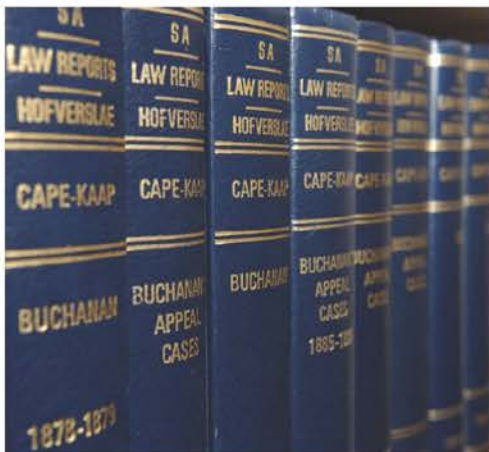


# RESEARCH OUTPUTS 2016

## Faculty of Law

*Defining tomorrow*



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# ARTICLES

## 1.1 ACCESS TO JUSTICE

### 1.1.1 Welgemoed, M “Die balans tussen kliniese regsopleiding en regstoegang per se in ’n regslyniek – ’n delikate spankoord”

*LitNet Akademies* 2016 Vol 13 (2) 753 - 777

#### **Abstract**

Law clinics form part of the law faculties of universities and play an important role in the practical education of law students. Students, mostly in their final year of legal studies, are educated and trained with regard to aspects of legal practice, which education is to a large extent conveyed to them by letting them do practical work at law clinics. This teaching method – which is not necessarily the only teaching method followed by all law clinics – may form part of the curriculum of the particular law faculty. This article is based on a particular teaching method followed by some law clinics called the live client teaching method. In terms of this teaching method, law students assist indigent members of society by providing them with legal advice, as well as with other legal matters, thus providing access to justice to the public. In doing this, the students gain knowledge by observing and executing certain tasks. This is known as experiential learning. Furthermore, it goes without saying that because law clinics form part of the law faculties of universities, this particular type of teaching and learning must include an academic component. Therefore, both practical (providing access to justice) and academic (teaching and learning) components are of importance in ensuring that the students undergo the best possible practical legal training. Together, these two components culminate in clinical legal education.

Access to justice in the context of this article simply refers to a person’s access to available and applicable legal remedies, as well as the provision of legal representation for such a person. It is important that the law should be accessible to everyone in society, not only to people who can financially afford the services of attorneys and advocates. The Constitution, which is the supreme

law of South Africa, contains a Bill of Rights that provides in section 34 that “[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”. In this regard, the Bill of Rights must be interpreted in a broad manner to mean that people do not have access only to the courts and other fora with regard to the resolution of legal disputes, but also to legal practitioners who can provide the necessary legal representation for them.

Clinical legal education is usually provided to law students at law clinics by practising attorneys known as clinicians. Clinicians must have a sound knowledge of the management of a legal practice and must have a good overall comprehension of substantive law in order to properly educate and train the law students for entering into legal practice after completion of their studies. Clinicians therefore fulfil a dual task, namely being educators as well as legal practitioners. They must train the law students in a way that keeps the reputation and overall professional esteem of legal practice in high regard. The training of the students includes consultations with members of the public regarding legal problems which they may be experiencing, drafting of professional-sounding legal letters and other legal documents, as well as the general application of their legal knowledge and legal ethics as required by legal practice. Apart from practical training at law clinics, classroom training sessions can also be arranged, during which students undergo additional training in a practical way. Such training can include basic rules of legal writing, basic professional and practice ethics, aspects of civil and criminal legal practice, and mock trials. Students may be required to complete written assignments, including the drafting of letters of demand, contracts, wills and testaments and pleadings, as well as to develop their civil and/or criminal litigation skills and understand the rules of evidence and general court etiquette during the mock trial sessions.

It could occur that one of the academic or practical components of clinical legal education is preferred to the other. This may result in the students’ not being exposed to the neglected component, for example, that the practical training of the students is not material and complete. There may be various reasons for

this, for example, where a clinician wants to focus only on the provision of legal services to the public, resulting in minimal attention being given to the education of the students. The opposite may also occur: students not being afforded the opportunity to have direct contact with members of the public because a clinician does not allow it. He or she may feel that the students are not fully capable to have direct contact with the public, or that a system by which the students gain experience by way of observing a clinician's actions and learning from that which they observe – that is by osmosis – is sufficient for their training purposes. However, as already stated, it must be kept in mind that clinical legal education is either a compulsory or an elective course within the LLB programme and that it entails a particular and set curriculum that must be adhered to. Therefore, it is crucial to see to it that all components provided for by a particular curriculum are being thoroughly attended to.

The point of departure is that where a law clinic employs the live client teaching method with regard to legal matters which may require litigation, there must be a balance between access to justice and the practical teaching and learning of the law students. The appropriate balance between these two components will be determined, as well as ways in which it can be restored or implemented if it does not exist. In this regard, the particular law faculty, or the department of the faculty within which the law clinic resides, may become involved in creating or restoring the desired balance. Law faculties must ensure that the appropriate persons are appointed as clinicians at law clinics. Clinicians must also develop their own clinical legal education skills by attending relevant training courses. The ideal teaching methodology involves a circular combination consisting of the following: students gaining experience, reflection by the students relating to their experiences, students understanding legal theory, as well as application of such theory by the students during their practical sessions at law clinics.

The argument forming the basis of this article is that law students must undergo training while they are in the process of providing access to justice to members of the public. The conclusion is that educating the student is the most important component and that access to justice must emanate from that, as well as complement it.

## 1.2 CHILD LAW

### 1.2.1 Van der Walt, G “The regulation of intercountry adoption in South Africa”

*Obiter* 2016 Vol 37 (3) 66 - 74

#### **Abstract**

A major child-welfare challenge presently facing South Africa is the securing of permanent placement for the increasing number of its abandoned and vulnerable children. Factors such as HIV/AIDS; poverty; neglect; exploitation; constraints on the availability of housing in urban areas; lack of access to services assisting in the maintenance of families; illegal immigration; child abandonment and other traumatic experiences (an example hereof is the violence against children experienced in South Africa), all contribute to the current position of many children in Africa, and in South Africa specifically. Despite communities doing the best they can to care for such vulnerable children, providing appropriate care remains a challenge (a UNICEF audit identified 400 voluntary organizations providing care for some 190 000 children). The devastating and long-term effects on the family as the primary unit of care of a child, where one or both parents have died, cannot be underestimated. However, increasing adult mortality as a consequence of specifically HIV/AIDS, has obliterated a large portion of the community who were acting as care-givers, and with it, the impact on the feasibility of this form of care is evident. South Africa experiences the highest rate of HIV/AIDS in the world, and many children have lost one or both parents to the disease. In 2010 an estimated 3,7 million children were orphaned in South Africa, approximately 50 per cent from HIV/AIDS. Since 2012, there were an estimated 53 million orphaned children on the African continent African Children Forum. This can be attributed to the HIV/AIDS epidemic which is prevalent on the continent, and further to war, famine and lack of education. In a report produced by the African Child Policy Forum it was observed that South Africa had the second highest number of intercountry adoptions on the African continent during the period 2004–2010, with a recorded 1583 cases. The extremely rapid rate of orphan hood and destitution among children makes it

difficult for families and communities to respond in the traditional manner of taking these children into extended families. UNICEF reported as early as 2010, that approximately 150,000 children were believed to be living in CHHs. The argument raised in the CRC in the past against intercountry adoption was largely due to the dispersed and unregulated intercountry-adoption system. This concern, however, has been addressed by the Hague Convention. Consequently, the potential of a child being granted a permanent placement abroad has become more palatable. When certain legislative provisions are considered, however, the question must be raised whether further barriers have been created by the legislature when seeking placement for a child in a permanent family .The Act clearly established who was eligible to adopt, but these provisions were not supported by any policy document outside the norms and standards which could provide guidance to organizations in respect to adoption criteria, which include *inter alia* age and size of family. Until recently, South African adoption organizations could establish their own policies and criteria regarding what they considered established a good adoption practice in line with their own value system, as long as no law, constitutional or otherwise, was infringed thereby. Concerning the hierarchy of alternative placement of a child, the South African Central Agency and accredited organizations were operating in unchartered waters. These agencies noted, with concern, the need to have a uniform set of principles, regulations and guidelines that could be followed in making such determinations. No uniformity in the approach of the relevant stake holders existed. With and by the enactment of the CA, and as such the incorporation of the provisions of the Hague Convention, these concerns have been addressed.

