages practiced in South Africa. This project also relates to the equality and land projects.

3. Rural and urban land development (Project leaders: Gerrit Pienaar and Willemien du Plessis)

Brief description:

Land is one of the major problems in the South African context. As a result of pre-1994 legislation, land law became a complex system that denied many people rights in land.

The aim of the project is to critically research legislation dealing with rural and urban development and to formulate proposals with regard to the practical implementation thereof within the development context. The following aspects are dealt with:

- Land reform law as a mechanism for the promotion of rural development in the North West Province
- Social security rights, eradication of poverty and socio-economic development in the North West province
 - Registration of land tenure rights
 - Discussion of South Africa's newest land legislation
- The role of rural governance, customary law and the environment in rural development in the Northern Province

4. Trade and development (Project leader: Leonie Stander)

Brief description:

Since 1994, international trade became a reality for the majority of South Africans. The fact that trade doors opened brought new challenges for development. On the one hand international trade is seen as a tool to alleviate poverty, while on the other hand it is seen as a solution to South Africa's developmental problems. The purpose of this study is to research

- the interaction between trade and the development of information technology and
- the effective development and management of trade through insurance.

In the first sub programme certain aspects regarding the development of the commercial law within the context of e-commerce are studied to accommodate the challenge brought by the development of information technology. In the second subproject the focus is on aspects of

the insurance law in support of effective management and development of trade within the context of import and export matters.

5. Environment, trade and development (Project leaders: Willemien du Plessis and Leonie Stander)

• Brief description:

The Constitution protects the right to a clean and healthy environment. Many actions of humans have a significant impact on the environment. Protection of the environment must however be weighed against reasonable and justifiable development. A vast number of laws regulate environmental protection. The project has, as its main aim, to collect the newest developments with regard to environmental law and to discuss them in relation to development. The following aspects are dealt with:

- Compilation of a database of relevant environmental legislation in the SADC region
- Quality comparative research on environmental law in the SADC region
- Contributions to the formulation of environmental law
- Discussions on new environmental legislation on a continuous basis and comments on draft legislation
- Establishment of product liability within life cycle assessments
- Research on the issue of environmental damage
- The determination of international legislation and standards to which South African companies must adhere
- Advice to mining companies on the implementation of the new developmental paradigm in which they function.

6. The Promotion Of Sustainable Development In The African Union (Project leader Werner Scholtz)

The main aim of this project is to investigate the way in which the African Union can establish and implement an environmental policy for the African continent that pursues sustainable development.

7. Environmental Specific Issues Within the Context of Sustainable Development in the South African Constitutional State (Project leader: Louis Kotzé)

By focussing on the inherent conflict contained in section 24 of the 1996 Constitution, domestic law, international law and relevant international and national case law, this project will investigate the interactive co-existence of developmental and environmental conservation

issues (sustainable development) as it is currently established in South African law and the international environmental legal regime. The focus will be made on environmental specific issues, which includes but is not limited to: environmental conservation, the impact of physical development on the environment, environmental principles that promotes sustainable development, environmental justice and specific environmental issues in the sphere of international environmental law.

8. Paradigm shifts in South African law (Project leader: Rolien Roos)

The new constitutional order has resulted in development in almost all fields of law. In some instances, these developments may be described as evolutionary, whereas some developments can justifiably be described as paradigm shifts. This will be the case when the development is not limited to the change in legal position of parties, but also refers to a new fundamental approach to the issue. The purpose of this research project is to analyse a number of paradigm shifts that have taken place in South African law since 1994.

9. Religion, faith and belief in the Constitutional State of the 21st Century (Project leader: Rolien Roos)

The South African Constitution protects freedom of religion, thought, belief and opinion. To which extent must the state respect religious diversity by accommodation and even protection of the right to sustain personal belief or conviction and the right to demonstrate such belief or conviction through worship, devotion, teaching and preaching? Exactly which rights are protected by the Constitution? What is the difference between freedom of religion, thought, belief and opinion? When are limitations imposed by the state on these rights, justifiable? When is the use of religious terminology, symbols and rituals within the public sphere, acceptable? The research question in this project is therefore: what are the parameters within which convictions of faith, religion, or of spiritual nature, may be exercised within the legal order?

EXAMPLE: RESEARCH PROPOSAL FOR MINI-DISSERTATION:

**Research Proposal submitted in fulfilment of the Requirements for the Degree
Magister Legum
At the North-West University (Potchefstroom Campus)**

RESTRAINT OF TRADE COVENANTS IN THE CONTEXT OF THE FREEDOM TO
TRADE

by

**Johanna Antoinette Esterhuizen
Student number: 12429678**

Proposed:

Study Supervisor: Adv. P Myburgh
Study Co-Supervisor Me MC Roos

2 March 2009

1 Proposed Title

Restraint of trade covenants in the context of the freedom to trade.

2 Research question

What are the purpose, application and implication of restraint of trade covenants within the ambit of the employment relationship in light of the constitutional protection of every citizen's right to choose his/her trade, occupation and profession freely?

3 Problem statement and motivation

3.1 Introduction

First and foremost it is prudent to note that South African law is governed by the *Constitution of the Republic of South Africa, 1996* (hereinafter referred to as the "Constitution"), which is the "supreme law of the Republic" and that any "law or conduct" that is inconsistent therewith will be subsequently invalid (section 2 of the Constitution).

