Prof Christof Heyns
Dean

Prof Anton Kok
Acting Dean

4.7 Faculty of Law

Message from the Dean

The Faculty of Law aims to be an active research Faculty that contributes to the construction and sustainability of democratic citizenship and the legal, political and social transformation of South African society through high-quality research outputs and undergraduate and postgraduate study. To ensure that its research is not merely functional in nature, confirming in this way the *status quo*, but indeed contributes to the broadening of rule of law, constitutionalism and democracy, both the manner in which research is done and the aims of that research should focus on enquiry and questioning.

During the past four years, monthly departmental research seminars were made compulsory as a way of making research more central to the daily activities of the Faculty. This will continue and external academics (such as extraordinary professors) have increasingly become involved. There are also other initiatives like the Prestige Lecture series, the Book Club and the publication of *PULP Fictions* to encourage academic debate and research.

The Research Committee started to play a more active role since the beginning of 2010 in terms of communicating important dates to Faculty members, and representatives on the committee play a more active role in their departments. The research seminars in all departments in the month of October 2010 were dedicated to an in-depth reflection on research. Colleagues were asked to reflect on, among other things, links between research and the "idea of the university", democratic citizenship, substantive questions about the nature of scholarly research, and the need for engagement on a conceptual level. A serious challenge is that only a small number of publications in the Faculty appear in international

journals and books. As a result, the impact of most of the publications is limited to a more local readership. Local online journals might have a wider impact. The Faculty currently has 16 NRF-rated researchers.

It has been the stated intention of the Faculty since 2006 to significantly increase its number of postgraduate students. One of the main developments in the Faculty has been the introduction of a funded doctoral programme over the last two years with the generous financial assistance of the University. In the course of implementing this programme, it has been discovered that there is much to be gained from also targeting part-time students, in particular academics from other law faculties in South Africa and the rest of the continent. The funded doctoral programme is designed to accommodate at least 30 LLD students. All indications are that this funded programme will enable the Faculty to significantly improve its supervision of doctoral students and their throughput rate.

A number of ambitious principles have been set relating to research in the Faculty. The aim is to confirm and expand the link between postgraduate study and research. At least some of the mini-dissertations should meet the standards of publication. Supervisors, heads of departments and the postgraduate and research committees will be required to be more actively involved in ensuring and following up on publications by postgraduate candidates. Co-publication with a supervisor, mentor or other postgraduate candidate is an option that encourages mentorship. Candidates on the funded LLD programme are required to publish three articles during their degree and another one at completion. The responsibility to monitor the obligation of postgraduate students to publish rests on the relevant supervisors. This would be easier if the various departments and/or supervisors had more focused areas to take students for postgraduate study.

The Faculty, with its partners in South Africa, on the continent and abroad, will establish what may – for lack of a better word for the time being – be called an "academy", aimed at advancing postgraduate studies and research for the law academics of the country and the continent. The academy will convene for more or less a month a year, during August. The programme will include a substantive theoretical programme, as well as generic and specific research methodologies and skills.

By linking research, teaching and community, the Faculty aims to make research a core activity in each staff member's life as an academic. This is a long-term strategy that will hopefully, after some time, result in quality and sustained research outputs and a broader culture of research within the Faculty.

Prof Anton Kok
Acting Dean: Law

Centre for Human Rights

Critical issues in the human rights mandate of the ECOWAS Court of Justice

In this research, the researcher discusses the new opportunity for international human rights litigation in West Africa, which was presented when the Economic Community of West African States (ECOWAS) adopted a protocol to empower its judicial organ, the ECOWAS Community Court of Justice, in 2005 to determine cases of human rights violation that occur in ECOWAS member states. Since then, several human rights claims have been brought before the court. However, critical questions concerning the legality of the new mandate and the suitability of the court to exercise a human rights jurisdiction have lingered. Beginning with an inquiry into the foundation within ECOWAS for the exercising of a human rights jurisdiction, this research analyses the legitimacy of the human rights mandate of the ECOWAS Court and interrogates crucial issues relevant to the effectiveness of the mandate. The research suggests ways to enhance execution of the mandate and concludes with a call for careful judicial navigation in the exercise of the court's expanded jurisdiction.