## **1.3 COMPANY LAW**

### **1.3.1 Coetzee L “Directors’ fiduciary duties and the common law: the courts fitting the pieces together”**

*Obiter* 2016 Vol 37 (2) 401 - 409

#### **Abstract**

This article analysed the court’s decision in *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* (12476/2015) [2015] ZAWCHC 113; 2015 (6) SA 338 (WCC) (4 August 2015). It considers the duty of the courts to develop the common law as provided for in section 158 of the Companies Act 71 of 2008. The note refers to a number of court decisions that considered the validity of exclusion of directors from board of directors meetings where directors are perceived to have a conflict of interest. The note proposes an amendment of The legislature is recommended to amend section 75(5) of the Companies Act (71 of 2008) to read “personal financial interest or any other conflict of interest in respect of a matter to be considered at a meeting of the board”. In addition to amending section 75(5), section 71(4) can also be amended to make the procedure provided for in section 71(4) applicable to a situation where the board considers a resolution to suspend a director. The proposed amendments will contribute to clarity and legal certainty. It will also make the statutory statement clearer to directors which is one of the advantages of partial codification.

### **1.3.2 Coetzee L and Van Tonder J-L “Advantages and disadvantages of partial codification of directors’ duties in the South African Companies Act 71 of 2008”**

*Journal for Juridical Science* 2016 Vol 41 (2) 1 - 13

#### **Abstract**

This article offers a critical examination of partial codification and its effect on the interpretation of the directors’ standard of conduct provision. Previously, the fiduciary duties and the duty of care and skill were regulated by the common law

and case law. In May 2004, the Department of Trade and Industry released a policy document entitled *South African company law for the 21<sup>st</sup> century: Guidelines for corporate law reform*. The policy document acknowledged that South Africa had no extensive statutory dispensation that covered the duties of directors. The policy document recognised the need to bring South African company law in line with international trends and to reflect and accommodate the changing environment for businesses locally and internationally. For the first time in South Africa's corporate law history, the *Companies Act 71 of 2008* partially codifies the fiduciary duties of directors, the duty of care and skill, and introduces the business judgement rule (also referred to as the 'safe-harbour provisions') into South African company law. The *Companies Act 71 of 2008* prescribes certain duties and its extent, but the content of those duties, such as *bona fides*, is still determined by the common law.

### **1.3.3 Van Tonder JL “An Analysis of the Directors’ decision-making function through the Lens of the Business Judgment Rule”**

*Obiter* 2016 Vol 37 (3) 562 - 580

#### **Abstract**

The main purpose of this article is to examine the standard of conduct required from a director in the exercise of his decision-making function, through the lens of the business-judgment rule. The business-judgment rule provides the circumstances in which the duty to act in the best interests of the company and the duty of care, skill and diligence will be satisfied by a director. In order to achieve the stated goal the board's statutory managerial authority, the standard of director's conduct required to discharge the duty of care, skill and diligence as provided for in section 76(3)(c), and the features and functions of the business-judgment rule will also be examined. Section 5(2) of the Act provides that, to the extent appropriate, a court interpreting or applying the provisions of the Act may consider foreign-company law. This is complementary to section 5(1) which directs that the Act must be interpreted and applied in a manner that gives effect to the purpose of section 7. The article will refer to the highly developed corporate law in the State of Delaware to assist the research in examining the content and meaning of the decision-making function as a standard of director's



conduct. For this reason, the corporate legislative framework of the State of Delaware will also be discussed.

## 1.4 CONSTITUTIONAL LAW

### 1.4.1 Govindjee, A & Van der Berg, E “Vultures before the Constitutional Court: The cheque is in the mail: *Khohliso v S and Others* [2014] ZACC 33”

*Obiter* 2016 Vol 37 (2) 369 - 380

#### **Abstract**

The legislative protection of wildlife in the Eastern Cape is not in what one would describe as a state of orderliness. Considering merely provincial or other regional legislation, one finds that there are at least three (four, if one includes the Problem Animal Control Ordinance 26 of 1957) such pieces of legislation operating simultaneously, or in parallel, depending upon where one finds oneself in the Eastern Cape, regulating the same subject matter. In the first place there is Decree 9 of 1992 which applies to what was once the independent homeland of Transkei before Transkei once again became part of the “new” South Africa following the constitutional developments since 1993. Decree 9 was issued by presidential decree upon the recommendation of a Military Council, following a military coup which soon replaced the “democratic” government of the Transkei. Similarly there is the Nature Conservation Act 10 of 1987 (Ciskei) which applies to what was the independent homeland of Ciskei, which also became part of South Africa following the same constitutional developments since 1993. (The Ciskei too suffered a military coup soon after attaining independence.) As for the remainder of the Eastern Cape, the subject matter is regulated by the (Cape) Nature and Environmental Conservation Ordinance 19 of 1974, a creation of the Cape Provincial Council then in existence. The Provincial Councils were ultimately abolished by the Provincial Government Act 69 of 1986, and their law-making powers were transferred to the Executive.

The result of this farrago of legislation is that the status of each piece is unclear. Do they constitute original legislation or delegated legislation, or did they constitute legislative acts as opposed to executive acts? As if the matter is not complicated enough, Parliament has adopted (national) legislation which overlaps with the subject matter regulated by the aforementioned provincial or

regional legislation, namely the National Environmental Management: Biodiversity Act 10 of 2004 in terms of which the relevant Minister adopted the Threatened or Protected Species Regulations (GN R150 / GG 29657 / 20070223). A new draft set of such Regulations has been published for comment (GN255 and 256 / GG38600 / 20150331).

In 1994 the sovereignty of Parliament gave way to the rule of law and the supremacy of the Constitution of the Republic of South Africa, 1996 (the Constitution). The validity of legislation could now be challenged before the courts on the grounds that it was in conflict with the Constitution. In this regard section 167(5) of the Constitution provides that the Constitutional Court had to confirm an order of invalidity made by a High Court in respect of an Act of Parliament, a provincial Act or conduct of the President. In terms of section 172(2)(a), the declaration of invalidity had no force unless confirmed by the Constitutional Court.

On 20 February 2010 Ms Nokhanjo Khohliso (“the Appellant”) ran afoul of the Transkei Decree 9 of 1992 having had in her possession two vulture feet in contravention of the Decree. The Appellant was a traditional healer and intended to use the feet as ingredients to a remedy designed to protect her clients against theft. For her troubles, the magistrate’s court handed her a sentence of a fine of R4000.00 or twelve months imprisonment. The Appellant appealed to the Eastern Cape High Court, Mthatha, against her conviction, essentially challenging the constitutionality of the provisions of the Decree in terms whereof she was convicted. The key question that is examined in this note is whether a declaration of such unconstitutionality is subject to confirmation by the Constitutional Court in terms of section 167(5) and 172(2)(a) of the Constitution (*supra*). Reduced to its essence, the issue is whether legislation of the nature of Decree 9 is subject to the abovementioned two sections.

## **1.5 CRIMINAL LAW**

### **1.5.1 Knoetze, I and Crouse, L “DNA processing contemplated in the Criminal Law (Forensic procedures) Amendment Act 37 of 2013 and the constitutional right to privacy”**

*Obiter* 2016 Vol 37 (1) 36 - 65

The article focuses on the provisions of the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013, which established the National Forensic DNA Database (NFDD) of South Africa. The implications of DNA taking, retention, and profiling on an individual’s constitutional rights are discussed with special reference to the provisions of the Protection of Personal Information Act 4 of 2013 (POPIA). The value of DNA evidence in combating crime is not disputed. Policies relating to the parameters of the database and the duration of DNA storage are also highlighted. It is submitted that the different categories of expungement of DNA samples and profiles raise constitutional issues. The article also deliberates whether there is adequate awareness of rights and adequate resources to ensure the proper destruction or expungement of DNA samples. Although the writers are *prima facie* of the opinion that the individual’s right to privacy is not violated by the abovementioned Acts, only time will tell whether this opinion is correct.

## 1.6 CRIMINAL PROCEDURE

### 1.6.1 Erasmus, D “S v Pistorius: Open justice, media coverage of court proceedings and the elephant in the room”

*Litnet Akademies* 2016 13 (3) 878 - 912

#### **Abstract**

The murder trial of the world-famous paralympic athlete and icon Oscar Pistorius, in connection with the killing of his girlfriend, the model Reeva Steenkamp, was the first criminal trial to be televised live in South Africa. This case generated unprecedented media coverage and was declared the newsmaker of the year for 2014.