Section 22 of the Constitution expressly recognises the right of every citizen to "choose their trade, occupation and profession freely". Notwithstanding the aforementioned, it has been held that restraint of trade covenants, which is a contract that limits an individual's right of freedom of trade, are both valid and enforceable within South African law. The question thus arises whether restraint of trade covenants are still valid and enforceable in light of section 22 of the Constitution and recent developments in case law.

3.2 Historical overview of restraint of trade in South African law

Pre-1984, South African courts followed different conflicting approaches to determine the validity and enforceability of restraint of trade covenants. Some courts followed the English law approach based on the freedom of trade, although others preferred the Roman-Dutch principle, which favoured the sanctity of contracts.

In terms of the English law restraint of trade covenants were regarded as *prima facie* invalid and unenforceable, founded on the principle that every person should be free to trade as he or she pleases. The Roman-Dutch principle, on the other hand, regarded the sanctity of contracts to be determinative in evaluating the validity and enforceability of restraint of trade covenants.

In 1984, the Appellate Division, as it was then, in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) 863 (A), brought legal certainty and simplified the approach to be followed in relation to the status of restraint of trade covenants. After much evaluation and analysing both the approaches in terms of English and Roman-Dutch law, the honourable court concluded that the South African common law did not view a restraint of trade to be void merely because it restricted a person's right to trade, but the fact that such a covenant was regarded to be *prima facie* invalid and unenforceable was derived from English law. It was further held that the validity of restraint of trade covenants should be determined with reference to the same rules and principles applicable to contracts, which are contrary to public policy. The public policy determined that contracts entered into freely should be honoured, unless the enforcement thereof will be damaging or contrary to public policy. The Appellate Division concluded that restraint of trade covenants are not *per se* contrary to South African public policy and should therefore be regarded as *prima facie* valid and enforceable, unless the enforcement thereof will be contrary to public policy.

3.3 Constitutional framework and enforcement

In South African law there are two opposing considerations in determining whether a restraint of trade agreement is contrary to public policy. On the one hand there is the principle of sanctity of contracts, i.e. freedom to contract, and on the other the freedom of trade (as entrenched in terms of section 22 of the Constitution), i.e. that competition is in the interest of public policy and a person should not have his/her trade unreasonably restricted. The test for the validity and the enforceability of restraint of trade covenants would be the balance between these competing considerations.

However, in terms of section 39 of the Constitution, the court, in interpreting any of the rights contained in the Bill of Rights, must apply and if necessary develop the common law to give effect to such rights and may also limit such rights, if the limitation is justifiable in terms of section 36 thereof. It is submitted that restraint of trade covenants as interpreted and developed by South African courts, comply with the requirements for limitation in terms of section 36 and would therefore be valid and enforceable despite section 22 of the Constitution, provided that the enforceability thereof is not contrary to the public policy.

Pre-1984 the burden of proof lied where the enforcement of the restraint of trade agreement was sought. Whereas the decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) 863 (A) determined that the burden of proof lays with the person who claims that he/she is not bound by the restraint and that the enforcement thereof would be contrary to public policy. However, it has been suggested by the Natal Provincial Division per Kondile J in *Canon Kwazulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2004 (1) BCLR 39 (N), that the constitutional protection of the right to trade has shifted the burden of proof to the employer to show that such a restraint is reasonable and not contrary to public policy.

3.4 Conclusion

In light of the above the question thus arises whether restraint of trade covenants in the context of the employment relationship is valid and subsequently enforceable in light of the constitutional development thereof, despite passing the constitutional muster for the justifiability of its limitation.

This dissertation will therefore endeavour to investigate the historical development and general principles relating to restraint of trade covenants, the fundamental right of freedom of trade and the implication thereof on the common law principle, the purpose, validity and enforceability of restraint of trade covenants in employment contracts and finally shall offer conclusions on whether restraints remain valid, enforceable and necessary in the context of the employment relationship.

4 Framework and outline

Chapter 1: Introduction and Problem Statement

Chapter 2: Historical Overview and Theoretical Foundations

Chapter 3: Fundamental right of freedom of trade

Chapter 4: Purpose, Validity and Enforceability of Restraint of Trade in Employment Contracts

Chapter 5: Conclusion

5 Research methodology

The research will entail the synthesising of literature in respect of the general principles pertaining to restraint of trade, followed by the synthesising of legal history and the development thereof, by critically evaluating and analysing relevant case law in the context of the employment relationship with reference to the constitutional development of restraint of trade covenants, which led to the current status thereof in South African law.

6 Relevance/topicality for the research unit theme

The research that is going to be conducted falls within the ambit of the Research Unit of the Faculty of Law and within the framework of "Development in the South African Constitutional State". More specifically this dissertation shall be aimed at the development of the common law to such an extent to give effect to the constitutional values in such a manner that a shift in the paradigm is being introduced.

7 Projected time scale

1. Collection of Literature: 1 August 2008 to 31 January 2009

2. Processing of Literature: 1 February tot 31 March 2009
3. Rounding off and finalisation: 1 tot 30 April 2009
4. Submission of draft dissertation: 20 April 2009
5. Submission of final dissertation: 5 May 2009

EXAMPLE: RESEARCH PROPOSAL FOR DISSERTATION (RESEARCH LLM)

**JUDICIAL PROTECTION OF THE INDEPENDENCE OF INVESTIGATIVE
AUTHORITIES**

Research proposal for a dissertation submitted in partial fulfilment of the requirements for the degree *Magister Legum* (LLMV) at the North-West University (Potchefstroom Campus)

by

SHAUN KRUGER

21886148

Proposed study leader: Prof F Venter

August 2009

1 Proposed title

Judicial protection of the independence of investigative authorities.

