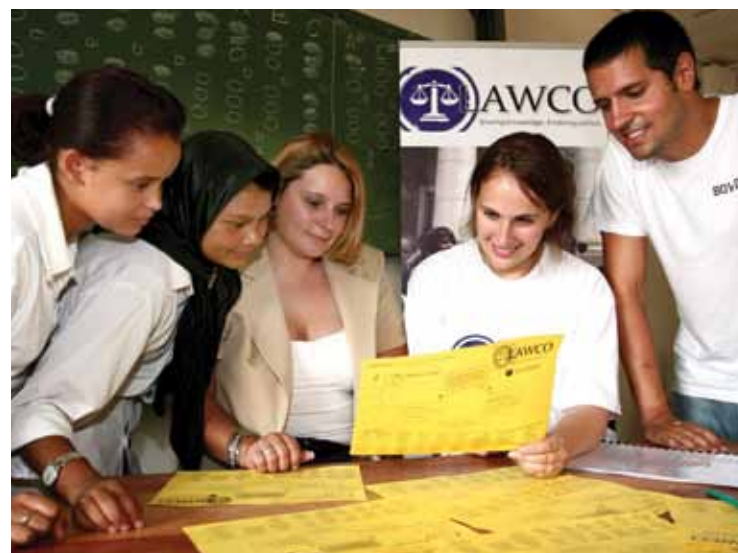


# FACULTY FOCUS

A MONDAY MONTHLY SUPPLEMENT

FACULTY OF LAW



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# A WORD FROM THE DEAN

**PJ Schwikkard**  
Dean of the Faculty of Law

Law might be the smallest of the six faculties, but its footprint is large – whether you’re talking about the impact its staff and students continue to have on society, the largesse of its alumni, or the diversity of research coming out of departments and research units.

As a consequence of the excellent leadership provided by past deans, I had the privilege of being appointed dean to a faculty of high repute. The faculty makes a significant contribution to legal education and intellectual discourse both nationally and internationally. We are the only faculty of law in Africa rated in the top 100 law faculties in the world; our current ranking is 40.

We are the smallest of UCT’s six faculties, consisting of three departments (commercial, private and public law) and multiple research units. We have over a thousand students, 43% of whom are masters or doctorate students. In addition we teach law courses to over 2 500 students in other faculties. The demographic profile of our students is slowly normalising. At present black, coloured and Indian students constitute 40% of the student body (49% in the LLB), and 41% are white (48% in the LLB). Some 19% are international (35% at the postgraduate level).

The university and faculty’s mission statements emphasise excellence and equity. As a law faculty we recognise the role that law played in creating an oppressive and divided society, and commit ourselves to teaching and research that is of the highest quality; developing all staff and students to their fullest potential; and promoting an institutional culture founded on mutual tolerance, respect, understanding, integrity

and openness, one which values our common humanity and which celebrates and promotes diversity. In the pursuit of all these goals we hope to contribute to redressing the inequality and disparity that continues to exist within South African society.

For me, there is a direct link between diversity and excellence. It is not sufficient for scholarship to simply be reproduced; it needs to be developed. Diversity is an essential tool in optimising this capacity to develop. Diversity allows us to broaden our vision of possibilities and question our claimed ‘truths’. The way in which we interpret things is contextually contingent on past, immediate and imagined future contexts. The interactions of diverse histories and traditions give rise to multiple questions which allow us to expand the boundaries of our own and of communal knowledge; and in doing so, to reconstruct our institution.

If we are serious about addressing historical inequalities we should acknowledge that hierarchy is embedded in social structure and is reproduced in the law faculty. In order to successfully change the demographics of the student body we need not only to provide academic and financial support, but also to question our teaching practices and curriculum.

A revised curriculum was introduced in 2012. We were fortunate to be able to appoint Professor Lesley Greenbaum, a legal education specialist, who has guided us in improving throughput rates and developing a successful extended curriculum programme. Hugh Corder and his team have been very proactive in raising money for bursaries, and involving law firms in supporting existing students. Our strategy was primarily to attract talented black learners to UCT to do law, while also offering some support to our master’s and PhD cohort. R10.3-million has been invested in students between 2009 and this year.

Our faculty is also committed to meeting the needs of a transforming society. In the three years since the inauguration of the university’s social responsiveness award, it has twice been awarded to members of the law faculty. Many of our students are active in civil society – in addition to their compulsory 60 hours of community service. All departments and research units are in some way engaged with socially responsive research. Given our small size and high staff-to-student ratio, the research output of our teaching staff is remarkable. A multitude of authored and edited books are produced, alongside more than 100 articles per annum.

This supplement is a small sample of that commitment and abundance. For more information on our faculty, please visit: [lawuct.ac.za](http://lawuct.ac.za)



Photo by Michael Hammond



Familiar views for past and present law staff and students of outside and inside Kramer Law building

## FACULTY FOCUS

Every two months, UCT’s newsroom brings out a special supplement to *Monday Monthly* focused on one of the university’s six faculties as well as the Graduate School of Business (GSB) and the Centre for Higher Education Development (CHED). Coming up later this year is the Faculty of Engineering & the Built Environment, as well as the GSB and CHED.

To read past editions, head online: [uct.ac.za/mondaypaper/faculty\\_focus](http://uct.ac.za/mondaypaper/faculty_focus)