Pistorius was charged with murder, read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1977, as well as three counts of contravening sections of the Firearms Control Act 60 of 2000. On 12 September 2014 Masipa J acquitted Pistorius of murder, but convicted him of culpable homicide for the killing of Steenkamp. In addition, he was convicted on one count in terms of the Firearms Control Act. On the conviction of culpable homicide he was sentenced to five years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1997, and on the firearms-related conviction he was sentenced to three years' imprisonment, wholly suspended for five years. The court ordered that the sentences be served concurrently.

The state applied for leave to appeal against both the conviction on culpable homicide and the sentence imposed in respect thereof. On 10 December 2014 Masipa J granted leave to appeal only against the conviction on culpable homicide.

Pistorius was released from prison on 19 October 2015 and placed under house arrest. The appeal hearing in the supreme court of appeal was heard on 3 November 2015 and judgment was reserved. On 3 December 2015 the court ruled in favour of the state and the conviction on culpable homicide was set aside and replaced with a conviction of murder. The case was remitted to the

trial court for consideration and imposition of a fresh sentence. Pistorius lodged an application for leave to appeal to the constitutional court on 11 January 2016 but this application was refused on 3 March 2016.

Pre-sentence proceedings took place before Masipa J from 13 to 15 June 2016. The state argued that the prescribed minimum sentence of 15 years' imprisonment should be imposed. Pistorius was, however, sentenced to six years' imprisonment. On 26 August 2016 the state brought an application for leave to appeal against this sentence on the basis that it was shockingly inappropriate, which application was dismissed with costs. The state subsequently petitioned the supreme court of appeal for leave to appeal, but the outcome of the petition is still pending.

This contribution will not focus on the legal question of whether Pistorius acted intentionally or negligently when he shot and killed Reeva Steenkamp. The focus will be placed on the impact the live televising of the proceedings, in both the trial court and the court of appeal, had on the trial of the accused and the criminal justice system in general.

The trial was preceded by an application launched by the electronic and printed media in *Multichoice (Proprietary) Limited v National Prosecuting Authority* 2014 1 SACR 589 (GP), where permission was sought to cover the entire trial of Pistorius via radio and television broadcasts as well as through photographs in the printed media. The judgment highlighted the interaction between the proper functioning of the criminal justice system and the zealotry of the media to cover court proceedings. Different, apparently conflicting constitutional rights, such as the right to a fair trial on the one hand and the right to freedom of expression and the principle of open justice on the other hand, became relevant during this inquiry.

The applicants argued that both Pistorius and the deceased were local and international icons, which generated immense public interest both locally and internationally. They highlighted that the bail proceedings had been chaotic, as there had been insufficient space for reporters and members of the public. Permission was sought to install television and still cameras in court to cover the

trial in the media. This application was originally opposed by both the director of public prosecutions and Pistorius on the ground that it might impact on the fairness of the trial. After discussions, the director of public prosecutions withdrew his objection, but Pistorius objected against broadcasting of the trial by any means.

In its judgment, the court set out the historical approach to applications by the media to cover judicial proceedings by analysing prior applications. In addition, the court referred to *SA Broadcasting Corporation Ltd v Thatcher* [2005] 4 All SA 353 (C) where a comparative legal overview of the coverage of court proceedings in the United Kingdom, the United States of America, Canada, Australia and New Zealand was undertaken.

The court found that there was a direct conflict in this matter between the right of the accused to a fair trial and the right to freedom of expression, which includes the right to freedom of the press. In an attempt to balance these conflicting rights, the court should attempt to uphold the interests of justice. In terms of section 173 of the Constitution, the court has the power to regulate its own procedure and processes, taking into account the interests of justice. This balancing process should not have the result that one right will be watered down against the other. The values of openness and accountability underlie our constitutional democracy. Allowing media coverage, while still protecting the right to a fair trial, would make the justice system more accessible to the public at large and dispel negative and unwarranted criticism against the system. The court accordingly allowed the setting up of broadcasting equipment and determined which portions of the trial could be transmitted live as well as what could be filmed.

This contribution further affords an updated comparative legal overview of the five jurisdictions discussed in the *SA Broadcasting Corporation Ltd v Thatcher*. The in-court media cover guidelines applicable in New Zealand are set out and discussed in detail. It is commented that these guidelines are comprehensive and well structured. It creates a practical framework to guide presiding officers when exercising their judicial discretion to allow or refuse media coverage.

The main arguments in favour of and against media coverage are then evaluated. These arguments are based on the interest and role of the various role players concerned with court proceedings as well as the underlying constitutional rights the role players rely on.

The media argue that they have the duty to provide members of the public with information, which in turn will educate members of the public about the judicial process and promote the principle of open justice. Section 16 of the Constitution supports this view.

Caution is expressed that the media often sensationalise high-profile cases and in that sense do not act as mere agents of the public reporting objective facts. Advocacy journalism affords the opportunity for journalists to resort to subjective reporting. What a television viewer sees is not what happened in court, as the final production is often influenced by the prejudices and ideological or political views of the producer.

The judiciary especially is critical of the media coverage of court proceedings, as it is feared that the dignity of court proceedings as well as the competency of courts to regulate their own proceedings may be impacted on. It is pointed out that these arguments do not have much merit today, as digital broadcasting equipment is totally unobtrusive and operates almost unnoticeably.

The parties to court proceedings are very important role players and the infringement there may be on the fairness of trials by media coverage is real, as it may have a negative impact on the parties, witnesses and the quality of evidence. The mere presence of television cameras may cause witnesses to be intimidated and become reluctant to testify. A real danger exists that witnesses may be influenced in their testimony and even adapt their evidence if they are able to follow the evidence of witnesses testifying before them. This, in fact, took place in the Pistorius trial when witness Darren Fresco admitted that he knew before testifying which issues would be canvassed with him as he watched the broadcasted evidence of witnesses who testified before him.



It is concluded that section 16 of the Constitution, which guarantees freedom of the press as well as the right to receive and share information, is in direct conflict with the right of an accused to a fair trial. This perceived conflict is created mostly by the insatiable craving of the public for real courtroom dramas and the pursuit of profit by media houses.

The negative effects of media sensationalism and irresponsible journalism can be prevented if other means are employed to give the public at large access to court proceedings, such as webcams being installed in courtrooms. In view of the fact that only 52% of South Africans have access to the internet and that the cost of streaming an entire trial is expensive for the end user, this mechanism seems impractical.

As 78% of South Africans have access to public radio and television broadcasts, it is recommended that a specially dedicated public television channel, akin to the current parliamentary channel, be utilised to cover high-profile cases. To eliminate the danger that the public broadcaster might be unwilling to broadcast high-profile cases involving politicians for example, it is suggested that any interested party, even members of the public, may apply to the presiding officer to have the trial covered on the dedicated public channel. It is suggested that the New Zealand application procedure be adopted and applied locally in this regard.

The problem of influencing witnesses may be addressed by introducing a lag period between the actual testimony of the witness and the broadcasting thereof. This will, however, affect the live character of the transmission. It will not be feasible to sequester witnesses as is done with jury members in high-profile cases in the United States of America.

Live media coverage of the Pistorius trial indeed afforded the first opportunity for ordinary members of the public to observe the operation of the South African justice system first-hand without attending court. The coverage furthermore supported and enforced the principle of open justice.

### 1.6.2 Erasmus, D & Hundermark, P “Access to justice: Ensuring quality legal aid representation in adversarial systems of criminal procedure”

*SADC Law Journal* (2016)

#### **Abstract**

Ten out of the fifteen SADC member states follow an adversarial system of criminal procedure. This system of criminal procedure assumes that partisan advocacy and the manipulation of evidentiary material placed before an impartial presiding officer will enable the latter to determine the “truth”. Implicit in this model of criminal procedure is the principle of equality of arms.

Undefended accused persons are not competent adversaries in a highly professionalized adversarial system. They lack the legal knowledge, skill and experience to take informed legal decisions, properly test the evidence adduced by the state, challenge the prosecutor’s actions and present their case adequately. Inequality of the parties, usually due to indigence and the absence of legal representation, can deny accused persons access to justice and impact on the fairness of the resultant trial.