2 Research question

What are the current shortcomings in South African law regarding the judicial protection of investigative authorities against political interference?

3 Problem statement

3.1 Directorate of Special Operations

The independence of investigative authorities in South Africa came under scrutiny with the dissolution of the Directorate of Special Operations (the DSO) and the announcement of its incorporation into a new police unit, amidst heavy criticism from various stakeholders in South Africa and abroad. The reason for the abolishment of the DSO, or so the critics allege, is the investigation into the so-called "Arms deal" and the implication of high ranking government officials such as the current South African president, Jacob Zuma, in allegations of bribery and corruption associated with the Arms debacle.

One of these critics (Bruce D "Without fear or favour – The Scorpions and the politics of Justice" 2008 *SA Crime Quarterly* June 24:11) argues that "doing away with the Scorpions will in fact increase the potential for such (*political*) manipulation thereby undermining the principle of equality before the law." So too has the Working Group on Bribery in International Business Transactions which forms part of the Organisation for Economic-Co-operation and Development (the OECD) stated that it "expresses serious concern in regard of this issue, and notes that it will monitor this further in the context of future evaluations, to ensure that the effective enforcement of the foreign bribery offence is not affected by this rearrangement of law enforcement

responsibilities" (see Venter F "Arms deals, Bribery and Political Interference: How (im)potent, the (rule) of law?" 2008 SALJ, to be published in Vol 4).

The dissolution follows the African National Congress' (ANC) 52nd National Conference held at Polokwane between 16 to 20 December 2007 and implementation of the *South African Police Service Amendment Act 57 of 2008* (Act 57 of 2008) and the *National Prosecuting Authority Amendment Act 58 of 2008* (Act 58 of 2008) (amending the *South African Police Service Act 68 of 1995* and the *National Prosecuting Authority Act 32 of 1998*). By the dissolution of the DSO and the incorporation of its members in a new unit – the Directorate for Priority Crime Investigation (the DPCI) – under the control of the South African Police Service (SAPS), the former investigative body not only loses the independent status it previously had, but also its decision-making ability as the new unit will now report to a ministerial committee with "wide powers to determine what crimes (*and cases*) the new unit" should investigate (Opposition "Scorpions Bill marks dark day in SA History" 30 January 2009 *Mail & Guardian*). The Online Reporter ("Glenister fails in Scorpions court appeal" *Mail & Gaurdian* 22 October 2008) states that "the new unit could be subject to political interference as the head of the unit would have to report to the police National Commissioner."

3.2 Mandate of special investigative bodies

Special investigative authorities are creatures of statute, which means that they are enacted by way of legislation which sets out the composition of the bodies as well as their mandate, functions and powers. The establishing legislation for the DSO was one of the previous amendments to the *National Prosecuting Authority Amendment Act 61 of 2008* (Act 61 of 2000) which set out the mandate for the DSO as investigation into organised crime and other offences determined by the President. This meant that the DSO investigated organised crime, money laundering and high profile matters related to political figures and high ranking businessmen. The DPCI has a similar mandate as set out in Act 57 of 2008, which provides for the transfer of powers,

investigations and budgets from the DSO which in practice means that they take over from the DSO. However, whereas the DSO reported to the Investigating Director at the NPA, the DPCI as a sub-division of the SAPS, reports to the SAPS Commissioner and ultimately to a Ministerial Committee designated thereto by the President.

Another specialised investigating authority is the Special Investigation Unit (the SIU) headed by Willie Hofmeyer, one of the three Deputy Directors of the NPA who also heads the Asset Forfeiture Unit (the AFU). The SIU was established by the *Special Investigating Units and Special Tribunals Act 74 of 1996* to investigate serious malpractices and maladministration in State institutions such as government departments and to recover stolen, lost or misappropriated funds by way of civil recovery. The SIU reports directly to the President and is established and can be dissolved by President by way of a mere proclamation in the *Government Gazette*.

3.3 Independence of investigative bodies

The *Constitution of the Republic of South Africa, 1996* (the *Constitution*), makes provision for the independence of certain bodies such as the Independent Complaints Directorate (the ICD), the Public Protector, the NPA, the SAPS and the Judiciary to name but a few. As such, the Constitution protects the impartiality of these bodies, which means that the NPA and the Judiciary can prosecute and adjudicate cases as impartially and as objectively as possible. Nowhere, however, is mention made of specialised investigative authorities (specialised crime fighting units) such as the DSO, the DPCI and other investigative units such as the Special Investigation Unit (the SIU) and the protection that these bodies should enjoy against political interference in their ongoing investigations. It is possible that (extreme) political interference with such investigative bodies may prohibit the proper and impartial investigation of alleged crimes, thereby resulting in the cases never reaching the NPA or the Judiciary. Should this be the case, it might give rise to an undesirable result that negates the whole principle of "equal justice for all" and

cultivates a culture of "abuse of powers" by political figures. As the Opposition (30 January 2009 *Mail & Guardian*) states "(n)o ANC politician or business crony would ever again be investigated now that this unit, which served without fear or favour, had been destroyed."

