



CENTRE^{FOR}
LAW AND
SOCIETY



LAW^{AND} SOCIETY IN AFRICA

9-11 DECEMBER 2016



Conference Programme

LAW AND
SOCIETY
IN AFRICA

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Posting on Social Media? Tag us!



#AfricaLSA @ClsUct

Co-Chairs' Welcome

Dear LSA in Africa Delegates,

Welcome to South Africa's Mother City, and the first formal Law and Society conference to be held on the African continent. The Centre for Law and Society, along with the Law and Society Association, is proud to host such an exciting, and diverse, collection of scholars and papers – all focused on the African continent.

The idea for this conference germinated at a roundtable held at the 2014 LSA Annual Meeting in Minneapolis, where a large number of scholars convened to discuss how they may envision a more global socio-legal field. The discussion recognised that while LSA had served as a major hub for socio-legal scholars drawn from many countries, existing networks tended to favour themes and ideas that originated in, and primarily benefitted, scholars from the North. From the perspective of scholars from the Global South, any exchange, when it did happen, tended to be rather lopsided, favouring Northern theory and scholarship. The *Committee on the 2nd Half Century*, appointed by Presidents Michael McCann and Carroll Seron, and led by Eve Darian-Smith and Greg Shaffer, concluded that LSA could take a number of steps to improve this situation. Among them was the idea of holding small, mini-meetings in selected parts of the Global South, co-hosted by LSA and a local organisation.

CLS recognised this as an opportunity for the African continent, and one that would add value to our existing efforts in addressing the lack of coordination and organisation around law and society scholarship in Africa - in part due to limited funding opportunities, the size of the region, and the local challenges facing particular communities of scholars. CLS, under the leadership of Dee Smythe, therefore proposed to LSA that we hold a Law and Society in Africa conference which would be open to scholars from Africa and to all members of LSA, and would aim to create and stimulate an African law and society network. For CLS, the conference is a platform to showcase the innovative research and socio-legal thinking emerging within and across Africa. The conference aims to nurture intellectual exchange between scholars in the Global South and Global North by bringing together scholars from African countries with people from the North.

Our conference theme, '**Dynamism, Liminality, Reality? Policy, Research and the Law in an Afropolitan Era**', makes reference to the tensions that arise in crafting and applying law and policy in a context of continual, dynamic (post) transition as has been experienced in Africa. We hope to problematize how policy, research and the law respond to an environment that is at once fluid and responsive, but also focused on social problems that are often deep-seated and entrenched. The conference panels provide us an opportunity, as African scholars working on African problems, to reflect not only on the law and society 'moment' at the end of 2016, but also on the wealth of knowledge, innovation and connections that we have to make among ourselves and our work.

We hope that the conference will produce rich and robust engagement, and spark a vibrant network of African Law and Society scholarship that will flourish. Enjoy the few days that we have together, and we look forward to meeting again elsewhere on the continent.

Finally, a special thanks must go to the CLS Conference Organising Committee members – especially Diane Jeffthas, Dee Smythe, Jemima Thomas and Vitima Jere. This team is, without doubt, the reason that this conference is taking place. Without their hard work, dedication, attention to detail and energy, this would not have been possible.

Kelley Moulton and Heinz Klug

Centre for Law and Society / University of Wisconsin Law School

Conference Co-Chairs

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Dean's Welcome

Dear Law and Society Conference Attendees,

It is my pleasure to welcome all attendees of the Law and Society in Africa Conference to the University of Cape Town (UCT) Faculty of Law. It is so wonderful to have you visit here in Cape Town at this beautiful time in this the most beautiful city in the world! I look forward to reconnecting with old Law and Society friends and colleagues and meeting new ones. It is especially an honour to be associated with this Law and Society conference with scholars from across the African continent, the USA, and elsewhere gathering to engage and explore the many contours of Law and Society research and scholarship.

As you may be aware, in 2016 UCT and other universities across South Africa experienced a series of disruptions with students protesting the social inequalities that still bedevil South Africa after 22 years of democracy. Our struggle in South Africa for social and economic justice will continue as we try to bridge the gap between our constitutional promises of dignity, non-discrimination and human rights, and the realities of the lives of many black South Africans. I know that many of these issues will be debated, alongside others, at this conference.

What sets UCT Law apart is the emphasis we place on engaged scholarship and I can think of no better example of engaged scholarship than what will be taking place over the next three days.

Kelley Moulton, Diane Jeffries, Dee Smythe, Heinz Klug and others on the planning committee put together an absolutely wonderful program – and I applaud and thank them.

Please let me know if I may be of assistance to you as you spend the next few days in Cape Town.

Welcome again!

Penelope Andrews

Dean: Faculty of Law, University of Cape Town

A Message from the Centre for Law and Society

The Centre for Law and Society (CLS) at the University of Cape Town is proud to be the host of the Law and Society in Africa conference. The Centre is an innovative and multi-disciplinary hub located in the Law Faculty at UCT. It strives to be a place where scholars, students and activists engage critically with, and work together on, the challenges facing contemporary South Africa and Africa at the intersection of law and society. Through socio-legal research, teaching, and critical exchange, the centre aims to shape a new generation of scholars, practitioners and activists working at the law and society interface, and to build responsive and relevant legal theory, scholarship and practice. We are committed to social justice, constitutionalism and transformation. The Centre aims to provide an interactive space to collaborate on solutions to pressing social injustices, and incubates ideas, people and projects to promote justice.

As one of the foremost university-based law and society research units on the African continent, CLS sees one of its aims as facilitating connections among law and society researchers in South Africa, Africa and beyond. The conference, with its focus on sharing scholarship on African policy-relevant socio-legal research, presents an important opportunity to bring scholars from across the continent together into a space which facilitates mutual learning, builds knowledge, provides an introduction and access to local and global law and society networks, and fosters collaborative partnerships. It also provides us with an opportunity to provide early career Black African scholars and PhD students exposure to critical thinkers known for making significant scholarly contributions in the law and society arena while simultaneously showcasing the exciting, innovative work being done on the African continent.

CLS does not view the conference as a single event, but rather as a catalyst for a robust and active Law and Society in Africa network. The Centre aims to be a vibrant and supportive hub for showcasing a diversity of voices, perspectives and disciplines that shape law in practice and for building the field of legal theory and practice.

Look out for our series of videos showcasing plenaries and presentations from the conference that will be uploaded onto the CLS website in early 2017.

Brief Programme Information

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Conference Programme at a Glance

Friday 9 December

| | | | |
|---|--|-------------------------------------|---|
| Shuttle or walk to the conference venue | | | |
| 11.30 | Registration and Lunch | | |
| 12.30 | Welcome | | VENUE: ZAMBEZI |
| | Kelley Moulit University of Cape Town, Centre for Law & Society Penelope Andrews University of Cape Town, Faculty of Law | | |
| 12.45 – 14.15 | Opening Plenary | | VENUE: ZAMBEZI |
| | What is the Law and Society ‘moment’ in South Africa going into 2017, as we respond to the real challenges of law and society in our country? | | |
| | Jameelah Omar University of Cape Town, Faculty of Law Joel Modiri University of Pretoria,. Faculty of Law Nolundi Luwaya University of Cape Town, Land and Accountability Research Centre Sanele Sibanda University of the Witwatersrand, School of Law Facilitated by Rashida Manjoo, University of Cape Town, Faculty of Law | | |
| CONCURRENT PANELS | | | |
| 14.30 – 16.00 | Panel 1A | Panel 1B | Panel1C |
| | Children and the Law Venue: Clubhouse | Courts and Judges Venue: Zambezi | Socio-Legal Research Agendas Venue: Berg |
| 16.00-16.30 | Tea Break | | |
| 16.30- 18.00 | Panel 2A | Panel 2B | Panel 2C |
| | Land and Property Venue: Clubhouse | Equality Venue: Zambezi | Citizenship Venue: Berg |
| 18.15 – 19.30 | Keynote Conversation | | VENUE: ZAMBEZI |
| | The Development of Law and Society Scholarship | | |
| | David Trubek University of Wisconsin Law School Dennis Davis University of Cape Town, Faculty of Law Facilitated by Dee Smythe, University of Cape Town, Centre for Law & Society | | |
| 19.30 | Dinner Social | | |
| | A traditional South African ‘braai’ (barbeque) served on the terrace at the River Club A shuttle will be available to take guests back to the hotel thereafter. | | |

Shuttle or walk to the conference venue

08.00 – 08.30 Registration

CONCURRENT PANELS

8.30 – 10.30

Panel 3A

Teaching and Learning

Venue: Zambezi

Panel 3B

Constitutionalism

Venue: Clubhouse

Panel 3C

Gender, Law and Society

Venue: Berg

10.30 – 11.00

Tea Break

11.00- 12.30

Panel 4A

The "Other" Law

Venue: Zambezi

Panel 4B

Urban Land Occupations

Venue: Clubhouse

Panel 4C

Authoritarianism and International Law

Venue: Berg

Grab your boxed lunch

13.00 – 14.30

Lunchtime Keynote Conversation

VENUE: ZAMBEZI

Race and the Law

Tanya Hernandez Fordham University School of Law

Penelope Andrews University of Cape Town, Faculty of Law

Facilitated by Erena van der Spuy, University of Cape Town, Faculty of Law

CONCURRENT PANELS

14.45 – 16.15

Panel 5A

Socio-Economic Rights

Venue: Zambezi

Panel 5B

Intellectual Property and Indigenous Knowledge

Venue: Clubhouse

16.15 – 16.30

Tea Break

17.00

BUSSES DEPART FOR THE BO-KAAP MUSEUM FOR EVENING EVENT

17.45 – 20.00

A CLS 'With(Out) Law Conversations' Event

VENUE: BO-KAAP MUSEUM

Turning to Law: Perspectives on Legal Activism for Social Justice

Amelia Vukeya Motsepe Senior Legal Consultant

Kerry Williams Webber Wentzel

Mandisa Shandu Ndifuna Ukwazi Law Centre

Nurina Ally Equal Education Law Centre

Introduction to the Bo-Kaap by Fr. Michael Weeder Dean of the Anglican Cathedral of St George

Facilitated by Melanie Judge, University of Cape Town, Centre for Law and Society

20.00 Onwards

Evening at leisure at the Cape Town Waterfront

Busses will drop participants at the Waterfront after the evening event, and will return to the hotel at 22.00

Saturday 10 December

Sunday 11 December

07.15 – 08.30

Breakfast Keynote Conversation*VENUE: MOWBRAY PROTEA*

The globalisation of the Legal Services Market and its Implications for Africa

David Wilkins Harvard Law SchoolFacilitated by *Heinz Klug*, University of Wisconsin Law School

08.30 – 09.00

Shuttle or walk to the conference venue**Registration****CONCURRENT PANELS**

09.00 – 10.30

Panel 6A

Mining and Extractives

*Venue: Clubhouse***Panel 6B**

Protest

Venue: Zambezi

10.30 – 11.00

Tea Break

11.00 – 13.00

Panel 7A

The Environment

*Venue: Clubhouse***Panel 7B**

Law, Culture and Custom

Venue: Zambezi

13.15 – 14.15

Closing Panel Discussion*VENUE: ZAMBEZI*

Law and Society Scholarship on Africa: Towards 2018

Amr Shalakany American University in Cairo, Law and Society Research Unit*Heinz Klug* University of Wisconsin Law School*Kelley Moulton* University of Cape Town, Centre for Law and Society*Lamia Bulbul* American University in Cairo, Law and Society Research UnitFacilitated by *Dee Smythe* University of Cape Town, Centre for Law and Society

14.15 – 14.30

Thank you and Farewell*VENUE: ZAMBEZI**Kelley Moulton & Heinz Klug* Conference Co-Chairs

14.30

Lunch & Departure

Plenary Information

LAW AND
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Friday Opening Plenary

12.45 - 14.15 ZAMBEZI

What is the Law and Society 'moment' in South Africa going into 2017, as we respond to the real challenges of law and society in our country?

Jameelah Omar University of Cape Town, Faculty of Law

Joel Modiri University of Pretoria, Faculty of Law

Nolundi Luwaya University of Cape Town, Land and Accountability Research Centre

Sanele Sibanda University of the Witwatersrand, School of Law

Facilitated by Rashida Manjoo, University of Cape Town, Faculty of Law

Friday Evening Conversation

18.15 – 19.30 ZAMBEZI

The Development of Law and Society Scholarship

David Trubek University of Wisconsin Law School

Dennis Davis University of Cape Town, Faculty of Law

Facilitated by Dee Smythe, University of Cape Town, Centre for Law and Society

Saturday Lunchtime Keynote Conversation

13.00 – 14.30 ZAMBEZI

Race and the Law

Tanya Hernandez Fordham University School of Law

Penelope Andrews University of Cape Town, Faculty of Law

Facilitated by Elrena van der Spuy, University of Cape Town, Faculty of Law

Saturday Evening: A CLS 'With(Out) Law Conversations' Event

17.45 – 20.00 *BO-KAAP MUSEUM*

Turning to Law: Perspectives on Legal Activism for Social Justice

Amelia Vukeya Motsepe Senior Legal Consultant

Kerry Williams Webber Wentzel

Mandisa Shandu Ndifuna Ukwazi Law Centre

Nurina Ally Equal Education Law Centre

Introduction to the Bo-Kaap by **Fr. Michael Weeder** Dean of the Anglican Cathedral of St George

Facilitated by **Melanie Judge**, University of Cape Town, Centre for Law and Society

Sunday Breakfast Keynote Conversation

07.15 – 08.30 *MOWBRAY PROTEA HOTEL*

The globalisation of the Legal Services Market and its Implications for Africa

David Wilkins Harvard Law School

Facilitated by **Heinz Klug**, University of Wisconsin Law School

Sunday Closing Panel Discussion

13.15 – 14.15 *ZAMBEZI*

Law and Society Scholarship on Africa: Towards 2018

Amr Shalakany American University in Cairo, Law and Society Research Unit

Heinz Klug University of Wisconsin Law School

Kelley Moulton University of Cape Town, Centre for Law and Society

Lamia Bulbul American University in Cairo, Law and Society Research Unit

Facilitated by **Dee Smythe**, University of Cape Town, Centre for Law and Society

Full Panel Information

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Panel 1A: Children and the Law

Panel Chair: **Ntombizozo Dyani-Mhango**, University of the Witwatersrand, School of Law

‘The law on your books isn’t the law on my mind’: Child marriage in Southern Africa

Kelley Moulton, University of Cape Town, Centre for Law and Society

Treatment of juveniles in the custodial institutions under the Nigerian law: A critique

Mariam Abdulraheem-Mustapha, University of Ilorin, Faculty of Law

Child justice in South Africa and diversion procedures: Tensions between theory and practice?

Salona Lutchman, University of Cape Town, Faculty of Law

Realising children’s right to be protected from maltreatment: The need for a legal ban of corporal punishment in the home

Stefanie Röhrs, University of Cape Town, Children’s Institute

Panel 1B: Courts and Judges

Panel Chair: **Tebello Thabane**, University of Cape Town, Faculty of Law

Who nominates? Some issues underlying the appointment of judges in South Africa

Chris Oxtoby (and Tabeth Masengu) University of Cape Town, Democratic Governance and Rights Unit,

The reality of African women as judges in international tribunals

Josephine Dawuni, Howard University, Department of Political Science

Perceiving gender and judging from an African vantage point: A ‘different’ voice versus different perspectives

Tabeth Masengu, University of Cape Town, Democratic Governance and Rights Unit

Judicial activism as a replacement for legislative intervention: A comparative case study involving Muslim Personal Law

Waheeda Amien, University of Cape Town, Faculty of Law

Panel 1C: Socio-Legal Research Agendas

Panel Chair: **Ruth Nekura**, University of Cape Town, Centre for Law and Society

Questioning appropriateness of legal research in Kenya: The nexus between research funding, academic freedom and social responsibility

Duncan Ojwang, Agnes Meroka, (Attiya Waris) & Edwin Abuya, University of Nairobi, School of Law

Applying relational theory in realisation of the right to health in African countries

Omowamiwa Kolawole, University of Cape Town, Faculty of Law

Complex system methodology for gender justice research in Liberia and Australia

Veronica Fynn Bruey, University of Washington, School of Law

Panel 2A: Land and Property

Panel Chair: **Sindiso Mnisi Weeks**, University of Massachusetts, School for Global Inclusion and Social Development

The double-edged role of law in struggles over mining on 'communal' land

Aninka Claassens, University of Cape Town, Land and Accountability Research Centre

The edifice of private property and its discontents

Ben Cousins, University of the Western Cape, Institute for Poverty, Land and Agrarian Studies

Mobilising for urban land justice in Cape Town

Sarita Pillay, Ndifuna Ukwazi

Whose land is it anyway? A critical analysis of the post-apartheid communal land tenure project, drawing on case studies from rural KZN

Philile Ntuli, University of Cape Town, Land and Accountability Research Centre

Panel 2B: Equality

Panel Chair: **Omowamiwa Kolawole**, University of Cape Town, Faculty of Law

Speaking into being: Developing a non-racial discourse for 'dissing' race

Amanda Kinnors, Varsity College, Independent Institute of Education

Substantive equality beyond an age of dignity – Context and contestation

Cathi Albertyn, University of the Witwatersrand, School of Law

Enabling sustainable development through the empowerment of woman and girls to achieve human rights and gender equality in an Afropolitan era

Mala Naidoo, Varsity College, Independent Institute of Education

Women's land rights and communal land: Taking small steps to security

Nolundi Luwaya, University of Cape Town, Land and Accountability Research Centre

Panel 2C: Citizenship

Panel Chair: **Tinenenji Banda**, Southern African Institute for Policy and Research

The non-profit sector and citizenship in Africa: Insights from South Africa and Nigeria

Ada Ordor, University of Cape Town, Centre for Comparative Law in Africa

Enhancing legal protection in mixed migration: A critical examination of the legal institutional framework in Tanzania & Kenya

Juliana Masabo, University of Dar es Salaam, School of Law

Opening space for independent election candidates for all legislative bodies

Nkosikhulule Nyembezi, University of Cape Town, Faculty of Law

The incomplete case of *Farai Daniel Madzimbamuto v The Registrar*: Citizens by descent – Citizens or aliens?

Ntandokayise Ndhlovu & Melissa Omino, University of Fort Hare, Faculty of Law

Panel 3A: Teaching and Learning

Panel Chair: **Jameelah Omar**, University of Cape Town, Faculty of Law

Decolonising the commercial contract law curriculum

Andrew Hutchison, University of Cape Town, Faculty of Law

Craving for the message but shooting the messenger: RBA to teacher welfare and quality in basic education in Nigeria

Azubike Onuora-Oguno, University of Ilorin, Faculty of Law

The time and space of critical legal pedagogy

Joel Modiri, University of Pretoria, Faculty of Law

The future and legal education in South Africa

Jonathan Klaaren, University of the Witwatersrand, WITS Institute for Social and Economic Research

Working on an Introduction to Sociology of law (SoL) in the LLB in Pretoria

Nick Huls, Leiden University, Van Vollenhoven Institute

Panel 3B: Constitutionalism

Panel Chair: **Nkosikhulule Nyembezi**, University of Cape Town, Faculty of Law

Judicial conception of democracy in South Africa and Nigeria: Implications for political action

Akinola Akintayo, University of Lagos, Faculty of Law

Rendering legality with transformative constitutionalism – The South African Constitutional Court's approach toward administrative justice

Cheng-Yi Huang, Institutum Iurisprudentiae, Academia Sinica

Incorporating a coherent principle of restraint in South Africa's separation of powers model

Mtende Mhango, University of the Witwatersrand, School of Law

Criminal pasts and political futures: The Truth and Reconciliation Commission and failures of post-apartheid state building

Nicholas Rush Smith, City University of New York – City College

When do you call time on a compromise? The future of transformative constitutionalism in South Africa

Sanele Sibanda, University of the Witwatersrand, School of Law

8.30 – 10.30

Saturday 10 December 11.00 – 12.30

Panel 3C: Gender, Law and Society

Panel Chair: **Tabeth Masengu**, University of Cape Town, Democratic Governance and Rights Unit

Significance of the distortion of bridewealth payment for child marriages in Africa

Jane Chinoyerem Diala, University of Cape Town, Centre for Law and Society

“Why should I wait to be raped?” – Homophobia-related violence and the limits of law

Melanie Judge, University of Cape Town, Centre for Law and Society

Football evangelism and the gospel of sport: Using Association Football to combat gender and sexual discrimination in Uganda

Richard Peltz-Steele, University of Massachusetts, School of Law

The ‘160 girls’ case and state accountability for sexual violence in Kenya: Towards an effective implementation approach

Ruth Nekura Lekakeny, University of Cape Town, Centre for Law and Society

Exploring the efficacy of criminal sanctions in combating harmful practices in Malawi: An analysis of *The State vs Eric Aniva*

Sarai Chisala-Tempelhoff, Malawi Human Rights Commission

Panel 4A: The “Other” Law

Panel Chair: **Ada Ordor**, University of Cape Town, Centre for Comparative Law in Africa

Securing accountability for violations of the right to life: *Ubuntu* and alternate accountability mechanisms in Africa

Meetali Jain & Yvonne Oyieke, University of Pretoria & University of Nairobi, School of Law

Using interdicts to silence dissension and undermine customary law: The case of Ga-Chokoe

Joanna Pickering & Phiwe Ndinisa, University of Cape Town, Land and Accountability Research Centre

‘The Locust Effect’: The consequences of structural and interpersonal violence for human security in rural KwaZulu-Natal

Sindiso Mnisi Weeks, University of Massachusetts, School for Global Inclusion and Social Development

Mob justice in Nigeria’s megacity: Social perception and policy implications

Tosin Osasona, Centre for Public Policy Alternatives, Nigeria

Panel 4B: Urban Land Occupations

Panel Chair: **Chanda Tembo**, University of Zambia, School of Law

Property and dignity: Understanding the occupation of vacant dwellings in Detroit and Johannesburg

Bernadette Atuahene, IIT, Chicago-Kent College of Law

Property rights in a time of transition: An examination of how inner city residents in Johannesburg perceive and navigate property relations

(Jackie Dugard) & Makale Ngwenya, University of the Witwatersrand, School of Law

An urban proletariat with peasant characteristics: Land occupations and livestock raising in the City of Cape Town

Ricardo Jacobs, Johns Hopkins University, Department of Sociology

11.00 – 12.30

Panel 4C: Authoritarianism and International Law

Panel Chair: **Kelley Moul**, University of Cape Town, Centre for Law and Society

Legal pluralism and the crisis of governance in Somalia, 1950–1991

Mark Fathi Massoud, University of California, Santa Cruz

South Africa's dilemma: Immunity laws, international obligations and the visit by Sudan's President Omar Al Bashir

Ntombizozo Dyani-Mhango, University of the Witwatersrand, School of Law

Legislating memory in Rwanda

Thomas Kelley, University of North Carolina at Chapel Hill School of Law

Saturday 10 December 14.45 – 16.15

Panel 5A: Socio-Economic Rights

Panel Chair: **Monica de Souza Louw**, University of Cape Town, Land and Accountability Research Centre

The judicial enforcement of economic, social and cultural rights in Africa: Is it a case of different approaches same results or same approach different results

Christopher Mbazira, Makerere University, School of Law

Normal rights, just new

James Fowkes, Westfälische Wilhelms-Universität Münster

In the shade of Grootboom

Steve Kahanovitz, Heinz Klug & Shéan Rippenaar, Legal Resources Centre/University of Wisconsin Law School/University of the Western Cape

Justiciability of socio-economic rights in Nigeria: Lessons from South Africa and India

Wahab Egbewole, University of Ilorin, Faculty of Law

Panel 5B: Intellectual Property & Indigenous Knowledge

Panel Chair: **Jane Dila**, University of Cape Town, Centre for Law and Society

Sui generis legislation for the protection of traditional knowledge in South Africa: An opportunity lost (and found)?

Caroline Ncube, University of Cape Town, Faculty of Law

Repairing the Zambian Plant Breeder's Rights Act: A case for the inclusion of small scale farmers in the development of sustainable agriculture in Zambia

Chanda Tembo, University of Zambia, School of Law

Intellectual property systems for developing countries

Gregory Mandel, Temple University, Beasley School of Law

Sunday 11 December 9.00 – 10.30

Panel 6A: Mining & Extractives

Panel Chair: **Mtende Mhango**, University of the Witwatersrand, School of Law

The effects of the politics of development for benefit sharing with mine communities in South Africa

Anri Heyns, University of Cape Town, Mineral Law in Africa

Water pollution: A legacy of mining and its implications for communities

Bernard Kengni, University of Cape Town, Mineral Law in Africa

Africa as a new frontier? Lawyers, extractive economies and global reconfigurations of political authority: A case-study of the 'Africa Corporate Bar' in Paris

Sara Dezalay, Cardiff School of Law and Politics

Benefit sharing in oil and gas communities in Tanzania

Shirley Mushi, University of Cape Town, Mineral Law in Africa

Panel 6B: Protest

Panel Chair: **Mark Fathi Massoud**, University of California, Santa Cruz

The day the graffiti died

Amr Shalakany, American University in Cairo, Law and Society Research Unit

Civil disobedience in Constitutional South Africa

Jameelah Omar, University of Cape Town, Faculty of Law

Lawyering protest: Critique and creativity

Lisa Chamberlain, Gina Snyman, Mbali Matandela & Sherilyn Naidoo, University of the Witwatersrand, Centre for Applied Legal Studies

The crucible of horrid protest laws

Mluleki Marongo, Section27

Panel 7A: The Environment

Panel Chair: **Cheri Young**, University of Cape Town, Mineral Law in Africa

Promoting participatory forest management: A critical and comparative review of South Africa and Namibia's forest legislation

Alexander Paterson, University of Cape Town, Institute of Marine and Environmental Law

Contested regulation: Is CITES an appropriate instrument for combating illegal wildlife trade?

Annette Hübschle, University of Cape Town, Environmental Security Observatory

Regime fragmentation patterns in Kenya's marine fisheries

Erick Komolo, Kenyatta University, School of Law

Environmental management of mining activity in Zambia: Addressing the agency costs

Tinenenji Banda, Southern African Institute for Policy and Research

11.00 – 13.00

Sunday 11 December 11.00 – 13.00

Panel 7B: Law, Culture & Custom

Panel Chair: **Nolundi Luwaya**, University of Cape Town, Land and Accountability Research Centre

Judicial Protection of Women's Matrimonial Property Rights under Customary Law in South-East Nigeria

Anthony Diala, University of Cape Town, Faculty of Law

The certification of customary marriages in pluralistic legal systems with special reference to South Africa and Zambia: A case for parallel and decentralised certification systems

Chuma Himonga, University of Cape Town, Faculty of Law

Customary legal empowerment, or how to engage with customary justice systems

Janine Ubink, University of California, Irvine School of Law

Defining "communities": The impact of law and practice on rights and standing in Xolobeni, South Africa

Monica de Souza Louw & Thiyane Duda, University of Cape Town, Land and Accountability Research Centre

Law and culture in Nigeria: Challenges, conflicts and adaptation in a global village

Rhoda Asikia Ige, University of Lagos, Faculty of Law

Abstracts

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Panel 1A: Children and the Law

'The law on your books isn't the law on my mind': Legislating against child marriage in Southern Africa

Kelley Moulton, University of Cape Town, Centre for Law and Society

This paper reflects on the findings of a recently completed project that aimed to examine the gaps and challenges in effective interventions, programming, policies and laws to curtail forced/child marriage in Southern Africa. Based on fieldwork in ten Southern African countries, the project was interested in understanding the challenges of legal and policy frameworks that regulate marriage in the region, as well as how civil society is responding to these challenges and advocating for change.

The project provides qualitative evidence that – despite the increasing global recognition of child marriage as a human rights violation and a hindrance to development – the issue remains ubiquitous and continues to thrive in the region. Although we heard participants say time and time again that “child marriage must be different everywhere,” there were striking similarities in their descriptions of the problem: stories of poverty, stories of lack of opportunity, blocked access to justice, education and social services, and a lack of intersection with sexual and reproductive health and HIV service provision and policy, the complexity of the nexus between customary and statutory law, and the problems of enforcement in resource-poor, often rural settings.

While most countries have laws on marriage (for example, laws that regulate marriage in customary, traditional and religious settings, or that speak to children's rights), most do not have laws protecting specifically against early/child marriage. Even where countries do have laws specifically protecting against child marriage, our findings show that there is frequently a significant lack of alignment between the provisions of various laws, or between (often newer) marriage statutes with the (older) constitutional frameworks. The paper engages with participants' views that “words matter”: that even referring to these unions as marriages at all, whether early marriages or child marriages, provides them with a legitimacy they do not deserve. The ways that the problem is described - as abductions, as defilement, as everyday rape, as *ukuthwala*¹, as elopement, as cohabitation - provides symbolic places that child marriages can be justified, undercounted, and “hide”, and that complicate the policy, legal and enforcement response.

Our data shows how challenges of enforcement and response arise as communities grapple with defining and understanding the problem and its remedy against a backdrop of tradition and culture. These implementation challenges range from the practical to the cultural, political and ideological: from birth and marriage registration problems, a lack of criminal sanction, a lack of will among police to intervene, and a lack of oversight, to the paucity of shelters and options for girls who are already married and want to leave, a lack of pathways for girls who are already married (and likely have children) to go back to school. Where child marriage has been criminalized, it is sometimes unclear how to deal with girls who want to remain married. Questions abound about the role of the police in enforcing what is, in essence, only partly a legal problem, and whether there are more appropriate mechanisms for providing protection and services for girls who are at risk, or already married at a young age.

There have been a number of so-called ‘success stories’ in the region, where countries have undergone dramatic changes in legislation and policy. Even among countries where the laws remain problematic, there has been some evidence of incremental, but important, shifts. Yet, critical questions remain about the effectiveness of law reform efforts, and of campaigns and advocacy aimed at shifting beliefs and behaviour on child marriage. Across the continent, and regionally, the African Union's Campaign to End Child Marriage has raised the profile of the problem in the region, and countries with ‘champions’ for change within government appear to have gained more traction towards addressing the issue in the law. The SADC Model Law, adopted on 3 June 2016², aims to provide a blueprint for how laws against child marriage may be framed, but stakeholders in the region remain largely unclear about how to push-start these processes domestically. Overwhelmingly, progress towards change remains slow, and our evidence shows that the wealth of innovation, experience and expertise at the local level are seldom fed upwards into the policymaking space – whether regional or domestic. Importantly, the links between civil society and government that may be critical to producing legal and policy change that reflects local learning remain elusive.

¹ This term is defined slightly differently by language and community, but broadly defined means to carry a girl off for the purposes of marriage. *Ukuthwala* is defended as being a traditional cultural practice. Opponents argue, however, that the aberration of the tradition allows, in practice, a man to abduct a woman whom he wishes to marry, even if he has not proposed. In reality, then, this allows older men to abduct young girls who are on their way to school or are fetching water or wood. These young girls, who are mainly between the ages of 12 and 15, are frequently raped, and then forced to marry their (sometimes HIV-positive) suitors.

² Adopted during the 38th Plenary Assembly of the Southern African Development Community Parliamentary Forum (SADC-PF) held in Swaziland on 3 June, 2016.

The paper therefore reflects on the regional push for law reform in a context where culture, gender, poverty and a lack of information provide a backdrop for a problem that requires a fundamentally intersectional, resource-heavy response. The paper problematizes the symbolic role of (new) law in shifting behaviour and response to a problem that remains entrenched, and that appears to be viewed by many as a discordant fit within the ambit of the formal law.

Treatment of juveniles in the custodial institutions under the Nigerian law: A critique

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It is argued by some scholars like Alemika and Chukwuma³ that juvenile offenders deserved to be rescued and reformed rather than being punished. This accounts for the philosophy that the juvenile justice institutions should act in the 'best interest of the child' by promoting their well-being. The juvenile justice system is designated for children and youth and considers offences committed by children under the age of eighteen as delinquent acts rather than crimes as it is legally used for adults' offenders.

In line with this, the juvenile justice system demands a 'friendly' Police system, separate courts, and hearing not to be open for the public in attendant Chinwe and Akpan (1997). While the criminal justice system for the adult is focused on punishment for adult offenders, the juvenile justice system focuses more on care, treatment, rehabilitation and supervision. Incidentally the objectives of juvenile justice system cannot be achieved effectively and efficiently without working correctional institutions to drive them.

Against this background, this research project is design through empirical analysis to examine the experiences of the juvenile offenders in the police stations, the courts and the prisons in the six geo-political zones in Nigeria in order to underscore juvenile custodial institutions' relevance to a holistic understanding of the primary objective of rehabilitation and reintegration of juvenile offenders into the society.

Statement of the Problem

It is instructive to note that despite the existence of legal and institutional frameworks on juvenile justice system in Nigeria, studies by Alemika (2001)⁴, Chukwuma Innocent (1985), Adedokun Adeyemi (2003), Ijaiya Hakeem (2008)⁵, Ladan Taofiq, Danbazau (1998)⁶ and Abdulraheem-Mustapha, M.A. (2015)⁷, have shown that juvenile custodial institutions is still beset with lots of problems. For instance, Nigerian child offender's situation is deplorable as the system operates not to restrain child offender but to punish him/her. Like the police institution which is the first contact of a child offender accelerate his/her career in crime by increasing his/her age to be above eighteen years in order to be tried in the adults' courts. Similarly, Akinseye-George's (2013)⁸ research shows that the existing laws on juvenile justice system in Nigeria have not adequately protected the children. To him, children that have been adjudged to have committed minor offences like being beyond parental control were committal to custodial institutions. Thus, this practice is against the international standard which allows institutionalization to be a measure of last resort and encourages the use of diversionary measures.

Aims and Objectives of the Study

The research project shall examine generally the framework for juvenile justice custodial institutions in Nigeria with spectrum of treatment of juvenile offenders in Nigeria. The specific aims and objectives of this research project are:

1. To analyse the inherent problems and challenges faced by juvenile offenders in the criminal justice system in Nigeria;
2. To evaluate the extent to which Nigeria juvenile custodial institutions comply with the international standards in relation to the protection of juvenile offenders; and
3. To present empirical findings on experiences of the juvenile offenders in the police stations, the courts and the prisons in the six geo-political zones in Nigeria

³ Alemika E.E.O. and Chukwuma I.C., 'Juvenile Justice Administration in Nigeria: Philosophy and Practice' (Centre for Law Enforcement Education, Lagos, 2001)

⁴ Alemika, E.I., Law and the Rights of Suspects in Nigeria. Unpublished (PhD. Law and Diplomacy University of Jos, Jos Nigeria, 2010).

⁵ Ijaiya H., 'Juvenile Justice Administration in Nigeria' International Journal of Jurisprudence and Philosophy of Law. Vol.2 Nos. 1-2 (Serial Publications, New Delhi, India, 2008).

⁶ Ladan M.T., Rights of the Child in Nigeria: An Overview in Individual Rights and Communal Responsibility in Nigeria, (National Human Rights Commission, Abuja, Nigeria, 1998). p. 25.

⁷ Abdulraheem-Mustapha, M.A., An Analysis of the Framework for Juvenile Justice Administration in Nigeria. Unpublished (Ph.D. Law, Faculty of Law, University of Ilorin, Nigeria. 2015.

⁸ Yemi Akinseye-George, Juvenile Justice in Nigeria (Centre for Socio-Legal Studies, Abuja, Nigeria, 2009).

Literature Review

In this study, primary data are supplemented by secondary data. Important secondary data included the work of Abdurraheem-Mustapha Mariam Adepeju (2015) on the analysis of the framework for juvenile justice administration in Nigeria which left for future research and this present study intends to address those limitations. It also included Ijaiya (2008) on the procedural aspect of the juvenile justice system and its custodial institutions, Adedokun Adeyemi (2003) on the subject of the juvenile justice system, Alemika (2001), Dambazau (1998)⁹, Chukwuma and Nwadialo (1985) on the subject of juvenile delinquency, specifically as regards causes, place and mode of occurrence of juvenile crimes; the gross inadequacies in Nigeria's juvenile delinquency control laws, processes and institutions; and a brief exposition of juvenile courts and Borstal institutions in Nigeria. Chinwe and Akpan (1997) on the challenges of punitive, reformatory and rehabilitative in the juvenile justice administration in Nigeria. Ayua and Okagbue (1996)¹⁰ on the treatment of juvenile offenders and the rights of the child. Ahire (1987) on juvenile delinquency and the handling of young prisoners in Nigerian Borstal Institutions. Alemika Emily (1988)¹¹ on policing and perception of police in Nigeria. However, those studies did not directly documents the experiences of juveniles in the police stations, courts and prisons such as handcuffing, stigmatization and increase in crime tendency thereby posing threat to their reintegration into the society. Most important sources of primary data are Nigerian Constitution, 1999, the Nigerian Child Rights Act, (2003), the Police Act, (2004), Prison Act, (2004), Penal and Criminal Codes (2004); Criminal Procedure Code, (2004), the Criminal Procedure Act, (2004), the Nigerian Prisons Act, (2004) and the Children and Young Persons Act, (2004). Also, it includes archival reports in Archives and documentation centres in the Universities of Ilorin, Ibadan, Jos and OAU Ife, Juvenile courts, Police Force and Nigeria Prisons service registers in the six geo-political zones in Nigeria and eyewitness accounts are also important sources.

Research Methodology

Understanding the treatment of juveniles in the Police, the Courts and the Prisons under the Nigerian law directs the use of qualitative research design, multiple data sources and analytical techniques to explain how individuals or group felt about a social or human problem like the one that is under consideration in this research. The multiple sources of data such as in-depth interviews, personal narratives as well as focus group discussions with the child offenders and personnel in the Police, Courts and Prisons in Nigeria. Content analysis of the existing legal and institutional frameworks on the procedures of child/juvenile offenders in the custodial institutions will also be adapted. These multi-disciplinary approaches will facilitate the triangulation of scattered primary and secondary data such as statutory and case laws, books, journals, periodicals, newspapers and magazines. The researcher will employ the services of fifteen (6) research assistants, one in each of the six geo-political zones in Nigeria in order to facilitate the gathering of data for the research. The data will be analysed in order to determine whether or not the custodial institutions have achieved the primary objective of child offenders' rehabilitation and reintegration into the society which will serve as basis for the research's findings and recommendations.

Expected Results

It is instructive to note that Nigeria currently face several security challenges. This is evident from spate of abduction/kidnappings, terrorism and insurgency (i.e.) which has displaced people from their homes now in Internally Displaced Persons (IDP) camps. The contention here is that children facing these challenges are inadvertently exposed to criminality and may eventually become delinquents. This further reinforces the significance of this research especially within Nigeria. The research therefore intends to generate new vistas to the study of juvenile justice system in Nigeria. The findings are intended to provide new regime for the understanding of the challenges confronting the institutions responsible for the administration of child justice and the consequence on juvenile offenders. Traditionally in Nigeria, legal research is conducted by examining provisions of the law contained in the legal sources to attempt to understand the inadequacies in the law. This is done without paying attention to the social legal effect of such laws on affected individuals. This research constitute a departure and would therefore enrich legal literature on the subject of child/juvenile offenders generally and provide easier access to researchers on the subject in Nigeria.

Conclusion

Against this background, this research project makes a case for policing with a human face, separate courts and additional rehabilitation institutions for juvenile offenders in Nigeria as well as suggesting plausible strategy through which optimum rehabilitation of juvenile offenders in Nigeria could be achieved.

⁹ Dambazau, A. B., *Criminology and Criminal Justice* (Spectrum Books Limited, Ibadan, 2007)

¹⁰ Ayua A.A. & Okagbue I.E, 'The Rights of the Child in Nigeria'. (Nig. Inst. of Advanced Legal studies, Lagos, 1996)

¹¹ Alemika E.E.O, 'Policing and Perception of Police in Nigeria'. (Police Studies. International Review of Police Development 1988)

Child Justice in South Africa and diversion procedures: Tensions between theory and practice?

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The South African Child Justice Act 75 of 2008 ("The Act") undertakes to create a criminal justice system for children who are in conflict with the law and accused of committing offences. The Act requires that this be done in line with Constitutional values and international law obligations. Importantly, the Act provides that child offenders may be diverted from the criminal justice system. In terms of section 51 of the Act, diversion is aimed at dealing with a child outside of the criminal justice system and encourages the child to be accountable for the harm she has caused. It is not equated to a previous conviction (section 59(1)(b) of the Act) and is designed to protect the child from the harshness of the criminal justice process as well as the social stigmatisation of being labeled a criminal. Ultimately, the diversion process aims to have reconciliatory effects by promoting the re-integration of the child into family and community life while promoting her dignity, well-being and confidence as a contributing member of society. This has restorative effects for the child and the community. However, does the theory of child justice translate into reality? What type of infrastructure needs to be in place to assist decision makers tasked with dispensing child justice? What are the main tensions present between theory and the South African reality? This paper attempts to answer these questions.

Diversion programs can take many different forms. They are divided into groupings dependent on the type of crime committed by the child and the age of the child. Section 53 of the Act refers to various diversion orders: a compulsory school attendance order; a family time order; a good behavior order; a peer association order; a reporting order; a supervision and guidance order; an oral or written apology to affected person/s or institution/s; a formal caution with or without conditions; payment of compensation or symbolic restitution to a specific beneficiary; provision of a service by the child to the victim/s; and attendance at a specified centre or place for therapeutic, educational or vocational purpose. A prosecutor, inquiry magistrate or a presiding officer may even develop an individual diversion option where appropriate. Thus the legislation provides for great flexibility and this is a notable strength. However, there is no means of nationally measuring consistency and uniformity in the application of diversion orders. Thus a child may be subject to different diversion orders depending on locality. Inconsistency may be a potential problem.

Decision makers involved in dispensing child justice thus have crucial roles to play in determining the fate of child offenders. Only the prosecutor or the Director of Public Prosecutions may refer a matter for diversion. A Child Justice Court may refer a matter for diversion only after an application by the prosecutor or the Director of Public Prosecutions. In terms of section 52 of the Act, a matter may be considered for diversion if the child acknowledges responsibility for the offence (without being unduly influenced to do so), there is a prima facie case against the child, the child and (if available) his or her parent/guardian or appropriate adult consents to the diversion and the prosecutor or the Director of Public Prosecution has indicated that the matter may be diverted. A potential problematic issue is the fact that it is unclear how a court establishes that a child has not been unduly influenced to acknowledge liability for an offence. Furthermore, a court should take into account a child's age when determining whether a child can in fact acknowledge liability for the commission of a crime.

A child's legal representative may not refer a matter for diversion. This is problematic as much seems to rest on the discretion of the prosecutor and the Director of Public Prosecutions. This is compounded by the fact that at times poor administration and fact keeping may prevent a child from the benefit of the diversion system. Indeed recent cases have shown that due to general tardiness and negligence, the age of the child concerned was incorrectly reflected on the charge sheet or the child's correct age was only been established at the time of sentencing (JD Mujuzi 'Diversion in the South African criminal justice system: Emerging jurisprudence' (2015) 28 SACJ 40 at 58). This disadvantages the child from the full benefit of the diversion process. It seems more practical for the law to allow a child's legal representative to refer the matter for diversion seeing as how he would have access to the child's personal information. This may ensure that a child is prevented from experiencing the full brunt and harshness of the criminal justice process.

This study is centrally focused on how the decision makers involved arrive at conclusions on whether juvenile offenders should be prosecuted, taking into account their age, the possibility and appropriateness of diversion methods and whether these decisions are sound in law. Case law will be analysed in the arrival of conclusions. The paper also highlights potential difficulties in the application of certain diversion provisions. International law, child rights theories and South African case law will be used to reveal possible tensions and solutions between the theory and practice of child justice.

Realising children's right to be protected from maltreatment: The need for a legal ban of corporal punishment in the home

Stefanie Röhrs, University of Cape Town, Children's Institute

After more than 20 years of democracy, children's right to protection from maltreatment and abuse is still far from being realised in South Africa. One of the most widespread forms of violence against children in South Africa is harsh physical discipline, also referred to as corporal punishment. In one population-based survey employing a large sample of young men and women in the Eastern Cape province, 89% of young women and 94% of young men reported experiencing corporal punishment before the age of 18 years from their caregivers (Jewkes et al., 2010)¹². Corporal punishment also remains prevalent in schools despite being legally prohibited. Nationally, approximately 50% of learners experience corporal punishment by teachers (Burton & Leoschut, 2012)¹³.

Corporal punishment is closely linked to physical child abuse. Studies from the U.S. and Canada have shown that most physical child abuse takes place in the context of punishment: 75% of physical abuse of children occurs during episodes of discipline using corporal punishment, and children who are spanked by their parents are seven times more likely to also be severely assaulted by their parents (Durrant & Ensom, 2012)¹⁴. Preliminary results from South Africa's first national study on violence against children found that 34% of children between 15 and 17 years report lifetime experiences of physical abuse by an adult caregiver (Burton et al., 2015). Community studies report even higher rates of physical abuse. A large community study among 10-17-year-old children found that 56% of children had experienced lifetime physical abuse, which was defined as being hit by an adult with a stick, belt or other hard object; or being slapped, punched or hit so hard that it hurt (Meinck et al., 2016)¹⁵. Seventeen percent of the children in this study experienced physical abuse on a monthly basis (Meinck et al., 2016).

Physical child abuse, in turn, is related to child homicide. Research has shown that nearly half of all child homicides in South Africa are linked to child abuse and neglect, with children under five years of age most at risk (Mathews et al., 2013). South Africa has a child homicide rate of 5.5/100,000 children, more than double the global rate and which claims the lives of approximately 1,000 children per year in the country (Mathews et al., 2013)¹⁶.

Corporal punishment is furthermore linked to domestic violence. Research has shown that the rate of corporal punishment is higher in homes where domestic violence is taking place (Postmus et al., 2012), and that women who find violence against women acceptable are more likely to see corporal punishment as a necessary form of child discipline (Lansford et al., 2013). In South Africa, many children are exposed to family violence, e.g. witnessing siblings being abused and/or violence directed at their mothers. The UBS Optimus study found that 38% of girls and 26% of boys between 15 and 17 years report having been exposed to family violence (Burton et al., 2015)¹⁷.

Social acceptance of violence is likely to be learned in childhood (Abrahams & Jewkes, 2005)¹⁸. Both corporal punishment and domestic violence convey the message that violence is a legitimate tool to resolve conflict, exert control or express disapproval. Emerging research shows that for boys, the use of harsh discipline and exposure to domestic violence increases the risk that they will adopt violent masculinities and perpetrate violence against their partners or their children in adulthood (Mathews et al., 2011; Mathews et al., 2014)¹⁹. For girls, experiencing violence during childhood increases the risk that they will become victims of violence in adulthood (Mathews et al., 2011²⁰; Mathews et al., 2014). Corporal punishment and domestic violence, therefore, both play a role in fuelling gender-based violence and in the intergenerational transmission of violence.

South Africa has ratified the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). Both of these human rights instruments call on states to protect children from physical violence,

¹² Jewkes R, Dunkle K, Nduna M, Nwabisa J & Puren A (2010) Associations between childhood adversity and depression, substance abuse and HIV and HSV2 incident infections in rural South African youth. *Child Abuse & Neglect*, 34: 833-841.

¹³ Burton P & Leoschut L (2013) *School Violence in South Africa: Results of the 2012 National School Violence Study*. Centre for Justice & Crime Prevention: Cape Town.

¹⁴ Durrant J & Ensom R (2012) Physical punishment of children: lessons from 20 years of research. *Canadian Medical Association Journal*, 184(12): 1373-1377.

¹⁵ Meinck F, Cluver L D, Boyes M E, Loening-Voysey H (2016) Physical, emotional and sexual adolescent abuse victimisation in South Africa: prevalence, incidence, perpetrators and locations *Journal of Epidemiology and Community Health* ():1-7.

¹⁶ Mathews S, Abrahams N, Jewkes R & Martin L (2013) Underreporting child abuse deaths: Experiences from a national study on child homicide. *South African Medical Journal* 103(3):132-133.

¹⁷ Burton P, Ward C, Artz L & Leoschut L (2015) *The Optimus Study on Child Abuse, Violence and Neglect in South Africa. Research Bulletin*. Centre for Justice & Crime Prevention: Cape Town.

¹⁸ Abrahams N & Jewkes R (2005) What is the impact of witnessing mother abuse during childhood on South African men's violence as adults? *American Journal of Public Health* 95:1811-1816.