In most of the SADC countries mechanisms to provide legal aid to indigent accused have been put in place. These methods usually entail that a legal representative is appointed via state funds to assist accused persons who fall within the qualifying criteria for legal aid. Guideline 5(c) of the UN Principles and Guidelines on Criminal Legal Aid refers to ‘a competent lawyer (to be) assigned by the court or other legal aid authority’. This implies that an accused person has a right to be represented by a legal representative who will be able to properly, effectively and competently present the case of the accused.

In a recent South African judgment the court commented that the way in which the allegation of rape was investigated, the case for the State was presented and the way in which the defence was conducted left the court with ‘a grave sense of disappointment’. The poor investigation of cases and incompetent legal representation on behalf of both the state and the defence place an immense

and unfair burden on presiding officers to fulfil their proper role as impartial arbiters to ensure that a fair trial takes place.

This judgment and others emphasize that mere legal representation is not sufficient to satisfy the proper application of the right to legal representation. What is called for is the provision of quality legal representation of a calibre that meets certain minimum requirements or standards. The South African Supreme Court of Appeal held that the constitutional right to legal representation must be real and not illusory.

In this paper it is argued that entities administering legal aid in SADC countries should employ quality control mechanisms to ensure that quality legal representation is provided, in order to ensure that the cases of accused persons are properly and effectively presented. This will ensure that accused persons receive a fair trial and the need for presiding officers to judicially intervene in the trial will be limited. The quality control mechanisms employed by Legal Aid South Africa are outlined and considered as a successful model to ensure that legal representation of quality is afforded to accused persons making use of legal aid assistance. It is argued that quality legal aid representation will, in turn, facilitate improved access to justice.

### **1.6.3 Erasmus, D & Ndzengu, C “A note on the introduction of the *Nullum crimen, nulla poena sine lege* or principle of legality in the South African asset forfeiture jurisprudence”**

*South African Journal of Criminal Justice* 2016 Vol 29 No 3 pp 247 - 271

The Prevention of Organised Crime Act 121 of 1998 provides for both criminal and civil forfeiture regimes. In the case of criminal forfeiture, the confiscation machinery provided for may only be invoked when the ‘defendant’ is convicted of an offence. Civil forfeiture provides for forfeiture of the proceeds of and instrumentalities used in crime, but this form of forfeiture is not conviction-based and may even be invoked when there is no prosecution. The National Director of Public Prosecutions (NDPP) via appointed legal practitioners chooses in each case which asset forfeiture regime to invoke, depending on the facts of the case. The recent judgment of *Ntsoko v National Director of Public Prosecutions* deals

with a review of the decision of the NDPP to resort to civil forfeiture, as opposed to criminal forfeiture, and an attempt to constrain the exercise of these powers in this regard. The court held that the decision of the NDPP to invoke civil, instead of criminal forfeiture, is reviewable as a consequence of the principle of legality. In this contribution it will be argued that the court in fact introduced and extended the application of the principle of legality into asset forfeiture jurisprudence. The extension of the principle of legality was applied as a constitutional imperative or an interpretive tool to review the decision of the NDPP.

## 1.7 HUMAN RIGHTS

### 1.7.1 Abrahams, D “The possibility of the right to religion emerging as a *jus cogens* norm” (Part I)

*Obiter* 2016 Vol 37 (2) 201 - 227

#### Summary

This article has been divided into two parts, owing to its nature and scope. The aim of the work is to explore the possibility of the right to religion emerging as a *jus cogens* norm. In Part One, the concept of *jus cogens* and its role in the international community, together with the nature of the right to religion, will be discussed. It is on this foundation that the reader will be able to understand why enforcement is such an issue when considering countries such as the Democratic People’s Republic of Korea, which serves as a case study and is discussed in detail in Part Two. Gross violations against the right to freedom of religion still exist despite the prevalence of international instruments protecting such rights. Something more needs to be done to hold human rights transgressors to account.

### 1.7.2 Abrahams, D “The possibility of the right to religion emerging as a *jus cogens* norm” (Part II)

*Obiter* 2016 Vol 37 (3) 53 - 348

#### Summary

This article follows a previous article published in *Obiter* Vol 2 of 2016. In that article the concept of *jus cogens* and its role in the international community, together with the nature of the right to religion, were discussed. In Part Two, the seriousness of such human rights violations needs to be appreciated by the international community at large. To this end, the Democratic People’s Republic of Korea will serve as a case study, examining the extent of the DPRK’s compliance of its obligations *vis-à-vis* the right to religion. This should ultimately lead to an understanding as to why the right to religion emerging as a *jus cogens* norm will not solve the problem of enforcement, and even if it could, due to the uncertainty surrounding the formation of *jus cogens* it is unlikely that other human rights will be added to the list in the near future.

**1.7.3 Botha, J and Govindjee, A “The regulation of racially derogatory speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000”**

*The South African Journal of Human Rights 2016 32 (2) 293*

**Abstract**

A significant number of hate speech cases in South Africa involve the use of racially derogatory epithets in the form of inter-personal racial slurs. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), as a transformative human rights and anti-discriminatory statute, is ideally suited to regulate the use of such speech and to provide a means grounded in law to overcome the harm caused thereby both to its victims and to the broader societal good, which includes the constitutional ideal of an equal and pluralistic society embracing tolerance. Section 7(a) of PEPUDA, however, is an inappropriate tool for the regulation of racially derogatory epithets, which are more suitably addressed through the medium of the narrowed down hate speech regulator proposed for section 10(1) of PEPUDA.

## **1.8 LABOUR LAW**

### **1.8.1 Govindjee, A & Leppan, F “Bargaining in bad faith in South African Labour law: An antidote?”**

*Obiter* 2016 Vol 37 (3) 474 - 486

#### **Abstract**

While good faith bargaining is recognised in many overseas jurisdictions and by the International Labour Organisation, such a duty has not been incorporated in South African labour legislation. Given the many recent examples of labour unrest in South Africa, it is time to consider whether there should be a duty to bargain in good faith when taking part in collective bargaining. Recognising such a duty would arguably benefit both employers and employees and South African as a whole.

### **1.8.2 Govindjee, A & Olivier, M “Protecting and integrating migrant workers in ASAN social security systems”**

*Institutions and Economies Journal* October 2016 Vol 8 (4)

#### **Abstract**

This paper considers how social security systems in Southeast Asia may be adapted in order to improve the level of protection and integration of low-skilled migrant workers and to facilitate the mobility of workers, without negatively affecting the economic situation in the region. This involves a discussion of existing unilateral, bilateral and multilateral arrangements within the Association of Southeast Asian Nations (ASEAN). Best practices within ASEAN countries, such as the Philippines, and examples of bilateral agreements involving ASEAN countries containing social security provisioning, are examined against the backdrop of the developing international and regional standards framework. The role of countries of origin in providing social protection for migrant workers and the portability of benefits is also briefly discussed. It is submitted that a co-ordinated, integrated yet streamlined approach may be able to provide solutions and options for excluded categories of migrant workers and their family

members, including informal economy workers and undocumented migrants. All of this needs to be supported by suitable regulatory and institutional arrangements which inform and facilitate the adoption of key interventions at a national, bilateral and regional level to enhance the social security position of ASEAN migrant workers and, to the extent required, their families.

### **1.8.3 Myburgh ,A “Reviewing CCMA Awards: Undecided and controversial issues”**

*ILJ* 2016 Vol 37 2193 - 2210

#### **Abstract**

This article examines undecided and controversial issues relating to the review of CCMA arbitration awards. Firstly, with what intensity should a review for reasonableness be undertaken by the Labour Court? This involves trying to determine the point at which the elastic of reasonableness should snap so as to give rise to a review. Secondly, assuming that all material errors of law are reviewable, what constitutes an error of law, and the finding by the Supreme Court of Appeal in the *Oscar Pristorius* case that a failure to consider material facts constitutes an error of law. Thirdly, what is the reach of the (latent) gross irregularity ground of review? Explored under this head is the *Tao Ying* debate; Zondo J’s judgment in *Toyota* dealing with the failure by commissioners to resolve and determine issues; and the meaning of the phrase ‘misconceived the nature of the enquiry’. The law on each of these issues is unsettled. The article concludes with the suggestion that it is time that the Constitutional Court pronounces on the review test again.