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Towards more liberal standing rules to enforce constitutional rights in Ethiopia

In this research, the researcher analyses the legal regime governing standing to enforce constitutional rights in Ethiopia. The research reiterates the direct link between standing rules and the right of access to justice. It observes that, although the laws of several states still require a personal interest in the action one wants to litigate, there is a developing trend towards the liberalisation of standing rules, particularly regarding human rights issues. It considers the activism of the Indian judiciary and the innovative changes introduced by the South African Constitution, recognising public interest litigation. With regard to Ethiopia, the research considers the rules governing standing in ordinary courts, the House of Federation and the Council of Constitutional Inquiry, the Human Rights Commission and the institution of the Ombudsman. It concludes that the current standing law regime is too restrictive, as it requires the actual violation of personal rights and interests in a particular claim. The issue of standing is still governed by archaic rules that do not take into account the interest at stake and the individual circumstances of the victims. It recommends the liberalisation of standing rules to ensure that the constitutional guarantees can be enforced via, among others, public interest litigants.

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International law and domestic human rights litigation in Africa

In this research, academics and practitioners from across the continent, including five researchers from the Centre for Human Rights, illustrate how domestic courts in Africa have engaged with international human rights law to interpret or fill in gaps in national bills of rights. The researchers also consider the challenges encountered in increasing the use of international human rights law by African domestic courts. The researchers discuss how lawyers and judges in civil law Africa are reluctant to make use of international human rights law despite the monist constitutional framework. In contrast to courts in dualist common law, countries have made extensive references to international human rights law in their jurisprudence. However, direct application of human rights treaties is rare. The main reason for this is not whether a constitutional framework is monist or dualist, but the fact that international human rights treaties have influenced the national bills of rights. The main role of international human rights law, in the form of case law and other interpretation by supervisory bodies, should be to aid national courts to interpret constitutionally recognised rights.

In an investigation of the place of international law in human rights litigation in Tanzania, the researchers further examine the position of international law before courts and quasijudicial bodies in Tanzania. They examine the status of international law in Tanzania and find that Tanzania follows a dualist approach to international law. They present ways of transforming international law into municipal law in Tanzania and examine how domestic courts have used international human rights law to interpret domestic human rights provisions in the Constitution. Further, factors influencing the use of international law by courts in Tanzania are highlighted, including the role played by judges and advocates. The conclusion drawn is that courts apply international law, albeit cautiously. The research recommends a wider application of international law principles and foreign case law by courts in Tanzania.

In an examination of the domestication of international human rights law in Zambia, the researcher notes how, even though it has been an independent sovereign nation since 1964, most of Zambia's legal system remains under the straight-jacket of the British legal system, of which common law is the defining characteristic. International law faces stiff challenges to infiltrate the defiant Zambian legal terrain. This is largely the result of colonial heritage rather than Zambia's deliberate choice. Courts have been reluctant to make use of international law with some notable exceptions. In a study of international law and human rights litigation in Côte d'Ivoire and Benin, the researchers discuss how some African countries have made significant progress to make human rights litigation a reality, while others are still finding

their way. This is illustrated by the two countries that are examined, Côte d'Ivoire and Benin. Benin is taking human rights litigation seriously, as can be seen by the establishment of a constitutional court with a specific mandate to decide on cases of alleged human rights violations. The task of the Constitutional Court of Benin has been made easier with the incorporation of the African Charter on Human and Peoples' Rights in the Constitution of 1990. However, the Constitutional Court has its limitations, as it does not order compensation or reparation to the victims of human rights violations. In Côte d'Ivoire, complainants still have to rely on the ordinary courts, which have not proven to be efficient in the enforcement of human rights. There is therefore a need to establish a specialised court with a specific human rights mandate.

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Mercantile Law

International perspectives on South Africa's unfair dismissal law

This research deals with the perception that South Africa may be over-regulated regarding the right not to be unfairly dismissed. In this regard, the International Labour Organisation (ILO) Convention C158 is analysed and the respective positions in the Netherlands, the UK, the USA and South Africa are compared. The researchers conclude that South Africa's unfair dismissal law regime gives effect to the core principles of the ILO Convention C158. South Africa's norms do not require more in respect to predismissal procedures than the standards established by the ILO and those implemented in the UK. It does, however, provide more protection to employees than what is offered in the Netherlands and the USA. In instances where South African employers and trade unions agree to more formalistic court-like procedures in their disciplinary codes (such as the ones prescribed during the era of the Industrial Court) than those required by law, it is something of their own making. They will have to adhere to such requirements. Such a practice does, however, not have the consequence that South African labour law is more prescriptive than the standards set by the ILO or those introduced in countries like the UK.