3.4 Rule of law and separation of powers

When the Constitutional Court was approached to intervene in the ruling party's decision to disband the DSO, the arguments by the applicants and the respondents were based on two vital democratic principles: the rule of law and separation of powers (*Glenister v The President of the Republic of South Africa and others* [CC] CCT41/08 / 2008 ZACC 19; *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC); *Zuma v NDPP* Case 8652/08 NPD; *NDPP v J Zuma* Case 573/08 SCA / 2009 ZASCA 1).

In terms of the rule of law principle, the Constitution is the supreme law and any action, whether from government or private individuals, which is inconsistent with it, is invalid. The rule of law is a cornerstone of the South African democracy and cannot be ignored in an arbitrary manner (see also *Matatiele Municipality v President of the RSA* 2006 5 SA 47 (CC) para [100]) and presupposes that "all government action is required to be legally justified" (Venter 2008 *SALJ*). Furthermore, the rule of law assumes that all citizens are equal before the law, thus meaning that all are entitled to the rights but also the duties imposed by the law. It seems therefore that, in terms of equality, no one may be protected against criminal investigation and subsequent prosecution where a crime had been committed.

The separation of powers principle is derived from the *trias politica* principle first penned by French philosopher, Montesquieu, requiring a separation of the executive, legislative and judicial branches of government (Rautenbach, IM and Malherbe, EFJ *Staatsreg* 3rd ed Butterworths Durban 1999). This principle is included in section 41 of the *Constitution* which state that "(a)ll spheres of government and all organs of state within each sphere must –

exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere." According to *Doctors for Life International v Speaker of the National Assembly* (2006 6 SA 416 [CC] para 68) "(c)ourts have traditionally resisted intrusions into the internal procedures of other branches of government."

During the numerous "Glenister" court cases leading up to the dissolution of the DSO, it was argued by Glenister that the courts needed to intervene based on the protection of the rule of law principle. However, the respondents (the State) argued that any intervention by the courts would be a violation of the separation of powers. These two competing arguments and thereby, the two competing principles of law, resulting in a deadlock and the courts, having to choose between these two options, choose not to interfere based on the separation of powers principle (see *Glenister v The President of the Republic of South Africa and others* [CC] CCT41/08 / 2008 ZACC 19, as well as *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC)).

3.5 United Kingdom

The independence of investigative authorities in the United Kingdom is enforced by the courts. In the case of *The Queen on the Application of Corner House Research and the Campaign Against Arms Trade v The Director of the Serious Fraud Office and BAE systems* (PLC [2008] EWHC 714 (Admin)) the court recognised the need for an impartial, unbiased investigative authority when it found that investigations by the Serious Fraud Office (SFO), "an independent government department within the UK criminal justice system" (see Venter 2008 SALJ (to be published)) into an Arms deal between Britain and Saudi Arabia should not be suspended based on external threats and political pressure. The court recognised that, for an investigative body to function effectively, the political interference (if any) should be kept at a minimum. The SFO is an independent government department set up in the United Kingdom by the Criminal Justice Act 1987 and its purpose is to investigate and prosecute serious or complex fraud in England, Wales and

Northern Ireland. In its essence, the SFO is much like the DSO and the SIU, especially with regard to its focus on specialised and complex investigations, and the English courts acknowledge its role in ensuring the independence thereof. Such way of thinking, could be of assistance to South African legal thinking.

4 Points of departure, assumptions and hypothesis

Point of departure:

The rule of law is the supreme principle of law, preceding all other principles of law.

Assumptions:

- The objective of the separation of powers (*trias politica*) is to prevent an abuse of power by government.
- Courts should be willing to overlook the *trias politica* principle in favour of the protection and preservation of the rule of law in order to safeguard the democratic value of equality for all, especially when the courts foresee the possibility of political interference in investigations. Such decisive interference by the courts should only be considered once all other avenues have been explored.
- The position in the UK may provide lessons for South Africa.

Hypothesis:

The independence of investigative authorities is threatened in South Africa and should be protected by the courts.

5 Proposed framework of the dissertation

Proposed framework:

- 1 Introduction and problem statement
- 2 Specialised Investigative Authorities in South Africa
- 3 The "Rule of Law" v "Separation of Powers"
- 4 Constitutionally protected investigative bodies
- 5 United Kingdom
- 6 Conclusion and Recommendations

6 Projected time frames

February – July 2009	: Research and perusal of preliminary material.
31 July 2009	: Submission of research proposal
24 August 2009	: Submission of Chapter 1 and 2
7 – 11 September 2009	: Oral Exam with subjects Constitutional Law, Administrative Law and Criminal Law
21 September 2009	: Submission of Chapter 3
12 October 2009	: Submission of Chapter 4
2 November 2009	: Submission of Chapter 5
23 November 2009	: Submission of First concept of Final draft
January – July 2010	: Completion of related subjects in Tilburg, Netherlands
August 2010	: Final submission to Research Unit

7 Description of the research methods to be used

The proposed study will comprise of the following research methods:

7.1 Literature study

A literature review of the relevant South African law dealing with investigative authorities, the rule of law and separation of powers and the abuse of power in the form of political interference will be conducted. The review will include a review of statutes and other legislation, case law, common law, textbooks and articles as well as electronic material obtained from various internet sites.