#### **1.8.4 Van der Walt, A Abrahams, D & Qotoyi T “Regulating the termination of employment of absconding employees in the public sector and public education in South Africa: A preliminary view”**

*Obiter* 2016 Vol 37 (1) 140 - 146

##### **Introduction**

South Africa is a constitutional democracy with a justiciable Bill of Rights. Section 23(1) of the Bill of Rights entrenches the right to fair labour practices. National legislation, including the Labour Relations Act 66 of 1995 (LRA), gives detailed context to the constitutional right to fair labour practices, including the right not to be unfairly dismissed, provided for in section 185(a). In terms of section 186(1) of the LRA a dismissal means “an employer terminated a contract of employment with or without notice”.

Section 188 provides further that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the dismissal is for a fair reason related to the employees conduct, or capacity, or based on the employer’s operational requirements, and the dismissal had been in accordance with a fair procedure. These provisions give effect to the Termination of Employment Convention 158 of the ILO (see in particular articles 3 to 14) and the constitutional right to fair labour practices contained in section 23(1) of the Constitution.

In the Public Service Act 103 of 1994 (PSA), section 17(3)(a)(i) provides that an employee other than an educator who absents himself without permission of his head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his last day of attendance at his place of duty.

In a similarly worded provision, section 14 of the Employment of Educators Act provides for the deemed dismissal of an educator who is absent from work for a

period exceeding fourteen (14) consecutive days without permission of the employer.

The issue that is addressed in this note is whether or not the provisions dealing with unexplained absence in the South African national and provincial public sector does not unreasonably limit the constitutional right to fair labour practices, and whether the provisions do not circumvent the essential provisions of Convention 158 of the ILO. The public service at local level is not affected, since the Public Service Act is not applicable to such employees. Such employees enjoy the same legal protection as private-sector employees. This note therefore explores how these issues may be addressed, by firstly considering the general legal position in relation to employees who are absent without leave as well as absconding employees. Secondly the “deemed dismissal” provisions in the public sector are discussed. Thirdly, the constitutionality of the “deemed dismissal” provisions are briefly considered. The note concludes by providing an analysis of the courts’ approach to this matter, as well as making certain recommendations regarding the way forward.

## **1.9 LAW OF THE SEA**

### **1.9.1 Vrancken, P & Ntola, SY “The delimitation of maritime boundaries on Africa’s eastern seaboard”**

*Journal of Ocean Law and Governance in Africa* 2016 (1) 54 - 104

#### **Abstract**

This article analyses the extent to which maritime boundaries have been delimited on Africa's eastern seaboard. The article starts by discussing the delimitation agreements which have been concluded. Following this, the article discusses two cases that have been submitted to a third party, namely the Eritrean/Yemen arbitration and the Kenya/Somalia dispute concerning maritime delimitation in the western Indian Ocean. The article then moves on to identify and discuss the maritime-boundary delimitations which are outstanding, largely owing to sovereignty disputes over dry land territory which affects claims to maritime zones between disputing States. Lastly, the article identifies and discusses the provisional arrangements of a practical nature that have been put in place by those States that have not yet delimited their overlapping maritime boundaries. The article concludes by suggesting that African States give priority to finalising their delimitations among themselves before attempting to resolve delimitation and related issues with other States in the region.

### **1.9.2 Vrancken, P & Marx, F “Birth, marriage and death at sea”**

*South African Yearbook of International Law* 2016 Vol 40

#### **Abstract**

This article examines the legal regime governing in South Africa births, marriages and deaths occurring at sea. The article starts by distinguishing and outlining the legal regime of the various maritime zones. Against that background, the article examines the legal implications of a birth at sea with regard to the citizenship of the newborn as well as the registration of the birth. The article then turns to the legal implications of a marriage at sea with regard to its conclusion and its registration. Finally, the article focuses on death-related legal issues, with emphasis on the

registration of deaths at sea, enquiries into the causes of deaths at sea, disappearances at sea, human remains at sea, wills executed at sea, the criminal taking of human life at sea. The article shows that a legal regime, which is inevitably complex due to the legal nature of the marine environment, is made even more complicated in South African law by failures to adequately take that complexity into account when drafting legislation and to ensure that the various pieces of legislation involved speak coherently to each other. It concludes by stressing that the situation with regard to births, marriages and deaths at sea is only a facet of a larger problem which can only be addressed as part of a comprehensive process of revision of South African marine and maritime law.

**1.9.3 Vrancken, P & Ntola, SY “Land sovereignty and LOSC: The Chagos Marine Protected Area Arbitration (Republic of Mauritius v United Kingdom)”**

*South African Yearbook of International Law* 2016 105 - 134

**Abstract**

This case discussion examines critically the Award and the separate opinions in *The Chagos Marine Protected Area Arbitration (Republic of Mauritius v United Kingdom)*. It does by focussing on the characterisation of the dispute, the jurisdiction of the arbitral tribunal and the merits. The contribution stresses that the lack of consensus among the members of the Tribunal confirms how delicate the relationship between the 1982 UN Convention on the Law of the Sea and sovereignty over dry land is. The conclusion reached is that the title of the UK to the Archipelago is invalid for the purpose of making a decision involving the interpretation and application of the Convention with regard to the contested MPA.

## 1.10 TRUST LAW

### 1.10.1 Nel EC “Unfettered, but not unbridled: the fiduciary duty of the trustee – *Wiid v Wiid* NCHC (unreported) 13-01-2012 Case no 1571/2006”

*Obiter* 2016 Vol 37 (2) 436 – 448

#### **Abstract**

The fiduciary duty and accompanying discretionary power of the trustee in South African trust law is considered, with particular reference to its application in *Wiid v Wiid*. The contents and exercise of trustees' discretion in light of the fiduciary duty has been examined and applied to the particular judgment. The conventional attribution by trust deeds of an unfettered trustee discretion is proven to be subject both to the limitations inherent to the fiduciary duty and the unique nature of the trust figure. It is submitted that, notwithstanding some equivocal statements by the court, valuable lessons for trustees could be taken from this case. It is submitted further that, irrespective of the theoretical basis of the fiduciary relationship between the trustee and the beneficiary, the practical exercising of the duty is sometimes much more challenging than many trustees may contemplate. The various tests applied by the court in deciding whether or not the trustees have applied their minds adequately to the facts before them, as well as the manner in which the court analysed the practical implications of the contents of the trust instrument, are identified and evaluated. The facts in *Wiid* are of major significance to trustees in illustrating the difference between the interests of an individual beneficiary and those of the trust as a body, representing beneficiaries as a whole. Trustees have a fiduciary duty towards all beneficiaries and must act in the best interests of all beneficiaries at all times. To achieve this end, they must first manage and administer the trust for the benefit of the beneficiaries, where after they must exercise their discretion to distribute impartially and fearlessly in terms of the trust instrument. This judgment should in particular be a wake-up call for independent trustees. Failure to critically scrutinise and check the conduct of co-trustees, including that of a founder who is also a trustee, may result in a breach of trust as well as a breach of the

resulting liability - with dire financial consequences for the independent or corporate trustee.

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- 2.1.5 Govindjee, A “2016 Juta Annual Labour Law Seminar” (with John Grogan and Puke Maserumule) (Cape Town, Port Elizabeth, Durban, Pretoria, Johannesburg and Bloemfontein) (October, 2016).
- 2.1.6 Ndimurwino, L “Application of Refugee Laws: A comparative analysis between South Africa and Tanzania” presented at the NMMU Faculty of Law 1st Annual Emerging Legal Scholarship Conference, 4-5 February 2016, held at NMMU.
- 2.1.7 Ndimurwino, L “Transformation of the South African legal fraternity and Faculty of Law at NMMU” presented at the BLA SC NMMU Opening Function held at NMMU South Campus, 4 April, 2016.

### **2.1.8 Welgemoed, M & David, D “The incorporation of street law into the legal practice-module at the Nelson Mandela Metropolitan University”**

*Ed O'Brien Street Law and Legal Literacy International Best Practices*

*Conference held in Durban, 1 - 3 April 2016*

#### **Abstract**

The Legal Practice-module, presented by the Law Faculty of the Nelson Mandela Metropolitan University is one of a kind legal course in South Africa in that Street Law forms an integral part thereof. Students must therefore complete and pass Street Law as a subject in order to be awarded the credit for Legal Practice. Why is this so and how did it originate? In short, the Nelson Mandela Metropolitan University Law Clinic experienced problems with the large number of students who had to be accommodated every year. Two supervisors had to supervise approximately 110 students per week, which raised a concern for adequate clinical legal education towards the students, as well as for professional and efficient access to justice to the indigent members of society. Furthermore, Legal Practice is a compulsory module at NMMU and therefore the number of students, registering for the subject, could not be limited in any way. The incorporation of Street Law into the module however solved the problem regarding the supervisor-student-ratio and contributed towards certain other benefits for both the students and the public, which will be discussed. The students, who register for Legal Practice, are divided into two groups. The first group will complete practical sessions at the NMMU Law Clinic during the first semester, while the second group will participate in the Street Law-program. During the second semester, this changes: group one will participate in Street Law, while group 2 will work at the Law Clinic. In this way, student numbers at the Law Clinic is limited; moreover, students are exposed to more than one way of community engagement and sharing of their legal knowledge.