¹⁹ Mathews S & Benvenuti P (2014) Violence against children in South Africa: Developing a prevention agenda. In: Mathews S, Jamieson L, Lake L & Smith C (eds) *South African Child Gauge 2014*. Cape Town: Children's Institute, University of Cape Town.

²⁰ Mathews S, Jewkes R & Abrahams N (2011) 'I Had a Hard Life' Exploring Childhood Adversity in the Shaping of Masculinities among Men Who Killed an Intimate Partner in South Africa. *British Journal of Criminology* 51:960-977.

abuse and maltreatment while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (s 19(1) of the UNCRC;s 16(1) of the ACRWC). Both the UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child have recommended that South Africa enact legislation that prohibits corporal punishment in all settings, including in the home. In January 2016, the South African Human Rights Commission echoed this call and requested that, within the next 12 months, legislation be enacted that prohibits corporal punishment in the home and abolish the common law defence of “reasonable chastisement”, which allows parents to use moderate forms of violence to discipline their children.

This paper argues that corporal punishment violates a number of children’s constitutional rights: the right to dignity; the right to be free from all forms of violence and to have their bodily and psychological integrity protected; the right to be protected from maltreatment, neglect, abuse, and degradation; and the right to equality as the law currently does not afford children the same protection as adults. A legal ban of corporal punishment in the home would be the first step to protect children from harsh discipline in their homes. However, while protection ‘on paper’ is necessary, it certainly would not be sufficient or successful in eliminating corporal punishment in the home. What is required is a radical shift in people’s attitudes and behaviours towards children and children’s rights.

Panel 1B: Courts and Judges

Who nominates? Some issues underlying the appointment of judges in South Africa

Chris Oxtoby & Tabeth Masengu, University of Cape Town, Democratic Governance and Rights Unit

This paper proposal addresses the conference theme “Justice and Judging in Transition” by examining the impact of nominating organisations and individuals on the process of judicial appointments in South Africa, under the 1996 Constitution.

The process of judicial appointments in South Africa has changed dramatically following the country’s transition from apartheid to constitutional democracy. In the pre-constitutional era, appointments were made under the old Westminster, tap-on-the-shoulder system. Appointments were made by the state president in cabinet, with little or no input from outside a small political and legal elite. This contributed to creating a judiciary that was entirely lacking in diversity. Judges were drawn almost exclusively from the ranks of senior advocates, and until the early 1990’s, were exclusively white men.

This system was changed under the South African Constitution of 1996. Schedule 6 (6) of the section dealing with Transitional Arrangements required, amongst other things, that the structure and composition of the courts be rationalised with a view to establishing a legal system suited to the requirements of the new Constitution. In this regard, the Judicial Service Commission (JSC), established by section 178 of the Constitution, was created to recommend the appointment of judges to the superior courts. A large and diverse body, the JSC includes representatives from the executive, the legislature, the judiciary, the organised legal profession and academia. This diversity, was borne from the desire to make the appointment process more transparent and open to greater input from bodies like the organised legal profession, and other users of the court. The JSC’s procedures specifically require input from the organised legal profession to be sought out in nominating candidates for judicial vacancies, and in commenting on the suitability of candidates for appointment.

This change in the appointments system vests significant power and influence in organisations that were previously excluded from the process. Organisations such as the National Association of Democratic Lawyers (NADEL) and the Black Lawyers’ Association (BLA) are represented in the structures of the organised legal profession. Indeed, the regulations governing the JSC’s procedures specifically identify NADEL and the BLA, as well as the Law Society and General Council of the Bar, as institutions to whom the short list of candidates are specifically distributed for comment.²¹

The mandates of these organisations would suggest that they should also be at the forefront of nominating candidates in order to address the transformational imperatives identified by the constitution. For example, NADEL describes its primary goal as being “a legal and judicial system that realises access to justice for disadvantaged people and the rule of law”²², and the General Council of the Bar “identifies itself fully with the ideals, aspirations and challenges presented by a new democratic South Africa.”²³

²¹ Judicial Service Commission Act 9 of 1994, Procedure of Commission, No. R 423, 27 March 2003, regulations 2(g) and 3(g).

²² See <https://www.lawsoc.co.za/default.asp?sl=&id=1972>

²³ <http://www.sabar.co.za/>

The authors' observations of the JSC's public interview process has revealed frequent questions raising the issue of which organisations nominate and support candidates, and how the organised legal profession, in particular, views a candidates' suitability for appointment. As well as trying to ensure broader participation in the appointments process, the constitution specifically enjoins the JSC and other decision makers to take into account the need for the judiciary to be broadly reflective of national demographics, when recommending appointments.²⁴

This need for transformation of the demographic composition of the judiciary has been a hotly contested topic. Significant progress has been made in improving the racial composition of the bench, with the composition of black judges ²⁵ increasing from 1.4% in 1994 to 64% as of January 2015. However, gender transformation has long lagged behind, with the composition of women on the bench increasing from 1.2% in 1994 to 32% at present. Our research has shown that it has often been treated as an afterthought, a finding confirmed by Justice Theron of the Supreme Court of Appeal who has stated that "gender took the backseat to race". There have been improvements from 2013 onwards, but there is still need for vigilance in respect of judicial appointments, especially in light of the continued challenges faced by women in the legal profession.

This paper therefore sets out to establish empirical information regarding the role played by organisations and individuals in nominating candidates for appointment, and the impact, if any, that this has on a candidate's chances of being successfully appointed. Based on a survey of the application forms of candidates interviewed by the JSC between October 2010 and April 2015, the paper will address the following questions:

- Which organisations or individuals (or groupings of individuals, for example judges) are the most frequent nominators of candidates for judicial office?
- Which organisations are most successful in nominating candidates who in fact go on to be appointed?
- Which organisations are most proactive in nominating candidates who will meet the transformative requirements of section 174(2)?
- What are the objectives of the most prominent organisations and how are these being met by the candidates they nominate?
- Are the main nominators' mostly transformative organisations or is there an interest from other general groups?

In order to inform this analysis, research will be undertaken into key organisations, examining structural issues such as their membership numbers and demographic breakdown, governance structures, mandate, etc. The paper will also acknowledge arguments that transformation of the judiciary ought not to be about numbers alone, but include considerations of transformation of mindset and judicial philosophy. To this end, we will examine whether and in what ways the leading nominators have motivated their nominations with reference to concepts of transformation, broadly or narrowly understood.

The paper will thus seek to assess whether the objectives of opening up the appointments process have been met by those organisations nominating candidates. It will conclude with thoughts and recommendations on how the process can be further improved.

The reality of African women as judges in international tribunals

Josephine Dawuni, Howard University, Department of Political Science

Within the last decade, judiciaries across the continent of Africa have witnessed the presence of a growing number of women as judges and in some cases, women have risen to occupy the position of Chief Justice (the highest position within the judiciary). Of particular importance is the presence of African women on international tribunals both within the continent and beyond. While little studies have been done in the past to uncover the nexus of gender and the judiciary, this paper provides an exploratory study into the role of African women as judges in international courts. It seeks to reject the dominant discourse that emphasizes that international diffusion of ideas is the main factor in explaining the rise of women as judges in Africa. Rather, it argues that women have joined the rank and file of judiciaries due to multiple internal, personal and domestic factors.

²⁴ Constitution of the Republic of South Africa, 1996, section 174(2).

²⁵ As legislated, the term "black" refers to people of African, Indian and Coloured decent who were all disadvantaged by apartheid to different extents.

This research project is guided by two central questions; Is the appointment of African women to international courts having an effect on the domestic judicial and legal context in African countries? And, what factors account for the difference in the gender composition of two international human rights courts? These questions will be answered through a comparative study of two international courts—the International Criminal Court (ICC) and the African Court on Human and People's Rights (ACHPR). The last decade (1995-2015), has witnessed a growing number of African women serving in both domestic and international tribunals. To date, four African women have served as judges at the ICC, and the current Chief Prosecutor, Fatou Bensouda, an African, and the first female to head the position was appointed in 2011. At the regional level, the ACHPR based in Arusha Tanzania, appointed a former Supreme Court judge from Ghana, Justice Sophia Akuffo as the first female President of the Court in 2006. As at January 2015, there are only two women out of a total of nine judges, a situation which does not reflect the legal stipulation for a gender balanced court as provided for in the Protocol to the African Charter on Human Rights (the Maputo Protocol).

Situating this study within the literature on gender and judging, feminist legal scholarship questioned the democratic nature of domestic courts, which, in different jurisdictions have remained largely unrepresentative and less diverse in terms of gender composition²⁶. As women judges “trickled in”, scholars begun to focus on whether attaining a critical mass of women would lead to measurable outcomes for women's rights issues²⁷. Other studies questioned whether women judges make a difference not only in the composition of courts, but also and in case law and development of legal jurisprudence.

While feminist scholars have addressed critical questions on gender and judging within the domestic courts, little has been done to critically examine the role of women in international courts²⁸. The gap in the literature is more pronounced when one looks at the non-existent literature on African women serving in international courts²⁹. Understanding the representation and roles of African women in international courts is important for purposes of understanding the descriptive, symbolic and substantive representation of women's rights in international courts.

This oversight in the literature has led Chappelle (2010:486) to argue “the time has now come to examine more closely the effect of legal institutions and the judicial personnel appointed to implement legal rules and norms on gender outcomes.”

This study provides the first comparative study of African women in international courts. A deeper exploration of the research question posed above will be guided by further questions that seek to unearth the appointment processes to these courts, the impact of the rules of appointment in generating more women, whether the presence of African women judges affect African gendered norms on justice and gender equality and last but not the least, whether the appointment of women in these courts have influenced domestic judicial appointment processes?

Perceiving gender and judging from an African vantage point: A ‘different’ voice v different perspectives

Tabeth Masengu, University of Cape Town, Democratic Governance and Rights Unit

This paper proposal addresses the conference theme “Justice and Judging in Transition” by examining the impact of gender diversity on the bench. In particular it briefly critiques the notion of women judging in a ‘different voice’ as valid reason for gender diversity and instead, calls for the promotion of different perspectives as a means to strengthen judicial independence and impartiality.

There has been much academic writing and political debate about the advantages and disadvantages of diversification of judges and in particular, diversification by gender.³⁰ While others have insisted that advocating for a more transformed bench will ‘water’ down the quality of the bench³¹, there has also been a call for affirmative action policies to bolster what are seen as meagre efforts to create a bench that is more reflective of society.³² Scholars have made numerous arguments to advance the case for women

²⁶ Kenney, Sally. 2008. Thinking about Gender and Judging. *International Journal of the Legal Profession* 15 (1):87-110. Durant, Leah. 2004. Gender bias and the legal profession: a discussion of why there are still so few women on the bench. *Margins* 181-205. Feenan, Dermot. 2009. Editorial Introduction: Women and Judging. *Feminist Legal Studies*. 17:1-9.

²⁷ Hunter, Rosemary. 2008. Can feminist judges make a difference? *International Journal of the Legal Profession*. 15 (1)7-35. Jacquette, Jane. 1997. Women in power: from tokenism to critical mass. *Foreign Policy*, 108:23-27.

²⁸ For details of work done in this area see Chappell, L. and Durbach, A. 2014. Introduction: The International Criminal Court – A Site of Gender Justice. *International Feminist Journal of Politics*. 16(4): 533-537.

²⁹ For information on the forthcoming book by Josephine Dawuni and Gretchen Bauer see; Gender and the Judiciary in Africa: From Obscurity to Parity? Available at <http://www.sponpress.com/books/details/9781138856493/>

³⁰ I will refer to these discussions in the first section of this paper.

³¹ LTC Harms 'Transparency and Accountability in the Judicial Appointment Process' available at <http://www.sabar.co.za/lawjournals/2010/august/2010augustvol023no2pp3638.pdf> accessed on 18 September 2016.

³² Kate Malleon 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36,3 *Journal of Law and Society* 376-402.

judges. These include amongst others, that women have the right to form part of the judiciary, because they are part of society³³ and that more women on the bench is of great importance for a judiciary to be considered legitimate in the eyes of the public. This ensures that a judiciary broadly reflects a spectrum of experiences and awareness.³⁴ Ifill has advanced arguments for equity in the judiciary because it is a site of societal power³⁵, while a better quality of deliberation and an enhancement of judicial decisions have been cited by South African scholars as reasons for a more gender diverse bench.³⁶

Amidst the clarion calls for more women on the bench, has been the difference argument championed by feminists who have promoted Carol Gilligan's notion of a distinctly feminine 'ethic of care'.³⁷ Gilligan argued that gender differences in moral reasoning results in the feminine voice acknowledging and being concerned to preserve social relationships, while the masculine voice tends to see individuals as atomistic and to make judgments according to a hierarchy of rights.³⁸ This approach has already been criticised by academics in the global north for its essentialism and the myopic view it postulates of women.³⁹ However, in this paper I aim to show why the difference argument is especially problematic for voices from the African continent. In doing so, I submit that the problem is not that women are not different from men, but that the difference argument narrows their different experiences into one monolithic voice. This is essentialist at best and dangerous at worst, because it ensures that only one perspective dominates legal decision making in multi-perspective societies. As often occurs, the perspective to dominate would be that of the advantaged or privileged leaving out minorities, previously disadvantaged and a greater part of society.

To remedy this, this paper suggests that it is important to acknowledge the different perspectives that women judges bring to the bench. Once, this is acknowledged, I argue that gender diversity can perform two important functions:

1. Strengthen judicial independence of the judiciary by buttressing substantive independence,
2. Strengthen judicial impartiality and consequently judicial decision making.

I submit that gender diversity on the bench can result in internal behavioural changes for judges that would lead to external behavioural changes. This would not be limited to how litigants are treated but, would also be visible in how written judgements are reasoned. In this regard, African judges-especially women, can enrich their jurisprudence and leave a legacy that is not prescribed nor dictated by perspectives that are unfamiliar to their own communities. This is particularly important because there is a dearth of the African academic literature on judging and jurisprudence in the region.

Judicial activism as a replacement for legislative intervention: A comparative case study involving Muslim Personal Law

Waheeda Amien, University of Cape Town, Faculty of Law

In this paper, several significant Muslim Personal Law related cases that have been decided by the South African, Indian and (Canadian) British Columbian judiciaries are considered with a view to highlighting the significance of judicial intervention in the area of Muslim Personal Law.

In the Canadian context, three seminal cases decided by the British Columbian Supreme Court of Appeal are examined namely, *Nathoo v. Nathoo*,⁴⁰ *Amlani v. Hiran*⁴¹ and *N.M.M. v. N.S.M.*⁴² Each of these three cases confirm the Court's willingness to recognize and enforce *mahr* agreements as marriage contracts for the purpose of the British Columbian Family Law Act. In contrast, the Ontario Court of Justice refused to recognize and enforce a *mahr* agreement in the case of *Kaddoura v. Hammoud*⁴³ even though the facts of the *Kaddoura* case were similar to those in the British Columbian cases. The Ontario Court of Justice was unwilling to

³³ Sally J. Kenney *Gender and Justice: Why women in the Judiciary really matter*, 2013.

³⁴ Dermot Feenan, 'Judicial appointments in Ireland in comparative perspective' (2008) 1 *Judicial Studies Institute Journal* 37-66.

³⁵ Sherrylin Ifill, 'Racial Diversity on the Bench: Beyond Role models and public confidence' (2000) 57 *Washington & Law Review*, 405-495.

³⁶ See Yvonne Mokgoro J 'Judicial appointments' (December 2010) *Advocate* 43 at 45 available at <http://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp43-48.pdf> and Catherine Albertyn, 'Judicial Diversity', in Cora Hoexter and Morne Olivier (eds.) *The Judiciary in South Africa*, 2014, 245 – 287.

³⁷ Carol Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982).

³⁸ *Ibid.*

³⁹ Professors Sally Kenney and Kate Malleson have been some of its harshest critics.

⁴⁰ [1996] B.C.J. No. 2720 (S.C.) [Q.L.].

⁴¹ [2000] B.C.J. No.2357 (S.C.) [Q.L.].

⁴² [2000] B.C.J. No.2357 (S.C.) [Q.L.].

⁴³ 168 D.L.R. (4th) 503, 44 R.F.L. (4th) 228, [1998] O.J. No.5-54, 83 O.T.C. 30.

bring a *mahr* agreement within the ambit of the Ontario Family Law Act on the basis that the agreement was religious in nature and comprises a core element for a valid Muslim marriage contract. The Ontario Court of Justice invoked the separation of religion and state to justify its decision. Yet, the British Columbian Supreme Court of Appeal, implicitly recognizing that a failure to recognize and enforce the *mahr* agreement would result in an injustice to Muslim wives, found a creative way to ensure justice for Muslim women who were parties to those agreements. The significance of the British Columbian decisions is that the Court afforded recognition and enforceability to *mahr* agreements even though Canada does not recognize Muslim marriages as legally valid.

Similarly, in the South African context, Muslim marriages have also not been afforded legal recognition. Yet, the South African judiciary too found creative ways to come to the aid of Muslim women who were adversely affected by the non-recognition of their marriages. In fact, since 1997, there has been a spate of cases in which the judiciary has either recognized certain aspects of a Muslim marriage or brought Muslim spouses within the ambit of certain pieces of legislation. The paper will unpack most of those cases beginning with *Ryland v Edros*,⁴⁴ which was the first case in which a South African court accepted proven terms and customs arising from a Muslim marriage contract as enforceable. This was followed by several cases that recognized Muslim spouses as beneficiaries for the purpose of particular types of legislation. For instance, the Supreme Court of Appeal in the case of *Amod v Multilateral Motor Vehicle Accidents Fund*,⁴⁵ recognized the Islamic law duty of support owed by a husband to his wife as worthy of legal recognition thereby enabling a Muslim wife to assert a dependant's claim under the Multilateral Motor Vehicle Accidents Fund Act.⁴⁶ A few years later, the same duty of support was recognized as enforceable under the Maintenance Act⁴⁷ in the case of *Khan v Khan*.⁴⁸ Thus, Muslim wives can now claim their Islamic law right to maintenance through civil legislation. At the same time, the Constitutional Court in the cases of *Daniels v Campbell and Others*⁴⁹ and *Hassam v Jacobs NO and Others*⁵⁰ respectively recognized the right of a Muslim spouse in a monogamous and polygynous Muslim marriage to inherit under the Intestate Succession Act.⁵¹ More recently, in the case of *Hoosein v Dangor*,⁵² Muslim ex-wives were brought within the ambit of Rule 43 of the Uniform Rules of Court where they were granted interim relief pending the finalization of their matrimonial actions in which they requested that their Muslim marriages be recognized as civil marriages under the Marriage Act.⁵³

In contrast to Canada and South Africa, India recognizes Muslim marriages as legal. However, it leaves the regulation of the marriage and divorce at the behest of Indian Muslim communities. This has resulted in numerous cases being adjudicated involving various aspects of Muslim Personal Law where Muslim wives are usually the claimants. The Indian judiciary, via its Supreme Court, has perhaps been the most active as far as judicial intervention is concerned, especially in the area of Muslim Personal Law. Not only has it come to the aid of marginalized and vulnerable Muslim wives by providing relief in the context of marriage, divorce, maintenance and post-divorce maintenance, it has reinterpreted Islamic scriptures to enable gender-friendlier versions of Islamic law. In particular, two seminal cases will be discussed in this regard namely, *Mohd. Ahmed Khan v. Shah Bano Begum and Others*⁵⁴ and *Danial Latifi and Another v. Union of India*.⁵⁵ These two Indian decisions were met with much controversy and in fact generated division within the Indian Muslim community as well as between the Indian Muslim and Hindu communities.

The purpose of this paper is therefore two-fold. The first is to demonstrate that South Africa, certain parts of Canada and India boast judiciaries that illustrate the role that judicial activism can play, not only in holding the legislature accountable to its constitutional commitments but also in stepping in and providing relief to marginalised and vulnerable sections of society where the legislature has failed to do so. In particular, the area of Muslim Personal Law provides a stark example where the South African, British Columbian and Indian judiciaries have displayed a robust form of judicial activism, in which precedent setting cases have been adjudicated to provide protection for Muslim women. The second aim of the paper is to interrogate the approaches and methodologies adopted by the respective judiciaries in their attempts to provide protection to vulnerable and marginalized Muslim women with the hope of identifying a best practice or best practices.

⁴⁴ 1997 (2) SA 690 (C).

⁴⁵ 1998 (4) SA 753 (CC)

⁴⁶ 93 of 1989.

⁴⁷ 93 of 1989.

⁴⁸ 2005 (2) SA 272 (T).

⁴⁹ 2004 (5) SA 331 (CC).

⁵⁰ 2009 (5) SA 572 (CC).

⁵¹ 81 of 1987.

⁵² [2010] 2 All SA 55 (WCC).

⁵³ 25 of 1961.

⁵⁴ (1985) 2 SCC 556.

⁵⁵ (2001) 7 SCC 740.

Panel 1C: Socio-Legal Research Agendas

Questioning appropriateness of legal research in Kenya: The nexus between research funding, academic freedom and social responsibility

Duncan Ojwang, Agnes Meroka, Attiya Waris & Edwin Abuya, University of Nairobi, School of Law

The University of Nairobi, School of Law is the oldest and largest law school in Kenya, and it is also currently the only one that offer's post-graduate courses in the country. The School of Law places great emphasis on research, and both at the undergraduate and post-graduate levels of study, research is taught as a stand-alone course, and students are also required to complete research projects in order to be eligible for the award of any degree. Legal research is a field that has evolved and changed since the School of Law was founded, and in part, such developments and changes have been influenced by the growing interest in social-legal and post-colonial studies. Socio-legal research is concerned with studying law in context, and it uses social science research methods to research legal processes. In post-colonial societies such as Kenya, socio-legal research is seen as a tool that may be used to enable better and greater understanding of how law operates in such societies. The need to understand how law operates in the socio-economic and political contexts is therefore well accepted. This makes it important to consider our social-legal research blind spots.

Accordingly, each research project carries a certain voice. What voice does our legal research carry? There is a need to analyse what counts as research at the University of Nairobi, School of Law and to discern the role of research carried out in the School of Law in the society as a whole. Answering this question is the interest and objective of this study. Our hope is to provide this information in the light of LLB, LLM and PhD theses. We will also look at the linkages between research carried out by students and the research carried out by faculty members, and we will analyse the specific ways in which faculty member research influences student research. We will draw on these research projects in order to analyse the factors that influence students to carry out particular types of research and also to analyse the methods students predominantly use to carry out research in order to consider the role of research conducted at the School of Law. We will be seeking to determine whether research carried out at the School of Law enables us to address pertinent issues within our society, that is, does this kind of research provide African solution for African problems. It is vital to the society and African region, which seeks solutions to deal with its economic, political and cultural needs. Ideally, research should be a tool which facilitates and enables learners to extend conversation in different social, cultural, political and economic areas. Generally, the research process embodies the political, economic and cultural interests of different groups with an interest to control research agenda. But we should interrogate whether African voices are missing. This paper will seek to identify and explore these interests as fleshed out in the topics of research interests.

Research must open ways to broaden these needs beyond the global structural realities, because these realities sometimes determine the knowledge we generate through our research. Here, the inequality emerges in terms of various factors. However we still have a responsibility to consider the advantage our research brings to liberate all knowledge. It is prudent for research lecturers to examine why it might be the case that most research in their school privileges the dominant Eurocentric legal knowledge and theories. We therefore ask what "space" does our research create to advance knowledge that reflects a melting pot. There might be numerous reasons for this influence; funding, call for papers by different INGOs and reputable law journals, consultancy, online legal journals carried by Westlaw and Lexus Nexis, reputable law journals by different law schools and societies etc.

Socio-legal research presents a means through which unseen, silenced or hidden aspects of law are revealed. The lack of prescribed methods within socio-legal scholarship allows researchers to be creative enough in their analyses in order to highlight key aspects about the law which may be unseen, silenced or hidden. In post-colonial scholarship, it is important to let the voices of the colonized be heard. The above research question has been posed in different ways by various researchers, for example: Do we have space for African voices? To what extent is our work complicit of the dominant theory? To what extent does our work either silence Africa or transform it? To what extent is our research leading to transformative critical pedagogy? Does our work make a difference and create space in post-colonial scholarships? To what extend does our work ignore serious power dynamic and politics of knowledge? To what extend does it represent the voice of Africa? What are the undercurrents in our legal knowledge research? To what extent is our work complicit in merely duplicating and advancing dominant legal knowledge? Are we true to our authentic selves as African subjects of knowing?

Using the University of Nairobi, School of Law as a case study, this paper will therefore look at the specific ways that socio-legal research is taught. Given the lack of prescribed methods for carrying out socio-legal research, this paper will highlight the challenges that lecturers teaching research methods at the University of Nairobi, School of Law, may encounter while teaching students how to practically carry out socio-legal research. The paper analyses the way socio-legal research has been conducted at the School of Law, highlighting the methods that were used in the chosen research projects. It will then conclude by analysing the extent to which

socio-legal research has transformed knowledge bases in the School of Law. Our hope is to answer the question as to whether socio-legal research does in fact present a space through which African voices may be ultimately emancipatory. By studying the limitations and strength of our research, we seek to make it more responsive to the society and Africa. Ultimately by studying the limitations and strength of our research, we seek to make it more responsive to the society and Africa. In our opinion this is an attempt to actualize the role of socio-legal research in bringing forth solutions in a society.

Applying relational theory in realisation of the right to health in African countries

Omowamiwa Kolawole, University of Cape Town, Faculty of Law

The realisation of the right to health in African States is important in the light of great losses incurred on the continent over the years due to diseases such as malaria, typhoid, polio, tuberculosis and HIV/AIDS. Most recently, the Ebola pandemic that occurred in parts of West Africa has brought the urgency of proper health care in African States once again to the fore.

The Problem

Many African States are parties to international⁵⁶ and regional conventions⁵⁷ that recognise and demand the promotion of the right to health. Also many of these States provide for health either as a right or as a national obligation. Despite these seemingly adequate legal provisions, the reality of the realisation of the right to health is unreflective of the legal aspirations as there are limitations to the realisation of the right. The major limitation the paper will seek to address is that of limited funds,⁵⁸ which are even often further stifled by competing interests, as well as in many cases, by corruption.⁵⁹ The result of this is often weak health systems with limited functionality, low number of health personnel who often equally unmotivated and a resultantly high dependence on international aid.

To address this problem, the Abuja Declaration⁶⁰ encouraged all African States to commit to spending at least fifteen per cent of their annual budget on the realisation of the right to health.⁶¹ While this declaration was a landmark in its own right as it made what was at the time a giant leap in its specifications of budgetary allocations for health, in reality that percentage is hardly sufficient to address the health challenges of many African States, and even so, is not even often attained by States.⁶²

There is thus need for a theoretical framework that can take these realities into consideration while proposing an impactful application of the right to health. Such a theoretical framework will have to (a) contextualise the relevant rights to the dynamics of the African societies (b) provide an 'empowering' narrative that places an emphasis on autonomy and agency in the reading of the relevant rights and how they apply, (c) navigate the application of the observance of the relevant human rights in such a manner that amplifies the inherent local 'advantages' and 'potential' in the established systems on the ground, so as to help compensate for the limitations in the State's fulfilment of its obligations (d) in the long term lay the foundations for States to actually meet their obligations and move the fulfilment of the duties attached to the relevant rights away from the sphere of policy goals and aspirations to immediately accruable benefits. An examination of relational theory provides hopes for the possibility of an approach that can yield these outcomes.⁶³

The Case for a Relational Reading of the Right to Health

The paper proposes applying relational theory into the understanding and application of the right to health, order to provide a realisable reading of States obligations to citizens and the obligations of the international community to States in need of assistance. The recourse to such an approach is due to the nature of relational theory which has at its core the bid to place constructive relationships at the heart of social, legal and political dynamics.⁶⁴ As such, a relational reading of rights, places autonomy at the centre. However, the interpretation of autonomy varies from the liberalist school of thought to the communitarianist view. This paper

⁵⁶ Universal declaration of human rights, GA res. 217 (III), UN Doc/810 at 71 (1948). International Covenant on Economic, Social and Cultural Rights (ICESCR), GA res 2200A (XXI) of 16 December 1966.

⁵⁷ African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982). African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

⁵⁸ Institute of Medicine (US) Forum on Microbial Threats. Ethical and Legal Considerations in Mitigating Pandemic Disease: Workshop Summary. Washington (DC): National Academies Press (US); 2007. Available from: <http://www.ncbi.nlm.nih.gov/books/NBK54167/> doi: 10.17226/11917.

⁵⁹ Ibid.

⁶⁰ Abuja Declarations and Frameworks for Action on Roll Back Malaria, April 2001. See World Health Organization, 'The Abuja Declaration: Ten Years On', available at http://www.who.int/healthsystems/publications/abuja_report_aug_2011.pdf, accessed on 3 September 2016.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Jennifer Nedelsky, 'Law's Relations: A relational theory of Self, Autonomy and Law', New York: Oxford University Press. 2011.

⁶⁴ Ibid.

proposes a communitarianist view, as it is most suited to the social and cultural realities in most African States and bears the most resonance with the populace⁶⁵ because it places emphasis on communal rights and the fulfilment of rights in a manner that seeks to realise rights for as many as possible. In addition such a reading promotes the 'good neighbourliness' which is important at a domestic, regional and international level, if a right as complex as the right to health will have any chance of realisation and fulfilment.

To make the case for adopting relational theory for the fulfilment of the right to health, the paper will begin with a brief explanation of the current problems militating against the fulfilment of the right to health, followed by an exposition of the limitations of previous attempts to address the specific limitation of inadequate funds for the fulfilment of the right to health. It will then discuss the concept of relational theory, explaining its meaning, import and how it may be applied to our understanding of human rights. The paper will go on to explore how relational theory can specifically be read for the fulfilment of the right to health in particular, where the otherwise necessary tools to fulfil the right are scarce as in an African context. The paper will conclude with an exposition of autonomy in a manner that places the emphasis on the fulfilment of collaborative goals by a willing use of agency to pursue the good of all, bearing in mind that humanity is driven by social interactions, meaning that liberty is best interpreted and exercised in that context.⁶⁶

Complex system methodology for gender justice research in Liberia and Australia

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Dissertation Abstract:

This research is a major undertaking. It is complex, complicated and comprehensive. However the scope intended to be covered so important to consider the big picture of complex systematic approach to assessing the law. The gender agenda is borderless. Arguably, legal justice for Indigenous women and girls who have experienced gender violence has been characterised as unfair, inequitable, and sometimes arbitrary. Violence against women, clad in a myriad of shapes, forms, structures and categories, pervades cultures, societies and states. Unlike comparative studies, the research is founded on heuristic arguments derived from validating the formation, establishment and continuity of Indigenous critical mass in Liberia and Australia bound by common collectives in charting their very own path to justice and equality. While many studies have focused on "gender---based violence" and the "rule of law" in separate contexts, none has zoomed in on the particular extent to which the Western concept of the "rule of law" impacts upon gender violence in Indigenous communities of Australia and post---war Liberia.

Hypothesis

The principle of the "rule of law" is applied fairly and adequately when restoring justice to Indigenous women and girls who have suffered gender violence in Australia and post---war Liberia.

Research Question

Is the "rule of law" an essential axiom [an accepted truth that all is equal under the law] for restoring justice to Indigenous women and girls who are survivors of gender violence in Australia and post---war Liberia?

Objective

The main objective of the research is to examine the efficacy of the "rule of law" in restoring justice to Indigenous women and girls who have suffered gender violence (e.g., female genital cutting, rape, domestic violence, forced marriage, forced adoption, deaths in custody, land dispossession, patriarchy, paternalism, racism etc.,).

Methodology

An interdisciplinary approach, grounded in complex systems theories/principles of decolonization, (legal) feminism, intersectionality, critical race/legal, and social determinants of health this research adopts a mixed method design drawing on desk reviews, case studies, case law, secondary statistical data, survey and interview instruments with service providers and Indigenous women advocates, respectively. Triangulated by content analysis of historical documents, case law and case studies, the research draws on a mixed (Indigenous and feminine) research methodologies. A survey of 232 services providers working with Indigenous women and girls and an interview of 30 Indigenous female advocates were conducted between October 2013 and September 2014 in both

⁶⁵ Evidence of the acceptance of this mind-set is apparent in the various cultural notions of rights and right living in various parts of the continent such as Ubuntu, but even more specifically in the African Charter on Human rights which provides for duties to the community. See Chapter 2 of the African Charter Human and People's Rights, op cit (n2).

⁶⁶ Thomas C. Kohler. "Individualism and Communitarianism at Work." (1993) Brigham Young University Law Review 727-741.

Australia and Liberia. Further analysis is carried out on, 127,708 convicts to Australia; 14,996 former slaves to Liberia; 2,701 sexual and gender violence cases reported to the Ministry of Gender, Children and Social Protection in Liberia; seven case files from the Sexual and Gender-based Crimes Unit in Liberia; and 1,200 interview entries from the Longitudinal Study of Indigenous Children in Australia.

Findings and Results

Preliminary findings from the research study show that structural/cultural, institutional/state and interpersonal/community violence are intersecting factors responsible for violence against Indigenous women and girls in post-war Liberia and Australia. Despite cultural, historic, political and socio-economic dissimilarities *entre* Australia and Liberia, Indigenous women and girls in selected communities are disproportionately predisposed to violence perpetrated and orchestrated at these three main levels. Although the rule of law is crucial and seen as an emancipatory tool for justice and redress, it is also used to discriminate against Indigenous peoples.

Conclusion

In conclusion, while rejected the research hypothesis (i.e., the rule of law is inadequate for restoring justice to Indigenous women and girls who have experience State/Institutional, Structural/Cultural and Interpersonal/Community violence); the study highly recommends the need to incorporate complex systems approach to a more comprehensive research on violence against Indigenous women and girls. That to effectively reduce violence against Indigenous women and girls, boys and men must be educated and encouraged to equally participate in gender justice advocacy work. A novelty, this research helps give global agency to Indigenous women and girls' ways of being, knowing and doing justice.

Chapter Introduction

Many authors have compared and contrasted between qualitative and quantitative research methods.... The Debate over the legitimacy of qualitative versus quantitative research is ongoing and seemingly endless. (...) The distinction is not just about counting things against not counting them. Qualitative researchers can and do count things. Rather the distinction lies in the deep philosophical foundations underlying the methods or technique in the "doing" of research...and I agree, that the researcher needs to understand that the different types of research methods originate from different theoretical frameworks within the social sciences and humanities.⁶⁷

A major constituent of a valid conventional academic research is the capacity to be systematic, replicable and rigorous in its methodology and design. In essence, every traditional research must conform to a requisite standard for appropriating the choice of method and design. Such a choice must ensure that the research question(s) aligns with a method and design that is robust enough so as to buffer confounds and biases. In this scenario, the task of the researcher is to carefully decide which method and design will aptly aid with understanding, describing, and explaining the reality of complex human behaviour. A one-size fit-all method does not cut. Rather, a research that can tightly combine several study methods has the propensity to guarantee rigour, originality and comprehensive understanding – a process described as triangulation.⁶⁸ The CSW 57th Meeting (2013) reaffirms Janice Morse's triangulation model in stating that to,

[d]evelop and implement effective multi-sectoral national policies, strategies and programmes, with the full and effective participation of women and girls, which include measures for prevention, protection and support services and responses; data collection, research, monitoring and evaluation; the establishment of coordination mechanisms; allocation of adequate financial and human resources; independent national monitoring and accountability mechanisms; and clear timelines and national benchmarks for results to be achieved;⁶⁹

Suffice to say that the inherent non-reporting, privacy and consent issues associated with VAW&G challenges this research pushes barriers and break grounds. Needless to say, the necessity to resist academic conventions in exchange for augmenting the efficacy of laws needed to protect Indigenous women and girls is understated. Of greater importance is the impetus for carefully selecting a mixed-method research design, which transcends an incline to deconstruct pedagogical norms – i.e., the author's lived experience of being a war survivor couple with persistent frustration about restoring justice to survivors of violence.

⁶⁷ Ibid 53–55.

⁶⁸ Janice M. Morse, 'Principles of mixed methods and multimethod research designs' in Abbas Tashakkori & Charles Teddlie (eds) *Handbook of Mixed Methods in Social and Behavioural Research* (2003) 189–208, 190.

⁶⁹ CSW 57th Meeting *supra* at 6.

Beginning with the philosophical paradigms that dictate the interdisciplinarity⁷⁰ and complexity of a research twirling *entre* conformity⁷¹ and resistance.⁷² Contemplating the migration of Indigenous women and girls' issues of violence from the margins of complex social and cultural structures towards the edges of Western centrality re---defines the scope of this mixed method⁷³ research design. This re---definition is couched in the novelty of utilising empirical data and epidemiological study as a nexus between gender violence and the rule of law. Section 6.1 offers an attempt to meet the inherent challenges of conducting high quality research on gender violence apt for evidence---based law and policy reform.⁷⁴ Further, a description of the components of both the qualitative and quantitative aspects of the research with a strategy structured around textual/statistical analysis, surveying and interviewing ensues. Section 6.3 describes the sampling techniques that used to select and recruit participants. The sources of data collection, where and how it is stored and analysed is discussed in this Section. The next two sections chronicles the ethical approval process as it pertains risks and benefits analysis, as well the challenges associated with gathering research data on a highly sensitive topic. The final section of the chapter outlines the phases and timelines proposed to successfully complete the research project.

Panel 2A: Land and Property

The double-edged role of law in struggles over mining on 'communal' land

Aninka Claassens, University of Cape Town, Land and Accountability Research Centre

This paper describes increasingly violent processes of dispossession that target the poorest South Africans in former homeland areas, particularly where mining is taking place. It argues that various parts of government are deeply implicated at two levels. The first is the process whereby revenue from mining (and other investment deals) on 'communal' land is diverted to politically connected individuals and organisations through patronage networks in which some traditional leaders play a pivotal role. The second is in relation to a web of policies and laws that have made it increasingly difficult for ordinary people to assert and protect their land rights in the face of the unaccountable powers attributed to traditional leaders since the Traditional Leadership and Governance Framework Act (TLGFA) was enacted in 2003. The paper describes how recent laws and policies have enabled, and indeed elicit, the processes of dispossession and elite enrichment taking place. It argues that the laws mobilise colonial and apartheid versions of customary law to undermine the land rights of rural people, and to assert distorted versions of chiefly power that seek to vest sole decision making authority in traditional leaders.

They rely on the same rationale that was used to justify colonial dispossession in the first place, which is that customary systems of land rights do not entail property rights for their members, thereby rendering 'communal' land 'free for taking'. Related to this, is the assertion that the 'natural' form of authority for rural black people remains chiefly rule. The TLGFA re-imposes the disputed tribal authority boundaries put in place by the Bantu Authorities Act of 1951 in former homeland areas, thereby locking 18 million South Africans under the jurisdiction of chieftainships delineated during apartheid.

The paper discusses case studies that highlight the mechanics of how patronage politics, mining deals, and particular interpretations of chiefly power intersect to enrich a politically connected elite at the expense of the basic rights of very poor South Africans. These lay bare the ways in which law has been mobilised to strip people not only of their land rights, but also of basic political rights such as freedom of assembly, and self-representation. In other articles I have examined the provisions of the new traditional leadership laws. In this article I concentrate not on what the laws say, but how they are applied in practice in local struggles over resources.

One reason for shifting focus from the 'letter of the law' to current struggles is that much of what is done in the 'name of law' breaches the provisions of various laws including even the TLGFA and its provincial counterparts, the only post-apartheid traditional leadership laws that have survived thus far. Examining the dynamics on the ground enables us to focus in on the specific interests of key actors in various disputes. Traditional leaders are able to enter into secret multi-million rand deals with mining companies, and evade auditing requirements only because provincial and national politicians and officials refuse to enforce the financial oversight provisions, and checks and balances built into laws such as the TLGFA and the Ingonyama Trust Act. In order for those laws to have passed Constitutional muster, they had to contain such checks and balances, but case studies from North West and

⁷⁰ Robert Post, 'Debating disciplinarity' (2009) 35(Summer) *Critical Inquiry* 749–770.

⁷¹ James Chandler, 'Introduction: Doctrines, disciplines, discourses, departments' (2009) 35(4) *Critical Inquiry* 729–746.

⁷² Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (1999).

⁷³ Jennifer C. Greene, 'Is mixed methods social inquiry a distinctive methodology?' (2008) 2(1) *Journal of Mixed Methods Research* 7–22.

⁷⁴ Mary Ellsbert & Lori Heise, *Researching Violence Against Women: A Practical Guide for Researchers and Activists* (2005) 27.

KwaZulu-Natal illustrate the ways in which the parts of government and organs of state responsible for exercising oversight benefit directly when it is abrogated.

The case studies illustrate that such deals are legally vulnerable on four main grounds. The first is that they abrogate constitutionally protected rights, the second that they breach customary law requirements in respect of accountability and participatory decision making processes, the third that they breach the rights protected by early land reform laws, such as the Interim Protection of Informal Land Rights Act of 1996, the fourth that they fall foul of administrative justice laws such as the Promotion of Administrative Justice Act of 2000 and the Public Finance Management Act of 2000. In many instances arguments based on these grounds complement one another, particularly in relation to the failure of government or traditional leaders to obtain consent from rights holders when their land rights are undermined by mining and investment deals.

The paper reflects on the double-edged role of law in South Africa today. At the national level the Constitutional Court has played a protective role, striking down retrogressive laws such as the Communal Land Rights Act and the Restitution of Land Rights Amendment Acts, and upholding constitutional and customary law rights in the face of chiefly claims to unilateral power in a number of key recent judgments. On the other hand provincial High Courts and magistrate's courts disregard these precedents and continue to grant interdicts stopping community meetings. Time and again disputes pertaining to the scope of chiefly power over communal land, are determined not according to Constitutional Court's jurisprudence of 'living customary law', but by whether the incumbent chief can produce the Government Gazette notice proving that his lineage was officially recognised during apartheid.

Yet claims by some traditional leaders to sole authority to represent rural people are manifestly precarious. Laws that sought to buttress this claim have not survived scrutiny, and unanimous judgments of the Constitutional Court have resoundingly rejected the privileging of chiefly interests over the rights of ordinary people in no uncertain terms. Administrative law challenges too, have played a key role in challenging state decisions that are 'unreasonable' or unprocedural, particularly in relation to the institutions responsible for policing and prosecution. Those who have profited from opaque mining deals are no longer guaranteed the same protection when their cases get to court. This has contributed to an exponential increase in intimidation and violence against land activists over the last two years, who now have to dodge thugs and assassins at the same time as they struggle to protect their land.

Land reform must go beyond the boundaries of the former Bantustans in order to have a meaningful impact on the scale of racial inequality in land holding, and to address deepening rural and urban poverty. But struggles over land and mining in the former Bantustans are instructive in showing how the land reform policy and budget have been diverted away from the poor to politically connected elites. The model of development espoused by government is increasingly of investor-driven projects rather than support for small-scale local initiatives. The Recapitalisation and Development Policy requires a 'strategic partner' in all such investor-driven projects, in much the same way that the MPRDA requires black empowerment shareholders in mining projects. This creates a key intermediary role for government in selecting and directing budgets to these strategic and empowerment partners, rather than to the people whose land rights and labour are directly at issue. In the same way that current policy attempts to restrict the customary land rights of families and individuals to 'use rights' in respect of 'household plots', so the beneficiaries of Recapitalisation are doomed to be perpetual tenants of the state, rather than landowners. Land is thus retained by the state as a source for future patronage deals.

I argue, however, that the status quo is legally precarious, and moreover increasingly politically precarious. Deepening inequality, the flaunting of profits, overt corruption and violent repression have focused renewed attention on government's role and interests in pursuing particular policy choices. Given the symbolic importance of land, and the overt failure of land reform, policy approaches that default to the colonial denial of African property rights and autocratic versions of chiefly power cannot disguise the elite interests that they protect, in continuity with the same role during colonialism and apartheid.

The edifice of private property and its discontents

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In the post-apartheid era in South Africa a key goal of land policy has been to give effect to constitutional imperatives to provide tenure security to those citizens whose tenure was rendered insecure through past racially discriminatory law or practice in the past. Twenty-one years after the first democratic elections in 1994, however, few such reforms have been implemented, and the government's current proposals continue to be mired in controversy. Less remarked, but also highly significant, is a widespread failure to extend formal property rights to the urban poor.

This paper undertakes a critical analysis of underlying paradigms that inform efforts to implement land tenure reform in South Africa today. It describes the nature of the incompatibility between the dominant system of registered private property rights and associated institutions and practices (termed 'the edifice') and the complex realities of a variety of 'social tenures' on the ground, which are fundamentally different from private property. The paper shows that nearly 60% of South Africans hold land and dwellings outside of the formal system of property rights, in a variety of 'social tenures'.

Key features of social tenures include the following: (a) local oversight of processes of claiming, recognizing and transferring rights, as well as dispute resolution. Such oversight takes place through institutional structures of varying degrees of formality that are responsible for managing or administering land rights and associated duties. Often these are nested or layered in character, depending on the nature of the rights and the group affected by the land uses in question; (b) social and political relations, identities and dynamics directly inform the recognition of which people hold rights and duties in relation to land and dwellings, as well as how institutional arrangements are structured (such as through elections or other means of legitimation, including through reference to 'customary law'). In other words, they are socially and politically embedded and are highly relational in character. A key criterion for the recognition of a claim is often need, as distinct from the ability to pay; (c) these regimes are generally less oriented to strict and well-defined rules than to socially and politically defined processes, that is, they are much more 'processual' in character than the rule-oriented dominant system; (d) there is a great deal of flexibility in relation to both defining which people qualify as legitimate rights holders and in defining the relevant unit of land or dwelling to which people hold rights namely with regard to both social and territorial boundaries. This is one key reason why these systems often fail to meet the requirements of the cadastre that form the basis of the dominant property system in South Africa.

The dominant system of property holding in South Africa constitutes an imposing ensemble of laws, institutions, practices and professions, or edifice. Property law is based on a binary distinction between a dominant system of 'ownership' and all other systems. 'Ownership' rights (also termed 'real rights') take precedence over all other forms of land tenure located within a lower-order sub-structure. Ownership is realized only when the standards of the national land information system, or cadastre, are complied with. This has three components; the first is spatial, and involves the geometric description of land parcels. Linked directly to the spatial component is a textual aspect that involves the registers that record ownership, bonds and servitudes in relation to the land parcel. Thirdly, these spatial and textual records must be updated over time to reflect sales, inheritance, subdivisions, the addition of servitudes, and so on, all of which must be registered on the deed; this is the temporal component of the cadastre. The key features of this system are tightly interlocked with each other, since the spatial, textual and temporal dimensions must be closely aligned to each other before the deed can be registered. As a result the system is highly inflexible.

There are many incompatibilities between the two systems of property rights, with social tenures disadvantaged as a result of living in the shadow of the edifice. 'Ownership' and 'real rights' always trump off-register, social tenures. Social tenures receive little external support and minimal oversight of local arrangements by the state or other agencies creates many opportunities for abuse by powerful local interest groups. There are few available avenues for recourse when abuses occur within social tenure systems, and social tenures are not well served by systems of planning, development and service delivery. The underlying insecurity of the *de jure* property rights of most South Africans contributes to their marginality within the wider political economy. The inability of the cadastre and the edifice to recognize these rights contributes to continuing structural inequality and the poverty that results.

The paper discusses four different paradigms that influence thinking on tenure reform. One involves the extension of individual titling of land to the rural and urban poor. Another focuses on adaptive modifications of the dominant system of private property that allows incremental improvements in tenure security at the local level, through administrative and legal innovation, but without formal titling being on offer. Advocates of this approach continue to see registered title as the ultimate goal or endpoint. A third approach seeks effective protection of social tenure rights through legal recognition and support, does not envisage individual titling as the destination, but does not directly challenge the hegemony of the dominant system. The fourth approach involves a more fundamental shift: providing full recognition of and large-scale support for land rights that do not have the characteristics of the exclusive, Western-legal form of property, as well as state support and oversight of their functioning. If adopted as policy, this would require major adjustments to how development planning, service delivery and payment for services are conceptualized, planned and implemented. The paper concludes by assessing the strengths and weaknesses of these paradigms, taking into account current political realities in South Africa.

Whose land is it anyway? A critical analysis of the post-apartheid communal land tenure project, drawing on case studies from rural KZN

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Whereas pre-colonial African land tenure systems were structured in inclusive social relations characterized by various forms of networks, colonial land tenure paradigms introduced exclusive, commodity-based legal concepts that favoured land ownership by the white minority while confining the black majority to insecure land tenure in Bantustans/Homelands. Yet despite a strong commitment by the Constitution of South Africa (103 of 1996) to reverse these injustices, the post-apartheid framework for land tenure in the former Bantustans is intrinsically tied to colonial land tenure ontology.

