NELSON MANDELA UNIVERSITY

RESEARCH OUTPUTS

2023

Faculty of Law

Editor: S Gillespie

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1.1.1 Welgemoed, M and Erasmus, D "The Importance of Graduate Attributes in Preparing Law Students for Legal Practice"

Obiter 2023 44(4) 709–736

ABSTRACT

The gap between university legal education and legal practice significantly contributes to the view that most law graduates are substantially underprepared for entry into legal practice. Consequently, this article suggests that an improvement in the training of law students, as far as preparing them for entry into legal practice is concerned, is necessary. It is argued that this preparation is supported by transformative constitutionalism – that is, after graduation, graduates will be expected to possess certain attributes that will ensure that they are ready for entry into legal practice. It is therefore necessary to investigate and evaluate such graduate attributes, as well as to ascertain the source of the need for such attributes. In this article, the Qualification Standard for the LLB degree, as the source stipulating the standard of proficiency for which the LLB degree should prepare graduates, is also discussed. This is followed by an evaluation of a baseline study into graduate attributes from the perspective of employers. Holistically seen, the qualification standard, as well as the graduate-attributes study, should provide an indication as to whether the LLB degree is adequately preparing law graduates for entry into legal practice. The qualification standard is set out and evaluated on whether, and to what extent, it aligns with the arguments put forth in this article. The research in this article has been conducted by way of a desktop study.

1.2 CONSTITUTIONAL LAW

1.2.1 Van As, HJ "Do Municipalities Have the Power to Regulate the Keeping of "Dangerous" Dogs?"

Obiter 2023 44(4) 858–878

ABSTRACT

Dog attacks and resultant deaths are frequent occurrences in South Africa. Pit bulls are responsible in many of these cases and there are calls for them to be banned. Dogs, however, are the property of their owners, and forcing people to give them up will amount to a deprivation of property and an infringement of a dog owner's right to property, which is protected by section 25 of the Constitution. Dogfighting is rife in South Africa and the conduct of dog owners contributes to dogs being aggressive and leads to dog attacks. In terms of the Constitution, animal control is a functional area of concurrent national and provincial legislative competence; on a strict interpretation, this means that municipalities do not have the power to legislate on the function. However, everyone is guaranteed the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. As such, the municipality (as part of the State) must respect, protect, promote and fulfil the right. Municipalities also have a duty to promote a safe and healthy environment, and the power to make by-laws on matters they may administer. They may also exercise powers that are reasonable and incidental to the effective performance of municipal functions, which is supported by the principle of subsidiarity, the fulfilment of the duties arising from section 12 of the Constitution, and the objective to promote a safe and healthy environment. A municipality that has the necessary resources can legislate and enforce by-laws on matters listed in Schedule 4A and 5A of the Constitution, provided that such action seeks to further the objectives of Chapter 2 of the Constitution and is not in conflict with measures adopted by the national and provincial spheres. The National Society for the Prevention of Cruelty to Animals (NSPCA) is responsible for animal welfare, but the responsibilities of animal welfare organisations are

becoming greater as urbanisation in South Africa accelerates and animals in many disadvantaged communities are in dire need of basic animal care. The suite of local government law is geared towards the social and economic upliftment of communities, and there is legislative justification for interventions by municipalities to address matters such as the control of public nuisances, dog licensing, the operation of pounds, and the conduct of community members that can alleviate the pressure on those organisations tasked with animal care. There are a number of legislative instruments that apply to animals. A consolidation of the provisions of the various pieces of legislation into a single by-law aimed at regulating the keeping and treatment of dogs, may result in increased law enforcement and (it is hoped) increased sentences as a result of amplified enforcement, as well as improved deterrence.

1.3 CRIMINAL PROCEDURE

1.3.1 Ntontela, M "A Courtroom Misdiagnosis: A Historical Overview of the South African Approach to Evidence of Persons with Communication Disabilities before 1996"

Fundamina: Journal for Legal History 2023 29(1) 29–52

ABSTRACT

Over the past centuries, the English and South African jurisdictions have struggled with the best approach to hearing evidence of persons with impaired speech. The English courts' challenges in hearing such evidence have led to the courts there developing legal principles for receiving evidence of witnesses with communication disabilities. Unfortunately, these principles have led to courts misdiagnosing witnesses with communication disabilities. Consequently, the courts treated witnesses with communication disabilities similarly to witnesses with mental illness. Accordingly, under English law and later also under South African law, for some time, people with communication disabilities were detained indefinitely without trial. Such detention was subject to pardon by a designated government official. This contribution examines how the courts have ill-treated persons with communication disabilities in England and South Africa during the nineteenth and twentieth centuries. The study uses a periodisation theory to critically argue how witnesses with speech impairment were unfairly treated in both jurisdictions during this period before the promulgation of the Constitution of the Republic of South Africa, 1996.

1.4 CYBERCRIME LAW

1.4.1 Myburgh, Anton “The Correctness Standard of Review”

Industrial Law Journal 2023 44 (April) 724–733

ABSTRACT

The traditional conceptualisation is that an appeal is about the correctness of the decision, while a review is about its justifiability. However, there are many decisions and actions by commissioners of the Commission for Conciliation, Mediation and Arbitration that must meet the standard of correctness and are reviewable if they do not. This is known as correctness review. This note examines when correctness review applies, and when it does not.

1.4.2 Snail Ka Mtuze S and Musoni M “An Overview of Cybercrime Law in South Africa”

Cyber Security Journal 2023 4 299–323
https://link.springer.com/article/10.1365/s43439-023-00089-8

ABSTRACT

The COVID-19 pandemic has accelerated the uptake and use of information communication technologies and led to the digital transformation of different sectors of the economy. For South Africa, the COVID-19 pandemic struck at a time when the South African government had committed itself to leveraging technology for the benefit of its citizens, the private sector, and the public sector. By 2020, South Africa already had in place enabling policy and legal frameworks to assist with the regulation of activities taking place in cyberspace. The increase in broadband access has resulted in the increase of internet users. Due to increase in use of digital technologies and processing of personal data, there has been an increase in cyber-attacks and cybercrimes such as data breaches, identity theft and cyber fraud. Several South African based companies, state owned entities, government departments and citizens have been victims of cyber-attacks. To respond to the growing spectre of cybercrime, the South African government promulgated laws to supplement the existing legal framework. It also operationalised some of the laws which had been passed but had not yet come into operation. This paper gives a summary of the evolution of cybercrime laws in South Africa. It starts off by summarising how common law and the Electronic Communications and Transactions Act addressed cybercrime. The paper then proceeds to discuss the recently promulgated Cybercrimes Act, which is now the primary law criminalising certain online activities. It explores how the various provisions of the Cybercrimes Act address different types of cybercrimes known today. This discussion is aimed at demonstrating that South Africa is no longer a safe haven for cybercriminals.

1.5 ENVIRONMENTAL LAW

1.5.1 Adelman, Sam; Kotzé, Louis J; Mayer, Benoit; Van Asselt, Harro; Setzer, Joana; Biermann, Frank; Celis, Nicolas; Lewis, Bridget; Kennedy, Amanda; Arling, Helen and Peters, Birgit "Courts, Climate Litigation and the Evolution of Earth System Law"

Global Policy 2023 15(1) 5–22
https://doi.org/10.1111/1758-5899.13291

ABSTRACT

Numerous scientific reports have evidenced the transformation of the earth system due to human activities. These changes – captured under the term 'Anthropocene' – require a new perspective on global law and policy. The concept of 'earth system law' situates law in an earth system context and offers a new perspective to interrogate the role of law in governing planetary challenges such as climate change. The discourse on earth system law has not yet fully recognised courts as actors that could shape climate governance, while climate litigation discourse has insufficiently considered aspects of earth system law. We posit that courts play an increasingly influential climate governance role and that they need to be recognised as Anthropocene institutions within the earth system law paradigm. Drawing on a set of prominent climate cases, we discuss five inter-related domains that are relevant for earth system law and where the potential influence of courts can be discerned: establishing accountability, redefining power relations, remedying vulnerabilities and injustices, increasing the reach and impact of international climate law and applying climate science to adjudicate legal disputes. We suggest that their innovative work in these domains could provide a basis for positioning courts as planetary climate governance actors.

1.5.2 Casalin, Deborah and Klocker, Cornelia "Discriminatory Practices in Armed Conflict Contexts: Exploring (Parallel) Proceedings Under the European Convention on Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination"

The International Journal of Human Rights 2023 27(5) 896–924
10.1080/13642987.2023.2180631

ABSTRACT

This article examines the approach of the European Court of Human Rights (ECtHR) to claims of discriminatory practices linked to armed conflict, as well as the more recent development of overlapping or parallel interstate claims before the International Court of Justice (ICJ) and the interstate procedure of the Committee on the Elimination of Racial Discrimination (CERD), based on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). It examines the potential implications of the latter trend for the application and interpretation of non-discrimination norms, and concludes that this should encourage the ECtHR once again towards application and explicit interpretation of Article 14 in armed conflict contexts. Such an approach would recognise the gravity of any discriminatory dimensions of conflict practices; ensure consistency with the ECtHR's own evolving case law on discriminatory violence; and facilitate harmonious interpretation of non-discrimination norms, as well as the ECtHR's autonomous interpretation of the ECHR and participation in judicial dialogue on concepts common to the ECHR and ICERD.

