



UNIVERSITY OF CAPE TOWN LAW REVIEW

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UCT LAW celebrating the 2010 World Cup in South Africa





From the dean's desk

2010 was always going to be a milestone year for South Africa. It is 50 years since the Sharpeville Massacre, 20 years since the release of Nelson Mandela, 15 years since the opening of the Constitutional Court, and the Football World Cup came to Africa for the first time. For the Law Faculty there was also the prospect of some spin-offs from being part of a building site for 18 months.

Has it been a good milestone year? I think it has. The faculty ran a most successful Constitution Week and participated in a conference on lessons learned (or not?) from Sharpeville. The World Cup did so many things for South Africa, but for UCT one of the things it did was to bring home the potential in the Vice Chancellor's *Afropolitan* vision.

Three initiatives illustrate this African focus and the enrichment that it is beginning to bring. The faculty has been given the go ahead for a Chair in Comparative African Law and this chair joins the two recent NRF Chairs, one in Customary Law and one in African Security and Social Justice.

In 2009 I created the post of Deputy Dean, Internationalisation and Outreach. Professor Kalula is getting into his stride in the position, and the last year has seen a pre-testing facility set up in Kigali for our Rwandan Masters students, a co-

operation agreement with Eduardo Mondlane in Maputo and a renewal of ties with the University of Zimbabwe; there were alumni gathering in Harare, Lusaka and Nairobi. The faculty's digital course, *Trends in the Governance of Security*, is bringing key scholars in Africa and the world directly into African classrooms.

Turning to the students, the leadership this year has been exceptional. The student newspaper has been resurrected, a series of lunchtime talks on alternative careers in law has been organised and the Students for Law and Social Justice and LAWCO have enlarged their mandate. Orientation Week was voted exceptional. The postgraduates are a more cohesive grouping than in years past, and on the academic front, throughput on LLMs has improved dramatically. 2011 will see a dedicated PG Knowledge Commons in the revamped library space.

On the staffing front, the first Academic Scholars leave in September to do their LLMs – three at UCL. Dr Lesley Greenbaum's arrival in July has been a boost to the already successful Academic Development Programme, and we welcome Cathy Powell back after a three-year sponsored doctoral sabbatical in Toronto, and Aifheli Tshivhase and Admark Moyo, from their time as Fox International Fellows at Yale.

As to our overarching vision of *Towards Sustainable Justice*, there are some fifteen LLB students benefitting from Endowment Scholarships, with another ten on the Law Firm Diversity Programme. 2011 will see a further eleven LLBs and in addition three LLMs with full fee support. 2010 saw the inaugural *Rabinowitz Visitor*, and we look forward to Lord Hoffmann's 'Visit' in 2011.

Despite the continuing financial rockiness, money does still come into *Law 150* and I am sure that we will achieve our target. As you know, it is a five year process and we hope those of you that haven't made a pledge will do so, as every contribution helps.

Enjoy reading about your faculty and I look forward to getting to know many more of you at upcoming lectures and events,

PJ Schwikkard

Visitorship initiative in Law

As you know, UCT celebrated 150 years of the teaching of law in South Africa in 2009, the first lecture having been given on March 18th 1859. What you may not know is that, as part of the Law 150 celebrations, Ben & Shirley Rabinowitz established a Visitorship Programme. The aim of the Visitorship is to bring leading lawyers (academic or practising) to participate in the intellectual life of the faculty on an annual basis.

Speaking at the inaugural *Rabinowitz Visitor* public lecture on 17th February, Professor Schwikkard thanked the donors for their generous and innovative gift, commenting that the Visitorships dovetailed perfectly with the faculty's plans to develop a diverse learning and research environment.

'The first Visitor, Professor Jeffrey Jowell QC is not only a graduate of UCT, having obtained his LLB in 1960, but has also maintained a close relationship with his alma mater, as Honorary Professor for a number of years and then as initiator of the exchange programme for talented black academics with his faculty at the University College, London (UCL).'

'Having one of the UK's leading public lawyers as the first Visitor set the bar very high', she added.

What raises that bar even higher is the recent announcement of Professor Jowell as Director of the new Bingham Centre for the Rule of Law which has been established as part of the British Institute of International and Comparative Law. Editor

Left - right: Ben Rabinowitz, Premier Helen Zille, Jeffrey Jowell and Shirley Rabinowitz



UCT in Kenya

Kenya was thrust into world headlines in 2008 when disputes about the December 2007 elections erupted into violence that killed over 1 200 people. As part of a settlement brokered by Kofi Annan, political leaders agreed to revive the process of constitutional reform which had collapsed in 2005 when a proposed new constitution was defeated in a referendum. The new process was to be started by a "Committee of Experts" which was given responsibility first for producing a draft constitution, then for gathering and incorporating the views of the public into the draft and, finally, for ensuring that political agreement on issues identified as "contested" was accommodated. Professor Christina Murray served on the 11-member committee as one of three foreign members.

The constitution that emerged from this process was approved by over 67% of the voters in a referendum on 4 August, 2010.

Two of our LLM graduates, Ken and Patricia Nyuandi were also involved; Ken as a commissioner on the nine member Interim Election Commission, the Commission that has just run the very successful referendum; and Patricia as the director of the Truth, Justice and Reconciliation Commission.

Cape Town-Maputo link

University of Eduardo Mondlane and the University of Cape Town signed a co-operation agreement in March. UEM's Centre of Regional Integration Studies is supported by the UN Economic Commission for Africa (UNECA) and SADC, among others. A conference in September will outline a joint research project.

Law Clinic in demand

The Law Clinic is always a hive of activity, with both the student volunteers for the various clinics (see pg. 49), as well as students being coached for intervarsity Mock Trials or coming to discuss aspects of their Legal Practice course.

2010 has seen groups and clinicians from Botswana, China, Iran, Rwanda, UK, Venda, Zambia and Zimbabwe, as well as from three different American universities, coming to the Law Clinic to find out just how UCT manages to run such a successful law clinic; a law clinic that as well as training large numbers of senior law students, serves the needs of various impoverished local communities.

'Where feasible, visitors are invited to accompany the Law Clinic students to some of the evening clinics held in different areas around the city and to observe them in action assisting and advising their clients,' comments Director, Bev Bird. Some groups have a specific focus, for example, the visiting group from Rwanda comprised practitioners and academics from four different universities, including the directors of all four of those university law clinics, as well as representatives

from the Rwandan Legal Aid Forum, a body which co-ordinates legal aid services in Rwanda and which organised the SA visit.

'The specific purpose behind the visit was to improve the quality and accessibility of legal aid services provided by various legal institutions in Rwanda to the indigent population, especially through the clinics of the four universities. It was expected of all delegates that on their return to Rwanda, they would actively share the information and experiences gained in SA with their colleagues at their respective universities and with the Rwandan justice sector at large. The visitors agreed that they had gained useful insights into the workings of the clinic and had benefitted from the experience.'

'The large group of law teachers and clinicians, principally from Mofid University in Iran, but including a few individuals from other countries, being Ireland, Egypt and the USA, were extremely impressed with the facilities offered within the Law Faculty, in particular the OR Tambo Moot Court and the Law Clinic's annual Mock Trial programme which offers students the opportunity of running a complete trial in the Moot Court before an actual magistrate,' said Bev.

The Professional Development Project continues to thrive, with just under 1000 participants every year passing through the hands of Irena Wasserfall and Shani Vavruch (right).





Chair in Customary Law

Chuma Himonga (LLB University of Zambia; LLM Kings College, London; PhD London School of Economics and Political Science) has been appointed to the NRF Chair in African Customary Law.

In an interview with UCT's *Monday Paper*, Professor Himonga said that the chair would create greater prospects for the development of research, the generation of knowledge, and inclusion in the intellectual life of UCT of an area of law that regulates the lives of millions of South Africans.

'The challenges customary law faces and creates in relation to human rights and its application by the courts in changing social and legal contexts require serious investigation and scholarship. It is my hope that the award of this chair will create new inspiration for colleagues at this university and elsewhere to get to grips with this system of law through debate and collaborative research.'

'My research will focus on the actual workings of customary law as a normative system and as part of the South African legal system, against the backdrop of legal pluralism. It will also examine how customary law intersects with other components of the system.'

'Within the pluralistic nature of African legal systems, and against the colonial historical backgrounds of African countries, customary law plays a very important role in the regulation of people's lives, especially in family, gender relations, traditional leadership and land matters.'

'The recognition of this law by the Constitution of South Africa has heightened its relevance and significance in the legal system. Moreover, the courts are constitutionally obliged to apply customary law and, if necessary, to develop it in accordance with the spirit, purport and objectives of the Bill of Rights.'

'Although the Constitution also requires customary law, like any other law, to be aligned with the Bill of Rights, little is known of the field in its current form. This is due both to the dearth of research and the marginalisation of customary law in the colonial and apartheid legal systems.'

'The research of the chair is intended to increase the understanding of customary law as a dynamic system, as well as its actual workings within modern constitutional frameworks. At the same time, the chair will serve, firstly, as the nexus between research, capacity building and teaching in customary law, through undergraduate and postgraduate teaching; and, secondly, as a base for building a body of scholarship and a young generation of scholars in South Africa and the rest of the continent.'

'The announcement also has institutional implications, as the chair is positioned to enhance UCT's *Afropolitan* vision through the development of scholars from other African countries and the consolidation of the chair's involvement in regional postgraduate teaching and research.'

Professor Himonga has been a lecturer on the master's programme at the Southern and Eastern African Regional Centre for Women's Law based in Harare.



The institutionalisation of process pluralism: Or 'Why are we resolving our disputes so badly?'

Extract from the inaugural lecture of Professor Alan Rycroft, Chair of Commercial Law, November 2009

Professor Rycroft began by acknowledging the debt he owed to those who have gone before him. 'The Chair in Commercial Law at UCT has been filled by scholars and teachers whose writings have played a significant part in the development of a vibrant business law in South Africa. Together with the three previous professors in Commercial Law - J T R Gibson, Michael Blackman, and Mike Larkin - there were others, such as George Wille, Dennis Cowen and Dennis Davis, who consolidated and reshaped our thinking on commercial law. They each undoubtedly offered far more to the faculty than just commercial law: for example, in Professor Visser's history of the faculty he describes Michael Blackman as writing on company law and jurisprudence, and whose office is always open

to anyone bearing a cigar and prepared to talk about history.'

'This lecture,' he continued, 'attempts to understand why we settle disputes so badly. In doing so I will explore why process pluralism (also referred to as co-existential justice) - the use of dispute resolution mechanisms alongside litigation - has been so slow to take root in South Africa and why, despite legislative intent, the institutionalisation of process pluralism has largely been confined to employment disputes. I will end by asking some uncomfortable questions about whether legal education contributes to the production of graduates ill-prepared as effective dispute resolvers.'

'You may be asking how this theme of dispute resolution relates to commercial law. I am primarily a labour lawyer and have always understood the resolution of labour disputes to be in the main about commercial interests. The resolution of commercial disputes more generally is not too different, involving not only financial considerations, but also legal principle as well as on-going relationships. With these similarities, why have commercial law practitioners not embraced commercial mediation and arbitration?'

The Chair in Commercial Law at UCT has been filled by scholars and teachers whose writings have played a significant part in the development of a vibrant business law in South Africa

'I want to spend a moment tracing the historical development of what has come to be known as the ADR - Alternative Dispute Resolution - movement. Most writers recognise the American Bar Association's 1976 conference on the Causes of Popular Dissatisfaction with the Administration of Justice as the pivotal moment which gave encouragement to a new consciousness about alternative ways of resolving legal disputes. In its wake neighbourhood justice centres and multi-door courthouse programmes were started across the USA, legitimising alternative ways to resolve disputes. A culture of settlement began to take root, to the extent that the American Bar

Association drew attention to some problems in its 2003 Vanishing Trial project. The point had been reached where the trial as the dominant mechanism for reaching resolution had been replaced by a process which has come to be known as "liti-gotiation" – the process of litigation serving as a spur to negotiation. Although data is difficult to find in South Africa, in Canada only 3,2% of matters which start off as litigation are concluded in a trial and judicial adjudication of the matter.'

'As a central part of the settlement culture, mediation became the darling of the US courts, with court-connected mediation programs appearing from the 1980's and these can now be found in nearly all state and federal courts. Some enthusiasts felt that this process democratised the courts in a potentially profound way because mediation actively encouraged the parties to decide for themselves which values were most important to them, then to use ADR to pursue those values.'

'It was precisely because it was *the parties'* values – as opposed to social or judicial policy – which became the determinant of the settlement, that opposition to the culture of settlement developed. Professor Owen Fiss, in his seminal article in 1984 Against Settlement, regarded settlement through ADR as a highly problematic technique for streamlining dockets. His main criticism was that power imbalances which could be checked by a judge were transferred to the mediation setting, advantaging the more powerful party. He was concerned that settlement did not provide a foundation for continuing judicial involvement because Courts do not see a mere bargain between the parties as a sufficient foundation for the exercise of their coercive powers. In broader terms Fiss argued that adjudication should be seen as more than just settlement of disputes. He asserted the traditional position: judges and courts are society's chosen way of resolving disputes, to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when parties settle. Settlement, Fiss said, deprives a court of the opportunity to create precedent to guide the resolution of other disputes.'

'Others too argued that there are important and intangible social benefits that flow from the public trial. As Patricia Refo put it:

"Trials can be about catharsis and healing. Trials can educate and enlighten. Trials can be a catalyst for change. Trials can bring the light of public scrutiny into what would otherwise be the dark corners of our social landscape. Settlement and compromise can be viewed as just another step toward moral relativism, where there are only shades of grey. Trials are about right and wrong, good and bad, innocence and guilt."

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'Criticism of the ADR movement has not been confined to the USA. The 2008 Hamlyn lectures in the United Kingdom were given by Professor Dame Hazel Genn who was highly critical of Lord Woolf, the architect of the civil justice reforms of ten years ago. Genn argued that the main thrust of civil justice reform was not about more access, nor about more justice. It is simply about diversion of disputants away from the courts. She said that in England, we are witnessing the decline of civil justice, the degradation of court facilities and the diversion of civil cases to private dispute resolution – accompanied by an anti-court, anti-adjudication rhetoric that interprets these developments as socially positive...Although this policy has been given an "access to justice" label, it is, in fact, a strategy for diverting disputes away from justice.'

'Mediation, she added, had little to do with access to justice – that is, access to the courts or to just outcomes. Mediation is not about just settlements. It is just about settlement.'

'These are serious criticisms, worthy of deep debate, but it is the absence of process pluralism rather than its promiscuous use that is the problem.'



One of the positive outcomes of the Law School being part of a building site for the last 18 months is that the Law library has not only been enlarged and the space made lighter and more comfortable, but there are now 80 PCs for students' use, 40 desks equipped with power and network points and four group study rooms





Challenges to the rule of law in South Africa

By Hugh Corder

No one who writes critically of the current governance of this country should fail to mention the dire straits in which we wallowed a mere 20 years ago. No one involved in the legal profession in the years before 1994 should forget the sense of illegitimacy, unaccountability, injustice, and hopelessness which pervaded our legal system under apartheid.

There were some noble exceptions among lawyers and even judges, who kept alive the ideal of democratic constitutionalism. We have made magnificent progress in many ways, which makes my concerns all the more distressing, because they represent regressions from the ideal, and might threaten a return to past practice.

My focus is only on challenges to the rule of law directly related to the administration of justice, although 'tenderpreneurship' and narrow-based

crony-enrichment are cancers which strike at the heart of the Constitution, which values 'openness, accountability and responsiveness.'

Among the basic values of our constitutional democracy is the rule of law. No one is above the law, and the exercise of all public power is subject to review by the courts. This idea represents an achievement of universal significance, the result of centuries of human struggle.

Four issues signal that our system is under stress, that we face substantial challenges to the sustainability of the rule of law.

A. The restructuring of the administration of the courts and the legal profession

This year sees the culmination of a long process of discussing, amending and revising proposals about the structure and governance of the superior courts. The destructive attempt in 2004/05 to exert undue executive influence over the courts, which was resisted by a united judiciary, seems to have been diluted. It seems clear from the Superior

Courts Bill that the Office of the Chief Justice will play a leading role in the resourcing and administration of such courts. Given the natural inclination of the executive to rein in the courts, firm and fearless judicial leadership becomes ever more important.

Two aspects of the proposals in the Bill ought to be drawing more attention, however. It will probably be proposed that the terms of office of Constitutional Court (CC) judges be the same as those of other judges. Those currently on the Court were appointed in anticipation that they'd serve for only 15 years, and this change would essentially freeze the membership of the Court for some time to come. If it is accepted, it should only apply to those appointed in future.

Secondly, it seems that the creation of a single apex court will be proposed, which again has consequences for the qualities desired of the justices of the CC, in terms of their experience of the broad sweep of the law, and the competence of the CC as a whole to hear any kind of legal dispute.