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# LAW BY NUMBERS

## GENERAL

**Ranked 40<sup>th</sup> in the top 100** law schools worldwide – the only one in Africa

**Oldest law school in SA** with lectures first starting in 1859

## STUDENTS

**40%**

of 1 000 students are registered for post-LLB studies

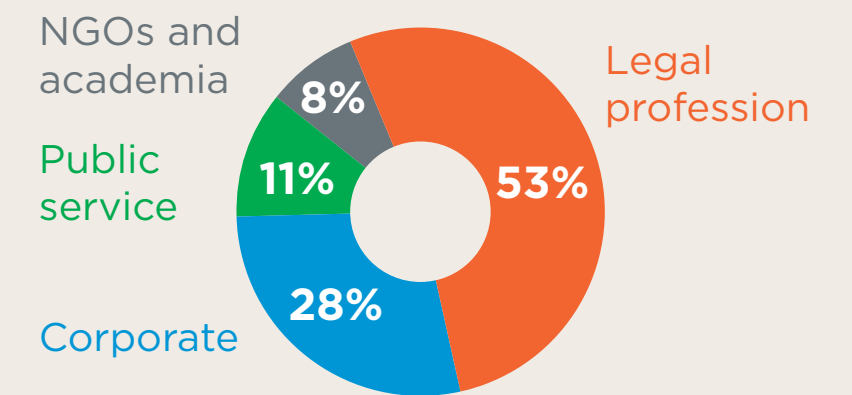
**66%**

of students are female, as are most of the academic staff

**114%**

increase in number of black South Africans between 2009 and 2015

## Where are our graduates?



## 3 routes to an LLB

1. A combined degree of 5 years
2. An undergraduate degree of 4 years
3. A postgraduate degree of 3 years

## STAFF

**2**

NRF chairs

**19**

NRF-rated researchers

**4**

Distinguished Teacher Awards

**2**

of the first three UCT Distinguished Social Responsiveness Awards

**1**

National Excellence in Teaching Award

## ALUMNI

**74%**

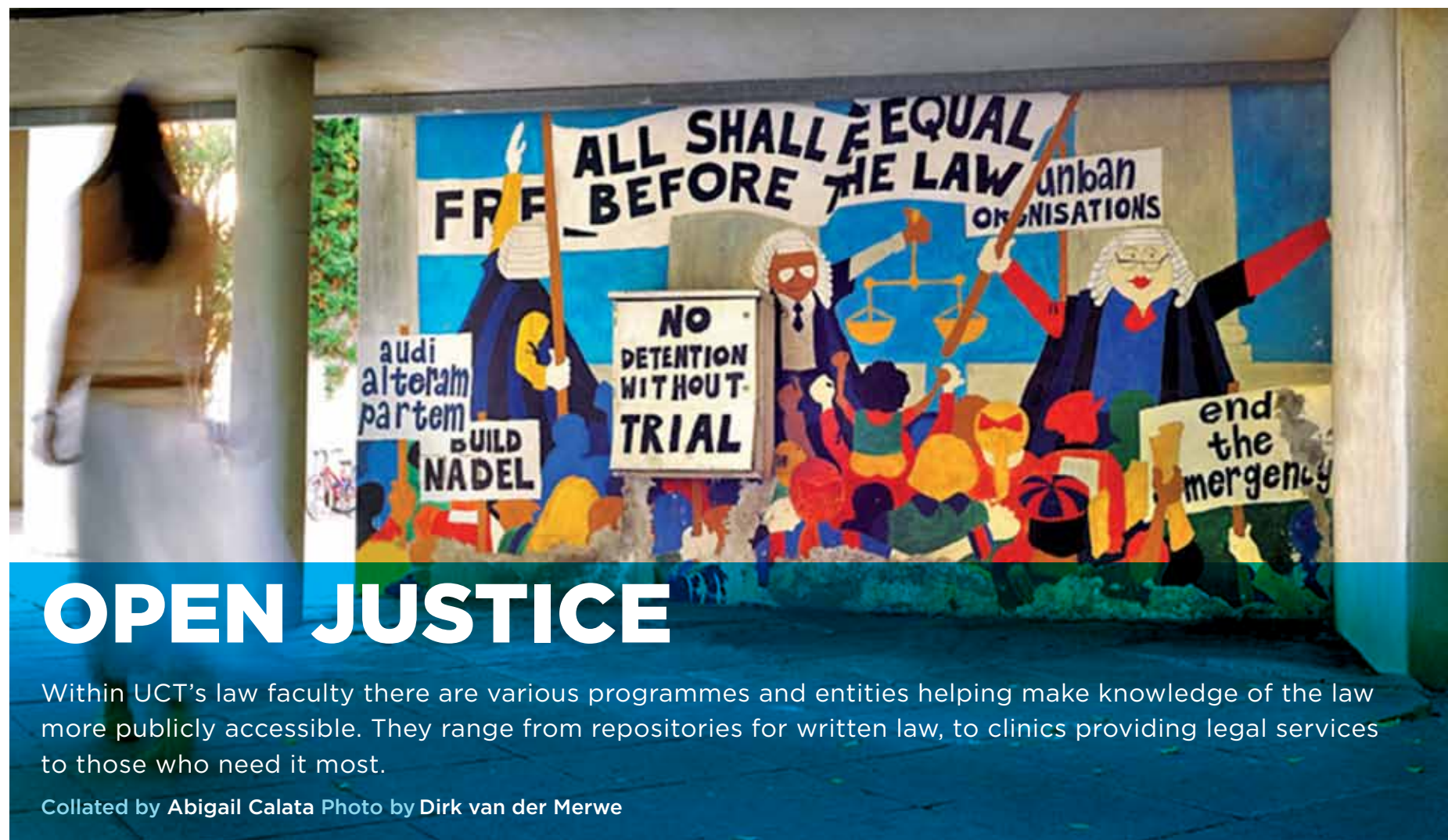
of law endowment funds came from individuals (vs the UCT average of 7%)

**UCT’s 150<sup>th</sup>** anniversary celebrations included fundraising for an endowment fund that today supports over 60 students

**R13 million** in scholarships

from law alumni and law firms awarded since 2009

A UCT mural designed by engineer Mike Merrifield and painted by keen young lawyers in the 1980s



## OPEN JUSTICE

Within UCT's law faculty there are various programmes and entities helping make knowledge of the law more publicly accessible. They range from repositories for written law, to clinics providing legal services to those who need it most.

Collated by Abigail Calata Photo by Dirk van der Merwe

### SA's largest online law library

The Southern African Legal Information Institute (SAFLII), established in 2002, is the largest online law library; through its website ([www.saflii.org](http://www.saflii.org)), it offers free access to journals, judgments and legislation from Southern Africa.

Based in UCT's Democratic Governance and Rights Unit, SAFLII hopes to promote transparency, judicial accountability and the rule of law, by providing free and open access to South African legal information. It is part of the global Free Access to Law Movement (FALM), as well as the international network of legal information institutes (LII).

SAFLII receives over 120 000 unique visitors a month requesting over 2 million pages from its databases. The library currently hosts close to 100 000 documents across over 50 databases. It also links up to other LIIs in the region, making comparative law research that much easier online.

### Africa's legal info incubator

AfricanLII is primarily an incubator of new legal information institutes (LIIs) and a facilitator for existing LIIs in Africa. AfricanLII and other national LIIs also contribute to judicial education through a training programme in electronic legal research, which includes aspects of advanced legal research, citation and access to resources. The training is available to judges, their assistants, lawyers and legal academics.

It is also housed within the Democratic Governance and Rights Unit.

### Law in your pocket

Pocket Law gives you access to legal materials via portable media such as flash or external hard drives. Content is updated every time the device is reconnected to the internet.

Developed by UCT's Democratic Governance and Rights Unit, Pocket Law is an answer to the difficulty legal practitioners face accessing the written law – considered by many to be the basic 'tool of the trade'.

A pilot project of this legal information research product is being rolled out to 25 judges of the Southern African Development Community (SADC). If the pilot is successful, the product will be launched more widely later this year. Plans are also afoot to market it to a wider audience of judges and legal professionals on the continent.



### Free legal advice

Established in 1972 as the UCT Legal Clinic, the Law Clinic is a registered law practice that offers free legal advice and assistance on legal issues, ranging from divorce and custody disputes to evictions and wills.

The first university law clinic to be established in South Africa, UCT's Law Clinic started life as a student-run initiative giving legal advice to members of poor communities. Former student advisors include Justices Kate O'Regan (Constitutional Court) and Dennis Davis (Cape High Court).