1.5.3 Ndimurwimo, LA and Jähnig, M "The Impact of Climate Change on Statelessness in the Southern African Region"

African Human Mobility Review 2023 8(3) 94–128

ABSTRACT

There are three ways by which nationality can be acquired: by descent, birth on the territory, or naturalisation. However, the determination of nationality remains ambiguous, and statelessness is becoming a major concern in the Southern African region. Statelessness often occurs due to the *lacunae* found in the laws, policies, and practices of states that deny individuals their right to nationality, at birth or later in life. Stateless persons become unfairly marginalised and denied their basic human rights and access to services, legal protection, and recognition. Statelessness is not only harmful to stateless persons themselves but can destabilise the society in which such persons live. Cross-border and permanent displacement due to the impacts of climate change is among the factors that can cause statelessness. Persons who are unable to prove their nationality often can be regarded as stateless. This article investigates how statelessness can be associated with cross-border and permanent displacement due to the impacts of climate change. It uses case studies of South Africa, Mozambique, and Tanzania. It evaluates the likelihood that such circumstances may lead to uncertain rights and legal statuses of stateless persons, issues that have the potential to be passed on to subsequent generations. The article concludes that climate change has far-reaching stateless implications. It recommends the law and policy review as among the possible solutions for effectively preventing statelessness and protecting and promoting stateless persons' rights in the Southern African region.

1.6 LABOUR LAW

1.6.1 Hlwatika, Siphile and Van der Walt, Adriaan "An Employer's Ability to Substitute a Disciplinary Enquiry Sanction – Part 1"

Obiter 2023 44(1) 199–231

ABSTRACT

It is common practice for employers to appoint an external chairperson to preside over a disciplinary enquiry which has been convened for purposes of investigating allegations of misconduct against an employee. The external chairperson is ordinarily mandated to decide on guilt, and to the extent that there is a guilty finding, to recommend or impose the appropriate disciplinary sanction.

Employers often tend to have expectations that the external chairperson will, after having found the employee guilty of the alleged misconduct, impose a sanction of dismissal depending on the gravity of the alleged misconduct. The expected outcome of dismissal, however, does not always occur. An external chairperson may impose a sanction short of dismissal after considering an employee's mitigating circumstances. An employer's dissatisfaction with the disciplinary sanction may result in the employer instituting an internal review process to review the external chairperson's disciplinary sanction, whilst in other cases, employers may resort to unilaterally substituting the external chairperson's disciplinary sanction with a sanction of dismissal. The employer's disciplinary code and procedure or the collective agreement regulating the disciplinary procedure in the workplace may or may not make provision for the substitution of the disciplinary sanction. In circumstances where there is no provision for the substitution of the disciplinary sanction, the employer's conduct of substituting the disciplinary sanction raises questions regarding the applicability of the "double jeopardy" principle which means, in an employment context, that an employee should not be subjected to more than one disciplinary enquiry on disciplinary charges arising from the same set of facts.

It is, however, a well-established principle that employers who are classified as organs of state can review their own decisions. This includes decisions of chairpersons who are appointed to preside over disciplinary enquiries and further decide on the appropriate disciplinary sanction. In the latter case, and in circumstances where the organ of state is dissatisfied with the disciplinary sanction, it may institute review proceedings in the Labour Court to review and set aside the chairperson's decision. This recourse is, however, only available to organs of state and not private-sector employers.

This article seeks to determine whether it is permissible for an employer to substitute an external chairperson's disciplinary sanction, and, if so, the circumstances under which an employer is permitted to do so and the procedure which should be followed in such an instance. The article is written in two parts – Part 1 covers the employer's ability to revisit a disciplinary sanction and Part 2 concentrates on the conflicting judgments involving the South African Revenue Service's conduct of substituting disciplinary sanctions, alternative avenues to the unilateral substitution of a disciplinary sanction and the conclusion.

1.7 LAW OF DELICT

1.7.1 Mukheibir, A "Constitutional Damages – A Stagnant or a Changing Landscape?"

Potchefstroom Electronic Law Review 2023 26 2–40

ABSTRACT

Section 38 of the Constitution of the Republic of South Africa, 1996 provides for appropriate relief where a right in the Bill of Rights has been infringed. In Fose v Minister of Safety and Security 1997 3 SA 786 (CC) the Constitutional Court raised the question of "appropriate relief" with reference to section 7(4)(a) of the Constitution of the Republic of South Africa Act 200 of 1993. In the Fose case the plaintiff claimed "punitive constitutional damages" together with delictual damages. While the court did not rule out an award for damages for the infringement, it did not award constitutional damages in that instance, specifically because the plaintiff claimed "punitive constitutional damages". The Fose case has been followed by most of the cases heard in the years after Fose was decided. In most instances where constitutional damages were claimed the courts, following Fose, have not awarded constitutional damages where delictual damages were available. The rules relating to constitutional damages are casuistic and it is submitted that the principle of subsidiarity could form a foundational principle to solve the problem of casuistry in this regard.

1.8 LAW OF THE SEA

1.8.1 Egede, Edwin "UNCLOS 82: Africa's Contributions to the Development of Modern Law of the Sea 40 Years Later"

Marine Policy 148 2023 105463 1–8

ABSTRACT

After being excluded from the development of early law of the sea due to colonialism, Africa has become quite active in the development of contemporary law of the sea ever since the various African States gained independence from colonial rule. Unfortunately, because many African states had not achieved independence during UNCLOS I and II, the outcomes of these Conferences did not include significant contributions from Africa. However, by the time of UNCLOS III, a significant number of African States had gained independence and had become active members of the international community. These African States were active in pushing for the convening of UNCLOS III to renegotiate the terms of modern law of the sea, and they made significant contributions during the Conference, particularly in the areas of the exclusive economic zone (EEZ), continental shelf (CS), and international seabed area (the Area), which were eventually incorporated into UNCLOS 82. This article will focus specifically on the Exclusive Economic Zone (EEZ) and Continental Shelf (CS) and will investigate whether African States have made significant contributions to the advancement of these two key functional economic maritime zones within national jurisdiction forty years after the adoption of UNCLOS.

1.8.2 Karomo, Adelaide; Vrancken, Patrick and Plön Stephanie "Get with the Beat! The Regulation of Underwater Noise in South Africa"

Obiter 2023 44(2) 383–411

ABSTRACT

Anthropogenic noise in the oceans, including from shipping and seismic surveys, is of concern as it often adversely impacts marine life and biodiversity. It is considered to be the number-one ocean pollutant today. The authors review major international legal instruments regarding underwater noise as a marine pollutant and examine them in the South African context. The authors find, *inter alia*, that a distinction between substance-based pollution (such as chemical pollution) and energy-based pollution (such as noise) is currently lacking. It is also found that very little literature is available on the impacts of shipping and seismic noise on small fish, turtles and cetaceans, a state of affairs that calls for a precautionary approach. It is recommended: (1) South African legal instruments that regulate underwater noise should be revised and aligned with international legal frameworks; (2) more scientific research should be conducted on the cumulative impacts of shipping and seismic surveys on the South African marine environment; and (3) the public participation process should be effectively monitored to ensure full compliance with the requirement to consult all affected and interested persons. Doing so would have wider implications for developments in the western Indian Ocean region regarding shipping, port construction and seismic explorations.

1.8.3 Vrancken, P; Lombard, AT; Clifford-Holmes, J; Goodall, V; Snow, B; Truter, H; Jones, PJS; Cochrane, K; Flannery, W; Hicks, C; Gipperth, L; Allison, EH; Diz, D; Peters, K; Erinosho, B; Levin, P; Holthus, P; Szephegyi, MN; Awad, A; Golo, H; & Morgera, E "Principles for Transformative Ocean Governance"

Nature Sustainability 2023 6 1587–1599

ABSTRACT

With a focus on oceans, we collaborated across ecological, social and legal disciplines to respond to the United Nations call for transformation in the '2030 Agenda for Sustainable Development'. We developed a set of 13 principles that strategically and critically connect transformative ocean research to transformative ocean governance (complementing the UN Decade for Ocean Science). We used a rigorous, iterative and transparent consensus-building approach to define the principles, which can interact in supporting, neutral or sometimes conflicting ways. We recommend that the principles could be applied as a comprehensive set and discuss how to learn from their interactions, particularly those that reveal hidden tensions. The principles can bring and keep together partnerships for innovative ocean action. This action must respond to the many calls to reform current ocean-use practices which are based on economic growth models that have perpetuated inequities and fuelled conflict and environmental decline.

1.9 MINERAL LAW

1.9.1 Badenhorst, PJ "Nature of Rights, Permission and Permits to Minerals under the Mineral and Petroleum Resources Development Act 28 of 2002: A Novel Two-Fold Test?"

Journal of South African Law 2023 4 615–630

ABSTRACT

In this article the nature of rights, permissions and permits to minerals will be determined by application of selected private law-based tests. The first test focuses on the nature of the object of a right in terms of the doctrine of subjective rights. Application of this test , however, leads to an outcome that for instance, a mining right, with land as its object, theoretically does not differ in nature from a mining permit, with land as its object. This outcome will be questioned. The article then determine whether the twofold test, as used by the courts to identify registrable real rights under the Deeds Registries Act, can successfully be applied to the granting and registration of prospecting rights or mining rights, which are labelled as real in nature by the legislature. The difference in nature between rights to minerals and permissions or permits to minerals is explained with reference to the application of a novel twofold test, namely the subtraction from the imperium test and the intention test. Lastly the grant of prospecting rights or mining rights by virtue of an administrative act will be briefly contextualised and clarified.