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Temporary employment services: closing a loophole in section 198 of the Labour Relations Act

This research explores the loophole created by section 198 of the Labour Relations Act, Act No 66 of 1995, which undermines the rights of workers, maintaining the fiction that a temporary employment service (TES) broker is an employer instead of the intermediary between the client and the worker. Atypical employment, specifically part-time work, is playing an increasingly important role in industrialised countries. The dismissal of an atypical employee should be regarded as a dismissal in terms of the Labour Relations Act (LRA) to afford the worker, as the weaker bargaining party, the much-needed protection in accordance with the provisions of the LRA. The wording of section 198(2) of the Labour Relations Act and the definition of an employee (section 213) should include an independent contractor, who has been placed at a client by a TES broker to afford any person who has been procured or provided to a client by a TES broker, protection in accordance with the country's constitutional labour rights, the LRA and International Labour Organisation (ILO) standards. Section 198 clearly states that "a person whose services have been procured or provided to a client by a [TES] is the employee of that [TES] and the [TES] is the employer of that person". The loophole thus created by the wording of section 198 should therefore be amended to give effect to fundamental labour rights. The TES broker or the client may be regarded as the employer in accordance with the concept of the tripartite relationship.

The growth in atypical labour requires urgent attention with regard to the effective protection, regulation and registration of labour brokers.

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Bankruptcy and alternative debt relief for consumers in Tanzania: a comparative investigation

This research seeks to compare the Tanzanian consumer bankruptcy and debt relief procedures to those of South Africa. The purpose is to ascertain whether there are any lessons to be learnt by Tanzania from its fellow South African Development Community (SADC) country and to indicate a way forward for future law reform in this regard. The research shows that the Tanzanian system, compared to the South African system, is in many respects more liberal towards debtors. So, for instance, the Tanzanian Bankruptcy Act does not require proof of "advantage for creditors" in order for a debtor to be adjudged bankrupt. However, the Tanzanian system does not provide for any significant alternative debt relief procedure. In 2001, the consumer debt committee of the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International) recommended that legislators of countries undertaking law reform with regard to debt problems of individual debtors should provide for alternative debt relief procedures that take into consideration the debtor's specific needs. The researchers suggest that the Tanzanian legislator, when designing such a procedure, should learn from the mistakes the South African legislator has made. The alternative procedure should be inexpensive and simple and should be extrajudicial rather than judicial proceedings. Finally, it should offer the consumer a discharge from indebtedness and accordingly enable him or her to make a fresh start.

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Jordan v Farber 1352/09 ZANCHC 81

The case note of Jordan v Farber 1352/09 ZANCHC 81 deals with several aspects of the law of contract, such as public policy and validity, error, cancellation, repudiation, undue influence and damages. It concerns the case of an elderly couple who had to stop their farming operations because of ill health. The attorney whom they approached for assistance offered to lease the farm, equipment and animals from them in his personal capacity although in his professional capacity he also drafted the contracts of lease. It later transpired that the attorney used his position to mislead the couple with regard to the contracts in question and that he was guilty of unethical and unprofessional conduct. The couple applied to court to have the leases declared void, alternatively cancelled, and to have the attorney evicted from the farm. The order was granted. However, the researcher demonstrated that the couple were afforded only minimal justice in that they did not claim, nor were they granted, any damages. The various possibilities open to them in the circumstances were examined and the finding was that ventilating the matter by way of application was probably not the best manner in which to have sought assistance.

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Procedural Law

To sequestrate or not to sequestrate in view of the National Credit Act: a tale of two judgments

In this research, the researchers consider the impact of the National Credit Act, Act No 34 of 2005 (the NCA), on sequestration procedures in terms of the Insolvency Act, Act No 24 of 1936, and recent precedents. The impact of debt relief remedies and certain special

provisions that apply to debt enforcement in terms of the NCA on sequestration procedures are considered in particular. The researchers analyse the legal position and provide guidelines on how the courts should approach certain potential problem areas when apparent opposing provisions of both these acts may find application in a particular case.

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Therapeutic jurisprudence: judicial officers and victims' welfare

In this research, the researcher examines the principles and practice of the therapeutic jurisprudence perspective (including its relationship to restorative justice) and briefly explores the differences between traditional and therapeutic court procedures and judicial officers, as well as the importance of personal skills. It is argued that, in addition to focusing on the offender's wellbeing, there is a need to also recognise and facilitate the therapeutic needs of specific victims. It is illustrated how the court's unusual approach towards an adolescent victim in the rape case of S v M 2007 (2) SACR 60 WLD sets an example for incorporating therapeutic jurisprudence principles, with regard to victims, in the sentencing courtroom. An analysis of the judgment of M thus confirms how therapeutic jurisprudence principles (albeit unwittingly in this case) provide an opportunity for judicial officers to look beyond adjudication (with regard to both offender and the victim), to do more than just process a case, to acknowledge the profound impact (often anti-therapeutic) the legal process and its outcome may have on all participants' lives and wellbeing, and to develop an ethic of care and humanise the legal process. A therapeutic jurisprudence approach also changes the dynamics of the courtroom, particularly in the context of sentencing, inter alia, by requiring more active judicial officers. It is submitted that one reason why the therapeutic jurisprudence "lens" has not been used in an explicit way in South Africa might be that the courts have, as guiding principle, the concept of *ubuntu*, which underscores the constitutional recognition and furtherance of the dignity and wholeness of all people. However, since 2004, several international jurisdictions have accepted the perspective of therapeutic jurisprudence by either adopting resolutions, developing judicial manuals on the topic or incorporating it into their national curricula for judicial education. This research recommends that the formal recognition of therapeutic jurisprudence in South Africa is considered.