This paper presents a critical analysis of the post-apartheid land tenure project - focussing on the policies of the Ingonyama Trust Board (ITB). I present a review of post-1994 legislation applicable to the Ingonyama Trust, namely the Ingonyama Trust Act (3 of 1994), the Constitution of the Republic of South Africa (108 of 1996), The Interim Protection of Informal Land Rights Act (31 of 1996), The Public Finance Management Act (2 of 1999), the Promotion of Administrative Justice Act (3 of 2000) and the Mineral and Petroleum Resources Development Act (28 of 2002).

Drawing from on-going field research conducted in the former Bantustan of KwaZulu, I then measure the applicable legal framework against the administrative practice of the Ingonyama Trust. The paper focuses on the three main ways through which the ITB sustains this practice, namely: residential lease agreements, mining authorisation without consent, and the dispossession of groups with historical land rights.

The residential lease agreements: Whereas Section 25(6) of the Constitution instructs that those whose tenure of land is legally insecure as a result of past racially discriminatory laws are entitled either to tenure which is legally secure or to comparable redress, the response of the ITB has been, since April 2007, to introduce long-term residential leases. The leases are presented as the best and only available land tenure solution for the people who reside on land under ITB jurisdiction, and as a catalyst for investment, business opportunities, as well as secure access to finance for the development of the land as they are an acceptable guarantee of residential address in accordance with financial laws.

The ITB argues that land tenure traditionally held by communities through PTOs is vulnerable and does not afford strong security of tenure to its holders. This is despite the directives of the Upgrading of Land Tenure Rights Act (1991), which provide for "the upgrading and conversion into ownership of certain rights granted in respect of land; for the transfer of tribal land in full ownership to tribes; and for matters connected therewith." Such upgrading and conversion included the permission to occupy certificates. Accordingly the conversion of PTOs to leasehold thus constitutes the conversion of a stronger land ownership right to a weaker right, which becomes dependent on the payment of rent.

Unfortunately, this systematic loss of customary land rights comes at a high financial cost. The lease agreements, issued at a standard 40 years across districts, are subject to a 10% annual increase. In reality, over the full 40-year term a residential lease costing an initial R3,000 a year would cost the tenant R1,466,758.73. This is for undeveloped land lacking even basic municipal services.

Mining with Community Consent: Here I provide evidence, using examples from Makhasaneni, of patterns of corrupt relations between multi-national mining companies, government officials and traditional leaders that perpetuate a culture of abrogating customary land rights. Makhasaneni is located in the former homeland in the Melmoth area within the Zulu-Entembeni Traditional Authority (TA) Area which falls under the jurisdiction of the Ingonyama Trust.

In Makhasaneni, and in many other instances, the state fails to consult with affected communities as required by law, and the ITB relies only on the consent of Traditional Councils to grant approval for mining activities. Due to the monetary implications of these relations, those who attempt to defend their customary land rights are often subject to intimidation and at times, death.

Dispossession of Groups with Historical Land Rights: Lastly, I show how, using a common rhetoric repeated in KZN -that "the land belongs to the King, and everything in it, the nation and all who live and have built their homes in it"- the supreme power of the King over land and people is asserted. This, in effect, is a particular interpretation of customary law which is deeply hierarchical and authoritarian. I show how -using examples from the Nkuzana Community Property Trust near Phongola, the Amahlubi Clan in Newcastle and the Anglican Church of Umlazi- this interpretation also becomes a device through which groups with strong historical claims to land are dispossessed of their land rights.

Effectively, these case studies demonstrate how the ITB abrogates land rights by using an interpretation of customary law which takes a top-down approach, is deeply hierarchical and undermines the importance of consultation. I thus argue that this version of

customary law contradicts the Constitutional aspirations for post-apartheid democracy, and reinforces rather than rectifies the damaging trajectories born out of the colonial period.

In conclusion, I argue that the practice of the ITB is at odds with the applicable legal framework guiding its fiduciary duties, the legal precedent set by the Constitutional Court in the 2003 Alexkor judgment -that upholds the status of indigenous land rights as ownership, as well as empirical accounts of a bottom-up, inclusive version of living customary law. In the context of evidence that unequivocally demonstrates the problematics of the ITB's adherence to centralised control of communal land, the paper makes proposals for a review of the Ingonyama Trust Act.

Panel 2B: Equality

Speaking into being: Developing a non-racial discourse for “dissing” race

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“For as a man thinks in his heart, so is he.” Proverbs 23:7 Holy Bible, NKJV

Whitehead and Durrheim (amongst others) have analysed discourse among ordinary South Africans. Their research indicates little movement in how South Africans self-describe and locate themselves and others in everyday race-talk. Mare describes this every day benign practice as race-thinking or racialism. This form of race-talk is benign, unlike racism, because of the absence of malicious intent. But do ordinary South Africans understand why it is that they need to racially identify themselves and others in everyday discourse? Both Whitehead and Durrheim ask what is it that the speaker wants to convey to his audience about themselves and the persons to whom they refer. Is race-thinking and race-talk reflexive (unconsciously perpetrated) or is there always an unspoken agenda?

According to Sharp (1998) the non-racialism as an ideal formed part of the battle cry of anti-apartheid social movements which were committed to both eradicating the system of apartheid and the race-based systems upon which it was based. The non-racial ideal has become entrenched in state ideology in post-apartheid South Africa. The preamble to the 1996 Constitution of the Republic of South Africa envisions as democratic society, a feature of which is non-racialism. However, despite the long history of non-racialism as a sort-after and fought-for ideal (Frederickse 1990), its meaning remains elusive. Non-racialism remains undefined if not misunderstand and miscategorised as a liberal political notion. Bass et al (2012) compare attempts to disaggregate non-racialism to trying to prove the existence of the Higgs boson with the Large Hadron-collider – mammoth task.

Whether or not non-racialism as a foundational principle is justiciable is crucial in holding a government accountable. The responsibility for changing the current multiracial discourse to a non-racial discourse ought to lie with government but assisted by concurrent and parallel projects in the private sector, NGOs and media.

Erwin suggests that as a result of affirmative action being a major feature in our reformatory arsenal, race-thinking, race-talk and self-identification have become normative. Mare describes race-normativity has made racially locating one's self and others as a matter of self-evidence and natural way of mediating our existence as South Africans.

In the official discourse, non-racialism is invoked on public holidays by repeating the foundational values closely followed by the phrase “united in our diversity”. The adoption of the rainbow metaphor has further entrenched the notion of separate but equal. Census forms further require self-classification and until recently, persons opting for the “other” category were racially reassigned. In the judicial branch of government racial categorisation continues to go unchallenged. The judgements of *van Heerden v Minister of Finance* (2004) and more recently *South African Police Service v Solidarity obo Barnard* (2014) confirm that affirmative action as a form of race-based “restitution measure” will remain with us indefinitely. Regulations that require that national demographics are used as a yardstick also indicate that an affirmative action sunset-clause is very unlikely in the near future.

The apartheid system was supported by both infrastructure as well as vocabulary. The language of apartheid promoted the notion of separate development and difference. Part of the dialogue was based on fear, religion and religious sanction, economic preservation as well as white supremacy. The infrastructural support existed in the form of separate administrations; the groups areas; and schools offering different educational standards. Racialized identities were entrenched through the legislative framework of the Population Registration Act. Together with institutions like the Race Classification Board and inspectorates like the infamous Ndabasabantu, South Africans were clearly shown where they belonged, who they were and what they were entitled to. By 1986 the Identification Act removed the racial coding that had been incorporated into the identity numbers of the various “race” groups.

Self-identification had become normative. Although the Population Registration Act was repealed in the early 90s, self-identification on the basis of repealed legislation continues to be normative even post-apartheid South Africa. South Africans are constantly being asked to disclose a racialized identity as either part of government administration or for statistical purposes by the private sector. As Mare (2014:2) points out, racialized classification remains a crime against humanity and there can be no justification therefore.

Chapter 9 institutions were birthed by the 1996 Constitution. The purpose for these institutions is to support democracy. However none of these structures are specifically focused on the promotion of non-racialism. Instead the Chapter 9 institutions like the Equality Courts deal with, on an *ad hoc* basis, the symptoms of a deeply divided and racialized past. Apart from the attempts by the Department of Arts and Culture to promote social cohesion, there has been little investment from the South African government in furthering the constitutionally entrenched ideal of non-racialism. Mare (2014:1) describes the intensity of this investment as one which “is coherent, concerted and coordinated practice”. In contrast, considering the vast governmental investment in maintaining and monitoring the current classificatory project, Mare (2014:2) considers it rather naïve of the South African government to think that racism and racism would not continue. The socio-economic fall-out of being labelled “previously disadvantaged” must be considered as another unforeseen consequence of racialized identification.

Is it possible for race-based redress measures to co-exist with a non-racial discourse? As racialized identity continues to be normative in post-apartheid South Africa, the continued use of race as a form of identity must be qualified in both the official and every-day discourse. Educators for example are constitutively required to collect data in their classrooms with regards to “what” their students are. Mare notes that in the Eastern Cape educators have employed different “methodologies” to locate learners in the various categories. Anecdotal evidence suggests that some educators also make use of euphemisms to take-the-edge-off the apartheid racial category when learners are required to self-identify. Mare (2014:2) uses the words “burden” and “trapped” to describe the legacy into which the so-called “born-frees” are born.

Erasmus suggests that since the aim of race-based redress is to address previous disadvantage, that biographical data is best suited. Erasmus further suggests that educators use particular phrases to contextualise or qualify racial categorisation. By contextualising or qualifying racial categorisation, the message conveyed to those who are being categorised is that racialized identities are purposive as opposed to being self-defining. This purposive approach finds support in Mumdhani (.....) who explains that racialized identities were first and foremost economic identities. By reverting to the ‘original’ purpose for which racialized identities were intended, racial categorisation will hopefully lose the ethnic qualities that socialisation and separate development have created.

The focus of this paper will be on transformative discourse. It suggests that a similar approach as that which supported apartheid ought to be adopted, *mutatis mutandis*, to support the non-racial project. Like the apartheid project and the post-apartheid development discourse (Greenstein 2009) the non-racial project must be accompanied by institutional support, policy frameworks and practices to further its cause. We see the beginnings of an accidental if not overt development of a non-racial discourse in the attempts of the Eastern Cape educators as referred to by Mare. Erasmus’ strategy displacing and disengaging race is much more overt and directed. The work of the History Workshop Seminar: Teaching Race (2012) deserves further investigation as tool for undermining race-thinking.

Transformation must occur in both the official as well as the informal discourse so that race is “disrespected” and as well as “dislocating” as a primary form of identity. Mare (2014:2) recognises the magnitude of the non-racial project and confirms that race-thinking must be confronted in order to bring about fundamental society transformation.

Substantive equality beyond an age of dignity – context and contestation

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South Africa’s democratic Constitution has come under fire recently, with the resurgence of older claims that it was an elite pact that sold out the South African poor (Marais 1998) and the emergence of new, more populist, claims that it constituted a re-invention of apartheid. It is correct that the transition was governed by *realpolitik* and political compromise, and that this included extensive compromise on the more socialist economic policies of the Freedom Charter and the ANC (Terreblanche, 2013). However, the two constitutional documents that captured the political settlement, as well as the political aspirations of the new government (and African National Congress) still contained a radical edge that envisaged fundamental socio-economic transformation of our society. In constitutional terms, this was captured in Karl Klare’s influential work of transformative constitutionalism, and the idea that the Constitution provided the basis for political and legal work that could enable more fundamental social and economic transformation (Klare 1998). This garnered much support, and some critique (Sibanda 2012). Focussing particularly on the principle and right of equality, this paper will suggest that whilst transformative constitutionalism might have had its day (which is not certain), the radical

ideas of transformation emanating from the transition (that influenced ideas of transformative constitutional potential) have not disappeared. Rather they became subsumed by more liberal ideas of dignity, inclusion and market economy, and have recently resurfaced to find new support (although differently articulated) as we face the deep inequalities of the present.

Much has been written about transformative constitutionalism, dignity and the first two decades of 'lawfare' and constitutional litigation. Much is currently being written about the possibilities of constitutionalism and overcoming the deep racial inequalities inherited from colonialism at this moment. In this paper I am interested in three things. First, I will briefly discuss the emergence of a culture of dignity (and the dislodging of radical goals) in constitutionalism, located in a wider political context of reconciliation and a particular judicial (and political) interpretation of apartheid as primarily invasive of dignity, and of democracy as primarily about inclusion (Albertyn 2007). Second, I will explore the extent to which, and how, this more liberal notion was still contested by a more critical and radical politics of substantive equality and transformation. Here I will focus selectively on politics and jurisprudence relating to equality, culture, democracy and socio-economic rights. Third, I will build an argument about constitutionalism and substantive equality that draws on past and present struggles to suggest that the radical potential of the Constitution is undiminished, if under-developed, under-utilised and overly dependent upon legal mechanisms. I will end, if possible, with a final section that draws parallels and differences between South African and other post-colonial constitutional experiences.

In the first part, I am interesting in the competing narratives of our South African past and present, and how these might weave together to constitute the future. I will argue that that various liberal, radical and critical understandings of equality, rights and constitutionalism influence and co-exist, as much as they oppose each other. I will focus on the liberal 'dignity phase', and show how the immediate post-apartheid political, legal and judicial context enabled a particular set of conditions for the emergence and dominance of the dignity/inclusion imperative. I will suggest how this has been captured in the jurisprudence, and especially in cases on sexual orientation (equality jurisprudence) and socio-economic rights (as examples). If space, I will discuss further examples, such as the how the tug of dignity and the imperative of inclusion limited the potential of affirmative action.

In the second part, I will draw out and develop the critical and radical threads of substantive equality, egalitarian pluralism and substantive participation as they are manifest in theory, politics and jurisprudence. Here I will look at the feminist roots of substantive equality and the failure to capture this in the jurisprudence. I will suggest that it might be present or nascent in some of the law and politics around egalitarian cultural pluralism, gender, equality and property (to cite a few examples).

In part three, I will develop a radical notion of substantive equality that can facilitate and engage socio-economic transformation. This will build on the previous section, as well as theory more widely. Rather than relying on specific writers that have been popular (Nancy Fraser, Wendy Brown), I will draw out common themes and ideas and apply them to South Africa. I am particularly interested in describing a 'legal' or constitutional notion, or one that can be used in law. Here the emphasis will be on an 'indigenous' idea of substantive equality and on the reconstructive role of law in both practical and normative terms, but also on the limiting role of legal liberalism.

I imagine that although a radical idea of substantive equality can be partly captured in law, its place will always be transitional, fluid and contradictory. Thus I will explore the role of law in transformation, and the problems of an over-reliance on courts at the expense of democratic politics. Despite this, I expect to ponder whether the establishment of progressive values of substantive equality might not be easier to achieve in courts than in wider politics, except in particular moments of struggle. That was the case with gender struggles in the 1990s. It would be interesting to consider whether the renewed emphasis on racial inequality and overcoming colonialism lends any space for a radical idea of substantive equality.

Finally, if time and space allow, (which I doubt) I will reflect on the nature of law in a transitional and transforming post-colonial, African state. Whilst there will not be space for comparative work, I will draw on some of the work on constitutionalism and equality in Africa to broaden my analysis beyond the South African example. I hope that this might reduce the danger of South African exceptionalism that perhaps characterises too much of our work.

Enabling sustainable development through the empowerment of woman and girls to achieve human rights and gender equality in an Afropolitan era

Mala Naidoo, Varsity College

According to Taiye Tuakli-Wosornu, in "Bye-Bye Barbar" which was published in the LIP Magazine in 2005, the term "Afropolitan" refers to African immigrants who do not have a single home but instead live and work Globally. The fluidity of people could be considered problematic as could they not serve a better purpose in Africa? Other critics believe that Afropolitans can contribute to making the continent a better place.

Panel 2B: Equality

Given this context of Africans living abroad, how can we address the issue of sustainable development and achieving gender equality through the empowerment of women? There is a global consensus that empowering woman will lead to economic growth. The 17 SDG's reflects this understanding and supports the empowerment of woman and girls, which is especially the case for Africa. Women and girls can play a role in making a contribution to Regional and Global transformation.

Unequal education for girls, wide spread gender based violence, sexual reproductive and health challenges, restrictions to land ownership, etc disproportionately affect women and their livelihood and therefore negatively impacts on sustainable development. By ensuring the leadership of women in decision making, in the field of economics, politics and education, for example we can change the cycle of poverty and benefit society as a whole. The economic empowerment of women can no longer be postponed.

Yet the majority of women live in poverty, and have no political participation and public decision making opportunities. The prospect of sustainable development in Africa is therefore limited. Economic equality which is a fundamental human right will result in a more equitable distribution of financial resources and improved delivery services of water, education and health services.

The HIV / AIDS crisis in Africa is well known, especially amongst women and girls who endure rape and are often forced into marriage even before they turn 18. Young girls are mostly at risk. Women as the primary care-givers, have always invested economically in the development of their children and can therefore have a significant impact on eradicating poverty and increasing capital growth for generations to come. Violence against woman and girls condoned culturally through female genital mutilation, child marriages, sexual violence during conflict and wars needs to be addressed at all levels, including Government, private and societal levels.

The ineffectiveness of existing legislation and policy to empower women and address the exploitation of women is due to a lack of proper implementation strategies. The implementation of legislation and policies must be carefully and regularly monitored and evaluated. Although there are changes in policy these are very slow and women continue to be marginalised from a local to an international level. The empowerment of woman can only be achieved through legislation and policy changes that address discrimination, human rights violations and gender imbalances, which have stunted the development of African woman to achieve their full potential. Other barriers to the empowerment of women, especially in Africa are customary practices and a patriarchal culture which alienates women from the decision making process and participation in the economy.

Without full participation of woman in decision making we would be unable to realise political, economic, social and environmental rights which underpins sustainable development. There needs to be the development of indicators to measure the progress of woman empowerment and their participation in the decision-making process. Women and girls hold the key to Sustainable development and their empowerment should never be underestimated in the achievement of the SDG's. Internationally, regionally and nationally governments need to have the political will to implement Legislation and policy that empowers woman and girls. Sustainable development in Africa needs to be included within the Global, regional and national frameworks that are in place in order to accelerate the progress of human rights, empowerment and gender equality of women and girls.

The SDG's will be finalised at the UN General Assembly sitting in September 2015. The AU Summit addressed this issue in January 2015 under the theme "Women's empowerment and development". Nationally dialogues need to be facilitated to enable the transformation of the rights of women. There is a need for instruments that support Sustainable development for women. Real political will and commitment is needed by all stakeholders to realise the full promotion and protection of gender equality, empowerment and the human rights of women and girls. Governments need to be transparent accountable and responsive to the needs of women and girls in the implementation of policy to strengthen the rights of women and girls. We need to use the 2015 UN Sustainable Development platform to effect positive transformation of women and girls who are subjected to multiple and intersecting forms of discrimination and gender inequality. Gender equality of women and girls has the potential of contributing to the eradication of poverty and long term sustainable development.

In this Afropolitan era will we realise the change in the cycle of violence against women? Will we eradicate poverty and allow women to take their rightful place in society in decision making? Will gender equality and empowerment of women lead to sustainable development for Africa and the world?

Women's land rights and Communal Land: Taking small steps to security

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The opening discussion in this paper explores the relationship of tension and erasure inherent in the colonial and apartheid distortions around women's access to land and their land rights. The tensions are made evident through the differences in the characterisation of women's relationship(s) to land under customary law contrasted with the colonial and apartheid characterisation. The erasure is evident in how it suited patriarchal and apartheid interests to render invisible the diverse roles of women in relation to land and the varied ways in which women had access to land.

The land rights and tenure security of women in the former homelands has been shaped by the manner in which both colonialism and apartheid distorted customary systems. A reliance on male elders in defining the content of customary law resulted in a customary law system that foregrounded the patriarchal elements of custom. This contributed to the legitimisation of a narrative that erased women's land rights and made women's access to land dependent on their husbands, fathers or male relatives. Such narrow and limited characterisations of women as wives or daughters are in tension with customary characterisations of women which opened up imperfect spaces for women's access to land as sisters and in their own right. In spite of the colonial and apartheid legislative frameworks presenting its characterisations of women as part of custom since time immemorial, women and their communities have managed both then and now to operate outside of this constructed narrative about women and land.

The legacy of the suppression of customary narratives around land and characterisations of women in relation to land that countered those of the previous governments, has been accompanied by the imposition on customary law of dominant conceptions. The examples of this imposition can be seen in the manner in which customary tenure systems are being recognised by the South African state. The current approach taken by the state in recognising and legislating customary laws, particularly in relation to land, attempts to make use of a certain interpretation of common concepts that is ill suited to customary systems. In particular the interpretations of ownership, the notions of rights and the understandings of the role of traditional leaders being foregrounded rub up against more complex understandings that are better aligned with customary systems. This misfit is heightened when the approach of law-makers is contrasted with that of the Constitutional Court and with practices on the ground.

A key example is the prioritisation of one owner for one piece of land to the exclusion of all others which is at the heart of formal titling and is central to the idea of ownership. This conceptualisation is often not well suited to accommodating the layered, nested nature of customary land rights. Women's rights and access to land are part of a network of rights that in some cases draw much of their strength from social recognition rather than formal recording. Formal systems of registering rights struggle to accommodate the dynamism of the customary system which allows for recognition of claims based on social principles such as need or birth right. In addition only giving recognition to a notion of ownership that emphasises the exclusion of others creates dynamics that often play out to the detriment of women. Legislation aimed at securing the tenure of women within these systems needs to be cognisant of these dynamics and how both formal titling and the centralisation of decision making power interfere with the ability of women to navigate and negotiate within these spaces.

The paper goes on to explore the practices in rural communities that provide evidence of a push back against, and a counter narrative to, the apartheid and patriarchal distortions of women's access to land. The manner in which these practices draw on multiple repertoires combining customary laws and norms with the language of human rights is reflective of the manner in which rural communities navigate their lives. These community led initiatives around women's access to land offer a more complex understanding of the individual in relation to the collective. Thereby challenging many of the dominant conceptions underlying the state sponsored legislation around security of tenure and land rights.

Research in recent years shows that these limited, patriarchal notions of black women's access to land are being rebutted by rural communities emboldened and reassured by the transition to democracy. A survey of 3000 women, conducted by the Community Agency for Social Enquiry, across three provinces shows an increase in the number of women getting residential sites in their own name in the years after 1994. Although the rate of the increase varies across the three sites, a common explanation given for why women and communities feel that this is now possible is South Africa's transition to democracy and the rights and values in the Constitution. There is great potential inherent in the spaces that communities and women are continuing to carve out for themselves, even more so now that these spaces are buoyed by Constitutional principles like equality and dignity.

These discussions raise important questions around the role of law in addressing the complex and enduring legacies surrounding land in South Africa and more specifically laws role in doing so in a manner that serves the interests of women. Is the role of the law merely recognition and protection? Or should the law seek to hold open spaces in which women and their communities are themselves developing ways to address these enduring legacies? To date the role of law, especially in the context of securing the tenure rights of rural communities, has mostly been to replicate that which preceded it. This has proven insufficient thus far and as community practices and lived realities continue to reveal to us the complexities and nuances of customary tenure systems, it will not be sufficient in the future. Secure land rights require a break from the patterns and characterisations of the past.

Panel 2C: Citizenship

The non-profit sector and citizenship in Africa: Insights from South Africa and Nigeria

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The ways in which the modern nonprofit sector has emerged and taken shape in Africa and the characteristics of that sector are subjects that should interest not only scholars of civil society, but scholars of law and society in Africa. This paper presents an analysis of the processes that led to the growth of the contemporary nonprofit sector in South Africa and Nigeria, with a view to determining how much of the experience is shared and identifying what factors account for the distinctions and divergences that appear. The underlying theme is the imperative of movements in the expression and realisation of citizenship for the majority of the African population.

Background

Anheier's studies on trends in developmental policies in African countries not only highlighted and explained the increased focus, in the 1980s, on private voluntary organisations, but offered significant insight into the nonprofit sector in African countries in a way that brought the African nonprofit sector to the attention of the international scholarly community on the non-profit sector.⁷⁵ Employing the term 'private voluntary organisation' (PVO) to describe the nonprofit entity, Anheier maintained that the study 'demonstrated the weak link between the work on PVOs in Africa as represented in the development literature, and the body of theories and approaches which help explain the role of PVOs in Western countries.'

'Our understanding of PVOs in Africa can benefit from comparative analysis by incorporating knowledge of the historical and present role of PVOs in other countries and parts of the world. In the African case, the economic and political rationales for PVOs need further clarification, as do their comparative advantages when compared to the state agency or the for-profit enterprise: the role of PVOs in political mobilization, social movements, and policy formulation; and their economic importance in terms of resource mobilization, "gap-filling" activities, and the provision of public and semi-public goods.'⁷⁶ In short, the centrality of the non-profit sector to the realisation of citizenship rights in Africa is indisputable but has not been substantially studied.

Citizens' Movements in South Africa

With regard to South Africa, two distinct and clearly identifiable phases of contemporary civil society, coincide with key moments in the evolution of the political system. First was the liberalisation phase of the early 1980s which saw a phenomenal growth in associational life and a marked resurfacing of black civil society actors, followed by the democratisation phase covering the period from 1994 onwards.⁷⁷ The liberalisation of political and economic controls in South Africa in the 1980s and early 1990s resulted in the emergence and growth of large numbers of civil society organisations critical of government, leading to a nonprofit sector described as 'politically centred' and 'artificially large'.⁷⁸

The democratisation period was characterised by two elements. First, political democratisation which sought to establish representative government, and economic liberalisation which was aimed at integrating South Africa into the global economy.⁷⁹ The interplay between these two key elements influenced the development priorities of government at the time. South African transition politics was therefore also a determinant of its development politics in the sense that it was not only about constitutional and political issues, but also about development priorities.⁸⁰ The implication of these dynamics on the nonprofit sector was that although nonprofit organisations engaged in social service delivery had placed emphasis on social needs such as health, education and social support, traditionally their ties had been political, and a shift in political structures would affect the relationships with their traditional allies, and consequently their identity.⁸¹

⁷⁵ Helmut Anheier, 'Private Voluntary Organisations and the Third World: The Case of Africa' in Helmut K. Anheier and Wolfgang Seibel (eds) *The Third Sector: Comparative Studies of Nonprofit Organizations* (Berlin: Walter de Gruyter, 1990).

⁷⁶ Ibid at 374.

⁷⁷ Adam Habib, 'State-Civil Society Relations in Post-Apartheid South Africa' in J. Daniel. A. Habib and R. Southall (eds), *State of the Nation: South Africa 2003 – 2004* (Cape Town: Human Sciences Research Council, 2004) at 230.

⁷⁸ T. Smith, 'Questioning the Crisis: International Donors and the Reconfiguration of the South African NGO Sector' (Durban, Olive Publications, AVOCADO Working Paper Series No.4/2001) Vol. 2/1-21.pp.7 and 11.

⁷⁹ Habib, op. cit. at 235.

⁸⁰ M. Narsoo, 'The Rhythms of Saints and Scoundrels: An Attempted Identikit of Service Organisations' (Durban: Olive Organisation Development and Training, MULBERRY Series, 1996) at 4 and 6.

⁸¹ Ibid at 9.

Fast-forward to the present and it is evident that various constituencies of people continue to exercise their right to form associations to partner and network with other organisations, to engage with institutions of governance and to access resources through organisations that make up the nonprofit sector.

Nigeria's Anti-military civil society

In relation to Nigeria, explanations advanced for the growth of the nonprofit sector in Nigeria include the dual crises of militarisation and state failure in service provision at all levels of government. In this regard, references have been made to people's self-reliant efforts to solve common problems.⁸² While community based grassroots organisations served as the platform for addressing these individual needs, well established urban-based civil society agencies became the voice for these grassroots organisations. The human rights approach employed by civil society groups soon characterised them as the archetype of the contemporary nonprofit organisation in Nigeria.⁸³

In particular, civil society organisations gained prominence when it became obvious that government employees or government-affiliated institutions could not successfully champion the campaign for a democratic agenda without coming up against their military employers and overseers.⁸⁴ On the other hand, the inefficiencies of military rule served to emphasise the relationship between the economic objectives of trade unions and the imperative of political reform.

The legacy of the anti-military civil society activity of the 1980s and 90s is the existence of a motley assortment of community-based organisations, non-governmental development agencies and civic-advocacy organisations. The older and well established ones have well-defined organisational structures, typically with an advisory board or Board of Directors and a secretariat headed by an Executive Director who oversees the day-to-day running of the organisation, while some of the younger ones lack adequate organisational and professional staff base.⁸⁵

A Common Growth Factor

One identifiable growth factor common to the nonprofit sector of both countries is the failure of government in the delivery of citizenship rights, both civil and political rights as well as socio-economic entitlements. In Nigeria, the progressive degeneration of services was one of the features of its post-independence history. This failure was repeatedly used as an excuse for successive military interventions, resulting in more than three decades of military rule which finally ended in 1999. The decay in public services led to a growth in self-help activities by citizens and to the growth of formal human rights organisations. In South Africa, government failure manifested in the apartheid policy which systematically excluded the majority of the population from political, educational, social and economic opportunities. It was the sustained response and reaction to these manifestations of government failure that defined the dominant character of the modern nonprofit sector in both countries.

Conclusion

The exercise of citizenship through the vehicle of the non-profit sector continues even more stridently to the present and it is this subject that constitutes the focus of the proposed paper.

Enhancing legal protection in mixed migration: A critical examination of the legal institutional framework in Tanzania and Kenya

Juliana Masabo, University of Dar es Salaam, School of Law

Mixed migration, loosely defined as complex movements consisting of refugees, asylum-seekers, trafficked persons, unaccompanied and separated children, economic migrants and other persons, travelling internationally in an irregular manner, has emerged as one of the prominent features of contemporary migration. Although relatively new, the concept of mixed migration has gained specific importance because of its sheer numbers and its safety and security implications for both, the persons involved in these movements and the countries within which the migrants transit or establish themselves. The modes in which the movements take place are most often dangerous resulting into great suffering, human rights violations, exploitation and thousands of deaths among groups of migrants.

⁸² O. Olorode, "NGOs, Military Rule and Popular Empowerment" in O. Olorode, W. Raji, J. Ogunye and S. Jegede (eds), *Nigeria NonGovernmental Organisations and Democracy* (Lagos: Committee for the Defence of Human Rights, 1997) p.1 at 12..

⁸³ Bony Ibhawoh, *Human Rights Organisations in Nigeria* (Copenhagen: the Danish Centre for Human Rights, 2001).

⁸⁴ A. Banwo, "Democracy and Human Rights in Nigeria" in Olorode et al (eds), op. cit. at 48.

⁸⁵ Ibhawoh, op. cit. at 30.

The persons involved in these movements are most often in need of material and legal assistance to alleviate their sufferings and to ensure that their human rights are protected. These needs are, however, barely met by countries of transit and destination owing to absence of institutional arrangements and enabling policies and legislation. Even in countries where the said policies and legislation exist, they are either too limited, fragment or largely uncoordinated. Strict laws aimed at curbing migration are always employed by countries of transit and destination on an assumption that all persons involved in mixed migration flows are irregular migrants who arrive without the necessary documents allowing them entry in countries of transit or destination.

East African countries, Kenya and Tanzania in particular, have been in the limelight of countries with huge numbers of mixed migrants. Both countries serve as important hub for refugees and asylum seekers from their war-torn neighbour countries. Kenya hosts the largest proportion of Somali refugees and significant numbers of Ethiopians and South Sudanese in her two popular refugee camps, Dadaab and Kakuma. The United Republic of Tanzania, widely known for her generosity over refugees and asylum seekers from the Great Lakes Region, is currently a host to refugees over 60,000 refugees from the DRC and more than 100,000 refugees and asylum seekers from Burundi. The resultant In addition to these figures, both countries have for several years served as an important route for migrants who transit through the two countries in search of better economic opportunities in South Africa and beyond.

In response to unprecedented incidents of mixed migratory flows from the Horn of Africa and Great Lake Region to Southern Africa in the late 2000s, a Regional Conference on Refugee Protection and International Migration was organized in Dar es Salaam in 2010. Mixed migration and the importance of a comprehensive legal and institutional framework for proper management of mixed migration were amongst the issues prominently discussed at this conference. The gesture from the conference was that the countries represented at this conference would eventually come up with comprehensive strategies to ensure that sufficient protection is availed to the persons who qualify for international protection and especially refugees, asylum seekers and trafficked persons. It was equally anticipated that the humanitarian needs of the vast majority of migrants who do not fit any particular label or established legal category will be met. Contrary to these expectations, migrants arriving in mixed migratory flows have continued to endure various human sufferings. Arrest and detention of persons arriving in mixed migratory flows has remained a norm in both countries. In Kenya, incidents of arrests, raids and detention of groups of migrants are reported to have become popular especially following the Al-Shabab terrorist attacks in capital Nairobi and security threats in other parts of the country especially in the regions along the Kenya- Somali Border. This has been exacerbated by the fact that the Al-shabab group has its roots in Somalia where majority of migrants in mixed migration also originate.

This paper interrogates the asylum policy, legal and institutional arrangements in these countries so as establish whether they offer adequate protection to refugees and asylum seekers arriving as part of the mixed migratory movements. The paper starts with an introduction which gives an overview of the phenomenon of mixed migration. The context of mixed migration in Kenya and Tanzania is also discussed in this part. The second part interrogates the normative and institutional arrangement in both countries. In this part asylum policies, laws, procedures and practices are interrogated. It is argued in this part that asylum laws and procedures in both countries are fairly compliant with international refugee law. Both countries have refugee specific laws which contain fairly robust guarantees on access to asylum and protection against refoulment. However, although provisions on access to asylum and non-refoulment are fairly compliant with the relevant international standards, the treatment of refugees and asylum seekers arriving in mixed migratory movements is largely inconsistent with these provisions. Access to asylum procedures is most often prevented by different factors including, among others, inefficiency of the asylum institutions, poor infrastructural arrangement and poor referral mechanisms.

Moreover, the paper discusses various interventions which have been undertaken at national and regional level to enhance the legal and institutional capacity of these countries. It is observed that there have been notable progress in implementing the resolutions and recommendation made during the Dar es Salaam Regional Conference on Refugee Protection and International Migration held in 2010. Numerous programmes aimed at enhancing the capacity of institutions and in assisting migrants to voluntarily return to their homes have been implemented with assistance of International Organisation for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR). However, increased security threats along the Kenya- Somalia border and deadly terrorist attacks engineered by Al-shabab group have been major setbacks especially in Kenya where all asylum activities have been halted following the disbandment of the Department of Refugee Affairs which was the key national asylum institutions. Arrangements to return all refugees and asylum seekers to Somalia are ongoing. In Tanzania, indiscriminate application of immigration laws on all migrants arriving in mixed migratory flows has continued unabated leading to multiple arrests and detentions of refugees and asylum seekers.

Opening space for independent election candidates for all legislative bodies

Nkosikhulule Nyembezi, University of Cape Town, Faculty of Law

The history of electoral reform in South Africa is one of nearly exclusive attention to the "right to vote." Constitutional amendments, statutory amendments, and judicial decisions have, for the most part, ignored the "right to stand for public office or right to candidacy" of potential independent candidates. The scant legal protection that candidate rights have received has been the indirect result of constitutional concern either for voting rights or for compliance with electoral laws.

The right to stand for election, otherwise referred to as the right to candidacy, is guaranteed in the South African Constitution and a number of pieces of enabling legislation. It is often expressed alongside the closely related right to vote. Section 19(3) of the Bill of Rights provides that every adult citizen has the right — (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and (b) to stand for public office and, if elected, to hold office. Notable in this context is Section 1 of the Constitution which provides for universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness are some of the values on which our state is founded.

While these electoral rights enjoy widespread recognition in South Africa, a starkly different picture emerges in the manner in which the right to stand for public office can be enjoyed in contesting elections at local, provincial and national levels. The current electoral system does not make provisions for independent candidacy at provincial and national levels of government as it positions political parties as the exclusive and indispensable conduits for the enjoyment of the right to stand for public office. In contrast, in the case of municipal elections, enjoyment of this right is not solely dependent upon membership of, and support by, a political party. It is equally available to all citizens who wish to make themselves available for election for whatever reason.

Increasingly, there are questions as to whether the manner in which the current electoral system is couched violates rights of independent candidates and independent voters who, when registering to vote and voting in an election, do not base their decisions on their affiliation to a political party. Amongst these individuals are swing or floating voters, who vote independently for candidates with no political party affiliation instead of voting based on their political party membership. Also amongst these individuals are switch voters, who are registered voters with a history of crossing party lines by voting for whichever political party or interest group that promises in its election manifesto to address their immediate concerns.

The main questions are; as the right to vote and the right to stand for public office are two different rights rooted in citizenship and not the flipside of the same coin, should their enjoyment by independent candidates and independent voters, who are a unique and sizable segment of the population, continue to be denied in the national and provincial elections because of their non-affiliation to a political party? Why should South Africa adopt an electoral system that opens space for independent candidates to contest elections in all spheres of government? How should a revised electoral system properly make a distinction between the family of political rights protected under section 19(3) of the Constitution in the sense that, although political rights in general, such as the right to freedom of association and freedom of expression, may be exercised in a political party context, when it comes to the right to vote and the right to stand for public office political parties only play an intermediate role thus making these two rights to rest exclusively with individual eligible citizens because these rights are rooted in citizenship. Why should the importance of the right to independent candidacy be underscored by section 3(2) of the Constitution, which provides that 'all citizens are equally entitled to the rights, privileges and benefits of citizenship'?

In addressing these questions it is argued that while parties are a vital political asset to a vibrant and thriving democracy, they also have great potential to become a political liability to democracy. Whether political parties prove to be an asset or a liability depends crucially, among other things, on the context within which they operate, their mode of internal governance and how they respond to external political stimuli. This context is compounded if the tendency for patronage politics takes centre stage in the management of parties. It is also argued that there is a necessity for an electoral system in South Africa that opens space for independent candidates because of the underlying interests and values furthered by the right to candidacy, namely; dignity, autonomy, self-development and political expression. Finally, it is also argued that the right to candidacy is rooted in citizenship and its enjoyment cannot only be restricted to political party membership if elections are truly about exercising core rights aimed at establishing popular sovereignty in a manner that emphasises the direct link between eligible voters and candidates standing for office and democratically elected legislatures.

The incomplete case of *Farai Daniel Madzimbamuto v The Registrar*: Citizens by descent – Citizens or aliens?

Ntandokayise Ndhlovu & Melissa Omino, University of Fort Hare, Faculty of Law

Citizenship is one of the fundamental rights a person requires to access other legal rights at the domestic level. The right to citizenship, how and to whom it is conferred is based on policies that stem from the national prerogative. The grant and conferring of this status is thus dealt with in a variety of ways in different jurisdictions. One of the contentious issues that involves citizenship is the differing status between citizens by birth and citizens by descent. Citizens by birth tend to be conferred with all the rights and duties of a citizenship whereas citizens by descent are denied some key aspects of citizenship due largely to the fact that they were born on foreign soil. This paper addresses citizenship rights under the 2013 Constitution of Zimbabwe. In particular the variance in the rights conferred to citizens by descent and citizens by birth under the new 2013 Zimbabwean Constitution.

Firstly the paper discusses and analyses the case of *Madzimbamuto v The Registrar-General Home Affairs* which was heard in the Constitutional Court of Zimbabwe. The case resulted from a declaratory order sought by Mr. Madzimbamuto, a Zimbabwean citizen by birth, for confirmation of his right to a Zimbabwean passport and other ancillary relief. Of importance in this case was the order sought by the applicant (Madzimbamuto) to endorse his South African passport with an unrestricted and indefinite residence permit, which the respondent (the Registrar-General of Home affairs) staunchly refused. It must be noted that the Independence Constitution popularly known as the Lancaster House Constitution 1980 (LHC) did not permit dual citizenship. As such, the new 2013 Zimbabwean Constitution actively departs from the LHC in expressly allowing dual citizenship. Significantly this decision raises very important legal issues: firstly, clarification on who is eligible for dual citizenship under the new 2013 Zimbabwean Constitution (for instance legal status of children born between one Zimbabwean parent by birth and South African parent by birth).

Secondly, the issue of purposive and substantive interpretation of rights in a manner that promotes the spirit and purpose of the Declaration of Rights. The apex court in *Madzimbamuto* emphatically held that dual citizenship is now a right under the Constitution and that all citizens by birth are entitled to it. Furthermore the Court also confirmed that the new 2013 Zimbabwean Constitution is the supreme law and all law and conduct must conform to the demands and needs that it commands. The Constitutional Court in the *Madzimbamuto* case held that, it is the national regulations that must be in conformity with the Constitution and not vice versa. It is thus clear from the judgement in the *Madzimbamuto* case that the legislature must fulfil its obligations and align its laws with the demands of the Constitution, particularly, the Declaration of Rights.

The second part of the paper discusses and analyses the contentious issues surrounding whether children born between one South African parent by birth and one Zimbabwean by birth born outside Zimbabwe (citizens by descent) qualify for dual citizenship upon entering Zimbabwe on a foreign passport or travelling document. The new 2013 Zimbabwean Constitution at section 42 indeed empowers parliament to enact legislation prohibiting dual citizenship to citizens by descent and citizens by registration. In essence the question this paper posits is, should citizens by descent in Zimbabwe be declared fully fledged citizens equal to citizens by birth? The paper attempts to answer this question by arguing that a case indeed maybe made that such persons must be treated as full status citizens irrespective of their place of birth. Thus these citizens by descent should not face discrimination merely due to the fact that they were not born on Zimbabwean soil despite the fact that they were born to a Zimbabwean parent while outside the country who was not under the employ of an international organization as envisioned by the new 2013 Constitution. It is argued that section 36(2) of the new 2013 Zimbabwean Constitution should be interpreted in a substantive, flexible and purposive way to include all children of Zimbabwean nationals and that indeed the Constitutional Court in *Madzimbamuto* only met its task halfway stopping short of clearing out the issue of the inequality present in the status of citizens by descent.

It raises further questions as to whether the issue is only to be resolved by a declaration of the court to each applicant on a case by case basis as in the instance of Mr. Madzimbamuto and highlights the difficulties in this interpretation which would not only render such a scenario as impractical but also takes away from the purposive and substantive interpretation of the new 2013 Zimbabwean Constitution. The currency of this problem may be illustrated by the recent spate of xenophobic attacks experienced in South Africa and the difficulties that such citizens by descent may face in seeking access to Zimbabwe to escape such violence.

Moreover, it is further motivated by the increased number of Zimbabwean nationals living and working outside of the country. This movement of nationals is a reality for thousands of Zimbabweans in South Africa and elsewhere, as Zimbabwe has been long suffering an economic crisis, and their children who are often born outside Zimbabwe. These two realities do indeed call for focused attention on the status of citizens by descent with regard to access to and residence in Zimbabwe. In addressing the problem this paper seeks to contribute to the discourse on the enforcement of the core values enshrined in the Constitution, including the rights to human dignity and equality. The paper draws some insights from the 2010 Constitution of Kenya which is in many respects similar to the new 2013 Zimbabwean Constitution. The Kenyan Constitution is further of particular import as this Constitution paves the way forward on the African Continent in dealing with the construction of citizenship by dealing with and doing away with the distinction between citizens by birth and citizens by descent as per its section 14 and further in clearly dealing with the issue of dual citizenship at section 16 as well as to whom such dual citizenship is conferred.

Panel 3A: Teaching and Learning

Decolonising the Commercial Contract Law Curriculum

Andrew Hutchison, University of Cape Town, Faculty of Law

April 2015 saw the beginning of student protests on university campuses in South Africa. At the University of Cape Town, protesters complained about a perceived Eurocentric bias in university practices, staffing and curricula. Students called for an adjustment of the status quo to better speak to the African context, which was summed up by the term 'decolonisation'. I asked at the time on the online student portal ('Vula') what the members of my (2015) Commercial Transactions Law ('CTL') course would like to see in a decolonised curriculum. (CTL is a 72 lecture, compulsory, final level course in commercial contracts and insolvency. If ever, there was a dry commercial course of a largely instrumental nature, this is it.) To my Vula request I received a number of constructive and varied responses from students from all racial groups. These can be distilled into three propositions:

- a) African customary law should be reflected in the course curriculum;
- b) Social justice should be emphasised; and
- c) Comparative materials from other African countries should be discussed.

Customary Contract Law

While there are new and exciting textbooks on African customary law, the coverage of contracts is sparse. Chanock's 'The Making of South African Legal Culture 1902-1936' (2001), describes this omission as having been engineered by the white minority government in the early twentieth century. Pre-commercial transactions relating to marriage and co-operative labour are covered, but there is little of a commercial nature. There is, however, a vibrant literature on contracting in modern (particularly urban) South African communities – it's just that this literature deals with the so-called 'popular economy', and is social scientific, rather than legal. Black market loan sharks; stokvels (a form of rotating savings and credit association); burial societies; as well as other black businesses such as taxi operators, funeral parlours and spaza shops all engage in commercial exchanges – is this not customary contract practice (if not law)? Many of these participants still adhere to traditional practices in other facets of their life; surely then their contractual practices are the 'living' customary 'law' (or norms) of contracting? The law and society literature on contracting (such as the non-use of contracts as per Macaulay, or relational contracting as per Macneil) in turn provides a useful paradigm for studying these transactions. My intention in CTL next year, is to draw on social scientific materials on the popular economy and to apply socio-legal contracting insights to frame my discourse. This I will do particularly in the first module on credit, which is a much studied topic in the popular economy literature. With regard to the textbook 'customary contract law', in the modules on secured transactions and insurance I will look at transactions involving risk-spreading practices with regard to cattle ownership ('sisa' transactions), as well as the collateral given when borrowing money/cattle to pay 'lobola' (bridewealth) in order to get married (eg: 'ukwenzelela' transactions). I will frame this with the warning that this may be 'official' customary law and should hence be treated with caution. In 2015 there was a lively discussion of this material led by black students, including some who had not previously spoken in large group sessions before.

Social Justice

The South African Bill of Rights has had a pervasive role on contracting, which continues to be implemented by our Constitutional Court. Of my modules in CTL, this is particularly relevant to credit and secured transactions. Thus we will see (for example) the impact of the rights to housing, and of access to court, on execution procedures by banks in security agreements over both movable and immovable property. My co-presenter, Prof Tjakkie Naude, also deals extensively with consumer law in her modules, which I believe should be of interest to everyone in society, particularly those who are disadvantaged. She will cover topics like rental housing and consumer sales agreements; while I will look at debt rearrangement and creditor enforcement procedures under the National Credit Act. Specifically with regard to the low income market, we will deal with micro-credit and micro-insurance, debating the efficacy of these measures.

Comparative Law in Africa

This type of scholarship is an area of growing interest in South Africa, as reflected by (inter alia) the establishment of the Centre for Comparative Law in Africa at UCT. My course is intended as an introduction to South African commercial contract law, so we won't be doing much comparative law. There are specialist courses on offer in our faculty, however, which I will refer the students to. What is of interest to me in this literature is the question as to what is different about contracting in Africa? There is scholarship on

the regional codifications of commercial law on our continent, such as OHADA, which discusses this question. This may make a good topic for a student research paper or voluntary presentation.

Conclusion

My own conclusion is that African knowledge and culture should be included in South African commercial contract law in a way which is appropriate to each different contracting context and also preserves contractual sanctity and certainty. South African law has always been a synthesis, comprising Roman law, Dutch customs, and English law. There is room for an indigenous African element too, such as via the value of 'ubuntu' (communitarianism; solidarity) as per the Constitutional Court's jurisprudence on contracting, which equates this notion to good faith and objective reasonableness. I will leave students to form their own conclusions, but will argue for this type of approach, as I have done in my research on this topic.

In the first module on credit, we will deal with decolonisation through the vehicle of a 2015 Constitutional Court decision on the in duplum rule in credit agreements. Here the Court used an old rule of Roman Dutch origin to protect debtors under a suretyship agreement which was outside of the consumer framework. The judgments – by black judges – deal closely with Roman Dutch sources and indeed apply this historic law. This is of particular interest in our present context and to a course on contract in South Africa, which is here originally based on Roman Dutch sources. I believe that our common law edifice has value and should be preserved with the necessary modifications.

Students will also still receive the necessary grounding for practice in commercial attorneys firms and the core basics of CTL will remain unchanged.