1.10 PROPERTY LAW

1.10.1 Badenhorst, PJ "Sir William Blackstone and the Doctrine of Subjective Rights"

Obiter 2023 44(1) 162–174

ABSTRACT

The doctrine of subjective rights forms part of South African jurisprudence. This is not the case in English law, which, for instance, does not clearly distinguish between property, as a legal object, and property rights. However, if one considers Sir William Blackstone's famous definition of property in his *Commentaries on the Laws of England*, it does contain some features of the doctrine: the definition is about the "right of property" and its features. Property as object, and right of property as a right, are distinguished. A right of property has entitlements and operates against third parties. A property right involves a legal relationship between a person and a thing, as well as a legal relationship between a person and third parties. In conclusion, the Blackstonian definition contains features of the doctrine of subjective rights that are useful when analysing property rights in English common law systems.

1.10.2 Ngwenyama, Lerato "Alternative Accommodation of an Unlawful Occupier's Choosing: Some Reflections on *Grobler v Phillips* [2022] ZACC 32"

Obiter 2023 44(3) 646–660

ABSTRACT

The Constitutional Court in *Grobler v Phillips* (CCT 243/21) [2022] ZACC 32 (20 September 2022) had to decide whether it was just and equitable in terms of section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act1 (PIE), to grant an order instructing the Mrs Phillips and her son, who has a physical disability, to vacate their current home. This judgment is important, not only because it showed that an unlawful occupier such as Mrs Phillips does not have right to refuse to be evicted on the basis that she prefers or wishes to remain in the same property that she is occupying unlawfully, but it is also important because the judgement provides clarity on whether private landowners are obliged to provide unlawful occupiers with alternative accommodation of an unlawful occupiers' preference. The purpose of section 26 of the Constitution played a significant role in the determination of whether private landowners have an obligation to provide alternative accommodation to unlawful occupiers. The Constitutional Court indicated that section 26 of the Constitution does not give Mrs Phillips the right to choose exactly where she wants to reside. According to the Constitutional Court, where an offer of alternative accommodation is made available by a private landowner, such an offer should not be construed as authority regarding what other private landowners are obliged to do in similar circumstances.

CONFERENCES

2.1 NATIONAL CONFERENCES

2.1.1 Badenhorst, PJ "Nature of Rights, Permissions and Permits under the MPRDA: Subtraction from the *Imperium* Test" paper presented at the Private Law and Social Justice Conference held at Nelson Mandela University, 7 August 2023

ABSTRACT

In this paper the nature of rights, permissions and permits to minerals is dealt with by the application of selected private law-based tests. The first test focuses on the nature of the object of a right in terms of the doctrine of subjective rights. This application, however, leads to an outcome that for instance, a mining right, with land as its object, theoretically does not differ in nature from a mining permit, with land as its object. This outcome will be questioned. The paper determines whether the twofold test, as used by the courts to identify registrable real rights under the Deeds Registries Act, can successfully be applied to the granting and registration of prospecting rights or mining rights, which are labelled as real in nature by the legislature. The paper also dealt with the application of the twofold test to determine the nature of permissions and permits to minerals. It is argued a subtraction from *dominium* of the landowner does not take place in both instances but a subtraction from the custodial powers of the state (*imperium*) takes place. The difference in nature between rights to minerals and permissions or permits to minerals is explained with reference to the application of a novel twofold test, namely the subtraction from the imperium test and the intention test.

2.1.2 Denson, R "The Exclusion of Parental Rights and Responsibilities for Unmarried Parents of Children Conceived Via Artificial Fertilisation Finally Remedied: *VJV v Minister of Social Development* [2023] ZACC 21" paper presented at the Private Law and Social Justice Conference held at Nelson Mandela University, 7 August 2023

ABSTRACT

The paper discusses the application for confirmation of the order of unconstitutionality granted by the High Court of South Africa, Gauteng Division, Pretoria, in respect of section 40 of the Children's Act. In terms of section 40 of the Children's Act, the donor of a gamete which is used in the artificial fertilisation process does not acquire parental rights and responsibilities except where the donor is also the spouse of the woman who gave birth to the child. the issue which arose was whether section 40 of the Children's Act unfairly discriminates against unmarried same-sex life partners by denying the non-birthing parent the right to acquire parental rights and responsibilities of children born via artificial fertilisation? Both the High Court decision and the confirmation order of the Constitutional Court is discussed in the paper.

2.1.3 Ntontela, M "The Use of Augmentative and Alternative Communication in the Criminal Courts". Paper presented at the National Conference "The Role of Law and Justice in the Fourth Industrial Revolution (4IR)", University of Limpopo, Polokwane/Turfloop, 29–31 August 2023

ABSTRACT

The use of augmentative and alternative communication systems in South African criminal courts is still in its infancy. In the 19th and 20th centuries, people who could not plead to a charge and understand court proceedings due to communication disabilities were treated like the mentally ill. Due to legislative developments such as the Criminal Lunatics Act of 1800, Criminal Procedure Code 1 of 1903 (Transvaal), and Proclamation 36 of 1902 (Transvaal), accused persons with communication disabilities were not tried but were committed into asylums for an indefinite period (while they waited for release on the "Governor's pleasure").

The use of technology and advancements in facilitated communication has improved the number of mechanisms available to communicate effectively with people with communication disabilities. The question is: how can these augmentative and alternative communication (AAC) systems? The author recommends incorporating AAC systems when hearing evidence in criminal trials. Using technology in the courtroom to hear evidence from people with communication disabilities will enhance the rights of access to courts, a fair trial, and equality before the law. With the 2021 amendment of sections 161 and 170 of the Criminal Procedure Act, courts can develop existing procedural laws to incorporate augmentative and alternative communication systems in criminal courts. Using such technology will further strengthen the rule of law and social justice principles as more previously marginalised groups (particularly those with communication disabilities) access the criminal justice system. The author concludes with recommendations on how criminal courts can merge procedural rules with evidence received through augmentative and alternative communication systems.

2.1.4 Van As, HJ "IUU fishing: Elimination vs Reduction" Regional Workshop on Marine Resource Sustainability Challenges in Southern Africa and the West Indian Ocean entitled "Promoting the interface between ocean science, society, and policy for sustainable blue economies in Africa" Port Elizabeth, South Africa, 29–30 June 2023

ABSTRACT

There is a global effort to reduce IUU fishing. The paper addressed the possibility to eliminate commercial IUU fishing as opposed to reducing it. Proposals were made to strengthen international inter-state collaboration, inter-agency collaboration and the strengthening of legislative regimes.

2.1.5 Welgemoed, Marc "Gender-Based Violence in our Community" Legal Integration Project Conference on Gender-Based Violence, Pius Langa Building, Faculty of Law, Nelson Mandela University, 21-25 August 2023

ABSTRACT

Gender-based violence (GBV) is the equivalent of a pandemic in the community. This is not only the case in South Africa, but throughout the world. Local, regional, national and international news are riddled with incidents of GBV almost every day. In this context, when referring to GBV, it is trite to think about incidents where men assault women. Approximately 35% of women, internationally speaking, have endured either sexual or physical violence. However, what is sometimes left out of sight, are those incidents where men also assault other men. This could be in situations when same sex couples encounter altercations, or even where there are incidents of hatred between heterosexual men towards homosexual men, or even *vice versa*. The same obviously also applies to women. It however appears that legislation, to control violence against men, is neglected throughout the world.

The courts rolls are stacked with domestic violence (hereafter referred to as "DV") matters. To name but one example, student paralegals at the NMU Law Clinic consult with parties involved in DV matters almost every day. It should be noted that the NMU Law Clinic is but one legal institution where members of society can get assistance as far as DV matters are concerned. This means that private law firms and other legal aid institutions, like Legal Aid South Africa, the Legal Resources Centre and Lawyers for Human Rights, may also provide similar assistance. Many of these cases are GBV related, not only between adults, but also involving children. Other causes of GBV are race related tension, economic circumstances, social inequality, alcohol and substance abuse.

How is GBV currently handled? What is the international community saying about this? Is there anything that we can locally do to alleviate the continuation of GBV? These are just some of the issues that will be addressed during this

presentation. In referring to “community” in context of this address, it is submitted that local communities should be seen as part of regional, national and international communities, as people throughout the world have an active influence over one another via the widespread reach of the internet, social media, advanced telecommunications and informational *fora*.

2.1.6 Welgemoed, Marc "Rethinking Assessment Methods in Preparing Students for the Working World" Humanising Pedagogy Symposium, Conference Centre, Ocean Sciences Campus, Nelson Mandela University, 3-4 October 2023

ABSTRACT

This paper focuses on assessing students in a way that will better prepare them for the working world out there. History is clear on the fact that universities have developed a series of sophisticated and significant assessment methods. Summative assessment methods, eg, written examinations, are firmly entrenched in the South African education system. Students are usually bound by strict time limits when conducting examinations. Examinations emphasise fast thinking and quick returns. Examinations usually do not lead to any reflection or feedback and are (often) not aligned with the curriculum. Examinations might therefore not be the best methods to assess students. Memory testing is indeed important, but so much more is required to train students for the working world out there. In this paper, an attempt will be made to emphasise factors that should be taken into account, when assessing students, that will prepare them for entry into the working world. In this regard, the following questions can be asked:

- What does a teacher want the student to learn?
- Is a particular assessment learner-centred or not?
- Have the outcomes of an assessment been clearly communicated to the students?
- Does the assessment align with the outcomes of the particular module?
- Are there separate assessments for students with different needs and abilities?
- Is transformation being considered when assessing students?
- Will a particular assessment method enhance the employability of students?
- Is there sufficient opportunity for self-assessment by the students?
- Is proper feedback on assessments provided to the students?

