

## FACULTY OF LAW

The Faculty of Law is committed to playing a significant role in legal research in South Africa and Africa. Various initiatives are continuously being considered to improve the quantity and quality of the Faculty's research outputs in order to move closer to the goal of the University of Pretoria to become a leading research-intensive university in Africa. In 2012, the Faculty published more than 110 articles in accredited journals – more than any other year. This is not only attributable to publications by full-time members of staff, but also to the contributions of students, part-time members of staff and extraordinary professors.

Apart from increasing the number of publications, the Faculty also endeavours to increase its number of publications in international journals in order to strengthen the University's international visibility. In this regard, members of the Centre for Human Rights published 14 journal articles internationally, and Dr Adem Abebe and Prof Charles Fombad managed to publish two articles in international ISI-listed journals. A new research focus initiative in 2012 was the hosting of the Law and Poverty Conference, which led to a number of publications.

The Department of Jurisprudence produced 14 journal publications. Two of the researchers featured in this report have significant achievements in this regard. Joel Modiri, a final-year LLB student, who is also a tutor in the Department, published three articles in accredited journals, and Prof Karin van Marle acquired 2.5 units in international Institute of Scientific Information (ISI)-listed journals. A number of postgraduate students in this Department also published articles.

The Department of Mercantile Law produced 28 journal publications. Dr Femida Cassim, another prominent academic, had two articles published in accredited international law journals, one of which is on the ISI list, namely the *Journal of African Law*, published by Cambridge University Press on behalf of the University of London. Her other article appeared in *Business Law International*, an IBSS-listed journal published in the United Kingdom on behalf of the International Bar Association. Dr Cassim is currently completing her PhD in Mercantile Law. Her extensive research on the new Companies Act has been quoted and/or cited with approval in four judgments of the High Court and two judgments of the Supreme Court of Appeal. The Head of the Department, Prof Stefan van Eck, published an article on the currently contested issue of labour brokers in South Africa and Namibia in the *International Journal of Comparative Labour Law and Industrial Relations*, published by Kluwer Law International.

The 12 publications by the Department of Procedural Law included two publications in the international *Commonwealth Law Bulletin* and the *Oxford University Commonwealth Law Journal* respectively.



Dean: Prof André Boraine

The Department of Public Law produced three textbooks, and the newly appointed Head, Prof Pieter Carstens, was invited to publish a chapter entitled “Medical malpractice and compensation in South Africa” in the *European Yearbook for Tort and Insurance Law*. A particular highlight was the establishment of the Centre for Law and Medicine, in conjunction with the Faculty of Health Sciences, which will function under the auspices of the Department of Public Law. The Centre conducts research to obtain insight on legal problems that include medical law and ethics, medical jurisprudence and health care law, and forensic medicine, to generate, promote and provide expertise concerning these medico-legal fields, and to contribute to the development of law and medicine in Africa.

The Department of Private Law also conducts its research through two centres housed in the Department. The Constitutional Court vindicated the points of view raised by Prof Johan Scott in various publications: that the true basis of state liability in cases of intentional police delicts are vicarious in nature. Apart from 27 publications by members of this Department, the Centre for Child Law focused on research to promote children’s right to a basic education. The theoretical basis for the research is a framework derived from the United Nations Social and Economic Council, which is known as “the four A’s framework”, namely availability, accessibility, acceptability and adaptability. The research has been used in court cases that reached the Constitutional Court early in 2013. In one of the cases, school governing bodies had prevented girls who had given birth from attending school for a full year. This affects accessibility and adaptability. The Centre for Child Law’s research was not only embodied in submissions to the court in the learner pregnancy policy case, but also in cases regarding admissions policy, infrastructure backlogs, government funding of independent schools and a lack of teachers in certain provinces. Prof Ann Skelton, Director of the Centre, who was recently appointed to the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Chair in Education Law, published an article entitled “How far will the courts go in ensuring the right to a basic education?” in the 2012 *Southern African Public Law Journal*. The article examines recent case law to determine how the courts are likely to interpret the right to a basic education.