Shifting focus, the independence and governance structures of the legal profession, which are effectively under its control at present, appear to be threatened by an anxious desire by government to exercise a substantial degree of influence, in terms of the long-debated Legal Practice Bill. This would be disastrous for the rule of law, and the professional representative bodies need resolutely to resist such predations.

Finally, but no less of a threat, is the 'reorganisation' of the National Prosecuting Authority under its new head, which again signals an interventionist executive and even manipulation by stealth.

B. Use of the legal process

Many worthy causes have been fought successfully before the courts, often to achieve socio-economic rights. Yet news coverage seems dominated by issues which have cast the judicial process in a negative light. I refer, for example, to the almost endless series of court appearances of President Zuma, pursuing every possible avenue to stall his potential prosecution. This was of course enmeshed in other political contests,

but it resulted in unwarranted and irresponsible criticism of the courts by Zuma supporters. The CC/Hlophe/JSC dispute, which has not yet ended, has had an even more damaging effect on public perceptions. These battles have cost the taxpayer tens of millions of rand in legal costs, which may also be resented.

More recently, we have seen the tendency to fight 'party political' battles through the legal process rather than through the vigorous and tolerant exchange of views. Opposition parties are quick to threaten legal action, and the ANCYL and COPE spend much of their political energy – but at least their own money – on going to court.

Now, I fully endorse everyone's constitutional right to take justiciable disputes to court, but what is enormously worrying is the inevitable fallout for the legitimacy of the courts when judges have to decide such highly politicised and divisive issues. The recent utterance from an office-bearer of the ANCYL (that a judgement which went against the League was 'drunken') exemplifies such dangers. It is simply outrageous, and apparently remains unaddressed. The leadership of the judiciary must take it up with the Minister of Justice, for it cannot be allowed to stand.

Regrettably, by many accounts, the 'judicial mindset' has been affected by this belligerent atmosphere. Many commentators have warned against the 'politicisation of the law and the legalisation of politics'. To some extent this is inevitable in a constitution built on judicial review, but it needs to be monitored and the proper judicial role defended. If the courts become needlessly enmeshed in political controversy, they may lose the hard-won public respect built in the past 16 years. Let those who so loudly trash the judges not whine when they seek recourse to court in future, and find an empty shell, destroyed by their own invective.

C. State non-compliance with court orders

The Constitution depends for its effectiveness on different parts of government respecting each other. Three instances of the state's failure to comply with court orders give cause for concern:

the appalling inefficiency (including non-compliance with court orders) which has epitomised the social grants administration in the Eastern Cape and has drawn fierce and repeated criticism from the courts; the occasional lack of urgency by the executive in remedying unconstitutional statutes; and the patchy implementation of judgments granting socio-economic rights.

These instances seem to evidence a careless attitude to court orders which prevails in some departments of state, and this past week we saw trade unions threatening to defy such an order. This tendency must be exposed and eliminated.

D. Media freedom and the Protection of Information Bill

There is little that need be added to those criticisms which have been expressed. Perhaps one aspect of the Bill which has had less attention needs be emphasised: not only are very high maximum sentences of imprisonment WITHOUT the option of a fine provided for (up to 25 years imprisonment), but MINIMUM terms of between 3 and 15 years are also prescribed.

The administration of justice needs critical media to inform the public and to hold the judges accountable. This Bill threatens the core constitutional values of openness, accountability and responsiveness.

In an interview conducted not long before he was elected, President Zuma criticised the CC for regarding itself as being “close to God”, and professed perplexity about why the Court could exercise an authority which prevailed over the wishes of the popularly elected majority party. This demonstrates a profound lack of understanding of the basic premise of our constitutional system. How pervasive and tenacious is this view among the leadership and membership of the ANC? If it is widely held, the temptation to curtail the authority of the courts and to depart from the rule of law must be strong.

Our constitutional democracy is a precious living legacy. We must fight to maintain and strengthen it.



The rule of law and the power to prosecute

By Professor Jeffrey Jowell, QC

It is a great honour to be the first Rabinowitz Fellow for a two special reasons. First, I have the greatest admiration for Bennie and Shirley Rabinowitz - for their many virtues, including their legendary generosity and their lifelong commitment to a just South Africa.

Second, it is always just the greatest pleasure to return to my alma mater and this great law faculty. When I was a student here the apartheid apparatus was being ruthlessly constructed and UCT was at the forefront of those who kept alive the values of equality, democracy, human dignity and the rule of law.

Even today those values need constantly to be asserted. There is a great deal of talk about the new imperialism; the foisting on countries with different traditions the so-called ‘European’ or ‘Western’ models of governance. What exactly is meant by that? In Europe, or the West, or anywhere else there are, fundamentally, two models of governance when it comes down to it: democracy and tyranny.

Of course there are different versions of democracy and tyranny, suited to a particular country’s own customs, traditions and past history.

But we have to remember that when reference is made to European values, many countries in Europe opted for many years for tyranny, rather than democracy. Some still veer in that direction. So you can take your pick of ‘European’ values. And there really is no middle way. If you are not democratic you are, plain and simple, tyrannical or despotic. That’s the choice that Europe offers. And no other continent is any different.

The difference between any tyranny and any democracy (European, Western, Asian, or other) is stark. The fundamental difference is that in a democracy, leaders can not only be voted out every so often (that’s just a part of it), but in addition there is a presumption that government is bound to treat everyone with equal respect and to uphold everyone’s equal dignity. In a tyranny the highest respect is accorded not to the individual but to the public interest as defined by those who hold power. And one of the most significant differences between tyrannies and democracies is the notion in democracies of the rule of law, proclaimed under Section 1 of the South African Constitution as a founding value of this country.

Tyrannies often claim that they meticulously abide by the rule of law, but this is a misnomer: they really mean rule by law. China claims that today. It is often said that the old South Africa met the test of legality because its practices were authorised by law. The rule of law does indeed require that everyone shall be held to account only by settled and knowable rules, but it has a richer texture than that by far.

It also insists that power should not be exercised in a way that is arbitrary or irrational. And there is a cluster of other meanings around the rule of law, another central requirement of which is access to justice, so that detention without trial, for example, violates the rule of law by virtue of the fact that the accused have not had the opportunity to challenge their detention in a court of law. Judicial independence is also linked to the rule of law, because how can a trial be fair if the judge is not impartial, or in some way beholden to the person on one side of a case (or to the government, when the government is a party to the litigation).

One of the most interesting recent developments in English law has been the way the rule of law has

been read into the exercise of power. It is sometimes thought that because the UK does not have a codified constitution and therefore is founded on the notion of the sovereignty of parliament, that the rule of law has no part to play. That is not true; it has been firmly established as a constitutional principle which, unless a statute clearly speaks to the contrary, is presumed to apply to the exercise of public power. Thus where prisoner Mark Leech was not permitted by the prison authorities to communicate by letter with his lawyer, he sought judicial review of that decision and when the case came to be decided by the Court of Appeal Lord Justice Steyn, a former graduate of Stellenbosch University as it happens, and the Cape Bar, who later became one of the most distinguished Law Lords, held that, contrary to the constitutional principle of the rule of law, Leech had wrongly been denied access to justice. The justification for the principle is of course that the rule of law is inherent in any democratic constitution, codified or not.

Does the rule of law require everyone who breaks a law to be held to account? If not, under what conditions may anyone be exempt from prosecution?

[Please note that I am discussing here the prosecutor’s discretion not to prosecute, rather than the decision to prosecute, which, if tainted by illegality, can normally be challenged at the trial which follows].

Popular talk has it that there must be ‘law and order’. This phrase sometimes has authoritarian connotations, suggesting harsh punishments and even encouraging vigilantism. However, there are also three connotations of ‘law and order’ which fall squarely under the principle of the rule of law: First, that existing legal rules must be obeyed. This tenet speaks both to members of the public (who are expected to obey the law) and to public officials (who are expected to enforce the law). The second connotation, also within the scope of the rule of law, requires that those who do break the law should not be permitted to do so with impunity. And the third connotation requires that the law must be enforced ‘without fear or favour’, meaning equally and regardless of the status of the defendant or any threats to the decision-maker or benefits offered.

If our law enforcement officers fail systemically to prosecute violators of the law, the rule of law is being violated. But does that mean that law must be fully enforced? Some places do have a policy of full enforcement, often known as ‘zero tolerance’, in an effort to deter crime.

In parenthesis here let me say, just for the avoidance of doubt, that a ‘shoot to kill’ policy does not accord with the rule of law. Quite the opposite. In the absence of self-defence, which may justify proportionate violence, a shoot to kill policy flagrantly violates the rule of law as it amounts to an arbitrary and extreme punishment without trial.

Obviously, even with a policy of so-called zero tolerance, it is neither possible, nor even desirable, to have full enforcement of the law. I doubt whether anyone here would want the prosecution of a doctor who had exceeded the speed limit while speeding to the aid of an accident victim late at night on an empty road. And the prosecution process is inevitably constrained by limited resources, not to mention limited prison space.

So what are the conditions which, while upholding the rule of law, nevertheless justify the decision not to enforce the law against a person who has violated it?

Before answering that question we must ask what structures are needed to ensure fair and adequate prosecutions. There are two possible models.

In some countries there is complete independence of the prosecutor. This is true not only in countries such as Italy where the prosecution is part of the judiciary and where each prosecutor is individually independent, but also in countries such as Ireland, Israel, India and some Canadian provinces and Australian states.

A second model is that adopted by England and countries such as Australia and New Zealand. In England there is there is an independent Director of Public Prosecution, who heads the Crown Prosecution Service, and also a Serious Fraud Office and a Revenue and Customs Prosecution Office with separate directors. However, the Attorney General has the ultimate responsibility for the decision whether or not to refuse consent for

prosecution on the ground of public interest and may direct the other Directors accordingly. The Attorney (now Baroness Scotland) is a member of the government who sits in one or other house of parliament and takes the ruling party whip.

Some argue that there is no need for the prosecutor to be completely independent, as if he were a judge. It is said that where the prosecutor lays a charge, the defendant will later have the opportunity of defence before a judge. And where the prosecutor decides not to lay a charge, he is entitled, as we shall see, to take into account matters of public interest, which inevitably involves the prosecutor in matters of policy. For that reason, it is argued, he should not be completely insulated from political affiliation. On the other side of that argument, however, there is a growing consensus internationally that in a democracy the decision to initiate a prosecution should not be influenced, or seen to be influenced, by partisan considerations. This is because the setting in motion of a prosecution not only adversely affects a person’s dignity, status and reputation, but can lead to that person’s punishment, loss of status or loss of freedom. Decisions of that significance to the individual should therefore patently be seen not to be driven by narrow political considerations, but only by an objective consideration of whether the person is likely to have breached the law. Such a decision should therefore best be taken by someone clearly separated from partisan political attachment.

For that reason, there is a lively discussion in the UK at the moment about the Attorney General’s political role. In favour of that role, it is contended, which is indeed true, that the Attorney General, by long convention, stays at arm’s length from party politics. Her role is in practice functionally independent in its day-to-day activities. Against that it is argued that, however independent and impartial she is in fact and practice, some of her decisions are vulnerable to being interpreted by the public as driven more by political convenience than law. This may be a matter of perception rather than fact, but is nevertheless important to the integrity of the law and the confidence of the public in the public decision-making process. Baroness Scotland has in large part conceded to that argument against her present political role, and a new Bill in the UK Parliament proposes that the office of the Attorney General be confined to

intervening in prosecutorial decisions in future only in relation to matters of national security. [She has, as a matter of interest, not conceded that her other role, that of providing legal advice to government, should be relinquished, despite the controversy over the legal advice on the Iraq war given by her predecessor]

Section 179 of the South African Constitution establishes a prosecuting authority, headed by a National Director of Public Prosecution which, by national legislation, must exercise its functions without ‘fear, favour or prejudice’. This seems to indicate a model of prosecutor of the independent kind, but is this confirmed by s.179 (6) which states that ‘The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority’? The National Prosecuting Authority Act also provides for the provision of certain information by the prosecuting authority to the Minister and also accountability to Parliament for powers, functions and duties under the Act, including decisions regarding the institutions of prosecutions.

It is not for me to engage in the detail of the recent controversy on this subject, but it may be helpful to bring to attention recent international guidance on this topic. At the time of the drafting of the present South African constitution there was very little such guidance on an international level on the prosecutorial role, and there is still no binding convention on the subject, but a growing amount of ‘soft law’ is now developing, especially by the United Nations and the Council of Europe, including the Council of Europe’s Venice Commission, which was formed in 1990 to assist the constitutions of the former Soviet Union. Rec (2000) 19 of the Council of Europe provides:

‘Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:

‘instructions not to prosecute in a specific case should, in principle, be prohibited’.

Similarly, the guidelines issued in 1999 by the International Association of Prosecutors (IAP) require that where prosecutorial discretion is permitted in a particular jurisdiction, it should be exercised independently and free from political interference.

International opinion therefore strongly favours the notion of an independent prosecutor in relation to the decision whether or not to bring charges. In order to ensure that goal, it has also considered the issue of the appointment and dismissal of prosecutors. In its Opinion on the Constitution of Hungary, the Venice Commission suggested that non-political experience should be involved in the selection process of prosecutors, and in relation to dismissal it said this:

‘An important element in the independence of the general prosecutor is his protection from arbitrary or politically motivated dismissal. If the government were to have the power to dismiss him at will then he could not discharge his function with the absolute independence which is essential. On the other hand to involve Parliament in the decision to dismiss might draw him into the arena of party politics which would be undesirable. The grounds for dismissal should be stated in the Constitution, eg stated misbehaviour or incapacity. A body whose membership would command public trust should investigate allegations of misbehaviour or incapacity and, if it finds the allegation proved, make a recommendation of dismissal if it considers that dismissal is justified... It would be advisable not to involve the Constitutional Court in the investigation or the dismissal procedure because it is not unlikely that there might subsequently be a legal challenge in that court to the affair, whatever its outcome. Whatever body is selected it is probably better that it be comprised of ex officio members rather than be appointed ad hoc, in order to avoid suggestions that its members have been chosen so as to obtain a particular result.’

Note how different this is from the situation in South Africa, where the President appoints the National Director of Prosecutions and may dismiss him on the grounds, inter alia of not being a fit and proper person to hold the office, subject only to the view of Parliament. Similarly in the UK the Attorney General can be simply appointed or replaced through a cabinet reshuffle.

Professor Jowell then returned to the central question: the extent to which the rule of law permits prosecutions not to be pursued, or to be discontinued. For the full text, email Pauline.Alexander@uct.ac.za



Zimbabwean standpoints: South Africa not as bad as South Africans think

By Nkanyiso Sibanda, a teaching and research assistant in Private Law

You would have probably heard about the destruction of people's homes in Zimbabwe under the notorious operation *Murambatsvina*. I am a victim of that dreadful operation. My late parents left me a three bedroomed house on a piece of land measuring 35m by 65 m (2275m²). I remember that fateful day when I was at school, getting a phone call from a neighbour informing me that they were destroying the house. I got onto the first bus in the morning and when I got there, I literally found ruins. My inherited property was everywhere and to make matters worse, I was informed that I owed the government an equivalent of R10 000 for its labour in destroying the house. After proving to them that I could not afford it as I was only still in school, I remember the chilling declaration by the council messenger telling me that they were going to repossess the piece of land where my house had been to recoup the cost of destroying the house.

When I look at what is happening around the rest of Africa, I can't help feeling that South Africa is not as bad as many people think it is

Here in South Africa, the government is literally parcelling out RDP houses to poor people at absolutely no charge. And yet people are still not happy! How paradoxical. One government destroys people's houses and sends them to live on the streets, and the other builds people houses and parcels them out at absolutely no charge and yet people are not happy?! I have heard all about how poor quality the RDP houses are but hey, what if the government did not build these houses at all? When I look at what is happening around the rest of Africa, I can't help feeling that South Africa is not as bad as many people think it is.

On the 22nd of February 2010, there was an article in the *Cape Times* where Police Minister Nathi Mthethwa was urging the police and community leaders to keep politics out of crime. In the article, the one utterance by the minister that really caught my attention was, 'I will not allow the police to be involved in politics.' Immediately, this excited memories of how Augustine Chihuri, the Zimbabwean Police Commissioner, vowed in 2000 that he would never recognise any other

person as president except Robert Mugabe. To prove and consolidate his views, he allowed the police to attack all opposition party supporters and he turned a blind eye to reports concerning crimes by ruling party supporters. Police vehicles were used to transport ZANU PF supporters as they perpetrated inexplicable orgies of violence against opposition supporters. The Zimbabwe Republic Police became a military wing of ZANU PF and so when I read that Nathi Mthethwa vowed never to allow this politicisation of the police force, I just could not help but admire the man. This I say because I experienced and witnessed first hand what happens when the police gets politicised. Yes, the South African police has its own flaws - crime statistics are high, criminal conduct is rampant, corruption abounds - but utterances such as the one by Nathi Mthethwa surely deserve praise.