7.2 Legal Comparative study

As referred to *supra*, other countries such as Britain, dealt with the same kind of problem that faces South Africa. The comparative review will focus on analogous situations with investigative authorities in the United Kingdom and discuss the court's and the legislature's attitude towards political interference

specifically with regard to the SFO. The composition, mandate and powers of the SFO will be discussed in terms of its founding legislation (*Criminal Justice Act 1987* (United Kingdom)) and foreign case law such as *The Queen on the Application of Corner House Research and the Campaign Against Arms Trade v The Director of the Serious Fraud Office and BAE systems* (PLC [2008] EWHC 714 (Admin)) and *Sharma v Brown-Antoine and Others* (2007 1 WLR 780 PC) will be analysed.

8 Relevance for the Research Unit

The proposed study falls within the scope of the Research Unit's "*Development in the South African Constitutional State*" and will critically analyze the role of specialised investigative authorities whilst maintaining the rule of law and how political interference with the function of these investigative authorities impact on the enforcement of the separation of powers doctrine. The study will scrutinize the constitutional protection of the SAPS (as the primary investigative body in South Africa) as well as the constitutionally established "State institutions supporting Constitutional Democracy" such as the Independent Complaints Directorate (the ICD) and the Public Protector. The proposed study will also recommend that courts take a more pro-active in the prevention of political interference and the abuse of power thereby contributing to the project "New Thinking in Law".

9 Preparatory study and research

The candidate successfully completed the following LLB modules which will assist him in carrying out the research goals of the proposed study: Criminal Law, International Law, Administrative Law and Constitutional Law. The candidate obtained his B Com Law and LLB degree at the University of Pretoria *cum laude*. The candidate also obtained a LLM degree (with specialisation in Criminal Law) *cum laude*. The candidate was employed by the SIU for a period of four years, gaining much knowledge on the functions of the SIU, the DSO and the NPA.

Prior to the submission of this research proposal, preparatory research was undertaken by way of a library and internet search. The preparatory research was utilised during the formulation of the problem statement and the sources are set out in the Bibliography hereunder.

10 Bibliography

Legislation

Constitution of the Republic of South Africa, 1996.
Criminal Justice Act 1987 (United Kingdom).
South African Police Service Amendment Act 57 of 2008.
National Prosecuting Authority Amendment Act 56 of 2008.
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National Prosecuting Authority Act 32 of 1998.
Special Investigating Units and Special Tribunals Act 74 of 1996.

Case Law

De Lange v Smuts NO and Others 1998 3 SA 785 (CC).
Doctors for Life International v Speaker of the National Assembly 2006 6 SA 416 [CC].
Glenister v The President of the Republic of South Africa and others [CC] CCT41/08 / (2008) ZACC 19.
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S v Yengeni 2006 1 SACR 405 T.
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Online Reporter "Glenister fails in Scorpions court appeal" 22 October 2008 *Mail & Guardian* online.

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Conference notes and Reports:

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Unknown "Resolutions taken from the ANC's 52nd National Conference held at Polokwane from 16 to 20 December 2007".

EXAMPLE: RESEARCH PROPOSAL FOR LLD THESIS

**Research Proposal submitted in fulfilment of the Requirements
for the Degree Doctor Legum
at the North-West University (Potchefstroom Campus)**

by

Anél du Plessis

Student number: 11731958

Proposed:

Promotor: Prof W Du Plessis (NWU)

Assistant Promotors: Prof J Verschuuren (University of Tilburg) and Mrs R Roos (NWU)

April 2005

1 Proposed Title

The Realisation of South Africa's Environmental Human Right at Local Government Level

2 Problem Statement

2.1 Research Question

Does the current local governance legal framework provide for the effective implementation and adequate realisation of section 24 of the *Constitution of the Republic of South Africa, 1996*?

2.2 Introduction

Most modern democracies, including South Africa have a number of international and regional human rights obligations (Heyns and Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) 539-572). Characteristic of these democracies may be the increasing indivisible nature of governance (in general the direction of public affairs) and human rights protection. Many of the human rights instruments that South Africa adheres to, contain issue-specific human rights. One such right is the human right pertaining to the environment that strongly links with international environmental law and instruments such as the 1992 *Rio Convention on Environment and Development* and *Agenda 21*, a global plan of action for sustainable development (Urquhart and Atkinson, *A Pathway to Sustainability: Local Agenda 21 in South Africa* (2000) 13 and Boyle and Anderson, *Human Rights Approaches to Environmental Protection* (1996) 60). Issue-specific human rights such as the human right pertaining to the environment, increasingly and in different apparel, infiltrate governance at the international, regional, national and local level.

The international and regional link between the environment and human rights protection is no foreign concept in South Africa, and has national standing in the form of section 24 of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution). Section 24 is both a narrowly constructed socio-economic and classical human right stating that 'everyone has the right to an environment that is not harmful to their health and well-being and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure sustainable development and use of natural resources while promoting justiciable economic and social development' (Boyle and Anderson, 18; Déjeant-Pons and Pallemarts, *Human Rights and the Environment* (2002) 19).