## **2.2 INTERNATIONAL CONFERENCES**

- 2.2.1 Coetzee L “Law Schools and Community Outreach engagement” Symposium on Human Rights in South Sudan- toward a people centred Human Rights state in South Sudan, College of Law University of South Sudan, Juba 24-26 May 2016.**
- 2.2.2 Coetzee L “Street Law South Africa: Crimes against women and children- an interdisciplinary training approach” presented at the Elimination of Violence against Women Conference, 2016 Aberystwyth University, Mauritius 25 November 2016.**
- 2.2.3 David D “The Criminalisation of the Transmission of HIV- its impact on women in society” presented at the Elimination of Violence against Women Conference, 2016 Aberystwyth University, Mauritius 25 November 2016.**
- 2.2.4 David D “Education as a means of empowerment of women and children in society- a reflection on the use of the Street Law programme as an empowerment tool” presented at the 2<sup>nd</sup> Putrajaya International Conference on “Women, children, the elderly and disabled” in Kuala Lumpur, Malaysia, 3 December 2016.**
- 2.2.5 David D “20 years of the Bill of Rights: The South African experience on protecting women and children in a violent society” presented at the 2<sup>nd</sup> Putrajaya International Conference on “Women, children, the elderly and disabled” in Kuala Lumpur, Malaysia, 3 December 2016.**
- 2.2.6 Erasmus, D “Piercing the rape shield: (In)justice for Khwezi” presented at the First Annual Conference on the Elimination of Violence Against Women, Aberystwyth University Satellite Campus, Mauritius, 25 November 2016.**

- 2.2.7 Govindjee, A ‘Introducing Return-to-Work in a developing country context: A case study of Namibia’ co-presented by invitation in a plenary session of the *International Forum on Disability Management* (Kuala Lumpur, Malaysia, 22-24 November 2016).**
- 2.2.8 Govindjee, A “Achieving justice via independent and impartial tribunals and forums: Possible lessons from the CCMA of South Africa for India” co-presented by invitation at the opening plenary session of the *International Conference on Liberalization and Globalization: Changing Legal Paradigm* (Bangalore, India) (14-16 July 2016).**
- 2.2.9 Govindjee, A “Selected (comparative) dimensions of South African law, with particular emphasis on labour and social security law” presented by invitation at the *3<sup>rd</sup> Nordic Summer School on Legal Landscape of Rights in India*” (Bangalore, India) (13 July 2016).**
- 2.2.10 Govindjee, A “Improving return-to-work and disability management in the developing world: Pointers emanating from international instruments, standards and guidelines” co-presented at the 14<sup>th</sup> International Conference in Commemoration of Prof Marco Biagi on *Well-being at and through work* (Modena, Italy) (16-19 March 2016).**
- 2.2.11 Govindjee, A “Limiting labour law and social security protection to “employees” in South Africa: A constitutional perspective” presented by invitation at the *Hamburger Rechtsgespräche Seminar* on “Atypical employment in an international perspective” (Hamburg, German) (21 January 2016).**
- 2.2.12 Van der Walt, G” Intercountry adoption: are the child’s best interests served?” presented at the International Conference, National University of Bangalore, India 13 – 16 July 2016.**

Society’s’ understanding and acceptance as to the meaning of what constitutes a “family” is determined with reference to the social values in the particular state or

country, at that time. By whatever means we define “family”, it is well accepted in all societies, that the family is the foundation of our society, and as such, provides a child with a sense of both security and identity. One of the first announcements made by Nelson Mandela after becoming President of the Republic of South Africa related to the domestic application of the principles enshrined in the Convention of the Rights of the Child. Mr Mandela opined: *“There can be no keener revelation of a society’s soul than the way in which it treats its children.”*

The problem in that deciding what's best for a child regarding the determination of appropriate alternative care where the biological family is unable or not willing to care for such child , is more complex that one might consider at first glance. It is an exercise that falls into that blurry area between determining what's good for the child and what is realistically possible; what is most desirable for the child concerned *versus* what is least bad. The increased popularity of intercountry adoption as a form of alternative care is notable since its introduction to the international legal scene following World War II. What had its beginnings in humanitarian grounds, has developed to a consideration debatably deemed in certain circumstances.to be in the best interests of the orphaned or abandoned child. Such determinations are made in light of the recognition of the child as a bearer of rights. Despite the advent of constitutionalism in South Africa followed by the promulgation of the Children’s Act 38 of 2005, domestic adoption has remained underutilized, with the majority of children in need of care remaining in foster and/or institutionalized care. Like the Hague Convention on Intercountry Adoption, the South African Children’s Act does not expressly promote or encourage intercountry adoption for a child in need of care, focusing rather on the regulation of the process of intercountry adoption, in an attempt to eliminate the potential of the abusive practices experienced in the past. South Africa, like India is an impoverished Third World country. Furthermore, both countries are made up of communities that are multi-racial, multi-cultural and multi-religious. And the impact of HIV/AIDS on both countries cannot be overemphasized. South Africa is presently facing a child welfare crisis in its attempts to secure permanent placement for the increasing number of its abandoned and vulnerable children. Some see intercountry adoption as an opportunity to deliver children

from destitute lives whilst opponents to intercountry adoption perceive such procedures as “imperialistic.” Following South Africa’s ratification of the Convention on the Rights of the Child, The African Charter on the Rights and Welfare of the Child, and The Hague Convention, an obligation rests on the legislature to enact legislation which reflect the provisions of the international instruments. However, whilst the Convention on the Rights of the Child (in principle reflected in the African Charter) refers to intercountry adoption as a matter of last resort , the same is not true of the provisions of the Hague Convention, which focuses on the importance of a child being placed in a permanent stable family environment. Taking into account the socio-economic and cultural environment, is it fitting to ask how “last resort” should intercountry adoption be understood and implemented in a Third World country when making a determination which is deemed to be in the best interests of the child concerned. Currently in South Africa, the number of children placed in foster care has increased significantly. It is also to be noted that many vulnerable children are being placed in institutional care. On the contrary, adoption is on the decline. Despite communities doing the best they can to care for such vulnerable children, providing appropriate care remains a challenge. Traditionally in South Africa, where a child is deprived of his or her parent or parents, such child was cared for by the grandparents (specifically the grandmother), and other family members. The breakdown of these traditional mechanisms of support for children has contributed substantially to the plight of children that have been left orphaned and abandoned. Over the years, support by the extended family and the community has played a pivotal role in providing alternative care for orphaned children. However, increasing adult mortality as a consequence of specifically HIV/AIDS, has obliterated a large portion of the community who were acting as care-givers, and with it, the impact on the feasibility of this form of care is evident.

Section 28(2) of the Constitution of RSA, provides that the best interests of a child are of paramount importance in any matter concerning a child. With the dawn of the constitutional era, recognition of the right of the child to family and parental care, and protection, became constitutionalized. India too has provided

that the welfare of the child be decisive in any determination regarding such child.