Eligibility for the services on offer is determined by a means test, which is adjusted each year – and clients don't pay for any of the legal services. Instead, payment extends to the actual expenses involved in running your case, such as sheriff's fees. And there's always a qualified, experienced litigation attorney on hand to supervise and guide the law students.

The Law Clinic also provides training for candidate attorneys every year. A candidate attorney serves under a contract of articles, with the director of the Law Clinic as his or her principal. In this way the Law Clinic plays an important role in empowering newly qualified law students, and equipping them to enter the world of formal employment.

The Law Clinic takes on approximately 200 cases per year, impacting the lives of at least 500 people.

### Supporting refugees and asylum seekers

Founded in 1998 as a division within the Law Clinic, the Refugee Rights Unit aims to provide legal support services to the growing number of refugees and asylum seekers in South Africa.

The Refugee Rights Unit has since evolved into an independent unit with four main components. Its Refugee Law Clinic provides direct legal services to thousands of refugees and asylum seekers in the Western Cape each year, while the unit conducts applied research in refugee law and related topics and teaches refugee law to undergraduate law and master's students in the Department of Public Law. It also undertakes a significant amount of targeted advocacy and training of government officials, the judiciary, civil society partners and refugee communities.

The Refugee Rights Unit is currently funded by the United Nations High Commissioner for Refugees, the Atlantic Philanthropies, and the Sigrid Rausing Trust.



### 60 hours of community service

It is a compulsory requirement for the LLB degree that all law students complete a total of 60 hours of unremunerated community service during their degree.

The service must be legally orientated, and must directly benefit an underprivileged, disadvantaged or vulnerable group or person. Community service is offered through a range of service providers approved by the law faculty's Community Service Committee. These include organisations that are directly affiliated to the faculty, such as the Law Clinic and Refugee Rights Clinic, certain UCT student organisations such as LAWCO, and approved external service providers.

### Students giving back

The Legal Welfare Community Organisation (LAWCO) is a UCT law student initiative established – in conjunction with SHAWCO Education – to provide basic legal education to disadvantaged schools and communities in the Cape Metropolitan area.

LAWCO's workshops are designed to educate high-school learners about their fundamental rights and how to enforce them. They hope not just to empower teens, but also to provide those hoping to practise law with a solid understanding of what their studies will entail.

Law students who volunteer for LAWCO gain practical legal experience while also becoming more familiar with the types of issues faced by the community surrounding the university. Time spent volunteering at LAWCO counts towards the compulsory pro bono hours every law student is expected to fulfil by the end of their degree.

### Labour law

The Institute of Development and Labour Law was established in 1996 through the merging of the Development Law and Labour Units. The focus of the former was on land, housing, small and medium enterprises and other socioeconomic issues; while the latter, established in 1987, was aimed at capacity-building and applied research in the area of labour rights and labour market reform in emerging democracies. The institute incorporates the Labour and Enterprise Policy Research Group (LEP), which explores the interface between labour market regulations, trends in the labour market, and development.

Besides conducting research, the institute conducts education and training with regard to labour law and the labour market, hosts occasional workshops on topical issues, and publishes working papers and monographs. Last year, it made a submission to the Marikana Commission on organisational and collective bargaining rights in the platinum mining sector. The institute is also one of the convening organisations of the Annual Labour Law Conference, now in its 28th year.

### Training judicial officers

The Centre for Law and Society (CLS) has trained over a thousand judicial officers and developed training materials on issues such as HIV, sexual offences, domestic violence, race and racism, and judicial ethics.

Established in 1993 at a time when courts were facing the challenge of transforming their structures and jurisprudence in line with constitutional and democratic values, CLS provides training and support to judicial officers by translating top research into accessible training materials and enlisting judicial officers as peer facilitators.

The participatory workshops organised by the centre are an important means for participant magistrates to share information and learn from each other, while also helping researchers tap into relevant issues in today's courts.



### Action research for rural women

Based in the Centre for Law and Society since its inception in 2009, the Rural Women's Action Research Project (RWAR) has emerged as a critical and influential voice in debates about customary law and traditional leadership. It sits at the nexus between research, social engagement and litigation.

RWAR's overarching objective is to bolster rural people's ability to assert their rights and hold those in authority accountable. It works in three main areas: land rights, traditional governance, and the impact of mining on communities.

RWAR has been at the forefront of efforts to secure the land rights of people living in former Bantustans, playing a major role in the campaign against the controversial Traditional Courts Bill, which eventually lapsed in 2014.

### Students for social justice

Launched by students in 2007 as a forum for law students to engage on central issues of legal and socioeconomic concern, Students for Law and Social Justice (SLSJ) aims to protect human rights, prevent discrimination and promote social justice and the rule of law. The society was formed in partnership with students of various universities in South Africa and strives to transform legal education and access to justice.

Partner universities include Fort Hare, KwaZulu-Natal and the North West. University branch committees were established by students, working closely with the national executive committee and SLSJ's other branches.

Over the years, membership has grown significantly, and has increased to include the Universities of Stellenbosch, Witwatersrand, Pietermaritzburg and the Free State.



### Supporting SA's largest human rights law clinic

Under the Law Advice Programme, some thirty UCT law faculty members have volunteered to provide free advice to the Legal Resources Centre, South Africa's largest public interest and human rights law clinic.

Associate Professor Alistair Price established the programme in 2012; and to date, faculty members have advised on a variety of matters, including:

- the obligations of media companies to respect the political free speech rights of their clients;
- the obligations of South African prosecuting authorities to investigate alleged international crimes committed abroad when suspected perpetrators visit South Africa;
- the international law implications of racially discriminatory expropriation of property;
- the constitutional implications of the Traditional Affairs Bill; and
- weaknesses in the enforcement mechanisms of the Consumer Protection Act.

There are hopes to extend the programme to include support to other public interest legal organisations.

**1959**

The first law lecture in South Africa is delivered on 16 April at the South African College, which would later become UCT.

**1919**

First LLB degree from the University of Cape Town is awarded.

**1962**

Civil rights leader and UCT alumna Cissie Gool becomes the first coloured female law graduate in South Africa, and the first to be called to the Cape Bar.

**1964**

*Responsa Meridiana*, an annual law journal and the collaborative effort of law students from the Universities of Cape Town and Stellenbosch, is first published.

**1972**

The UCT Legal Clinic, the predecessor of the current Law Clinic, is established.

**1977**

UCT's Institute of Criminology is established; in 2007, the core focus of the institute becomes African security and justice.

**1981**

Nicola Peart becomes the first woman to obtain a Master's in Law (LLM) at UCT.

**1983**

The Institute of Marine and Environmental Law, the largest and oldest unit of its kind in Africa, is founded initially as the Institute of Marine Law.

**1985**

A UCT-led research project into emergency law provides a resource for South Africans to know their rights under a state of emergency, after one is declared on 21 July.

**1986**

The legal education action project (LEAP) is established to provide legal support and representation for rural people of the old Cape Province affected by emergency rule.