Craving for the message but shooting the messenger: RBA to teacher welfare and quality in basic education in Nigeria

Azubike Onuora-Oguno, University of Ilorin, Faculty of Law

The intrinsic nature of the right to basic education is not incontrovertible. Emerging issues in the matrix of access to education is the question of quality. Thus, accessing basic education now encompasses the component of ensuring quality in the accessed education. Statistically Nigeria is said to have about 10 million of the world's 50 million out of school children.⁸⁶ Between the North and South of Nigeria different circumstances influence the statistics. Ranging from culture, religion and economic differences, the situation remains worrisome. Beyond access, the challenges of quality continue to loom large. Different paradigms inform the quality content of education ranging from infrastructural quality; resource quality, teacher quality and availability.

It must be underscored that education holds a pivotal role in ensuring that the future of every child is guaranteed. It is also to be noted that with the continued comatose of the state of basic education in Nigeria and the seeming effort on the part of government to enhance access to basic education; the inundating state of teachers' welfare still looms large. From poor remuneration, to unpaid salaries, teachers continue to embark on strike action thus affecting basic education. Questions ought therefore to be raised as to the extent teachers should equally be perceived not just as a vehicle to transmit educational values but also be valued themselves. Accessibility of education represents structural and financial access among other components; availability represents the numerical and proximity components while acceptability and adaptability represents the question of curriculum efficiency and flexibility to the needs of a people.⁸⁷ Noting that this component represents the quality of education a child can access, the role of a teacher is pivotal to the actualisation of the quality component of available and accessed education.⁸⁸ Understanding the quality concept presents its own diversified challenges, however, succinctly put, quality speaks to the ability to learn basic skills. Put differently, '...poor quality of education means millions of children are not learning the basics. Around 250 million children are not learning basic skills, even though half of them have spent at least four years in school'.⁸⁹

⁸⁶ See generally <http://www.uis.unesco.org/FactSheets/Documents/fs-28-out-of-school-children-en.pdf> (accessed June 10 2015); Out of school children and child labor available at <http://globalmarch.org/sites/default/files/Policy-Paper.pdf> (accessed June 10 2015).

⁸⁷ See generally Coomans, F 'Clarifying the Core Elements of the Right to Education'

⁸⁸ AM Vespoor 'The challenge of learning: improving the quality of basic education in sub-Saharan African' in D Johnson (ed) *The changing landscape of education in Africa: quality, equality and democracy* (2008) 33-38.

⁸⁹ UNESCO 'Teaching and learning: achieving quality for all summary' EFA global monitoring report 2013/4; Johnson further describes this situation to include poor quality of teachers and poor utilisation of poor resources that are available in education delivery. See generally D Johnson 'Improving the quality of education in Nigeria: a comparative evaluation of recent policy imperatives' in D Johnson (ed) *The changing landscape of education in Africa: quality, equality and democracy* (2008) 45.

With the Universal Basic Education Act (UBEA)⁹⁰ and the Universal Basic Education Commission (UBEC) coming into place, the drive to enhance access to basic education is on the increase. However, considering the components of access, availability, affordability and acceptability an often neglected component is the role of teachers. It is therefore germane to reiterate that a core and continued missing link is in the learning process.⁹¹ The poor quality experienced in Nigerian schools is linked to poor learning. According to UNESCO 'access is not the only crisis – poor quality is holding back learning even for those who make it to school. One third of primary school age children are not learning the basics, whether they have been to school or not'.⁹² While the various components of quality is explored, more attention in this paper is on the pivotal role of teachers as the messengers of education in the quality matrix. General Comment No 13 identifies the need to ensure that welfare of teachers is not compromised. Various international instruments recommend the basis of construing the teaching profession and ensuring the protection of their human rights with the education sphere. It is therefore crucial to examine the role and perception of teachers from a right based approach.

Based on the challenge, this paper seeks to argue that until the welfare of teachers' are seen from a human right perspective, government efforts will remain a case of craving for the message of education and yet shooting the teacher as messenger. The role the teacher must therefore play in the education process is pivotal and cannot be overlooked. The challenge however, is that most often than not, attention is paid to the question of advancing and enhancing access to education but neglecting the teacher. According to Beiter and Tomasveski, approaching the role of the teacher from a right based perspective will demand the same level of accountability from the state on teachers as currently advocated for education.⁹³ That the "teacher" should be construed from a right based approach is often submerged in certain erroneous assumptions. For instance according to Greene "The teacher is frequently addressed as if she had no life of her own, no body, and no inwardness...when they describe a good teacher as infinitely controlled and accommodating, technically efficient, impervious to moods. They are likely to define her by the role she is expected to play in a classroom... the numerous realities in which one exists as a living person are overlooked".⁹⁴

Relying on various international human rights law documents the paper advocates for a right based approach to the teacher malaise in Nigeria. To achieve this, the paper will be structured in 5 parts. Part 1 will be the introduction and discussion of education in Nigeria; part 2 examines the role of teachers in enhancing access to quality basic education; part three will consequently examine the challenges that affect teachers' performance; part 4 will argue for the need to see teachers' welfare as a fundamental right while part 5 shall make conclusions.

The time and space of critical legal pedagogy

Joel Modiri, University of Pretoria, Faculty of Law

If the shortcomings, inadequacies and failings (together dubbed the "crisis") in legal education could be traced to one central problem, it would be the failure of law teachers and law faculties/schools to adapt to the present-day context, to recognise and respond to the complexity and character of living, knowing and doing in post-1994 South Africa. Following Achille Mbembe, we could say that South African legal education is trapped "at the centre of the knot". To be at the centre of the knot, as I read Mbembe, is to be disconnected or unmoored from one's contemporary reality and location and it arises principally out of a failure to grasp shifts in the structure and consciousness of a polity and transformations in the legal and political order as "conceptual events" that thereby call for a new imagination: new definitions, new categories, new lines of enquiry, new practices and new mindsets. It is to be without a sense of time and space, without an account of the world and society today, lacking in the tools and vision to apprehend the specificity of the present as a construction of particular histories, practices and discourses.

That this is true for legal education in South African Universities is evident in many respects: (1) demographic overrepresentation of white and male professors; (2) law schools and legal scholarship more generally tends to be grounded in an oddly anachronistic view of law as a technical science, decidedly separate from morality and politics; (3) the inability of law schools to grapple with the pedagogical significance of the now radically heterogeneous nature of the student population in terms of race, ethnicity, language, religion, gender/sexuality, class background and worldviews; (4) the production of disproportionate throughput rates and (5) the

⁹⁰ UBE ACT 2004 Law of the Federation of Nigeria available at [file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/NGA87623%20\(1\).pdf](file:///C:/Documents%20and%20Settings/user/My%20Documents/Downloads/NGA87623%20(1).pdf) (accessed June 10 2015).

⁹¹ The process talked about here includes the perception of the child in the education sphere, Tomasveski have argued that the child must be seen as the object of any education and not a subject. See K Tomaševski *Removing obstacles in the way of the right to education Primers No 1* (2001) 44; Another core aspect of the process is the method of delivery of available curriculum, see generally G Obioma 'Continuous Assessment Practices of Primary and junior secondary school teachers in Nigeria' available at http://www.iaea2008.cambridgeassessment.org.uk/ca/digitalAssets/180437_Obioma.pdf (accessed June 9 2015).

⁹² UNESCO 'Teaching and learning: achieving quality for all summary' EFA global monitoring report 2013/4.

⁹³ See generally, KD Beiter *The Protection of the Right to Education by International Law* (2006); K Tomaševski *Removing obstacles in the way of the right to education Primers No 1* (2001); JO Afe *Reflections on becoming a teacher and the challenges of teacher education* available at <http://www.nuc.edu.ng/nucsite/File/ILS%202002/ILS-69.pdf> (accessed June 10 2015).

⁹⁴ M Greene *The teacher as a stranger* available at <http://bama.ua.edu/~jpetrov/504web/readings/Greene.pdf> (accessed November 4 2014).

problem that South African law schools remain wedded to the desire to cultivate a legalistic, technician and corporate-minded sensibility in students.

Indeed it is a stark reflection of how tightly law schools and legal academics are “at the centre of the knot” that none of the major political currents dominating the social sciences and humanities and public discourse have led to a meaningful revision of how we teach law and how we structure the LLB curriculum: the rise of social movements and their rejection of neoliberal government policies, service delivery protests across the country highlighting the falsity of the liberal constitutional promise and the quotidian indignity experienced by the majority of South Africans, increasingly vocal irruptions against the obscenity of unequal property ownership, private wealth and exploitation of workers, student protests over colonial-apartheid symbols and unaffordable higher education tuition fees, sexual violence and gender stereotyping, the Eurocentricism and whiteness of knowledge and cultural production in South Africa, government corruption and disillusionment with the ANC and hence with the “post-apartheid” dispensation, to name but a few.

Against this depressing and layered background, this article restates the case for a critical legal education, this time focusing on the extent to which a more critical approach to law may bring into view what is currently unseen and unknown and thereby respond to the conceptual, political and practical disorientation – the lack of direction – that in my view currently plagues South African legal education. The sense of the critical or critique being invoked here follows from what Wendy Brown calls “untimely critique”. As Brown puts it, critique “must know what time it is ...” which is to say “it must grasp the age”. Untimely critique further entails a “profound reading of the times” and it is also a “technique for blowing up historical time” through its insistence on “alternative possibilities and perspectives in a seemingly closed political and epistemological universe”. This view of critique is suggestive for my argument that a critical legal education and more generally a critical jurisprudence must be closely attuned to the times and spaces that structure our present realities if we are to fashion an emancipatory and socially-relevant pedagogy of law.

To realize a critical legal education – one that would produce graduates who are technically skilled and competent as well as socially and politically conscious, thoughtful and critically literate – involves attending to three problematics, which I shall set out in the section that follows. These are: (1) adopting a subversive orientation towards the history, practice and theory of law; (2) problematizing constitutional fetishism; and (3) decolonizing and transforming the curriculum. After tracing these three impression points as part of an agenda for critical legal teaching, I shall reflect on the tradition of critical pedagogy as primarily elaborated in the work of Paulo Freire and the paths it could disclose for expanded, critical and robust notions of reading and writing and of ethics that could inform legal education and legal study. Before the concluding section, I bring the preceding theoretical discussion to bear in a brief analysis of the current review of the LLB that has been mandated by the Council for Higher Education (CHE).

This article reaffirms once more “the dream of liberating education”, the belief that education should be geared towards the development of educated, democratic subjects and not merely “self-investing human capital”. Knowledge, theory, literature, ideas and debate within a community of scholars remain ideals worth fighting for even in the presently exhausting climate of the neoliberal configuration of the university. This is thus an argument for a critical legal education along the lines of what Cornel West has defended as “paideia”. As West explains, paideia is an ancient Greek term denoting “a deep education” and entailing a profound connection to the world. As he tells us:

Paideia concerns the cultivation of self, the way you engage your own history, your own memories, your own sense of what it means to be a critical, loving, aware human being.

The future and legal education in South Africa

Jonathan Klaaren, University of the Witwatersrand, WITS Institute for Social and Economic Research

Recent scholarship has reflected on the response to date by American law schools to the global economic crisis of 2008. Views have ranged across the spectrum. A thoughtful piece by Edward Rubin assesses not only the set of responses that claimed American law schools were “failing” but also looked into the future of legal education. The impetus for this has been the steady and significant recent decrease in the numbers of BA students applying for a JD in the United States and in the reduced numbers of graduates gaining employment in the legal sector.

One can find parallels between the situation in the United States and the one obtaining in South Africa.

Most particularly, since the legislative reform introducing and specifying the LLB degree as an undergraduate degree in 1999, there has been a steady drumbeat -- at least as heard in the law schools -- to the effect that the crop of law graduates in contemporary South Africa are lacking in necessary skills and competences. A student entering the LLB after matric will take four years to earn her degree. Before the undergraduate LLB, South African law schools taught the LLB as a postgraduate degree, usually for two

years after students had already spent three years and earned a BA or BCom degree. Schools additionally taught the B.luris degree, a degree inferior to the LLB, which was phased out in the 1999 reform.

The content of that criticism: graduates can't write, don't know law, and aren't practice-ready. The source was the profession.

This criticism reached at least the rhetorical level of a crisis. In May 2013, a number of stakeholders held a summit to assess and address the situation. The crisis was apparently resolved when the summit decided to extend the LLB degree.

This resolution contained a significant ambiguity, one which has not yet been clarified. Some present at the May 2013 summit supported a return to the pre-1998 situation, where the law degree was a second and a postgraduate degree and where students generally took five years in total to become a law graduate. Others present at the summit supported the extension of the undergraduate law degree from four to five years.

This latter position was later implicitly supported by a DHET task team recommending that undergraduate degrees in post-apartheid South Africa be extended by a year. Further, some data was presented to show that more than half of graduating law students take at least five years to finish their LLB anyway.

Soon after the summit, the University of the Witwatersrand announced that its law school would henceforth only take in LLB students with a prior undergraduate degree. The announcement was welcomed by the professional elite and deplored by the Black Lawyers Association. More recently, the same law school, located in Johannesburg, the commercial capital of South Africa, is seriously considering opening up a stream of students studying the LLB part-time.

Clearly, much is in play and flux in South African legal education. However, it is not so clear what is really going on.

This piece asks what may lie in store in the future of South African legal education. It does so not on the basis of experience in managing a single law school but rather attempts to build a perspective of the field of legal education.

The primary rationale for the introduction of the LLB was stated in the language of the time as transformation. While law schools were still free to teach the B.luris degree, which had been a black degree, few chose to do so. Instead, the promise and rationale was that the new four year LLB degree would be open to black as well as white students, making the crucial ticket for entry into the legal profession more widely available.

Relatively quickly attendant to the 1998 legislative reform, the student body at most of the law schools which had previously been nearly all white changed.

Indeed, this shift also had important consequences for student numbers and departmental staffing in other sectors of the universities.

What has been much slower to change has been the composition of the law school academic staff and also the curriculum. In general, the law school curriculum is doctrinally focused, without much practical training or appreciation of the growing transactional and regulatory roles played by legal professionals in the present. There is little use of the curricular option to have students receive credit for an externship.

In the South African system of legal education, the universities largely self-regulate on both the content of the curriculum and the number of credits required for graduate. The degree of curricular autonomy is greater than that of the US law schools. In fact, a study done on behalf of the national Law Deans' Association found a high degree of similarity in terms of what is taught but little consistently in the number of credits required for graduation.

As outlined above, each university with a law school has considerable autonomy over curricular matters. Unsurprisingly enough, this has allowed for considerable variation among the populations of law students, even after the 1998 legislative reform.

Nonetheless, some generalizations about the field may be made. First, it appears that there has been relatively little change in the number of law schools and in their hierarchy. Apart from the ascension of the Univ of Pretoria and weakening in position of Wits, the hierarchical parameters have remained steady. Second, the law schools are producing significantly more law graduates in 2015 than they were twenty years earlier in 1995. Third, the new stream of law students and graduates is more precarious than pre-1998. This can be seen in the high level of NSFAS indebtedness and in the low throughput rates of law students. This indebtedness is currently a policy problem for the state rather than the graduates, since the state does not have the capacity to even ask the graduates to pay back their loans, yet current policy will only fund new loans from recoveries of previously extended loans. Fourth, it appears that most law graduates are absorbed into the labour market and many in fact join the profession. While the information base for this assertion is not as strong as one would like, it would seem that the "desperate" need for skills in the South African economy has made for good employment prospects for adequately performing law students.

Undoubtedly, all stakeholders would be well served by better quality of information regarding the way in which law graduates fare in the South Africa labour market. While there are significant obstacles and segmentations within the pool of LLB applicants, there is some student choice and students could benefit from information in order to align their employment prospects with their admissions. Likewise, such information could allow for students to make better informed decisions about whether or not to pursue their LLBs once embarked on that journey.

Working on an Introduction to Sociology of law (SoL) in the LLB in Pretoria

Nick Huls, Leiden University, Van Vollenhoven Institute

Huls is the author of an Introduction to sociology of law for Dutch law and criminology students, called *Actie en reactie* (Boom Juridische uitgevers, 2008, Third edition, 2015). This book is mandatory reading for first year Rotterdam law students and second year Leiden criminology students.

During three years (2011-2013) Huls has taught a course in sociology of law for first year students of the University of Rwanda and he has proposed to develop such a course for the LLB curriculum of the University of Pretoria faculty of law.

The aim of this project is to transform and expand the Dutch book into an Introduction to SoL for South Africa, i.e. a new book together with Tshepo Madlingozi (and possibly other black African lecturers that have the ambition to become a socio-legal scholar).

We start from the assumption that there are some core (western) SoL- concepts that are useful for the UP LLB curriculum. They will be supplemented by African materials, such as empirical studies, concepts like Ubuntu, customary law and critical approaches of western concepts that are imposed on Africa etc.

In most African Universities law is primarily taught as a vocational discipline, as a preparation for legal work at the bar, the judiciary and prosecution, as civil servants and legal advisors etc.

Law students are introduced in the legal system as a whole, in the doctrines and core concepts of the main fields of law (private, public, procedural and international). At the end of the LLB curriculum they can choose from elective courses in specialized fields of law. The academic reflection on the law is covered by courses like philosophy and history of law, jurisprudence and comparative law.

What is missing in the curriculum is the critical analysis of the way that law actually functions in society, the empirical dimension of law and the functioning of legal institutions. What do the ideals of the law, such as equality, really mean for poor people? Why are some groups in society able to get their interests guaranteed in the law books and others not? Do laws have the beneficial effects that the lawmakers intended? In which ways are law and legal institutions able to guide and restrict policymakers and politicians?

The answers to these questions can be explored via empirical research in the courtroom, studying political deliberations in Parliament, interviewing stakeholders etc.

The aim of the book is to enrich the academic dimension of legal education at UP by making law students aware of the societal context of their future professional life. Students are invited to formulate critical questions about the assumptions of the Rechtsstaat and to think deeper about the contribution that law can make to a just society.

The course offers an introduction to the societal context of law and legal institutions. In the first part the key socio-legal theories and concepts are introduced. In the second part the focus shifts to the functioning of the pillars of a Rechtsstaat, an elected government, legislation, the bar and the judiciary in practice. The third part relates to specific aspects of (South) Africa and its legal system(s).

LEARNING OUTCOMES

After this course the students will have learned:

- The differences between an empirical sociological and a doctrinal legal approach to societal problems
- The key concepts of the sociology of law as demonstrated in relevant studies
- The key concepts of empirical research methods
- To apply socio-legal theoretical insights in a South African context

The book project is part of the upcoming discussion at UP about transforming the curricula, which for law consist of two drivers:

1. Modernizing and broadening legal education
2. Decolonization of the curriculum

Ad 1: 'Classical' sociology of law as an extension to doctrinal education;(see the 'basic concepts' in Actie en reactie in the Annex)

SoL as a discipline, as a craft, a necessary addendum to the traditional law curriculum. Lawyers of the future are confronted with complex problems. So they have to work together with other disciplines. Teaching doctrinal concepts is not enough.

Ad 2: SoL as part of social movements (legal aid, feminism, social justice, environment, and for SA: decolonization)

- Limits of and resistance against transformative constitutionalism
- What are the colonial /hierarchical elements of the existing legislation in private and public law?
- Eviction, expulsion, racial discrimination are the keywords
- Reparations claims and reclaiming land lawsuits
- What are the effects of labour and consumer protection, the 'new' rights for vulnerable groups?
- Discrimination: by the state and by the private sector (The poor pay more, or are excluded)

Epistemological diversity

- The relation between the North and the Global south
- Legal Consciousness in South Africa: How do people perceive the law, as a threat of a shield?
- Challenging western ideas and paradigms
- The relevance of Ubuntu and Pan Africanism
- Role of religion
- Citizenship and ethnicity
- Child labour

Law and development

- Legal pluralism
- The sustainable Development Goals of the World Bank

Skills for students

- interviewing
- problem solving
- critical and constructive

In the paper I will present the outline of the book and will formulate several questions and dilemma's that Tshepo and I have to address, amongst others:

- Which African thinkers must be included next to the usual suspects Marx, Durkheim and Weber?
- What is the distinction with criminology, public administration, law and economics, anthropology of law, etc.?
- How much empirical research methodology must be included in an Introduction?

Panel 3B: Constitutionalism

Judicial conception of democracy in South Africa and Nigeria: Implications for political action

Akinola Akintayo, University of Lagos, Faculty of Law

Robust literature and study exists which show a connection between resistance and struggle and more effective realisation of human rights and social justice.⁹⁵ Tatchell put this connection succinctly thus:

Mahatma Gandhi, Sylvia Pankhurst and Martin Luther King all shared a common commitment to direct- action protest as a way of winning social justice. Pleading with politicians was not their style - they found that writing letters to MPs and lobbying governments did not work. Instead, mobilising thousands of volunteer activists, they led mass demonstrations and work stoppages, hunger strikes and sit-ins, rent and tax refusals, boycotts, pickets and civil disobedience campaigns to defy unjust laws. This is how India won its independence, women got the vote, and racial segregation was ended in the US.⁹⁶

This connection between resistance, struggle and human rights appear to have recently renewed the interest of some African scholars on the impact of courts' interpretive function and role on the creation of the necessary space for citizens' participation, engagement and political action; renewed interest that is especially noticeable in the area of the realisation of socio-economic rights in South Africa. This renewed interest appears to stem from the overbearing influence and importance of courts in governance in constitutional democracies. Discourse in this area is often undertaken under the prism of the analysis of the impact of judicial conception of democracy on the furthering or restriction of the necessary space for citizens' engagement and action in constitutional democracies which evidence suggests is the dominant form of government in Africa as in most countries of the world at the present time.

Judicial conception of democracy is however not a new area of study nor is it a new discourse as such in legal and political discourses. One of the early pioneers of this field of study is Michelman who in the 80s pioneered the study of the impact of US Supreme Court's understanding of democracy on transformative dialogue, inclusion, liberty and jurisgenerative politics in America through a series of articles.⁹⁷ Judicial conception of democracy is an emerging discourse in South Africa since the adoption of the country's post-apartheid constitutions. There is consequently in South Africa some elaborate and robust literature in this area of discourse.⁹⁸ There is however no work yet in this area in Nigeria.

Even in South Africa, the discourse will appear to have stalled somewhat after the elaborate and ground breaking work of Roux.⁹⁹ As a result of this, I intend in this paper to conduct a focussed examination of the record of South African courts, especially in relation to cases that have arisen since the writings of the relevant South African scholars in this area, in order to determine whether the judicial conception of democracy of South African courts, especially the Constitutional Court, remains as identified and discussed by these scholars or has changed since the time of their writings. Thereafter, I will be using the rich South African jurisprudence as a basis for understanding and systematising Nigerian courts' conception of democracy where I am not yet aware of any literature on the subject-matter. South Africa and Nigeria's constitutions are both based on the constitutional democratic framework albeit under differing constitutional texts and structures. The purpose of the comparison is to examine and contrasts the dynamics and play of judicial conceptions of democracy in the two different constitutional regimes and the implications of the resulting jurisgenerative politics on effective political action and realisation and fulfilment of human rights in Africa.

⁹⁵ P J Hountondji 'The master's voice – remarks on the problem of human rights in Africa' in *Philosophical foundations of human rights* (1985) 319; F Piven and R A Cloward 'Collective protest: A critique of resource mobilization theory' (1991) 4 *International Journal of Politics, Culture and Society* 435 at 453; J Younge 'Riots are a class act' *The Guardian* 14 November 2005 available at <http://www.theguardian.com/politics/2005/nov/14/france.eu> (accessed on 15 August 2014); C Heyns 'A "struggle approach" to human rights' in A Soeteman (ed) *Pluralism and law* (2001) 171; J Dugard 'Civic action and legal mobilisation: the Phiri water meters case' in J Handmaker and R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 71; among others.

⁹⁶ Peter Tatchell 'Direct action for democracy' (2002) 149 *RSA Journal* 53 at 54.

⁹⁷ F Michelman 'Foreword: Traces of self-government' (1986-1987) 100 *Harvard Law Review* 4; F Michelman 'Law's republic' (1987-1988) 97 *Yale Law Journal* 1493; F Michelman 'Conceptions of democracy in American constitutional argument: The case of pornography regulation' (1988 – 1989) 56 *Tennessee Law Review* 291.

⁹⁸ See for instance, D Brand 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in AJ van der Walt (ed) *Theories of social and economic justice* (2005) 17; H Botha 'Representing the poor: Law, poverty and democracy' (2011) 22 *Stellenbosch Law Review* 521; D Brand 'Judicial deference and democracy in socio economic rights cases in South Africa' (2011) 22 *Stellenbosch Law Review* 614.

⁹⁹ T Roux 'Democracy' in S Woolman et al (eds) *Constitutional law of South Africa 2nd ed OS* (2006) 10 – 1. The more recent follow up to this work is T Roux 'The principle of democracy in South African constitutional law' in S C Woolman & M Bishop (eds) *Constitutional conversations* (2008) 79.

The paper will differ from existing work in this area in at least four significant respects. One, my focus area will be much more specific than some existing literature on the subject. Thus, while some existing literature were concerned with deducing the nature of South African democracy from both the texts and the jurisprudence of South African courts, I am mainly concerned with the understanding of democracy that is deducible from the courts' interpretive work and will therefore not be considering the texts of the constitutions under inquiry but only in so far as and to the extent that they relate to the cases under consideration. Two, while some existing works in this area were restricted to South Africa, mine is comparative. This is in order to see how the issue of judicial conceptions of democracy plays out under different constitutional frameworks/milieus and to see to what extent the judicial conceptions of democracy further or hinder the noticed curial and extra-curial struggles of citizens of both countries against deprivations and poverty. The purpose is to underline and bring into sharp focus the importance of the interpretive work of courts in fostering democracy and participation regardless of constitutional texts. Three, a number of cases have been decided in this area of enquiry since the publication of some existing works which I include in mine. This work is therefore more recent in this area of discourse. Four, the major contribution of this paper to discourse will however be the identification and articulation, for the first time, the judicial conception of Nigerian courts as can be gathered from the records of the courts and the analysis of the extent to which the identified judicial conception of democracy is likely to impact the noticed curial and extra-curial struggles of the citizens against deprivation, poverty and human rights violations.

Rendering legality with transformative constitutionalism – The South African Constitutional Court's approach toward administrative justice

Cheng-Yi Huang, Institutum Iurisprudentiae, Academia Sinica

This paper aims to explore the reconfiguration of substantive rule of law in post-apartheid South Africa through the Constitutional Court's application of administrative justice. Article 33 of the South African Constitution crystalizes the grandeur of just administration and incorporates the pursuit of administrative justice into the bill of rights. Meanwhile, the Promotion for Administrative Justice Act (PAJA) stipulates formality and procedure of administrative action and adopts relevant concepts from Australia and Germany. Both the constitutionalization of administrative justice and the codification of grounds of review struggled in the midst of two competing forces: one was the worry that constitutional confinement would impede the pace of transformation in public policy, whereas the other was the vigilance against the spectre of unfettered executive power. Article 33 and the PAJA are products of these struggles.

In reality, although the ANC conceded that the administrative justice clause in the 1996 Constitution was broad enough to include almost all kinds of administrative action, the ANC government later dominated the legislative process of the PAJA and significantly lessened the burden of the government by constricting the definition of 'administrative action'. However, the controversies over the definition of 'administrative action' emerged after the enactment of the PAJA. The Constitutional Court, as indicated in *New Clicks*, has had to settle the problems again and again. This paper argues that it is the stringent limitation of the PAJA that gives the Court leverage to expand its authority. In response to the expansion of judicial power, there was an outcry for judicial deference in the legal circles of South Africa, a form of judicial deference that was endorsed by courts in various cases after 2003.

In this paper, I would argue that the court's deferential turn has been a strategic reaction to political mandates undergirding the policy at issue, which may in turn bolster the court's legitimacy in response to the legislature's political agenda. Therefore, judicial deference in cases like *Bato Star*, rather than weaken the court's strength, enhances its exercise of judicial strategy in the democratic structure. The court's choice of deference further facilitates institutional changes in administrative law by weighing more heavily against information disclosure in real political dynamics than against the static display of information legislation. The expressive function of deferential judgments would prompt information flow and facilitate public deliberation on material policy issues. Deference is not the cul-de-sac of power control. In fact, it has positive functions like information elicitation. This article will demonstrate that recent South African administrative law cases confirm this proposition.

In sum, from South Africa's experience, the court by deferring to functionaries (or agencies) has been able to micromanage its strengthened power of judicial review since the structural changes of the PAJA. The Court's deference in fact is not a hands-off approach to control of public power. Instead, judicial deference is the way in which the Constitutional Court can control the lower courts' judgments. These lower courts' decisions sometimes hinder the transformation and effectuation of social-economic rights promised by the new constitutions. Also, by appealing to the principle of legality, the court has resumed its role of incrementalist reformer like a common law court. Although shadowed by a fear of executive-mindedness, the court consolidates its power by reverting policy choices to the post-apartheid government, which benefits from support in the form of strong political mandates. Indeed, the court has demonstrated its pivotal position in post-apartheid state-building. From the perspective of information theory, the court may further contribute to democratic deliberation by judicial deference. The expressive function of judicial deference can

expose relevant information regarding focal public policies. Therefore, to the court, judicial deference might improve the dialectical process of policymaking while bolstering its importance in state-building by manifesting the value of information. The transformation of South Africa's political economy has not, and likely will not, take place over night. And in this regard, the Constitutional Court's deference to government is not a surprise but an incremental reform responding to the competing needs of political accountability and an efficient administration in post-apartheid South Africa.

Incorporating a coherent principle of restraint in South Africa's separation of powers model

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The Constitution of the Republic of South Africa, 1996 (herein as the Constitution) establishes three pillars of the state being the legislature, executive and judiciary.¹⁰⁰ The legislature's functions under chapter 4 of the Constitution are to pass legislation, to scrutinize and oversee executive action, including the implementation of legislation, and providing a national forum for public consideration of issues.¹⁰¹ The allocation of these functions to the legislature is based on the theory that Parliament is a branch which is representative of the many different interests of society so that what comes out of there will respect and reflect the nation's diverse interests.¹⁰²

The Constitution vests executive authority on the President.¹⁰³ The executive's functions under chapter 5 of the Constitution are to implement the laws, develop and implement national policy and initiate legislation.¹⁰⁴ The allocation of these functions to a single President is based on the theory that the president can act quickly without the need to harmonise conflicting interests.¹⁰⁵ This is why in some areas like foreign relations or defence, the President is constitutionally permitted to act without the need to get prior parliamentary approval.¹⁰⁶ There are several other areas where the President is constitutionally permitted to act without prior approval.¹⁰⁷

The judiciary's function under the Constitution is to interpret and apply the laws to a specific set of circumstances or controversies involving individuals.¹⁰⁸ This explains why courts have consistently rejected to engage in an academic exercise by hearing a case that no longer presents an existing or live controversy which should exist if a court is to avoid giving advisory opinions on abstract propositions of law.¹⁰⁹ The allocation of these tasks to the judiciary is based on the theory that the judiciary is specially trained to carry out these functions and is insulated from the other branches that are politically accountable.

Apart from the text itself apportioning various powers and functions between and among the three branches of government, there is no constitutional text defining or codifying the principle of separation of powers.¹¹⁰ Nor is there an explicit provision in the Constitution that prevents one branch of government from seeking to overthrow the constitutional functions of another branch.

This paper examines the need for the development of a distinct separation of powers model for South Africa. The paper observes that while the courts have developed a separation of powers jurisprudence, which is mindful of the limits placed on all branches of

¹⁰⁰ See chapters 4, 5 and 8 of the Constitution.

¹⁰¹ See, sections 42(3) and 55(2) of the Constitution.

¹⁰² See, Burt Neuborne, "The Last Walls," a paper presented at the Great Hall at The Cooper Union on 13 December 2012, available at <https://www.youtube.com/watch?v=ATK7FtBiF4>. See also, Burt Neuborne, Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges, 35 *N.Y.U. Rev. L. & Soc. Change* 602 (2011).

¹⁰³ Section 85 of the Constitution. See, Mtendeweka Mhango, Constitutional Eighteenth Amendment Bill: An Unnecessary Amendment to the South Africa Constitution, 35 *Statute Law Review* 19-34 (2014) (noting that section 85 means that under the South African Constitution, a single President possesses the entirety of the executive authority, which he or she exercises together with the Cabinet).

¹⁰⁴ See, section 85(1) and (2).

¹⁰⁵ Neuborne, *supra* note 102.

¹⁰⁶ See, section 201, 203 of the Constitution, respectively, which permits the President as head of the national executive to authorise the employment of the defence force in defence of the republic or the fulfilment of an international obligation, or to declare a state of national defence without getting prior approval from Parliament. And see, section 231 of the Constitution which entrusts the national executive with the responsibility of negotiating and signing of all international agreements; section 231(3) provides that "an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time."

¹⁰⁷ See, section 84 of the Constitution.

¹⁰⁸ See, section 165 of the Constitution.

¹⁰⁹ *Legal Aid South Africa v Mxoxolo Magidiwana and Others* [2015] ZACC 28; *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21; *Radio Pretoria v Chairman, Independent Communications Authority of SA & Another* 2005 (1) SA 47 (SCA); *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA).

¹¹⁰ See, Chuks Okpaluba & Mtendeweka Mhango Between Separation of Powers and Justiciability: Rationalising the Constitutional Court's Judgment in the Gauteng E-Tolling Litigation in South Africa, *Potchefstroom Electronic Law Journal* (forthcoming); Kevin Hopkins, "Some Thoughts On the Constitutionality of Independent Tribunals Established by the State" 27(1) *Obiter* 150 (2006).

state, there has not been a clear and distinct separation of powers model for South Africa. Further, while the courts have consistently held that disputes that raise political questions are not justiciable,¹¹¹ they have failed to articulate a clear jurisprudential justification for this conclusion. In other words, while the judiciary has recognised the limits of judicial power in relation to the adjudication of political questions, it has failed to jurisprudentially explain this as part of any coherent constitutionally based principle of restraint.¹¹² It is not clear from existing case law whether and when the courts will hear or dismiss a dispute that raises political questions and what jurisprudential justifications can be offered.

The paper advocates that in developing a distinct separation of powers for South Africa, the judiciary should incorporate a political question doctrine or some other principle of restraint. I argue that this is required based on the principle of separation of powers in the same way that the doctrine of legality is implicitly derived from the concept of the rule of law.¹¹³ The paper maintains that failure to develop a separation of powers, which incorporates the political question doctrine, will cause a number of problems, including the danger of the judiciary getting smeared or appear taking sides in those amorphous political questions; the risk of courts making orders that can legitimately be circumvented; and the risk of creating jurisdictional problems for South Africa.

Criminal pasts and political futures: The Truth and Reconciliation Commission and failures of post-apartheid state building

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Despite its central place in the anti-apartheid movement, Truth and Reconciliation Commission hearings in Sebokeng – a sprawling peri-urban township 60 kilometres south of Johannesburg – were disproportionately concerned with the acts of one person: Victor “Khetisi” Kheswa. Khetisi’s prominent place in the hearings was peculiar because he was one of the township’s most notorious gangsters, yet the TRC was commissioned to consider only acts of “political” violence. More surprising still, even though his gang had committed one of the worst massacres in South African history, his mother was put on stage during the TRC hearings as a victim of human rights abuses, evoking anger from her former neighbours in the audience.

Based on extensive archival, interview, and ethnographic research in the neighbourhood where Khetisi lived, the paper argues that the strangeness of the Khetisi hearings reveals two relatively unexplored challenges of democratic state formation. First, the hearings illuminate processes through which violence comes to be deemed legitimate (or not) and the resistance attempts at such classification can provoke. If part of what defines modernist states like South Africa is the monopolization of legitimate violence, what violence is considered legitimate has to be politically constructed – a process that may receive resistance in local communities. Part of the TRC’s political work was to show South African citizens what the relationship among violence and the democratic state should be, separating the possibility of political violence during the apartheid era from violence that followed democratization – violence which would henceforth be inherently criminal. The Khetisi hearings illustrate that this neat division was undermined on stage during hearings as the uncomfortable complexities of apartheid violence were exposed.

Second, the hearings show the resistance state building projects face in making democratic law the arbiter for disputes among citizens. Recent literature inspired by Elias and Foucault shows how state institutions discipline citizens’ emotional habits and in the process reduce violence. Less recognized, however, are ways in which states need to discipline relations among citizens such that citizens turn to state law to resolve disputes rather than violently doing so themselves. By placing Khetisi’s mother on stage as a victim, the TRC unintentionally implicated the post-apartheid state in upholding her son’s illicit violence. This failed performance mirrored the newly democratic state’s challenges in getting citizens to turn to the law for justice, as many citizens considered

¹¹¹ See, *Ferreira v Levin* 1996 (1) BCLR 1 (CC); *UDM v President of South Africa* 2002 (11) BCLR 1179 (where the court observed that “this case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional”); *Mazibuko v Sisulu* [2012] ZAWCHC 189 (held that “an overreach of the powers of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the state to deal with these matters, can only result in jeopardy for our constitutional democracy. In this dispute I am not prepared to create a juristocracy and thus do more than that which I am mandated to do in terms of our constitutional model”); Okpaluba & Mhango supra; Mtendeweka Mhango ‘Is It Time for a Coherent Political Question Doctrine in South Africa? Lessons from the United States’ 7 *African Journal of Legal Studies* 476-477 (2014) (advocating for a coherent political question doctrine for South Africa); *Swartbooi and Others v Brink and Another* (2), 2003 (5) BCLR 502 (CC); *Mazibuko v Sisulu* [2013] ZACC 28 at para 83 (Jafta J minority opinion noted that “political issues must be resolved at a political level; that our court should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution”); *Democratic Alliance v Ethekwini Municipality* 2012 2 SA 151 (SCA) paras 19 and 38 (held that the determination of which streets should be renamed and what the new names chosen was deemed inherently political, and accordingly, it was not for a court to interfere in the politically motivated decisions taken by a deliberative assembly of the council politically accountable to the electorate.)

¹¹² See, *Doctors for Life International v Speaker* 2006 (12) BCLR 1399 (CC) (noting that “courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.”) at 1417–1418.

¹¹³ *Fedsure Life v Greater Johannesburg Metropolitan Council* 1998 (12) BCLR 1458, 1482 (CC); and *Pharmaceutical Manufacturers Association of SA* 2000 (3) BCLR 241,260 (CC).

suspects' strong procedural rights as putting the law on the side of criminals. As a result, citizens frequently and violently settle disputes themselves.

Truth and Reconciliation Commission Hearings, like those concerning Khetisi, are particularly good places to understand the initial processes and failures of democratic state building in South Africa. To the degree that any state ever has a monopoly on violence, the South African state had long been far from the ideal type. The late apartheid state had little control over coercive force (legitimate or otherwise) and, after decades of revolutionary insurrection, the newly democratic state was desperately trying to gain it. The TRC was one of South Africa's first and most dramatic attempts to counter this revolutionary violence and to establish the democratic state as the rightful institutional apparatus through which to seek justice. It did this by unearthing the capricious violence of the apartheid state and showing the desirability of a democratic state constrained by legal procedures. If the apartheid state's arbitrariness required revolutionary mobilization, the TRC illustrated that the constraints placed on the democratic state by the new legal rights dispensation required no such action. In other words, through its quasi-judicial form, the TRC presented the democratic state as a neutral arbiter of societal and political disputes directed at producing justice. As a result, the TRC was a crucial part of post-apartheid state building because it was a spectacle that actively displayed to South Africa's citizens what the relationship among violence, the law, and the democratic state should be.

However, in many local hearings these performances had unintended effects as specific incidents – like those involving Khetisi Kheswa – were examined and the uncomfortable complexities of apartheid history were exposed on stage. As the categorical messiness and painful intimacy of apartheid violence were bared in public hearings, the TRC's semiotic work was undermined with dramatic consequences for democratic state formation – or rather state failure – as the post-apartheid state was set on an unstable symbolic foundation which inhibited its ability to institutionally monopolize violence.

Of course, the TRC was not the only way in which the democratic state tried to display a new relationship between violence and the state. The renaming of the police service, the soaring language of the Constitution, and frequent speeches by political leaders like Nelson Mandela were others. But the TRC was the most public, most sustained, and most institutionalized effort to reckon with the country's past and to project a new future. And with the TRC unable to lay the ghosts of the past to rest, the effect has been that citizens turned away from the state to solve problems of violence in their communities, preferring local means, like vigilante violence, through which to produce "justice." Such practices actively contest what it means to engage in "criminal" violence, as many vigilantes believe that criminals should not be afforded rights because they have violated the rights of others. In other words, much like the TRC's attempts to project the state as a neutral arbiter over the country's history unintentionally made it appear as if it were siding with immoral enemies of the community, the democratic state's provision of rights for suspected criminals similarly makes the state appear as if it is siding with criminals' immoral acts. In its supposed neutrality, the TRC, like the state generally, often found itself on the wrong side of the meaning of violence in local areas

When do you call time on a compromise? The future of transformative constitutionalism in South Africa

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After centuries of institutionalised black subjugation and dispossession that culminated in a racist colonial-apartheid state, the protracted constitutional negotiations of the 1990s were widely dubbed a miracle. The popularly held notion of miracle in many ways captures, on the one hand, the transition to a constitutional democracy from a colonial-apartheid state that is widely characterised as being relatively peaceful, orderly and by most accounts lawful. On the other hand, less obvious but nonetheless implicit in the idea of miracle is the transmogrification of former enemies into co-sponsors of the 'new' South Africa in circumstances few a decade earlier would have imagined possible. How did this happen? How was it possible that erstwhile enemies emerged from the negotiating table espousing a shared sense of triumph and commitment to a common vision harbouring high expectations for both blacks and whites as to the future prospects of the country? Beyond constitutional commitments to formal rules and structures, abstract values, principles and doctrines, how were they able to find each other, let alone establish a common grammar able to transcend their centuries old history of racial antagonism? In the absence of a clear winner or loser at the negotiating table, the parties were compelled by the circumstances to establish a grammar of compromise. The primary organising idea at the heart of that grammar I will argue became and remains that of transformation, considered by many as being sourced in, delineated and, ultimately, mandated by the Constitution.

As a grammar of compromise, the discourse of transformation that has evolved in the democratic era post-1994 has played an important role in framing the agenda for political, social, economic, organisational, institutional and structural change in both the public and private realms. From education, to sports, to the media, to business, to the economy, to politics, to language, to the

courts, to policing, transformation has been deployed as a common vector for negotiating and directing change. Therefore, at face value, transformation outwardly appears to be widely embraced as a totalising idea reflective of the nation's collective acceptance of the need for change; however it is fairly uncontroversial to suggest that most will readily accept that transformation within South Africa's national discourse remains a highly contested notion, characterised by instability especially with respect to its meaning and the actions it demands from one context to the next. Despite this South Africa remains invested in the notion of transformation.

In line with the broader discourse of transformation, South Africa's constitution has been designated by many as a transformative one. Concomitantly, the notion of transformative constitutionalism that has emerged has since its introduction into the South African lexicon gained an incredible amount of discursive traction and become, I believe, the preeminent conceptual framework for typifying South African constitutionalism. Widely regarded as having shifted the discourse beyond a classic liberal understanding and more towards a social democratic one, transformative constitutionalism is portrayed by its proponents as being, if not the best answer, then at least an adequate one to address colonial-apartheid's multiple legacies of inequality and dehumanisation. In other words, transformative constitutionalism is presented by its proponents as having the wherewithal, if implemented properly, to lead to a fundamentally changed egalitarian and pluralist South Africa. Whether this is in fact happening requires that we consider the nature and extent the changes in the lived experience of South Africans since 1994.

Over two decades after the commencement of South Africa's transformative project, it remains extremely difficult to capture in words and numbers with sufficient precision and pathos the exact nature and extent of the disparities in living conditions, life opportunities and social provisioning that stubbornly persist between blacks and whites in South Africa. Considering the socio-economic disparities in education, healthcare, land distribution, basic sanitation, inadequate infrastructure and rapid urbanisation, Marais poignantly captures the contemporary state of post – 1994 South Africa in the following words:

[I]nequality has widened, precariousness is routine and a palpable sense of unfairness is rampant. The problem is not simply one of 'poverty' – a lack of means – but of the glaring disparities that assault people day in and out. A seething sense of injustice exists, generating rancour and insubordination.¹¹⁴

Of course this is not to suggest that absolutely no changes in the living conditions and life opportunities have taken place over the past two decades nor that there have not been any policies or initiatives targeted at redressing these disparities. Indeed, there has been a proliferation of affirmative action, education, employment equity, health care and housing programs and policies targeted at advancing the equality of 'previously disadvantaged groups', especially along the axis of race and gender. However, the lived reality is that the weight of these transformative initiatives has not necessarily resulted in a reduction of inequality, instead there has been an increase in inequality over the last twenty years. Put bluntly, materially, there has been no miracle equivalent for South Africa's masses that matches that of the much vaunted transformative constitution. Instead two decades later, beyond political freedom in the form of an inclusive majoritarian democracy, equal rights and citizenship, a more fulsome emancipation from the social, material and cultural depredation remains the dream deferred for large sections of South Africa's black population who continue to live under wretched conditions.

In my essay, I shine the spotlight on transformative constitutionalism and interrogate the potential of its claims against on-going claims for emancipation. I will argue that whilst the idea of transformation as emblematic of constitutional compromise has played a significant role in South Africa's transition to democracy by providing much needed space for dialogue and contestation, the effect of transformative constitutionalism 20 years into South Africa's democracy has been to constrain the ambition and possibility of South Africa's constitutional project. I will argue that rather than advancing the struggle for a more comprehensive project of emancipation, transformative constitutionalism has narrowed our understanding of what South Africa's constitutional project sought to respond to and counteract, namely colonial-apartheid's social, economic and cultural legacies. I will argue that it has achieved this by producing an adjudication driven court-centric constitutional discourse that has crafted unequal treatment and poverty as the fundamental antagonisms to be vanquished whilst failing to address the largely undisturbed social, economic and cultural milieu produced by colonial-apartheid.

¹¹⁴ Marais *South Africa pushed to the limit - The Political Economy of Change* p 4.

Panel 3C: Gender, Law and Society

Significance of the distortion of bridewealth payment for child marriages in Africa

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In its original sense, bridewealth functioned as a legitimating symbol of marriage, a material pledge that the bride will be well treated, and a recognition of her fecundity and worth to her community.¹¹⁵ Presently, it is regarded as a material or non-material value given by the groom's family to the bride's family.¹¹⁶ In the past, it sometimes took the form of labour or service from the groom to the bride's family for a stipulated period of time termed bride service.¹¹⁷ It was often accompanied by a small cash payment and drinks. However, the economic stratification of society and other socio-economic changes have led to a distortion of the meaning of bridewealth. Bridewealth has changed to the extent that its payment has taken the form of massive sums or materials of an expensive nature.¹¹⁸ This change is significant for the phenomenon of child marriage in Africa.¹¹⁹

The problem of child marriages has grown significantly in Africa.¹²⁰ Many parents who demand high sums as bridewealth do so in the context of child marriages. On one hand, the right to 'free and full' consent to a marriage is recognised in the Universal Declaration of Human Rights (UDHR) and other international instruments. The recognition that consent cannot be 'free and full' when one of the parties involved is not sufficiently mature to make an informed decision about a life partner is a violation of the provisions of the UDHR.¹²¹ Child marriages thus violate the rights of the girl child to informed consent.

On the other hand, cultural practices encourage child marriages. Notwithstanding the undertaking by nearly all national constitutions and endorsement of international treaties to put in place mechanisms for the elimination of child marriage, the outcome has not been satisfactory.¹²² Many African countries are members of the United Nations, African Union and subscribers to many international instruments and conventions such as the Commonwealth Charter, African Charter on Human and People's Rights (1990), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) 1979, the International Covenant on Economic, Social and Cultural Rights (1966), Convention on the Rights of the Child (1989), and other AU instruments. These instruments stress the need for States to take child marriage as a policy priority and support action in addressing the rights of children. To achieve this, States are urged to ratify all related international instruments and fully align their laws and policies with the international and regional child rights standards. Unfortunately, the application of these treaties has not fared better than national constitutions with regards to curbing child marriage. Due to the demands of customs, child marriage victims rarely give full and informed consent to their marriages. In South-East Nigeria for example, the bride is generally not allowed to be present during the negotiation of her bridewealth. She only presents herself to be praised and appreciated by her kinsmen so as to influence the offer the groom's family makes.¹²³ This gave rise to the Igbo saying that *nwanyi amaghi mgbe erere ya* (No woman knows when she is sold).