South Africa is the only country in the whole of Africa that constitutionally recognises same sex partnerships. In fact, same sex partnerships are criminalised in most of Africa. We all know about same sex partners who faced possible prosecution in Malawi, Uganda and Kenya. In other African countries, the offence is punishable by death! Surely such liberalism in South Africa ought to be lauded.

When I initially read about the UCT student who gestured 'inappropriately' to Gezeyhleleka and was briefly 'ruffled up' by part of the president's VIP protection team, I did not see anything unusual. In fact, I did not even finish reading the article because nothing felt unusual to me. You insult the president (an adult for that matter), you have to expect some chastisement of some sort - this is Africa. We have respect for the elderly regardless of their behaviour. However, when I got into the office on that day, the atmosphere was awash with discussions of the story. There were even suggestions of a solidarity march for the UCT student. It was only then that I realised that South Africa is not Zimbabwe or any other African country. Here, people enjoy freedom of expression and it is an enshrined constitutional right!

In Zimbabwe and other African countries, if one is suspected (without proof even) of harbouring negative thoughts against the president, if they are lucky, the least they should expect is some serious thrashing from the police otherwise the majority



Nkanyiso Sibanda.

of people just disappear, some get locked up for months on end without trial and others are even murdered. When I heard that the UCT student had simply been interrogated and locked up for a night, I thought to myself, 'Surely, South Africa is not as bad as many South Africans think.' No harm came to this guy and had he been in some other African country, the ending of the story would have indeed been different.

It was only then that I realised that South Africa is not Zimbabwe or any other African country. Here, people enjoy freedom of expression and it is an enshrined constitutional right!

If you are reading this and you are a South African, please note that your democracy is the envy of many and a dream of countless Africans. Your country is not as bad as some of you think it is. There are so many admirable things about it and while it is a young democracy, it is incomparably much better than the rest of Africa. Having spent some time in Europe, I can argue that it is even better than some Eastern European countries.



Zimbabwean standpoints: Building a law career in Zimbabwe

By Nqobile Ndlovu (2006)
Pictured above (right) with Tho Sithole

I am a Zimbabwean LLB Graduate, Class of 2006. I spent five years at UCT. In my final year, the then Dean, Prof Corder, came to our class and gave us a speech on being sensitive about job applications and interviews. He said that not everyone was

going to get invited to an interview, and those who would be invited should be sensitive to that. I applied to several law firms, but I did not even get a 'We regret' letter, let alone acknowledgement that any law firm had received my application.

I then decided to apply to a law firm in Bulawayo, where I had done my vacation work. Even my parents supported the idea of me seeking employment in Zimbabwe because it is home. I must admit that coming back to Zimbabwe was not easy, financially. The country was going through economic turmoil, and honestly, it was not profitable being a young lawyer. I remember times when my salary was insufficient to sustain me right through the month and I had to ask my parents for bus fare and lunch money. Nonetheless, I wrote and passed all my Conversion exams (Legal Accounting, Law of Evidence, Zimbabwean Statutes, Legal Ethics, Conveyancing and Notarial Practice) in two sittings, and was registered as a legal practitioner in August 2008.

Between January 2007 and August 2008, I worked under the supervision of two excellent legal practitioners, Mr K.I. Phulu and Mr N. Mathonsi, who is now a judge of the Bulawayo

High Court. I learnt so much from them across the board of legal practice. My work was not limited to one sphere of law. I did all areas of law: labour law, criminal law, divorce law, law of contract, law of delict and so on. My supervisors encouraged me to expand my practice into getting involved in civil society through attending workshops and presenting papers at workshops. I did that for many organisations including my church in the Catholic Commission for Justice and Peace, Bulawayo Agenda, Zimbabwe Lawyers for Human Rights, and Zimbabwe Women Lawyers' Association. By the time I was registered as a legal practitioner, I was able to draft excellent pleadings, stand on my own in court and represent clients without fear or anxiety and litigate alongside senior counsel.

Today, I am employed as the Legal Advisor to the Speaker of Parliament in Zimbabwe. I joined the Speaker's Office in October 2009.

I realised very early on in final year after the Dean's speech that I fell into the category of people who did not get any job offers from South African law firms

Mine is not an accidental success story; it is a story of the life that a graduate of the UCT Law Faculty can very well identify with. As a graduate practising in my home country, I have not faced challenges of a personal nature, I have faced challenges of a merit in the quality of work I produce. When I say challenges of a personal nature I mean challenges related to practising in a foreign country such as applying for and acquiring a work permit, having to work longer hours to prove your worth to your South African counterparts, and having fears of being unable to register as a legal practitioner if you are not a citizen or permanent resident of South Africa. I realised very early on in final year after the Dean's speech that I fell into the category of people who did not get any job offers from South African law firms. That realisation helped me to deal with job-hunting quickly and decisively and to look to Zimbabwe. It was not easy then, because as far as my Zimbabwean friends and I were concerned, there was nothing to come back to in Zimbabwe, not with our Law Degrees from UCT. But quite to the contrary, I discovered that

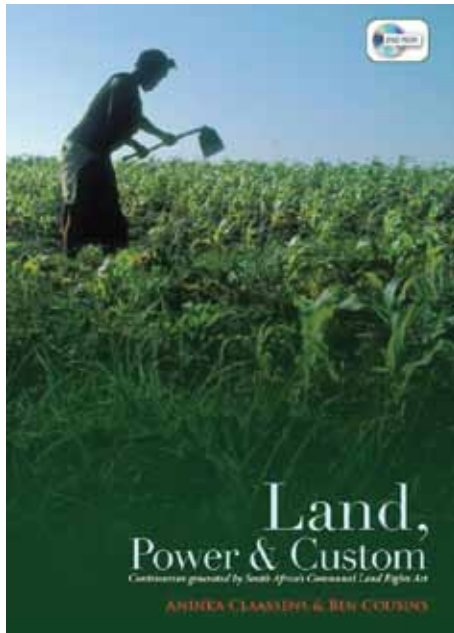
I grew so much and so fast in my career, at rates which I would not have achieved if I had stayed in South Africa. Because I chose to follow my profession, and not settle for anything less than being a lawyer, today I can stand side by side with my fellow Class of 2006 graduates and say, 'I am ahead of you in life. I advise the leader of one of the three arms of Government. Try competing with that.'

There are many excellent law firms that can accommodate excellent graduates such as those produced by the UCT Law Faculty. In addition, there are many companies that can accommodate the same graduates

Legal practice in Zimbabwe is like legal practice in any country – people get divorced, apply for guardianship, get arrested, breach contracts, get run over by cars; and basically, they need the services of a legal practitioner. Our country is not always about politics; it is also about the day-to-day life that ordinary people live. And in that day-to-day life, people need lawyers to assist them. There are many excellent law firms that can accommodate excellent graduates such as those produced by the UCT Law Faculty. In addition, there are many companies that can accommodate the same graduates.

The difference between practising in your home country and practising in South Africa or any foreign country for that matter is that at home, you do not have to worry about applying for a work permit, or standing in long queues at the immigration offices, or being stuck in a job that is beneath your qualifications. Rather, you spend as much time or even more dealing with a client's matter and achieve results that will earn you the reputation of being an excellent lawyer with a UCT Law Degree. And the financial rewards are like at the beginning of any job: the more experience you acquire, the more money you earn.

Nqobile, together with Justice LG Smith, Phillipa Dube and Tho Sithole, is part of the newly formed UCT Advisory Group in Harare - Editor



Land, Power and Custom edited by Aninka Claassens (UCT) and Ben Cousins (UWC) is 'a timely intervention in a crucial debate on the meaning of custom and tradition in post-apartheid democracy. South African democracy is at a crossroads, and these insightful and challenging analyses will help us make the right choices about which road we should choose to go down,' comments Nozizwe Madlala-Routledge, MP.

In Mamphela Ramphele's opinion, 'it is ironic that our government, that is so concerned about growing inequality, would continue to support the disempowerment of women and rural people by passing laws that reinforce apartheid boundaries and power relations in so-called "communal" areas. This is an important book for all citizens concerned with fighting inequality.'

Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act is a joint project with the Legal Resources Centre which has long been involved in litigation concerning land rights in rural areas. It combines chapters written by experts in the fields of land tenure, customary law, history and land reform, and detailed case studies collected from rural communities. The book

discusses and explains the impact that provisions of the Act will have on current problems, and the danger that it will introduce new forms of conflict and instability. Many of the chapters argue that the Act entrenches key distortions that derive from colonialism and apartheid.

The book includes a DVD-ROM containing over 3 000 pages of related material, including current and historical legislation affecting communal land and affidavits by rural applicants, state officials and traditional leaders in pending litigation concerning land rights and chiefly power.



Copyright in the 21st Century

Computers and the Internet have transformed the way we produce and distribute information and entertainment. And copyright is struggling to keep pace with these changes. The authors of all kinds of works, from the humble email to blockbuster films, rely on copyright to protect what they produce. But authors and those who use their work are often unclear about what copyright allows and what it prohibits.

Two books have come out on the subject in the last year. *Introducing Copyright* by Julien Hofman, Emeritus Associate Professor, takes readers through contemporary topics: digital rights management, open licences, software patents and copyright protection for works of traditional knowledge. In the final chapter he tries to predict how technology will change the publishing and entertainment industries that depend on copyright.

The book assumes no special knowledge and avoids technical language as much as possible,

and it explains copyright protection and what it means for copyright holders and copyright users. It was commissioned by Paul West, the Director for Knowledge Management and Information Technology at the Commonwealth of Learning, an intergovernmental organisation set up to encourage the development and sharing of knowledge, resources and technology about open learning and distance education.

Copyright in the 21st Century by Tobias Schonwetter focuses on the fact that people in Africa face challenges in accessing scholarly publications, journals and learning materials in general. At the heart of these challenges, and solutions to them, is copyright, the branch of intellectual property rights that covers written and related works. *Access to Knowledge in Africa* gives the reader an understanding of the legal and practical issues posed by copyright for access to learning materials in Africa, and identifies the relevant lessons, best policies and best practices that would broaden and deepen this access.

This book is based on the work of the African Copyright and Access to Knowledge (ACA2K) research network, launched in late 2007 as a network of researchers committed to probing the relationship between copyright and learning materials access in eight African countries: Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda.



Contract, Property and Succession

Text books on three key areas of the LLB degree have been published by OUP this year, and their *sui generis* is outlined by the four lecturers involved.



The Law of Contract in South Africa

Co-authored by Dale Hutchinson

The law of contract is currently undergoing a process of quite profound change and renewal as it adapts to meet the demands of the new constitutional era in South Africa. The entrenched ideology of freedom of contract – and with it, the fundamental idea that contracts freely and seriously entered into must be enforced – is increasingly being tempered by a very proper concern for fairness in contractual relations. This trend is strongly reinforced by the recent enactment of legislation designed to protect consumers, notably the Consumer Protection Act of 2008 and the National Credit Act of 2005. This process of change presents a challenge for all who must understand and keep abreast of this vitally important branch of the law. Most lawyers would

probably agree that, apart from constitutional law, there is no more fundamental course in the LLB curriculum than contract. So many other courses build upon it – particularly commercial law courses – that a proper understanding of the general principles of contract is vital to success in one's legal career. And yet, a complaint frequently heard is that law graduates very often lack this understanding, making their early years in legal practice that much more difficult than they would otherwise be.

Quite where the fault for this state of affairs lies will differ from institution to institution. One source of the problem might perhaps be found in the lack of a good textbook geared specifically to meet the needs of students. There are, of course, a number of books on contract available today, and most of them are highly to be admired; but by and large they seem to be aimed more at practitioners than at students. The latter do not need a list of virtually every case decided on a particular point, nor a detailed examination of the minutiae of the subject. What they do need is a solid grasp of the basic principles of contract law, and a deeper understanding of the theory underpinning it than is obtainable from most study guides.

It is to the credit of Oxford University Press that they identified this gap and assembled a team to address the need for a textbook on contract aimed specifically at students. All the members of the team are involved in teaching contract law at universities around the country, and all are established writers with acknowledged expertise in the field. We are privileged to have been asked to head this team, and to contribute to the book.

Although each contributor has a unique style, we have endeavoured to present the material in a manner and in language that renders it easily accessible to students. To facilitate understanding, we have where appropriate included diagrams and tables, and at the end of each chapter we have included a brief summary of the material covered. There is also a glossary at the back for those unfamiliar with the Latin expressions and key terms that permeate this branch of the law. We have used footnotes so as not to disturb the flow of the discussion in the text, but have referred only to what we consider the more important cases and academic writings in point.



The Principles of the Law of Property in South Africa

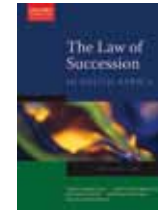
Anne Pope and
Hanri Mostert

As an academic text, the aim of this book is to assist those wishing to study or engage with property law to understand the principles of the subject and to encourage them to think critically and analytically about the implementation and impact thereof. For this reason, arguments developed on some points may deviate from the mainstream thinking in property law. As a didactic tool, this book aims to assist lecturers of property law to make this fascinating area of the law accessible to students, and to nurture the academic skills needed for students to master the subject. As a practitioner's companion, this book aims to provide an overview of basic property law principles and their interpretation and implementation, alongside references to further sources of specialised property law knowledge.

This text is designed to complement the existing body of knowledge, to supplement it where necessary, and to provide commentary where appropriate. No attempt has been made to rewrite or to supplant existing textbooks. Instead, this book is written to be used either as a 'stand alone' text or alongside any recent, authoritative work on property law. However, from a didactic point of view, the recommendation is that it should serve as an entry point to the most recent standard works on property law. Allowing students to engage with and grasp the basic principles, but also to shift their attention to more detailed accounts of particular aspects of property law as provided by other more comprehensive texts, is good training for aspirant lawyers.

In addition, students should always be encouraged to engage with *whole* cases rather than only excerpts. It is only by reading and re-reading whole judgments, including minority judgments, that a student develops a good feel for the discipline of law. The policy for a property law curriculum ought to be that fewer cases are studied in depth

rather than many cases superficially. In-depth engagement promotes recognition of important principles at work, for example, precedent, distinguishing the role and weight of comparative and foreign law, as well as the justification (or lack thereof) for taking a different view from another (possibly binding) judgment. Excerpts can rarely be put to such diverse didactic uses.



The Law of Succession in South Africa

Co-authored by
Mohammed Paleker

The Constitution places an obligation on the courts to promote the values enshrined in the Bill of Rights when developing the common and the customary law. To this end, the Constitutional Court has progressively developed both the common and the customary law of succession, most notably in the cases of *Bhe v Magistrate, Khayelitsha*, *Gory v Kolver*, and *Hassam v Jacobs*. Furthermore, Parliament has recently enacted the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, which has as its object the modification and clarification of aspects of the customary law of succession.

However, the common and the customary law of succession have traditionally been taught separately at most tertiary institutions in South Africa – the common law of succession as forming a division of private law, and the customary law of succession as forming a subdivision of customary law. This book, however, covers both the common and the customary law of succession together, explaining their respective principles as they relate to each other.

The book has been written to cover the core content of undergraduate courses in the law of succession as taught at South African universities. To a large extent, it follows the established conceptual subdivisions of the law of succession, but it also includes chapters on trusts and the administration of estates. The content covered in these chapters has often been taught separately to the standard course content, but its inclusion

is important for obtaining a holistic perspective of the subject. These two chapters, however, serve as an introduction to the specialised areas of law they cover, and they are therefore not comprehensive and all-encompassing.

Written primarily for undergraduate students of law, its focus is to establish a sound theoretical foundation, rather than to offer intricate and technical discussions. Simple, everyday language is used to make the subject more accessible to students, while standard legal terminology is retained. Special features are included to encourage students to think independently, reflectively and critically about the subject and the law in general, and to broaden their understanding and perspectives. These skills should enhance the performance of students while at university, and they are important for the development of good lawyers. Voluminous referencing has been avoided, and we have included only what we regard as the most important cases and academic writings. The comprehensive bibliography will serve as a useful reference for further study.



Harassment in the Workplace: Law, Policies and Process

Alan Rycroft and Rochelle le Roux

Sexual harassment, intimidation and bullying in the workplace have impacted almost every working individual at one time or another. And yet how many actually know their rights and how they are protected by law?

Until now, there has never been a single source of information which covers all of the various forms of harassment in the workplace as well as how to prevent it, manage it and mediate on it.

Authored by acknowledged experts in this field who together represent dozens of years of experience in dealing with this subject, the emphasis of this book is on practical, hands-on advice.



Commercial Law lecturers (Left - right) Caroline Ncube, Rochelle le Roux, Jacqui Yeats, and Tshepo Mongolo.