**1987**

The Institute of Development and Labour Law is started, as the Labour Law Unit. In 1992, its focus shifts to development law issues, such as land, housing, and small and medium enterprises.

**1990**

Law alumnus Albie Sachs delivers his first public lecture at UCT, on his return from exile.

**1991**

After a long legal battle that started in 1986, a team that includes UCT alumni Andrea Durbach and Anton Lubowski as well as Prof Martin West succeeds in getting the murder conviction of 21 of the Upington 25 overturned, and all their death sentences commuted.

**1993**

Prof Hugh Corder is appointed to the committee drafting the Bill of Rights in the interim Constitution.

**1993**

Faculty members establish the Law, Race and Gender Research Unit, which would later become the Centre for Law and Society. Its mission is to understand the role of race and gender bias in the administration of justice, and to train judicial officers to be able to fulfil their functions in a diverse society.

**1994**

Law alumnus Dullah Omar is appointed as the first minister of justice in a democratic South Africa.

**1994**

Christina Murray is seconded to the committee overseeing the drafting of the Constitution.

**1994**

UCT alumna and law faculty member Kate O'Regan and alumni John Diccott and Albie Sachs are appointed to the first Constitutional Court.

**1995**

Prof Halton Cheadle is appointed convener of the team that drafts the Labour Relations Act.

**1998**

The Refugee Rights Unit is established to provide legal aid and support to refugees and asylum seekers in South Africa.

## JUST IN TIME

UCT law staff and students – contributing to justice in South Africa over the years



Some of the world's oldest legal systems began in Africa. In the north, the ancient Egyptian kingdom used a civil code, founded on the idea of Ma'at, the cornerstones of which are tradition, rhetorical speech, social equity and impartiality. Today, many legal histories and traditions – some local, others imported with colonialism – create the warp and weft of law in Africa, informing everything from marriage and mining to intellectual property and gender rights. Helen Swingler looks at some of the work UCT's law scholars are doing in Africa.

Early stone tools fashioned by our hominid ancestors in sub-Saharan Africa show that innovation based on local knowledge has old roots in the continent.

This early African innovation continued in agriculture, metallurgy, medicine and textiles; and even in building techniques, design and material.

But Africa has learnt some hard lessons in properly managing its intellectual property. An often-cited case from the 1970s describes how the National Cancer Institute in the US invested in *Moytenus buchananii*, a plant that grows in the Simba Hills of Kenya. The institute had learnt what the local Digo communities have known for years: the plant is good for treating cancers. But the material was collected and traded without the Digo knowing – and without any acknowledgement of their knowledge, or reciprocal financial benefit.

The Intellectual (IP) Unit, based in the law faculty, advocates for development-oriented intellectual property laws and policies in Southern Africa. At the forefront is an initiative the unit co-leads with the University of Ottawa's law faculty: the Open African Innovation Research & Training (Open AIR) project.

Open AIR has hubs in Egypt, Nigeria and Kenya, and teams in 14 African countries, including Tunisia, Ghana, Senegal, Cameroon, Ethiopia, Uganda, Tanzania, Malawi, Mozambique, and Botswana.

At the coalface is UCT's Dr Tobias Schonwetter, who works to ensure knowledge and innovation – and the communities who create this capital – are appropriately protected through guidance as well as policy and research development.

One example of this can be found in South Africa's Kukula healers, the traditional health practitioners of Bushbuckridge who hold valuable knowledge about medicinal plants; knowledge passed down through generations.



Custom doesn't allow them to share all this knowledge (some secrets are kept in families and groups), but there's much they are willing to share with the broader community; a pooling of knowledge for collaboration, protection and benefit-sharing.

This collaborative model, with its recognition of the benefits of selective openness, is somewhat different from the commercially driven Western model; yet it can protect them from biopiracy.

The Kukula case study was included in Open AIR's book, *Innovation and Intellectual Property: Collaborative Dynamics in Africa*, co-edited by Schonwetter and available under an open licence. The book is accompanied by a fascinating report that transcribes

some of the project's findings into three possible scenarios for Africa's future, 20 years from now.

Some 80 Kukula healers have since formed the Kukula Traditional Health Practitioners' Association (a traditional knowledge commons), and a representative body to watch their backs, commercially speaking.

Supported by NGO Natural Justice, the Kukula Association has developed a biocultural community protocol (BCP) to govern use of their knowledge by members of the association and by outside stakeholders.

Through this the healers share their medicinal plant expertise, while ensuring their traditional knowledge is documented and not lost to the grave.

## DYNAMIC, NOT STATIC

Customary law has been at the core of Africa's legal systems for centuries, in matters from birth to death and for everything in between: marriage, land ownership, succession and inheritance, contracts, traditional leadership, and justice. In South Africa, customary law still governs the lives of most black citizens.

Even in areas of life that are now regulated by legislation and common law, such as succession and marriage, there are pockets of life that are regulated by customary law, says Professor Chuma Himonga (Department of Private Law).

Customary law is one of the legal traditions in South African law. Before 1994, this legal tradition was considered to be inferior to the

common law, recognised only to the extent that the latter considered it to be valid.

South Africa's interim and final Constitutions of 1994 and 1996 recognised customary law along with other state laws, resulting in some interesting interfaces.

### Side by side, but under control

"Though the Constitution recognises customary law and common law on the same terms, it's not shielded or protected from the application of the Constitution; it's subordinate to the Constitution as the supreme law of the land," Himonga explains.

"And legislation is being designed to reform customary law, to align it with the Constitution and with the Bill of Rights."

The area that has most taxed the courts is the compatibility of customary law with human rights. There have been several interesting cases in the broad area of family law, for example, which have tested the courts' interpretation of customary law vis-à-vis human rights – as well as the malleability of the judiciary, says Himonga.

That customary law is a challenging but important area of our law is evident in Himonga's work, which earned her the Department of Science and Technology/National Research

Foundation Chair in Customary Law, Indigenous Values and Human Rights in 2010.

### Developing customary law

But like any system of law, customary law must develop, and the country's courts have been enlisted to help in this process.

"The need to develop customary law goes hand in hand with the evolving nature of this law," said Himonga. "Customary law adapts to changing social and economic conditions, as well as to conditions induced at the local community level by the legal environment, such as constitutional or human rights. In short, customary law is not static. Rather, it is dynamic."

2001

The Oliver Tambo Moot Court in the Kramer Law Building is opened by Dali Tambo, who attended the function with his mother Adelaide Tambo.

2004

The Democratic Governance and Rights Unit is founded to facilitate an intellectual space to think through solutions that promote public accountability and the rule of law.

2005

UCT requires its LLB students do 60 hours of community service before their degrees are awarded.

2007

The Intellectual Property Research Unit is founded to enable the participation of developing countries in the evolution of intellectual property policy and law systems.

2007

UCT law students found the society Students for Law and Social Justice (SLSJ), which subsequently becomes a national organisation.