In this context, this paper highlights how the distortion of bridewealth payment contributes to high rates of child marriage in Africa. It argues that the distortion of the meaning of bridewealth payment is a significant contributor to the failure of States to meaningfully curb child marriage in Africa. It bases this argument on the disconnection between State law and cultural practices, which is a peculiar feature of many African legal systems. For example, high bridewealth led to the adoption of the Limitation of Dowry Law by

¹¹⁵ UC Isiugo-Abanihe, 'Consequences of Bridewealth Changes on Nuptiality Patterns among the Ibo of Nigeria' in C Bledsoe & P Gilles (eds.) *Nuptiality in Sub-Saharan Africa: Contemporary Anthropological and Demographic Perspectives* (1994) 74-93; MB Mulder 'Bridewealth and its Correlates: Quantifying Changes Over Time' (1995) 36(4) *Current Anthropology* 573- 603.

¹¹⁶ G Ferraro and S Andreatta, *Cultural Anthropology: An Applied Perspective* (2011) 222-225.

¹¹⁷ *Ibid* 224.

¹¹⁸ LA Obiora, 'Reconsidering African Customary Law' (1993) 17.3 *Legal Studies Forum* 217-252 at 230; J Goody, 'Bride wealth and Dowry in Africa and Eurasia' in J Goody and SJ Tambiah, *Bride wealth and Dowry* (1973) 7; HF Morris, 'Review of Development in African Marriage Laws since 1950' in A Philips and HF Morris (ed) *Marriage Laws in Africa* (1971) 35-59 at 50;

¹¹⁹ Although the definition of child marriage includes boys, most children married at <18 years of age are girls. see S Rembe *et al*, 'Child and Forced Marriage as Violation of Women's Rights, and Responses by Member States in Southern African Development Community' (2011) 87 (25.1) *Agenda* 65-74 at 65.

¹²⁰ NM Nour, 'Health Consequences of Child Marriage in Africa' (2006) 12 (11) *Perspective* 1644-1649 at 1644; United Nations Population Fund (UNFPA), *Child marriage fact sheet*, New York: UNFPA, 2005.

¹²¹ R de Silva-de-Alwis, 'Child Marriage and the Law' UNICEF 4-6.

¹²² R Gaffney-Rhys, 'International Law as an Instrument to Combat Child Marriage' (2011) 15 (3) *The International Journal of Human Rights* 359-373 at 369.

¹²³ P Iroegbu, 'Igbo Marriage System: A discourse on endogenous stages and meanings' cited in P Iroegbu, *Marrying wealth, Marrying Poverty Gender and Bride wealth power in an African Society: The Igbo of Nigeria* (2007).

the then Eastern Nigerian Government.¹²⁴ However, people flagrantly flout this legislation. Using case studies from Nigeria and South Africa, the paper argues that the pluralist legal system of African countries plays a major role in the slow response towards elimination of child marriage. Part one uses literature review to trace the distortion of bridewealth payment. Part two examines the disconnection between law and practice in relation to child marriages. It argues that the divergence between state law and people's practices is largely caused by the plural legal system bequeathed by colonial rule. Part three examines State efforts to combat child marriages in the context of their constitutional and treaty commitments. Part four draws a causal link between the distortion of bridewealth payment and high rates of child marriages.

"Why should I wait to be raped?" - Homophobia-related violence and the limits of law

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South Africa, the first country in Africa to recognise marriage between people of the same sex, is marked by contradictions between the legal inclusion of gay and lesbian people on the one hand, and their murderous exclusions on the other. In the post-apartheid period, LGBTIQ people have largely shifted from the 'bad' to the 'good' side of the law. Yet despite these legal developments, violence continues to be a dominating spectre in the democratic landscape and has constitutive effects on queer subjectivities and politics. Operating through modes of differentiation, the violence queer people face is inflected with race, gender, sexual and class content. Legal efforts to advance equality and non-discrimination draw into the spotlight the possibilities and impossibilities of law in transforming the relations of power that manifest the ongoing exclusion and marginalisation of queer people. Drawing on primary research, the paper interrogates legal discourses on homophobia-related violence and what these reveal about sexual, gender, race and class othering at the intersection of law and the social.

Law is a master frame for rendering homophobia-related violence intelligible and actionable, and is itself entangled with violence. As Foucault (2004, p.50)¹²⁵ asserts, "law is not pacification, for beneath law, war continues to rage in all the mechanisms of power, even the most regular". Heterosexuality is protected and privileged in law whilst homosexuality is variously regulated by it. In some jurisdictions, homosexuality is configured as a legal right (e.g. through marriage and civil partnership laws) and in others as a crime (e.g. anti-homosexuality laws). This construction of *law-as-problem* (i.e. laws that discriminate) and *law-as-solution* (i.e. laws that prohibit discrimination) is a principal narrative of queer (un)freedom globally (Judge, forthcoming¹²⁶). That the law is a potent tool to challenge discrimination, advance rights, and prolong life, is indisputable. However, in the same instance that legally-driven claims for state protection from violence are asserted, the nation-state's legitimacy to wield violence through force of law is reinforced (Butler, 2010; Brown, 2005)¹²⁷. The state's power to inflict injury, its implication in systems of violent oppression, and how queers themselves are subjected to the violent regulations of law (Brown, 1995; Moran, 2004¹²⁸) are largely obscured.

'Hate crime' provides a commanding explanation for prejudice-motivated violence, for which individual beliefs and sentiments (of hate and intolerance) are understood to be causal. In South Africa the discourse of hate crime has been mobilised to resist homophobia-related violence through political actions that include research, community mobilisation and advocacy for the classification, quantification, tracking and prosecution of hate crimes. These actions are rooted in public calls for the implementation of hate crime legislation. Critical perspectives on hate crime law challenge how it reinforces mutually exclusive social groups, overlooks the intersection of sexuality with other forms of violent oppression, and legitimises racist state security and violence (Reddy, 2011; Rosga, 1999; Spade and Willse, 2000¹²⁹). Moreover, the notion of *hate-as-cause* reduces complex relations of inequality to personalised states and behaviours, rendering oppression a private matter outside of social and historical context (Mohanty, 2013; Rosga, 2001¹³⁰). This further individualises the structural, material and systemic injuries queers face. Yet the hate crime construct also enables direct appeals to be made to act against particular forms of violence, the classification of which provides

¹²⁴ Limitation of Dowry Law, Eastern Region Law No. 23 of 1956, now Cap 76 Laws of Eastern Nigeria 1963. The use of the term 'dowry' is a misnomer, given that dowry differs from bridewealth. See A Schlegel *et al*, 'Marriage Transactions: Labor, Property, Status' (1988) 90 (2) *American Anthropologist* 291- 309 at 299-301.

¹²⁵ Foucault, M. (2004). *Society must be defended*. Lectures at the College de France, 1975-76. London, England: Penguin.

¹²⁶ Judge, M. (forthcoming). *(Un)settling homophobia-related violence: knowledge, identity and politics*. Routledge: Abingdon.

¹²⁷ Butler, J. (2010). *Frames of war: When is life grievable?* London, England: Verso; Brown, W. (2005). *Edgework: Critical essays on knowledge and politics*. Princeton, NJ: Princeton University Press.

¹²⁸ Brown, W. (1995). *States of injury: Power and freedom in late modernity*. Princeton, NJ: Princeton University Press; Moran, L. J. (2004). The emotional dimensions of lesbian and gay demands for hate crime reform. *McGill Law Journal*, 49, 925-949.

¹²⁹ Reddy, C. (2011). *Freedom with violence: Race, sexuality and the US state*. Durham, NC: Duke University Press; Rosga, A. (1999). Policing the state. *Georgetown Journal of Gender and the Law*, 1, 145-71; Spade, J., & Willse, C. (2000). Confronting the limits of gay hate crimes activism: A radical critique. *Chicano Latino Law Review*, 21, 38-52.

¹³⁰ Mohanty, C. T. (2013). Transnational feminist crossings: On neoliberalism and radical critique. *Signs*, 38(4), 967-991; Rosga, A. (2001). Deadly words: State power and the entanglement of speech and violence in hate crime. *Law and Critique*, 12(3), 223-252.

justification for law-driven interventions within the criminal justice system. The 'lesson and message' of law and its juridical modalities emerge as moral authorities that guard the social order against that which will 'not be tolerated' (Judge, forthcoming¹³¹).

The widespread violence, marginalisation and exclusion of queers have demanded that injury be a dominant site of political resistance. Accordingly, injury has spawned powerful social movements for queer visibility and struggle. However, injury can work against a more radical politics in that it is conditional upon the production of subjects defined by their injurability (Butler, 2010¹³²), and thus fails to transform the terms on which such injury is constituted. Identity-based discriminations are naturalised by laws that consign queer subjects to the status of victims and vulnerable groups. The law's reliance on the presumption of injury as the basis for extending its protection (Brown, 1995¹³³) reveals the regulatory effects of legal discourses on both gender and sexual performativity (Robson, 2002¹³⁴). As LGBTIQ people in South Africa become increasingly codified in law, queer freedom risks becoming normatively reduced to a legal right that demands testimonies of injury as the bases for the advancement of rights. This works against wider conceptions of queer justice, and what this might conceivably encompass.

Legal recognitions and protections have been critical to bringing LGBTIQ people out of the shadows of social recrimination and into fuller participation in public life. This has also been a powerful instrument through which people have successfully challenged the material effects of discrimination, marginalisation and violence. In investigating a number of legal discourses, the paper offers a critical appraisal of these as tools of freedom and of its denial. It posits that, as queers increasingly place their demands and desires for recognition and protection from violence before the law and the state, it is essential to consider how lego-juridical power perpetuates the conditions in which raced, gendered, sexual and class hierarchies are constituted.

Football evangelism and the gospel of sport: Using association football to combat gender and sexual discrimination in Uganda

Richard Peltz-Steele, University of Massachusetts, School of Law

This article posits that the public passion for football offers an easier in-road than top-down political reform to plant seeds of incremental change for gender and sexual equality in Uganda. Moreover, this article posits that overlap between the roles of sport and religion in society map an in-road to effect social change and the legal and social recognition of civil rights for women and LGBT persons.

Just ahead of the opening match of the men's World Cup of association football in Brazil in 2014, Pope Francis delivered an inspirational video message and prayer. A devoted supporter himself of football, the Pope explained that the sport affords "an opportunity for dialog, understanding, and reciprocal human enrichment"; "a tool to communicate values, promote the good of the human person, and help build a more peaceful and fraternal society." While Catholicism in Africa knows nothing like the dominance it enjoys in Latin America, the World Cup captivates the populace of both continents. Football is the world's game, and that evening in Brazil, the Pope spoke to the world.

Uganda is one of only two countries in Africa in which not only homosexual acts, but advocacy for gay rights or "promotion" of homosexuality is a crime punishable by long prison terms, even life. The law is now before the Ugandan Supreme Court upon a procedural challenge, having been struck down by the Ugandan Constitutional Court. And while Uganda is hardly a worst offender of women's rights in Africa—officials are fighting to eradicate female genital mutilation (FGM), which was outlawed in 2010—the country still struggles with issues of child marriage, domestic violence, and discriminatory inheritance and widowhood.

While the extent of its influence is debatable, religion unquestionably plays a large part in perpetuating discrimination in Uganda, where more than four in five persons identify as Christian. Christian pastors working in Uganda and abroad have advocated unabashedly in favour of the country's anti-gay legislation. President Museveni himself has repeatedly invoked God as authority for condemnation of homosexuality. Though the president has supported a progressive agenda on gender equality, traditional communities perpetuate practices that subordinate women and counter equality with assertions of cultural rights. Christian evangelism opposes physical abuse and overt subordination of women, but classical stereotypes of women in Christian theology subtly reinforce traditional cultural norms.

¹³¹ Judge, M. (forthcoming). *(Un)settling homophobia-related violence: knowledge, identity and politics*. Routledge: Abingdon.

¹³² Butler, J. (2010). *Frames of war: When is life grievable?* London, England: Verso.

¹³³ Brown, W. (1995). *States of injury: Power and freedom in late modernity*. Princeton, NJ: Princeton University Press.

¹³⁴ Robson, R. (2002). Assimilation, Marriage and Lesbian Liberation. *Temple LR* (2002): 709– 733.

Like people around the world, Ugandans turn to association football as a source of entertainment, patriotic identity, and inspiration for discourse. In Uganda and in Africa, “football is a religion.” But Ugandan football has found limited success on the pitch. Like Africa among the continents, Ugandan football on the international stage seems ever at the brink of transformative rally, but, frustratingly, always falling short. Uganda’s failure to qualify for the 2015 African Nations Cup precipitated “a fully packed,” three-hour press conference with FUFA President Moses Magogo to chart “the nation’s way forward.”

Referencing previous work on incrementalism and sexual equality, this article recognizes that social change starts small: with the demonstration of disparate norms; with the leadership of a female member of parliament; and with the personal revelation that a gay sibling or child is not an evil foretold. Referencing previous work on the power of transnational sport to influence domestic policy, this article contemplates the use of football development as a tool to effect social and economic change. Competitive football as an organization professes norms of opportunity, anti-discrimination, and fairness. Football as sport propagates values of free communication, tolerance, human dignity, and peace. All of these “Christ-like” virtues already are in place in the higher law of the Ugandan constitution, in the nation’s human rights treaty obligations, and most importantly, in the nation’s religious culture. And these virtues contravene customs that subordinate women and laws that criminalize same-sex intimacy and civil rights advocacy, even though historically those norms have been products of both traditional cultural practice and some Christian evangelism.

Confronting discrimination through international politics and top-down political rule-making is a worthy endeavour, but carries the cause of civil rights only so far. Evangelism captures hearts and minds. The people’s passion for football promises a new path: a new gospel of sport.

Key Prior Research: Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After U.S. v. Windsor*, 62 CLEV. ST. L. REV. 1, 10-11 (2014); Richard J. Peltz-Steele & José A. Benavides, *World Cup Dreaming: Sporting Activism and the Incrementalist Advancement of Sexual Equality Through Association Football*, 118 W. VA. L. REV. 100 (forthcoming 2015).

Outline and Research: I. Gender and Sexual Discrimination in Uganda; II. Football and Religion in Uganda; III. Virtues in Football and Religion; IV. Incrementalist Equality Advocacy Through Football, Like Religion.

The specific aim of this inquiry is to develop a model by which incrementalist equality advocacy may be accomplished through the propagation of football in society for men and women, youth and adults, in a pattern modelled after the example of evangelical faith. A fully cited treatment already has been drafted, comprising 1,280 words in main text and 3,566 words inclusive of footnotes. Research is well under way into background on Uganda with emphasis on football, religion, gender discrimination, and LGBT discrimination, both historic and contemporary. Much of the groundwork on football and society and incrementalist LGBT advocacy has been done in prior research. The parallel between sport and evangelical religion, especially in Ugandan society, is the least previously explored aspect of this endeavour.

It is hoped that these results with respect to gender and sexual equality in Uganda, where anti-gay law and rhetoric are notoriously harsh, will be extrapolatable to other developing political systems, and perhaps also to the advancement of other human rights norms.

The ‘160 girls’ case and state accountability for sexual violence in Kenya: Towards an effective implementation approach

Ruth Nekura Lekakeny, University of Cape Town, Centre for Law and Society

The limits of a state’s responsibility for human rights violations, in this case - sexual violence, are well defined in international law and increasingly being applied in national settings.¹³⁵ The expansion of ‘state responsibility’ to include the responsibility to act with due diligence to prevent, investigate and punish acts committed by private actors opens a front for evaluating and challenging the effectiveness of implementation approaches working to address sexual violence.¹³⁶

¹³⁵ Rebecca J. Cook ‘State Responsibility for Violations of Women’s Human Rights’ in *Harvard Human Rights Journal* 7 125 (1994). See also International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 art 2.

¹³⁶ *Velasquez-Rodriguez v Honduras Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

Looking beyond progressive legal frameworks, the proposed article seeks to reflect on how sexual violence victim's rights are implemented in practice. I discuss Kenya's recent land mark '160 girls case', to understand the role of the state in ensuring effective investigation and prosecution of sexual violence cases. I intend to argue that while this case was a success in identifying the state's culpability for systemic violence and failure to enforce the Sexual Offences Act which created a 'climate of impunity', the stern focus on the police takes away from the reality that successful investigation and prosecution is dependent on integrating law enforcement with other key stakeholders involved in the criminal justice system.

Context

Violence against women and girls is a form of gender-based discrimination and a human rights violation.¹³⁷ Approximately one in three of the world's women have experienced either physical or sexual violence.¹³⁸ Sexual violence against women and girls (SVAWG) is both a cause and a consequence of structural discrimination, control and patriarchal dominance.¹³⁹ In Kenya, sexual violence remains prevalent, often propagated by cultural practices and stereotypes which justify and normalize it.¹⁴⁰

According to the Kenya Demographic Health Surveys (KDHS), 2007-2008 almost half (45 per cent) of Kenyan women aged 15–49 have ever experienced physical or sexual violence, including 'forced sexual initiation'.¹⁴¹ The recently released 2014 DHS only reports on sexual violence perpetrated by an intimate partner. The report estimates that 14 percent of women have ever experienced sexual violence committed by a spouse or partner.¹⁴² A recent global systematic review showed that 10.4 percent of Kenyan women have experienced non-partner sexual violence.¹⁴³

In response to this situation, Kenya adopted a progressive legal framework especially through the Sexual Offences Act (2006) and the Constitution of Kenya 2010. The SOA prohibits various sexual offences, enshrines mandatory minimum sentences, emphasizes on consent rather than use of force in determining sexual violation and removes legal requirement for corroboration.¹⁴⁴ The SOA further enshrines mechanisms for effective processing of sexual violence cases through the criminal justice system such as means for collection of forensic evidence to strengthen a prosecution case. The Constitution of Kenya safeguards the right of access to justice for all, dignity, freedom and security of the person and freedom from any form of violence from either public or private sources.¹⁴⁵ To complement this national legal framework, Kenya has ratified and domesticated regional and international human rights instruments which protect the rights of sexual violence victims.

Despite this enabling legal framework, victims of SVAWG continue to encounter insurmountable challenges when seeking recourse through the criminal justice system in Kenya. From the reporting stage, through investigation, prosecution and even trial victims of SVAWG face secondary victimisation resulting in high attrition. These challenges are exacerbated by uncoordinated efforts among the police, health service providers among other service providers involved.

The 160 Girls Case

In 2013, 160 girls, all victims of sexual violence brought a class action against the state for inaction and failure to protect the victims. The *C.K. (A Child) & 11 Others v. Commissioner of Police/Inspector-General of the National Police Service & 2 Others*,¹⁴⁶ now commonly referred to as the '160 girls case' is ground breaking and relevant because despite the existence of an elaborate legal framework on sexual violence, its implementation remains encumbered. The court found the state responsible for systemic violence for failure to ensure proper and effective investigation and prosecution of sexual offences. The Kenyan state was held responsible

¹³⁷UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104 art 3.

¹³⁸ World Health Organization, *Global and Regional Estimates of Violence against Women*, 2012.

¹³⁹Manjoo, Rashida. "Report of the Special Rapporteur on violence against women, its causes and consequences." *Human Rights Council United Nations, Distr.: General, Twenty Sixth session, 28 May 2014*.

¹⁴⁰ See for example recent incidents of men public stripping and public rape of women because men consider the women's dressing as indecent. Jessica Hatcher 'Nairobi's 'miniskirt' March exposes sexual violence in Kenya' *The Guardian* 18 November 2014. See also Mercy Kambura 'Let's be real; we can't just dress as we please' *Daily Nation* 25 November 2014.

¹⁴¹ Kenya National Bureau of Statistics (KNBS) and ICF Macro. 2010. Kenya Demographic and Health Survey 2008-09. Calverton, Maryland: KNBS and ICF Macro.

¹⁴² Kenya National Bureau of Statistics (KNBS) and ICF Macro. 2015. Kenya Demographic and Health Survey 2014 Calverton, Maryland: KNBS and ICF Macro.

¹⁴³ Abrahams, Naeemah, et al. "Worldwide prevalence of non-partner sexual violence: a systematic review." *The Lancet* 383.9929 (2014): 1648-1654.

¹⁴⁴ Kenya Sexual Offences Act, 2006 ss 31-34.

¹⁴⁵Constitution of Kenya, 2010 arts 26, 27, 29, 48.

¹⁴⁶ *C.K. (A Child) Through Ripples International As Her Guardian And Next Friend) & 11 Others V Commissioner Of Police/Inspector General Of The National Police Service & 3 Others* [2013] eK.

for the physical, emotional and psychological harms caused to the petitioners by reason of their failure to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement.

This case demonstrates the role of the Kenyan courts and other stakeholders in the implementation of state obligation to address sexual violence against women and girls.¹⁴⁷ It also paves the way for critical discussions on the content and extent of state obligations to address sexual violence and the need to develop effective, implementation approaches to fulfil these state obligations.

The proposed paper will demonstrate and argue for the need for Kenya to invest in a sustainable integration approach where all relevant sectors including health, psychosocial, police and justice sector responses collaborate and harmonise sexual interventions in order to address the 'climate of impunity' and fulfil these state obligations.

Exploring the efficacy of criminal sanctions in combating harmful practices in Malawi: An analysis of

The State vs Eric Aniva

Sarai Chisala-Tempelhoff, Malawi Human Rights Commission

The Gender Equality Act, 2013 (the GEA) purports to criminalise harmful practices in an effort to promote gender equality. Harmful practices are defined as any social, cultural or religious practice which, on account of sex, gender or marital status, does (or is likely to) undermine the dignity, health or liberty of any person; or, result in physical, sexual, emotional or psychological harm to any person. Section 5(1) of the GEA goes on to prohibit harmful practices by stipulating that "a person shall not commit, engage in, subject another person to, or encourage the commission of any harmful practice". This is the provision that is being tested in the ongoing prosecution of Eric Aniva. Aniva worked as a *Fisi* "hyena" in the Nsanje district of Malawi. His job entailed having unprotected sexual intercourse to cleanse a woman and protect her/her family/her home from bad spirits. The BBC happened upon Aniva and broadcast a provocative piece which implicated Aniva (a man who admitted to being HIV seropositive) in sexual relations with over 104 girls. Almost immediately a manhunt started, the entire country (the world?) was calling for this hyena to be brought to book. And the president of Malawi, Arthur Peter Mutharika, issued a call for his arrest. Aniva was arrested and duly charged with contravention of section 5 of the GEA – it having been established that there were no children involved. This paper reflects upon the obvious and not-so-obvious challenges that arise generally when using the law to combat harmful practices and those that arose during the Aniva hearing in particular. Harmful *cultural* practices such as the sexual cleansing services provided by men like Aniva. The paper also takes a critical look at the relevant provisions of the GEA and the implications of casting so wide a net that it ought to capture an entire community and not just a single man. Finally, the paper tackles the regional push to bring harmful cultural practices to an end; the local resistance to change deep seated beliefs and relinquish these harmful elements of "culture"; and the gender injustices that continue to occur where the two forces collide: bringing to mind the proverb that when elephants fight, it is the grass that suffers.

The practice

Initially, and as misrepresented in the BBC coverage, it was presumed that Aniva was a traditional practitioner involved in the sexual initiation of young girls. Once arrested by the police it became evident that this was not the case. Aniva is what is known as a *Fisi* a Hyena, called upon to have sex with women as part of a funeral/burial cleansing ritual. One that is practiced when a woman has been widowed or when her son has died, in which case it takes place within three days of burial of the deceased. The practice is known as *kulowa kufa/kupita kufa* loosely translated as "entering death". In this time the entire community is called upon to participate in the ritual – family members are required to abstain from sexual intercourse during this mourning period. The ritual itself involves sexual intercourse over a three day period – three times on the first day, a break on the second, another three rounds on the third and last day. A sexual cleanser, *Fisi*, is hired if there was no family member willing to do the ritual. The charges for the cleansing vary based upon the ability of the bereaved family to haggle. "It should be noted that close relatives have to abstain from sex while *kupita kufa* is in progress. The chief is communicated to about these developments. After *kupita kufa*, relatives are free to share utensils with the widow/chief mourner and to resume sex in their respective homes. The process has to be repeated if it has not met the set conditions."¹⁴⁸ One further characteristic of this funeral rite is that it must be practiced without the use of condoms.

¹⁴⁷ Dr. Winifred Kamau, Kieya Kamau, Case Comment – Victory for 160 Girls in Defilement Constitutional Challenge eKLR accessed at <http://kenyalaw.org/kl/index.php?id=4504> on 12th August 2015.

¹⁴⁸ Malawi Human Rights Commission (2010) "Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi" p 64.

The law

International and Constitutional obligations towards women and girls in Malawi require the State to take all *appropriate* and *effective* measures to eradicate harmful practices. In Malawi, this obligation to do something about such harmful practices culminated in the relevant provisions of the GEA. In this paper it is suggested that the law as crafted, whilst a commendable effort to meet these international obligations, may have yet missed the mark. Perhaps the solution is as simple as comprehensive regulations to guide the police and the courts in the application of the law, or perhaps the solution lies beyond the law in the effort to break the rigid and enduring gendered view of the body of a woman as being sullied or cursed by the death of her spouse or her son. The provision if read correctly indicts the *fisi*, the hagglers, the Chief, the mourners, the family members and even the woman herself – for each of these persons either committed, engaged in, subjected another person to, or encouraged the commission of *kulowa kufa*.

The hearing

This hearing is the first time that the provisions of the GEA have been tested. The matter was put before a local magistrate, a member of the very same community that produces and reproduces the indicted cultural practice. The magistrate recused himself. He would go on to visit the accused in the local prison and was quick to inform officers from the Malawi Human Rights Commission (the Commission), myself included, and that Aniva had never even met his legal representatives' before the day of the first hearing. The Commission has been entrusted with the enforcement of the GEA and in the scope of this additional mandate there is the role of advising any party on gender issues when there is a dispute, and more generally to protect and promote human rights. This mandate is simply an extension of the Constitutional mandate that the Commission has to protect human rights in the broadest sense possible. Armed with this protective mantle we charged the tiny courthouse in Nsanje and demanded to be joined as friends of the Court (*amicus curiae*). The presiding Chief Resident Magistrate who had to travel down to the blistering heat of Nsanje for this case decided to hear our application in open court. All parties regarded us with suspicion and our application was duly rejected. We stayed on and watched with ever-deepening horror as the hearing went on. Aniva was largely silent and unflappable. The travesty was when the first witness was called. The Court declined to hear her evidence in Camera since the matter did not fall within the defined "sexual offences" that put in motion such protections for vulnerable witnesses. This despite the sexual nature of the practices she was testifying about. Bear in mind that in Malawi sex and talk of sex is still highly taboo – especially from women. So the legal system and the pursuit of justice forced this elderly lady to describe the sexual assault she experienced. Open court in Nsanje truly means open court. With a bird family nestled just under the witness stand and a large collection of the community in and around the open structure. The crowd laughed and heckled and were barely controlled by the clerk – who himself tried to swallow back a few chuckles at the expense of the witness.

The whole experience left me shaken and questioning how the intent of the law to protect and promote gender equality could become a reality and not further entrench the gender based violence of various aspects of our culture, our community and even our courts.

Panel 4A: The "Other" Law

Securing accountability for violations of the right to life: *Ubuntu* and alternate accountability mechanisms in Africa

Meetal Jain & Yvonne Oyieke, University of Pretoria & University of Nairobi, School of Law

This paper emerges from ongoing research at the University of Pretoria on accountability for right to life violations in Africa, and more specifically on *ubuntu* and the use of commissions of inquiry, truth commissions, and customary mechanisms in this context. (For ease of reference, we refer simply to "alternate accountability mechanisms" when referring to commissions of inquiry, truth commissions, and customary mechanisms.) Right to life violations are among the most extreme acts of inhumanity that communities have to face. How does such a robust value system like *ubuntu*, which is grounded in the concept of humanity, respond to such a challenge to its very foundations - in a humane way? Do alternate accountability mechanisms embody the principles of *ubuntu* whilst also providing for accountability for the crimes committed?

This paper investigates whether a role can be identified for *ubuntu* principles to play in securing accountability for violations of the right to life. Our research focuses specifically on alternate accountability mechanisms to illustrate the potential of the operationalization of the core principles of *ubuntu*, mutuality and interconnectedness, in the realization of accountability for violations of the right to life. Do these mechanisms have a special resonance with African values, in particular with the characteristics of *ubuntu*, in that they are less confrontational than for example criminal trials? Whereas legal processes can be unduly focused on retributive justice and criminal sanctions, these mechanisms often place a stronger emphasis on restorative justice and reconciliation, especially where past victims have to live with their previous oppressors (or beneficiaries of the system of oppression). These mechanisms prioritize beneficence to victims and survivors. Especially where killings can possibly be attributed to the state, criminal accountability often proves not to be a viable option. On the other hand, we ask, are these mechanisms a viable option at all? Do they have significant impact? They are often seen as not strong enough, open to manipulations, or even as a roundabout way of ensuring impunity, merely relating a "tragic narrative."

What this paper therefore aims to do is to investigate instances where alternate accountability mechanisms have been effective in holding accountable perpetrators of violations of the right to life, and draw lessons from these case studies that may be replicated going forward. These lessons will emerge from our evaluation of the track records of 51 commissions of inquiry and truth commissions into right to life violations appointed by African states during the last 20 years, along with our fieldwork research findings from a select group of these commissions. We will also evaluate the operation of customary mechanisms in Zimbabwe and Burundi, on the basis of fieldwork research findings conducted by colleagues. We ask whether more reliance should be placed on these alternative accountability mechanisms to achieve a greater measure of accountability in Africa for violations of the right to life. The focus shall be on the extent to which these bodies relied on principles akin to those constitutive of *ubuntu*, and if these principles had a causal effect on the outcomes of these mechanisms.

International Human Rights Law Discourse and the Right to Life

Dominant international human rights discourse holds that the right to life (seen here primarily as the continuation of biological life) is the supreme or at least a foundational right. The right to life has two components: it demands (1) no arbitrary killings (the prevention component), and (2) ensuring accountability when such a killing occurs (the accountability component). This applies during times of peace as well as during armed conflict.

As far as the prevention component is concerned, it is well established that the right to life is not absolute; it may be limited in specific circumstances. The taking of life is considered unlawful if it is arbitrary. A complex set of standards determine what is arbitrary, but in general it can be said that only in exceptional cases may one's life be taken if it is not done in order to protect another life. The rules in this regard are considerably more permissive during armed conflict as compared to situations of peace.

A failure to ensure accountability is in itself a violation of the right to life. Accountability may have retributive, restorative, or reconciliatory aims, or a combination thereof. Criminal trials and commissions of inquiry are some of the typical, but more formal mechanisms of accountability, on their own or in combination with each other. Accountability can also be achieved through other mechanisms, such as truth commissions and customary mechanisms. Alternate accountability mechanisms, especially if used on their own, are often seen at best as a softer, less confrontational form of accountability, aimed rather at restoration than retaliation, and at worst as smoke-screens aimed at avoiding real accountability.

***Ubuntu* and the Right to Life**

In many African societies, philosophies, such as the one called *ubuntu* in the Nguni languages, played a role in the development of their constitutive values, and continues to play such a role today, even if interwoven with external influences. We assume for now that the concept of *ubuntu* provides a useful perspective on similar African philosophies, and while there is a common core, we recognize that they are not interchangeable. A working understanding of the core values of *ubuntu* is that it values consensus-building; respects people by virtue of their capacity for communal relationships, ones of identity and solidarity; and is concerned with the collective respect for the dignity of personhood within social relationships and practices. *Ubuntu*, properly understood, has also been described as a liberatory concept centred on cultural emancipation and dependent on cultural manifestations of mutuality and accountability towards fellow human beings. We understand *ubuntu* to have had an historical impact in African societies, and to continue to be a living reality. This paper will not attempt to offer any new definitions on *ubuntu*, but draws from a wide range of existing literature.

We are interested to better understand how notions such as *ubuntu* may influence the approach taken in Africa as far as the right to life is concerned. Given the importance of the issues at stake – literally life and death – it appears to be potentially a particularly fruitful testing ground for the core value systems involved; both for *ubuntu* and international human rights.

A study of the modern-day protection of the right to life in Africa as seen in the context of *ubuntu* may, for example, help to make clear the extent to which *ubuntu* reinforces and supports the international law standards on the protection of the right to life, but also to establish whether it may in some respects have an approach that differs from the international standards. It is after all often remarked that the international standards have strong though not exclusive roots in Western culture. Identifying such differences may in turn point to the need for either value system to change, or at least enable a better understanding of the differences by all concerned. The research can potentially also lead to a better understanding of the concept of *ubuntu* itself. It is possible that it may transpire that modern practices as far as right to life issues in Africa are concerned do not comply with *ubuntu*'s aspirations, and the question will arise how to achieve better synergy between old and new African practices in respect of accountability for violations of the right to life.

Alternative Mechanisms of Accountability for Right to Life Violations in Africa

To illustrate the above, we will interrogate alternate mechanisms of accountability for right to life violations in Africa.

Commissions of inquiry, as accountability mechanisms gaining popularity across Africa and the world, are quasi-judicial bodies, with an investigative function. In a right to life context they are often instituted in the wake of an unlawful killing on a small or large scale and the aims are to understand the root causes or surrounding circumstances under which the violation of the right to life occurred. They are often believed to be less retributive than the more formal criminal justice system and although may be arguably constituted to serve political ends, they also have the potential to serve as robust accountability mechanisms, within an already existing framework, should they be developed and their capacity strengthened.

Truth Commissions are official bodies, often created by a national government transitioning from a repressive regime, to investigate, document, and report upon human rights abuses within a country, including but not limited to unlawful killings, over a specified period of time.

Customary mechanisms are local conflict mechanisms that are continuous and embedded in communities, where the conflict is happening, as a more relevant response than an isolated, time-specific nationally implemented institution divorced from the conflict dynamic found at the level of the local community.

Research Questions

In particular, is the assumption made at the outset of this document that commissions of inquiry, truth commissions and customary mechanisms resonate with what we know about the values of *ubuntu* justified, in other words, is there norm resonance between African societies and these mechanisms? To answer this, we will examine the extent to which principles of *ubuntu* in practice infused the proceedings of these mechanisms (allowing victims to testify, making public the proceedings and the final report) and/or informed the recommendations issued by these mechanisms (emphasizing reconciliation, amnesty, financial or symbolic reparations, and institutional reforms). In this way, we will approach the role/influence/impact of *ubuntu* on these mechanisms from two sides: both in respect of their substantive resonance with *ubuntu* and the extent to which *ubuntu* were consciously incorporated into these accountability mechanisms.

Preliminary evidence is mixed about whether alternate accountability mechanisms contribute to improve democracy and human rights. What is interesting, however, is that alternative accountability mechanisms are more widespread than expected and

complement rather than serve as a substitute for more traditional accountability mechanisms such as courts of law. Through the provision of complementary accountability mechanisms, as well as by closing the gap that exists between local community-based accountability mechanisms and state-imposed accountability mechanisms, we suspect that accountability and justice can be more effectively obtained, recognizing the multiple ways in which trauma and violations are experienced and striking the delicate balance between accountability and forgiveness. Our initial assumption is that where there has been a focus on upholding African values through both the *process* of the mechanisms, as well as the *outcomes* of the mechanisms that is where these mechanisms have been and will continue to be most effective. More pertinently, how can these alternative accountability mechanisms be brought closer to ideals of justice and accountability - and is there something that international practice can learn from Africa?.

Using interdicts to silence dissension and undermine customary law: The case of Ga-Chokoe

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The Constitutional Court's 2013 *Pilane*¹⁴⁹ judgment struck down a set of interdicts obtained by a senior traditional leader prohibiting meetings of certain community members in the Bakgatla ba Kgafela traditional community of Mothlabe village in North West province.

The *Pilane* judgment held that the use of interdicts by traditional leaders to ban meetings or gatherings of dissidents violates the latter's constitutional rights to freedom of expression, association and assembly. The Court delivered a clear message that the use of courts to silence dissenting voices was inappropriate and disquieting, especially in a constitutional democracy where robust engagement should be favoured over litigation wherever possible. Moreover, existing customary dispute resolution mechanisms were ignored. The Court noted with disapproval the traditional leader's litigious record and "lack of restraint" with regard to legal tactics, adding that this could be seen as an attempt to silence criticism, which should not be tolerated in law.

The judgment was received as a major legal victory not only for the Bakgatla ba Kgafela traditional community but also for traditional community members across South Africa, vindicating their constitutional freedoms in the face of the increasing abuse of chiefly power. The judgment confirmed that traditional leaders could not, in an attempt to quell criticism, suppress the rights of traditional community members' to freedom of association and expression.

However, three years on, the judgment has been all but ignored by traditional leaders and local courts. Interdicts and other court orders continue to be sought and obtained by traditional leaders to silence and restrain their critics, rather than engage in meaningful dialogue. Numerous examples can be provided as evidence of continued intimidation using legal tactics. These problems are particularly heightened in traditional communities affected by mining, as traditional leaders, who stand to benefit from deals entered into with mining companies ostensibly on behalf of their community, have much at stake when community members begin to ask questions or demand accountability with respect to those deals.

This should also be understood within South Africa's legislative and political context, which has seen the powers of traditional leaders being progressively strengthened, while ordinary traditional community members are increasingly left powerless to hold chiefly power to account. If passed, proposed legislation such as the Traditional Courts Bill and the Traditional and Khoi-San Leadership Bill would further centralize the power of senior traditional leaders and intensify the power imbalance between traditional leaders and ordinary community members.

It is in this context that we examine a specific case in the village of Ga-Chokoe, within the Mapela traditional community in Limpopo. The Mapela traditional community is host to the world's largest open-cast platinum mine, operated by Anglo American Platinum. In this case, an interdict was obtained in the context of a long-running, *bona fide* dispute over the traditional leadership of the village.

According to the custom of the village, the successor to the headperson had traditionally been appointed from the children of the first spouse of the previous headperson. However, upon the death of the headperson of the Ga-Chokoe village, it was decided that none of the children of his first wife were mature enough to be appointed. So began a long series of disputes regarding a line of acting headpersons.

The finer details of how the succession dispute played out in court do not bear relevance to the present discussion, save to say that the Applicant and Respondent share a grandfather who served as headperson of Ga-Chokoe. The Applicant, claiming to be the acting headperson approached the court on an urgent basis for an interdict against the Respondent, who in turn claimed to have

¹⁴⁹ *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC).

replaced the Applicant in the acting headperson position for, among other things, failing to consult the royal family and community members on mining-related issues.

The interim interdict was granted by the local Magistrate's Court on broad terms. It interdicted the Respondent, their colleague and "any other agent associated with them" from holding public gatherings. The interdict had a chilling effect on the usual meetings and engagements conducted within the village.

When royal family elders decided to hold a meeting with the community to discuss the headpersonship dispute, the police arrested the Respondent on contempt of court charges, merely on the accusation that the Respondent had attended the meeting.

We argue that the interdict should never have been granted. First, the granting of an interdict in these circumstances is in conflict with Constitutional Court jurisprudence, including *Pilane*, which confirms that the nature of customary law is participatory rather than exclusionary. Further, *Pilane* makes it clear that where there are *bona fide* disputes, robust engagement and meaningful dialogue should be favoured over legal tactics, as this serves to strengthen democratic practices, achieves greater accountability and openness, and respects rural citizens' fundamental rights of freedom of association, freedom of opinion and freedom to make political choices. Legal tactics such as interdicts, on the other hand, serve only to criminalise dissent.

Second, the existing dispute resolution mechanisms provided for in terms of the customary law of Ga-Chokoe, were ignored in favour of a restrictive legal remedy. In terms of the custom of the village, disputes are traditionally discussed and resolved via local forums, rather than through the courts. As set out above, the elders of the community attempted to resolve the issue through community meetings, but this process was hampered by the interdict.

Ultimately, the interdict was overturned by the Magistrate's Court, in a judgment that recognised that "[i]f the interdict is finally granted it will have the effect of preventing the respondents from attending Kgoro ya Moshate¹⁵⁰ at Ga-Chokwe where important customary issues are discussed".

Given the above context, we conclude that the circumstances in which the interdict was originally obtained, and the consequences it had for the respondents and their community, illustrate the dangers of ignoring the *Pilane* judgment. We conclude that this case, one of an increasing number of similar cases across the country, foreshadows what is to come if chiefly powers are left unchecked.

'The Locust Effect:' The consequences of structural and interpersonal violence for human security in rural KwaZulu-Natal

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In 1969, Johan Galtung gave us the terms "structural (or indirect)" and "personal (or direct) violence". In the first instance, "[t]he violence is built into the structure and shows up as unequal power and consequently as unequal life chance". The victims of such violence lack a plethora of necessary resources, basic human needs that we have come to know more generally as "capabilities", thanks to the work of Amartya Sen. The fact that these victims lack these capabilities is worsened by the fact that they also lack "the power to decide over the distribution of resources" because this power is unequally dispersed. By contrast, in the instance of personal violence, the cause and effect of the violence and harm is more directly perceivable because the perpetrator is clearly determinable.

In 2015, Gary Haugen and Victor Boutros have described the consequences of the multiple forms of violence suffered by those living in poverty as 'the locust effect'. In short, the lack of physical security suffered by poor people and their constant vulnerability to the loss or destabilisation of any material security they strive for or achieve undermine their welfare and wellbeing. In fact, this insecurity threatens and undermines any gains made by those working for economic development and the protection of essential human rights for poor and marginalised populations.

My study of Msinga, KwaZulu-Natal, demonstrates the real life experience of these theorists' observations. This paper discusses the ways in which the prevalent structural and interpersonal violence collude to undermine human security (in other words, both physical and material security) and the basic needs of ordinary poor people. In the context of the traditional justice system and the attempts of low-level local authorities to assist residents in obtaining security, we see the violence perpetrated by the structure. Traditional authorities are both victims of in/direct violence and inflictors of indirect violence through their participation in the problematic structures, even as they seek to maintain order in the context of a troubled reality.

¹⁵⁰ *Kgoro ya Moshate* is a Sepedi term and translates roughly to, *the royal compound, where village community meetings take place*.

Therefore, the present study deviates from Haugen and Boutros' comparatively simplistic analysis of who are the bullies and the vulnerable victims, which characterisation they themselves recognise is quite reductionist. Instead, it shows how such roles cannot be clearly assigned because of the nature of the history and powerful forces within the system. Put differently, whether you are looking at institutional actors or more or less ordinary individuals who leverage whatever power they have to take advantage of, exploit and oppress the poor and weak, in a context like Msinga, you must acknowledge that those same perpetrators are themselves victims of a sort. This does not make their conduct justifiable but it is important for us to acknowledge and understand the causal networks that contribute to, and perpetuate, the vulnerability of all parties – especially the most vulnerable.

The argument presented in this article is that the conflicts that come to the traditional forums in Msinga are the product of severe material, social and physical insecurity as well as a weak (and sometimes corrupt) presence of community social services. The consequence is that of wider systemic failure such as these traditional forums cannot single-handedly address.

Yet, the traditional forums too are part of the problem in that, when cases come before them, the methods of dispute management they use do not lead to long-term resolution. In fact, they often compound the conflict, if only by attempting to suppress it, as when the resolution headmen come to is telling people to forgive each other without creating space for them to be fully heard and their conflict histories and narratives thoroughly worked through.

The paper therefore provides a detailed examination of the institutional arrangements (that is, systems) – their agents and forums – that ordinary rural people turn to and depend on for assistance or relief in the final instance of continued social conflict or crisis. This leads to a focus on the gaps in institutional arrangements and social policy implementation that exist in Msinga. It also spotlights how these gaps undermine the potential for any kind of justice for Msinga's residents.

If violence, then, can be both direct (interpersonal) and indirect (structural) – often simultaneously – through this paper's emphasis we come to understand that justice can be likewise. Terms like traditional justice (which is the subject area that the Traditional Courts Bill of 2008/2012 is intended to regulate), criminal justice (presumed to be the domain, almost exclusively, of the police and particular state courts), social justice (thought to be concerned with human rights as effected both inside and outside of the courts) are widely used and accepted. All are based on the noun, justice, but refer to different forms.

The justice that is meant and intended by the legislature when it seeks to regulate 'traditional courts' through the mechanism of the Traditional Courts Bill, as drafted, is a very narrow conception thereof. It refers to access to courts that function efficiently and fairly in terms of process, as a result of which, it is assumed, the parties that come before them will obtain fair judgments that provide relief for the issues the wronged party has presented. Enforcement of those judgments is not even considered essential as the Traditional Courts Bill is virtually silent on this crucial point.

The findings in this article do not disagree with the need for the forums to which people take their concerns to function properly. That is why addressing the functional aspects of the traditional forums is an important point of intervention in order to ensure the rural people that turn to them get just outcomes. However, the empirical evidence presented decidedly refutes the idea that functional traditional forums are the primary means by which people will obtain just outcomes. In fact, I argue that the evidence shows that functional forums are inadequate to the task.

A wider system, in which all institutions relevant to people's security and well-being collaborate effectively, is essential. Moreover, social justice – through which people's basic and fundamental human needs, of which physical security is one are met – is indispensable for it is empirically proven that there are some basic human needs that, if not satisfied, will be pursued by whatever means available, including conflict-inducing ones. To address the conflict, in such instances, requires more than conflict resolution skills; it requires addressing the root need.

Mob justice in Nigeria's megacity: Social perception and policy implications

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The burning of three men accused of robbery in Ikotun a suburb of Lagos¹⁵¹, the bludgeoning to death of two suspected robbers in Badgary,¹⁵² the lynching of a suspected kidnapper in Ipaja¹⁵³, the torture of women accused of theft in Ejigbo¹⁵⁴ and the various video recordings of horror scenes on YouTube¹⁵⁵ of residents of Lagos summarily executing persons accused of crimes are collages on the canvass of mob justice in Lagos. The frequency of this practice highlights the seeming impotence of legal and security institutions to effectively stop the practice.

The 1999 Constitution of Nigeria in Section 33(1) provides that "Every person has a right to life and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria" and Section 36 of the same constitution guarantees the right to fair hearing. Also, there exists a framework of other legal and formal institutions in the state that punitively prohibits resort to violence in an attempt to remedy a grievance without recourse to the agencies saddled with the duty.

However, the effectiveness of legal guarantees is not just a matter of detailed institutional design, it is also a question of interconnected cluster of values that underpins formal institutions and the success of a law or legal policy rest seriously on extra-legal circumstances, least of which is public perception¹⁵⁶. This study therefore seeks to understand the perception of the residents of Lagos about mob justice in order to inform the best policy intervention to stop these egregious human rights violations.

Justification

Cairo, Kinshasa and Lagos are the only megacities in Africa in 2014¹⁵⁷ and Lagos, Nigeria's only megacity stands in a unique stead among these three- it is one of the three fastest growing megacities in the world¹⁵⁸.

Lagos is central to governance in Nigeria, although it covers only 0.4th of Nigeria's territorial landmass, it accounts for over 60% of industrial and commercial activities and contributes 12% of GDP as well as generating over 75% of nonoil revenues. If taken as a different country, the GDP of Lagos State which is estimated at \$91billion is higher than the GDP of 42 other countries in Africa¹⁵⁹.

Lagos has the highest crime incidence in Nigeria and its judiciary handles the highest number of cases¹⁶⁰. Any endeavour to evidentially understand the challenges its criminal justice policy system faces would go a long way in addressing the culture of impunity and bring to fore areas calling for intervention in criminal justice administration.

Research Problem

Supporters of mob justice have advanced the argument that law emanates from the people and therefore they must act as the true custodian of the law in enforcing its dictates. In doing this, enforcing the collective will of the majority becomes more expedient than niceties of legal minutia. Perpetuators of mob justice therefore seem to conceive their action as a right and a form of self-preservation flowing naturally from the ideas of popular sovereignty¹⁶¹. Another justifications adduced by the supporters of mob justice is the disconnect between criminal justice policy and societal expectation. As appositely pointed out by Harris, there is a popular perception that "criminals have more right than law abiding citizens" and that the criminal justice system is seen to protect criminals, at the expense of the crime victims¹⁶².