Acta Juridica

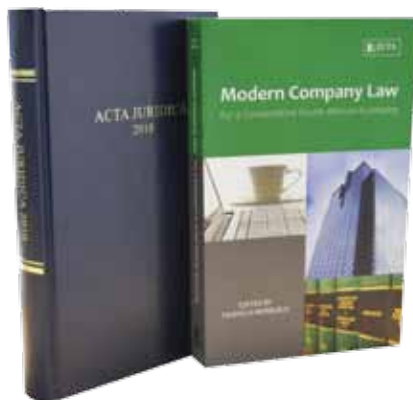
Acta Juridica was first published in 1954 and has, since 1968, been published by Juta. What makes the 2010 edition so special is that it is dedicated to the late Professor Mike Larkin, that scholar and gentleman of 'groot gees'; the current edition is largely the work of his former colleagues in Commercial Law pictured above.

The guest speaker at the launch was UCT law graduate and well respected practitioner in the field, Etienne Swanepoel, who from 2011 will be co-presenting a new Masters in Tax course at UCT. 'The new Companies Act has been 82 years

in the making, and South Africa now compares favourably with the rest of the world. It is not perfect, but it can be changed by amendment.'

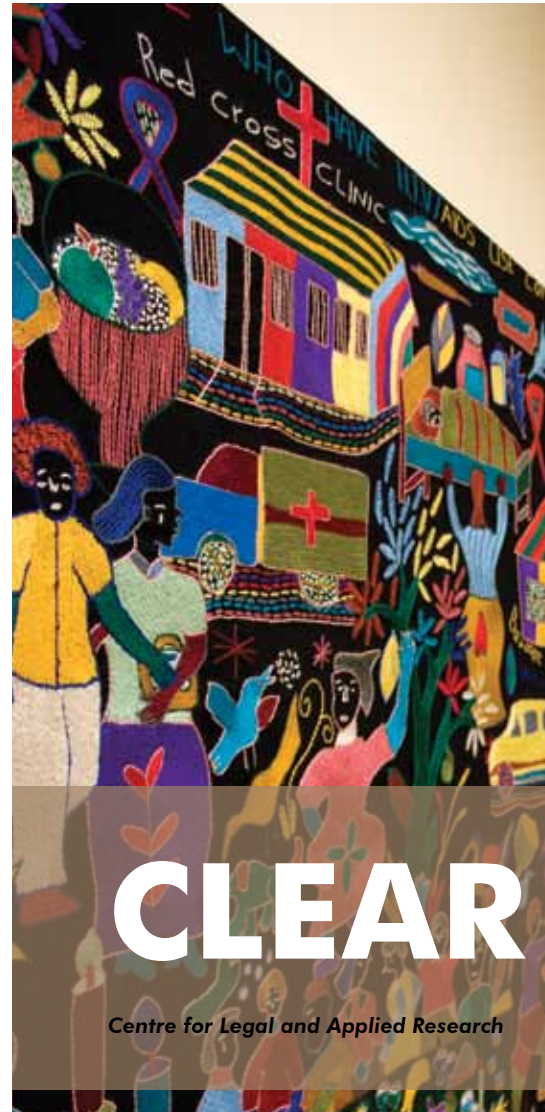
He singled out the essay by Caroline Ncube and Richard Jooste, and noted the legacy of Mike Blackman's separation of powers argument; he commended Tshepo Mongalo as managing editor for the incorporation of Simon Deakin - 'one of the finest jurists in the world' - as well as M&A gurus, Ezra Davids and Trevor Norwitz.

Swanepoel's chief criticism of the New Act was around 22 I (b) but for more elucidation on that, you'll need to register on his course! Editor.



FAST FACTS

Other books published in the last year were: Bradfield, G. & Lehmann, K. *Principles of the Law of Sale and Lease*
Corder, HM. *Global Administrative law: innovation and development*
Cornell, D. *Clint Eastwood and issues of American Masculinity*
Davis, D & le Roux, M. *Precedent and Possibility*
Shearing, C et al. *Lengthening the Arm of the law: enhancing police resources in the 21st Century*



Centre for Legal and Applied Research

A number of new appointments in 2009 further enriched the faculty's research community. Amongst the new additions to staff were Professor Alan Rycroft, appointed as Chair in Commercial Law, and Professor Pierre de Vos, appointed as the Claude Leon Chair in Constitutional Law; Associate Professor Loretta Feris was appointed to the Institute of Marine and Environmental Law and Professor Tjatie Naude and Associate Professor

Helen Scott were appointed to the Department of Private Law.

Recently retired Supreme Court of Appeals Judge Ian Farlam and former Education Minister Professor Kader Asmal were among four new honorary professors appointed in 2009. They join Professor Muna Ndulo of Cornell University, and Dr Manfred Weiss of Goethe University. They join a strong cohort of eminent legal thinkers that include Judges Dennis Davis and Belinda van Heerden, Professors John Dugard, Denise Meyerson, Akilagpa Sawyerr, Julie Stewart, and Advocate Wim Trengove.

Dr Dee Smythe was awarded the UCT Fellows Award, given to a young researcher of exceptional promise. The Law Faculty now boasts five newly (including renewed) NRF-rated researchers namely Jonathan Burchell, Danwood Chirwa, Chuma Himonga, Dr Thalia Kruger and PJ Schwikkard, bringing the total number in the faculty to 14.

Cognisant of its position in the research community and its responsibility to enhance research capacity, UCT invited the Department of Justice and Walter Sisulu University to participate in the 2009 Emerging Research Breakaway. A total of 16 papers were presented, nine of which were by designated emerging researchers. As part of the Ruhr University, Bochum and University of Cape Town PhD seminar exchange, a group of six doctoral students from Bochum visited the Centre of Criminology in January.

Substantial discussion has taken place about revision to the Faculty's Research Ethics Policy and Guidelines. Realising the importance of ethical research and monitoring, the Research Ethics Committee (REC) has now been established as a full Faculty Committee and has been tasked with reviewing existing procedures and implementing a transparent and rigorous system of ethics clearance review.

The launch of the Centre for Legal and Applied Research (CLEAR) was reported on in the last issue of *Law Review*. The impact of CLEAR's overarching structure is increasing, as is demonstrated in the updates that follow.

PJ Schwikkard

Meet the CLEAR Directors



Professor Hanri Mostert, Director of Research.



Jan Theron, Labour and Enterprise Policy Research Group.



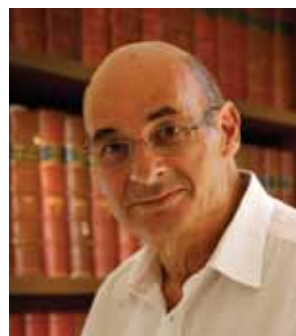
Professor Clifford Shearing, Centre of Criminology.



Fatima Khan, Refugee Rights Project.



Dee Smythe, Law, Race and Gender Unit.



Professor Julian Kinderlerer, Intellectual Property Unit.



Associate Professor Richard Calland, Democratic Governance and Rights Unit.



Professor John Gibson, Institute of Marine and Environmental Law.



Professor Evance Kalula, Institute of Development and Labour Law.

Institute of Criminology

South African Police Women's Experiences in the Peace Mission in Darfur

By Elrena van der Spuy, Associate Professor of Criminology

The UN has committed itself to increase the overall percentage of women in UN peace missions from its current level of 8% to 20% by 2014. Currently South Africa is ranked 13th on the list of countries making military and police contribution to UN Operations. Within sub-Saharan Africa South Africa is the fourth most important troop contributing country. Of particular importance is the fact that South Africa currently has one of the highest percentages of women deployed within peacekeeping circles. The main purpose of this exploratory enquiry was to explore issues of strategic and operational relevance to the future deployment of South African police women to peace missions.

As is the case with most troop contributing countries, South African peacekeepers receive 'gender training' as part of their pre-deployment preparation. Responsibility for this training is outsourced to a partnership of three NGOs. Those interviewed highlighted the following problems: insufficient time spent on gender awareness training in the pre-deployment environment; no formal provision for gender trainers to receive any feedback from trainees upon their return, and therefore no opportunity for quality control of training courses; little to no opportunity for planners or trainers to harvest the experience and knowledge gained by female peacekeepers in the field.

Peacekeepers are exposed to adverse conditions in the field. Living conditions are spartan and the physical environment is a challenging one. Many also reflected on the human capacity to adapt and to organise their living environments. Prospective peacekeepers, they thought, had to be better prepared for the conditions which they had to confront. In fact, ex-peacekeepers should be used as a valuable resource in orientation programmes.



High levels of job satisfaction were reported by the majority of women included in the focus group interviews. For most this was a first exposure to a world beyond the borders of South Africa. Deployment in peace mission thus brings exposure to foreign locations with different cultural dynamics. For many it provided an opportunity for comparative assessment of the better quality of life which South Africans enjoy vis-à-vis less fortunate neighbours. Within the impoverished environment of Darfur, police women commented on their sense of competence in working in a multi-national peace mission where they could 'hold their own' and 'make a difference' to the lives of local women. Many spoke of a sense of 'national pride' accompanying their role as 'ambassadors' for South Africa. The sense of accomplishment and professionalism in the field is challenged upon their return to South Africa given the reported lack of interest within the organisation.

Focus group participants agreed that there was no proper debriefing system or process in place once peacekeepers returned from a tour of duty. The opportunity for personal debriefing upon the return to South Africa is limited. Many of those interviewed experience stress and trauma upon their return, especially for those who had been deployed in complex missions. A further problem of which police officers spoke related to the difficulties encountered in the process of re-integrating back into their positions at station-level. Many commented on the lack of interest amongst colleagues in their field experience. Others articulated an unwillingness and inability within the police organisation (at station, area and central level) to put the skills acquired during deployment to use within the domestic policing environment. Many of the female police officers in fact spoke of a degree of ostracisation which

they experience upon their return. There was, they noted, some resentment among colleagues about peacekeepers who 'had a nice time' outside the country whilst earning 'heaps of dollars.'

Much of the conversation in the focus group interviews centred on the challenges which confront social relationships within the peace mission. The discussions brought to light the multi-dimensionality of social relationships in the field. Establishing relationships with *local women* required commitment, perseverance and strategic negotiation with local power structures (i.e. male gate-keepers) in a traditional Islamic society. Trust had to be built. This could be accomplished through cooperative ventures involving some or other developmental activity: establishing a garden, a crèche, a sewing club, a communal kitchen, a discussion group dedicated to personal hygiene. Language barriers made such engagements difficult but not impossible. In focus group interviews stories were told of individual initiatives undertaken by police women often without much in the line of social or financial support by the UN. Relationships within the professional domain required an ability to operate in a multi-national and culturally diverse environment. Here female police spoke of a range of matters: of how being 'all police personnel' provided a certain common identity which could focus on the overall objectives of the mission. Beyond this surface commonality, however, there lurked tensions. Difference in policing styles and attitudes were mentioned. Differences between more and less developed police organisations too featured with South African police women commenting on how 'privileged' they felt vis-à-vis other police officials. A measure of animosity too cropped up in the conversations with South Africans being accused of acting like 'little Americans' in the field. Contending with patriarchal attitudes amongst other troop contributing countries constitute a particular challenge for female peacekeepers. The focus group discussions provided a view onto the complexity of relations between men and women in the field and the coping strategies women devise to manage relations. Female peacekeepers have to deal with the conservative attitudes and potentially exploitative behaviour of local men in a diplomatic manner. They also had to contend with sexual advances and/or harassment from male peacekeepers.



Thus anecdotes from the field provide a view onto the complexity of gender relations as the latter develop in the taxing environment of peace missions. Further research into the micro dynamics of gender relations seems imperative so as to arrive at policy frameworks for managing the spectrum of outright sexual exploitation and sexual harassment to consensually-based sexual interactions between men and women in the mission.

This research enquiry succeeded in highlighting some key issues of relevance to our understanding of the politics and logistics which shape the deployment of pockets of female police to international peace missions. Needless to say, much more research on a wider scale is required to really understand the potential for and limitations confronting domestic police – both male and female – deployed to transnational policing environments.

FAST FACTS

The Institute is involved in three other projects: the first is examining security arrangements for the Soccer World Cup, 2010 and how partnerships between the public and private sectors work during the policing of a major event; the second seeks to involve poor constituencies in the new green economy and is a four-year project involving several organisations focusing on informal entrepreneurs in the solid waste economy and current business practices that are driving the informal recycling economy; the third is a collaboration with the CSIR and Santam Insurance to explore how the effects of global change are likely to affect the insurance industry and the potential role of insurance in reducing risk and improving socio-ecological resilience, using the Eden Municipality as a research site.



Institute of Development and Labour Law

The three papers presented at the Annual Labour Law Conference, August 2010, speak to the work of the Institute.

Income inequality: Executive salaries and pay discrimination

By Debbie Collier and Kathy Idensohn

Notwithstanding an unequivocal, constitutionally backed commitment to reducing income inequality, for various reasons the wage gap (being the income differential between low paid workers and management) in South Africa today remains among the highest in the world.

Excessive inequality has both social and economic costs. In addition to suggesting a link between inequality and crime, research indicates that extreme income inequality may undermine social cohesion and can negatively impact on efficiency and economic growth.

The South African legislative framework is designed, not only to prohibit unfair discrimination – ie breach of the 'equal pay for equal work' principle, but also to incrementally reduce disproportionate income differentials. This legislative framework is comprised of provisions in labour law – specifically the Employment Equity Act – and provisions in company law, and most recently

the King III Corporate Governance Code that contains rules for the determination of executive remuneration.

This workshop will discuss and analyse the labour law provisions on income inequality and recent case law dealing with the 'equal pay for equal work' principle, as well as case law relating to the disclosure of income differentials. In addition, the regulation of executive remuneration by company law and principles of corporate governance will be explored.

Dealing with racism and racial harassment

By Alan Rycroft and Eva Mudely

The United Nations Convention for the Elimination of All Forms of Racial Discrimination defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural and any other field of public life.

Examples and allegations of racial discrimination taken from the recent past involve a range of issues: disproportional wage differentials; non-appointment because of race; non-retention of affirmative action appointees in retrenchment; a misapplication of affirmative action policies; racist remarks; racist cartoons; disparities in relocation allowances; a refusal to admit an employee to certain funds; and indirect race discrimination.

The distinction was made between racial discrimination and racial harassment. Racial discrimination is an act or omission, whether official or unofficial, which differentiates on the basis of race. Racial harassment is a form of social behaviour (by either the employer or employees) that is intended to belittle, marginalise, coerce, manipulate, intimidate, or take advantage of persons belonging to a particular race.

Two Acts – EEA and PEPUDA – were looked at to understand the legal framework for the protection

of employees and non-employees from racism. Case studies were presented which deal with forms of racism or harassment: hate speech, racist name-calling, derogatory language, satire/humour, offensive or unfriendly behaviour.

The liability of the employer in terms of S 60 EEA and the Common law was looked at as well as the problems of how to compensate victims as illustrated in *SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and another* (2006) 27 ILJ 1204 (LC).

The problems of establishing racial discrimination and harassment were outlined and appropriate employer responses looked at including creating and maintaining a working environment in which the dignity of employees is respected; the general duties of employers and managers; the duty to adopt a harassment policy; worker education; and a zero-tolerance approach and consistent discipline.

Getting clarity: the differences between compensation, damages and back-pay

By Rochelle le Roux

The labour court has the power to award damages and compensation. This presentation deciphered the meaning of, and differences between compensation and damages; the circumstances under which either or both can be awarded; it explored to what extent, in the case of dismissal, the labour court (or arbitrator) may order both compensation and reinstatement; it considered whether the retrospectivity of an order of reinstatement is in any way proscribed by the cap placed on compensation awarded for unfair dismissal; and it considered the extent to which back-pay should be made and whether it is appropriate to reinstatement where a very long period has elapsed since the dismissal.

Some of the judgments that were considered included the judgments of the Labour Appeal Court in *Kroukam V SA Airlink; Chemical Workers Industrial Union V Latex Surgical Products; "Kylie" V*

CCMA; and Minister for Justice and Constitutional Development V Tshishonga; and the judgment of the Supreme Court of Appeal in Republican Press (Pty) Ltd V Chemical Energy Paper Printing Wood and Allied Workers Union.

Papers from the conference are available on www.labourlawconference2010.co.za

The idea of Labour Law

By Paul Benjamin

*The idea of labour law
Is to create rights as a floor
You may think it an oddity
That labour's no commodity
But that's not the flaw in the law*

*The contract of employment
Is a source of much enjoyment
It comes from the Romans
But most of the omens
Say we should reinvent*

*Labour law really is dead
That's what the scholar said
We have no future
Innovate don't suture
That's the road that's ahead*

*The chaps at the World Bank
Said, laws we can rank
We'll push deregulation
Across every nation
Makes no sense, to be frank*

*Labour law has no end
That's what many have penned
Will it last for all time
Is it still worth its dime
Hard to see the next trend*

*ILO Conventions
Express the best intentions
But sometimes we shirk
On creating decent work*

Democratic Governance and Rights Unit

What kind of judges are we appointing: is the JSC identifying a truly diverse judiciary?