The CRC considers intercountry adoption appropriate only when “the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin” (CRC , Art. 21(b)).The position of intercountry adoption in the hierarchy of care options as provided for in the CRC, is unclear. The CRC clearly adheres to the principle of subsidiarity which entails that intercountry adoption should always be “subsidiary” to domestic solutions, and, it appears as though the CRC considers intercountry adoption as a measure of **last resort**. However, it is not absolutely clear as to whether institutionalization is routinely considered to be a suitable means to care for a child, leaving intercountry adoption *de facto* the last resort. Article 20(3) provides that "foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children" all suffice as potential alternative care. Opponents of intercountry adoption would submit that in accordance with the principles of the CRC, any suitable placement for the child in his or her country of origin might include an institution or some undefined means of foster care. In effect the subsidiarity principle could trump the best interest provision. But The hierarchy to be followed in making a determination as to which option is deemed the most appropriate, particularly when considering intercountry adoption, and the place to be accorded to intercountry adoption amongst these potential options, remains elusive. Whilst accepting that the natural family remains the most appropriate unit of care for child, the Hague Convention places the concept of “family” within the confines of intercountry adoption. Where placement within a family in the country of origin of a child is not a viable option, intercountry adoption may be considered where it is determined to be in the child’s best interests. Though the CRC and the ACRWC cover intercountry adoption, these instruments appear to take a very limited and unclear view of when intercountry adoption is appropriate. The question to be asked here is whether a rights-based argument which aims to preserve the cultural and/or ethnic identity of the child could in fact be in conflict with other rights to which a child has, namely the right to grow up in a family environment. The CRC and the ACRWC include intercountry adoption as an optional

placement, but both appear to take a very limited and unclear view of when intercountry adoption is to be the most appropriate solution. However, the preference as provided in the CRC and the ACRWC for intercountry foster-care and institutionalization over intercountry adoption remains controversial, and appears to be in contradiction with the provisions of the Hague Convention. Is viewing intercountry adoption as a measure of “last resort” the correct approach? Should the widely accepted concept of “subsidiarity” be applied in such a way that intercountry adoption is always considered as an exception to the rule that prioritizes domestic placement and all other types of alternative domestic care? The question posed is to whether a vulnerable child’s fundamental right to be brought up in a family is being ensured or denied by opposition to intercountry adoption. For instance, is it intercountry adoption or institutionalization that should be considered as a measure of “last resort”? What does and should “last resort” actually mean in the best interests of the child? Should domestic adoption always be preferred over other alternative care options?

## **PAPER/GROUP DISCUSSION/WORKSHOPS**

- 3.1 Botha J, “The regulation of hate speech and racial epithets” Paper and group delivered at the Annual regional Court President’s Training, East London, 30 November 2016 (by invitation)**
- 3.2 Coetzee L London University Street Law workshop 16 March 2016, University of London International Programmes.**
- 3.3 Coetzee L “Racism – Sensitization to racial stereotyping. Westering High School Port Elizabeth 20 May 2016.**
- 3.4 David, D “Democracy for All” Street Law workshop 2016, Port Elizabeth November 2016.**
- 3.5 Erasmus, D "The electronic coverage of judicial proceedings." – Paper and group discussion delivered at the Annual Regional Court President's Training, East London, 30 November 2016 (by invitation).**

## **PUBLISHED CONFERENCE PROCEEDINGS, OTHER PUBLICATIONS AND COMMENTARIES**

- 4.1 Govindjee “Collective labour law case summaries” *Cliffe Dekker Hofmeyr Annual publication (2016).***
- 4.2 Grogan, J; Maserumule, P and Govindjee, A *Juta’s Annual Labour Law Update (Juta, 2016).***
- 4.3 Govindjee, A Acknowledged research contribution to Olivier, M “Exploring the links between remittances and social security for migrant workers and their families” (Thought Piece submitted to the AU / ILO) (2016).**



## **POLICY REPORTS**

- 5.1 Botha, J “Comments on Draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance 2016-2021” submitted to the Department of Justice and Constitutional Development, Republic of South Africa, August 2016**
  
- 5.1 Govindjee, A “Advocating for the improved legal rights and protections for Mozambican migrant mineworkers, ex-migrant workers and their families (Report in progress, to be submitted to Lawyers for Human Rights as part of the EU-funded Voices from the Underground Project on *Improving the protection and advocacy capacity of migrant mineworkers and their families in Southern Africa*) (2016)**
  
- 5.2 Govindjee, A Olivier, M; Jehoma, S and Rusconi, R “Namibia return to work research project” (Report to the Social Security Commission, Government of Namibia and SSC Board) (2016)**

# INAUGURAL LECTURE

## 6.1 Mukheibir, A “Transformative constitutionalism and reconciliation – balancing the interests of victims and beneficiaries” delivered at NMMU on 8 September 2016

The preamble to the Constitution recognises past injustices and the fact that those who suffered for justice and freedom ought to be honoured. The Constitution is adopted, *inter alia*, to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights.

This follows from the epilogue of the interim Constitution, which sees the Constitution as providing

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. **The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society**

The late former Chief Justice Pius Langa identified certain challenges facing transformation in our country, two of them being:

- Responsibility for transformation and reconciliation; and
- Creating a climate for reconciliation.

It would appear, particularly in the aftermath of the 2015 student uprisings, and a spate of racist utterances that started appearing on social media during the latter half of 2015 and continues unabated, that reconciliation remains a pipe dream.

Judge Langa stated in his article that it is not enough for the victims of Apartheid to forgive the perpetrators; in fact, forgiveness cannot be legislated. There is also

a responsibility on the beneficiaries to effect reconciliation. Judge Langa did not spell out what beneficiaries had to do.

It is submitted that many of the perpetrators, although not perpetrators of gross human rights violations, were beneficiaries of the previous regime and thus perpetrators by omission. Many are indifferent to the fact that they have benefited and that millions of our people continue to be disadvantaged more than two decades since the fall of apartheid. It is submitted that indifference is perhaps one of the greatest obstacles to transformation. Apart from beneficiaries not acknowledging their own privilege, they often fail to recognize the dignity of the victims of Apartheid. While the horizontal application of the Bill of Rights (through the development of the common law), as well as legislation such as the Promotion of Equality and Prevention of Discrimination Act 4 of 2000, can provide remedies against acts of discrimination, it is impossible to legislate for people to relinquish indifference. The answer lies in concerted efforts to create awareness in the form of awareness campaigns at schools, universities and all levels of society.

## **PUBLIC LECTURE**

- 7.1 Botha, J “Legislating against Racism and Hatred”, Launch of the NMMU Faculty of Law’s Celebration of 20 Years of the Bill of Rights, March 2016**

## **NEWSPAPER ARTICLES**

- 8.1 Botha, J “Call to legislate against racism: Use law to curb hate crimes, says NMMU lecturer” *Herald* 23 March 2016**
  
- 8.2 Botha, J “Racism, hatred in spotlight: Dialogues to be hosted as part of 2016 series as NMMU marks 20 years of the Bill of Rights” *New Age* 17 March 2016**

## **GUEST LECTURER**

### **9.1 Van der Linde, W (SC) The Current State of Class Actions in South Africa**

*Lecture to students at NMMU: 1 August, 2016*

#### **Abstract**

The lecture will cover the following topics, namely, what is a class action; what is its origin in other notable jurisdictions; what is its origin in South Africa; the bread class action certification cases; the elements of a class action; certification: developing the common law; weighing evidence in certification proceedings; need for and terms of certification, including opting in and opting out; appealability; and prescription; and managing a class action: case management; representation; contingency fees; bifurcation; trusts; settlements.

## CONTRIBUTIONS TO BOOKS

- 10.1 Bosch C & Myburgh A (2016) *Reviews in the Labour Courts*, LexisNexis (ISBN: 978 040 9044 850).
- 10.2 Crouse, L contributor in the revision of Govindjee, A (ed) *Constitutional law Introduction to Human Rights Law*.
- 10.3 Olivier, Govindjee, Mohammed, bin Hussain, Cheong, Rosely and Vadivel *SOCSCO Return to Work Programme in Malaysia: A Handbook* (2016) (SOCSCO / IISLP).
- 10.4 Van der Walt and Govindjee (eds.) *Labour Law in Context* (2<sup>nd</sup> Ed) (Pearson, 2016) (various chapters authored).
- 10.5 Govindjee and van der Walt “Achieving justice via independent and impartial tribunals or forums: Possible lessons from the Commission for Conciliation, Mediation and Arbitration of South Africa for India” (NLSIU publication) (2016).
- 10.6 Govindjee (ed.) *Introduction to Human Rights Law* 2<sup>nd</sup> Ed (LexisNexis, 2016) (various chapters sole-authored).
- 10.7 Van der Berg and Govindjee “The law of evidence and substantive law” in Schwikkard and van der Merwe *Principles of Evidence* (4<sup>th</sup> Ed) (Juta) (2016) 34-49.
- 10.8 Govindjee & Chetty “Law and religion in the African Union” in Robbers & Durham (eds) *Encyclopedia of Law and Religion* (2016) (Brill Publishers) (accessible at [http://referenceworks.brillonline.com/entries/encyclopedia-of-law-and-religion/african-union-COM\\_000056](http://referenceworks.brillonline.com/entries/encyclopedia-of-law-and-religion/african-union-COM_000056)).
- 10.9 Govindjee, A “Cliffe Dekker Hofmeyr *Annual Case Law Update*” (Johannesburg, October 2016).