2008

The law faculty funds the translation of the Universal Declaration of the Human Rights into Venda.

2012

The Centre for Comparative Law in Africa is established, to build research and teaching capacity on the African continent, and thereby support the university's Afropolitan initiatives.



Photo of Sishen Mine by Graeme Williams for Media Club South Africa.

That Africa is a continent of contradictions is starkly apparent in the great poverty that rides in tandem with its great mineral wealth. Researchers call it the 'resource curse', or the 'paradox of plenty'. With its long mining history, South Africa has not escaped this paradox.

The Marikana disaster at Lonmin Mines reminds us that the mining landscape is little changed, says professor of private law Hanri Mostert.

"The mining elite is largely indifferent to the poor."

And in Africa, this reality persists; perhaps with the exception of Botswana, she adds.

Some resource-rich countries, such as Norway, Australia and Canada, have escaped the 'resource curse'. But it's not the resource itself; rather, it's in the governance of that resource that the problem lies, and in the inadequacy and complacency of African governments in managing it, says Mostert.

### Fear of investment

The result is poor investor confidence (mining is Africa's main source of foreign direct investment), perpetuating the cycle of poverty, corruption and degradation.

"The common feature of these African countries is that they are all postcolonial states in a development phase," wrote Mostert in a project overview. That project – Mineral Law and Governance in Africa (MLiA) – is proving to be crucial.

Collaborating with UCT's Centre for Comparative Law in Africa, the initiative will map mining law across the continent through a network of legal academics, practitioners

and universities; to build capacity, disseminate information, and transfer knowledge.

"The project responds to the clear need to support the governments and citizens of mineral-rich countries with tools to debate and develop legislation, reframe the global discourse around their mineral wealth, and pass informed legislation derived from broad citizen participation to create the right environment for the sustainable use of mineral resources for shared prosperity."

### Mineral law library

The primary goal is developing an African mineral law library. The team will write a series

of academic books on African mineral law and governance – one each for the jurisdictions involved thus far: South Africa, Namibia, Botswana, Zambia, Mozambique, Eritrea, Tanzania and Nigeria.

The second goal is to build a network of practitioners and scholars in mineral law in these countries, as well as in Liberia, Ghana and Cameroon.

Third, to provide easy access to mining law information, the World Bank has initiated the African Mining Legislation Atlas (AMLA), a web-based, open-source platform containing all mining law in Africa.

## LABOUR INTENSIVE

Lesotho is sub-Saharan Africa's largest exporter of clothing to the United States, supplying retailers such as Gap, Levi Strauss, Timberland and Walmart. Clothing factories, which include South African-owned firms, constitute the largest employer in the mountain kingdom's formal sector.

Labour law specialist Shane Godfrey has been helping the country improve the compliance of clothing firms with labour standards.

The landlocked mountain kingdom faces numerous development challenges, says Godfrey of the Labour and Enterprise Policy Research Group in the Institute of Development and Labour Law. Godfrey and colleague Debbie Collier are involved in several projects there.

Funded by the International Labour Organisation (ILO), a specialised agency of the United Nations, these seek to secure and enhance labour rights. The pair has travelled to Lesotho on a number of occasions to research labour conditions.

"The clothing sector relies heavily on preferential trading arrangements such as the African Growth and Opportunity Act (AGOA)," says Godfrey. AGOA is a

non-reciprocal trade preference programme that provides duty-free treatment to US imports of certain products from eligible sub-Saharan African countries, such as Lesotho.

A number of these projects have been for Better Work Lesotho, a partnership of the ILO and the International Finance Corporation that aims to improve compliance with labour standards in the clothing sector in developing countries.

Better Work Lesotho conducts assessments of employer compliance with labour standards, provides training and capacity-building within the sector, and helps to forge joint worker and management consultative committees at clothing firms.

More recently, Collier has consulted on a labour law reform project to amend and consolidate the country's existing labour legislation.

Critical issues for the researchers include questions concerning the rights of vulnerable categories of workers, and the use of labour brokers in Lesotho; as well as mechanisms for strengthening collective bargaining structures.





A rampant drug trade, xenophobic violence, government corruption, rising income inequality and executive compensation – Yusuf Omar gets to grips with the legalities around some of society's tricky questions.



Huffing and puffing: Dr Simon Howell argues that traditional punitive approaches are doing more harm than good in combating drug use and the drugs trade. Photo by Brenton Geach.

## DO POLICING AND PRISON MAKE A DENT IN THE DRUGS TRADE?

A purely punitive approach to criminal justice leads to more prisons being built and more people being housed in them. The legal fraternity knows this well, says Kelly Phelps, senior lecturer in criminology at UCT.

“Put simply, prison doesn't work most of the time – and we know that, but we haven't got a better idea for most of the people,” says Phelps.

Dr Simon Howell of the Centre for Criminology uses the drug trade as an example to demonstrate that mere policing won't make a big enough dent in the problem.

“South Africa has recognised that the punitive approach doesn't work,” says Howell. “The famous saying is that the war on drugs has failed; and it *has* failed. It's failed spectacularly. You're talking \$50 billion a year spent on policing drugs globally, and it doesn't do anything.”

In the context of the drug trade, the punitive model can actually exacerbate the problem.

### Rat race to oblivion

Take tik – or crystal methamphetamine – for example. The ‘demon’ drug, it's especially popular among working class and unemployed communities in the Western Cape. Users of the drug are similarly demonised and cast out of mainstream society, and often find themselves in jail, says Howell.

“If you trace the logic of punitivism all the way back, you find that it is inherently wrapped up in the way we articulate the problem itself,” Howell argues. “We talk about justice and stuff, but throwing someone in a police van is violent. If you're already feeling excluded from society – pissed off that promises from '94

haven't been realised, that you're still living on the Cape Flats, and you still don't have a job – you're going to get even more angry and you're going to take more drugs, and you're going to join gangs, and get sent to a prison where the gang system is entrenched.”

Howell argues that unleashing the military on the Cape Flats will only reproduce the fear and antagonism that has often existed between communities and the state, further undermining the police's capacity to access the sources they need – and ultimately fuelling the conditions that allow drug use and crime to proliferate.

### Revamp the social structure

“So the punitive model doesn't work. You need to deal with the conditions that encourage the drug trade to proliferate – and for that you need multiple, strategic interventions,” says Howell.

The entire social structure must become less fertile ground for the drug trade to flourish. This could be done by creating viable alternatives to a life of drugs and gangsterism, Howell argues – like employment and education opportunities.

Regarding cannabis, legalisation is not the answer. This would merely serve to placate middle-class recreational users and save them from falling foul of the law; but the ones who would suffer would be those who rely on the trade to live, says Howell.

Often, these people don't want to be involved in the drug trade.

“They do it because in the Transkei, it's the only cash crop you can really grow – they do it to support their families.”

The answer, then, lies in creating economically viable options outside of the drug trade: “You'd need to find a cash crop that grows like cannabis [which can be harvested up to four times a year] ... but few are as viable,” is Howell's thesis.