By Abongile Sipondo and Chris Oxtoby

What kind of a person would make an ideal South African judge? Such an apparently simple, innocent question, but what a complex answer it demands. Which qualities and characteristics should a judge possess in order to give full expression to the provisions and values of the Constitution? Should they possess a particular mindset, and if so, what is it to be?

Those appointed as judges must embrace the transformative imperatives of the Constitution. But in assessing a prospective judge's commitment to constitutional values, do those who select our judiciary – the members of the Judicial Service Commission ("JSC") – ask questions that are relevant to showing this commitment? Or is there a danger that their questioning might create a bench that is too similar in outlook, and lacks the diversity of thought to address the many challenges facing our country?

In April, the JSC held interviews for numerous judges' positions in various high courts and labour courts. Underlying these interviews are certain themes which offer insight into the kind of judge it seems the JSC is looking for. Three stand out.

Firstly, in almost all the interviews, the issue of whether the candidates had experience on the bench as acting judges was prominent. The JSC clearly places great emphasis on prospective judges having gained previous judicial experience. But whilst experience as an acting judge provides an invaluable opportunity for the candidates to gain experience, it also raises questions about what impact this will have on the independence and diversity of the bench.

Independence is potentially impacted as acting appointments are made by the Minister of Justice, after consultation with the Judge President of the Division in question. This degree of executive involvement may be contrasted with the appointment of permanent judges, who are appointed by the President based on the recommendation of the JSC. By contrast, the JSC has no involvement in the appointment of acting judges.

An independent and impartial judiciary is a central part of a legitimate democracy. The Constitution states that judicial officers must 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'. The Constitution anticipates a judiciary which is able to insulate itself from pressure by government, or any other institution or person. Whilst we do not suggest that acting judges are necessarily likely to be unduly 'pro-executive' just because of the circumstances of their appointment, we suggest that there are good reasons for negative public perceptions of the independence of acting judges, in light of the circumstances of their appointment, and therefore vigilance on this issue is necessary.

Issues of independence are particularly important in light of the high prevalence of acting judges in the high courts. For example, in March this year there were over 50 acting judges in the high courts - a significant number in comparison with approximately 200 permanent judges. The Constitution specifically introduced the JSC to ensure that judicial appointment was not dependent on executive whim. We should be careful to ensure that this is not circumvented, even if unwittingly.

The emphasis placed on acting experience has another ramification that was not perhaps

anticipated by the drafters of the final Constitution. Whilst the pool of candidates for judicial selection may have been broadened, the majority of interviewees remain those from legal practice at the bar or the side bar. This echoes a major criticism of the apartheid-era judiciary, where judges were drawn from a small and exclusive group. Then, judges tended to be appointed solely from the ranks of senior advocates, and therefore by extension tended overwhelmingly to be white men.

On the one hand it seems self-evident that acting experience is a sensible requirement to ensure that prospective judges have the necessary courtroom skills. Yet it should be borne in mind that some of the most significant contributors to the jurisprudence of post-apartheid South Africa – judges such as Arthur Chaskalson, Yvonne Mokgoro, Albie Sachs and Kate O'Regan – had no prior judicial experience before their appointment to the Constitutional Court.

Yet, the other skills and 'life experience' these individuals possessed made them highly respected judges. It may well be said that the demands of the Constitutional Court and the high courts are different and that the comparison is not entirely apt. Yet, we suggest that careful consideration ought to be given to whether our current methods of judicial selection are ensuring that a wide enough pool of candidates is being tapped into, or whether we are in danger of repeating mistakes of the past by selecting our judges from a narrow section of the community. The bench may be transformed in terms of race and gender, and yet not represent as wide and diverse a range of views and outlooks as it might, if appointments are limited to some senior advocates and attorneys.

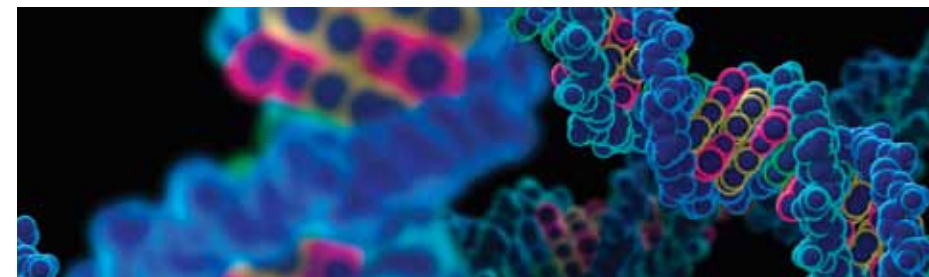
Secondly, the question of language raises a difficult challenge. Many candidates were asked about their ability to converse in African languages, and unsurprisingly most white candidates could not speak any African languages. However, the commissioners seemed not to see the bigger point here. Whilst we agree that the issue of language in courts is a crucial one, especially when it comes to access to justice, the reality is that for many decades the languages that were used in our courts were English and Afrikaans, and our jurisprudence

was developed in those languages. Using different languages is not as simple as understanding an African language. Practically, it will be a mammoth task to translate statutes, case law and other essential material into all official languages, not to mention to provide high quality interpreting services to enable court proceedings to run smoothly. It is important to change the status quo, but this issue should not be over-simplified. It is an issue that needs to be tackled by different stakeholders including the legal profession, government, and university law faculties.

Thirdly, several candidates were asked about the extent of their involvement in the community. The premise behind the question appeared to be that a lack of such involvement indicated that a candidate could not fully appreciate the challenges facing broader society. This is an interesting suggestion, and we would certainly encourage the JSC to ensure that candidates are sensitive to the wider social context in which they would operate as judges. Nonetheless, the premise that such activities are a sufficient condition for empathy and understanding is questionable. Candidates ought to be questioned on what they have learnt from their community involvement in order to assess whether this has indeed impacted on their understanding of the judicial role.

Furthermore, it should be borne in mind that successful attorneys and advocates are extremely busy people. Is it fair that building a successful legal practice would disqualify a candidate for judicial office if they had not been involved in community activities? Could the practice of law not also serve to make candidates aware of the challenges facing communities?

The process of judicial appointment currently does not place enough emphasis on the diversity, broadly understood, of the bench. The fact that judges are still appointed from a small (if changing) group means that there is a danger that judges who are of an essentially similar mindset on many issues are appointed. This is, we submit, not desirable. It is important for the judiciary to represent the diverse views characteristic of a democratic – and a pluralist, heterogeneous – South African society.



Intellectual Property Law and Policy Research Unit

The unit involves individuals with a vast range of expertise, including copyright, indigenous knowledge and patent law. It includes individuals who work in industry, entrepreneurs and researchers looking at the manner in which IP law is working or should be working.

It has involved IP practitioners and entrepreneurs in many areas of IP law in South Africa as well as entrepreneurs in modern technology - Donrich Jordaan, for example, is working with us to look at innovation in Biotechnology (CEO: Sylvean Biotech (Pty) Ltd), whilst the former head of IP at a major South African company has produced a PhD thesis on the manner in which IP protection is addressed when South African firms work in the international arena. Wim Alberts, one of the acknowledged experts in trademark law in South Africa, has visited the unit and is deeply involved in the work of the unit.

The new law on IP resulting from publicly financed research in South Africa is about to come into effect with the publication of regulations. Julian Kinderlerer and Andrew Rens, with significant input from Andrew Bailey and Pete Barnard of the University's Research Contract and Intellectual Property Services, have acted as advisers to the Department of Science and Technology in trying to find ways to assure that the Act achieves its aims without hampering research. In addition, the Department of Science and Technology has

requested the assistance of Professor Kinderlerer in addressing policy for establishing a database for indigenous knowledge. He has worked with the Department of Trade and Industry which was deeply concerned at counterfeit goods in medicines and in relation to the Football World Cup that was about to be staged in South Africa.

In late 2009 the committee set up by the Department of Science and Technology to look at ethics in nanotechnology completed its work on code of practice for workers in nanotechnology. Professor Kinderlerer was asked to present the draft code to a meeting of the management board of the DST. It was approved for distribution for discussion by those it would affect and consultations on the code are proceeding.

Members of the unit and their key areas are summarised here:

Professor Kinderlerer continues his involvement in many projects funded by both the European Union's Framework Programme 7 and the Canadian Genome Initiative.

Djims Milius is Senior Research Officer with primary interests in intellectual property law and development policy.

Dr Johanna von Braun, one of the post-doctoral fellows, works in the area of patents and development and works with a non-governmental organisation, Natural Justice, in relation to traditional knowledge.

Dr Bernard Maister (MBChB., J.D., LL.M) joined the Unit last year, and in 2010 has continued his work on the Schockland Proposal including a report for the Dutch Ministry of Development. Lee-Ann Tong has been on sabbatical for most of

this year, but she taught a course on intellectual property law and traditional knowledge at Levin College of Law, University of Florida

Dr. Tobias Schonwetter is a recognised expert on copyright law and in 2010, Tobias will update the South African Creative Commons licence from version 2.5 to version 3.0.

Andrew Rens, until recently a Fellow at the Shuttleworth Foundation, provides significant support in the field of copyright, particularly ensuring that open source is taken seriously.

Caroline Ncube's PhD thesis is entitled 'Intellectual property protection for e-commerce business methods in South Africa: Envisioning an equitable model for SMEs in the tourism industry.'

Debbie Collier was awarded her PhD in December 2009; it related to the use of genetically modified crops in South Africa (see page 41).

Charles Moitui's PhD focuses on regulation of biotechnology and domestic implementation of the precautionary principle in South Africa, Zambia, Kenya and Namibia.



Globalisation, Intellectual Property and Biotechnology was the title of Professor Julian Kinderlerer's inaugural address. The full text is available at www.iplaw.uct.ac.za

Labour and Enterprise Policy Research Group

The labour broking debate and lessons from De Doorns

By Jan Theron

When the locals drove out Zimbabwean migrants from Stofland, the informal settlement on the N1, across from De Doorns, it cannot have come as a surprise to anyone with knowledge of the labour situation there. A community leader told me a year ago that someone just had to say 'I have had enough of these Zimbabweans' and violence would break out.

The community leader was interviewed in a study on farm labour in the valley by the Labour and Enterprise Policy Research Group (LEP), as part of a broader investigation as to how the workplace in many sectors of the economy has been transformed. Researchers interviewed, amongst others, labour brokers and a cross-section of workers, including migrants from Zimbabwe.

It was one of the labour brokers interviewed who claimed that there were Zimbabweans who were being recruited to work for R30 a day. Since this was precisely the kind of claim we were intent on investigating, particulars were requested, and confirmation sought. We were not able to verify this claim.

It may be coincidental that a very similar allegation was reported in the press on the day the Zimbabweans were driven out of Stofland. Since then we have had various personages, including the Deputy Minister of the Department responsible for granting work permits to migrants, repeating a like allegation.

Our study found no evidence of underpayment. In fact there was a high level of compliance with the minimum wage prescribed in the sectoral determination. For a number of reasons, this



is not surprising. What was surprising was that most workers living off-farm, including the Zimbabweans, were earning R10 a week above the minimum wage.

Clearly the term xenophobia is unhelpful in understanding what has happened in De Doorns, and becomes a cover for intellectual sloppiness. In a situation in which there are large numbers of people living off the farm, depending on seasonal employment, there is bound to be intense competition for jobs. The explanation as to what has happened concerns competition for jobs. But jobs amongst those living off the farm are provided by intermediaries, and what we also found was a high-level of competition amongst labour brokers.

In what may be characterised as the debate about labour broking, some have claimed that most labour brokers are whites bent on exploiting blacks. There are of course whites who are themselves labour brokers, or who are employed by some of the big conglomerates providing broking services. But many labour brokers are in fact black. This is after all a business requiring minimal start-up capital.

The demand of the labour brokers we interviewed in De Doorns, who were black in the generic sense, was to be paid R10 per person placed per day. But it was not a demand they were often

able to secure, because there were too many others in the community willing to undercut them. There were also those who were willing to place workers for payment of a once-off placement fee. Some of the Zimbabwean migrants said they had been placed on this basis. Although we have no inside knowledge of what occurred, it is likely this competition amongst labour brokers will have been an incendiary factor.

Why should an intermediary who places workers on a farm expect remuneration rather than a placement fee? A short answer is that Section 198 of the LRA (and now, in the case of agriculture, an equivalent provision in the sectoral determination) recognises the labour broker as the employer of those workers whom it procures or provides to a client. We have become so inured to the notion of labour brokers as employers that it is easy to forget how bizarre a notion it is.

Employment is supposed to be a relationship characterised by reciprocal rights and duties, whereas there is nothing of the kind in the relationship between brokers and those whom they place. It is beside the point that labour brokers remunerate the workers. This is something the legislation requires and is in any event for services rendered to clients. It is also the clients that determine the remuneration the brokers pay to their workers.

It is for this reason that the notion of the labour broker as the employer has been described as a legal fiction. But it is only justified to maintain a fiction if it serves some public purpose to do so. The primary purpose that this fiction serves is to provide an incentive for firms to utilise labour without being accountable for the conditions under which labour is employed, and how employment is terminated. The probably not unintended consequence has been to radically undermine labour standards.

In this context, calls to ban labour broking are understandable, and proposals to allow the industry to regulate itself ludicrous. Industrial self-regulation is only possible where workers as well as employers are organised. Workers are not able to organise themselves when the workplace where they work is controlled by a client with whom, supposedly, they have no employment relationship.

At the same time it is not necessary to ban labour broking to address these problems. One could simply scrap Section 198. Or one could regulate the period for which a worker may be 'employed' by a broker. For although the service labour brokers provide is ostensibly "temporary", in fact there is nothing "temporary" about it. The legislation allows workers placed by labour brokers to be employed indefinitely, and it is this that has given rise to the most glaring inequities associated with labour broking. Another alternative is to regulate the margins labour brokers charge.

It is also by no means clear how such a ban could ever be effected. The first obstacle to such a venture is defining what it is one wants to ban. Namibia, for example, has adopted legislation that makes it unlawful for any person, for reward, to employ another with a view to making that person available to a third party to perform work for a third party. One problem with this formulation is that it would apply to cleaning, security and a range of other services as well as labour broking as conventionally understood.

It is not clear whether the legislature in Namibia intended to ban these services, and we will not know its effect until the litigation currently in process there is resolved. However while some would argue that these other services can be

differentiated from labour broking in occupational terms, it would be relatively easy for labour brokers to redefine their service in occupational terms. In fact this has already happened in De Doorns, where some commentators distinguish between contractors providing a relatively specialised service and labour broking. In short, a ban is unlikely to be effective.

But perhaps the more fundamental problem with a ban is the belief that appears to underlie it, that one can legislatively turn back the clock on a process of restructuring that has already occurred. In the case of De Doorns the mass of people living off the farm, dependant on seasonal employment, is not going to go away. In this and other sectors the workplace has been transformed from a place where the employees of a single employer work, to a place where a multiplicity of employers operate, each employing its own workforce, but nevertheless subject to the control of a core business.

In this regard, it is unfortunate that this debate has been framed as 'regulation' versus 'banning'. Whatever form a ban was to take it would certainly have to pass constitutional muster. The question therefore remains, and can only be, what form of regulation is appropriate.

It is also unfortunate that proposals discussed at NEDLAC have not been made public. These proposals, based on extending the liability of the client towards the workers 'employed' by brokers, do not go far enough in addressing the fundamental anomalies labour broking gives rise to. They also do not deal at all with the period for which workers may be 'temporarily' employed. The debate about labour broking is probably the most significant debate about labour regulation since the LRA was adopted. Whereas previous debates have been premised on the notion that labour regulation is unduly onerous and represents an obstacle to job creation, the current debate is premised on the contrary proposition, that labour regulation is inappropriately permissive. There was a missed opportunity to address the problem of labour broking in 2002, when its dimensions were already apparent. It would be a pity if an unintended consequence of the focus on a ban was to neglect another opportunity.



Institute of Marine and Environmental Law

Pirates of the Indian Ocean

By John Gibson, Professor of Marine Law

The work of the Institute of Marine and Environmental Law (IMEL) includes helping to develop capacity among African nations in the international law of the sea. In November 2010, IMEL collaborated with the UN Institute for Training and Research (UNITAR) to provide training in the law of the sea for 45 ambassadors and officials from the Ministry of Foreign Affairs of the State of Eritrea. Eritrea borders the vital Bab el-Mandeb Strait at the entrance to the Red Sea, but it has yet to join the 1982 UN Convention on the Law of the Sea. In April 2010, IMEL also contributed to a major international seminar on maritime security and safety in Dar es Salaam, Tanzania.