In terms of the Constitution, all three spheres of government have positive obligations relating to the realisation of section 24 and, indirectly, the promotion of sustainability in South Africa (s 8 read with s 24, see also De Waal *et al*, *The Bill of Rights Handbook* (2001) 405). Numerous decisions affecting the environment, and therefore affecting sustainable development, are

made on a daily basis in the exercise of government's discretionary administrative powers (Fuggle and Rabie, *Environmental Management in South Africa* (1992) 120). These decisions may directly impact on the South African community as they concern, *inter alia*, waste and water management, township development, the control of public nuisances, cleansing, the construction of roads and dams, the authorisation of activities likely to pollute the environment and the extraction of natural resources (Urquhart and Atkinson, 11). Except for the general and opaque guidelines in terms of section 24, many of these decisions are currently made and implemented at local government level without concrete and functional policy direction. Lack of a legally enforceable instrument(s) to measure and monitor environmental human rights protection in local level governance, could consequently result in detrimental impacts on human well-being and the state of the environment.

2.3 Theoretical Foundations

Internationally, the role of environmental human rights in decision-making and sound, open and legitimate environmental governance that may contribute to sustainability, are becoming more and more significant (Bruch, Coker and Van Arsdale, 'Breathing Life into Fundamental Principles: Implementing Constitutional Environmental Protection in Africa' 2000 *SAJLP* 22). For the purpose of this study, environmental governance is defined as the collection of legislative, executive and administrative functions, processes and instruments used by government to ensure sustainable behaviour by all as far as governance of environmental activities, products services, processes and tools are concerned (Nel and Du Plessis, 'Unpacking Integrated Environmental Management – A Step Closer to Effective Cooperative Governance' 2004 *SA Public Law* 181-190; see also Bruch, Coker and Van Arsdale, 24). South Africa's section 24 is, however, drafted in the broad and opaque language characteristic of third generation rights that may find practical meaning and relevance through, *inter alia*, the legal framework and instruments developed in terms thereof (Cheadle, Davis and Haysom *South African Constitutional Rights: The Bill of Rights* (2002) 413-415; see also Bruch, Coker and Van Arsdale 27). The efficacy of the existing legal framework for the interpretation and concretisation of section 24 at local government level may be determined through an analysis of local environmental governance and the implementation of those principles, strategies and practical legal mandates, required for comprehensive environmental human right protection (Fuggle and Rabie, 76). This analysis may assist in concretising section 24 in practical and sustainable components distilled from the amalgamation of existing international, regional and national law on respectively the environment, human rights, state administration and governance.

An investigation of the relevant principles and strategies may require an understanding of current international and regional theories and tendencies with regard to environmental law in general, socio-economic human rights, environmental human rights, local environmental governance, environmental management and policy-making. Such an understanding may for

example contribute in determining whether section 24 should be seen as an environmental human right that is anthropocentric in nature with underlying ecocentric values, what the vertical protection (protection of the rights of individuals by the state) of the environmental human right encompasses and whether the beneficiaries of environmental human right protection should be confined only to *personae in esse* (Henderson, 'Some Thoughts on Distinctive Principles of South African Environmental Law (2001) SAJLP 153, Cheadle, Davis and Haysom, 416 and Fuggle and Rabie, 85). It may also assist in establishing the degree in which principles in national legislation, such as the section 2 principles in the *National Environmental Management Act 107 of 1998*, contribute to the concretisation of the environmental human right.

2.4 International, Regional and Sub-Regional Environmental Human Rights Protection

South Africa is party to international, regional, sub-regional and soft law agreements on respectively the protection of human rights, development and environmental protection, for example the regional *African (Banjul) Charter on Human and People's Rights* of 1981 (hereafter the African Charter) which provides that 'all people shall have the right to a general satisfactory environment favourable to their development'; the *International Covenant on Economic, Social and Cultural Rights* of 1966, the *Rio Declaration on Environment and Development*, 1992, *Agenda 21* and the United Nations' Programme for the Further Implementation of Agenda 21, 1997. In addition to binding international and regional human rights obligations, several international and regional soft law instruments on the environment and development furthermore pose obligations parallel to the protection of the environmental human right (Cheadle, Davis and Haysom, 411). Section 24 needs to be interpreted and to theoretically meet with the different obligations derived from this international framework. The question is what the role of local government is in not only realising the section 24 environmental human right, but also in furthering the joined aims and objectives of the global human rights and environmental instruments that South Africa adheres to. Once this role of local government has been established, the *lacunae* of the current national local governance legal framework for practical realisation of the universal and national environmental human right, should be determined.

2.5 The National Legal Framework

The *Local Municipal Systems Act 32 of 2000* (hereafter the Systems Act), the *Municipal Structures Act 117 of 1998* (hereafter the Structures Act) and the *Local Government: Municipal Finance Management Act 56 of 2003* (hereafter the MFMA), are among the legislative instruments that provide the most recent framework for the operation of, and development by local governments in South Africa. These instruments, *inter alia*, provide for the development of integrated development plans (hereafter IDPs) as strategic development planning instruments for all planning, budgeting, management and decision-making in municipalities; the internal structures and functionaries of local authorities and for the sound

and sustainable management of the financial affairs of municipalities in order to establish treasury norms and standards for the local sphere of government. IDPs as local governance instruments to address environmental, social and economic issues in an integrated fashion, may be regarded as key instruments currently in place (Urquhart and Atkinson, 33). Most of these IDPs, however, fail to adequately address environmental issues (Du Plessis, Le Roux, Lommen and Bluemer, *Greener Governance in Southern SADC: Success Report on Medium Sized Local Authorities* (2004) 28).