### How to break the cycle?

In parts of Uganda, women spend days brewing a particularly potent alcoholic beverage, which they sell to raise funds to send their children to school. The obvious solution there is to fix the schooling system so that poverty is no longer a barrier to education, says Howell. Jail, on the other hand, won't cure the malady.

We need to engage with issues of development and health to deal with drugs over the long term, says Howell.

“There are people who are doing work on neurobiology and the damage drugs cause because they undermine brain development, which increases the likelihood of people becoming violent.

“You need to break that cycle; and that cycle *can* be broken by police intervention, but you need to have support systems in place. At the end of the day, government can't do that, unfortunately.”

### Policing a last resort

Howell works with a SAPS sub-committee dealing with drug use in Khayelitsha. They have the Departments of Social Development, Education and Health on board, as well as NGOs, and it's this kind of multi-pronged approach that he advocates.

“Ideally, when you police drugs, using the police should be the last resort. Not the first. Because it necessarily creates the very violence in which drug use becomes more entrenched.”

## OPINION



Photo of visible inequality in the Paraisópolis favela in Sao Paulo, Brazil courtesy of the International Monetary Fund.

## DOES EXECUTIVE PAY FEED INCOME INEQUALITY – AND HOW CAN WE FIX IT?

Massive salary disparities between those in the upper echelons of corporate management and those lower down the ladder are fodder for heated debate in a country racked by social inequality. Co-authors of the 2014 book *Executive Salaries in South Africa: Who should have a say on pay*, Associate Professor Debbie Collier (deputy dean of UCT's Faculty of Law) and Kaylan Massie discuss whether there's a ‘best practice’ for remunerating those at the top of the earnings pile.

Deepening income inequality is a complex global challenge – a dangerous phenomenon that requires a nuanced policy and regulatory response. A persuasive body of evidence tells us that the high levels of income inequality we are experiencing are both socially and economically bad for us. The social ills experienced in highly unequal societies include high rates of criminal activity, obesity, substance abuse, mental illness, depression and anxiety, poor educational outcomes, and low levels of trust and social mobility. The evidence also suggests that extreme inequality impacts negatively on economic growth.

Excessive executive pay, in comparison to pay in job grades lower down the scale, is of course only one aspect of the inequality problem: in South Africa, the apartheid legacy has left vulnerable members of our society living on the outskirts of economic activity, with poor access to public facilities such as transport, health and education. This exacerbates and sustains an inequality problem that is still largely defined along racial lines – even though we are experiencing increasing levels of intra-racial income inequality.

### More regulation is a double-edged sword

In *Executive Salaries in South Africa: Who should have a say on pay?* we suggest that corporate pay policies need to be determined by a more transparent and fair process, with a view to reducing the pay gap.

Is greater regulation of pay necessary to achieve this? Regulatory interventions are often ineffective. There is some evidence, globally, that increased disclosure

requirements for executive pay can in fact lead to peer comparisons of pay and pay increases, rather than the restraint in executive pay originally intended.

However, tax policy and transfer reform in the form of greater redistribution measures could well have a positive impact on inequality levels. In addition we suggest some reform – and better use – of two other areas of law and regulation: employment equity law, and corporate governance.

On the employment equity front, section 27 of the Employment Equity Act already obliges employers to report on income differentials within the organisation. This is a wholly underutilised area of our law. However, we are critical of the fact that the reporting requirements exclude share incentive schemes and discretionary payments – as often, excessive levels of executive pay are bound up in incentive schemes – and we suggest reform in this regard.

The Employment Equity Act requires employers to take measures to progressively reduce a disproportionate income differential, and provides a mechanism for trade unions or employees to request information on the wage gap during wage negotiations. This provides an underutilised opportunity for workers to engage with management on ways to reduce the wage gap.

At a corporate governance level, rules are provided for the setting of pay. The King Code of Governance Principles of 2009 (King III Code) requires that directors and executives be remunerated fairly and responsibly, and that remuneration policies should be guided by the principle of sustainability.

## CAN GOOD FENCES MAKE GOOD NEIGHBOURS?

State police might be good at solving crimes, but they aren't always the best at preventing them, says Julie Berg, of UCT's Department of Public Law. To illustrate her point, all it took was some chickens, a fence, and a neighbourhood scuffle.

The story she relates, from John Cartwright and Clifford Shearing's *Where's the Chicken? Making South Africa Safe*, involves a man (call him T) complaining to his local ‘peace committee’ that he's been beaten up by a neighbour, but is reluctant to go to the police.

The peace committee invites the two to state their cases, and the accused (call him S) confesses to the assault, saying he was drunk and lost his temper. But S insists that it was brought on by T repeatedly insulting him and his children when they walked past T's house.

T, in turn, admits to this, and says it's because S's chickens keep coming over into T's yard and destroying his vegetable garden, leaving T's children with nothing to eat.

So what was the solution?

“They built a fence,” says Berg.

This resolution was unlikely to have come about had the police got involved, says Berg. Peace committees – some born out of necessity during the apartheid era, when police didn't come to the party for all communities – are a non-state tool for promoting safety and preventing crime.

### Best practice:

#### A guide to fair executive compensation

##### 1. Link pay to performance

Remuneration policies should link pay to performance and be put to a non-binding advisory shareholder vote at every annual general meeting (Collier and Massie suggest that South Africa should make this vote binding).

##### 2. Link incentives to performance

Incentives should be tied to multiple performance conditions that should not be repeated across incentives. The vesting period for long-term incentives should be at least three (but preferably five or more) years. If the performance criteria are not met, they should not be re-tested in a subsequent year.

##### 3. Eliminate external factors

External factors affecting company performance that are beyond the control of the executive (such as rising commodity prices) should have minimal impact on the executive's pay for the year (executives in a gold mining company should not be paid significantly more money simply because the price of gold has increased, for example).

##### 4. Don't offer termination bonus or balloon payments

Companies should not commit to paying balloon payments, bonuses or other incentives on termination. Contractual provisions related to payments on termination or change of control should be disclosed.

##### 5. Disclose one clear figure for remuneration

Disclosure of executive pay should be done in a clear and understandable manner. Companies should disclose the value of share incentives granted, vested and exercised during the year. Preferably, companies should state ‘one figure’ for remuneration that includes the value of all remuneration paid during the year, including salary, bonus, pension, benefits and the value of any incentives granted.

##### 6. Establish an independent remuneration committee

Remuneration committees should be comprised of a majority of independent directors (or preferably, entirely of independent directors) and be empowered to seek independent external advice; and remuneration committees should consider the goal to be reducing the wage gap between the top and bottom levels of the company, and actively take steps to achieve this goal.

For regular updates on executive remuneration policies and debate, visit Massie's blog: remunerationmatters.com



## WHAT'S IT LIKE TO SEEK ASYLUM IN SOUTH AFRICA?

There's a great divide between the rights afforded refugees under the South African Constitution, and how they're treated in their day-to-day dealings with bureaucracy and ordinary citizens. Fatima Khan, director of UCT's Refugee Rights Unit, takes us through some of the challenges refugees - and the people trying to support them - face on an ongoing basis.