In 2012, the Centre for Intellectual Property Law contributed seven articles in accredited journals, as well as several papers at international conferences. In addition, Judge Louis Harms, a former Deputy President of the Supreme Court of Appeal and incumbent of the Adams and Adams Chair in Intellectual Property Law, published the third edition of his book on the enforcement of intellectual property rights. Seven of the Centre’s doctoral students (six of whom are foreign students) are conducting research on topics ranging from the protection of indigenous knowledge and the impact of patent laws on access to medicine, to aspects relating to the World Intellectual Property Organisation (WIPO) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). Prof Steve Cornelius, Director of the Centre for Intellectual Property Law and the academic who holds the best NRF rating in the Department, had an exceptional year. In 2012, at the age of 42, his publication record reached the 20 mark for textbooks or chapters in textbooks and passed the 50 mark for journal articles. His textbook chapter published in 2012, entitled “The significance of signature for the validity of a contract in South African law” recently formed the basis of advocates’ arguments in an appeal to the Pretoria High Court. The judgment is expected soon.

The Faculty is extremely proud of the work of its members, which promotes justice and our understanding of justice in various fields in our country, Africa and the rest of the world.

**Prof André Boraine**

# Law research focuses on transforming jurisprudence

The general area of research of Prof Karin van Marle, Head of the Department of Jurisprudence, has been the field of jurisprudence, legal philosophy and legal theory with a specific focus on reflecting critically on the features of a post-apartheid jurisprudence, but also to reconfigure such jurisprudence.

“Over the past three years, the pervasiveness of instrumentalist and functionalist aims overtaking the potential of critical theory has become more prominent. I have explored how instrumentalist and functionalist views affect discourses on transformation, reconciliation and reparation within the post-apartheid legal, political and social context,” explains Prof van Marle, a recipient of an Exceptional Young Researcher Award (2003) and Exceptional Academic Achiever Award (2010), both from the University of Pretoria.

Prof Van Marle has also reflected on how feminist theory, and particularly feminist jurisprudence, were influenced and sometimes overtaken by empirical method to the detriment of conceptual development and more pertinently the ideal of justice. Lately, she has contemplated the relationship between law and the humanities and social sciences in the post-apartheid context.

“To the extent that law has been involved with the humanities at all, it has unfortunately been in a purely functionalist manner”.

Prof van Marle’s research includes a focus on how South African legal scholars have also made use of, particularly, the social sciences (sociology, political science and psychology) to make law stronger rather than investigating the critical possibilities offered by the humanities (philosophy, critical theory and literature).

Prof Van Marle has been a fellow of the Stellenbosch Institute for Advanced Study (STIAS) since 2007, where her most recent STIAS endeavour in 2010 involved a group of international scholars in a project, *Genres of critique*, which explores the potential of aesthetic forms for critique.

Over the years, Prof Van Marle has published widely in national and international accredited journals, including the *Stellenbosch Law Review*, *Feminist Legal Studies*, *The Florida Journal of International Law* and *Griffiths Law Review*. Four doctoral students and eight LLM research students have completed their degrees under her supervision.

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The research of Prof Karin van Marle in the Department of Jurisprudence focuses on reconfiguring post-apartheid jurisprudence.

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# Post-apartheid law and legal theory

Law, critique and politicised identity, developing an indigenous post-apartheid critical race jurisprudence, and new directions in legal theory have been the subjects of research undertaken by Joel Modiri, a tutor and researcher in the Department of Jurisprudence.

The different ways that law is implicated in the construction, perpetuation and rationalisation of racial and gender hierarchies, and conversely the extent to which law can be used as a tool to remedy and eradicate the injuries of racial and gender inequality, are investigated in Mr Modiri's research. Thus, a core part of the research also entails a consideration of concepts such as power, freedom, equality, dignity, democracy, community, culture, history, ideology, transformation and justice.

To further this exploration, an argument is made in support of developing a South African-based critical race theory as a way of putting race back on the agenda in legal discourse and equality jurisprudence.