It is important that the aim of this paper will not be to prescribe and/or to prefer a particular way of assessing students. The aim is also not to discredit conventional tests and examinations. The aim is to propose alternative possibilities of assessment, duly keeping in mind whether the graduate attributes of students are being developed in order to prepare them for entry into the working world. A recommendation will be made that a system be devised that effectively blend the use of summative assessments with the submission of portfolios of evidence and self-assessment. In doing this, regard will not only be given to students who are academically strong, but also to students who are more practically orientated, thus duly attending to various factors that can contribute to make students employable in the working world.

2.2 INTERNATIONAL CONFERENCES

2.2.1 De Lange, MC "FishFORCE Bridge Inspection Game", presented a workshop at the SANORD Conference 2023, Hamar, Norway, 20 – 22 September 2023

ABSTRACT

Aligned to theme six (6) of the SANORD Conference 2023, "Digital Technologies in Educational Systems"

The FishFORCE Academy wished to workshop and introduce a virtual law enforcement training game for law enforcement officers in the fisheries environment, specifically designed for South Africa, and partner countries. The game is mobile based, available on smartphones and desktops, and FishFORCE honed in on the gamebased education model termed "gamification" which will allow users to learn through experience and through the use of a virtual environment, while leading them to approach problem solving through critical thinking.

The training game utilises digital technology to improve the efficiency of the academy's operations by transforming training into a detective experience underpinned by fun and curiosity to advance the learning experience of players. The game simulates the daily routine of a Fishery Control Officer (FCO) and trains them on how to undertake activities such as permit inspections, vessel inspections, and filling out correct documentation for reporting a crime. In so doing, the game mirrors the structural complexities that characterise real world scenarios and translates complex and critical inspection procedures into an immersive experience in which FCO's can learn and fail in a safe environment.

From a neuroscience perspective, this approach deepens the learning outcomes and makes learners more likely to engage with that content and remember it later. The game is innovative within South Africa and partner countries and helps officers to perform better in their jobs, which ultimately has a global impact

directly linked to the United Nations SDG's. The game will have a long-term impact forming an integral part of the ongoing training programme of FishFORCE and the Nelson Mandela University.

2.2.2 Denson, R "*Locus standi in judicio* - The Right of a Parent to Claim Maintenance From the Other Parent on Behalf of an Adult Dependent: *Z v Z* 2022 (5) SA 451 (SCA) (21 July 2022)" paper presented at the International Society of Family Law 18th World Conference Golden Jubilee titled *Rethinking Law's Families & Family Law* in Antwerp, Belgium, 14 July 2023

ABSTRACT

In terms of South African law, parenthood automatically gives rise to the legal obligation of maintenance towards a child. This is evidenced by Children's Act 38 of 2005, The Divorce Act 70 of 1979, the common law as well as the constitutional duty of support. There is no dispute that a reciprocal duty of support exists between a parent and a child. The problem is found, however, in the practical execution of the claim and this is most evident with respect to an adult child who is still financially dependent on his/her parents for financial support.

In terms of section 17 of the Children's Act, a child attains the age of majority at the age of eighteen years. However, despite attaining the age of majority, such major at the same time occupies the position of a child as the age of majority does not automatically confer maturity, capability or independence one normally associates with majority status. In other words, despite attaining majority status, the eighteen-year-old remains dependent on the parents for maintenance. Furthermore, whilst provision is made for the right to maintenance on terms of legislation, we must consider the effect such application for maintenance would have on the welfare of the child who finds himself/ herself having to institute proceedings against a parent and the potential negative consequence such application may have on the parent-child relationship considering the recognised advantages of family preservation.

In some instances, the high court has held that a parent does in fact have the requisite *locus standi* to do so, whilst other judgements have concluded to the contrary. The reason that courts have reached opposing decisions in this regard

is due to the fact that the adult dependent child has *locus standi in judicio* by reason of being a major and, therefore, has the legal capacity to claim for maintenance on his/her own behalf. However, in circumstances where the adult dependent child, does not wish, for whatever reason, to initiate maintenance proceedings for maintenance against his/her parent, the question arises as to whether the parent of the child has the necessary *locus standi in iudicio* to lodge a claim for maintenance against the other parent?

The presentation examines the right of a parent to initiate a claim for maintenance against the other parent on behalf of an adult dependent child, notwithstanding that the latter has reached the age of majority and has *locus standi in iudicio* to initiate a claim in his/her own capacity. The legal uncertainty surrounding this matter warrants a discussion of the recent judgment in *Z v Z*, where the Supreme Court of Appeal (hereafter referred to as the SCA) ruled that a parent can claim maintenance for adult dependent children from the divorced partner.

2.2.3 Erasmus, D "Combatting Corruption and Recovery of Looted Public Funds: A Tale of Two Countries" paper presented at Kilaw International Law Conference, Kuwait City, Kuwait, 3–4 May 2023

ABSTRACT

It is generally accepted that corruption in South Africa and many other countries has become endemic. The report of the Public Protector entitled *State of Capture* of 2016 sets out the way in which former President Jacob Zuma and senior government officials colluded with the Gupta family in the appointment and dismissal of cabinet ministers and directors of SOE's, which led to the improper and corrupt awarding of state contracts. The revelations by witnesses at the Judicial Commission of Inquiry into Allegations of State Capture made it clear that South Africa entered a phase of state capture under the presidency of former president Jacob Zuma and is still in a state of capture.

The state has a legal duty to address social inequalities and to oversee a fair and equitable distribution of state resources to all members of society. In terms of the Constitution the state is compelled to respect, protect, promote and fulfil a broad range of socio-economic rights. South African courts have recognized these positive obligations of the state and issued orders compelling the state to give effect to its obligations.

When the Covid-19 pandemic hit South Africa, emergency measures were put in place to address the pandemic. Relief packages introduced to assist the poor led to corruption on a grand scale. The looting of state resources designated for the poor involved politicians, government officials and corrupt operators in the private sector.

With reference to Fineman's vulnerability theory, it is argued that government failed to protect the poor in terms of its constitutional duties. It also did not act in a way that is responsive to the vulnerability of its citizens. Our government institutions have become captured and corrupted and failed to ensure that state resources are allocated for the common benefit of all and not just for a select few.

South Africa has a large arsenal of anticorruption instruments, which criminalises corrupt behaviour, targets the proceeds of corrupt activities and provides for severe criminal sanctions to be imposed on perpetrators. It is submitted that what is called for now, is the institution of criminal prosecutions against public officials, corrupt operators in the private sector and politicians involved in corrupt activities. Legislative measures aimed at recovering looted public funds should be implemented. In this research practical suggestions and recommendations for the conduct of such prosecutions and recovery of funds will be explored and advanced. A comparative research study will be conducted with reference to the USA, the UK and Kuwait.

2.2.4 Phorego, M "The Public Protector as a Mechanism to Enhancing Presidential Accountability for Cabinet Appointments in South Africa: Re-Visiting Nkandla" paper presented at CPF: Constitutional History: Comparative Perspectives: Conference on Landmark Judgments held at the University of Bologna, September 2023 (in-person)

ABSTRACT

This paper explores the extent to which the Public Protector has had impacted presidential accountability in South Africa post the *Nkandla* Judgment. It argues that as an oversight institution, the Public Protector can play an oversight role in enhancing presidential accountability for cabinet appointments. The paper proceeds from the premise that the President's appointment powers are too and should be curtailed in order to enhance the accountability that emanates from the exercise of the power are too broad and should be curtailed in order to enhance the accountability that emanates from the exercise of the power.

2.2.5 Sefela GL "The Fragmented Legal Regime of Veldfire Management in South Africa" 8th International Wildland Fire Conference, Porto, Portugal, 16–19 May 2023

ABSTRACT

Fire Management (IFM). Within a South African context, although the term 'veldfire' has a specific meaning it essentially has the same connotation as 'wildfire' or 'wildland fire'. On the face of it, South Africa adopts IFM within its veldfire legislative framework; however, this framework is fragmented. The argument by the authors is that legislative reform is required to improve IFM effectively and efficiently to optimise the benefits the latter provides. The objectives of this poster seek to demonstrate the extent of this (legislative) fragmentation and its effect on institutions, for example, provisionally demonstrate where reform is required. The former will be achieved through a qualitative study undertaking a theoretical, non-empirical, inductive thematic analysis comprising of critical content analysis. The content analysis will be based on a selected sample of international law and policy, domestic legislation, court decisions and other secondary data. The results have the potential to improve policy, practice, and further education within IFM.

2.2.6 Van As, HJ "Pro-Active Protection of Marine Living Resources" 7th Global Fisheries Enforcement Training Conference (GFETW) entitled "Moving from Words to Action: Innovative Collaborative Partnerships to Combat Illegal, Unreported, and Unregulated (IUU) Fishing" organised by the International Monitoring, Control and Surveillance Network, Halifax, Nova Scotia, Canada, 31 July–4 August 2023

ABSTRACT

The paper centred around the approach developed and implemented to prevent abalone poachers from entering the sea to commence with their poaching activities by employing a section in the Riotous Assemblies Act and charging individuals with conspiracy to commit a crime. The paper addressed the need that has driven the initiative, the approach taken to addressing the issue, the reasons for the approach, what was done, the achievements of the initiative, what worked and what must still be done.