¹⁵¹ Nigeria News Day, July 12, 2013 (<http://nigerianewsdaily.com/national/3458-3-okada-robbers-burnt-to-death-in-lagos-jungle>)

¹⁵² <http://www.punchng.com/news/police-hoodlums-accused-of-killing-student-friend/>

¹⁵³ <http://naijagists.com/jungle-justice-at-iyana-ipaja-lagos-another-kidnapper-stoned-to-death-by-hoodlums/>

¹⁵⁴ <http://www.premiumtimesng.com/news/153800-ejigbo-women-torture-fcid-takes-lagos-police.html>

¹⁵⁵ <https://www.youtube.com/watch?v=ecAmkSIDzbU>

¹⁵⁶ Martin Krygier, Compared to What? Thoughts on law and Justice, Quadrant magazine, December 1993.

¹⁵⁷ United Nations (2014) World Urbanization Prospects: The 2014 Revision, Highlights.

¹⁵⁸ Ibid.

¹⁵⁹ Punch Newspapers, January 21, 2015, Ambode: We can double Lagos GDP.

¹⁶⁰ <http://www.nigeriapolicewatch.com/wp-content/uploads/2011/07/20091.pdf>

¹⁶¹ Kelly D (2008), Vigilantism Revisited: An Economic Analysis OF the Law Of Extra Judicial Self-help. Available from: <http://www.wcl.american.edu/journal/lawrev/47/pdf/line.pdf>

¹⁶² Harris B. (2001). As for Violent Crime that's Our Daily Bread: Vigilante Violence during South Africa's Period of Transition: Braamfontein Centre for the study of Violence and Reconciliation.

If one puts in perspective the length of time it takes to complete a criminal trial in Nigeria the theory about the disconnect between social expectation and public delivery of justice becomes apparent. It is believed that presently, it will take an average of 15 years to successfully prosecute a criminal case from High Court to the Supreme Court¹⁶³. One survey by the Nigerian Prison Service using some select states as samples showed that in a period of 6 months, some states recorded less than 3 criminal convictions¹⁶⁴.

Argument Preview

While mob justice is not unique to Nigeria, the failures of the machinery of justice to either prevent its occurrence or punish those who engage in it, have projected the anomaly into public space as acceptable and strengthened the perverse culture of impunity that bedevils the Nigerian polity. This paper seeks to explore what the perception of the residents of the megacity on what factors are actually responsible for the practice.

Panel 4B: Urban Land Occupations

Property and dignity: Understanding the occupation of vacant dwellings in Detroit and Johannesburg

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Dignity is an enduring concept that has been closely examined by scholars from different disciplines (Sensen 2011). Although there are several existing definitions, at its core dignity is the notion that people have equal worth, which gives them the right to live as autonomous beings not under the authority of another (Atuahene 2014). The progressive property movement has most effectively inserted the idea of dignity into conversations about property (Alexander et al. 2009; Rosser 2013). A body of work has since developed that comprehensively explores the nexus between property and dignity, and it is centered upon the takings doctrine.

When the state confiscates property for a public purpose and pays just compensation, this is a constitutional taking. In contrast, there is a dignity taking when a state directly or indirectly destroys or confiscates property rights from owners or occupiers who it deems to be sub persons without paying just compensation or without a legitimate public purpose (Atuahene 2014). In these instances, the taking is part of a larger strategy of dehumanization or infantilization, so state has tried to deprive individuals and communities of more than just their property, but also their dignity. When this type of taking has occurred, the remedy requires more than just mere reparations—restoration of property or appropriate compensation for any property that cannot be restored. What is required is a more robust remedy called dignity restoration—which compensates people for things taken through processes that recognize their agency and affirm their humanity (Atuahene 2014).

In an upcoming issue of *Law & Social Inquiry*, several respected socio-legal scholars have empirically examined the concepts of dignity takings and dignity restoration in wide range of cases including the forced removal of blacks during colonialism and apartheid in South Africa (Atuahene 2014), the separation of Hopi people from their sacred lands (Richland 2015), the requirement that all married women give their property to their husbands under the laws of coverture (Hartog 2015), the dispossession of Arabs in Israel (Kedar 2015), the looting, burning and destruction of African-American property during and after the Tulsa race riots (Brophy 2015), the systematic displacement of Iraqi Kurds from their ancestral lands (Albert 2015), property taken from the Loyalist after the American revolution (Hulsebosch 2015), the forced evictions in China intended to create space for its rapidly expanding cities (Pils 2015), racially restrictive covenants in the US (Rose 2015), the taking of Jewish property in France and the Netherlands during World War II (Veraart 2015), and the forfeiture of all lands as punishment for a felony or treason under the Common Law of England and the laws of the Massachusetts Bay colony (Acevedo 2015).

While existing theoretical work has thoroughly explored the connection between the taking of property and the deprivation of dignity, scholars have not yet explored how the taking of property can actually bolster rather than deplete dignity. The proposed research uses the case of squatters in Detroit and Johannesburg to examine the following research question: Under what circumstances is the illegal appropriation of space or confiscation of property dignity enhancing? Dignity transfer is the tentative name given to the phenomenon where poor and vulnerable populations negotiate property rights to preserve their dignity; and the proposed study seeks to define and deepen this new socio-legal concept.

Squatting is when a person occupies a property without the permission of the record owner, and best available estimates suggest that there are over 3.79 billion squatters worldwide (United Nations Statistics Division 2009). More importantly, squatting is an ideal

¹⁶³ Davidson I. (2013). New Legal Year Heralds Hope for Change. *Thisday Newspaper*, September 12, 2012

¹⁶⁴ Orakwe I.W. (2005). 'Killing the Nigerian Prisons through Prosecutorial Ineptitude' *The Reformer*, 2 (1): 45 – 48. Abuja: Nigerian Prisons Service

starting point to explore this research question because it is an illegal appropriation of space that often provides poor and vulnerable populations with much needed shelter and thus has the potential to bolster dignity. Additionally, Detroit and Johannesburg provide an ideal context to examine the research question because squatting is occurring at significant rates. In Detroit, best estimates suggest that there are between 6200 and 7400 people illegally occupying publicly-owned homes and buildings in Detroit (Motor City Mapping 2015) in addition to a sizable but unknown number occupying privately-owned properties. In Johannesburg, the numbers are difficult to estimate, but there are a significant number of squatters. Each individual and family who is squatting in order to survive may be performing a so-called dignity transfer, so Detroit and Johannesburg have thousands of potential data points the PI can use to understand and define this phenomenon.

The research question is worthy of sustained empirical investigation for several reasons. First, while it is important to understand how poor and vulnerable populations are victims of dignity takings, it is also important to understand how they are sometimes perpetrators of theft who have intentionally adopted risky survival strategies. All too often poverty is associated with powerlessness and victimhood while stories of agency and autonomy go untold. But, even people with minimal resources and highly constrained choices will resist powerful institutions and actors to survive, and it is important to understand the rationales and logic they employ. Second, it is important to introduce human dignity into conversations about property because law and economics has come to dominate the field and notions of efficiency often overshadow other important goals like dignity, equality, virtue and justice. Third, economic inequality in South Africa and America is staggering. South Africa has one of the highest Gini coefficients in the world; and in America, the top 0.1% of families now owns roughly the same share of wealth as the bottom 90% (Saez and Zucman 2014)—making daily survival increasingly difficult for the lower classes. With limited economic mobility and few opportunities, poor people may increasingly turn to the illegal occupation of empty or underused spaces in order to survive.

In order to understand the circumstances under which the illegal appropriation of space or confiscation of property may bestow individuals and communities with dignity, the Principle Investigator (PI) has developed, tested and finalized an effective research design through seven months of preliminary fieldwork. The proposed study will use semi-structured interviews, focus group interviews and photo elicitation interviews to systematically analyze the perspectives of the study's three target groups: 1) people who are currently or were previously squatting; 2) homeless people who have chosen not to squat; and 3) homeowners or renters who live nearby someone who is squatting.

The scholarly impact of the research will come in the form of a book, several articles, a symposium, as well as conference and faculty presentations. To ensure that the proposed research has practical impact, the PI will report the research findings through several mediums including a policy report, TV and radio appearances, public presentations, several op-eds and a short documentary film.

Property rights in a time of transition: An examination of how inner city residents in Johannesburg perceive and navigate property relations

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Johannesburg has almost since its establishment been characterized by property and infrastructural inequalities, coinciding with race and class. In the early days of the gold rush wealthy white rand-lords and mining middle classes lived in the leafy suburbs north of the city and the budgets of the fledgling municipality were largely channelled towards these residents.¹⁶⁵ Working class residents (both black and white) were confined to the cheaper and less well serviced suburbs east and south of the city, closer to the mining and industrial development. During the 1960s this urban geography was further entrenched by state policies of racial segregation coupled with the emergence of an increasingly wealthy white middle class located north of the city. By the 1970s these well-appointed and –serviced areas enjoyed living conditions similar to the richest countries and increasingly drew wealthy businesses away from the inner city.¹⁶⁶

In stark contrast to the verdant northern suburbs were the townships. Hidden behind mine dumps south of the city, places like Soweto (meaning South-Western Township) remained cramped, under-serviced, far from jobs, and entirely black and predominantly poor. By the 1980s such conditions, along with apartheid oppression more generally, resulted in a gradual migration by black people into 'grey' inner city areas such as Hillbrow, which were closer to jobs. Although black migrants to the inner city were unable to own property in these formally white inner city areas, this move coincided with the economic shift during the 1970s and 1980s away from

¹⁶⁵ K Beavon (April 2000) "Northern Johannesburg: part of the 'rainbow' or neo-apartheid city in the making?" *Mots Pluriels* no 13: <http://www.arts.uwa.edu.au/MotsPluriels/MP1300kb.html>

¹⁶⁶ A Mabin (2005) "Suburbs on the veld, modern and postmodern": http://www.wits.ac.za/mabina/suburbs_on_the_veld_mabin.pdf

mining and manufacturing towards services and finance, resulting in a gradual decamping by white capitalists to enclaves and business parks in the northern suburbs. As inner city offices and apartment blocks were abandoned, these were taken over by black new-comers to the city. However, with the exiting of white rate-payers, so investment and regulation of inner city areas declined dramatically, leading to rapid urban disinvestment, mismanagement and decay.

This occurred against the backdrop in the early-1990s of a transition to a new political dispensation. Once in power after the historic April 1994 democratic elections, the new African National Congress (ANC)-dominated government was loath to intervene to disconnect municipal services or evict the new residents of the inner city. As such, it ignored rising municipal services- and rates-related arrears, as well as the downward spiral as building after building was abandoned by their registered owners. This vacuum of formal regulation and property relations provided an opportunity for the flourishing of informal property and service-related relations in which poor people occupied spaces and redefined relationships in order to find and maintain a foothold in urban South Africa. And, notwithstanding several municipality-led urban renewal projects since 2000, many areas in Johannesburg's inner city remain dilapidated, un-maintained and unlawfully occupied.

Since the coming into force of the final Constitution in 1996, along with transformative legislation aimed to give effect to the Constitution such as the 1998 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act), unlawful occupiers are afforded a range of legal protections. These include: the right to not be evicted without an order of court made after considering all relevant circumstances,¹⁶⁷ which has been interpreted by the Constitutional Court in a range of cases to mean that occupiers who would be rendered homeless by an eviction cannot be evicted unless the state provides alternative accommodation.¹⁶⁸ Moreover, the courts have also interpreted the right to property (section 25 of the Constitution) as having to be balanced against countervailing rights including the right of unlawful occupiers to adequate housing in section 26(1) of the Constitution.¹⁶⁹ In addition, unlawful occupiers (as with anyone) also enjoy the right to not have their water and electricity services disconnected without due process and, in relation to water services, the City is obliged to provide a minimum of six kilolitres of Free Basic Water per household per month to indigent households.¹⁷⁰

Research project

In the context of deep, racialised inequality alongside progressive legislation that confers rights on unlawful occupiers of inner city buildings, we plan to undertake a qualitative research project to examine how unlawful occupiers view, navigate and redefine property rights and relations; and to explore the extent to which (if at all) housing and service-related rights enter the equation. The research will comprise semi-structured interviews with residents of inner city buildings identified by an interlocutor organisation working to advance housing and service-related rights in the inner city of Johannesburg – the Socio-Economic Rights Institute of South Africa (SERI). The SERI connection will afford a degree of trust between the residents and our research project in a context that, despite all the above-mentioned legal protections, unlawful occupiers remain vulnerable and undocumented.

The research aims to contribute towards an understanding of the impact of law and rights in contested spaces.

An urban proletariat with peasant characteristics: Land occupations and livestock raising in the City of Cape Town

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In the City of Cape Town long-term urban residents are engaged in land occupations for raising livestock--a typical peasant activity in rural South Africa. This paper is a case study of one such land occupation-- that of the Zabalaza farmers--a group of 185 households who are occupying land in the City of Cape Town to raise livestock and engage in other agricultural activities.

¹⁶⁷ Section 26(3) of the Constitution.

¹⁶⁸ See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

¹⁶⁹ See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Props 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

¹⁷⁰ Section 27(1)(b) of the Constitution provides everyone with a right to have sufficient water. And section 33 of the Constitution, along with the Promotion of Administrative Justice Act of 2000 and the Water Services Act of 1997, guarantee just administrative action including due process prior to a proposed disconnection. The Free Basic Water amount is regulated by national regulations, and electricity services are regulated by municipal by-laws and regulations.

The Puzzle:

Land occupations of this variant present us with a puzzle. The overwhelming consensus view in the literature sees South Africa as a country that has been fully proletarianized since the 1970s, and as such, as a country in which urban (and even most rural) proletarians have neither the capacity (skills) nor the desire to engage in agricultural activities (Wolpe, 1972; Burawoy, 1976; Bundy, 1972; Morris, 1972; Beinart and Delius, 2014; Cousins 2013). For the vast majority of scholars working on South Africa, an urban proletariat that has ruptured ties with rural areas is presumed to be the main agent of social struggles today, including land struggles. From this point of view, justice-based land struggles aimed at redressing historical land disposessions are to be expected as are struggles to access urban land for housing (Hendricks, 2014; du Toit and Neves, 2014; Lahiff, 2014). But demands for land for raising livestock and other agricultural pursuits--like the Zabalaza occupation--are unexpected and unexplainable.

Urban land occupations for raising livestock are especially puzzling in Cape Town, the biggest city in the Western Cape Province. For one thing, the Western Cape is the province that has experienced the longest and most extreme history of land dispossession in South Africa as well as the most complete process of proletarianization/destruction of the peasantry. Moreover, livestock-raising clashes with the efforts of the city's political and business elite to model Cape Town as a "world city" with a "high-tech service-oriented urban core" (McDonald 2008). While Cape Town's political and business elite are seeking to build a world class city, sections of the urban proletariat--by raising livestock--are involved in what might be termed the ruralization of urban space. The Zabalaza and similar land occupations thus present us with a case of contemporary class formation that is anomalous for a neoliberal "world city" in a fully proletarianized capitalist country.

The Case and the Fieldwork:

This paper seeks to contribute to the ongoing debates through a case study of the Zabalaza land occupation located on the urban edge of the City of Cape Town. The occupied farm is located in the township of Eersterivier that was initially composed of many different farms owned by black families and expanded rapidly into a residential area after the 1980's. An especially significant aspect of the area's history is that it was a place of dispossession by the state for the purpose of apartheid-era real estate development. The land occupation, which began in the mid-1980s, involves 185 households (with an additional 150 households on a waiting list). The land is primarily being used for livestock farming (raising pigs, goats, cattle, and poultry) and some limited crop production. The occupied land is 70 hectares in size and belongs to the Western Cape Provincial Department of Human Settlement (DHS), which purchased it in 2001 as part of the department's strategy to acquire land to transfer to a "land bank" to utilize for the future expansion of low-income housing in the city. Since 2009 the DHS has been attempting to evict them from the land. This type of urban land occupation has received little attention in the academic literature. In South Africa the emphasis in the literature is on urban land occupations for housing, particularly the establishment of informal settlements (shantytowns).

Drawing on fieldwork conducted between 2009 and 2014 at a land occupation site in Cape Town, this paper argues there is a "latent reserve army of peasants" in urban South Africa today that would revert to agricultural activities in the city if land were available. Put differently there is an urban proletariat with peasant characteristic constituent of the long-term tendency to reproduce a laboring class with both proletariat and peasant characteristics.

The paper is organized in three sections. The first section describes the Zabalaza farmers and argues that they are a contemporary incarnation of the long-term tendency to reproduce a laboring class with dual characteristics. In this section I also argue that the Zabalaza land occupiers are not so different from a large percentage of the population of urban Cape Town and South Africa more broadly. This has important implications for how we think about the significance of the relatively small numbers of urban residents involved in land occupations for raising livestock. To that extent that they are demographically and sociologically similar, then the land occupations that are observable today are just the tip of the iceberg in terms of potential demand for land for agriculture by urban residents.

In the next section I take up the question of what the Zabalaza case reveals about the progressive potential of urban land occupation, visible from the way in which they organize themselves shaping the micro level reorganization of society through the allocation of land, democratic decision-making and interaction with the black informal market.

In the third section I discuss how collective action by the Zabalaza farmers to defend the land occupation against the state and capital led to the emergence of what I conceptualize as a "politics of repossession". Just as the earlier migrant peasants were a radical social force in the labour struggles in the cities and land struggles in the countryside, the urban proletariat with peasant characteristics appears to be the bearers of a progressive reorganization of society in the contemporary period. Land occupations as the Zabalaza occupiers delegitimizes land dispossession and throws into sharp relief the sanctity of private property and its protection by the state enshrined in the constitution of the country. The political struggles of the Zabalaza occupiers to defend the land occupation against the state and sand mining capital can be separated into three interrelated phases of negotiations, legal

engagements and direct action. These three strategies in part were influenced by the idea that the state is seen as the heir of the democratic struggles and aspirations of subaltern classes. In contrast the state in their attempt to evict the Zabalaza occupiers employed multiple strategies that ranged from court proceedings, negotiations and extra judicial means. The unintended consequence of the state action gave further impetus to a politics of repossession. Thus the section will explore how competing understandings of the law and notions of property rights were central in shaping the struggles of the Zabalaza occupiers and the state drive to evict them from the land.

Finally, I conclude with a discussion of the implications of the case study for the existing theories and literature on the contemporary land and agrarian question as well as on social movements (both urban and rural) in South Africa.

Panel 4C: Authoritarianism & International Law

Legal pluralism and the crisis of governance in Somalia, 1950-1991

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How do political elites and those who resist them use law, including Islamic law, to achieve their goals? Answering this question has taken me to Somalia, labelled by *Foreign Policy* magazine for six years in a row as the world's most "failed state."

This work is the continuation of a journey I began with my first book to uncover what law does, and what law fails to do, in the world's most desperate environments. My first book – *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan* (2013) – was based primarily on fieldwork in Sudan. The second book (in progress) is based primarily on fieldwork in Somalia/Somaliland. These two projects are related because they investigate how three important political actors – colonial, authoritarian, and humanitarian – use law to achieve their goals. This second book departs from the first because it investigates a different national and historical context (Somalia) and because it focuses more closely on what Islamic law does and does not do for these three actors.

While my analysis is ongoing, the book explains how these three actors – for a 130-year period from the start of the British colonial administration in 1884 to the continued collapse of the Somali state in 2014 – shape their own versions of law, including Islamic law, to meet their political goals. Ultimately, my work uncovers how colonial, authoritarian, and humanitarian actors each turn to a discourse of law to promote their distinct views of tradition, modernity, and human rights in the context of a fragile or collapsing state. Its contribution, I hope, lies in detailing the uncertain, nonlinear, and unstable processes that promote different visions of a certain, linear, and stable rule of law.

The attached paper is a preliminary draft of the section of my book manuscript on Somalia's late-colonial period (1950-1960) and first generation after independence (1960-1991). It is a case of how law, including Islamic law, matters for political elites seeking to build up a postcolonial of colonialism (1950-1960), the first decade of postcolonial crisis (1960-1969), and the authoritarian administration of Mohammed Siad Barre (1969-1991) in Somalia. As in the colonial administration, in the newly independent Somali Republic *shari'a* (roughly translated as Islamic law) provides a particular form of legal power that political elites try to confront, constrain, and assert.

Preparations for Somali Independence, 1950-1960

First, starting in 1950 colonial administrators and Somalis working under them invested in legal change – including writing new laws, restructuring the colonial legal system, establishing the region's first law school, and continuing to formalize and restrict the application of Islamic law – to justify a decade-long preparation for sovereignty in 1960. The British in Somaliland expanded Quranic schools teaching Islamic legal philosophy, and the Italians in the south opened the region's first law school. And, much like in other colonies, both the British and Italians recognized *shari'a* but confined it to realm of family law.

Dealing with Legal Pluralism, 1960-1969

Second, to unify Somalia (the former Italian colony in the southern Horn of Africa) with Somaliland (the former British colony in the northern Horn of Africa), Somali leaders in the early 1960s combined the two colonies' judiciaries. In so doing, they abandoned the

British-instituted *shari'a* courts and integrated family disputes into the civil judiciary. Somalia's first democratic government also integrated Islamic law into the country's first constitution but quickly abolished Islamic courts.

Authoritarian Legality, 1969-1991

Third, after the 1969 military coup led by General Mohamed Siad Barre, the government executed religious sheikhs and other religious leaders who voiced dissent against women's rights legislation. These and related decisions helped to bring about the regime's slow decline and the Somali Republic's ultimate demise in 1991. Thus, while colonial administrators confined shari'a to realm of family law, postcolonial state political leaders largely muted – while they paradoxically harnessed – Islamic legal power.

Confronting A Multi-colonial Legal Legacy

From the end of the colonial period in 1960 until the disintegration of the Somali state in 1991, disputes over how to build a stable, modern, and functioning legal system – and over what to do with Islamic law – became a central feature of the state's relationship with its people. State actors and those seeking to limit their authority adopted an instrumental view of Islamic law, making shari'a – rather than a static or fixed sacred constraint – an expedient and malleable tool adaptable to fit the political purposes of key actors. This is Islamic legal politics – how people use, shape, and constrain Islamic law to achieve political, economic, and social goals.

To document efforts to build the Somali state through Islamic legal politics, the paper proceeds as follows. First, the paper outlines how administrators during the late colonial periods in the British Somaliland Protectorate and Somalia Italiana (1950-1960) used legal change to push the region to independence and promote a widespread sense of modernity. Second, the paper examines the first decade of the Somali Republic – the democratic period prior to Siad Barre's military coup of 1969 – which is marked by attempts to build up a state judicial system that paradoxically integrated and challenged Islamic law. Third, the paper explains how the Siad Barre regime (1969-1991) – similar to the colonial administration – sought to create its own version of a modern state built on Islam, while it confronted resistance from religious leaders carrying the mantle of Islamic law.

South Africa's Dilemma: Immunity Laws, International Obligations and the visit by Sudan's President Omar Al Bashir

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In September 2004, the Security Council passed a resolution that requested the Secretary-General to establish an international commission of inquiry to the situation in Darfur, Sudan. The UN Commission found that the government of Sudan and Janjaweed were responsible for human rights violations with a likelihood of amounting to crimes against humanity and war crimes. The Security Council referred cases of international crimes to the International Criminal Court for investigation. The latter has since issued arrest warrants against the President of Sudan, Al Bashir, and his allies. In March 2004 the Pre-Trial Chamber of the ICC issued an arrest warrant against Omar Al Bashir, an incumbent president of Sudan, for international crimes committed in the region of Darfur, Sudan. Sudan is not a state party to the Rome Statute, and the situation in Darfur was referred to the ICC by the United Nations (UN) Security Council acting in terms of article 13(b) of the Rome Statute, which serves as one of the trigger mechanisms for the jurisdiction of the ICC. The Pre-Trial Chamber also requested cooperation from states seeking the arrest and surrender of the president. As a result, the Office of the Registrar ('the Registry') of the ICC sent requests asking for cooperation from all states parties to the Rome Statute in the arrest and surrender of Omar Al Bashir pursuant to articles 89(1) and 91 of the Rome Statute.

In light of the arrest warrants issued by the ICC against the two incumbent heads of state who happen to be from Africa, the African Union ('AU') asked the Security Council to request the ICC to defer the arrest warrants for a year, as permitted in article 16 of the Rome Statute. However, the Security Council is yet to respond to such requests. In light of the non-response by the Security Council, the AU Assembly passed decisions whereby it demanded its member states not to cooperate with the ICC on the request to arrest and to surrender the persons in question. One of the reasons advanced by the AU Assembly for non-cooperation with the ICC requests for the surrender of Al Bashir is article 98(1) of the Rome Statute, which relates to the cooperation by state parties of the Rome Statute versus the immunities of the requested persons under international law. On the other hand, article 27 of the Rome Statute makes it clear that immunities for any state official are not to bar prosecutions by the ICC. There is therefore a clear tension between articles 27(2) and 98(1) of the Rome Statute when it comes to states parties' cooperation with the ICC in cases of arrests and surrenders. State parties are therefore faced with the dilemma of having to abide by the Rome Statute and to also honour their other obligations under international law as contemplated by article 98(1) of the Rome Statute.

I have argued elsewhere, when discussing Malawi's obligations to the ICC versus the AU, that Malawi was justified in not arresting Al Bashir to comply with its obligations under customary international law, and pursuant to article 98 of the Rome Statute. However, South Africa's case is different as the Constitution states that customary international law is applicable in so far as it does not conflict with national legislation and the Constitution. South Africa's legislation domesticating the Rome Statute prohibits immunities irrespective one's status including the heads of state and government.

In early January 2015, the South African government agreed to host the African Union Summit to be held in June the same year. This meant that the African States' heads of state and government and other senior officials (and representatives) would attend this Summit. Amongst those who would attend was President Al Bashir of Sudan whose arrest warrant is out to be surrendered to the International Criminal Court. As a result, the Southern African Litigation Centre approached the high court in order to ensure that South Africa abide by its international obligations and arrest President Al Bashir to surrender him to the ICC. Meanwhile, the ICC Pre-Trial Chamber also clarified South Africa's position with regard to its obligations under the Rome Statute. It held that there was no dilemma for South Africa as it is a state party to the Rome Statute (to abide by its obligations), and that the Sudanese situation was referred to by the Security Council in its resolution – which makes the resolution binding upon all states. While the government tried to delay the proceedings by asking for more time, the court made an order that President Al Bashir be not allowed to leave South Africa. It is well-known that President Al Bashir was able to leave South Africa's territory before the judgment was handed down by the court- which required South Africa to arrest and surrender President Al Bashir to the ICC.

This case necessitates an examination of the immunity laws of South Africa. South Africa has enacted at least three statutes that deal with immunities of heads of state and other senior state officials. However, the arguments before the court do not adequately address these pieces of legislation. The question I ask in this paper is whether South Africa's immunity laws are still applicable post the domestication of the Rome Statute? Is there a justification for South Africa for failing to abide by its obligations under the Rome Statute when it did not secure and arrest President Al Bashir while he visited South Africa on AU business? In other words, does the same argument I used for Malawi apply to the South African situation?

I argue that the court had no choice but to order the arrest and surrender of Al Bashir. My argument is based on the weakness of the government's arguments before the court. I am of the opinion that had there been a properly argued case based on the current immunity laws of South Africa, the court may have found in favour of the government. I will also argue that it is unclear how the bar to immunities applies. Does it apply as a defense during trial, or does it apply as a defense for pre-trial matters such as arrest? The wording of the South African statute says that the immunities may not be used as a defense during trial, and for the reduction of the sentence. Further, I will scrutinize the ICC Pre-Trial Chamber's decision on the DRC's failure to surrender President Al Bashir and the subsequent decision that clarifies the obligations of South Africa towards the ICC. The Pre-Trial Chamber has changed its stance since the Malawi decision and has relied on the binding nature of the Security Council's resolutions. I argue that this is incorrect as the said resolution does not bind all states.

Legislating Memory in Rwanda

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He who controls the past controls the future. He who controls the present controls the past.

-- George Orwell, 1984

This article is about the government of Rwanda's use of legal and extra-legal means to control memory and history in their country. The regime, to the extent it admits its actions, justifies them as necessary to maintain stability and avoid a repeat of the country's horrific 1994 genocide. But increasingly, critics claim that Rwanda's president, Paul Kagame, along with his ruling coterie, are tailoring memory and history with the aim of legitimizing their increasingly autocratic rule.

American legal scholars who focus on Rwanda tend to describe what is happening in terms of 1st Amendment values, focusing their attention on the Rwandan government's suppression of political speech. This paper takes a different approach. Borrowing from the disciplines of history, historiography, and memory studies, it argues that Rwanda's government is surpassing mere suppression of speech and is engaging in a comprehensive effort to rewrite history and reprogram its citizens' collective memory. The Rwandan government's comprehensive efforts at "memory entrepreneurship" grow more consequential and alarming as the country approaches a presidential election in 2017, one that Paul Kagame is virtually certain to win.

Uncovering and analysing the Rwandan government's sophisticated repression, in particular its reshaping of history and memory, requires an interdisciplinary approach. After introducing the general topic in Part I, Part II of the paper provides context for the reader by offering a brief overview of Rwanda with an emphasis on the history leading up to its 1994 genocide. Rwanda experts may choose to skim or skip this part.

Part III digs deeper into Rwanda's history and specifies the ways in which Rwanda's government is attempting to distort it. The section introduces helpful concepts from historiography and memory studies, then recounts two competing versions of Rwanda's history: the self-serving narrative insisted upon by Rwanda's government, and the narrative generally agreed upon by historians and other scholars. Historians' version of Rwandan history describes ongoing, dynamic interplay and contestation between and among diverse social groups and reveals that those social groups tended to coalesce around the ethnic labels Tutsi and Hutu beginning in the early-to-mid-18th century. Between then and the start of the colonial era in the late 19th and early 20th centuries, much of what today is Rwanda was ruled by an elite Tutsi monarchy that in many instances controlled and exploited the labour of its mostly Hutu subjects. Ongoing tension and contestation between the groups – tensions that could have been managed and ameliorated by wiser, less craven political leaders – were an important contributing cause to the 1994 genocide.

In contrast, the Kagame regime's preferred historical narrative posits a happy pre-colonial kingdom whose origins reached back into the mists of time. In that harmonious place, the terms Tutsi and Hutu merely referred to socio-economic positions – Tutsi described the wealthier subjects and Hutu the less well off – and they moved freely from one category to the other depending on how many cattle they had accumulated. It was not until the arrival of the European colonialists that the terms Tutsi and Hutu began to take on a sinister ethnic meaning. Employing their usual divide-and-conquer strategy, the Germans, and later the Belgians, invented ethnic rivalry and taught Hutus to hate Tutsis. The 1994 genocide was the inevitable result of this colonial manipulation. Implicit in this story is the assertion that the current regime should return the country to its natural, pre-colonial status when ethnicity did not exist (thus the virtual ban on employing the terms Tutsi and Hutu in contemporary social discourse) and a wise and benevolent leader (Paul Kagame?) guided his people.

Part IV of the paper describes the comprehensive legal and extra-legal methods Rwanda's government uses to enforce its ahistorical narrative. The methods include the passage and aggressive enforcement of sweepingly vague genocide denial laws. The way these laws are defined and applied, almost any expression or act that questions the government's policies or diverges from its approved historical narrative is subject to harsh punishment. But the methods for controlling memory and history go far beyond mere squelching of objectionable expression. Among other approaches, the government silences the press, stymies academic inquiry, infiltrates and muffles civil society, strictly controls all memorialization concerning the genocide, and subjects many of its citizens to "reeducation camps" that inculcate the approved narrative.

Part V of the paper concludes by positing that the Rwandan government's efforts to control history and memory are a symptom of creeping dictatorship. Critics must acknowledge that strong leadership is needed in a country that suffered a horrific genocide less than a generation ago. Critics also should not ignore the fact that the international community, including the United States, bears significant moral responsibility for the 1994 genocide, given that we stood by – and even exercised our political influence to prevent other countries from intervening – while the horrific killing intensified. Finally, critics should recognize that Rwanda has made enormous social and economic progress since 1994, all under Paul Kagame's leadership (although many allege that Rwanda's economic miracle has been subsidized by its illegal exploitation of Congo's mineral resources). Ultimately, however, in spite of the progress Rwanda has made, this paper concludes that its government's efforts to control memory and history are geared more toward maintaining power than maintaining peace.

Panel 5A: Socio-Economic Rights

The judicial enforcement of economic, social and cultural rights in Africa: Is it a case of different approaches same results or same approach different results

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One of the fastest growing areas of international human rights law is in the area of the protection and realisation of economic, social and cultural rights (ESCRs). This has been reflected in the proliferation of international and regional instruments protecting various categories of ESCRs and in some cases adapting these to particular groups such as women, children and persons living with disabilities, among others. It could be argued that with these developments, the controversies surrounding the justiciability of ESCRs have been overcome. The Optional Protocol completes the justiciability of ESCR at the international level by giving the UN Committee on Economic, Social and Cultural Rights powers to adjudicate over complaints alleging violation of the Covenant rights by states parties. In spite of this however, the protection of ESCRs and their judicial enforcement at domestic levels has not uniformly been asserted. It should be noted that international human rights law does not prescribe the method of protection that should be used in order to give effect to ESCRs. For instance, with respect to the ESCRs in the ICESCR, Committee on Economic, Social and Cultural Rights has indicated that the Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant.

The practice of countries shows that different domestic jurisdictions are at different levels and have taken different approaches in giving effect to the ESCR in the ICESCR. The approaches oscillate on a spectrum of outright rejection on one end and full justiciability on the other. The approaches adopted to give effect to ESCRs in domestic legal systems too have varied. There are countries which have given ESCRs a place in their Constitutions as fully justiciable rights enforceable on the same basis as the civil and political rights. One could argue that this is the most ideal way of giving effect to the rights. This has been described as the direct protection of economic and social rights as justiciable subjective rights. On the African Continent, examples of these countries include South Africa and Kenya, the latter being the new kid on the block. Yet, in reality, even these countries are still facing some challenges in fully realising the rights. Along the spectrum are jurisdictions which have selectively protected the rights by including only a few rights as fully justiciable in their bills of rights. In some of these countries, the bulk of the rights are protected in a "non-justiciable" way as part of national objectives/directive principles of state policy. In some countries, the rights, or elements of these, are purely protected as part of the national objectives. Yet in others, the rights or elements thereof do not appear anywhere in the Constitution but have in some cases appeared in ordinary statutory law.

What is interesting though is that ESCR litigation and adjudication is happening in all jurisdictions, irrespective of the place of the rights in the national legal system. Resort to litigation has among others resulted in the increasing adoption of litigation as a strategy to fight poverty. The outcomes of this litigation though have varied; it has been characterised with successes and failures alike, and yet across jurisdictions with different conceptual approaches. Another interesting happen as jurisprudence in this area grows, a trend is emerging characterised mainly by judicial approaches with courts becoming more inclined to using human rights based approaches in adjudication. This has among others arisen from the trans-boundary judicial dialogue which is happening on the African continent, driven mainly by jurisprudence being churned by the South African Constitutional Court. This jurisprudence has even influenced constitutional review processes in some parts of the Continent, which has resulted into greater protection of ESCRs in some countries.

It is on the basis of the above that the proposed paper will review the different approaches which different jurisdictions have taken, focusing particularly on approaches adopted by African jurisdictions. Countries to be reviewed include South Africa, Kenya, Uganda, Zimbabwe, Nigeria, Malawi and Zambia. The paper will show case the different judicial approaches used in these countries and how whether these have been effective in enforcing ESCRs. It will be illustrated that the approach adopted is dictated by the legal framework, including the place of ESCRs in the constitution and the powers accorded to judicial institutions. The paper will however show that the legal framework notwithstanding, there are creative ways of enforcing ESCRs, meaning, different approaches can be used with the same results.

Normal rights, just new

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Socio-economic rights, or at least socio-economic interests, are widely enforced by courts around the world, and are starting to matter increasingly in African practice. This paper, learning from the experience thus far, considers how some of the categories familiar from these debates have turned out to be misleading. The paper uses both a comparative approach and a functional one to challenge some traditional tenets that, it argues, have served to obscure reality.

The first lesson, as a starting point, is that if courts are willing and able to enforce socio-economic interests, they will do so with whatever legal tools are at their disposal. Thus Indian courts do far more in relation to socio-economic interests than Japanese courts do, though the latter are armed with justiciable socio-economic rights and the former are not (bar the recently added right to education). Ireland, with the same directive principles as India, does less than Germany, with something similar, or Canada, with nothing socio-economic at all.

This first lesson may seem trite enough, but it is an important step towards the second lesson, because it encourages us to look at the substance of what courts are doing. For instance, if our enquiry is about the justiciability of socio-economic rights, we will naturally take our sample to be the set of systems that have socio-economic rights in the text. But if we are interested in what courts are able to do to enforce socio-economic interests, we will not want to confine the sample that way – we will be more interested in Canada than in Japan. Similarly, if our enquiry is about whether courts can enforce socio-economic rights, we will bias our sample if we look only at the more socio-economically deprived countries in which textual rights and debates about them disproportionately occur. Socio-economic rights debates often do not look at Germany, for example, partly because Germany does not have fully-fledged socio-economic rights in the text (the first sort of sample bias), and also, it seems, because German is a rich system in which judicial enforcement of socio-economic rights or interests is not associated with the sort of large-scale anti-poverty concerns of these debates.

The reason this is a mistake is the paper's second lesson. What examples from the world's more established welfare states illustrate is how eminently justiciable socio-economic interests can be. A mass of judicial socio-economic enforcement occurs in these states. It is just mostly done (a) in terms of other rights, and (b) in relation to already existing and largely functioning government programs: the adjudication of claims against government programs usually framed in terms of discrimination or administrative law. This even happens in systems that do contain textual socio-economic rights, because the controversy surrounding these rights means that litigants are often well-advised to frame claims in terms of more traditional rights if they can, and when we are dealing with these more modest types of claims, that will usually be possible.

The result is that the parts of socio-economic interest enforcement that look most like traditional judicial activity have been routinely excluded from the sample of cases used to assess the justiciability of socio-economic rights. Looking only at whether socio-economic rights can provide food in India or medicine in Brazil means assessing these rights only in terms of some of the hardest kinds of social change litigation, or indeed some of the toughest challenges for government action anywhere in the world. It is no surprise that socio-economic rights often seem less justiciable. We have sharply biased the sample that way.

The paper's final lesson responds the natural objection, that this does not rebut the challenges that really do sometimes dog socio-economic rights enforcement. It is quite true that these challenges are real. But once we see how we are biasing the sample, we can also see something else. The challenges often associated with socio-economic rights are the challenges with using courts to bring about any large-scale social change or deal with any intricate policy problems. Those are hard in the context of any right. Just as there is such a thing as routine socio-economic rights enforcement, so there is such a thing as thoroughly non-routine civil-political rights enforcement, that also implicates large-scale social change or intricate policy problems. (The long history of the US 14th Amendment may be the most richly documented example, but examples are everywhere). When this happens, it too raises large problems for courts, and those problems, the paper argues, are actually very similar to the ones in socio-economic rights debates.

Thus the paper's final lesson. The meaningful distinction, much of the time, is not between socio-economic and civil-political rights, though this distinction remains in constant use. It is about when courts are asked to do a great deal, and when they are asked to do little; when rights are relatively settled and associated with existing infrastructure for their vindication, and when they are not. This variable, which I call newness, is the key consideration, cutting across existing categories and arguments. It shows that sceptics have a point, just not the one they usually think they are making. Supporters' arguments that socio-economic rights must be enforced like other rights are too simple: to the extent that the socio-economic right displays substantial newness, asking for it to be enforced like a settled right is really to ask much more of the court. On the other hand, to the extent that a socio-economic claim does not implicate newness, there is nothing specially different or challenging about its judicial enforcement. We should assess rights claims

of a like degree of newness the same, whatever the right. If we do, we may need to re-calibrate our assumptions: enforcing a very new claim in terms of the eminently traditional equality right, such as equality for non-human animals for example, is likely a more formidable and controversial judicial prospect than merely getting houses built.

The late 19th century US distinction was between civil-political rights, and social rights, of which marriage was seen as an example. It too was really a distinction of newness, between rights whose judicial enforcement society was variably ready to accept in the turbulent wake of the Civil War. That changed – newness is a contingent property of the relationship between a right and a society, and can change and be changed by public activity – and so today that distinction is a historical curiosity. If an analogous political story unfolds – as it seems to be with the rise of welfare states – the same will happen to the distinction between civil-political and socio-economic rights. In the meanwhile, we should use it with care, or better still, giving its limited purchase on what matters, drop it entirely.

In the shade of Grootboom

Steve Kahanovitz, Heinz Klug, Shéan Rippenaar, Legal Resources Centre/University of Wisconsin Law School/University of the Western Cape

The Constitutional Court's decision in the Grootboom housing case is recognized as a landmark decision in the recognition of socio-economic rights in South Africa and around the globe. Despite this iconic status the understanding of the decision varies, including claims on the one hand that it recognizes an individual right to housing, while on the other hand there is the acknowledgement that the decision merely requires the government to produce a policy to address emergency housing needs. Our broader project seeks to place the Grootboom decision in a broader context, one that recognizes that it emerged from a long history of struggle against apartheid forced removals and for housing in the Western Cape as well as an understanding that the struggle for housing continues to be negotiated in the shade of the Grootboom decision. This is an arena in which different levels of government and private interests frame their strategies so as to achieve their goals within a context in which post-apartheid legislation (PIE) and its interpretation in the courts has placed an effective obstacle on the path to any legal eviction of occupiers while a continuing housing shortage and the structure of segregated cities continues to frame housing policies across South Africa.

This project is bounded by its focus on housing in the Western Cape and is rooted in the history of popular and legal struggles against forced removals as well as the apartheid labour preference and pass law policies that restricted African urbanization in the region. The project traces the legal cases brought by the Legal Resources Center (LRC) office in Cape Town over the last forty odd years and uses the data contained in the files of the LRC to explore how the legal strategies and interests of clients have shaped the right to housing over this period. Our proposed paper to be presented at the LSA/UCT workshop in December 2016 will highlight two aspects of this broader project. First, it will argue that one way to explore the emergence of a right to housing in South Africa is to identify the different points of entry into litigation that frame legal strategies. For example in the Joe Slovo case the point of entry was to challenge the National Minister of Human Settlements, Lindiwe Sisulu's jurisdiction – based on a land availability agreement. In the Barsdale case Transnet was horrified that people were living on the edge of the suburban railway line leading to repeated accidents in which pedestrians, often small children, were killed by passing trains. At the same time Transnet felt restricted by Chapter 2 of the Constitution – defining intergovernmental relations – which prevented it from bringing suite against the other government entities responsible for housing so Transnet brought suite to evict the 6000 people living on the side of the railway lines on Transnet property and served papers on the Legal Resources Center, Human Rights Commission and the community, knowing that it would force the responsible government institutions to the table. Another point of entry into litigation was created after the adoption of national legislation designed to prevent illegal evictions. The result of PIE and its interpretation by the judiciary is that before the party in legal possession of property may serve a notice for eviction they need to go to a judge to get permission to serve an eviction notice. At the same time they are required by the court to notify local government and other parties, such as non-government organizations and the Legal Resources Center. The outcome has been greater judicial management of the process.

Second, the paper will explore the relationship between negotiated settlements and the recognition of legal rights. For example, in the case of the Wallerstein community, which was the site of the initial Grootboom litigation, the different parties are now into their tenth round of negotiations over the development of housing for the community. The paper explores whether the positive right to housing included in the 1996 Constitution and recognized in Grootboom is in practice being defined and driven by eviction cases. This process of definition is evolving through the creation of different procedural protections contained in the PIE statute and developed in case law from Mhamba to Changing Tide. As these cases continue through different rounds of negotiation so the relationship between court decisions – such as the order allowing for eviction in the Joe Slovo case – and the factual conditions shift. What might seem like a viable solution based on a court order might, once the costs of implementation are brought to light,

lead to complete reorientation of the case. In the case of Joe Slovo which seemed like a court ordered solution – allowing eviction but requiring temporary accommodation and the inclusion of a certain percentage of former residents in the new development – resulted in an about face and a decision to explore in situ upgrading which was the communities initial demand. This outcome is however not premised merely on costs but also on a number of other issues, including the nature of judicial management of the cases, significance of who the opposing party is at each stage – which political party, the leadership and any subsequent political changes – and the capacity of the community and its representatives to remain united and engaged. None of these conditions are preordained or stable yet they seem to be having an important impact on the evolution of the relationship between positive and negative dimensions of the right to housing.

In conclusion the paper develops the argument that evictions and the history of resistance and litigation around evictions has been the true driver of the development of a positive housing right in the shadow of the broader constitutional protection of a socio-economic right to housing. The paper develops this argument by exploring the relationship between the procedure and substance of legal practice and the creation and enforcement of rights, not merely in formal legal proceedings but in relationships with clients and the relevant opposing parties, from government officials and politicians to tensions within communities and among different groups of claimants. The paper explores this complex matrix to clarify the different aspects of the right and the effect of these influences on its development.

Justiciability of socio-economic rights in Nigeria: Lessons from South Africa and India

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The Constitution of the Federal Republic of Nigeria, 1999 provided for socio-economic rights in Chapter two as Fundamental Objectives and Principles but the rights enshrined in the Constitution were not justiciable as they represent only principles and goals of the government.

The provisions in this Chapter were largely devoted to socio-economic rights as provided in the Covenant on Socio-Economic rights and detailing the obligations of the Federal Government of Nigeria on issues of health, education, economic prosperity, employment of citizens, environment and social security. The Constitution curiously provided that citizens will not have right to question the denial of such rights before any court in Nigeria. The government of Nigeria has consistently hide on the economic downturn as reason for not providing the good things of life for the citizens in spite of glaring wastes that government use the money realised on. This is coupled with monumental corruption that is engaged in by public servants, political office holders and business people which corruption is still flaunted.

The Judiciary has consistently held that since the rights are not justiciable, they refused to uphold the rights. At the level of the judiciary since the decision in the Archbishop Olunmi Okogie V. Attorney General of Lagos State where the Reverend gentleman questioned the propriety of the Lagos State government on the provision of Education for the citizens, the court held that by virtue of the Constitutional provision the right is not justiciable. In the celebrated Balogun's case, the young girl who had more marks than her counterparts from other parts of Nigeria but was not admitted into the Unity Schools sued the government but unfortunately the same excuse of non-justiciability was used to knock off the case. However, in the case of Gani Fawehinmi V. Minister of Finance where the lawyer challenged the payment of the Minister in foreign currency and based on his argument that as a citizen of Nigeria, tax payer and Senior Advocate of Nigeria his locus standi was upheld and the matter determined.

The judiciary may have to use the provisions of United Nations Convention on Social Economic and Cultural Rights, African Charter on Human and Peoples Rights, Economic Community of West African States Protocol to give basis for its activism and justifiably too. This will not be completely a new approach as the Supreme Court evoked the provisions of the African Charter on Human and Peoples Rights to give Late Chief Gani Fawehinmi his rights on the breach by the military government and the court stated unequivocally that such laws are in a class of its own and that Nigeria as a signatory to such International legal instruments must strictly comply with the provisions.

The civil society in Nigeria have not done enough to promote these rights and the rights remained impotent and unavailable to the Nigerian citizens. One would have expected that the civil society organizations will take the bull by the horn and promote Public Interest Litigation such that all the issues affecting Nigerian citizens from any part of the country would be championed in such a way that the courts will be left with no option than to accede to the requests made through such cases. It appears that the civil society organization resigned themselves to the status quo and belief no headway can be made from the courts.

Contrary to the conservative and restraint attitude of the Nigerian courts, the Judiciary in South Africa and India faced with similar circumstances have taken the bull by the horn through judicial activism and consequently enforced the socio-economic rights of their citizens. This paper will therefore analyse the trajectory of socio-economic rights in Nigeria, the attitude of the Nigerian courts which is largely conservative and the paper will argue for judicial activism. This will mean that the Nigerian Judiciary will have to be more relaxed on the issue of *Locus Standi* as well as use the justice question based on the clear and unequivocal provision of Section 6(6)(b) of the Constitution which enjoined resolution of disputes without putting any form of limitation. The courts must use expansive interpretative model to accommodate such cases before it.

On the part of the legislature, there is need for the legislative arm to also look at the need to further alter the Constitution and made the provisions justiciable. The legislature must take this stand in order to confirm its essence as a law making body that has the interest of the citizens at heart. The legislature can as an interim measure make budgetary provisions for such socio-economic rights such that the executive will no longer have an excuse on funding. This proactive step will also be a way to exonerate the legislature from the executive that will normally provide excuse on budget.