One of the most important issues currently affecting maritime security and the law of the sea in Africa is the rapid growth of piracy and armed robbery against ships. In 2009, the International Maritime Bureau recorded 211 actual or attempted hijackings by pirates around Somalia, the Gulf of Aden and the Red Sea, and the number of incidents has doubled in each of the last three years. This is the latest manifestation of a problem that is old as the history of shipping itself, and was well documented in Graeco-Roman times, but it still raises difficult legal issues.

Definition of piracy

The classification of pirates as universal outlaws is commonly traced to Cicero, who in 44 BC described them as the common enemy of all mankind. This was echoed in English criminal law, when Coke wrote in 1644 that a pirate was an enemy of the human race, and Blackstone stated in 1769 that piracy was an offence against the law of nations. However, in 1932, Harvard Law School published research concluding that piracy was not an international crime, but simply an extraordinary basis of jurisdiction entitling all States to enforce municipal criminal laws against pirates beyond their territory. This research influenced the International Law Commission, which prepared draft articles on piracy that were incorporated in the 1958 Geneva Convention on the High Seas, and are now largely reproduced in the UN Convention on the Law of the Sea.

There are several problematic aspects of the definition of piracy in article 101 of the UN Convention. First, a requirement that two ships must be involved in piracy excludes the situation where a ship is hijacked by its own crew or passengers, as in the case of the cruise ship *Achille Lauro* off the coast of Egypt in 1985; this incident led to the negotiation of the 1988 Rome Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, which obliges States to make various violent actions on or against ships punishable as offences under national law, but does not require the involvement of another ship. Of more immediate relevance to the situation in Somalia is a provision in the UN Convention that piracy can only occur on the high seas outside the territorial limit of coastal States. Although the Convention restricts the territorial sea to 12 nautical miles, Somalia has claimed a 200-mile territorial limit since 1972, and many piratical attacks occur within this zone. Another issue of concern is that piracy must be committed for private ends by the crew or passengers of a private ship, and so it excludes politically motivated acts or State-sponsored terrorism. Thus, Somali pirates claim that, despite the huge ransoms demanded, they are poor fishermen whose livelihood has been destroyed by over-fishing and uncontrolled pollution by foreign ships, and they are eco-warriors defending a wider public interest.

Arrest and prosecution of pirates

Article 105 of the UN Convention declares the right of every State to seize a pirate ship on the high seas, and prosecute the pirates in its own courts, irrespective of their nationality or that of the arrested ship. However, there is no power under the Convention for foreign navies to undertake enforcement activities in the territorial sea of another State. While the principles in the UN Convention are intended to respect the sovereignty of coastal States, they fail to take account of the situation in countries like Somalia, where the Transitional Federal Government (TFG) lacks the military capacity to police its own waters, and does not control the autonomous region of Puntland where many pirates are based. In February 2008, the TFG asked the United Nations for urgent assistance to safeguard shipping, and the Security Council responded by adopting Resolution 1816 (2008), which decided that for a limited period States cooperating with the TFG could enter Somali territorial waters and take the same kind of action against pirates there as is permitted on the high seas under international law. An important qualification is that the TFG must have given advance notification to the UN Secretary-General identifying the States to which this concession applies, which means that intervention in the territorial sea by the armed forces of other countries may not happen without the prior general consent of Somalia.

In the longer term, however, it will be important for the law of the sea itself to evolve, and develop more appropriate principles to deal with new threats to maritime security

Following Resolution 1816, the Security Council has issued five more resolutions developing and extending its principles. In particular, Resolution 1851 (2008) invites States involved in the fight against Somali piracy to negotiate 'shiprider' agreements with countries in the region that are willing to take custody of pirates; under these arrangements, law enforcement officials from

those countries are carried on board foreign warships in order to participate in arrests and assert jurisdiction over prisoners. This resolution also allows the States and regional organisations cooperating at sea to undertake measures against pirates inside Somalia itself, subject to similar qualifications to those that apply to intervention in the territorial sea. However, the resolutions are careful to stress that these special measures are restricted to Somalia, and do not create general principles of customary international law that would apply elsewhere.

International and regional action

Many nations have responded to the call with naval assistance, either through multinational coalitions or independently. NATO has deployed warships from its Standing Maritime Group 2, the United States has established the Combined Task Force 151, and the European Union has undertaken Operation EU NAVFOR-ATALANTA to escort humanitarian aid convoys. In January 2009, 17 States in the region adopted the Djibouti Code of Conduct on the Suppression of Piracy and Armed Robbery against Ships in the Western Indian Ocean, in which they undertake to share information about piracy and review the adequacy of their national legislation against it. Both Kenya and Seychelles have recently revised the relevant provisions in their criminal laws, with assistance from the UN Office on Drugs and Crime (UNODC), and have also entered into agreements with the European Union and other countries on the status of foreign armed forces and the transfer of prisoners.

Nevertheless, the limited capacity of the judicial systems in Somalia and other States in the region to deal effectively with suspected pirates led the Security Council to adopt Resolution 1918 (2010), which requested the Secretary-General to prepare a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy at sea. This report was published in July 2010, and examines seven options, including the establishment of a Somali court in the territory of a third State in the region, a special chamber within the national jurisdiction of one

or more States with or without UN participation, a regional tribunal based on a multilateral agreement, and an international tribunal either based on an agreement between the UN and a State in the region or established by a resolution of the Security Council under Chapter VII of the UN Charter. The first option, however, which is the least ambitious and seems to be preferred in the report, is simply to enhance existing UN assistance to build capacity for prosecution and imprisonment by individual States in the region.

Conclusion

The international response to hijacking and armed robbery in African waters has demonstrated the problematic nature of the UN Convention on the Law of the Sea in relation to pirates. When the Convention was adopted in 1982, piracy was largely a historical issue, and the provisions dealing with it were redolent of another era. The modern emergence of piracy in the Indian Ocean as a result of the political vacuum in Somalia has exposed the inadequacy of traditional legal definitions and concepts in this context, and the international community has been compelled to resort to temporary expedients in order to respond to a regional emergency. In the longer term, however, it will be important for the law of the sea itself to evolve, and develop more appropriate principles to deal with new threats to maritime security.



Institute of Marine and Environmental Law

Refugee Rights Project

The Refugee Rights Project (RRP) joined CLEAR in early 2009, as an emerging research unit at the Faculty of Law. With over a decade of extensive direct legal services, strategic litigation, and advocacy experience on behalf of refugees, the RRP was well positioned to expand its research beyond its previous capacity of providing research support to other institutions. The RRP is currently engaged in a three-year research project in collaboration with Oxford, York and Melbourne Universities, concerning the analysis of domestic refugee legislation in the global south. It is also spearheading ground-breaking research on the 2010 incidences of xenophobic violence in the Western Cape.

Two of its staff members published articles in peer reviewed journals this year, as noted below:



Tal Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition' in *Refuge: Canada's Periodical on Refugees*, Vol. 25, No. 2 Building a Better Refugee Status Determination System. The paper analyses South Africa's application of the OAU Refugee Convention's expanded refugee definition. It is the first of its kind to review decisions of the South African Refugee Appeal Board. The paper



concludes that in the first stage of South Africa's refugee status determination process, improved training of officials is essential in order to avoid what amounts to a unique and incorrect form of prima-facie refugee determination, based on the use of the OAU refugee definition and country of origin conditions. At the South African Refugee Appeal Board, however, due to the more in-depth nature of the decisions rendered, the OAU refugee definition is more correctly, yet cautiously utilised to provide protection to persons fleeing indiscriminate widespread disruption of public order or generalised violence.

Rebecca Chennels, 'Sentencing: The real rape myth in Agenda: Empowering women for gender equity' Vol. 82, 2009. This paper argues that the manner in which the judiciary has interpreted and deployed minimum sentencing legislation when sentencing convicted rapists, reveals not only their institutional resistance to perceived intrusions on the judicial function but also problematic assumptions and prejudices which inform judicial reasoning in sentencing decisions. In particular, judicial reasoning reflects a social construction and legitimisation of rape which is best understood as a manifestation of the continued prevalence of 'rape myths'. The paper provides a contextual outline of feminist theory relevant to the operations of rape mythology and the legal framework within which perpetrators are sentenced. Analysis of 14 randomly selected sentencing judgments exposes the continued judicial reliance on rape myths. The paper seeks

to highlight the role of sentencing courts in the maintenance and perpetuation of a criminal justice system that marginalises the experiences of the vast majority of rape victims.

The Refugee Rights Project is proud to report on a successful 2010 World Refugee Day Conference which it co-organized and hosted at the Faculty of Law. The first Annual Conference on Legal & Social Protection Perspectives on Migration in South Africa was very successful in facilitating dialogue between academics, policy makers and practitioners on migration and legal and social protection issues in South Africa. The keynote speaker at the Conference was Deputy Minister of the Department of Home Affairs, the Honourable Malusi Gigaba, whose presentation expressed a pragmatic, yet human rights based approach to the future plans of the country's asylum system administration. The RRP particularly welcomed the Deputy Minister's comments that: 'The view of the Department of Home Affairs is that immigrants, be they regular or irregular, whether affluent or poor, skilled or unskilled, be they male, female or children, are human beings and as such must be treated with a human rights ethos that recognised first and foremost their right to life and hence protection, as well as the socio-economic contribution that they make to our society.' The Conference also included two expert panel discussions, members of which included Dr. John Akokpari (UCT), Dr. Loren Landua (Wits), Ms. Fatima Khan (Refugee Rights Project Director), and Mr. Ken Mutuma (Nelson Mandela Foundation).

Law Race & Gender Unit

Are the rural areas in the former Bantustans part of a united and democratic South Africa? Or are they zones of exclusive chiefly rule built on colonial and apartheid precedents? This question is at the heart of the Law, Race and Gender Unit's work on customary law, traditional leadership and rural women. It is a question that has immediate relevance for the estimated 17 million people living in those areas. Through its Rural Women's Action Research Project (RWAR) LRG researchers are engaging with the difficult and often contested issues of customary marriage, tribal levies, traditional courts, and – through the use of participatory research methodologies – providing a forum for dialogue and rigorous debate.

Central to contestations on the ground and to LRG's work is the issue of who defines and interprets the content of customary law and thus the scope of chiefly power. Does this remain the exclusive preserve of traditional leaders in conversation with government as it was during the colonial and apartheid eras? Or do the Constitution and

recent judgments interpreting customary law to be constantly changing 'living law' open up the debate to include ordinary rural people and the changes and developments occurring on the ground? Recent legislative processes indicate that the new government remains stuck in the old paradigm of excluding rural people from debating laws that affect them directly – hence the striking down of the 2004 Communal Land Rights Act on procedural grounds earlier this year.

The National House of Traditional Leaders (NHTL) has called on parliament to amend the country's Constitution in order to give the powers, functions and duties of local government in rural areas to traditional leaders. But what are the views of ordinary people in these rural areas? As the Constitutional Court has recognised, many of these rural communities have developed localised and living customary law and governance systems. Often these systems of law and governance embody strong customary principles of democratic accountability: *Inkosi yinkosi ngabantu*. In some cases new developments integrate constitutional principles of equality, gender equality, and non-discrimination. For example, research conducted by LRG has shown that in a number of rural areas single women are now being granted rights to



land in their own name by such localised systems of living customary law. However, this is not to suggest that all developments on the ground are positive and in line with constitutional values of equality. Indeed, there are many problematic aspects of customary law that still exist in many areas of our country. It must also not be forgotten that in many cases what traditional leaders claim as customary are in fact colonial and apartheid versions of customary law which are at variance with the organic evolution of customary practice on the ground.

The notion of 'living customary law' espoused by the Constitutional Court is different from the versions of customary law that the NHTL has in mind. It is also different from the scheme of tribal authorities and boundaries that apartheid laws such as the Black Authorities Act (BAA) of 1951 imposed. Parliament's Rural Development and Land Reform Portfolio Committee is currently processing the repeal of this controversial law that played a major role in the creation of the hated 'homelands' and saw many chiefs being co-opted as collaborators by the apartheid state. But LRG and many rural CBOs and NGOs argue that the repeal of the BAA is an inadequate step on its own. They argue that a set of post-1994 measures and legal provisions in effect entrench and even exacerbate the legacy of the very Act that is being repealed. It is not only the Act that needs to be repealed, but the institutional structures and systems of indirect rule that it created over half a century ago, a system that Mahmood Mamdani rightly calls 'decentralised despotism'.

The problematic laws that rest on and further entrench these institutions are the Communal Land Rights Act (CLARA), the Traditional Leadership and Governance Framework Act (TLGFA) and the pending Traditional Courts Bill (TCB). These new laws do not undo the tribal authorities and boundaries established by the BAA, but instead provide for their continuation as traditional councils with significant powers of rural governance, land allocation and many other aspects of rural life. These laws also open the door for chiefs to impose tribal levies on rural 'subjects', a form of double taxation that is patently unconstitutional. Making her submission in Parliament in May, following a workshop of concerned rural NGOs and CBOs hosted by LRG, Maria Mabaso, Chairperson of

the Farm Evictions and Development Committee in KwaZulu Natal, pointed to the proliferation of taxes, fines and levies to which rural people in her area are subject. These include a fine of between R200 and R1000 if your unmarried daughter gets pregnant, R300 to R1000 for a widow to remove her mourning clothes, levies for the chief's car, his children's university fees, extensions to the palace, and even a levy to pay legal fees for lawyers to represent the chief in private legal matters. The implications of not paying are dire, as Ms Mabaso testified:

'No receipts are received for the taxes and levies paid. Payment is not recorded, and we do not sign that we have paid any fees. There is no accountability to the community about how much money was collected, how much money was spent and how much money is left. If the amounts for the taxes and levies are not paid, the traditional leader will not give any support to you, and if you ask the Chief for anything, he will not help you. If you have not paid, you will not be allowed to bury your relatives in the community and you cannot receive your verification as a member of that community.'

When it comes to the Traditional Courts Bill, LRG believes that customary courts are valuable institutions. They provide millions of South Africans with access to justice they would not otherwise have. They are more accessible and affordable than existing 'formal' courts, and in general reflect the values of the people who choose to use them. However the TCB fails to recognise customary dispute resolution processes at the local levels where the system works best, and provides no role for the community councils which are the bedrock of the system. Instead it vests power exclusively in 'senior traditional leaders' as presiding officers. It enables a traditional court to order any person to perform unpaid services 'for the benefit of the community'. The Bill also enables the court to deprive an 'accused person or defendant of any benefits that accrue in terms of customary law or custom'. Land rights are one such entitlement, and community membership is another. The powers given to the court (in the person of the presiding officer) override historical customary protections which require that issues as serious as eviction and banishment first be debated and endorsed at various levels, including at a pitso, or gathering of the whole community.

Researchers of excellence

Each year the faculty awards a research prize for papers submitted by non professorial staff and in 2010 the winner was Anne Pope and the runner up was Andrew Hutchison. These abstracts give you an idea of their work.



HIV preventive research and minors

Anne Pope

HIV preventive research using minors as participants is important and necessary in the South African context. However, whether the law permits minors to consent independently to research participation is unclear. This article asserts a weakness in the law regarding the protection of minors.

Current policy of ethics committees to expend with the requirement of parental permission in the informed consent process flows from the lack of clarity in the law as well as a conflation of the requirements for consent to medical treatment with those for research participation. Key differences between treatment and research require careful consideration of the implications of permitting independent consent by minors. A failure to give sufficient attention to these differences exposes minors to inadequate protection where health care research is concerned, especially that which is aimed at preventing the spread of HIV. This article examines the legal and ethical framework for health care research and minors, the complex issues that are involved, especially whether parental permission is expendable in light of the requirements of international instruments, national law and ethics guidelines. The article proposes that parental or guardian involvement is necessary in order to properly respect the rights of minors and their families and should be waived only in circumstances where all relevant circumstances have been properly canvassed and considered.



Suppositions in futuro

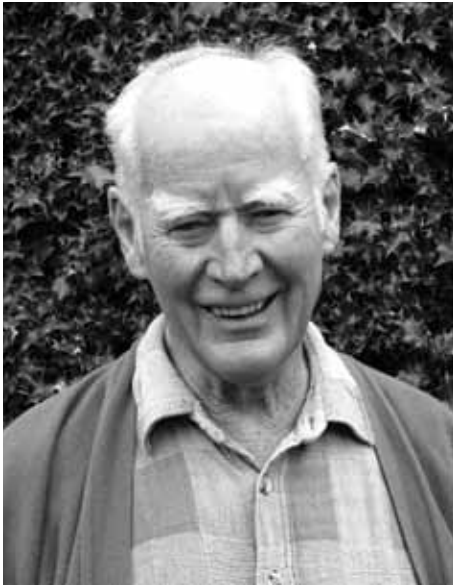
Andrew Hutchison

When the parties to a contract base their consensus on a commonly held belief which is fundamental to their motivation in contracting, we say that they contract on the basis of a supposition. Should the supposition prove false, the contract will be void. While South African courts have accepted this proposition where the supposition relates to a past or present fact, the status of a supposition relating to the future has had a far more controversial history. The CPD accepted the validity of the supposition in futuro in Williams v Evans, but this decision has been overruled by the SCA in recent history. This article will address the concept of a supposition relating to a future fact, in the light of the original finding in the Williams case and the relevant case law since. The current prevailing view is that a supposition in futuro is indistinguishable from a resolutive condition: this article will aim to reconcile this position with the finding in Williams through the medium of equating the supposition in futuro with a tacit resolutive condition. If a supposition is merely a type of tacit term, then what is all the fuss over the Williams case about?