2.2.7 Van As, HJ “Can We Break the Criminal Strangle Hold in Africa?” Marine Regions Forum Conference: Navigating Ocean Sustainability in the Western Indian Ocean (WIO) and beyond, Dar es Salaam, Tanzania, 7–9 November 2023

ABSTRACT

The paper addressed the drivers of fisheries crime, the crimes encountered in the fisheries sector and the species under threat. The link between fisheries crime and organised international criminal syndicates was explained and proof of the links between fisheries, drug-, human- and firearm trafficking was provided. The devastating impact and prevalence of corruption was highlighted and international systemic weaknesses were identified. The presentation was finalised by providing 5 recommendations to improve the current situation.

COLLOQUIUMS AND SEMINARS

3.1 Denson, R "Maintenance Matters for Spouses Married by Muslim Rites" paper presented at the NWU Maintenance Law Colloquium, 12 October 2023

ABSTRACT

The paper highlights the differences between spouses married in terms of Islamic law and South African in respect of maintenance in view of the Maintenance Amendment Bill of 2023. The purpose of the paper is to identify these difference so as to counter the stumbling blocks that may arise.

During the subsistence of the marriage and unlike the position in Islamic law where the husband bears the sole duty of support, the position in South African as far as spousal maintenance is concerned, is that there is a reciprocal duty of support between spouses. Furthermore, in terms of South African this reciprocal duty of support exists throughout the marriage and can be extended in certain circumstances even at the dissolution of the marriage either through death or divorce. The prevailing position in Islamic law is that the husband bears the sole responsibility of support during the subsistence of the marriage, and where the marriage is dissolved through divorce, the husband is obligated only to maintain the woman for a period of three months after the divorce has taken place.

In terms of Islamic law, after the death of her husband, the widow once again becomes the responsibility of her guardian, who is under an obligation to maintain her. The surviving spouse is only allowed to be maintained from the estate of her deceased husband for a period of four months and ten days after the demise of her husband. South African law makes provision for the widow of the deceased to claim for maintenance in terms of the Maintenance of the Surviving Spouses Act. As mentioned previously, surviving spouses married according to Muslim rites qualify as a "survivor" in terms of the Maintenance of Surviving Spouses Act, allowing the surviving spouse to lodge a claim for maintenance against the deceased spouse's estate. Although this claim is

allowed in terms of South African law, it conflicts with the teachings and principles of Islamic law, as the surviving wife becomes the responsibility of her guardian and would not be allowed to lodge a claim against her deceased husband's estate.

The position in Islamic law with regard to the post-divorce maintenance differs from that in South African law in the following respects: firstly, the duty of maintenance in South African law is reciprocal during the marriage, and the duty rests on both the husband and the wife depending on their circumstances, whilst in Islam the duty falls only on the husband. Secondly, in South African law, the duty to maintain terminates at the date of the divorce, unless there is an agreement between the parties to the contrary, or a court order to that effect. In Islam maintenance of the wife terminates three months after the divorce. In other words, the husband's spousal duty of support does not extend beyond the *iddah* period and after the *iddah* period the husband ceases to be responsible for the maintenance of his ex-wife. There is no provision for the duty to continue, either by agreement or by a court order. The exception to this rule is when the ex-wife is pregnant or where she is still breastfeeding. Unlike South African law, in Islamic law arrear maintenance is regarded as a debt against the husband which does not prescribe.

Notwithstanding the differences identified above, Islamic Law and South African Law appear to find common ground in respect of mediation as both legal systems advocate the use of mediation as the preferred method of resolving family disputes, especially children's issues, which once again, include maintenance matters.

3.2 Erasmus, D Delivered two lectures "Truth Finding During Criminal Trial Proceedings" and "Addressing Cyberbullying: An Overview of Legislative Measures" at the annual Prague Summer School presented yearly by Schola Empirica, from 2–7 July 2023.

3.3 Ngwenyama, LR "SCA Clarifies that Student Accommodation at Higher Education Institution is not a Considered a Home for Purposes of PIE: *Stay at South Point Properties v Mqulwana*" South African Property Law Teachers Colloquium, University of Cape Town, 2-3 November 2023

ABSTRACT

The Supreme Court of Appeal ("SCA") in *Stay At South Point Properties (Pty) Ltd v Mqulwana* had to decide whether the provision of student accommodation by the Cape Peninsula University of Technology ("CPUT") to its students constituted a home, to render the application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). This judgment is important, not only because it paved the way for CPUT and other educational institutions to evict the respondents, but also, because it provides a much-needed clarity that student residence at higher learning institutions is not a home. The features of the student accommodation made available to the students, for the purpose and intended use of student accommodation play an important role in the determination of whether it is a home. The SCA correctly found that student accommodation is not a home. This is because student accommodation at the learning institution is a residence of limited duration and for a specific purpose. Therefore, student accommodation is time-bound by the academic year, and subject to rotation. The SCA has clearly clarified from these features of the student accommodation that it cannot be a home in terms of PIE. The purpose of this paper is to critically analyse the judgment in *Mqulwana*.

3.4 Ntontela M "The Conundrum of Conducting Court Proceedings in an Indigenous Language" Legal Culture 25 Years On: Conceived, Perceived and Lived – Colloquium Organised by the Research Unit for Legal and Constitutional Interpretation in Collaboration With the Free State Centre for Human Rights, University of the Western Cape, Belville, Cape Town, 14–16 August 2023

ABSTRACT

The South African Constitution recognises eleven official languages. Insofar as it's practical, the courts have historically acknowledged the importance of promoting the use of all official languages in various government sectors. Over the years, the contrast has been in the court's response to criminal proceedings conducted in an indigenous language. Some courts have recognised the constitutional authority to use indigenous languages to conduct court proceedings, while others have rejected the idea with reasons. Some courts have rejected for lack of the appeal court's competency to comprehend proceedings conducted in an indigenous language. The issue has further been exacerbated by the legislature's slumber in introducing legislative reforms to accommodate conducting criminal proceedings in an indigenous language.

The article addresses the conundrum of the courts' reluctance to conduct criminal proceedings in an indigenous language almost 30 years into the South African democracy. The author proposes various interventions that can transform courts to accommodate indigenous languages when conducting criminal proceedings.

3.5 Van As, HJ “Movement of Products of Illegal Wildlife Trafficking in Africa”. Illegal Wildlife Trafficking (including Marine Living Resources) Colloquium for Mozambique and South Africa Judiciary Pretoria, South Africa, 25–27 October 2023

ABSTRACT

The paper addressed the value and drivers if the illegal wildlife trade (IWT) in southern Africa, and focused on the trafficking of marine living resources. It also included trafficking in leopard, lion and pangolin. I further addressed the latest trends in IWT such as geographic and species displacement, and the move from physical to online trade as well as the replacement of wild animals with animals bred in captivity. It also analysed the market states and identified action that need to be taken such as the introduction of Lacey-type legislation and compulsory health certification becoming a requirement in market states.

GROUP DISCUSSIONS/WORKSHOPS

4.1 CENTRE FOR LAW IN ACTION AND FISHFORCE ACADEMY

ABSTRACT

Development of a national abalone strategy and action plan

The need for a shift in thinking around the management of the abalone resource and how best to prevent and combat the illicit trade was identified. This led towards a drive to develop a National Strategy and Action Plan to prevent and combat the trade in illegally harvested South African abalone. The Department of Forestry, Fisheries and the Environment (DFFE), academia, including FishFORCE, civil society and government agencies proposed the need for the development of an inclusive strategy for the prevention and combatting of trade in illegally harvested abalone. Such a strategy would seek to bridge the gap between compliance and enforcement with a regulatory framework that engages with and uplifts communities and explores economic opportunities of the fishery for the benefit of South Africa, its people and the resource. This led to a multi-stakeholder workshop with the aim to develop a National Strategy and Action Plan to Prevent and Combat the Trade in Illegally Harvested South African Abalone in Stellenbosch from 27 February - 03 March 2023.

FishFORCE formed part of the organising committee since inception and was the lead on the Regulatory Framework, Policy Development & Management Workstream whilst providing additional input and support on the Enforcement and Compliance Workstream, both of which would culminate in the establishment of a national strategy to curb abalone poaching.

4.2 FishFORCE (Guildo Espada obo of FishFORCE), Workshop to support the effectiveness of fisheries prosecutions, members of the judiciary are sensitised on the nature and extent of fisheries organised crime in Maputo, Mozambique, 14 December 2023.

ABSTRACT

FishFORCE acknowledges the strategic importance to include and engage with prosecuting authorities and members of the judiciary who are relevant to the protection of marine living resources, as well as FishFORCE's goal to create awareness about fisheries organised crime so that the prosecuting authorities and members of the judiciary can better understand the magnitude of the crimes they are tasked to judge. In partnership with the Eduardo Mondlane University, a one-day awareness workshop to members of the judiciary, mainly for public prosecutors and judges, took place on 14 December 2023. The workshop focused on the impact of fisheries crime and Illegal, Unreported and Unregulated (IUU) fishing on society, the economy, and the environment.