The non challant disposition of the Executive as well as the docility of the civil society all culminated in the present state of affairs in contradistinction to the judicial activism of the South African and Indian Courts which have raised the bar of socio-economic rights coupled with the investment in Public Interest Litigation in both jurisdictions and how that can positively impact on the Nigerian State.

The South African Constitutional Court has blazed the trail in Africa on issues of health, education and environment as socio-economic rights such that if the model is applied by the Nigerian courts a lot of things will change and the socio-economic rights will be given a pride of place when such rights are litigated upon successfully.

The paper will conclude by making recommendations on the need to further alter the Constitution of Nigeria by advocating for the amendment on the provision of non-justiciability and also making the issues of health, education, employment and environment fundamental rights.

It is also the part of the recommendation of the paper that the legal profession must brace up and provide a basis for the courts to act on the socio-economic rights by using International legal instruments as basis for the cases filed under this regime.

Panel 5B: Intellectual Property and Indigenous Knowledge

Sui generis legislation for the protection of traditional knowledge in South Africa: An opportunity lost (and found)?¹⁷¹

Caroline Ncube, University of Cape Town, Faculty of Law

This paper discusses South Africa's attempts to protect traditional knowledge (TK) over the last several years. These attempts have encompassed the following four major developments. First, the Indigenous Knowledge Systems (IKS) Policy was adopted by Cabinet in November 2004. Secondly, the enactment of amendments to Intellectual Property (IP) laws, through the Patent Amendment Act of 2005 and the IP Laws Amendment Act of 2013. The latter amendment act has not yet entered into force. Thirdly, an alternative to the latter legislation was proffered in the form of a private member's bill on the protection of TK in 2013, which was ultimately rejected by parliament at the committee stage. This development seemed to mark the loss of any opportunity to craft *sui generis* protection. However, this opportunity seemed to have been regained through the fourth major development, namely the publication of a draft bill providing for *sui generis* protection in March 2015. However, by the time a revised version of the bill was introduced to parliament in April 2016, the opportunity was vulnerable again as the wording of the bill, gave primacy to IP protection. These twists and turns in domestic developments are borne out of the complex and contested issue of how to best protect TK. The paper sets out each development in some detail and weighs in on the debate on the suitability of IP protection for TK.

The paper notes that South Africa is not alone in her grappling for solutions. Whilst these national developments were playing out, other efforts were being made at sub-regional, continental and global levels. Sub-regionally, the African Regional Intellectual Property Organisation (ARIPO) adopted the *Swapkomund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* and published a *Policy Framework on Access and Benefit Sharing Arising from the Use of Genetic Resources in the ARIPO*

¹⁷¹ Published in Caroline B Ncube and Elmién WJ Du Plessis (eds) *Indigenous Knowledge & Intellectual Property* (2016) Juta pp 29 - 47

Member States: A Guide for ARIPO Member States (2016). Continentally, the African Union prepared a *Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (2000). Efforts at implementing this Model Law by African states include the Southern African Development Community (SADC)'s *Nyanga Guidelines for developing principles for sui generis, national policies and legislation for intellectual property protection that emphasise community, farmers and breeders rights* (2000). Globally, the World IP Organisation (WIPO)'s Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore (IGC) is working to craft a binding text that provides for *sui generis* protection to protect TK.

Based on its consideration of the various national and international developments, the paper argues that IP is ill-suited to protect TK for a variety of reasons such as how the usual communal creative process does not meet typical IP protection eligibility criteria. It recommends that a *sui generis* approach that has better resonance with traditional knowledge governance norms would be the more appropriate form of protection.

Repairing the *Zambian Plant Breeder's Rights Act*: A Case for the inclusion of small scale farmers in the development of sustainable agriculture in Zambia

Chanda Tembo, University of Zambia, School of Law

Sustained and reliable access to adequate food in Zambia remains a significant challenge. New seed technologies provide the key to sustainable agricultural intensification required for securing the national food supply system. However, increased privatisation of plant genetic resources place restrictions on the availability and use of new plant varieties that threaten the availability and transmission of low cost, good quality seeds to small scale farmers. The enactment of the *Plant Breeder's Rights Act*, No. 18 of 2007 in compliance with Zambia's obligation under Article 27(3)(b) of the TRIPS Agreement creates the potential for further obstacles to ensuring timely access to good quality seeds at a price affordable to small scale farmers. However, this is not to deny that intellectual property protection for new plant varieties remains a potentially important tool for encouraging both public and private innovation and investment in the development of new seed technologies as well as the transmission of these technologies to farmers, particularly small scale farmers as primary food producers, in Zambia. This paper recognises that plant variety protection provides opportunities for innovating, introducing, transmitting and disseminating new seed technologies to farmers in Zambia.

This paper demonstrates that the *Zambian Plant Breeders Rights Act* establishes an unsuitable institutional design for a plant variety protection regime that has excluded small scale farmers in Zambia by failing to create a transmission mechanism for low cost good quality seeds for these farmers. But rather than bemoaning the advent of plant breeder's rights in Zambia this paper looks at how the institutional design for the plant variety protection regime under the *Zambian Plant Breeder's Rights Act* can be repaired to establish a more sustainable plant variety protection regime that is inclusive and capable of facilitating local and public seed innovation and the creation of a transmission mechanism for low cost good quality seeds to small scale farmers in Zambia. Accordingly this paper argues that a more permissive approach to the interpretation of Article 27(3)(b) of the TRIPS can assist Zambia repair the *Zambian Plant Breeders Rights Act*.

In so doing this paper is underpinned by a doctrinal approach and provides a critique of the institutional design of the *Zambian PVP model*, a model that is wholly transplanted from the *European International Union for the Protection of New Varieties of Plants (UPOV) model* of 1991. In addition this paper employs the concept of sustainable agriculture as its theoretical foundation for two key reasons. First the paper employs the concept of sustainable agriculture as a lens through which to re-balance, in the context of Zambia, the competing and conflicting policy objectives for protecting plant varieties. Secondly, the concept of sustainable agriculture provides the theoretical foundations for proposing policy and legislative reform to the *Zambian Plant Breeders Right Act*. What is significant is that key findings suggest that for the context of least developed countries such as Zambia, developing sustainable legal institutions will require norm setting at national level to implement TRIPS obligations that takes into account factors such as the function that plant variety protection is to play in an economy; existing seed systems; farming systems and local social economic conditions. Also it was found that balancing the objectives for protecting plant variety protection will also require the development of local capacity of policy makers in intellectual property policy formulation to enable policy makers to tailor and adapt *sui generis* intellectual property rights such as plant variety protection, using TRIPS flexibilities, to fit local contexts and needs.

From this starting point this paper looks at what amendments are necessary to rebalance the public policy objectives within the Act, in particular, with a view to facilitating: access to; transmission; and use of new seed technologies relating to staple food crops. The paper demonstrates that Zambia has failed to utilise TRIPS flexibilities in the design of its legislation and that the creation of a new breeders' exemption would mark an important start in creating a plant breeder's rights system that is fit for Zambia's needs.

Intellectual property systems for developing countries

Gregory Mandel, Temple University, Beasley School of Law

Most international intellectual property debates fail to seriously consider the fundamental question of how to optimize the environment for innovation, focusing instead on whether a particular policy benefits or harms a particular country. The cost of this misplaced focus is significant as states fight bitterly over how to divide fixed benefits, rather than seeking to improve social welfare through greater innovation. This missed opportunity is not a surprise, however, given the difficulty of trying to identify which intellectual property regimes will support greater innovation. Innovation is a highly complex cognitive and social phenomenon involving significant uncertainty, varied creative and motivational influences, and multiple spill over and feedback dynamics. Layered on top of the social phenomena of innovation is the complicated legal system of intellectual property law, muddying the analysis even further. Determining the relationship between intellectual property law and innovation is hard to parse and often impossible to decipher directly.

This article makes three sequential contributions concerning intellectual property systems for developing countries. First, a common trope in many international intellectual property debates is that stronger intellectual property regimes will promote greater innovation. Such arguments typically rely on traditional law and economics reasoning and they have been criticized on multiple grounds, including for failing to consider the distributional effects of innovation and ignoring cultural differences. This article adds to the body of critique, but does so using law and economics' own methodology to show that, even on its own terms, claims that stronger intellectual property rights necessarily lead to greater net innovation incentives are simply incorrect. Optimizing the net incentives to innovate provided by intellectual property law requires balancing the benefit of the incentives that intellectual property law provides against the costs of exclusivity produced by those very same laws. Maximalist approaches generally ignore the exclusivity costs of intellectual property law, and therefore fail to take their full effects into account. Once the exclusivity costs of intellectual property laws are considered, stronger intellectual property laws do not necessarily lead to greater innovation.

Second, the Article develops an empirical approach to intellectual property law and innovation that leverages international trade data in an effort to identify indirectly which intellectual property regimes are more likely to provide greater net incentives to innovate globally. This approach examines a country's trade balance in high-innovation goods to indicate the country's likely preferences for intellectual property rights regimes. The analysis examines thirteen countries at different stages of economic development, including South Africa. In short, countries that export more innovation products than they consume tend to favour strong intellectual property rights regimes so as to reap the greatest rents from others, while countries that import more innovation products than they produce favour weaker intellectual property laws so as to take advantage of innovation by others. Neither type of country will favour intellectual property regimes that maximize global incentives to innovate. Countries that happen to produce and consume relatively equivalent value from high-innovation goods, on the other hand, will tend to have self-interested incentives for an intellectual property system that supports the greatest innovation possible. These results help clarify why maximalist intellectual property systems are not beneficial for global innovation generally nor developing countries individually.

Third, the Article explores what the trade data results mean for the course of intellectual property law and innovation in developing countries. The findings underscore that the relationship between intellectual property systems and development is highly context dependent. As many African countries stand on a threshold of development, trade balance data can be utilized to help identify which intellectual property regimes may provide the most beneficial domestic innovation strategy. In addition, the approach used here can operate dynamically to offer feedback on how changing course on intellectual property rights can be advantageous in a rapidly evolving economy.

Panel 6A: Mining & Extractives

The effects of the politics of development for benefit sharing with mine communities in South Africa

Anri Heyns, University of Cape Town, Mineral Law in Africa

Generally, it is not questioned whether economic and human development is worth pursuing, as many have benefitted from generous development initiatives. As instrument and an ideal in itself, development has become a globalised solution to poverty. Due to its apparent political and ideological neutrality, it is regarded as the natural path to be followed by any society in pursuit of overcoming poverty, economic growth and human freedom.

Whereas nation states are mandated in terms of legal instruments to promote and respect the right of development of its citizens, multinational corporations are also expected to contribute to development. Mining companies, for instance, make amends for their historic exploitative operations by contributing to the development of the areas in which they operate. In South Africa, where mining has been branded by the Truth and Reconciliation Commission as the “blueprint for ‘grand apartheid’”, poverty and inequality in mining areas are addressed by the socio-economic empowerment measures provided for by the Mining Charter and the Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”). One of these empowerment measures tasks a mining company to put in place projects that would contribute meaningfully to the development of the mine community in which the mine company operates.

The idea of development was conceived in the Western world during the second half of the 20th century as a means to address poverty after the Second World War and as a result of colonialisation. The concept has its origins in the thoughts of Western economists and lawyers, and has therefore been associated with neo-classical and neo-liberal theory. These theories ascribe certain significance to institutions such as the economic market and the law, which institutions play a decisive role in the allocation of resources and therefore poverty alleviation.

The post-war period coincided with great economic growth, but the world has changed since then and levels of economic growth have stagnated. Development is critiqued for not achieving its goals and for merely becoming a means of measuring or describing different regions in the world. The concept is further critiqued for perpetuating an idea of inferiority, for being “riddled with paradoxes” and “contested hypotheses”, and for constituting a new form of domination.

The purpose of this paper is not to dismiss the development project because of its association with neo-classicism and neo-liberalism, but rather to expose the subjectivity of the concept that is development. This subjectivity undermines the assumption that development is natural and ideologically neutral, therefore providing an opportunity to challenge the idea of development as a means to address poverty and other past injustices. By considering deconstructionist and post-modernist critiques of the development project it will be shown how the development project frames both the problems and solutions regarding development in a manner that requires Western intervention. The purpose is therefore in the first instance to acknowledge the politics of development, or the underlying power relations and ideological motivations for development. These aspects will have consequences for how development is conceptualised by lawmakers and accordingly also for the relationship between those tasked to develop and those earmarked for development.

The latter mentioned relationship can be compared with the relationship between a mine company and mine communities in the area in which the company operates. In South Africa, this relationship has historically been fraught with contention due to the exploitation of black labour and land dispossession. Incidents such as the Marikana shootings in 2012, show that the relationship has still not been mended and suggests that mine communities want more done to address their poverty.

It is in this sense that sharing the benefits of mining becomes relevant. The term “benefit sharing” for the purposes of this paper refers to measures utilized by mine companies to share the profits from mining with those affected by mining. These measures should ultimately make up for the impacts of mining, both current and historical. The empowerment provisions of the Mining Charter, such as mine community development, are regarded as measures to share the benefits of mining in South Africa for the purposes of this paper. Benefit sharing and development are therefore regarded as part and parcel of a globalized solution to poverty.

The purpose of this paper in the second instance is to determine, by assessing the Mining Charter, whether the politics of development affect benefit sharing in mining in South Africa. This will be determined by considering the “empowerment” perspective from which the Mining Charter operates, which, as will be argued, has also been influenced by global development rhetoric. If it is argued that development theory still largely reflects the views of the developed world, the question can also be raised whether the policy behind development initiatives in mining in South Africa is biased towards mine companies, or even specific types of

communities. It can therefore be argued that the politics of development will also become the politics of benefit sharing. The question should then be asked to which extent the politics of benefits sharing affect the relationship between the mine company and mine communities; especially if one of the objectives of benefits sharing is to address the historically unequal relationship.

These questions will be considered in the light thereof that the minerals of South Africa ought to be held for the benefit of all South Africans in terms of the MPRDA. The Mining Charter, however, identifies specific beneficiaries of the mentioned benefit sharing mechanisms. Will the politics of development or benefit sharing therefore affect how the law makes this differentiation? In other words, will the underlying power relations and world view of the development project translate into how the beneficiaries of development are described?

The paper will address these issues from a legal perspective and will therefore focus on the relationship between the law and development. Since development primarily addresses poverty, the relationship between the law and poverty will also be considered. It will be argued that poverty represents an injustice and that any approach to alleviate poverty, such as development, should be able to restore justice.

To blame the politics of development for all problems arising from the relationship between mine companies and mine communities, will oversimplify the matter. If, however, development is accepted as a solution to poverty and inequality without investigating and acknowledging the worldview development represents, the perception of mine communities that benefit sharing by mine companies is insufficient, will persist.

Water pollution: A legacy of mining and its implications for communities

Bernard Kengni, University of Cape Town, Mineral Law in Africa

Most often when one thinks of mining, he thinks of wealth. Like many countries around the world, South Africa has continuously relied heavily on mining activities to generate wealth intended to improve economic development, infrastructure and provide employment. However, there is the bad side of mining that is certainly not known to everyone. That is its damaging impacts on the environment.

It is time that the impact of mining is seen by all beyond its economic benefits, by focusing on the role of mining in environmental degradation, specifically water pollution and its impacts on vulnerable communities. Sustainable mining should also be given better attention, especially by the law which can and should create a balance between the impacts of mining – both positive and negative.

The more than 100 years of ongoing mining activities in South Africa, indicate that as long as new mines have been opened, older ones have been closed. As a result, the environment is repeatedly affected, causing a range of undesirable effects such as water pollution which has a negative effect on local communities.

Based on the above, it is obvious that, though mining can contribute to countries' economies and to the wellbeing of communities through the creation of jobs as well as the development of various infrastructures, it equally has the potential to adversely affect the environment.

Vast regions of South Africa and the geographic isolation of many of the State's communities results in serious challenges as a result of water pollution caused by mining activities in certain regions. A major concern for these communities is the lack of sufficient access to clean water resources enjoyed by other mine-free areas and their city counterparts in particular. In particular, water that is safe for human consumption, farming and other uses that have the potential to contribute to their wellbeing.

The Case of Communities in and Around the Highveld of the Mpumalanga Province

The Highveld is the biggest and most economic part of the Mpumalanga Province (Previously called Witbank). The most mined mineral in the Highveld is coal whose mining began in Witbank as far back as 1868, but large scale coal mining only began after 1886, following the discovery of gold in the Witwatersrand.

Water pollution

Given the long history of coal mining, some deposits have been worked out and some mines closed. With closure, numerous environmental problems emerged. Water pollution is one of the most severe environmental problems in the Highveld area. One particular issue is that old and abandoned mines expose chemicals and mineral salts to underground water. Acid Mine Drainage (AMD) is probably one of the biggest threats to the environment and which causes a negative impact to human health and water

resources. AMD is quite problematic in the Highveld areas. Acid Mine Drainage occurs in abandoned mines, as well as current mines. Most often it finds its way into water sources such as streams in and around communities, and dams built for the supply of fresh water to communities. Some few years back, the degree of contamination of water in the Middelburg Dam exceeded the quality limits for water meant for human consumption. The Witbank dam catchment also indicated unacceptable levels of sulphate. If and when the main water supplies get contaminated, it is likely to cost more money to purify water for local communities.

Implications for communities

1. Limited access to clean water for human consumption and for recreational purposes which is a threat to community wellbeing. Most known health issues associated with mining are the irritation of mucous membranes or the eyes when and after swimming in contaminated waters.
2. The aquatic ecosystem is also seriously affected – there have been reports of dead fishes in streams and damage of vegetation, all caused by mine-polluted waters.
3. The impacts equally include the sterilization of land due to the collapse and acidification of soils, leading to poor soil for farming. As well, the situation as discussed above has in some cases resulted in shortage of clean water for irrigation.

Considering the rate of water shortages in South Africa, exacerbated by water-polluting activities such as mining, we might be heading to a point where more financial resources will be needed for investment in water purification and the development of other water sources. Should that become the case, it is highly possible that there will be a cost associated to access to purified water resources. Mindful of the poor living conditions in most communities, one can already anticipate that some community members might continue using the easily accessed contaminated waters. Except mining companies and or the government are willing to subsidise the development of clean water and make it accessible to mine communities free of charge or at least at affordable rates.

The abovementioned effects of water pollution relating to mine communities are puzzling, mindful of the fact that South Africa is regularly portrayed as having one of the most progressive set of legislation in the world. Particularly, the environmental and water legislation are hailed for being very inclusive and explicit, following constitutional provisions guaranteeing environmental human rights for all.

If that is the case, how does one then explain the alarming degree of water pollution caused by mining? Does this suggest that:

1. Mining companies are not compliant with the provisions guiding water protection;
2. The laws are poorly implemented and or enforced;
3. The laws are ineffective and thus need to be amended to respond effectively to the challenges facing the South African water sources?
4. Or does it imply that the above are all working against water protection?

This paper will examine mining threats to environmental sustainability; specifically water pollution. The main goal is to highlight that legislation can and should guide mining activities such that the aim to render mines profitable does not cancel communities' rights to enjoy clean water resources.

Africa as a new frontier? Lawyers, extractive economies and global reconfigurations of political authority: A case-study of the 'Africa Corporate Bar' in Paris

Sara Dezalay, Cardiff School of Law and Politics

In the wake of the 2008 financial crisis, the global search for new sources of energy and commodity reserves, and the expansion of infrastructure and telecommunication markets, the African continent is emerging as a new harbinger in the transformation of global capital flows and the reconfiguration of political authority at the international and national levels. There is a growing momentum in Europe and North America around the role that the law and legal institutions can play for development and the reduction of poverty on the continent, in particular for the sustainability and transparency of so-called private-public partnerships between corporations and African states.¹⁷² These policy debates also hinge on the competing impact of the investing strategies of China and other emerging Asian economies on the continent.

¹⁷² As evidenced by the leading role played by Germany in the framework of the G7 in 2015 to strengthen the struggle against corruption, and the negotiation of fair and sustainable contracts between African states and foreign investors in the extractive industries. See <http://www.bmz.de/g7/en/Entwicklungspolitik/Schwerpunkte/Connex/index.html>.

This presentation looks at this renewed prominence of the continent as a source of mineral riches as an opportunity to assess the relationship between capital investment, political configurations, and legal practices.

Looking at extractive economies in particular, it uses the law, legal professionals and legal practices, as an entry-point to explore two interrelated questions. How is the extractive economy in African national contexts bound up with social, legal and political developments at the domestic level and with global markets and metropolises at the global level? How, in turn, are the structure and logics of extractive economies affected by and impacting on legal globalization patterns, in particular corporate law?

In scholarly and policy accounts, these developments are framed under contrasting discourses that reflect knowledge gaps, on law and politics in the continent, and the position of Africa in legal globalization. The high profile of International Criminal Court prosecutions against African dictators and warlords, massive rule of law investments in conflict and post-conflict situations, as much as the formidable stakes of natural resources in the continent taint Africa with the image of a *new* political, economic and legal frontier. Yet, discussions on the role of law and lawyers in the continent are often mired by a degree of defensiveness, if not outright suspicion. Seemingly more than for any region or continent, the threshold question centers on the degree of failure of the legal transplants inherited from colonial Empires, and the twin legacies of brutal colonial experience and Big Man politics.¹⁷³ Further, in sharp contrast with the wealth of scholarship on legal professions in Europe, North America, Latin America and more recently South-East Asia, there is a dearth of research on lawyers in African contexts, with few exceptions.¹⁷⁴ Indeed, lawyers appear under very contrasted guises: they are either idealized as a professional corps protecting the rule of law¹⁷⁵, or denounced as mercenaries at the service of new strategies of looting of the continent.¹⁷⁶ On the other hand, there is a growing expert legal literature on the transformation of global corporate legal markets and their expansion into the continent; as much as a wealth of policy and NGO-based expertise on the detrimental effects of land-grabbing on the continent and the scarcity of natural resources on societal relations. But this latter expertise remains by and large disconnected from scholarship in legal history, anthropology and development focused on the transformations, in the *long durée*, of the historical trajectories of states on the continent under the impact of successive globalization dynamics, including colonialism.¹⁷⁷

The gist of this proposal is that the trajectories of lawyers be they Africans or Europeans, Asians and Americans –, their professional strategies and political mobilizations, can be used as an entry-point to map out these changes as they reflect not only transformations of state authority and capacity but also the historicity of dynamics of legal globalization on the continent.¹⁷⁸

It is developed in the context of a wider research project (in particular through collaborations with David Wilkins at the Harvard Center on the Legal professions, Swetha Ballakrishnen at NYU- Abu Dhabi and Jonathan Klaaren at Wits University). For the purpose of the Cape Town conference - and subject therefore to ongoing developments of my fieldwork in the meantime – I will focus on the emergence and transformation of what could be dubbed the 'Africa corporate bar' in Paris. The noticeable surge of major law firms, both Anglo-saxon (UK and US) and French, towards the African continent in the last ten years, has materialized, in particular and somewhat paradoxically, with the setting up of 'Africa' offices in Paris.

With a research methodology based on relational biography (through biographical interviews with key individual actors), I look at the emergence of this Africa bar and how its transformations – in terms of generational effects and legal practices – reflect wider changes on the evolution of corporate legal markets on the continent and globally. The key position of Paris in relation to former colonies in Francophone Africa has indeed furthered the emergence of this 'Africa bar' of corporate law in Paris, dominated by French and a handful of African lawyers, building on the double legacy of the US import of corporate law in Europe, but also colonialism. The emergence of Paris as a beachhead for offshore legal markets operating on the African continent thus followed successive stories: the transplantation in Europe of a US model of legal practice from the 1960s and further in the 1980s¹⁷⁹, the reorientation of corporate legal markets following the financial crisis of 2008 towards Africa, as much as the US influenced financialization of the legal practices involved in the negotiation of 'complex contracts' for the purposes of natural resources extraction and infrastructure. These ongoing developments highlight the continuous transformation of the combinations between economic and state power involved in the restructuration of the state and legal markets in Africa.

¹⁷³ J.-F. Bayart and R. Bertrand, "De quel legs colonial parle-t-on?", *Esprit*, 12, 2006, pp. 134-160.

¹⁷⁴ É. Gobe, *Les avocats en Tunisie de la colonisation à la révolution (1883-2011)*. *Sociohistoire d'une profession politique*, Paris, IRMC-Karthala, 2013.

¹⁷⁵ T.C. Halliday, L. Karpik, M. M. Feeley (eds.), *Fates of Political Liberalism in the British Post-Colony. The Politics of the Legal Complex*, Cambridge, Cambridge University Press, 2012.

¹⁷⁶ See T. Burgis, *The Looting Machine. Warlords, tycoons, smugglers and the systematic theft of Africa's wealth*, Harper Collins Publishers, 2015.

¹⁷⁷ See B. Ibhawoh, *Imperial Justice. Africans in Empire's Court*, Oxford, Oxford University Press, 2013.

¹⁷⁸ See S. Dezalay (ed.), *Lawyers in Africa. Building the state*, *Politique africaine*, 138, 2015.

¹⁷⁹ Yves Dezalay, *Marchands de droit. La restructuration de l'ordre juridique international par les multinationales du droit*, Paris, Fayard, 1992.

Benefit sharing in oil and gas communities in Tanzania

Shirley Mushi, University of Cape Town, Mineral Law in Africa

Tanzania has recently discovered large quantities of commercially viable gas reserves. It has been estimated that 55.08 trillion cubic feet (tcf) of recoverable natural gas lays beneath the coast of Mtwara. This discovery has raised expectations among all Tanzanians. While political leaders and the elite see the industry as promising an end to 'perennial poverty' and aid dependency, others see an opportunity to 'get rich quick'. For the local Tanzanian (those in the exploration area in particular), the predominant wish is to have a share in the benefits ripped from their land.

Much of the debate has centered on how to steer the new hydrocarbon sector towards realising the nation's dream of becoming the next big oil and gas producer. The government has passed laws on the governance and regulation of the oil and gas sector as well as established a number of regulatory bodies and institutions. Whereas these laws take into account important regulatory measures of the upstream, mid-stream and downstream activities, very little is covered on exactly how the affected communities will benefit from their resources. Much as the oil and gas revenue management act provides for and regulates the management of the industries revenue, it is not in itself sufficient enough to addresses benefits of the oil and gas communities. The oil and gas laws need to be synchronised with other policies and laws so as to holistically address the question of how best communities around oil and gas exploration and nation at large can benefit from their god given resource.

The failure of devising proper benefit sharing systems is witnessed in the poor history of mining Gold, Diamond and Tanzanite. The mining industry has been poorly governed and regulated and has in a large part failed to fulfill its expectations of providing improved social economic development within the mining communities and the country at large. This poor governance of the mining industry remains foremost in the minds of Tanzanians. The prospect of history repeating itself is a genuine concern, and it is thus understandable that there is heightened public interest in the new discoveries of oil and gas and how communities will benefit. As an indication of heightened vigilance from the citizenry, the Mtwara community's vehemently opposed the construction of a 532 km natural gas pipeline from Mtwara to Dar es Salaam on 23 May 2013. The lack of synergy between investment policies and land issues as well as the respective mining or oil and gas laws is one of the major setbacks in realizing benefits for social economic development.

Like any other development country, Tanzania relies on foreign direct investment for the exploration and extraction of its oil and gas resources. Thus it is important that a synergy exists between investment policies, land issues and the oil and gas sector policies and regulations for better realization on how best citizens can maximize their benefits. Tanzania has however for a long term embarked on a foreign investment campaign without taking industry specific policies and regulations into account. In fact, the term investor in present day Tanzania is almost an ineluctable statement in the lives of its citizens. It would be correct for one to acknowledge the president's campaign on foreign direct investment as one of his major achievements alongside his well-known road construction projects. The down side of his campaign was however the claiming of there being a land bank for investment in Tanzania paying little regard to the communities residing in the investment areas of the various sectors including oil and gas.

According to the world investment report, Tanzania has for the past five years been the leading country in East African as far as attracting foreign direct investment is concerned. The world investment report shows that Tanzania has attracted about 48% of all foreign direct investment in flow in the five East African countries. In the 2013 World Bank global economic prospects, Tanzania is ranked 18th among the 20 fastest growing economies of the world. The IMF in its world economic outlook report ranks Tanzania as the second fastest growing economy after Rwanda in east Africa. Tanzania's economy is said to be faster than that of the "East African economic power house" Kenya. Surely the role played by foreign direct investment in Tanzania's economic growth leaves allot to be desired.

As Tanzania registers success in its campaign on foreign direct investment, major policy questions on how best to realize and benefit from such investment remain vague. The importance of aligning our foreign investment policies with the general and overall development policies and strategies such as MKUKUTA among other national strategies cannot be emphasized enough. The National investment promotional policy of 1996 is what informs the present day investment sector in Tanzania. Among major challenges of investment is the whole question of land and benefit sharing which is not well addressed in Tanzania's investment policy.

When one talks of gold, diamond, gas, cash-crops, wild-animals and all the God given gifts of nature; land is what bares all whether above, on the surface or beneath. This gift of nature we call land is the mother to all being of mankind. Without land man cannot exist. Land is to human being the only means by which he can obtain access to the material universe and utilize its power. Land is an important factor of production.

As all investment involves land, African communities should enjoy their God resources as the important factor of production it is. In the present day, the investor is believed to be the only one with the capital, technology and skill and know how. Whereas this is true one cannot eliminate the power of owning the resources. We quickly dismiss our importance by assertions like "What is the importance of having abundant natural resources without having the ability to explore them?" We however fail to bear in mind that one with capital equally needs the God given gift of land for natural resources.

The argument that we need to have investor friendly policies is valid but should not work to our detriment. Tanzania has witnessed our policies and decisions fail in maximizing our benefits in a number of foreign investment sectors especially the mining sector. It is high time that we review our policies so as to maximize our benefit and benefit sharing of natural resources particularly at the grass root levels. The aim of this topic is to steer a discussion on how this can be done..

Panel 6B: Protest

The day the graffiti died¹⁸⁰

Amr Shalakany, American University in Cairo, Law and Society Research Unit

For the Western media once interested in the Cairo of the Arab Spring, there is perhaps nothing more indicative of the short life of the revolution in Egypt than the silence of the city walls.

Two years ago, my city was celebrated for a graffiti boom. Critics, photographers and curators descended on Cairo to document the newly vibrant street-art scene, while foreign graffiti artists arrived to collaborate with locals on innovative and exciting projects. A coffee-table book industry mushroomed, carrying pictures, essays, and interviews with artists, curators and gallery owners. Some of the more iconic images made it onto T-shirts, calendars and greetings cards.

For two years, I proudly packed these souvenirs whenever I travelled to the West—gifts for colleagues in Europe and the USA who had kept faith with our daringly 'non-violent' insurrection. But recently I stopped. It was not only, I realised, that Western interest in these revolutionary souvenirs had faded; they had also become something of a political embarrassment—their once inspirational message now ringing as a false and facile optimism; our 'nonviolent' revolution, militant from the start.

At the beginning of the revolution in January 2011, the first graffiti I noticed consisted of simple slogans calling for bread, freedom and social justice. These were painted with spray cans on the asphalt surfaces of the streets around Tahrir Square, on the limestone walls of police stations and government offices, and, later, on the military tanks and armoured personnel vehicles that came to be stationed on the Square. As the violence increased, there appeared stencilled images of the men and women who had been killed, injured or harassed by counter-revolutionary forces. Eventually, the slogans and stencils graduated into stylish and sophisticated murals, painted on the large cement blocks that prevented demonstrators in Tahrir from reaching important security buildings in downtown streets nearby.

But where once there was the creative energy of the artist in spray paint, stencil and murals, all we see today is whitewash, whitewash and even more whitewash. If the walls are so dumbstruck, does this mean the revolution is dead?

For the legally inclined, the death of the Egyptian Revolution might suggest that 'transitional justice' had failed. But just look at us. We've been to the polls ten times, had two transitional periods (each with its own road map to democracy), three constituent assemblies, two constitutional referendums and practically four presidents (two in prison awaiting trial, one interim ex-president about to resume his place on the bench as Chief Justice, and yet another army-general newly inaugurated as President.)

Far from killing the rule of law, has our revolution been too obsessed with transitional justice?

What follows are diary entries written retrospectively on the basis of newspaper articles from the first three weeks after General Sisi was elected president in June 2014. Each entry recollects the past three years or so of our revolution, and shows how it was saturated with the 'rule of law' and an obsession with 'transitional justice'. The entries are interspersed with a selection of Cairo graffiti, much of it whitewashed today. Yet, the whitewashing was often halfhearted; the graffiti, only thinly covered. So just as the rule of law, democracy and transitional justice are not dead but are rather ideas that continue to structure the way we think about present conditions so the graffiti remains and continues to communicate from Cairo's streets despite its ostensible obliteration. And

¹⁸⁰ Based on a paper published as: Shalakany, A.A. (2014). The day the graffiti died. *London Review of International Law*, 2(2): 357-378.

the anti-army slogans that today denounce Sisi as a criminal and a traitor are the new graffiti—even if they are not artistically compelling enough to catch the Western media's eye.

Civil disobedience in Constitutional South Africa

Jameelah Omar, University of Cape Town, Faculty of Law

Civil disobedience, in various forms, has played important roles in political movements globally. Some of these forms are contested theoretically. South Africa has a rich history which allows a unique lens through which to practically interrogate civil disobedience, both during Apartheid and during its present democratic dispensation since 1994.

Apartheid was a legal and social system based on segregation and subjugation along racial lines and generated victimisation and violence through policies¹⁸¹ aimed at achieving these goals. Physical force at the hands of the police as well as more subtle types of violence, such as restrictions on freedom of movement, family life and economic opportunities were strategies employed by the Apartheid state. The move from Apartheid to a constitutional democracy was made through the use of political resistance, foreign economic sanctions, and at the end, a negotiated settlement between the National Party and the African National Congress. This is essential to understanding the context of civil disobedience in South Africa.

This paper will conduct a theoretical definitional analysis of civil disobedience. This definition will then be critiqued and a test developed for civil disobedience in South Africa. What the essential elements are for the definition of civil disobedience and whether meeting these elements justifies the use of civil disobedience in a constitutional state such as South Africa is the particular focus of this paper.

Rawls defines civil disobedience as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government”.¹⁸² This definition was designed only for “nearly just” societies.¹⁸³ Lefkowitz adds an additional dimension to the concept of civil disobedience with his definition of “suitably constrained civil disobedience” which is “non-coercive and communicative disobedience undertaken by persons willing to accept the legal consequences of their conduct, specifically, penalisation.”¹⁸⁴ Civil disobedience is concerned with acts classified as politically motivated by the need for change in law or government.¹⁸⁵

Traditional civil disobedience is where the legal system or system of government is directly challenged because the laws or the system are unjust.¹⁸⁶ One way of doing this is to directly challenge the precise law or policy that is under question. To illustrate, suppose that a land distribution project will be discontinued due to resources being redirected from that project to another project. To protest this policy change, the meeting being held at the local government offices are stormed in order to force being heard on the matter. The unlawful conduct may include breaking and entering or damage to property. This example does not exclude the indirect form of civil disobedience. Using this same scenario, it is not only the resource issue that is being challenged, but also the systemic issues of lack of access to elected representatives and no public consultation.

South Africa has one of the highest numbers of protests each year, with an amount of 191 protests recorded for 2014.¹⁸⁷ Many of these protests are service delivery protests aimed at challenging unequal access to basic services. Generally, civil disobedience that challenges socio-economic conditions will often be indirect in nature. This is for two reasons, firstly, there is sometimes no formal law or policy that can be challenged,¹⁸⁸ and secondly, in a context such as post-Apartheid South Africa, the legal and social

¹⁸¹ M Shaw *Crime and Policing in Post-Apartheid South Africa: Transforming Under Fire* (2002) at 2.

¹⁸² John Rawls *A Theory of Justice* (1921) 364.

¹⁸³ Rawls op cit (n.182) 363.

¹⁸⁴ Lefkowitz 'On a Moral Right to Civil Disobedience' *Ethics* 117 (2007) 215.

¹⁸⁵ LJ Macfarlane 'Justifying Political Disobedience' 79 (1968) 1 *Ethics* 24 at 30

¹⁸⁶ M Cohen 'Civil Disobedience in a Constitutional Democracy' 10 (1969) 2 *The Massachusetts Review* 211 at 212. Macfarlane op cit (n185).

¹⁸⁷ Municipal IQ Press Release: *Uptick in service delivery protests in third quarter of 2015* available at www.municipaliq.co.za/publications/press/201510051129504623.doc (accessed 26/04/2016). At the time of the release of this press release in October 2015, 2015 had shown a decrease in numbers with an amount of 129. However, it must be noted that this is not the full year and this time period excludes the 2015 university student protests across South Africa that occurred after this time period.

¹⁸⁸ There have been some examples of concrete policies being challenged. For example, in the case of *Lindiwe Mazibuko and Others v City of Johannesburg and Others* CCT 39/09 [2009] ZACC 28, the City of Johannesburg's policy on installing pre-paid water meters was successfully challenged as well as the Free Water policy of 6 kilolitres per month of water being provided for free was held to be unreasonable, and instead the court found it should be 50 kilolitres.

system as a whole are not democratically illegitimate and therefore protest aimed at the social structure often appear to target ancillary issues.

Is a distinction between direct and indirect civil disobedience a useful one? It would be an essential one for those arguing that justifiable civil disobedience can only include direct civil disobedience.¹⁸⁹ This paper does not take that view because it is contended that some injustices are not possible to challenge directly.¹⁹⁰ To paraphrase the poignant words of Howard Zinn, to deny the justification of indirect civil disobedience is to accept that fundamental evils such as poverty and racism will remain unassailable.¹⁹¹ More pragmatically, is the distinction really one that describes the conduct of the disobedients, or can it not be more accurately understood as describing the system in which the conduct takes place?

MacFarlane proposes a distinct test for when civil disobedience is capable of justification in a Constitutional democracy.¹⁹² This is important for the South African case because despite the democratic government and processes, the socio-economic inequalities remain. Civil disobedience targeting deplorable living conditions are aimed at redress of the whole system and should not be understood as discrete issues of better access to sanitation or better educational facilities.

Lawyering protest: Critique and creativity

Lisa Chamberlain, Gina Snyman, Mbali Matandela & Sherilyn Naidoo, University of the Witwatersrand, Centre for Applied Legal Studies

In the struggle against apartheid, human rights lawyers were well-versed in criminal law, as providing representation in criminal proceedings for their activist comrades was an everyday part of their work. After the transition to democracy, criminal justice work ceased to be a focus of many public interest legal organisations. However, in the past few years there has been a resurgence of the need for this kind of support to communities across South Africa.

Although democratic and governance structures unquestionably are transformed since apartheid, true political inclusion remains an aspiration and not an achievement. This is evident from the increasing suppression by the state of so-called 'civil and political rights' such as the right to protest. Moreover, more than ever we see in South Africa the importance of understanding the intersectional nature of rights violations, where those whose socio-economic rights are violated, also experience the violation of their civil and political rights. People living in poverty, for example, are often arrested for protesting against the lack of water and sanitation; Marikana mineworkers, protesting economic 'unfreedom', are killed by police for 'unlawful' gatherings; students living in poverty are tear-gassed for demanding the right to education.

This injustice is also racialised through the perpetuation of poverty alongside the accumulation of wealth and profit. The continuation of poverty impacts black South Africans more than any other racial group in South Africa, making black South Africans particularly vulnerable to an entrenched cycle of poverty. The absence of basic services, dignified living conditions and living wages perpetuates, rather than alleviates, conditions of extreme poverty. This need not be the case given the potential of South African industries, such as mining, agriculture and the robust financial sector, to act as a catalyst for local economic development. Yet it is predominantly black communities who resort to protest in an attempt to force systems of power to hear them. It is therefore also predominately black community members and activists that face criminalisation through excessive and obstructive state response to protest activity.

The Constitution provides that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions (section 17 of the Bill of Rights). The Regulation of Gatherings Act ("Gatherings Act") is the legislative framework enacted to give effect to this right. However, despite the protection written in these legal instruments, criminalisation of protestors is rife. Evidence suggests that the state is drifting towards greater intolerance of protests, with softer forms of policing being replaced by harder and even lethal policing, and municipalities routinely censoring protests that are critical of their own performance. Communities seeking to protest thus face obstruction from local government and the South African Police Service, as well as a very real risk of arrest and criminal charges. This notwithstanding the fact that protest is often a means of last resort, used when frustrated communities can no longer justify continued fruitless attempts at engagement.

¹⁸⁹ Cohen op cit (n186) 220.

¹⁹⁰ HA Bedau 'Civil Disobedience and Personal Responsibility for Injustice' 54 (1970) 4 *The Monist* 520. Cohen op cit (n186) 225.

¹⁹¹ Bedau op cit (n190) 525 (quoting H Zinn *Disobedience and Democracy*).

¹⁹² MacFarlane op cit (n185) 43.

In spite of the fact that protests are so central to South Africa's politics, there has not been a system in place to support protesters. Many civil society organisations assist their community partners and clients to defend their right to protest, but no organisation is dedicated solely to protest-related issues. The legal organisations operating in civil society have been receiving increasingly frequent requests to assist with the negotiations around section 4 meetings (held in terms of the Gatherings Act), bail applications for arrested protestors and even subsequent criminal trials. While many civil society organisations have begun working on protest-related issues, this work has not always been co-ordinated, and these organisations have very little if any existing capacity to respond to the scale of these requests.

In response to these needs, civil society organisations have launched a collaborative project known as the Right2Protest Project (R2P). It is a coalition whose collective objective is to support the realisation of the constitutional right to protest, in a co-ordinated way. R2P's vision is a country in which protestors are able to exercise their constitutional right to protest, peacefully and unarmed, and can do so without fear of being criminalised for their protest action.

The R2P Project includes the following elements:

- A full-time attorney to take on both civil and criminal cases flowing from protests, including urgent court applications where protests have been prohibited, bail applications and conducting the defence of those protesters in protest related criminal trials.
- A protest information portal consisting of:
 - A protest hotline to provide callers with advice on the process of planning a protest, notification of authorities and engagement with authorities at meetings. The hotline will also serve as a clearing house for requests for legal and other assistance.
 - A website acting as a repository of the material produced by members of R2P.
- Where there is a need to make strategic interventions at the level of policy- or law-making, advocate for compliance with the law, lobby high-level government authorities, or strategic litigation, R2P will facilitate those interventions, which will be executed by individuals, organisations or institutions who are mandated to perform those functions, for example NGOs or universities.
- Where there is an opportunity for advocacy, publicity and journalistic work R2P will facilitate other organisations to write for the media, work with journalists on specific reports on cases, as well as trend reports, hold workshops with journalists on reporting on protests, hold civil society meetings to discuss strategic options for the Gatherings Act, meet with government, SAPS and Municipalities about research findings, and where necessary advocate for changes to how gatherings are regulated, including a possible review of the Gatherings Act.

R2P's largest contribution to protest work is the opportunity it provides for collaboration and coordination of efforts. The Project is deliberately set up to encourage cross-disciplinary learning so that protestors benefit from the expertise of lawyers, activists, researchers and journalists.

This paper will examine the context to which R2P is responding, outline the proposed modality of the project and discuss some of the key issues confronting R2P.

The crucible of horrid protest laws

Mluleki Marongo, Section 27

A cardinal aspect of this paper looks at the personal circumstances and personal stories of those disproportionately affected by bad protest laws. I seek to demonstrate that a people's based approach to law making i.e. a focus on those people who are marginalised, poor and illiterate is the cure that is needed for bad protest laws. I argue that appreciating the circumstances of those disproportionately affected by bad protest laws and who, because of their personal circumstances, are more likely to embark on a protest and therefore find themselves locking horns with public order police, are already marginalised in society then how we create protest laws, the substance and shape of those laws must be a response to people's positionalities which will in effect ensure that protest laws create conditions within which protests can evolve instead of stifling protests.

Protest laws, by responding to people's positionalities, will consequently become laws that harness the culture of protests.

Protests are an intrinsic quality of the South African polity and culture. They are cemented in the annals of our history not only as a tool of rising against a bad government but also as a means for people to express themselves and to rally in unison behind the same idea. Events such as the 9 August 1956 women's march to the union buildings; 21 March 1960 Sharpeville massacre; the Soweto uprisings in 1978 and the 1989 March in Cape Town led by the Clergy such as Frank Chikane and Archbishop Tutu anchor protests as a distinct South African culture.

Methods of protests have evolved and their evolution is symbolic and significant. There are four central ways (among others) in which this evolution has taken place: First, the use of faeces against those to whom the protests are directed not only because there is an absence of other items to be thrown but because in those protests and in those localities, faeces are symbolic of something more. Secondly, naked protests in various universities in the country. Third, protestors demanding those they are protesting against or those who are receiving their memorandums to sit on the floor with them before any talking can take place. Fourth, the use of white bodies to protect black protesters from violence by the police. These are only some of the ways in which we see the culture of protests evolving.

Although an evolution has taken place, in some respects, on protests, there is a possibility of that evolution being stunted and of that culture being decimated due to bad laws that regulate protests, inefficient and insufficiently trained public order police and the horrid implementation of protest laws.

On July 2014, 3500 Community Health Workers (CHWs) were summarily dismissed by the Free State Department of Health. 127 of them decided to participate in a night vigil outside the office of the MEC for Health in the Free State. They were arrested and convicted with attending a gathering for which no notice was given. In describing the circumstance in which the CHWs were arrested their attorneys, SECTION27, stated:

"At no time during the night vigil where they were arrested did the #BopheloHouse94 [the CHWs] threaten public safety or damage property. They simply wanted a meeting with the MEC of Health to address their challenges, after several unsuccessful attempts and requests to do so. Instead they were arrested, thrown into the back of police vans and imprisoned in police cells. The arrests were only the start of their ordeal. Over the following two years the #BopheloHouse94 would have to travel at high cost to court seven times from across the province, spending a total of 14 days in court before they were finally convicted in October 2015."

What happens when poor elderly women, to whom historically (through Apartheid) the legal system has been an instrument for the desecration of their dignity as black people, they now get summoned to interface with the same legal system and are proceeded to be convicted for protesting their dismissals?

In this paper we intend on demonstrating that bad laws and bad implementation of laws have multifaceted egregious harms not only to the legitimacy of the laws themselves but also to the legitimacy of our Constitutional democracy, for people's participation in that democracy and consequently on people's dignity.

More than merely responding to the conditions within which people find themselves in their lives, there are legally specific actions that can be taken in ensuring that laws do not kill protest culture but protect it.

The Constitution of South Africa recognises the pivotal nature of protests and states that: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

A useful guidance in the protection of protest culture is section 7 (2) of the Constitution, which states that: "the state must respect, protect, promote and fulfil the rights in the Bill of Rights. The terms: "respect", "protect" and "promote" all give birth to specific duties which I will argue that in our current protest laws have not been fulfilled and that if they were to be fulfilled, the entire regime of protest laws would be enhanced for the better.

Lastly, section 7 (3) of the Constitution states that: "the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill. The way in which protest laws currently limit the right to protest is not reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account... less restrictive means to achieve the purpose of the limitation, as required by section 36. This all contributes to what may well be the extinction of protests, the decimation of the collective dignity of people and consequently the erosion of our Constitutional democracy.

Panel 7A: The Environment

Promoting participatory forest management: A critical and comparative review of South Africa and Namibia's forest legislation

Alexander Paterson, University of Cape Town, Institute of Marine and Environmental Law

Forests covers 30 percent of the earth's terrestrial landscape and the benefits they bring to the myriad species inhabiting this landscape are diverse. From a biological perspective, they are the largest repository of terrestrial biodiversity and home to many of the world's most endangered species. From an ecological perspective, they filter our polluted air, mitigate the impacts of climate change by absorbing and storing carbon dioxide, improve the quality and quantity of essential fresh water resources, and preserve and replenish soil stocks. From a socio-economic perspective they are equally important providing numerous environmental goods and services to people living within, adjacent or at a significant distance from the forested areas. These include providing food for nourishment, wood energy (for heating homes, cooking food and sterilising water), construction materials for shelter, and employment in the formal and informal forest sector.

Owing to the vital environmental goods and services forests provide to society, international and domestic policy makers have sought to introduce comprehensive policy and legal frameworks aimed at seeking to simultaneously conserve and promote their sustainable use. At last available count, 156 countries had adopted specific forestry legislation, 75 percent of the world's forests were covered by a national forest programme, and 13 percent of the world's forests were incorporated within legally established protected areas.