Jubilation in the Faculty

Dr Debbie Collier and her supervisor Professor Jan Glazewski were given loud applause at the 2010 graduation ceremony. Debbie's thesis was on agriculture, modern technology and the law.





Obituary

Dick Christie

Professor Christie died in February this year after suffering an incapacitating stroke in December 2008. 'Prof' came to us as an Honorary Researcher in 1998; not many months later he was an indispensable part of the Commercial Law Department lecturing to Masters students on his speciality, arbitration, and also on international trade law. His book on the law of contract in South Africa is the standard text and he was working on the 6th edition when he fell ill.

Dick had played a vital role in the establishment of the University of Zimbabwe, and he is fondly remembered by students both there, in Cambridge and at UCT.

Sustainable Kramer

This project, featured in last year's *Law Review*, has reduced the building's energy use by 108 000 kWh/annum or 112 tons of CO₂ from being released into the atmosphere. The retrofits paid for themselves within 15 months i.e. a remarkable return on investment over five years of 560%.

FAST FACTS

Professor Hugh Corder has been appointed to the Editorial Board of the Law and Philosophy Library, convened by the publishers Springer, in the Netherlands.

Professor Evance Kalula is President-Elect of the International Industrial Relations Association (IIRA) from October 2009 and in April was appointed to the Panel of Advisors of the new Department of Economic Development.

Dirk van Zyl Smit, former Dean and Professor of Criminal Justice, has received an LLD (hc) from the Ernst Moritz Arndt University in Greifswald, Germany; and Margaret Hewett, Honorary Researcher, obtained *de graad van doctor aan de Universiteit van Amsterdam*.

Dirk has been a professor at the University of Nottingham for several years, and is an acknowledged expert in prisons law in Europe. He has been involved in drafting guidelines for minimum standards for the treatment of prisoners in EU countries.

Margaret Hewett will be remembered by generations of students for her inspiring teaching of Latin!

Master Swimmer, Halton Cheadle, won gold in the individual medley, silver in 100m butterfly and bronze in 200m butterfly in the recent International Championships in Stockholm.



Yale Experience

Aifheli Tshivhase

I was privileged to have the opportunity to work on my PhD at Yale University as a Fox International Fellow (2009/10).

One is spoilt for choice as to which events to attend, but I did hear former President Clinton and his point that there were more things which bring people together than those which divide them, resonated with me in the context of South Africa. I also participated in a course called 'Guantanamo Bay' that focused on legal issues arising out of the detainees held post September 11.

What particularly struck me was the highest level of critique, confidence and the passion displayed by the students. LLB students are only required to do four compulsory courses, and that perhaps partially explains the high level of engagement displayed by students.

Aefheli commented on how seriously sport is taken at Yale, and I'm pleased to see that he had time for the lighter side of university too. Editor



Zambia: Alumnus Misozi Lwatula (second left) with some prospective LLM applicants.



More Mzolis: The Postgraduate Students' Council has been active this year and one of the most popular outings was a traditional braai at Mzoli's in Khayelitsha.

It is with much sorrow that we record that Bjorn Czepan was killed in a car accident in September. Bjorn (right) was an outgoing and hardworking student who will be sorely missed.



Rwanda: Elrena van der Spuy, Deputy Dean Postgraduate Studies (right) met with the prospective Masters students in Kigali earlier this year.

Student Prizes & Awards 2009

Class Medals 2009

Course name	Student name
Corporation Law	Sheldon Hunt Laing
Commercial Law	Calli Ann Ferreira
Transactions Law	Ryan Dennis McDonald
International Law	
Interpretation of Statutes	Catharine Lisa Thorpe
Criminal Law	Sheldon Hunt Laing
Criminal Procedure	Ashley Patrick Pillay
Administrative Law	Robert Murray Peel
Law of Evidence	Emma Webber
Law of Persons and Marriage	Katherine Rosholt
Foundations of SA Law	Niquita Ehrlich
Comparative Legal History	Leo Boonzaier
Law of Property	Meghan Rose Finn
Law of Succession	Alan Wright
Law of Delict	Ariana Omar
Law of Contract	Catharine Lisa Thorpe
Civil Procedure	Catharine Lisa Thorpe
African Customary Law	Emma Webber
Jurisprudence	David Watson
John Kotze Medal (Private Law)	Calli Ann Ferreira

Final Years

BISSET BOEHMKE MCBLAIN 150TH ANNIVERSARY AWARD
A strong academic record and a demonstrated passion for what the law can do

BOWMAN GILFILLAN PRIZE for Revenue Law

D B MOLTENO PRIZE for Public Law

THE GERING PRIZE
for Commercial Transactions Law

INA ACKERMANN PRIZE
for Commercial Transactions Law



Samples of the Crime and Deviance students poster exhibition.



Eunice Pieterse, Marethe Hertuth

Calli Ann Ferreira; Thabo David Lockett; Jennifer Nettleton Emma Webber

Calli Ann Ferreira

Calli Ann Ferreira

JUDGE SCHOCK & JUTA PRIZES
for the best LLB student

SOUTH AFRICAN SOCIETY FOR LABOUR LAW PRIZE

Intermediate Year

ADAMS AND ADAMS PRIZE in Corporation Law

BLUMBERG PRIZE FOR SERVICE TO STUDENT COMMUNITY

BRINK COHEN LE ROUX INC. PRIZE for Law of Contract

LEXISNEXIS BUTTERWORTH for Civil Procedure and for best Intermediate

MIKE BLACKMAN MEMORIAL PRIZE for Corporation Law

TW PRICE MEMORIAL PRIZE in Private Law courses

Preliminary Year

BEN BEINART MEMORIAL PRIZE in Comp. Legal History & Foundations of SA Law

CLIFFE DEKKER HOFMEYR PRIZE for the best student at Preliminary Level

ROUTLEDGE MODISE PRIZE for the Law of Property

SIR FRANKLIN BERMAN PRIZE for International Law

YASH GHAI PRIZE for best student in Constitutional Law

Other Prizes

BAR COUNCIL MOOT PRIZE

CAPTAIN BOB DEACON MEMORIAL PRIZE for Shipping Law

Calli Ann Ferreira

Naseem Ameer Mia

Sheldon Hunt Laing

Sheldon Hunt Laing Etain Stern

Catharine Lisa Thorpe

Catharine Lisa Thorpe

Sheldon Hunt Laing

Ashley Pillay

Leo Boonzaier

Amy Elisabeth Armstrong

Meghan Rose Finn

Meghan Rose Finn Ryan Dennis McDonald

Amy Elisabeth Armstrong

Aalia Manie; Ashley Pillay

Melissa Deacon

Prizes (continued)

BAR COUNCIL MOOT PRIZE

Aalia Manie; Ashley Pillay

CAPTAIN BOB DEACON MEMORIAL PRIZE for Shipping Law

Melissa Deacon

DEAN'S AWARDS FOR SERVICE

Rebecca Metz

DEAN'S AWARDS – ACADEMIC DEVELOPMENT PROGRAMME

Aphindile Govuza; Sheila Madumo; Sibonelo Mdluli; Bonga Siyothula

EDWARD NATHAN SONNENBERGS ESSAY PRIZE (*Responsa Meridiana*)

**Lindiwe Knutson
Jonathan Parsonage**

ENGEN PETROLEUM PRIZE IN MARINE LAW

Laura Guy

RODMAN WARD PRIZE for best essay on an aspect of Corporate Governance.

Leo Boonzaier

SPOOR AND FISHER PRIZE: legal writing

Lindiwe Knutson

SOPLY KESSLER MEMORIAL ESSAY PRIZE: Constitutional Law.

Jonathan Parsonage

Scholarships 2010

Law 150 Endowment

Cecil Chauke; J-P Fortuin (BA/LLB); Muhammad Ebrahim; Skhumbuzo Jware; Mulesa Lumina; Siviwe Mcetywa (B.Com/LLB); Luvo Savuba; Mandisa Shandu; Mutlhuweni Suto; Lance McKenzie and Grant Caswell

Other

UK Alumni: Stacey Bowers
Nick Boydell: Wandisa Phama
Class of 1997: Rethabile Mosese

UCT - Law firms initiative

Bowman Gilfillan: Gugu Jambile, Sibonelo Mdluli, Richard Julies, Sanelisiwe Ngcobo
Davis Polk Wardwell: Ariana Omar
Deneys Reitz: Resheditiwe Kgomo, Sheila Madumo, Amanda Rinquest
Edward Nathan Sonnenbergs: Zolani Buba
Herold Gie: Bonga Siyothula



LAWCO, the Legal Welfare Community Organisation, enables communities to access legal knowledge while giving law students the opportunity to apply and share their knowledge; workshops were held in six schools including Aloe Secondary (below) and Lavender Hill (right). lawcoed.co.za



Alternative Careers in Law



Left - right: LSC President Lauren Cowley, alumna Glenda Jeffries, co-ordinator Christine Immenga and LSC member Anelisa Keke

Every year Kramer is descended upon by the corporate world and this all students have come to know. Suddenly there is a mad rush to get a spot in one of the big five but what students often don't ask themselves is whether that is the career path they really want to follow. Statistics show that of the students who graduate with LLB's from UCT, only 53% actually pursue a career into the profession. What becomes of the rest?



In the interest of students making informed career decisions and preparing students for a career after graduation, the Law Students Council, Students for Law and Social Justice and the Career Development Programme decided to host a series of talks to showcase alternative career options and opportunities. Every Wednesday in Meridian for the entire second semester UCT hosted speakers from various backgrounds who offered invaluable tales of what they did with their LLB's, and how the skills learnt during their studies have served them in their respective careers; the series also served to enlighten students more about possible and potential career paths and opportunities.

'So far, the students have had the privilege of listening to Glenda Jeffries (UCT graduate) illustrating her experiences as Law Reports Editor for Juta Law and then as Senior Professional Officer at the Cape Law Society, and finally as Legal Advisor to the Cape Town Municipality,' comments Christine Immenga. 'Sanja Bornman of the Alliance for Children's Entitlement to Social Security (Acess) and Doron Isaacs (UCT graduate) of Equal Education have both painted a picture of very rewarding work in advocating for social justice. We have heard about the drafting of by-laws, the influencing of policy and the making of parliamentary submissions, amongst other things. All very fascinating stuff.'

'A recurring question at each session has been the financial implications of pursuing an alternative career. While Glenda stated that the Government paid very well, Sanja quipped that working for an NGO would not allow for the purchasing of a yacht, but would definitely pay the bills. Pursuing a career in alternative paths to practising law does not translate to poverty.'

'Other important points that have been highlighted in the talks so far are that students need to be prepared for interviews, need to know about the organisation and need to show versatility and adaptability. Students also need to be proactive and confident when looking for jobs and be prepared to make cold calls and arrive at organisations uninvited to showcase themselves as possible employees.'

'We still have presentations on a career in labour law, the insurance industry, and on working to protect our democracy in institutions such as IDASA and the DGRU at UCT as well as working for public interest institutions such as the Women's Legal Centre and Legal Resource Centre to look forward to. We will also hear about the traditional routes of an attorneys firm and the Bar, as well as the Judiciary and National Prosecuting Authority.'

'The aim of these talks is to expose Law students to all the opportunities and possibilities that a LLB degree has to offer and to help them identify suitable career options for themselves as well as to motivate and inspire students to follow their callings. We all know how vast the legal arena is and how law touches almost every aspect of our daily lives and often we do not even comprehend how much the law influences our surroundings. But we as scholars of the law have decided that we wish to spend our lives and careers, some way or another, utilising our knowledge of the law.'

'It is my hope that these talks will give students direction and allow them to realise that the world truly is their oyster and even further, to inspire them to use the skills, abilities and knowledge they have acquired at UCT to make a difference in our country, if not the world. We hope to make this talk series an annual occurrence and would love to hear from alumni as to speaker suggestions for next year. Please feel free to contact me at ccimmenga@gmail.com,' she said.



SLSJ Seminar expands

In an attempt to substantively expand the organisation, the Students for Law and Social Justice are holding three regional seminars as opposed to one national seminar as was done in the past.

The theme of this year's Western Cape seminar was 'Transforming Legal Education and Access to Justice' and it took place on the weekend of the 31st July and 1st August 2010. SLSJ embarked on a vigorous advertising campaign which resulted in record numbers of applicants from UCT, UWC, and for the first time substantial numbers of students from Stellenbosch University.

The programme of the seminar was carefully designed, with issues relating to the theme of the seminar chosen as topics to be spoken on. The seminar committee worked hard in securing prominent legal scholars, activists, NGO's, judges, lawyers, advocates, and members of civil society experienced in engaging in issues of social justice to speak at the seminar. Prominent Harvard Law Professor Frank Michelman made the trip from the United States to address the SLSJ community, and other speakers included Justice Kate O'Regan, Chief Justice Arthur Chaskalson, Judge Dennis Davis, Wim Trengove SC, Deputy Minister of Justice and Constitutional Development Andries Nel, Jay Naidoo, Geoff Budlender SC, Yoliswa Dwane, Fatima Hassan, and many more.

The seminar aimed to engage students in issues of social justice, and in view of this, students were assigned to facilitate groups where they discussed such issues and reported back to the SLSJ community as a whole.

Much positive feedback has been received on the seminar and the Seminar Committee is proud of

having organised such an inspiring, informative, and well run seminar. SLSJ thanks the following for their support: Democratic Governance and Rights Unit, Claude Leon Foundation, Section 27, and the UCT and UWC Law Faculties.



SLSJ Less talk, more walk

SLSJ is a society that stands for the advancement of the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms. It has a commitment to non-racialism and non-sexism, as well as to the supremacy of the Constitution of SA and the rule of law. It foregrounds the need for a progressive and united student voice – across universities, faculties and disciplines – to address the challenges of our society.

SLSJ has since diversified into a vibrant organisation that aims to engage students in legal and organisational work to promote social justice, provide opportunities for Law students to engage in public interest legal work before and after graduation, and transform our law schools and universities into socially engaged institutions. The reality is that access to justice is but for the rich in this country. Our primary focus is pushing to make access to justice in this country a reality for all South Africans especially the poor and marginalised.

To embark on a road of 'less talk more walk' we successfully implemented the Legal Advice Volunteer Programme this year. This is a programme in partnership with the Athlone District Advice Office. This project was initiated as a pilot project this year and is now flourishing. The vision for next year is to expand to another two advice offices at least.

The students have been drawing up wills, notices of demand, mediating contractual disputes, dealing with evictions, advising people on the *mandament van spolie*, helping with substance abuse, family violence and even criminal matters and so on. Most of what they deal with are basic legal problems and giving basic legal advice. Anything more complicated goes through the comprehensive referral system. Great effort is made to refer the client to the right organisation or person.

The advice offices have a rich struggle history playing a vital role in community organisation in the 1980s. They are however now, since 1994, completely politically independent. They serve the communities surrounding each advice office by aiding access to justice for the indigent. They help clients as far as is possible, free of charge, and help them further by saving them money by referring them to the right place. In addition they also play a vital accountability role. When anything goes wrong with service delivery in the community the advice offices are the first to hear about it.

The project has proved to be a wonderful service-learning experience for the students and an invaluable support for the Advice Office. This project provides a platform where law students can do their 60 hours of community service (mandated by UCT) in interesting, proactive, law related work. Something the faculty is itself pushing for.

We have already entrenched a strong relationship with the co-ordinator of the advice office, Mr Brian Alcock, who is adamant that our work in the community has been significant. Our presence at the advice office has increased the capacity of the office. The staff used to not see all the clients in one day and now everyone gets seen to. The staff at the advice office are not trained lawyers. Thus we, as law students, are also able to help provide some additional skills in various areas to further aid the clients.

The Law students have benefited greatly from participating in this project. The law syllabus in this country is largely theory based with very few opportunities for Law students to gain any practical experience in their field during their studies. This project has given Law students the opportunity to

apply their theoretical knowledge, advance their understanding of the law, gain invaluable skills in the application of the law, advance their ability to use the law in creative ways and will hopefully increase the numbers of those interested in public interest law.