BOOKS AND CONTRIBUTIONS TO BOOKS

5.1 Adelman, Sam; Kotzé, Louis J and Dube, Felix "The Problem With Sustainable Development in the Anthropocene Epoch – Reimagining International Environmental Law's Mantra Principle Through Ubuntu" in *The Routledge Handbook of Law and the Anthropocene* (eds: PD Burdon and J Martel) (2023) 3–17

ABSTRACT

A central argument in this chapter is that sustainable development has become so deeply embedded in international environmental law that it has become a quasi-constitutional principle. The initial motivations that generated the notion of sustainable development were positive in that its proponents sought to achieve social justice through development that is sustainable. However, sustainable development as it is currently understood is different from its original conception. It has changed from being a discourse of resistance neoliberal globalisation. We argue that sustainable development was bedevilled from the outset by the contradiction between endless economic growth and environmental protection. Its acceptance by developed Western countries was contingent upon a greener form of capitalism, but it was not inevitable that they should be neoliberal.

5.2 Barratt, A, Domingo, W, Denson, R, Mahler-Coetzee, JD & Olivier, M, *Law of Persons and the Family Pearson* (2023) 3ed

ABSTRACT

Law of Persons and the Family: Fresh Perspectives, now in its third edition, is a practical, hands-on law publication that is part of the successful Fresh Perspectives Law series. It offers students and readers a comprehensive introduction both to the South African Law of Persons and to South African Family Law. This book functions as a practical introduction to law in which students begin to engage with the law and apply the rules and principles they learn.

5.3 Du Plessis, M; Peté, S; Hulme, D; Palmer, R; Palmer, T and Sibanda, O *Peté and Hulme's Civil Procedure: A Practical Guide, Fourth Edition* (2023)

ABSTRACT

As its title suggests, this is a practical, down-to-earth guide to civil procedure. It is designed for students and legal practitioners who are establishing their practices and need a book which is both easy to understand and sufficiently detailed to provide a solid introduction to this complex area of the law. The most important aim of this book is to provide you, the reader, with an effective mind map of the way in which the different concepts involved in this difficult subject fit together. Everything about the book – from the style in which it is written and the way in which the concepts are ordered to the diagrams and glossary which are provided – is designed to assist you in developing a practical understanding of what the subject is about.

5.4 Ngwenyama, Lerato Rudolph "Transformative Constitutionalism in the Context of ESTA – Cases After *Daniels v Scribante*" in Madlanga, Mbuyiseli R; Njotini, Mzukisi; Osode, Patrick C; Nwauche, Enyinna S and Ntlama-Makhanya, Nomthandazo (eds) *Enforcing Accountability, Consolidating Democracy and Compelling Sustainable Development in the 21st Century* (2023)

ABSTRACT

Daniels v Scribante (*Daniels*) was a transformative case in the context of the Extension of Security of Tenure Act 62 of 1997 (ESTA). This is because the Constitutional Court in *Daniels* upheld an occupier's right to human dignity over the owner's right to property. This judgment confirmed that the rights of ESTA occupiers are equally important to a property right and worthy of similar protection. In this regard, Ms Daniels was allowed to make improvements to her dwelling to make it habitable without the owner's permission. The *Daniels* decision shows that ownership is not absolute, as it was perceived to be before the advent of the Constitution. Finally, *Daniels* was a case where the notion of habitability in the context of ESTA occupiers was clearly and explicitly developed in light of the Constitution of the Republic of South Africa, 1996. The aim of this chapter is to provide a conceptual understanding of transformative constitutionalism. After that, the chapter will analyse selected cases since the decision in *Daniels*. The analyses focus on what the courts have pronounced as transformative constitutionalism since *Daniels*. Finally, the chapter will propose a way forward to ensure continued transformation in the context of ESTA.

5.5 Ntontela M and Ntlama-Makhanya "Contesting the Element of Consent in Sexual Rights Violations in Coko v S (Ca&R 219/2020) [2021] ZAECGHC 91 and R v Gondwe [2021] Mwhc 102: The Case of South Africa and Malawi" in Madlanga, Mbuyiseli R; Njotini, Mzukisi; Osode, Patrick C; Nwauche, Enyinna S and Ntlama-Makhanya, Nomthandazo (eds) *Enforcing Accountability, Consolidating Democracy and Compelling Sustainable Development* (2023)

ISBN 978 1 48515 199 9

ABSTRACT

In contemporary constitutional democracies in Africa, the judiciary serves as a catalyst and is integral to an effective system of upholding the rule of law. It is entrusted with the ultimate authority to constitutionalise the evolution of human rights. It also has the potential to minimise tyranny and impunity in the enhancement of people's ability to enforce their rights. The court's role is significant, particularly with its independent status encapsulated in the doctrine of separation of powers. The latter doctrine is at the thrust of the new constitutional order in present-day Africa to ensure its duties' performance distinctively from the other two branches (legislature and executive).

However, with the accorded status and responsibility, the judiciary operates in a context where Gender Based Violence and Femicide (GBVF), especially sexual violence, strips women of their foundational human rights. Women in contemporary Africa have a greater chance of sexual violation due to several factors undermining their human rights. The element of 'consent' in sexual rights violations has been a subject of contested interpretation by the courts. The judiciary seems, at times, to view and endorse the 'consent' element through the woman's physical appearance and body language.

Thereof, the article assesses the impact of the recent review judgments in *Coko v S* (CA&R 219/2020) [2021] ZAECGHC 91 in South Africa and *R v Gondwe* [2021] MWHC 102 in Malawi on the interpretation of the element of 'consent' on

the crime of rape concerning the rights of women to access justice in contemporary Africa. The objective is to examine the lens through which the language of human rights on the element of ‘consent’ is applied and developed by the courts in the two countries. The limitation in these two countries is motivated by their sharing of the attainment of democracy in 1994 and Constitutions of supreme status over any other law in the respective Republics.

5.6 Olivier, MP and Tewolde, A "Social protection for Refugees and Asylum Seekers: A South African case study" in *Handbook of Social Protection and Social Development in the Global South* (eds: Patel, L. Plagerson, S. and Chinyoka, I.) (2023) 438–456

ABSTRACT

Refugees and asylum seekers are legal categories of vulnerable non-nationals in need of inclusive and humane social protection measures. This is in keeping with the social development approach to social and economic inclusion (see Chapter 1). Under international law, 'refugees are persons outside their countries of origin who are in need of international protection because of feared persecution, or a serious threat to their life, physical integrity or freedom in their country of origin as a result of persecution, armed conflict, violence or serious public disorder' (UNHCR 2021b).1 For South African purposes, Section 1 of the Refugees Act, Act 30 of 1998, defines refugee as any person who has been granted asylum in terms of the Act. Asylum, in turn, is defined as refugee status recognised in terms of the act. Asylum seeker is a general term for any person who is seeking international protection (as a refugee) (UNHCR 2021b).

Section 1 of the South African Refugees Act defines it as a person who is seeking recognition as a refugee in the Republic. According to specific international treaties, refugees are granted the right to access social protection on par with nationals. This is particularly evident in the provisions of the United Nation's (UN) 1951 Convention Relating to the Status of Refugees. Yet, a recent study by the United Nations High Commissioner for Refugees (UNHCR) on the inclusion of refugees in government social protection systems in Africa found that many countries are not yet able to include refugees and asylum seekers in all of their social protection programmes on par with their citizens, though there are signs for progress toward inclusion (UNHCR 2021a). The vulnerability of refugees in social protection terms is therefore evident; in many African countries they are forced to rely on the limited humanitarian aid that may be available. Globally, the position of asylum seekers is even more precarious, even if (as

explained later) their inclusion in at least basic forms of assistance is required by international law.

This chapter focuses on two dimensions of social protection measures of relevance to refugees and asylum seekers in South Africa: first, the normative framework, thus the policy, legal and jurisprudential framework of extending social protection to refugees and asylum seekers in the context of South Africa; and second, the experiences of these vulnerable groups. The chapter draws on primary legal and policy materials and on secondary sources to examine these dimensions. Together, the two dimensions provide a compelling picture of the interactions between social protection and social development for asylum seekers and refugees, by depicting the way in which legislation is realised and shaped by particular political, social and economic contexts. The chapter first provides a background overview of the salient characteristics of refugees and asylum seekers in South Africa, the factors informing the evolving policy and legislation, and how migrants are affected in practice. It then offers an evaluation of the normative or regulatory context: first, of the impact of South African policy and legal instruments (including the constitution); and second, of key jurisprudential developments. This part also considers South Africa's obligations in terms of international law regarding social protection and the treatment of refugees and asylum seekers. The chapter then turns to the experiences of refugees and asylum seekers as regards their welfare, access to social protection, treatment by state organs and the general population. This section considers whether experiences vary by immigration status. The chapter concludes with an evaluation of the current state of social protection available to these two migrant categories and provides recommendations on how the state and its agencies should deploy inclusive and humane social welfare and development policies and practices to refugees and asylum seekers in South Africa.

5.7 Phorego, M "Botswana (Country Report)" in Barosso, L and Albert, R (eds) *The 2022 International Review of Constitutional Reform* (2023)

https://dx.doi.org/10.2139/ssrn.4623844.

ABSTRACT

The International Review of Constitutional Reform (IRCR) is a scholarly effort to gather jurisdictional reports--written by scholars and judges, often in collaboration--on all forms of constitutional revision around the world over the past year. This edition contains over 80 jurisdictional reports. Each report explains and contextualizes events in constitutional reform over the previous year in a given jurisdiction. Constitutional reform is defined broadly to include constitutional amendment, constitutional dismemberment, constitutional mutation, constitutional replacement and other events in constitutional reform, including the judicial review of constitutional amendments. This chapter explored the 2021 constitutional review process in Botswana.