- 10.10 Tshivhase, AE 'The future of military summary trials in the modern age' in Alison Duxbury and Matthew Groves **Military Justice in the Modern Age** ed. 347-364, Cambridge University Press
- 10.11 Van der Berg, E Chapter 4 "The Law of Evidence and Substantive Law" (with A Govindjee) Schwikkard et al *Principles of Evidence* 4ed Juta.
- 10.12 Van der Berg, E Chapter 8 "Opinion Evidence" (with SE van der Merwe) Schwikkard et al *Principles of Evidence* 4ed Juta.



## **SUPERVISION OF LLM DISSERTATIONS**

- 11.1 Govender, MM “Determining reasonableness in the light of Sidumo” supervised by Prof JA van der Walt, completed 2016 for graduation 2017.**
- 11.2 Jacobs, PH Fairness and flexibility: procedural fairness in terms of the Labour Relations Act supervised by Mr F le Roux, completed 2016 for graduation 2017.**
- 11.3 Laing, SR “The Constitutionality of the Criminal Law (Forensic Procedures) Amendment Act” supervised by Prof D Erasmus and co-supervised by Ms D David, completed 2016 for graduation 2017.**
- 11.4 Maliti, Z “Alcoholism and being under the influence of alcohol” supervised by Mr T Qotoyi, completed 2016 for graduation 2017.**
- 11.5 Matiwane, LMB “The enforcement mechanisms of the Employment Equity Act, 1998” supervised by Prof JA van der Walt, completed 2016 for graduation 2017.**
- 11.6 Mnguni, S “The application of section 17 of the Employment of Educators’ Act” supervised by Prof JA van der Walt, completed 2016 for graduation 2017.**
- 11.7 Nair, S “Workplace racism” *cum laude* supervised by Prof JA van der Walt, completed 2016 for graduation 2017.**
- 11.8 Paul, GW “Equal pay for equal work” supervised by Prof JA van der Walt, completed 2016 for graduation 2017.**
- 11.9 Roets, ME “Comparative perspectives on the doctrine of vicarious liability” *cum laude* supervised by Prof JA van der Walt, completed 2016 for graduation 2017.**

## **SUPERVISION OF LLD THESIS**

- 12.1 Botha, JC “Hate speech as a limitation to freedom of expression” supervised by Prof A Govindjee, completed 2016.**
  
- 12.2 Ndzengu, NC "A Comparative Analysis of Aspects of Criminal and Civil Forfeitures: Suggestions for South African Asset Forfeiture Law Reform” supervised by Prof D Erasmus, completed (2016) for graduation 2017.**

## **LAW FACULTY STAFF MEMBERS GRADUATING**

- 13.1 Botha, JC “Hate speech as a limitation to freedom of expression” supervised by Prof A Govindjee, completed 2016.**

# **ACHIEVEMENTS OF CENTRE FOR LAW IN ACTION (CLA)**

## **14.1 The FishFORCE Award**

FishFORCE, the Fisheries Crime Law Enforcement Academy, housed at Nelson Mandela Metropolitan University (NMMU), Port Elizabeth, South Africa, was established in 2016 with funding from the Norwegian Department of Foreign Affairs. The agreement between NMMU and the Norwegian Embassy was signed on 6 June 2016 in Port Elizabeth.

FishFORCE aims to build enforcement expertise and strengthen cooperation between agencies, domestically and cross-border, in order to address fisheries crime. This will be achieved via a combination of -

- hands-on expert training of fisheries control law enforcement officers from multiple relevant agencies;
- the provision of post-training support;
- and focused research.

The Academy aims to translate into practice the fisheries crime law enforcement model which promotes use of all relevant laws, administrative and criminal, as entry points for initial detection of fisheries crime and subsequent investigation and prosecution such crime, particularly that which is transnational and organised (the 'full force of the law' or 'multi-door' compliance approach). Fisheries crime refers to the full range of serious offences occurring throughout the fisheries value chain both at-sea and on land including document fraud, illegal fishing, human trafficking and corruption to name a few.

## **14.2 Invitation to serve on an Indonesian expert group panel in Yogyakarta**

Prof van As was invited by the Ministry of Maritime Affairs of Indonesia to attend the 2<sup>nd</sup> Regional Conference on the Establishment of a Regional Convention against Illegal, Unreported and Unregulated Fishing (IUUF) and its related crimes on the 12 and 13 October 2016.

Prof van As was requested to serve on a panel of experts together with representatives from INTERPOL, the UNODC and the US National Oceanic and Atmospheric Agency.

Apart from serving on the expert panel Prof Van As also gave a presentation on innovative measures to address fisheries crime through capacity building and the FishFORCE model.

The event was attended by mostly diplomatic representatives from Australia, China, the European Union, Laos, Malaysia, Myanmar, UNODC, INTERPOL, New Zealand, Papua New Guinea, Philippines, Thailand, Indonesia, Unit States, Vietnam and Singapore.

### **14.3 Invitation to serve on the UNODC expert panel in Vienna**

Prof van As served on a panel of experts called together by the UNODC in Vienna, Austria from 24-26 February 2016 to address the organised nature of fisheries crime and the improvement of inter-agency collaboration.

### **14.4 Significant conference hosted during 2016**

#### **FishCRIME conference in Yogyakarta with UNODC and the Indonesian Government**

The Government of Indonesia, the Norwegian Ministry of Trade, Industry and Fisheries, the United Nations Office on Drugs and Crime and the PescaDOLUS network at Nelson Mandela Metropolitan University successfully jointly hosted the 2<sup>nd</sup> International Symposium on Fisheries Crime on 10-11 October 2016 in Yogyakarta, Indonesia.

The 2016 symposium brought together more than 250 political leaders, policy makers, representatives of law enforcement agencies and civil society from more than 45 countries.

The core theme of the symposium was transnational organised crime in the fisheries value chain and the critical role of criminal law enforcement in addressing fisheries crime. .

## **14.5 The high level stakeholders' meeting, Mombasa, Kenya 23-24 November 2016**

A High Level Stakeholder's meeting was held on 23 and 24 November 2016 in Mombasa, Kenya by FishFORCE organised in cooperation with the University of Nairobi.

The aim of this meeting was to share and draw on participant countries' experience in law enforcement in fisheries, and to confirm interest in and firm commitment to rolling out the FishFORCE model in the respective countries. To this end, the FishFORCE Academy project was formally presented to participants, together with the fisheries crime law enforcement model that underpins the project. The meeting was well-attended by representatives at political and executive level of relevant key ministries and agencies in countries in the region including South Africa (attended by DAFF and Operation Phakisa), Kenya, Tanzania, Somalia and Mozambique, as well as Indonesia and representation from UNODC.

During the meeting representatives of the attending countries shared their fisheries law enforcement experiences and challenges, deliberated on the suitability of the FishFORCE model and committed to a process facilitating the implementation of the FishFORCE model in their jurisdictions.

## **14.6 Newsworthy articles**

**14.6.1 Heather Dugmore: Tackling crime on high seas: Norwegian funds establish Fisheries Law Enforcement Academy at Nelson Mandela Metropolitan University – Wednesday May 18, 2016 – The Star**

**14.6.2 Devon Koen: NMMU, Norway strengthen ties: Fisheries Law Enforcement Academy to tackle oceans crime part of new deal – Tuesday June 7, 2016 – The Herald**

## **NMMU REFUGEE RIGHTS CENTRE**

**15.1 The United Nations High Commissioner for Refugees has funded this refugee rights project annually since 2010 and has just renewed the funding agreement for 2017, committing R 2 267 285.00 to the project.**

The project has as its primary objective to provide protection through the provision of quality legal services and support to asylum seekers in the Eastern Cape. Direct, in-person support to refugees in the outlying towns of the Eastern Cape is a core element of the project. Through the framework of this project, direct legal support was provided to 1765 persons of concern during 2016, whilst an additional 712 persons were briefed on refugee rights and refugee documentation through a range of workshops, briefing sessions and advocacy initiatives. Staff at the RRC has succeeded in making life-changing interventions in the lives of a very vulnerable and marginalized sector of our society.