Athlone Advice Centre



Knowledge really is Power

By Tess Peacock

There are many things I have come away with after my few short weeks volunteering at the Athlone Legal Advice Centre. I have had glimpses into the real struggles endured by people who live a few kilometres from me but whose lives I have not had access to up until now. I have learnt that the closer it gets to four o'clock, the less it is that social services will answer the phone but more than anything, I have learnt that a truer word has never been spoken than by Francis Bacon who claimed that 'Knowledge is Power.' In a world that is becoming more specialised by the day, with auto-electricians for your car and doctors that specialise in every part of your anatomy, having knowledge gives you infinite power over those who do not. Contracts that have fine print in complicated legal jargon and people who are forced out of their houses not knowing they have legal remedies to help them, prove to me every time I make the journey to the advice centre that the knowledge I am receiving through my studies really does put me at an unfair advantage.

At the beginning of the year, about 40 UCT volunteers decided to remove themselves from their campus bubble to put to rest once and for all the old maxim that a UCT student doesn't know there is a world beyond Woolsack Drive. Up until now the law had consisted of principles to be crammed the day before exams. Abstract doctrines that are applied to one dimensional characters named A, B and C who have contract disputes that can be resolved by you, dear law student, in a coherent 1200 word essay to be handed in by 12:00 sharp. It was a new concept entirely to wrap your head around: the law actually applies to people in real life.

Working at the advice centre takes you away from textbooks and computers and chronologically ordered government gazettes, out of the law library and into a world beyond Woolsack Drive. Here, A, B and C become three dimensional people; people with life stories and daily struggles that extend beyond your syllabus. And while A, B and C's tale will end once your essay has been handed in, the people you meet will continue living without water, in debt, having been evicted from their houses or having lost their jobs.

Emotions will range during the time spent at the office until you are not quite sure whether you are stimulated and alive or slowly suffocating in your attempt to deal with inefficient government departments, one phone line, and a lot of people in a lot of not-so-good situations. Many times you reach home, frustrated and exhausted, wondering if you did anything more than flick helplessly through your Paralegal handbook and refer your client to another department that will, in turn, refer them endlessly until they come back to you. You may indeed feel that John Arbuthnot hit the nail on the head when he claimed that 'Law is a Bottomless Pit' – one that will engulf people with nothing while people with resources circumvent it.

But sometimes, you have a moment. A moment where you actually do know the answer, where the contract formed between A and B is actually relevant and you can give the person before you the same advice you gave to C in last year's November exam. And it's possible that in this moment, the gift of knowledge you have been given can be used to help someone, and that knowledge changes you from a passive observer

into someone who is actively participating in making someone's life better, and that makes you infinitely powerful.

There are many things you will take away with you from your work at the advice centre. You will definitely get what you signed up for, be it an improved CV, your 60 hours or a clearer conscience thanks to your philanthropic endeavours. But you are also likely to get much more. I will continue to take away the sincere smiles of gratitude and word of thanks given by people who just needed someone to listen to their story, to be overwhelmed by the continuous and unfailing dedication shown by Cecelia and Brian, who run the centre and are oceans of knowledge and patient words to naïve law students who think they can change the world. I will remember the feeling of unadulterated passion as you rush home to look up the name of the 'doctrine-I-remember-learning-about-last-year-you-know-I-wrote-my-essay-on-it-in-the-exam-and-I-swear-is-on-the-tip-of-my-tongue.' Debating heatedly with fellow volunteers about the merits of a case, long after you have left the centre and returned home to the library where you will learn more principles and laws that apply maybe only to A, B and C on paper, but with a knowledge that somewhere in the world they are applying to someone real.

Most importantly though, every time I leave the advice centre, I feel unfailingly and overpoweringly grateful that I have this power of knowledge. And, as always, with great power comes great responsibility. The Athlone Advice Centre will hopefully always remain a place where you can change something for the better; definitely not the world, certainly not the community and probably not even some of the people you meet there, but you have the ability to change the lives of a few, and having that knowledge is something I wouldn't give back for the world.

Altum Sonatur

By Eunice Pieterse

Altum Sonatur is the brain child of a couple of LLB students who decided at the end of 2009 to start a university newsletter. Instead of a regular newsletter, it was meant to be a forum for LLB

students to raise concerns and debate topical issues within law and law school in general; a forum where students can freely write about what they have learnt, comment and criticise it as well as challenge each other to think further than the legal texts they study and confront uncomfortable truths. The aim was to have a paper written by Law students for Law students. The law student societies were instantly taken with the idea and decided to contribute financially towards the paper in order to get it started.

Since the idea was first formed, a group of students have come together to run the magazine throughout the year. Most of the articles have been contributed by Law students in varying stages of their degree. In each issue a selected few lecturers have contributed to our lecturer's page. Four societies: Students for Law and Social Justice (SLSJ), Lawco, the Law Students' Council, and Black Law Student Forum (BLSF) have contributed greatly to the paper with their written and financial contributions. Each class has a dedicated page for someone to write a tongue-in-cheek article (or poem) related to current happenings in their class.

The quarterly paper has in just three editions grown from a student paper for students to a good quality paper, representing the students of our law faculty, and is distributed to students from various campuses, faculty staff and UCT law alumni. With much room to grow, we hope our paper continues from year to year, continuing to challenge students to grapple with the issues facing the law, the students and the society we live in.

To advocate, or not?

A unique opportunity to experience life at the Bar and a career in advocacy is being offered to



selected students in 2010 under the Lexis Nexis Cape Bar Exposure Programme.

This is the first time that the Cape Bar has run such a student-based programme, and is believed to be the only initiative of its kind in South Africa. Highlights of the programme include one-on-one sessions with counsel in which students will be exposed to various specialisation areas, litigation procedure, general career advice and other workshop-style sessions.

There will also be talks from current and retired judges regarding life on the Bench, another unique vantage point offered to students. The programme will culminate in the presentation of a Moot assignment by the students to a sitting judge in the High Court. Argument will be filmed and later video-reviewed by counsel in order to give invaluable feedback regarding argument-style, technique and presentation.

For more detail contact jason@mitchell.co.za



Emerging Leaders Programme

UCT has for some years been running a very successful Emerging Leaders' Programme in the last week of the June vacation.

Students from across all disciplines and years of study participate in a well-honed conference-cum-workshop formula, run by Student Affairs, the Career Development Unit and their partners in Commerce. Leaders in their field, including the Law Dean in 2010, challenge students to 'values of good citizenship, the promotion of a culture of human rights (and difference & diversity) and sensitivity to the human impact on the environment.'

At the 2009 gala dinner, intermediate LLB student, Najma Kahn, was one of two participants chosen to speak; this is what she said:

The Leadership Cake

by N.Kahn

'As a leader, you are a 'brand'; a brand that must appeal to and satisfy your consumers. In this regard, the notion of leadership is likened to a culinary delight that we as emerging leaders love to indulge in every so often. A possible recipe to create this delicacy called the 'leadership cake' is as follows:

- Step 1: Mix a cup of humility and confidence into the bowl of purpose.
- Step 2: Gradually sift in the varying quantities of competence, compromise, charisma and the ability to listen.
- Step 3: Carefully fold in these virtuous ingredients into the mixture and then pour the final batter into the dish of dedication.
- Step 4: Place the dish into the furnace of passion and let it cook over a period of time at a temperature that can be classified as neither 'Celsius' nor 'Fahrenheit', but as 'Development'.
- Step 5: Once ready, taste it. Something is missing. After all that hard work, you realise that it tastes mediocre. What is that secret ingredient that will convert this abstract cliché called 'leadership' into an addictive and worthwhile life skill? Well, that secret ingredient, that added spice, is 'being you'.

Step 6: Accordingly, sprinkle generous amounts of your personality on top of your self-made 'leadership cake' and enjoy it with a warm cup of open-mindedness.

The above recipe makes us question what it is that makes one a leader. Is it really the zeal to sensitise the larger design we call the 'world' on social responsiveness or is it simply a desire for inner self-fulfilment? Well, only we as individuals can carve our unique leadership paths by using the tools that have been magnanimously bestowed upon us, the participants, over the course of this week. Jerome and his amazing team of organisers have truly provided us with a rare opportunity to sculpt, tweak, embrace and display our leadership identities.

A big thank you to everyone who has transformed this 'leadership cake' into appetising soul food.



Freeway Football

Liam Shirley came to South Africa on a football scholarship in 2008, and has stayed on, now as an M Phil student in Commercial Law. But Liam's week is also very much about football. He saw the enthusiasm of kids playing soccer on the bits of open land alongside the N2 and decided to set up a Football Academy in Khayelitsha.

With support from Umbro (kit and equipment), the City of Cape Town (the stadium in Site B) and a teacher from Western Province (Justin Green), 45 boys from U/13 to U/18 train on Monday, Tuesdays and Thursdays from 4-6, and the training includes life skills as well as a Photographic Academy.

Under the banner KU, the pride is rising, the teams' sights are set on moving from a local league to the big tournaments. Liam's sights are set on getting a couple of the boys scholarships - to UCT, and to a university that photographer Damon Hyland has links with in the USA.

www.freewayfootball.com



UCT's legacy a year or two on

'I just wanted to thank you (Mohammed Paleker) for preparing us (your UCT class) so well, particularly for civil procedure. Some of my colleagues in the other law firms have also mentioned how well the UCT students know their stuff, even the filing room in the High Court wasn't a complete shock to us!' Mark Meyerowitz (LLB 2009)

AND

'You don't value what you learn at UCT until you are out there. Articles were NOT daunting and nor was a court appearance on my own in week three. In our LEAD classes only the UCT students knew the Bhe case - thank you Professor Himonga!' Nancy Cairncross-Chinnayel (LLB 2006)
Nancy is back in Kramer doing Judge Davis's course on Competition Law. Editor

AND

'You (Prof. Hare) gave so much support and encouragement to me; it really helped me to become stronger. Now I am become much more confident and with the learning not only from studying but also the life, I got a nice job and happy life in China. I am working in P&G in Shijiazhuang province, North China.' Meng Li (Emily Li) (LLM 2008 in Shipping Law).



Harare, July 2010 (Left - right) LG Smith, David Coltart, Professors Kalula and Schwikkard, Dennis Davis, Gary Crosland and Brian Crozier.



Venerable alumni Gerald Friedman and Pat Tebutt at the Rabinowitz dinner, February 2010.



Gauteng, August 2010 (Left - right) Uday Naidoo, Masechaba Bookholane, Gabi Richards, Michelle Wright, Duncan Wild and Joe Fine.



Alumnus David Ross (1980) at the opening of his art exhibition in London in August.



Student and teacher 28 years on, Minster David Coltart (1982) and Judge Dennis Davis, in Harare.

Where are they now?

1985: Christine Venter (nee Tosh) lectures in International Human Rights Law in Indiana.

1992: Felleng Sekha has been appointed to the Board of the SABC, and is Deputy Chair.

1998: Hugh Hollman is doing a BCL at Oxford, having done his Masters at Duke.

1999: Ntombenhle Conco is managing sustainable development at a mine in Limpopo Province.

2002: Catherine Maclay has for the last two years specialised in UK Immigration Law.

2007: Racheal Kemigisha is at Warwick doing an LLM in International Economic Law.

2009: David Watson goes to Oxford in September to do his BCL at Baliol

2009: Albert Mennun has chosen to do his LLM in IP Law at Maastricht because its IP programme focuses on music and film.

FAST FACTS

Beric Croome (PhD 2007) was given the SAIT Award in recognition of his contribution to tax jurisprudence in SA.

Edward James (2007) was awarded the *President's Prize* and the *Philip Friedland Prize* by the Law Society of the Northern Provinces.

Kato van Niekerk (1977) and Nate Ndauendapo (1992) serve as judges to the High Court of Namibia.

Leeanne de la Hunt (1986) will be a Visiting Study Fellow at the Refugee Studies Centre at Oxford from September.

Kunyulala Maphisa (2004) is Chairperson of the Businesswomen's Association. 'We need to shift focus from talking about our under representation to doing something about it.'

Emma Webber has been awarded a Fulbright for 2011 and will join fellow Fulbrighters Jeremy

Raizon (Harvard) and Janice Bleazard (New York University); Janice also won the prestigious Hauser Scholarship.

The HSBC buyout of part of Nedbank is being advised by Alumni Rob Cleaver of Linklaters, whilst the Old Mutual shareholders are being advised by Slaughter & May from London with Ezra Davids from Bowman Gilfilan.

The 2010 Ismail Mohammed Prize sponsored by the S.A. Law Reform Commission and Jutta was awarded to Jonathan Parsonage. Jonathan joins Richard Moultrie (1999), Kerry Williams (2002), Sindiso Mnisizwe and Mathew Burnell (2004) and Susanna Harvey (2008).

UCT seems to be making a habit of clerking at the Constitutional Court.

In 2011, climbing the freedom steps will be Jon Parsonage, Sarah-Jane Frith, Brett Pollack, Tim Hodgson, Calli Ferreira, Nyoko Muvangua and Brian Watson.

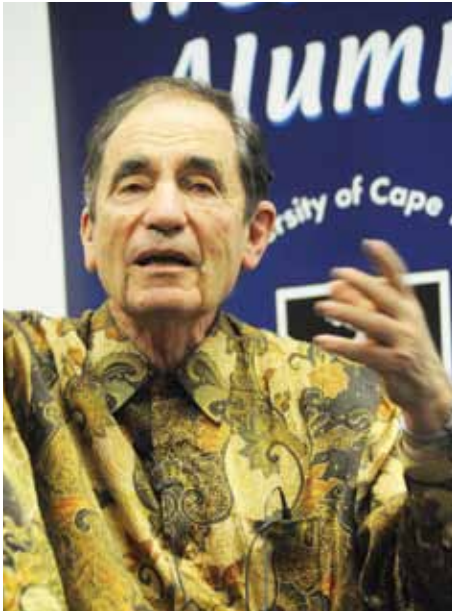


The Hamburg shipping set with lecturer Professor John Hare (back right); the next generation of UCT students were there too.

We remember

Tony Charnock (1952), who practised for many years and was a keen bridge and tennis player; Mendel Kaplan (1958) who established the Centre for Jewish Studies at UCT; Gerrit van Schalkwyk (1964), a member of the Cape Bar

and of the governing body of SACS; and Ivan McKursic (1999). Of Ivan, classmate Josie Lindop writes: 'I remember him particularly enjoying lectures by Professor Blackman, Solly Leeman and Hugh Corder; he also loved contract law and the final year option of forensic medicine.'



The Strange Alchemy of Life and Law

Speaking at the launch of the new book by Albie Sachs (1958), the Dean of Law referred to the author as a truly remarkable South African. 'A central part of Albie Sachs' entire life has been the struggle for democracy and he has paid dearly for it – the horrors of lengthy periods of solitary confinement, the brutality of having his body damaged by a bomb and the deep sadness of losing friends and comrades who did not survive the apartheid state. Albie not only survived but he also won and consequently we have had the privilege of being served by Justice Sachs on the Constitutional Court for the past 15 years.'

'When I was having my bath moment last night, I was pondering how I could articulate what it is that for me makes Albie Sachs such a distinctive judge, and I think it is this. I learnt the basic tools of legal analysis in poetry classes and what Justice Sachs brings to law is far more than the tools of analysis. He integrates poetry into the substance of the law and that is why *The Strange Alchemy of Life and Law* is such a special contribution to legal literature,' said Professor Schwikkard.

Jonathan Sandler (1979)

by Hugh Corder

Jonny Sandler's sudden death of a heart attack in January 2010, while on holiday with his family in Sydney, came as an enormous shock to all. While at UCT, Jonny had been fully involved in student life, such as Rag and the LSC, of which he was President in 1978/9.

He qualified as an attorney in Cape Town, but emigrated to Melbourne, Australia, in the late 1980s, where he established a very good reputation as a labour lawyer with a leading firm of solicitors. For the last few years he headed the Legal Division of the ANZ Bank, which meant that he travelled extensively.

Throughout his life he kept up his devotion to the practice (or art) of karate, and was graded as a 3rd Dan (Black Belt) and ran his own 'dojo', which took hours of disciplined exercise each week.

Jonny was a loyal friend of the faculty; he arranged a gathering of alumni when I was in Melbourne last September, and attended his 30th Reunion weekend at UCT last October.

His warmth, enthusiasm, sense of fun and commitment to justice will be the abiding memory of all who knew him.



Class of 1979, in 2009

Back, Left - right: Ron Tainton, David Loxton, Paul Hart-Davies, Jonathan Mart, Craig Webster.

Middle, Left - right: Peter Surgey, Steve Kesler, Jonathan Sandler, Andrew Ladley, Neil McDougall, Paul Martin.

Front Left - right: Dimitri Kakiades, Lindsay Goldberg, Anne Boag, Kate Robertson, Dennis Davis, Caron Lehmann, Peter Dempsey.

Contact details

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Faculty of Law, Private Bag X3,
Rondebosch 7701, South Africa