5.8 Schrage, EJH; Van Der Walt, JA; Van der Walt, G and Hamukuaya, H *The Road to Justice – The Bible and the Law as Cornerstones of Civilisation and Culture* (2023)

ABSTRACT

The relationship between art, Christian culture and the law often receives attention. It is trite that law influences all human lives as well as culture and art. The law, however, does not only provide a context within which art and culture can develop, but it is also the cornerstone of civilisation and culture. On the other hand, we must contemplate whether civilisation and culture are necessary conditions for a legal system. This book consists of a compilation of essays narrating the influence of principles from the Bible – on which the Christian belief is premised and practised by Christians worldwide – on law and on culture. Consideration is given to the foundation of the law on different and well-known Biblical texts. The interplay between Christian principles vis-à-vis the law and culture is considered and unpacked in this research. In addition, copies of well-known art depicting scenes from the Bible enhance each chapter. The main author, the late Prof. Eltjo Schrage, passed away shortly before the book was published with the assistance of Prof. Jan Adriaan van der Walt, Dr Glynis van der Walt and Dr Hashali Hamukuaya.

5.9 Snail ka Mtuze, S. Dr. Ifeoma Nwafor: Cybercrime and the Law: Issues and Developments in Nigeria (2022) CLDS Publishing 1–285. Int. Cybersecur. Law Rev. 4, 253–254 (2023)

https://doi.org/10.1365/s43439-023-00080-3

ABSTRACT

Book review done by Prof Sizwe Snail published 30 January 2023.

5.10 Vrancken, P *State Ocean Jurisdiction* (2023)

ABSTRACT

Proposing a systematic analytical framework which assists in understanding and applying the international law regime governing State ocean jurisdiction with a view to improved ocean governance for sustainable development, this book distinguishes between, and focuses on, the form, the ground, the scope and the purpose of State ocean jurisdiction. Defining jurisdiction as the international-law authority of a State to be involved in a factual matter on the basis of a valid legal ground to perform authoritative acts impacting on that matter, it disaggregates the concept the complexity of which often leads to States failing to make full use of their existing ocean jurisdictions. In the process, it identifies when and to what extent there are gaps and overlaps of jurisdictions. Bringing clarity on an inevitably complex and often misunderstood framework that is aimed at striking a universally accepted balance of competing interests, the book lays the foundation for future research, contextualising the position of State ocean jurisdiction not only in terms of ocean governance, but in the whole of public international law. With an original systematic focus on State ocean jurisdiction, the book will be of interest to academics, students and practitioners working in the areas of international law of the sea, ocean governance, human rights and environmental law.

5.11 Vrancken, P. (Ed.). (2023). *Law of the Sea: Contemporary Norms and Practice in Africa*. Wagenaar, T., Ali, K., Brillembourg, C., Egede, E., Okafor-Yarwood, I., Pasipanodya, T., Snow, B., & Tsamenyi, M. (Authors). Juta.

ABSTRACT

This expanded version of P Vrancken & M Tsamenyi (eds) The Law of the Sea – The African Union and its Member States (2017) Juta consists of six volumes aimed at reflecting comprehensively the, contemporary norms and practice in Africa in the field of the law of the sea. Volume I: Contextual perspectives. Volume II: Global, continental and regional perspectives. Volume III: National perspectives. Volume IV: Zone-related comparative perspectives. Volume V: Use-related comparative perspectives. Volume VI: Settlement of disputes.

5.12 Wagenaar, T; Ali, K; Brillembourg, C; Egede, E; Okafor-Yarwood, I; Pasipanodya, T; Snow, B & Tsamenyi, M (2023) *Law of the Sea: Contemporary Norms and Practice in Africa*. Juta. Vrancken, P. (Ed.).

ABSTRACT

This expanded version of P Vrancken & M Tsamenyi (eds) *The Law of the Sea – The African Union and its Member States* (2017) Juta consists of six volumes aimed at reflecting comprehensively the, contemporary norms and practice in Africa in the field of the law of the sea. Volume I: Contextual perspectives. Volume II: Global, continental and regional perspectives. Volume III: National perspectives. Volume IV: Zone-related comparative perspectives. Volume V: Use-related comparative perspectives. Volume VI: Settlement of disputes.

AWARDS AND ACHIEVEMENTS

6.1 Ndimurwimo, L Faculty of Law Researcher of the Year (2023)

6.2 Ntontela, M Faculty of Law Emerging Researcher of the Year (2023)

MEDIA COVERAGE

7.1 **Phorego, M Interview with Mr Thabiso Kotane on Power FM, 13 July 2023, regarding the outcome of the Constitutional Court judgment on former President Jacob Zuma's bid to overturn an earlier ruling by the Supreme Court of Appeal that he must return to prison.**

7.2 **Van As, HJ Director of the Centre for Law in Action, Prof van As hosts regular talks on fisheries crime on Radio Islam International. A total of 3 talks on live radio in 2023.**

7.3 **Van As, HJ News24: "FishFORCE virtual game to assist fisheries' law enforcement" – 16 February 2023 https://www.news24.com/news24/community-newspaper/ud-news/fishforce-virtual-game-to-assist-fisheries-law-enforcement-20230215**

7.4 **Van As, HJ Biz Community: "How gaming is helping protect our oceans" – 3 March 2023 https://www.bizcommunity.com/Article/196/628/236516.html**

7.5 **Van As, HJ Mandela University News: "FishFORCE Academy assists fisheries law enforcement with virtual game" – 7 February 2023 https://news.mandela.ac.za/News/FishFORCE-Academy-assists-fisheries-law-enforcement**

7.6 **Van As, HJ Fishing Industry News and Aquaculture: "Fishery Control Officers Are Upping Their Game!" – 16 February 2023 https://www.fishingindustrynewssa.com/2023/02/16/fishery-control-officers-are-upping-their-game/**

7.7 **Van As, HJ Engineering News: "Mobile game to help law enforcement officers in the fisheries sector" – 10 February 2023 https://www.engineeringnews.co.za/article/mobile-game-to-help-law-enforcement-officers-in-the-fisheries-sector-2023-02-10**

7.8 **Van As, HJ Herald Live: "Nelson Mandela University academy launches mobile game to help sink ocean rogues" – 6 March 2023 https://www.heraldlive.co.za/news/2023-03-06-nmu-academy-launches-mobile-game-to-help-sink-ocean-rogues/**

7.9 **Van As, HJ IT-online: "Games could be critical in the fight to protect our oceans" – 3 March 2023 https://it-online.co.za/2023/03/03/games-could-be-critical-in-the-fight-to-protect-our-oceans/ https://www.thefreelibrary.com/Games+tipped+to+win+fight+to+save+SA%27s+oceans.-a0739369339**

NEWSLETTERS

8.1 FishFORCE Newsletter Edition #6 and #7

8.2 One Ocean Hub. Fisheries Law Enforcement Academy FishFORCE

ACHIEVEMENTS AND MILESTONES

9.1 CENTRE FOR LAW IN ACTION

9.1.1 PHASE 2 CONTRACT AWARDED TO FISHFORCE

The Fisheries Law Enforcement Academy (FishFORCE) has been awarded a Phase 2 contract by the Norwegian Ministry of Foreign Affairs for 3.5 years, effective from 01 July 2023. Phase 2 will extend the training on offer to provide a broader reach, higher level of professionalism and develop a southern African network of trained fisheries law enforcement professionals. FishFORCE will be the regional institutional anchor of the southern African network, providing national and regional platforms for education, training and research to enable cross-border action against Illegal fishing and crime in the fisheries sector.

9.1.2 FISHFORCE VIRTUAL LAW ENFORCEMENT GAME

FishFORCE collaborated with a Cape Town based animation, gaming and immersive technologies company called SeaMonster to develop a virtual law enforcement game specifically designed for law enforcement officers (LEOs) in the fisheries crime environment. The game titled: ‘FishFORCE Bridge Inspection’ was officially launched in February 2023. It is specifically designed for South Africa, and SADC countries. It is mobile based, available on smartphones and desktops. The game allows players to learn through experience and through the use of a virtual environment, while leading them to approach problem solving through critical thinking.

9.1.3 EXPANDING THE FISHFORCE FOOTPRINT IN AFRICA

FishFORCE hosted a high level meeting in Livingstone, Zambia where the buy-in and collaboration of additional countries in Africa, namely Zambia, Zimbabwe and Malawi was obtained. It is part of its objective to include land-locked countries and to cover inland waters. The meeting was attended by the political and executive level of key ministries and agencies from these countries. Each country will form a Country Chapter to ensure that a training programme that

addresses the training needs of participating countries is organically developed. The FishFORCE Academy will assist new partners administratively and financially to develop curricula, and harness existing local expertise to ensure that the Academy is technically relevant in the particular partner country. The FishFORCE project management team will meet with the Country Chapter at the commencement of the project implementation.