The national legislative framework on local governments, in so far as it may relate to section 24 of the Constitution, also comprises environmental framework law. The *National Environmental Management Act* 108 of 1998 (hereafter NEMA), among others, determines that the environment is a functional area of concurrent national and provincial legislative competence, but that all spheres of government and all organs of state must co-operate with, consult and support one another (Ch 1 and 3). It further contains provisions to ensure that organs of state, including local authorities, maintain the principles guiding the exercise of functions affecting the environment. Various legislation currently place, and may in future place additional environmental-related obligations on local government in fulfilling its governance role, for example the *Environmental Conservation Act* 73 of 1989, the *National Water Act* 36 of 1998, the *Water Services Act* 108 of 1997, the *National Air Quality Management Act* 39 of 2004 and the *National Environmental Management: Biodiversity Act* 10 of 2004.

The question is how existing national law and the instruments in terms thereof may contribute to local authorities' efforts to effectively implement, and accordingly realise section 24 of the Constitution in local environmental governance practices.

2.6 Lessons Distilled from Foreign Law

The Bill of Rights is silent on exact obligations and duties, also of local government in upholding and protecting human rights (Kidd, *Environmental Law: A South African Guide* (1997) 39). It may be possible to determine a minimum international standard for local government achievements in protecting and realising the human right to environment (Boyle and Anderson, 187). Several countries have included environmental rights, principles or related obligations in their Constitutions as well as provisions that oblige local authorities to respect and protect these rights. These include, for example, Namibia, Germany and Belgium.

2.6.1 Namibia (The Southern African Development Community (SADC) framework)

Instead of a fundamental environmental human right, article 95(1) was included as one of the Chapter XI Principles of State Policy in the *Constitution of Namibia*, 1990. Article 95(1) determines that the state shall actively promote and maintain the welfare of the people by

adopting, *inter alia*, policies aimed at the maintenance of ecosystems, essential ecological processes and biological diversity of the country and the utilisation of living resources on a sustainable basis for the benefit of all Namibians, both present and future. Namibia is South Africa's sub-regional neighbour with a similar political history, environmental challenges and regional and sub-regional environmental and human rights obligations. The question is to what extent the existing means to implement article 95(1) at local government level in Namibia, may assist in developing an institutional framework for the implementation of section 24 in South Africa.

2.6.2 Germany and Belgium (The EU framework)

The EU, similar to the SADC, constitutes a regional framework for state co-operation, policy development and collective growth. Member States of the EU prioritises independence of local authorities in the *European Charter of Local Self-Government*, 1985 (Hascke, *Local Government Administration in Germany* (1998) <http://www.iuscomp.org/gla/literature/localgov.htm>). In terms of this instrument local authorities not only have to deal with higher national policy (including for example human rights protection, public administration and environmental governance), but must further deal with European authority, which include the direct observation of all European regulations. Approximately half of the EU Directives concerning the single market, need to be implemented or realised by the local authorities of Member States. These include, for example, Directives on water quality control and the implementation of waste policies. For the purpose of this study, Germany and Belgium as Member States could serve as comparative examples.

2.6.2.1 Germany

Chapter II of the *Grundgesetz*, 1949 deals with the Federation of the States and in article 20a addresses the protection of natural resources. Article 20a determines that 'the state, also in its responsibility for future generations, protects the natural foundations of life and the animals in the framework of the constitutional order, by legislation, and according to law and justice, by the executive and judiciary'. The level of cities and municipalities is furthermore one of the five constitutionally distinct and legally independent political levels in Germany. Two of the rights that largely belong to the responsibility of local governments and that cannot be infringed by the Federation or the *Länder*, are planning and the right to pass municipal bylaws (Hascke). An analyses of the German system of local government constitutions, national local government legislation and instruments (such as planning instruments that may correspond with the IDPs in South Africa) that are in line with article 20a and related EU policy, may assist in formulating an institutional framework plan of action for local governments in South Africa.

2.6.2.2 Belgium

Title II of the *Constitution of Belgium*, 1970 addresses the rights of Belgium citizens with article 23 addressing specifically the right to dignity. Article 23 states that everyone has the right to lead a life in conformity with human dignity. The right is furthermore extended to include a basic right to the environment, stating that all laws should take into account, for example, corresponding economic, social and cultural rights. These rights include notably, and *inter alia*, the right to enjoy the protection of a healthy environment. In Belgium, municipalities are regional authorities that are entitled to organise and administer local matters within the framework of legislation (Law Library of Congress: Kingdom of Belgium *Governments on the World Wide Web* (2004) <http://www.bc.gov/law/guide/belgium.html>). Local governments are regarded to form the basis of the state and democratic life. Competencies regarding sustainable development are furthermore divided amongst the federal government and the federal entities. What concerns the ecological dimension of sustainable development, the regions are largely given the responsibility, but from a legal point of view, the regions and municipalities are positioned at the same level as federal government (Law Library of Congress: Kingdom of Belgium). The constitutional obligations for the achievement of sustainable development together with the existing legislative framework binding on Belgium's local authorities, may assist in formulating a framework institutional plan for local governance in South Africa. The question is how the lessons distilled from Namibia, Germany and Belgium assist local governments in South Africa in realising the section 24 environmental human right.