Photo by Michael Hammond

While Somali, Bengali and Ethiopian shopkeepers were being attacked and their businesses looted in Soweto in January, Lindiwe Zulu offered scant comfort to the victims: "Foreign business owners in SA's townships cannot expect to co-exist peacefully with local business owners unless they share trade secrets," was the small business development minister's take on the attacks.

"A remark like that is unfortunately completely in line with the current ethos of restricting the rights of refugees - rights that cannot just be taken away, because they've been afforded those rights in terms of the Constitution," says Fatima Khan, director of UCT's Refugee Rights Unit.

That ethos is also at odds with the Refugees Act. South Africa's laws regarding refugees are generous and progressive, says Khan. "Our Constitution is human-rights oriented; it respects not just South Africans but everyone as human beings, and it affords *everyone* who comes into the country, legally or illegally, the right to dignity.

"The South African definition of 'refugee' is broader than that of most countries in the world, because it is subject to our Constitution," she adds. "Despite these generous laws for refugees, xenophobia is rife, and there is a disparity between the law and policy." The challenge faced by some of the most vulnerable individuals in South African society is an ongoing struggle.

### Disjuncture between law and policy

It's on the frontline that the cracks begin to show.

"For example, a refugee child with a temporary asylum permit who tries to enroll in a school may find that many schools will reject his or her efforts, saying that the permit is only valid for three months or, even in cases in which the child has refugee status, that the permit is only valid for two years, so we're not registering the child."

As clearly unlawful as that is - according to both the Refugees Act and the Constitution - this type of problem is common, because so few "frontline service providers", from school principals to nurses, know the rights of refugees. Consequently the Refugee Rights Unit spends much time educating these service providers, including government officials and magistrates, on refugee law, which Khan admits is a relatively new field in South Africa.

This is in addition to the initial emergency assistance the unit provides: getting asylum seekers documented, getting them their legal status, and making sure that they are not deported to where they will face serious harm, says Khan.

How difficult is this initial process?

"Very difficult; exceptionally difficult, because we have to deal directly with the Department of Home Affairs." Khan estimates that "90% of Home Affairs' determination of our clients' refugee claims is flawed. There are clear errors; these people should be granted refugee status in the first instance, but they're not. About 90% of them are being rejected."

Clearly it should not be this way. Asylum seekers should get their initial documentation the first time they visit Home Affairs, says Khan. Yet the Department of Home Affairs closed their Cape Town, Port Elizabeth and Johannesburg offices, leaving only three places to apply for asylum in the country - Durban, Pretoria and Musina.

"This is what the government has created now, with their restrictive policies. Because of that you now have large numbers of undocumented people in the country. That is a huge problem."

"We also do a lot of advocacy work ... and we find that if you explain the difference between a refugee and an economic migrant, you find that there is empathy," Khan says. "People realise that [a refugee] is a person genuinely in fear of being harmed who cannot return to his country and whose life is in danger. But it is a challenge getting people to understand this."

## WOMEN'S WORK

In spite of South Africa's advanced Constitution, gender inequalities still characterise the country's judiciary, says legal researcher Tabeth Masengu, of the Democratic Governance & Rights Unit (DGRU).

An applied research unit with the public law department, the DGRU was launched in 2007 to play a strategic role in establishing democracy and human rights in Southern Africa.

Its research informs advocacy initiatives, both in the unit and with partners and civil society organisations.

### Thin on the ground

Much of Masengu's work addresses gender disparity. She pays particular attention to the scarcity of women judges and the challenges women

face in their aspirations to become judges - and in the legal profession generally.

A mere 33% of judges in the Superior Courts (High Courts, Supreme Court of Appeal and the Constitutional Court) are women. In the Supreme Court of Appeal, only one-third of the justices are women and in the history of the Constitutional Court there have never been more than three women judges sitting in it.

And although the proportion of women in the magistracy is 40%, it's still a dismal statistic, adds Masengu.

"This affects the legitimacy of our judiciary, and gender equality as a whole."

Masengu's secondary area of work is constitutionalism and women's rights.

Here she's involved with an African working group that's publishing a book, *Women and Constitutions*, in seven different countries.

Looking ahead, in 2017 the DGRU will establish a teaching course, part of the new Law & Society LLM developed by the Centre for Law and Society.



UCT's Honorary Professor of Law Justice Yvonne Mokgoro was one of few female judges in South Africa's Superior Courts. Today only 81 of 240 judges are women. Photo by Tyrone Arthur for Business Day, courtesy of Gallo Images.

# FIVE WAYS YOU'RE BREAKING THE LAW EVERY DAY (AND YOU DON'T KNOW IT)

We're spending more and more of our time online, but what does the law have to say about some of our most common online activities?

Story by Ambre Nicolson

## HERE'S A QUICK QUIZ

HOW MANY OF THE FOLLOWING STATEMENTS DO YOU AGREE WITH?

<p><b>1</b></p> <p>I have sent a bulk email invite to everyone on my contacts list.</p> <p><input type="checkbox"/> Y <input type="checkbox"/> N</p>	<p><b>2</b></p> <p>I have used a photo I found on the internet as a cover picture on one of my social media accounts.</p> <p><input type="checkbox"/> Y <input type="checkbox"/> N</p>	<p><b>3</b></p> <p>I know of a great product that's only available overseas; so I am planning to buy it in bulk and get it sent to me in South Africa, so that I can sell it locally at a profit.</p> <p><input type="checkbox"/> Y <input type="checkbox"/> N</p>	<p><b>4</b></p> <p>Sometimes I buy music online and then convert it to mp3 format to share with my friends.</p> <p><input type="checkbox"/> Y <input type="checkbox"/> N</p>	<p><b>5</b></p> <p>I recently used a proxy IP - how else could I set up an American-based Netflix account?</p> <p><input type="checkbox"/> Y <input type="checkbox"/> N</p>
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If you said yes to any of the above, you - like many South Africans - are guilty of illegal online activity. Surprised? Look at the list again, and now consider that it includes: sending unsolicited bulk email, otherwise known as spam (1); illegally modifying and sharing copyrighted material (2); parallel importing (3); copyright infringement and illegal distribution (4); and committing fraud by faking your IP (5).

"Nowadays, we research online, we communicate online, we shop online, we play online; yet we hardly ever think about the legal implications of these online activities," says Dr Tobias Schonwetter, director of the law faculty's IP Unit. According to Schonwetter, most of us do not sufficiently consider the website terms and conditions of common service providers (such as Facebook); our employer's policies regarding online conduct (their social media policies, for example); or even whether clicking on a button really concludes a contract as intended when ordering an item online and paying for it instantly with a credit card.