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An assessment of the current state of debt counselling under the National Credit Act

This research consisted of a review of the National Credit Act and its regulations, as well as an update on the relevant case law and academic articles concerning debt restructuring. In addition, a quantitative survey – comprising an analysis of 41 657 credit agreements under debt restructuring with reference to, inter alia, certificate of balance turnaround times, incidence of response to proposals and acceptance rates of restructuring proposals – was undertaken. A qualitative study on the attitudes, experiences and perceptions of the 60 most active debt counsellors and a number of credit providers, attorneys and magistrates also formed part of the study. A number of recommendations regarding legislative and regulatory amendments, as well as other matters were made.

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Public Law

Observations on representivity, democracy and homogenisation

This research investigates the implications of enforcing the principle of representivity, ie the principle according to which the national population profile – more particularly the racial profile of the national population – is required to be reflected in all institutions and organised spheres. Even though the principle has not as yet established itself in practical terms in all spheres of South African society, it has developed into the master concept of the South African public order post-1994 and one of the core concepts for pursuing the so-called transformation drive of the present South African government. Apart from appearing in a handful of constitutional provisions, representivity features prominently in an impressive tally of legislation, requiring institutions to reflect the composition of the national population. In the judgment of various prominent commentators, representivity has also proven to play a crucial part in both in the legal and political spheres in South Africa. Against the backdrop of the proven practical significance of representivity, an assessment of its consequences and application has become particularly topical. It is argued that there ought to be but limited room for representivity, namely only within the context of bodies or institutions in which everyone takes an equal interest (bodies representing equal-stake common interests). Beyond these bodies, there is no legitimate place for representivity in a democratic society, since it would entail a system whereby organised spheres of the minorities are annexed for and put to the service of the majority. It would create and fortify a general system of majority domination, homogenisation and systemic inequality to the disadvantage of minorities.

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Legal History, Comparative Law and Legal Philosophy

An overview of the regulation of informed consent for participation in clinical research by mentally ill persons in South Africa

This research examines the law on the informed consent of mentally ill persons to participate in health care-related research. The study is the first overview of its kind to be published after the enactment of the Mental Health Care Act and the National Health Act. The research outlines the conditions under which ethical and legal research may be undertaken in this potentially vulnerable group. It concludes that still no statute provides specifically and comprehensively for the informed consent of mentally ill persons to participate in research and that it is consequently necessary to extrapolate general principles to the research setting involving mentally ill persons.

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LB v YD 2009 5 SA 463 (T)/ YD v LB (A) 2009 5 SA 479 (NGP) 2010(2)

This research related to a case involving the application of an alleged father for an order compelling a woman to submit herself and her minor child to blood tests with a view to establishing the paternity of the minor child. The case required the court to weigh the rights of the father to know with certainty whether or not he is the biological parent of the child against the mother and the child's rights to privacy and bodily integrity. The court determined to compel

the tests on the basis of the primacy of the need for the court to establish the truth. The court found that the need to establish the truth and the benefits to both the father and the child of establishing the truth as early as possible far outweighed any minor discomfort that the test might cause. Furthermore, a failure to allow the test would lead to the imposition of parental responsibility in accordance with an established legal presumption. To do this in circumstances where the biological parenthood could be definitively established and where the alleged biological parent was seeking to assume parental responsibility would be wrong. The application for leave to appeal was denied. This was unfortunate, given that the research revealed inconsistency in the courts' approach to such matters and an appellate decision would have lent legal certainty to the matter.

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Jurisprudence, friendship and the university as heterogenous public space and the archaic structures of our desire

In this research, the researcher furthers a broader investigation of what the main tenets of a post-apartheid jurisprudence are and should be. The question of the role of formalism and functionalism in a transformative social, political and legal context is critically evaluated against an approach that underscores complexity and continuous reflection connected to friendship and heterogeneity. Furthermore, post-apartheid jurisprudence is investigated by engaging with the contribution of Albie Sachs to adjudication, legal interpretation and jurisprudence. Tentative findings and suggestions are for an engagement with law that recognises the limits and the force of law and places responsibility at the heart of a post-apartheid jurisprudence.

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