3 Aims of the Study

The aims of this study are to:

1. Critically analyse section 24 of the Constitution in order to establish the content and scope of the human environmental right in South Africa;
2. To establish from the international, regional and sub-regional environmental and human rights legal framework, the most important of South Africa's obligations related to the environmental human right;
3. Establish and critically analyse the existing national legislative framework and instruments that may relate to the realisation of section 24 in local governance efforts;
4. Compare foreign local governance legal frameworks for the realisation of the environmental human right in Namibia, Germany and Belgium with the existing legislative framework in South Africa; in order to

5. Reach a conclusion and to make recommendations for a generic local institutional plan of action to operate in conjunction with the established local governance legal framework to allow for vertical realisation of section 24.

4 Points of Departure and Assumptions

4.1 Points of Departure

1. South Africa is party to international, regional and sub-regional human rights instruments that pose binding and non-binding obligations in terms of, *inter alia*, the environment;
2. Section 24 of the Constitution is part of the established Bill of Rights and affords people the human right to an environment that is not harmful to health or well-being;
3. The South African government, in its entirety, has obligations in terms of international, regional and sub-regional environmental and human rights instruments; and
4. South Africa currently responds to its local government obligations in terms of for example *Local Agenda 21* (the process used around the world to translate *Agenda 21* into actions at the local level, hereafter LA21), other international and regional agreements, sections 24 and 152 of the Constitution by means of, *inter alia*, IDPs and other national environmental legislation.

4.2 Assumptions

1. Local environmental governance efforts are unsustainable;
2. There is a need to further sustainable local governance in South Africa;
3. Local government has a key role to play in realising the section 24 environmental human right and in indirectly furthering international, regional and sub-regional environmental law and human rights protection;
4. A national legal framework that obliges local authorities to govern in a sustainable way exists that may contribute to the realisation of section 24 at local government level as is the case in respectively Namibia, Germany and Belgium;
5. Although many local authorities in South Africa have already developed IDPs or local programmes in terms of LA21, the efficient execution of these instruments are not legally enforceable with the result that effective implementation and monitoring strategies either lack or fail; and
6. A generic local institutional framework plan of action aimed at the realisation of section 24, and to be implemented and applied in concurrence with existing IDPs and local

programmes in terms of LA 21, may address *lacunae* in the current local governance legislative framework.

5 Framework

- Chapter 1:** Introduction
- Chapter 2:** Theoretical foundations
- Chapter 3:** International, Regional and Sub-Regional Environmental Human Rights Protection
- Chapter 4:** South African National Legal Framework
- Chapter 5:** Lessons Distilled from Foreign Environmental and Municipal Law
- 5.1 Namibia (SADC Framework)
 - 5.2 Germany (EU Framework)
 - 5.3 Belgium (EU Framework)
- Chapter 6:** Conclusion and Recommendations

6 Projected Time Scale

- 6.1 South African Literature Study and Empirical Data Collection:
December 2004-November 2005
- 6.2 International Literature Study and Empirical Data Collection:
November 2005 – July 2006
- 6.3 Final submission:
November 2006

7 Research Methodology

Research will initially be done in the form of a synthesising literature review of the purport of the environmental human right obligations of government in terms of section 24 of the Constitution, the current legal framework for development and governance at local government level and existing normative and other theories that constitute the theoretical base of this study.

Thereafter empirical data will be collected and existing data contained in technical reports will be re-arranged and substantiated. For the purpose of this qualitative study, the former method will include the conducting of semi-structured individual interviews and focus groups with local government officials and politicians in South Africa and abroad, the conducting of

local participatory workshops with particularly local government involvement and the distribution of questionnaires to municipal managers of metro, medium-sized and small local authorities in South Africa. This method may assist in observing and interpreting policy and in establishing governance-related needs for the protection of the environmental human right by respectively the officials of capacitated and less capacitated local governments.

In order to distil regional and international lessons with regard to the implementation of the environmental human right at local government level, a legal comparative study will be undertaken. The comparative study will include the synthesising of literature on SADC and the EU human rights regime, as well as a similar investigation of the local government legal instruments in place for the realisation of the environmental human right or constitutional environmental principle in respectively Namibia, Germany and Belgium. These countries show similarities with South Africa in their constitutional provisions on the environment, levels of development or legal positioning at regional level.

8 Topicality and Relevance for Focus Area

Since this thesis primarily focuses on section 24 and the realisation of this environmental human right at local government level, it will resort under the Focus Area theme: *Development in the South African Constitutional State*. The sub-Focus Area project involved is: *Environment, Trade and Development*. This thesis addresses key issues pertaining to sustainable development, local government (and accordingly governance), as well as the nature and implementation of section 24 as socio-economic right. Current *lacunae* in the local government legal framework for sustainable development and environmental protection, hampers the realisation of section 24 for not only *personae in esse*, but also for future generations. The results of this study may accordingly contribute to the improvement of local environmental governance and the advancing of section 24 as the foundation of sustainable development in the South African constitutional state.

9 Preparatory Study

The literature review and collection of empirical data were partially completed in 2004 as part of research that has been done for the compilation of two technical reports. These results were documented in respectively the *Greener Governance in Southern SADC: A Success Report on Medium-sized Local Authorities* and the *SAHRC Inquiry Report on Human Rights Violations against the Khomani San Community*. Research visits to different local authorities in the SADC region has been undertaken in 2004. For the purpose of an empirical international comparative study, research trips to respectively Germany and Belgium are intended. Available academic resources have also been gathered for the purpose of the theoretical foundation of this thesis.