To this end, the research examines competing philosophical and sociological theorisations of race and racialism, and tentatively embarks on a critical race reading of the South African Constitutional Court's racial equality jurisprudence. "Law and legal theory should move closer to critical race jurisprudence through delineating a number of 'racial themes' that could deepen the conversation on race in South African critical legal thought. These themes include a comparison of the relationship between race and law in South Africa and the USA, a study of whiteness and



white subjectivities and the tension between the Constitution and alternative accounts of memory," says Mr Modiri.

"All the questions and reflections that frame the study on politics, identity and the law are finally raised again, more generally in making the case for an approach to legal education that is attentive to the historical and social realities of post-apartheid South African society. We also draw on the insights of critical legal theory to place social transformation at the heart of the LLB curriculum," he concludes.

# The law of sport

Prof Steve Cornelius, Director of the Centre for Intellectual Property Law and Co-Director of the Centre for Sports and Entertainment Law, attached to the Department of Private Law and a B-rated researcher, is widely respected for his research in the field of sports law.

With the prominent focus on sports locally and internationally and the huge amounts that are invested annually, the fields of sports law, sports-related intellectual property rights and sportspeople's obligations are receiving more and more prominence.

Prof Cornelius's first area of focus was to analyse and reflect on the law and principles relating to the interpretation of contracts, and how the new constitutional dispensation, with its more liberal approach to interpretation, has influenced the interpretation of contracts.

His seminal work, *Principles of the interpretation of contracts in South Africa*, has been cited on several occasions by the high courts in South Africa. It reflects on the admissibility of evidence to assist a court with the interpretation of a contract, the various expressed, tacit and implied terms that constitute a contract, as well as the presumptions, rules and principles that guide the process of interpretation. "Because legal relationships in sport are mostly based on contracts, my other focus relates to the concept of fair play in sport and the legal implications of corruption, match-fixing, doping and other forms of cheating in sport, as well as equal opportunities and affirmative action in sport. These are issues that have hit headlines often over the past few years. Lance Armstrong's doping scandal and the match-fixing allegations that have tainted the sport of cricket for some time are just two examples," says Prof Cornelius.

His articles on doping have highlighted shortcomings in the current anti-doping regime. Based on this research, he has been appointed to a task team that is reviewing the South African Institute for Drug Free Sport Act, Act No 14 of 1997, and the regulations made thereunder.



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Department of Mercantile Law  
focuses on the implications of  
the new Companies Act.

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# New Companies Act in the spotlight

The implications of the new Companies Act have been the focus of research conducted by Dr Femida Cassim, a senior lecturer in Mercantile Law.

“The new Companies Act has overhauled the South African system of company law. I aim to analyse fundamental corporate law concepts and the many innovative and controversial provisions of the new Act, taking into account comparative foreign law of other leading jurisdictions. My purpose is to provide guidance to legal practitioners, judges, academics and law reformers, as well as company directors, other professionals, and students of law and commerce,” says Dr Cassim.

Her research projects have proved to be successful contributions to the legal, commerce and accounting community. *Contemporary Company Law*, a scholarly work on the new Companies Act to which she contributed six of the 21 chapters, is prescribed at numerous leading universities at both undergraduate and postgraduate level, and is extensively relied on by leading advocates, attorneys, and even the judiciary.

Dr Cassim’s research and her contribution to the book has recently been quoted and cited with approval in four judgments of the High Court and two judgments of the Supreme Court of Appeal. The work has also been cited in several articles published in the *Business Report* newspaper. An award-winning financial journalist has referred to the book as “a brilliant analysis” and as “the most accessible and comprehensive account of the Companies Act”.

Dr Cassim, who holds an MBChB (cum laude) from the University of the Witwatersrand, as well as an LLB and LLM, both obtained cum laude, is currently completing her PhD thesis at the University of Cape Town.

Her research in this respect concerns the effectiveness of the remedies that the Companies Act confers on the minority shareholders of a company to deter directors of companies from plundering the company’s resources for their own benefit.