Beyond our personal responsibility to educate ourselves, however, Schonwetter agrees that in many cases the law is out of sync with the contemporary reality of our online lives. "We are somewhat privileged here in South Africa, in that we have

a relatively modern piece of legislation called the Electronic Communications and Transactions Act, which ensures that we can participate in e-commerce in a somewhat predictable manner," he says. "But take our copyright laws as the opposite example. The Copyright Act was drafted in the late 1970s; and it doesn't take a lot of imagination to see that a pre-digital piece of legislation is unsuited to dealing appropriately with the issues brought about by digital technologies, most of which are connected to the fact that each and every one of us nowadays copies other peoples' material on a grand scale, just by using the internet. This leads to some pretty absurd results."

In addition to laws being out of date, there are also factors specific to our local context that increase the likelihood of people participating in unlawful activity. For example, copyrighted material from overseas is often either not available locally, or offered at a price beyond the budgets of the majority of South Africans. Add to this the low likelihood of being prosecuted for such unlawful activity, and it's not hard to see why most people remain unconcerned.

On a deeper level, and specifically in the area of intellectual property, Schonwetter questions whether the general concept of monopolising knowledge through IP rights is supported in a society in which communal values and systems of collective ownership are still prevalent. "Our research in this area - such as the Open AIR project - has shown that often more flexible systems are attractive; and more relevant locally as they allow for formal or informal collaboration with varying degrees of openness that can be a crucial engine for innovation and development."

So what can you do if you want to become a more law-abiding online citizen?

In the case of material that is commonly copyrighted, Schonwetter suggests making use of open licences such as when music or literary works are shared under a creative commons (CC) licence. He says: "This is a great and easy way to alleviate the risk of (unintentional) copyright infringement. And with almost a billion works licensed under CC - including all content on Wikipedia, and tens of thousands of pictures on Flickr - it shouldn't be hard to find the right material for one's purposes."

For the rest, the best single thing you can do is become better informed about the legal consequences of your online actions.

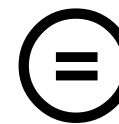
## DIFFERENT TYPES OF CREATIVE COMMONS LICENCES



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**Attribution-ShareAlike** is the same as an attribution licence with the addition of requiring that any new creations are licensed under the identical terms. This is the kind of licence that Wikipedia uses.

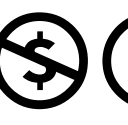


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continued from pages 6&7



# ON THE RECORD

Law staff, students and alumni explain what drew them to the profession, and what keeps them going.

Curated by **Thaheer Mullins**. Photos by **Michael Hammond**



**Andrea Durbach**  
Director,  
Australian Human Rights Centre

“Some years ago, I had formidably interesting and challenging experiences as a law student here, and my experiences at this law school inform my everyday work and life.”



**Mandla Radebe**  
Final-year law

“Hopefully I can use law to drive social change – to do something that’s going to have a positive impact on people.”



**Christina Murray**  
Professor,  
Department of Public Law

“Law matters but it doesn’t necessarily do good. A strong and just legal system must be built on good lawyers and rigorous thinking about every aspect of law. Teaching and research guided by a commitment to social justice is one part of this, and that’s why I do it.”



**Chelsea Bruk-Jackson**  
Final-year LLB

“I’d like to contribute to furthering the pursuit of equal access to justice for all, and not just those who can afford it. In terms of what I’m doing now that works towards the goal, I started a community service project with another student that partners with the Triangle Project, an NGO that focuses on the protection of LGBTIQI rights. The project goes out to various Triangle ‘safe spaces’ and conducts legal education workshops.”



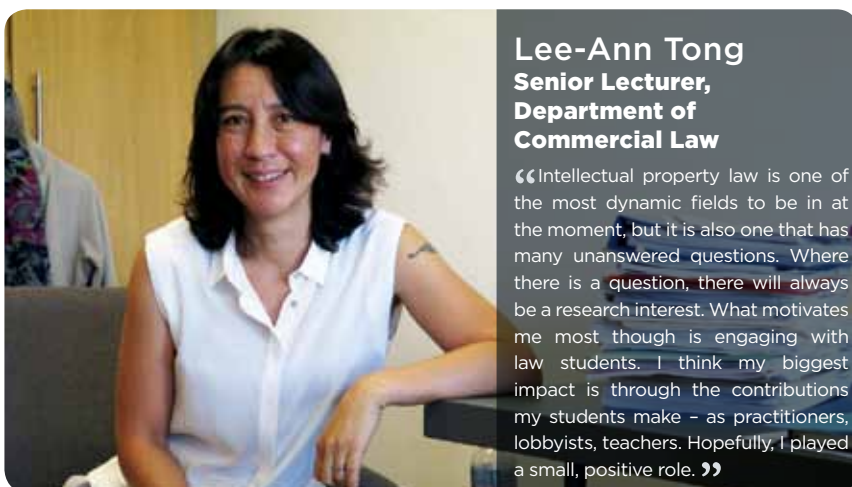
**Muattham Carlie**  
Final-year postgrad LLB

“I hope to make the law a bit easier for general people to understand – possibly by developing an app where someone can type something in and get a general answer with regard to the law, so it’s not so technical.”



**Fumisa Ngqele**  
3rd-year BA law

“A lot of people don’t know their rights. They don’t know that these laws exist. They don’t know that they can be protected. That’s one of the differences that I want to make, but I want to do it at a grassroots level for communities that are isolated.”



**Lee-Ann Tong**  
Senior Lecturer,  
Department of  
Commercial Law

“Intellectual property law is one of the most dynamic fields to be in at the moment, but it is also one that has many unanswered questions. Where there is a question, there will always be a research interest. What motivates me most though is engaging with law students. I think my biggest impact is through the contributions my students make – as practitioners, lobbyists, teachers. Hopefully, I played a small, positive role.”



**Jordyn Petersen**  
2nd-year LLB

“I want to focus on family law – especially in terms of divorce, maintenance and child support. There needs to be a huge difference made there.”



**Marumo Nkomo**  
Senior Lecturer,  
Department of Commercial Law

“The role lawyers played in our country’s political liberation inspired me to enter this profession. What keeps me going is the desire to contribute to the development of policy and regulation that will enhance Africa’s competitiveness in the global economy.”



**Beric Croome**  
Tax specialist at  
Edward Nathan Sonnenbergs

“The rich tradition of UCT’s legal scholars in upholding justice, as well as the law, inspired me to study at UCT’s Faculty of Law. Obtaining my Doctorate in Taxpayers’ Rights from UCT has opened many doors in the legal profession, both internationally and locally. The high standard of work demanded by my supervisors instilled in me a world-class knowledge of my area of specialisation.”



**Mohamed Paleker**  
Associate Professor,  
Department of Private Law

“My motivation is the law of unintended consequences. It is hard to predict the impact that your work will have; but you keep at it, in the hope that some day, something good will come of it. The hope that something good will come of my work is my motivation. That said, I have no doubt that teaching is my biggest impact. I can see, touch and feel the immediacy of its impact every time I stand in a classroom.”