With 80 percent of the world's forests falling on state owned land, feasibly facilitating the implementation of the above comprehensive law and policy framework, it is disconcerting to note that global forest cover has decreased by 300 million hectares since 1990. While the rate of deforestation is apparently slowing somewhat, the global rate of deforestation remains at approximately 13 million hectares per annum. Adopting a slightly longer temporal perspective, this translates into the earth having lost approximately 40 percent of global forest cover in the last 300 years. From a regional perspective, Africa lost 3.4 million hectares per year in the period 2000-2010, the second largest net forest loss during this period per continent after South America.

This rapid rate of deforestation, coupled with degradation of the remaining forested areas, naturally significantly undermines the provision of the numerous essential environmental goods and services forests afford to humans and other species inhabiting the earth. Focussing, for example, on climate change, deforestation is the third largest source of greenhouse gas emissions, contributing approximately 19 percent to global emissions. A failure to curb deforestation and associated forest degradation is recognised as significantly jeopardising any global effort to reduce global warming.

Given the above state of affairs, it is not surprising that policy makers have experimented with different approaches to forest governance over the past 50 years. Literature canvassing forest governance in particularly the past three decades is littered with terms such as community-based forest management, community forestry, social forestry, collaborative forest management, decentralised forest governance and participatory forest management. Notwithstanding this variety of terminology and in no way dismissing the diversity of the nuanced approaches and institutional arrangements inherent in each, all are generally analogous to moves in the broader conservation discourse to recognised decentralised forms of community-based natural resource management. Furthermore, all appear to be underpinned by three main tenets. Firstly, promoting community governance by divesting authority over forest management from the state to local communities. Secondly, promoting ecological sustainable use as the central management goal, with local communities assuming responsibility for maintaining and restoring forest health. Thirdly, aiming to provide local communities with equitable social and economic benefits from forests. It is this approach to forest governance, which from now on shall be referred to as participatory forest management (PFM) given the prevalence of the use of this term in the African context, which shall form the main focus of this paper.

From its initial humble beginnings in Nepal (1978), Philippines (1982) and India (1990), PFM regimes now span 18 percent of the world's forest area. It is however far less prevalent in the African context where most recent assessments place 6% of the continent's forest area subject to some form of PFM regime. One common theme inherent an almost all analysis of PFM, is the importance of an enabling regulatory framework. Many jurisdictions in Southern Africa, including South Africa and Namibia, have sought to introduce legal frameworks to promote, enable and regulate PFM in the last decade and a bit, but debates still abound as to what elements are central to their successful implementation. In 1998, South Africa introduced the National Forests Act, which promotes participatory community forestry through the conclusion of community forestry agreements between forestry authorities and communities. Namibia on the other hand, introduced its Forest Act in 2001, which seeks to promote the same ideal through the

establishment of community forests, similarly created through the conclusion of an agreement between state authorities and relevant communities. Notwithstanding having both undergone significant political transformation in the early 1990's, experiencing similar social and economic rigors associated with this transformation and having introduced new forestry legislation within a few years of one another, the two countries have had very discrepant experiences in the implementation of their respective legal frameworks. South Africa has to date not implemented a single community forestry agreement aimed at promoting the sustainable management of indigenous forests. Namibia on the other hand, has established numerous community forests, which at last count covered an area of approximately 2.55 million hectares.

Within the above context, this paper seeks to critically consider the very discrepant experience of these two countries in implementing the legal tools embedded in their respective forestry laws for promoting PFM. The paper proceeds by providing a review of the origins, forms, nature and factors which theorists have identified as influencing the success of PFM, with a view to distilling a theoretical matrix against which to consistently and coherently compare and contrast the two jurisdictions. Key themes which emerge through this theoretical analysis which should be addressed in the relevant legal framework include the following: ownership/rights; scope; process; institutional arrangements; management; use and benefits; and oversight mechanisms. Having grappled with the relevant theoretical context, the paper then shifts to compare and contrast the relevant legal frameworks of Namibia and South Africa. In respect of each jurisdiction, the paper firstly provides a brief overview of the relevant context and domestic legal framework, and then seeks to review each against each of the themes identified above. The paper concludes by distilling a range of key lessons for future legislative reform in South Africa aimed at promoting improved participatory forest management, lessons which are informed by the Namibian experience.

Contested regulation: Is CITES an appropriate instrument for combating illegal wildlife trade?

Annette Hübschle, University of Cape Town, Environmental Security Observatory

The multilateral treaty, the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), provides the regulatory framework for international trade in endangered plant and animal species. Its stated aim is to ensure that international trade in specimens of wild animals and plants does not threaten the survival of the species in the wild, and it accords degrees of protection to more than 35 000 species of animals and plants (CITES 2014)¹⁹³. The economic exchange of wildlife products was legal and legitimate until regulators declared otherwise in the 1970s. Twenty-one states signed the Convention initially, which had placed 1100 species on the appendices, a system of negative listing. The underlying philosophy was that international cooperation would prevent international trade causing species extinction. Since its humble beginnings, 183 countries have joined CITES. These state parties meet every three years at the Conference of Parties (CoPs). My paper seeks to understand the normative agendas underpinning the CITES regulatory framework, the role of private interests and agendas in sponsoring specific determinations and the conflictual relationship between science-based and political decision-making processes. I draw, amongst others, on empirical data gathered at the CITES Conference of Parties 17, which took place from 23 September to 5 October 2016 in Johannesburg.

CITES as a platform for North-South conflict

Seen as the 'Magna Carta' of wildlife by some (Layne 1973)¹⁹⁴, others regard the CITES approach to conservation as fundamentally flawed (for alternative views, see: Hutton/Dickson 2000). As most of the planet's remaining biodiversity is located in the Global South and northern countries are perceived as particularly concerned about the potential loss of biodiversity, the Convention has become a platform for North-South conflict (Hutton/Dickson 2000b: XV)¹⁹⁵, and its legitimacy has suffered as a consequence. Powerful alliances between state and non-state actors have had a lasting influence on the cornerstones of the convention. South Africa, although a pariah nation during the height of apartheid in the 1970s, was one of the founding signatories of the Convention. Moreover, key endangered wildlife consumer countries such as Cambodia, Laos, Myanmar, Taiwan, Vietnam and Yemen only joined CITES more than 20 years after the Convention entered into force, allowing a massive window for uncontrolled international trade in wildlife in the interim period.

¹⁹³ CITES, 2014: What is CITES. <<http://www.cites.org/eng/disc/what.php>>

¹⁹⁴ Layne, Elizabeth, 1973: Eighty nations write Magna Carta for Wildlife. In: Audubon Magazine 3, 79–102.

¹⁹⁵ Hutton, Jon/Barnabas Dickson, 2000: Introduction. In: Jon Hutton/Barnabas Dickson (eds.), Endangered species threatened convention: The past, present and future of CITES, the Convention on International Trade in Endangered Species of Wild Flora and Fauna. London: Earthscan, XV–XX.

The north-south divide¹⁹⁶ and the perceived politicization of CITES became increasingly evident when the African elephant was 'uplisted' (moved from Appendix II to Appendix I) and the trade ban of ivory products entered into force in 1989. The proposal for the complete ban was based on recommendations from the CITES Elephant Working Group and a study undertaken by the specially convened Ivory Trade Review Group. The group found that neither the quota management system nor any of the earlier CITES resolutions had stemmed the tide against illegal poaching of elephants and trade in ivory ('t Sas-Rolfes 2000)¹⁹⁷. In the run-up to the ban, Western conservation NGOs had campaigned in favour of prohibition. The CITES proposal was adopted despite objections from 9 southern African elephant range states, and Japan and China. Back then the population of elephants was considered stable or rising in Botswana and Zimbabwe. A similar scenario was replayed at the 17th CITES CoP.

The role of local communities in listing decisions

While CITES Secretary General Dr John Scanlon branded the most recent conference a "game changer for the world's most vulnerable wild animals and plants,"¹⁹⁸ there are key constituencies that do not share these sentiments. Amongst these constituencies are several parties and local communities from the Global South who feel that their voices are not heard when crucial listing decisions are made. Yet, they are the ones who have to live with the consequences of CITES resolutions and decisions. The big elephant in the conference room was why parties and conservation NGOs far removed from the realities of living with wild animals should have a say in listing decisions.

Ideally the regulation of a formerly legal activity or product should involve a protracted process of public consultation with affected constituents, negotiation, drafting and implementation. Illegalization per se presents a socio-political process rather than a static condition, likely to lead to regulation that tend to favour the preferences of powerful political and economic elites (Heyman 2013: 304)¹⁹⁹. The influence of professional knowledge, scientific insights and disciplinary regimes is likewise not to be discounted in the process of legalization or illegalization (Heyman 2013: 306). The role of the state, regulatory authorities and law enforcement agencies is significant when it comes to national regulations. But who pulls the strings when it comes to determinations decided upon at the international level? CITES offers interesting insights as to why it might be difficult to garner support for trade bans when they are imposed "from the outside world" (Interview with South African environmental official, 2013) or in a different historical context. The political, social, economic and environmental dimensions of the modern world have changed since the treaty entered into force more than forty years ago. It is, for example, noteworthy that South Africa's apartheid regime gave CITES the stamp of approval in 1975, rendering it one of the Convention's earliest signatories. The voices of local communities as those affected by listing decisions are seldom heard or taken into consideration when state parties vote. At CoP17, local communities backed by southern African countries put forward a proposal to establish a special committee on rural communities. The objective of the committee would be consideration and due diligence of listing proposals. While parties agreed that rural communities were important actors, a resolution undertook to include rural communities in listing processes. However, the proposed new committee received no traction.

Has the 43-year old convention outlived its usefulness? What needs to happen for it to stay relevant?

Regime fragmentation patterns in Kenya's marine fisheries

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Considerable scholarship have emerged overtime especially in academic spheres such as Law and Economics²⁰⁰ and Political Science postulating on the question of regulatory or regime fragmentation, especially in national settings.²⁰¹ In addition, literature in Public Administration has interrogated the subject of regulatory fragmentation particularly from the perspective of negative regulatory

¹⁹⁶ The term is used with reservation as some states in the Global South (notably Kenya) have aligned themselves with the anti-sustainable use faction, which is largely linked to countries and conservation NGOs in the Global North.

¹⁹⁷ 't Sas-Rolfes, Michael, 2000: Assessing CITES: Four case studies. In: Jon and Barnabas Dickson Hutton (ed.) *Endangered Species Threatened Convention: The past, present and future of CITES, the Convention on International Trade in Endangered Species of Wild Fauna and Flora*. London: Earthscan Publications Ltd., 69-87002Ex

¹⁹⁸ <http://www.jjcornish.com/2016/10/cites-cop17-game-changer-says-secretary-general-john-scanlon/>

¹⁹⁹ Heyman, Josiah McC, 2013: The study of illegality and legality: Which way forward? In: *PolAR: Political and Legal Anthropology Review* 36, 304-307. <<http://dx.doi.org/10.1111/plar.12030>>

²⁰⁰ See generally, Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World', *Current legal problems*, 54/1 (2001), 103-46.; Gunther Teubner, 'After Legal Instrumentalism-Strategic Models of Post-Regulatory Law', (1984).

²⁰¹ See generally, Robert A Kagan, 'Political and Legal Obstacles to Collaborative Ecosystem Planning', *Ecology LQ*, 24 (1997), 871.

competition by public agencies.²⁰² Consistent with this scholarship, regulatory or regime fragmentation patterns like the one arguably emerging in the context of Kenya's marine fisheries can find contextualization from examination of three normative factors. First, the historical response by different regulatory or institutional stakeholders to the regulatory problem.²⁰³ Second, the depth of the regulatory or institutional stakeholders' specialization or comparative knowledge in relation to the regulatory problem.²⁰⁴ And third, the existence of dispersed regulatory pressure over the regulatory problem that manifest in multiple regulatory stakeholders claiming regulatory jurisdiction or mandate over the regulatory problem.²⁰⁵

Using this paradigm, this paper examines historical statutory, institutional and policy environment characterizing marine fisheries regulation in Kenya. The paper evaluates systemic attempts at regime interaction and stakeholder engagement through the inclusion of formal requirements for stakeholder consultation in its diverse constituting framework. It argues that such stakeholder consultation and interaction processes have largely been ineffective in disciplining the country's marine fisheries resource. Instead, they tend to integrate embedded institutional discretion which in turn allows various forms of vertical and horizontal interference in the regulation and management of the resource. In this regard, the paper argues that such implicit forms of fragmentation including formal and informal institutional discretion have permitted the emergence of disparate regulatory practices that now highlight the regime's fragmentation more overtly.

Accordingly, the paper critiques examples of disparate formal and informal regulatory practices that have emerged in Kenya's marine fisheries regime and retraces their legal and institutional formation and mechanisms, if any, within them for regulatory interaction. This includes Locally-Managed Marine Areas (LMMA),²⁰⁶ Marine Protected Areas (MPA),²⁰⁷ Beach Management Units (BMUs)²⁰⁸ and the Integrated Coastal Zone Management (ICZM). It is argued in the paper that such mechanisms are essential towards achieving the desired regulatory outcome of effective and sustainable regulation of the country's marine fisheries resource. In practice, however, the above disparate regulatory practices are generally anchored in diverse legal and policy instruments and are spearheaded by corresponding formal and informal institutional stakeholders with arguably scant evidence of either horizontal or vertical regulatory interaction. Methodologically, field interviews, onsite observation and desktop review of primary and secondary literature were considerably relied upon in the development of this paper.

Drawing from the above analyses, the paper concludes emergence of disparate regulatory practices has not contributed to optimal utilization of Kenya's marine fisheries resources, which is the underlying regulatory problem. For example, different institutional regulatory claimants like the Fisheries Department and the Kenya Wildlife Service have disparately implemented Beach Management Units and Marine Protected Areas respectively as regulatory practices that essentially constitute their regulatory interventions in attempting to address perennial overfishing and overcapacity challenges facing marine fisheries in Kenya. On the other hand, whilst artisanal fishing communities have often informally constituted LMMAs as their regulatory practice, NEMA has tended to emphasize Integrated Coastal Zone Management (ICZM) as the most appropriate regulatory practice. The Fisheries Department, on another hand, has traditionally preferred Beach Management Units and Access Licensing Arrangements as their regulatory practices in the territorial seas and the EEZ respectively. Finally, it shows that the Kenya Wildlife Service has preferred Marine Protected Areas as the regulatory practice of choice to intervene in marine fisheries.

In conclusion, it is apparent from the examination of various regulatory practices above that they essentially all claim a regulatory role in the regime. However, from field observation and interviews, it is to be noted that insufficient mechanisms have been integrated within the disparate regulatory practices that substantively facilitate interaction by all the regulatory claimants as a mechanism for achieving optimal marine fisheries exploitation. It was, for instance, apparent that no obligatory mechanisms or enforceable requirements exist demanding regulatory interaction or coordination between BMUs and Marine Protected Areas, which are

²⁰² See generally, Eugene Bardach, *Getting Agencies to Work Together: The Practice and Theory of Managerial Craftsmanship* (Brookings Institution Press, 1998), p. 100-101

²⁰³ William W Buzbee, 'Brownfields, Environmental Federalism, and Institutional Determinism', *Wm. & Mary. Envtl. L. & Pol'y Rev.*, 21 (1997), 1., p. 2

²⁰⁴ Ibid.

²⁰⁵ Ibid., p. 2; William W. Buzbee, 'The Regulatory Fragmentation Continuum, Westway, and the Challenges of Regional Growth', *Journal of Law and Politics*, 21 (2005), 35., pp. 2-5

²⁰⁶ See generally, Hugh Govan et al., 'Locally Managed Marine Areas: A Guide to Supporting Community-Based Adaptive Management', (2008).; Joshua E Cinner et al., 'Toward Institutions for Community-Based Management of Inshore Marine Resources in the Western Indian Ocean', *Marine Policy*, 33/3 (2009), 489-96.

²⁰⁷ See generally, Timothy Mcclanahan, Jamie Davies, and Joseph Maina, 'Factors Influencing Resource Users and Managers' Perceptions Towards Marine Protected Area Management in Kenya', *Environmental Conservation*, 32/01 (2005b), 42-49.

²⁰⁸ Stephen J Oluoch and David Obura, 'Assessment of Fisherfolk Organizations and Beach Management Units (Bmu) in the Management of Fishery Resources in Diani-Chale, Southern Kenya', *Ten years after bleaching—facing the consequences of climate change in the Indian Ocean. CORDIO Status Report, Coastal Oceans Research and Development in the Indian Ocean/Sida-SAREC, Mombasa, Kenya*, (2008), 335-44.

jurisdictionally overlapping regulatory practices in Kenya's marine waters. This has inevitably led to a situation of uncoordinated and inadequate regulatory response to the overarching regulatory problem of need to optimally exploit the country's marine resources.

Environmental management of mining activity in Zambia: Addressing the agency costs

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The principal-agent problem gives us insight into the regulatory framework governing the environmental management of Zambia's mining activities. A principal-agent problem arises whenever one party engages another to perform a function on his or her behalf. The dilemma is that without an alignment of principal and agent interest, and without the curtailing of the agents free reign, the agent may lack the necessary incentive to (i) perform the subject of the agency and (ii) remain loyal to the principal.

While the concept of democracy has many underpinnings, its basic idea is that political power must reside in the collective and not just a privileged few. The fiction therefore is that "the people" govern collectively. But since it is impractical for this to occur in a literal sense (the barriers to collective action are insurmountably high), the people choose representatives, political agents if you will, to act on their behalf. This decision is made through the vehicle of an election, the principal institution of democratic representative government.

Once so chosen, the actions of those representatives become for all intents and purposes, the actions of "the people". This substitution is the central feature of agency. When a nation elects its representatives in an election, the key requisite for an agency relationship, namely mutual consent, is met. The principal (*viz*, the people) agree to appoint the agent (*viz* the government) to act on their behalf and likewise the agent accepts this responsibility. Just as the agent in a commercial transaction owes the principal certain duties, so too the government owes its citizens the duty to "well and truly serve"²⁰⁹, in other words, to act in the best interests of the principal.

The Principal's Problem

When one first encounters the law of agency and its central feature of authority, the principal as the dispenser of that authority is given a cloak of supremacy that is elusive in reality. In theory, the principal is the centre of power—she commences the whole enterprise by appointing the agent and defines the agency by issuing instructions. The agent in turn owes the principal an impressive array of duties, and the principal is issued a formidable set of remedies to penalize the erring agent.

However, implicit in these exacting duties and remedies is the unhappy reality of the principal's position. Indeed, the business of agency is a risky enterprise. As Weber describes, the principal-agent relationship is an asymmetric one in which "authority" as it is possessed and dispensed by the principal "is located on one side of the curtain while the agent who possesses the knowledge advantage is located on the other."²¹⁰

The pedagogy of the law of agency does not adequately capture this hierarchal inversion. As the centre of authority, the theoretical principal is the arbiter of the agency relationship. However in reality, the knowledge advantage of the agent can prevent the principal from administering the agency in any meaningful way. This hierarchal inversion is particularly notable in electoral agency. During campaign season, the principal is king. After the election, the agent is king. This inversion is what is known as the "principal's problem."

All elected governments present with a principal-agent problem. The so-called "checks and balances"—touchstones of modern democratic dispensations are designed with the principal-agent problem in mind. The balance between according the government enough autonomy and discretion to govern effectively, while simultaneously shrinking the agent's potential for mischief, is a delicate one to strike.

The core argument of this paper is that a critical function of the law is to minimize agency costs, and to the extent that the law accomplishes this, it succeeds. Ostensibly, governments negotiate and execute mining agreements to benefit the nation. However the reality is that in many cases, these transactions are driven by powerful political interests that are at cross-purposes with the interests of the country at large. This paper examines the agency costs inherent in the environmental management of copper mining transactions. The aim is to examine whether the law anticipates these costs and if so, what it does to address them.

²⁰⁹ Extract of the Zambian Ministerial oath of office contained in the fourth schedule of the Official Oaths Act, Chapter 5 of the Laws of Zambia.

²¹⁰ Max Weber, From Max Weber (1998).

This work makes three core arguments. First, it argues that the relationship between the Zambian government and its citizens is one of political agency. The citizens acting as the “principal” appoint an “agent” (i.e. the government) to manage their mineral resources on their behalf. Just as in any other agency relationship, the relationship between the government and its citizens is characterized by a dilemma; the agent may not always be motivated to act in the principal’s best interests.

Second, although the framing of the principal-agent problem as it relates to public accountability is a political science enterprise, I argue in this work that a partial answer to the problem, namely the supervision of the agent and the curtailing of his or her free reign, is one that the law can provide. While game theorists address the principal-agent problem by manipulating the rules of the game to align the rational self-interested choices of the agent with those of the principal, the regulatory framework can address the problem by ensuring that the agent’s ability to be disloyal is curtailed.

Third, I show that when it comes to managing the impact of mining operations on the environment, the mechanisms to “check” the agent’s conduct and constrain her power, are either very weak or non-existent and as such, the agent has wide latitude to pursue self-interest and behave disloyally. The removal of discretionary authority and the increased autonomy of the Zambia Environmental Management Agency are important first steps in addressing these agency costs.

Panel 7B: Law, Culture & Custom

Judicial Protection of Women’s Matrimonial Property Rights under Customary Law in South-East Nigeria

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Up until now, recent judgments delivered by Nigeria’s Supreme Court on women’s property rights have been perceived as a development of customary law.²¹¹ The question is whether these judgments actually develop customary law or merely present a false dawn for the advancement of women’s property rights under customary law. For two inter-linked reasons, this article argues that these judgements do not signal any significant shift in appellate courts’ approach to women’s matrimonial property rights under customary law in Nigeria.

Firstly, the Supreme Court failed to address the social context of rules of inheritance under customary law. The agrarian society in which these rules emerged was founded on families living in close-knit units.²¹² This arrangement was mainly for agricultural and defence purposes, given that family wealth was jointly generated.²¹³ In this setting, the best interest of the family was paramount.²¹⁴ Accordingly, the principle of male primogeniture – that is inheritance by the first-born male – aimed at caring for the family, especially a deceased person’s dependants.²¹⁵ Thus, heirs inherited not only the properties of deceased persons, but also responsibilities to maintain their dependants.²¹⁶ In effect, property acquisition and disposal in the agrarian past were primarily based on the need to perpetuate clan lineage and keep wealth within the family. Given this preservative nature of property, male primogeniture entrenched patriarchy, which affected matrimonial property relations.²¹⁷ Today, patriarchy is sustained by the fact that women leave their parents after their bridewealth is paid in order to join their husbands’ families.²¹⁸ As Radcliff-Brown remarked, “marriage involves some modification or partial rupture of the relations between the bride and her immediate kin ... and gives the husband and his kin certain

²¹¹ For example, see N Chinwuba “Ending inequality in Nigeria: A refreshing approach from the nation’s judiciary” (2015) 29/3 *International Journal of Law, Policy and the Family* 341-350; O Edu “A critical analysis of the laws of inheritance in the southern states of Nigeria” (2015) 60/01 *Journal of African Law* 141 at 149. The term, “customary law” is used here to denote, in a broad sense, the various forms of norms which a given population uses to conduct its affairs. It is also referred to as ‘people’s law, folk law, traditional law,’ and ‘indigenous law. See Morse & Woodman (eds.) *Indigenous law and the state* (1988, Foris Publications); Allot & Woodman *People’s law and state law: the Bellagio Papers* (1985, Foris Publications); T Elias *The nature of African Customary Law* (1955, Manchester University Press) 55.

²¹² V Uchendu *The Igbo of Southeast Nigeria* (1965, Holt, Rinehart and Winston) 22-25; J Barton *et al Law in radically different cultures* (1983, West Academic Publishing) 41-42.

²¹³ Uchendu *ibid*.

²¹⁴ T Nhlapo “The African family and women’s rights: friends or foes” (1991) *Acta Juridica* 135 at 138, 141 & 145-146 [Explaining implications of “The values underlying the African family”].

²¹⁵ N Okoro *The customary laws of succession in Eastern Nigeria and the Statutory and judicial rules governing their application* (1966, Sweet & Maxwell) 4.

²¹⁶ *Ibid*.

²¹⁷ The most significant aspect of patriarchy is levirate marriage or wife inheritance. See, generally, JU Ogbu ‘African bridewealth and women’s status’ (1978) 5/2 *American Ethnologist* 241-262.

²¹⁸ P Iroegbu *Marrying wealth, marrying poverty: gender and bride wealth power in an African society: the Igbo of Nigeria* (2007, Trafford Publishing).

rights in relation to his wife and the children she bears".²¹⁹ This attachment to another family setting transports women into the legal sphere of their husbands' property rights. The preservation philosophy of male primogeniture, which heavily influences matrimonial property relations, is yet to be analysed by appellate courts.

Secondly, the unclear status of customary law in Nigeria's legal framework poses a hindrance to judicial protection of women's matrimonial property rights. Unlike countries such as South Africa, Ghana, Kenya, and Uganda, customary law is not subjected to the Bill of Rights in the Nigerian Constitution,²²⁰ nor is its relationship with statutory law defined. Indeed, Nigeria's Constitution pays little attention to "the proper place of customary law" in the face of social changes.²²¹ In addition, the customary law of succession, marriage, and divorce are not statutorily regulated.²²² This status of customary law is significant, given that judges are not expected to apply the law in vacuum. For example, a divorcing wife has no legal basis to claim matrimonial property under customary law.²²³ Similarly, she cannot claim maintenance rights.²²⁴ Her non-entitlement to maintenance is traceable to ancient agrarian settings in which she usually returned to her family for sustenance. Whereas she could return to her father's house in the precolonial era, the diminishing concept of extended families makes this return difficult today.²²⁵ To compound women's position, judges tend to apply the customary law captured in precedents with little regard to evolutions in the social settings that informed those precedents. For example, as recently as April 2013, the Court of Appeal affirmed that under the Abagana customary law, women have no right of inheritance in their late father's estate.²²⁶ In effect, the unregulated "coexistence of modern, statutory laws with traditional customary laws and practices – has created a complex and confusing legal regime under which women generally are denied adequate legal protection".²²⁷

In the light of the foregoing, this article examines the extent to which Nigeria's apex courts protect women's matrimonial property rights under customary law. In addition to fieldwork conducted in South-East Nigeria between June 2014 and January 2015, this question is explored with an analysis of thirty divorce and succession judgements. This analysis focuses on Supreme Court and Court of Appeal judgements delivered since Nigeria became self-governing in 1960. The focus on these two courts is largely informed by the doctrine of judicial precedent. Given that their decisions are binding on all other courts in Nigeria, the Supreme Court and Court of Appeal are, in a sense, judicial policy makers.

Following this introduction, Part II describes the analytical framework that underpins the article. It first explains the philosophy of women's matrimonial property rights under customary law. Next, it identifies the problematic manner in which Nigeria's legal framework provides for the application of customary law. Thereafter, it highlights how this framework fails to deal with women's inability to legally assert matrimonial property rights. Finally, it explains the flexible nature of customary law and the need for judges to avoid a rule-based approach to women's matrimonial property rights. Part III examines the institutional and functional challenges to judicial recognition of customary law. Part IV uses case analysis to shed light on the legal mechanisms used by judges to interpret matrimonial property rights. It reveals the extent to which the Supreme Court and Court of Appeal uphold these rights under customary law. Part V concludes the article and makes legislative and policy reform proposals.

The certification of customary marriages in pluralistic legal systems with special reference to South Africa and Zambia: A case for parallel and decentralised certification systems

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'Sometimes people [...] come here [the local court] and get a certificate, go to church and then go to the civic centre [where the Town Council is located and where the certification of certain forms of marriages takes place]. It's a way of securing their marriages and – maybe it's a bit of ignorance on really what they want – because they could go for one'
(Senior Local Court – Zambia)

²¹⁹ Radcliffe-Brown & Forde *African systems of kinship and marriage* (1950, Oxford University Press) 43-51.

²²⁰ Constitution of the Federal Republic of Nigeria 1999, as amended; ('the Constitution').

²²¹ U Ewelukwa "Post-colonialism, gender, customary injustice: widows in African societies" (2002) 24/2 *Human Rights Quarterly* 424 at 446.

²²² What may be an exception is the Limitation of Dowry Law, Eastern Region Law No. 23 of 1956, which limits bridewealth amounts.

²²³ Evidence from the field indicates that women may only claim matrimonial property that is bought in their own (maiden) names, or by furnishing evidence that they purchased it with their own funds.

²²⁴ A Osondu *Modern Nigerian family law and practice* (2012, Holy Publications Ltd) 100.

²²⁵ C Ajaero & P Onokala "The effects of rural-urban migration on rural communities of Southeastern Nigeria" (2013) *International Journal of Population Research*.

²²⁶ *Eucharía Nwinyi v Anthony Ikechukwu Okonkwo* (2013) LPELR-21216 (CA).

²²⁷ Ewelukwa above note 221 at 446.

'One may prove marriage with the production [of] a marriage certificate. Even if a marriage is under customary law, the local court gives spouses a marriage certificate to confirm such marriages. The appellant has not produced the said documents and therefore he has not convinced me that the respondent is married to another man [...] the application is dismissed (lightly edited)

The aim of this paper is to examine systems for registration of customary marriages in African legal systems with special reference to South Africa and Zambia. These countries share the common feature of the existence of multiple forms of marriage which parties intending to marry can choose from. Another point of interest in these countries is that they provide an opportunity to examine certification of marriage systems against the backdrop of findings of recent empirical research conducted in each country by the Chair in Customary Law, Indigenous Values and Human Rights at the University of Cape Town.

The focus of the paper is the registration of customary marriages in African legal systems with respect to two imperatives - the normative and the practical or "grounded" reality imperatives. The normative imperative for registration stems from international and regional human rights law, as well as domestic legislation, in some countries, while the practical imperative is the need to provide more reliable means of enhancing family members' access to human rights and family resources. Needless to say because of fragile or non-existent social security systems in Africa to support indigent citizens, family resources account for major sources of livelihood for families, especially when a marriage breaks down or is dissolved by divorce or death.

Access to human rights and family resources in the field of family law in a broad sense, including inheritance, depends on the existence of the marriage, a fact which requires proof whether or not there is a dispute about the legal status of the marriage. Marriage registration or certification provides the most reliable proof of the existence of the marriage. However, a combination of the absence or failure of state interventions aimed at certification of marriages and the co-existence of different marriage forms in African legal systems lead to complex problems concerned with the certification of marriages. These problems result in many marriages not being certified and presenting consequent hardship to family members in relation to access to family rights and resources.

The two excerpts above signal some of the intractable issues concerning the state of certification of marriage systems. The first excerpt reveals the practical perspective arising from the co-existence, within the setting of deep legal pluralism, of multiple certification systems that lead to confusion among the users of the systems. The second excerpt highlights the drastic consequences not only of the ignorance of the law regarding the certification of marriages by state officials, but most importantly regarding the denial of justice arising from the inability to prove the existence of the marriage in the context of adjudication of disputes. The paper discusses these and other issues after a brief outline of the normative imperative, and recommends ways of strengthening marriage registration systems in African contexts as a matter of legal policy. In this respect, drawing from the South African and Zambian case studies, the paper argues for the need to develop parallel and decentralised certification systems that respond to the fact of legal pluralism, and the "grounded" realities of the administration of state certification systems.

The argument of the paper is advanced in seven sections. Following the introduction, the second section sets out the normative imperative by outlining the certification of marriage obligations of African states under international and regional human rights law. This is followed by the third section which discusses the certification systems in the two countries with the aim of providing insight into the actual state and challenges of marriage certification in Africa through concrete examples. The certification systems in the two countries are characterised by a maze of regulation that is better understood within the context of deep legal pluralism, which is the subject of the fourth section of the paper. This section discusses the concept of legal pluralism and how it operates in the process of certification of marriages from the perspectives both of state and non-state actors. It shows the co-existence of state and non-state certification systems and how people move between these systems, as well as the confusion among state and non-state actors with regard to the regulatory regimes and the enforcement of family rights created by the intersection of the registration systems. The fifth section draws from the preceding sections to show how the state of the marriage certification systems and the maze of regulation and its operation affect the protection of family members' access to matrimonial resources, such as maintenance and redistribution of matrimonial property upon the dissolution of the marriage. Here, specific reference is also made to the decisions of courts in which certification was central to family members' access to family resources. The sixth section pulls together all the sections to consolidate a two-pronged argument: Firstly, there is a need for registration of all customary marriages in African legal systems. Secondly, the systems of registration must respond to the grounded realities and legal pluralistic nature of African marriage laws. More specifically, the paper will argue for parallel and decentralised certification systems that respond to the "grounded" realities of state and non-state actors concerned with certification systems and the fact of legal pluralism. The last section is the conclusion.

Customary legal empowerment, or how to engage with customary justice systems

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Development practitioners involved in rule of law building projects recently accepted the importance of customary justice systems for the majority of the rural inhabitants of the global South. Their increasing willingness to engage with customary justice systems in rule of law building programs is not, however, unproblematic. The approaches and expectations of donors and development agencies do not easily tally with the complexity of customary justice systems. External actors often lack knowledge about the different versions of customary law, the negotiable nature of customary justice, and the power differentials involved in defining customary law. This article poses that programming in customary justice needs to engage more with issues of power and empowerment. It uses the term 'Customary Legal Empowerment', to emphasize the importance of improving the representation and participation of marginalized community members in customary justice systems and their ability to make use of these systems to uphold their rights and obtain outcomes that are fair and equitable (cf. Ubink and Van Rooij 2011: 17).

To illustrate this point, the article will analyze two different approaches to reforming customary justice systems, one undertaken in Namibia, one in Ghana. In Namibia, a clamor for change from society led to substantial changes in customary law. In northern Namibia, Uukwambi Traditional Authority tried to enhance the role of women in the customary justice system. Stimulated by the national government, they initiated changes at three arenas: several customary norms that were detrimental to women were altered, participation of women in traditional dispute settlement was encouraged, and the number of female traditional leaders was increased. The measures adopted prompted positive change in customary practices: the new female traditional leaders were well-accepted by their communities and their administration assessed positively; the scene of traditional court meetings changed enormously, with more women present and actively participating; the majority of court users was satisfied with the performance of the court and felt that men and women were treated equally and had an equal chance to obtain a fair decision or settlement; and a new norm prohibiting property grabbing of the widow on the death of her husband was widely known and the practice had gradually declined.

In Ghana, a heavily donor-sponsored Land Administration Program (LAP) aimed to improve the quality of customary land administration via the introduction of customary land secretariats that were to enhance tenure security of smallholders and the accountability of customary actors regarding land transactions. However, donors and government actors involved in LAP engaged with the customary land tenure system in such a way that the program enhanced the powers of traditional leaders to administer and regulate communal land without clearly spreading the message of the legitimacy of communal interests in land and the need for accountability of the chiefs. This allowed for elite capture of increasing land revenues to the detriment of ordinary land users.

Through an analysis of the different approaches taken to reform customary law in Namibia and Ghana, and the extent to which these reforms have empowered marginalized groups, this article aims to discuss which aspects of the complex nature of customary justice systems need to be understood if legal reforms targeting customary justice systems are to be effective; what approaches can be used to improve the functioning and effectiveness of customary justice systems for vulnerable groups; what role power plays in these reforms; and whether a particular kind of legal empowerment can improve the functioning and effectiveness of customary justice systems.

Defining "communities": The impact of law and practice on rights and standing in Xolobeni, South Africa

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How are groups of people living in customary law contexts defined as "communities" in law, and what impact does this have on their ability to protect and assert their rights and customs? In this paper it is argued that defining these groups of people as particular "communities" in law has adversely affected their involvement in decision-making processes and undermined their ability to participate in litigation. As the example of Xolobeni in the Eastern Cape of South Africa shows, this happens when the standing of individuals and smaller sub-groups existing within larger groups is hidden and subsumed into a primary association with the larger group, and then cemented into law. The law effectively becomes a tool for the silencing of, particularly dissenting, sub-groups.

The authors begin by examining and comparing how groups of people have been defined as "communities" in two pieces of legislation that are pertinent to the former homeland areas of South Africa. In the Interim Protection of Informal Land Rights Act of 1996 (IPILRA) the key defining factor for constitution of a "community" is that people share certain rules about land rights and access. There are no defined margins for the scope or size of a "community", nor are there any prescriptions about how the group

of people should be positioned in relation to other groupings. Yet IPILRA does not subsume an individual's identity into the "community" that he or she may be a part of, and no challenge is presented in respect of personhood for both individual and "community". This understanding then forms the basis for the methodology that must be applied before any person belonging to a particular "community" can be deprived of their individual rights to land that is held on a communal basis.

Instead of reference to shared rules and practices, the Traditional Leadership and Governance Framework Act of 2003 (Framework Act) focuses on a notion of "community" that is explicitly linked to the concept of "tradition" and the recognition of traditional leadership institutions. While the Framework Act sets out an administrative process for the recognition of a "traditional community" according to specified criteria, transitional mechanisms at section 28 of the Act provide a more immediate route for defining the scope of communities. This provision effectively converts all "tribes" that were recognised in terms of the colonial-era Native Administration Act 38 of 1927 into "traditional communities" and they are deemed to have met the relevant administrative criteria. This means that the constitution, shape and status of "traditional communities" cannot be separated from the political and legal history of "tribes" in South Africa – and the apartheid government's Bantustan project. The underlying danger is an assumption that people living in the former homelands can only be a "community" if they are a "traditional community" with historical recognition as a "tribe". In contrast, IPILRA explicitly defines "tribe" as a particular kind of community that can hold informal land rights, rather than the only kind of community that can do so.

Legal understandings of "community" are then juxtaposed with social science critiques of the processes and impacts of defining groups of people as "communities". Scholars have cautioned against romanticising the notion of "community" since it potentially obscures strategies for challenging and destroying structures of domination and exploitation. The authors rely on this key point as a motive for interrogating the use of the concept "community" in legislation. While "communities" are presumed to occur organically, the concept often actively serves to exclude and oppress "others".

Despite close interrogation and critique, the positive and romantic conception of "community" has proved resilient and remains prominent in both scholarly and public discourse. This has led to calls to abandon the use of the term altogether, or to adopt more nuanced understandings of the concept while recognising its power in everyday experiences. The authors argue that the definition of "community" found in South African legislation, particularly relating to traditional governance, does not take sufficient cognisance of the complexity of the term, which is dangerous for the realities the laws regulate.

The struggles of people in Xolobeni, in the Eastern Cape province of South Africa, present one context in which legal conceptions of "community" have proved harmful. The authors attempt to interpret events in Xolobeni through the lenses of both disciplines, describing the ways in which a particular "community" definition has stalled legal claims to assert customary land and environmental rights by people living in Xolobeni. In practice the Framework Act's assumptions enabled the avoidance of substantive rights issues through a series of preliminary court processes about the capacity of groups to litigate when they are not officially-recognised "traditional communities".

Finally, the authors connect struggles around "community" definitions to broader constitutional questions about the roles of traditional authorities and recognition of living customary law in South Africa. These questions are presently being grappled with in the legislative arena, in relation to the Traditional and Khoi-San Leadership Bill of 2015, and other policies dealing with communal land tenure. Jurisprudence from the Constitutional Court has also dealt with these broader issues. In the *Pilane v Pilane* judgment handed down in 2013, for example, the Court suggested that traditional institutions can exist and have legal status in terms of customary law in parallel to those institutions that are recognised by statute. The authors argue that this logic should extend to the recognition and status of "communities". This accords with a more nuanced understanding of "community" gained from the social sciences, and also resonates with the Constitutional Court jurisprudence about recognising a form of customary law that is living and responsive to everyday realities.

Law and culture in Nigeria: Challenges, conflicts and adaptation in a global village

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Law and culture are interwoven, for law permeates all realms of social behaviour, also there is no society without culture, law pervasiveness and social significance is felt in all walks of life. Law as we know is a tool of social engineering, and there is hardly any society which is not governed by law or ideas, which can be basically or dogmatically interpreted and developed. Law has two faces, as a mechanism of regulation of social life through distinct institutions and practices and as a body of doctrine. Law is the totality of life, but seen from a specific view point. Culture is simply that element in human behaviour which enables man to make the most of his physical capabilities and adapt to different environments without highly specialised biological equipment. Almost all

other human activities are more or less cultural in nature. Most of what we do and what we think even the way in which we perceive experiences and environments is learned by each new generation of human beings from previous generations.

African cultures have witnessed successive waves of assault, desecration, derision and consequently derogation at the hands of diverse alien forces over many centuries. The assaults started with the religious, political and cultural conquests by Arabs and Euro-Americans and thereafter by colonial plunder. The annexation of Lagos by the British Administration in 1862 which led to the received English Law in Nigeria; the society is now polarised between the dichotomy of those who have abiding love for the customs and traditions of our fore-fathers, this category resist change, they abhor violent change, they believe and adhere to the Latin maxim of *FESTINA LENITE*. This act led to cases where the rules of the indigenous laws are objectionable; the need to effect necessary modifications to customary law because of its 'exotic' nature; the need for choice of law rules in matter of adjudication and the Repugnancy doctrine.

A major challenge is the existence of different systems of court namely a) customary law court; b) *shariah* court; c) the general law, the question is can all these courts be fused? The paper will seek to address this. There is also the problem of language which the court will adopt in adjudication going by the diversity of the people and the high rate of illiteracy, though the English Language is the lingua franca. The superimposition of English Laws and statutory enactments has gone further to complicate the matter and this serve as a major conflict. There are main differences between rights enjoyed under the received law, Islamic law and customary law; the common law has wrecked more havoc to customary law concepts in Africa (Nigeria) by especially introducing new terminologies and doctrines to govern land tenure which have completely come to displace or submerge the terms and categories known to these systems. In Nigeria, as elsewhere throughout former British African colonies, customary law concepts governing communal land tenure known only to English Common Law has been achieved through judicial interpretation and application of existing customary law notions which do not quite mean the same thing but have nonetheless suddenly been transformed by a process of co-operation and merger. Nigeria is at the cross roads of culture conflict, our social institutions are an amalgam of the inveterate institutions introduced into the country by western European civilisations, yet there are fundamental differences between African and Western ideas. Majority of the people of Nigeria are subject to the primacy of culture, at least in matters of personal relations; the factor which connects a person with the law creates problem of its own, and this problem results in conflicts.

The ultimate value of any social institution and practice such as the legal system lies in its contribution to the resolution of problems and attainment of the goals of society. In modern Nigerian society, customary law holds its place as a force sustaining legal order, an appeal to the underlying principles of customary law is an appeal to a reliable means of solving the problem of social order. Customary law possesses certain principles which must be distilled and preserved as essential ingredients of a Nigerian common law; consciously developed from the tripartite system of customary and imposed (Islamic and English Laws) to promote development, democracy, social justice and liberty in the country.

No command law, colonial or post-independence has been able to fundamentally transform, let alone eradicate of what the people of Nigeria consider to be 'their' law; process wise and even rule wise, today African law many not always correspond to that of pre-colonial past, but value wise it has retained its communal/socialist nature, as distinguished from the individualistic/capitalistic character of the imposed English Law.

How has recognition been given to law and culture in Nigeria? The paper seeks to chronicle the journey by examining 1) the characteristics of customary law which are: simplified procedures; facilitation of the parties in the customary court proceedings rather than bewildered spectators in the combat between lawyers and judges; consolidation as opposed to adjudication, repression and punishment is prominent in customary law and court. 2) the divergence of customary law in different areas with specific insight that shows that legal realities can only be understood as part of the history and prevailing dynamics of political, socio-cultural and economic organisations and circumstances in the society. 3) The similarities of customary law in Nigeria i.e. the basic notion of law and justice, this is because 'every society is built on a set of values and norms'. 4) The basis of legal validity i.e. the idea of law in the society and its recognition thereof.

Thus, the paper part 1 will examine basis of law in the society; part 2 will discuss the need for recognition of law and culture.

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Sanele Sibanda is senior lecturer at the University of Witwatersrand's School of Law. He has taught, researched and published on questions related to constitutional law, administrative law, customary law reform and law and culture. He adopts a critical perspective to these questions, asking how they impact upon or have been impacted upon by South African constitutionalism since 1994. He is also a member of the editorial committee of the South African Journal on Human Rights.

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Mathias Siems is a Professor of Commercial Law at Durham University, UK. He was previously a professor at the University of East Anglia, a reader at the University of Edinburgh, an associate professor at the Riga Graduate School of Law, a Fulbright Scholar at Harvard Law School, and a Jean Monnet Fellow at the European University Institute in Florence. He is a graduate of the Universities of Munich and Edinburgh.

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Nicholas Rush Smith is assistant professor of political science at the City University of New York – City College. He is currently completing a book manuscript on vigilantism in post-apartheid South Africa. Based on nearly 20 months of ethnographic and archival research, it asks why South Africa has experienced high rates of vigilantism despite a celebrated transition to democracy, lauded constitution, and massive transformations of the state's legal apparatus following apartheid. His work has been published or is forthcoming in leading journals like the American Journal of Sociology, African Affairs, and PS: Political Science and Politics.

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Dr Dee Smythe is a Professor of Public Law and Director of Research in the Law Faculty at the University of Cape Town. She was founding Director of the Centre of Law and Society between 2013 and 2016. Prior to that she was Director of the Law, Race and Gender Unit and Principal Researcher at the Gender, Health and Justice Unit in UCT's Faculty of Health Sciences. Dee's work spans a range of areas at the intersection of law, policy and social justice. She has convened the African Network of Constitutional Lawyers' focus group on Women, Equality and Constitutionalism and teaches on Law and Society in Africa.

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Gina Snyman is in-house counsel at the Centre for Applied Legal Studies litigating across CALS' programmatic areas, with a special interest in the Rule of Law, and most recently focusing on the social security rights of grant beneficiaries, and the legalization of assisted dying in South Africa. Prior to joining CALS, Gina practiced as in-house counsel at Lawyers for Human Rights' in the Strategic Litigation Unit, with a strong focus on Environmental Rights and mining affected communities, as well as representing clients before the Arms Procurement Commission. Before joining the bar, Gina headed LHR's Immigration Detention Programme where she successfully obtained landmark judgments on the rights of asylum seekers not to be detained, and the non-extradition of foreign nationals facing the death penalty.

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Tebello holds the following degrees: BA Law, LLB, LLM, LLM. He is currently a lecturer in the UCT Faculty of Law, Commercial Law Department and a PhD candidate in the same department. Prior to joining UCT, Tebello was the Principal Secretary (Director General) of the Ministry of Law and Constitutional Affairs in the Kingdom of Lesotho. Prior to that, he lectured at both undergraduate and postgraduate levels at the University of KwaZulu Natal, Howard College. He teaches Company Law and Business Law. His research interests straddle two areas of law, namely, corporate law as well as the emerging field of business and human rights. He has published and delivered conference papers in these areas. His current PhD research is on the impact of ownership and control models on corporate governance of state-owned companies.

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Professor Wilkins is the Lester Kissel Professor of Law, Vice Dean for Global Initiatives on the Legal Profession, and Faculty Director of the Center on the Legal Profession at Harvard Law School. He is also a Senior Research Fellow of the American Bar Foundation and a member of the Faculty Committee of the Harvard University Edmond J. Safra Foundation Center for Ethics. Prof. Wilkins has given over 50 endowed lectures at universities around the world and is a frequent speaker at professional conferences and law firm and corporate retreats. He is the author of over 80 articles on the legal profession in leading scholarly journals as well as a co-author of several books, including *The Indian Legal Profession in the Age of Globalization* (forthcoming 2016), *Diversity in Practice* (2016), and *Problems in Professional Responsibility for a Changing Profession* (5th edition 2009). He and his Harvard Law School colleague, Andrew Kaufman, are also co-authors of one of the leading casebooks in the field. He was elected to the American Academy of Arts & Sciences in 2012 and the Spanish Royal Academy of Doctors in 2014 and most recently was the recipient of the Harvard Law School Association Award in 2016. His major research interests include the legal profession, legal ethics, diversity and globalization.

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Dr Cheri Young is a lecturer in the Department of Private Law at the University of Cape Town. She currently lectures Advanced Property Law (Expropriation), Property Law in a Constitutional Order and Mineral Law in Africa. She obtained her LLB and PhD degrees from the University of Cape Town. In 2015, she completed a Postdoctoral Research Fellowship at the University of Cape Town, furthering her research interests in mineral and natural resources law, and property law and theory. She is an admitted attorney of the High Court of South Africa. Her interests include energy and natural resources law (particularly water law), property law and theory, and administrative law. AW Mellon fellow, UCT (2011-2012). Reviewer: African Mining Legislation Atlas (2015). UCT Future Water Institute (2016).

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