9.1.4 ILLEGAL WILDLIFE TRAFFICKING (INCLUDING MARINE LIVING RESOURCES) COLLOQUIUM FOR MOZAMBIQUE AND SOUTH AFRICA JUDICIARY

A colloquium, jointly hosted by the South African Judicial Education Institute (SAJEI) and officials from Mozambique were held in Pretoria. The objectives of the colloquium were:

- To map the nature and extent of Illegal Wildlife Trafficking in Mozambique and South Africa;
- To share cross-border judicial training initiatives on Illegal Wildlife Trafficking;
- To highlight and discuss case law on Illegal Wildlife Trafficking.

FishFORCE Director Professor Hennie van As was invited to address the members of the judiciary and presented on the following topics:

- Cross-border challenges in dealing with Illegal Wildlife Trafficking; and
- Overview of movement of products of Illegal Wildlife Trafficking in Africa.

9.1.5 THE PACIFIC ISLANDS FORUM FISHERIES AGENCY (FFA)

The Pacific Islands Forum Fisheries Agency (FFA) is an intergovernmental agency established in 1979 to facilitate regional co-operation and co-ordination on fisheries policies between its member states in order to achieve conservation and optimum utilisation of living marine resources, in particular highly migratory fish stocks, for the benefit of the peoples of the region, in particular the developing countries. The office campus is located in Honiara, Solomon Islands.

FishFORCE was requested to submit an expression of interest to register as a FFA Preferred Service Provider (PSP) for the provision of advisory and training services on Offshore Fisheries. It will function as learning and assessment advisor in the following broad areas of expertise:

- Fisheries management
- Fisheries trade and development
- Fisheries monitoring, control, surveillance and enforcement
- Administration and monitoring and evaluation
- E-Learning design

FISHFORCE IS RECOGNISED BY THE SADC REGIONAL TASK TEAM ON FISHERIES AS A CENTRE OF EXCELLENCE

FISHFORCE IS RECOGNISED AS THE PRIMARY TRAINING PROVIDER FOR THE MARINE AND OCEAN CRIME PRIORITY COMMITTEE OF OPERATIUON PHAKISA

SUPERVISION OF LLM TREATISES/DISSERTATION/THESES

10.1 APRIL 2023 GRADUATION

10.1.1 **Coetzee, L supervised NGOBESE, Nokhwezi Xatyiswa "Exclusion of the Primary Residence from an Insolvent Estate and Debt Enforcement Procedures" completed for April 2023 graduation.**

10.1.2 **Erasmus, D supervised MNYAKAMA, Mzimkhulu "The Prevention of Money Laundering in the Use of Cryptocurrency" completed for April 2023 graduation.**

10.1.3 **Erasmus, D supervised MOSES, Andrew Paul "The Use of Police Force in Crowd Management" completed for April 2023 graduation.**

10.1.4 **Erasmus, D supervised SINUKA, Zamile Hector "The Imposition of Life Sentences in Rape Case" completed for April 2023 graduation.**

10.1.5 **Gathongo, JK supervised MBONGWANA, Patiswa "Workplace Discrimination Based on Pregnancy" completed for April 2023 graduation.**

10.1.6 **Gathongo, JK supervised MPAMBANI, Ntombizodwa Rose "Affirmative Action and People with Disabilities in the Workplace" completed for April 2023 graduation.**

10.1.7 **Gathongo, JK supervised THATHOBA, Portia Chwayita "The Enforcement of Settlement Agreements and Arbitration Awards" completed for April 2023 graduation.**

10.1.8 **Goliath, AA supervised NKONTSO, Siviwe "The Legislative Regulation of Consensual Sexual Acts by 16 and 17 Year Olds" completed for April 2023 graduation.**

10.1.9 Hamukuaya, H with co-supervisor Qotoyi, T supervised MNTWELIZWE, Sandisiwe "The Dismissal of an Employee who Refuses to Vaccinate Against Covid-19" completed for April 2023 graduation.

10.1.10 Newman, SP and co-supervisor Botha, JC supervised YOUNG, Lindsay Nicola "The Legal Aspects of Fairtrade Objectives and Socio-Economic Development in South Africa" completed for April 2023 graduation.

10.1.11 Van der Walt, JA supervised MASENYA, Mogodi Mcdonald "An Evaluation of the National Minimum Wage Dispensation" completed for April 2023 graduation.

10.1.12 Van der Walt, JA supervised NTSHOZA, Zoleka Albertina "The Programmatic Enforcement of the Affirmative Action Provisions of the Employment Equity Act 55 of 1998" completed for April 2023 graduation.

10.2 DECEMBER 2023 GRADUATION

10.2.1 **Biggs, L supervised NHLEMA, Kudzaiishe Daniel "The Regulation of Social Media Practices in the Workplace" completed for December 2023 graduation.**

10.2.2 **Botha, JV supervised GROOTBOOM, Helenique Janielle "The Requirement of a Fixed Residential Address for Bail: Unfair Discrimination on the Basis of Poverty" completed for December 2023 graduation.**

10.2.3 **Erasmus, D supervised MATABATA, Edmyrach "Sentencing in Terms of the Doctrine of Common Purpose" for December 2023 graduation.**

10.2.4 **Gathongo, JK supervised MAFUYA, Aphelele Viwe "Inherent Requirement of the Job as a Defence to Unfair Discrimination" completed for December 2023 graduation.**

10.2.5 **Gathongo, JK supervised NDABENI, Ntombesine "The Regulation of Fixed Term Employment" completed for December 2023 graduation.**

SUPERVISION OF LLD THESES

11.1 APRIL 2023 GRADUATION

11.1.1 Botha, JC with co-supervisors Mukheibir, A and Taiwo, EA supervised OSUNTOGUN, Tope Adefemi "The Regulation of Communications Surveillance in Nigeria" completed for graduation April 2023.

ABSTRACT

Rapid innovations in ICT undermine the right to privacy. Communications surveillance without notice is particularly harmful. Yet, surveillance enables law enforcement by permitting the remote gathering of evidence and the acquisition of metadata. The study examines how communications surveillance is regulated in Nigeria, providing recommendations for a new surveillance regime with adequate safeguards for human rights. The study establishes that the legal framework for communications surveillance in Nigeria does not meet the global standard. Using the South African law as a comparator and drawing on relevant international and regional law on the right to privacy and communications surveillance, reform is recommended for new communications surveillance laws in Nigeria.

11.1.2 Vrancken, PHG supervised CHASAKARA, Rachael Sharon “Marine Spatial Planning by the State as Trustee of Coastal Public Property” completed for graduation April 2023.

ABSTRACT

The oceans are under increasing human pressures and face an unprecedented ecological crisis that threatens the future of life on earth. Marine spatial planning (MSP) and the public trust doctrine (PTO) propose frameworks to address this situation. This study examined the international and South African law instruments on MSP and the PTO. It was concluded that the MSP instruments are consistent with the PTO that underpins South Africa's environmental law framework. Nevertheless, the study proposed that the PTO be expressly mentioned in the MSP instruments. Express PTO provisions would serve as continual reminders to stakeholders and the state of the latter's PTO duties when performing MSP-related acts. Such provisions would also contribute to greater state accountability because trust beneficiaries would find it easier to challenge the state should it fail to fulfil its duties as trustee.

11.2 DECEMBER 2023 GRADUATION

11.2.1 Van der Walt, JA supervised BONO, Luvuyo Livingstone "A Comparative Analysis of an Essential Service System" completed for graduation December 2023.

ABSTRACT

The thesis investigates and critiques the essential service system in South Africa. The study analyses the South African essential services system and compares it to the New Zealand and Australian systems. The candidate reaches the conclusion that although the evolution of the substantives provisions of allowing limited strikes in essential services are positive and have a more limited erosion of the constitutional right to strike, the enforcement of the system is inadequate. Proposals are made to remedy these challenges.

11.2.2 Van der Walt, JA supervised FOCA, Nolusindiso Octavia "Violent and Intractable Strikes and the Right to Strike" completed for graduation December 2023.

ABSTRACT

This study examines violent strikes in South Africa, its historical origin and the socio-economic factors that trigger violence, while considering the legislative developments over the years to balance the right to strike and the right of employer and non-striking workers to not be exposed to criminal elements. This thesis argues that strike violence can be averted through further amendments to the Labour Relations Act to incorporate criminal sanctions, which will serve as a deterrent for future misconduct by striking workers.

FACULTY OF LAW STAFF MEMBERS GRADUATING

12.1 WAGENAAR, Tanya "The Integration of Marine Bioprospecting Governance Regimes" (Vrancken, PHG (supervisor); Marx, FE (Late) (co supervisor))" completed for graduation December 2023.

ABSTRACT

This study aimed to assess how marine bioprospecting is governed in areas within national jurisdiction (AWNJ) and areas beyond national jurisdiction (ABNJ), to determine how these regimes can best be integrated to strengthen the governance of marine bioprospecting for technical and scientific equity between developed and developing states. The study showed that, while there is general compatibility between the regimes applicable to biodiversity and the marine environment, the intellectual property (IP) regime is seemingly incongruent with the regimes applicable to biodiversity and the marine environment. The proposed international legally binding instrument (ILBI) to govern biodiversity of ABNJ represents an ideal opportunity to integrate these regimes and the ILBI needs to engage with IP in a way that existing frameworks have not.

CONFERENCES AND COLLOQUIUMS HOSTED BY THE NELSON MANDELA FACULTY OF LAW

13.1 Annual 14th Private Law and Social Justice Conference, Theme: Rights, relationships, resources and remedies, Date: 7–8 August 2023

https://privatelaw.mandela.ac.za/privatelaw/media/Store/previous%20conference%20programmes/conference-programme-2023.pdf