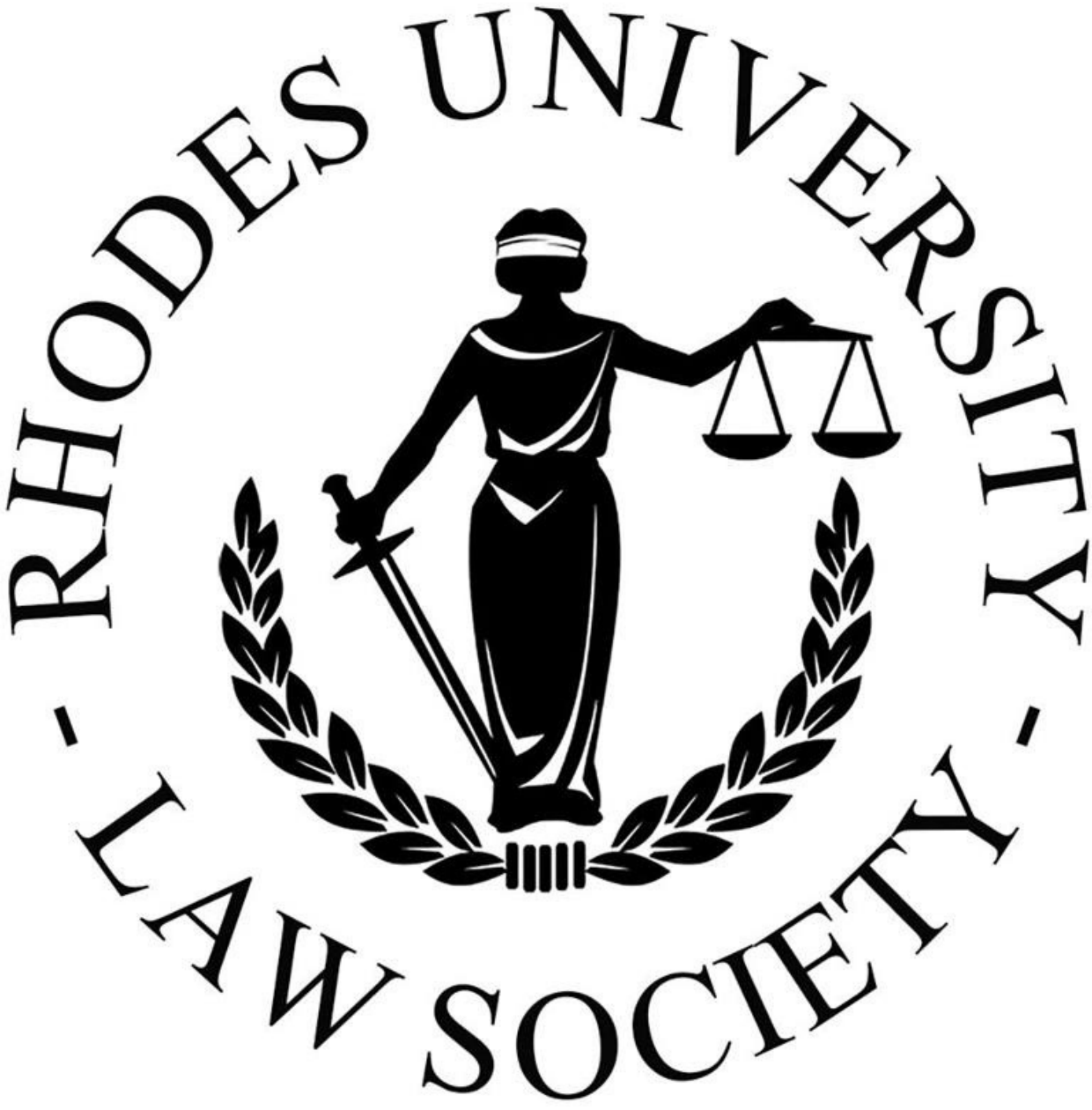
IN CAMERA

2018

THE RHODES UNIVERSITY ANNUAL LAW MAGAZINE


RHODES UNIVERSITY
- LAW SOCIETY -

IN CAMERA

The Rhodes University Annual Law Magazine

2018

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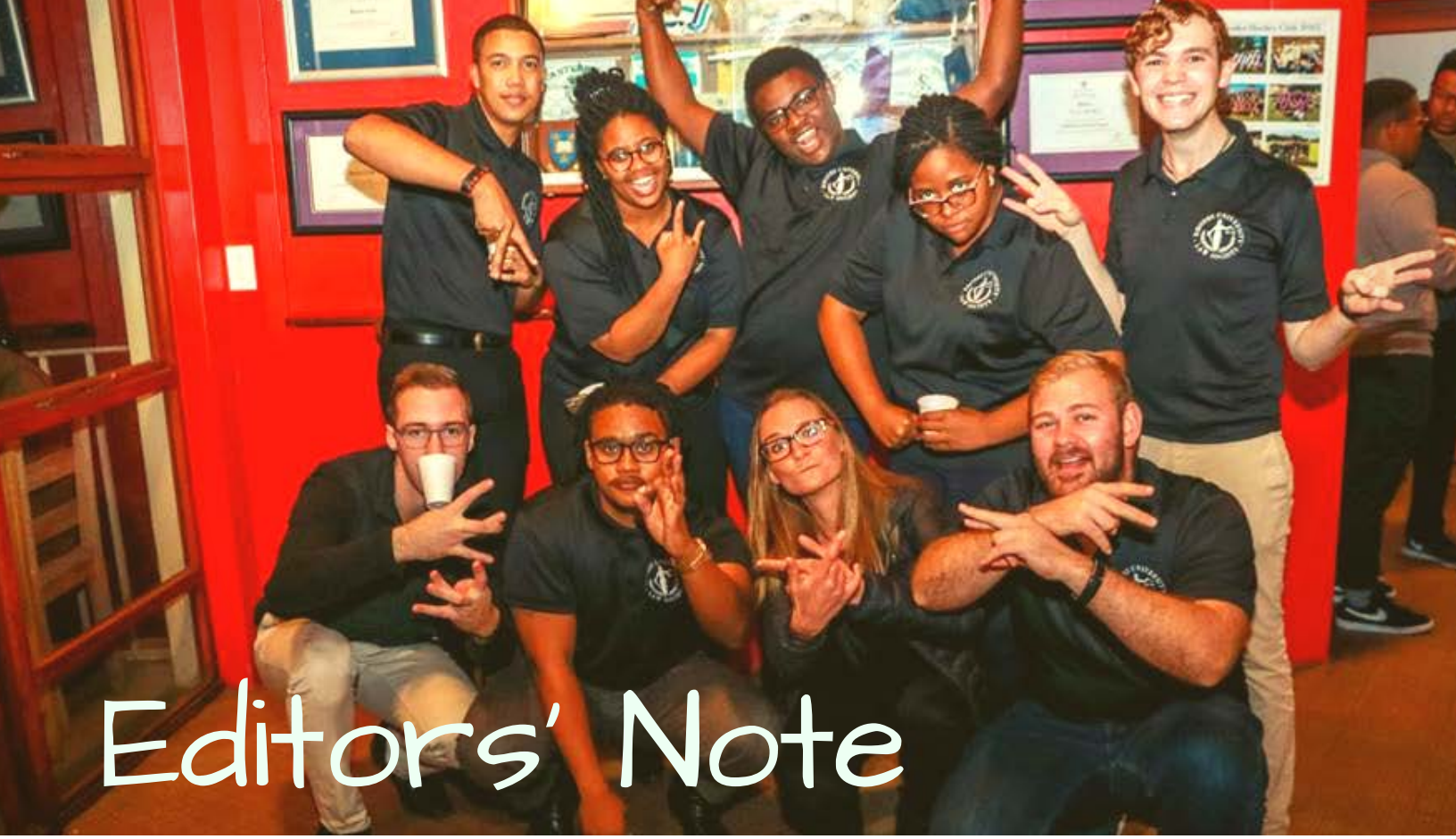

Editors' Note

It is with great joy that we present to you the 2018 edition of *In Camera*! As you will notice, quite a lot has changed in terms of the look and content of the magazine. One of the biggest changes that has been made is the fusion of the annual Final-Year Yearbook into *In Camera*.

Although we tried not to stray more than it was necessary from the work of our predecessors, we saw it necessary to adapt in certain respects to ensure that *In Camera* remains relevant to the context in which it is received.

We would like to take this opportunity to show our appreciation to the following, without whom the publication of this magazine would not have been possible: the Law Society Committee for all the help and support, and especially to our honorary *In Camera* Editor, Noni Tusi; the Law Faculty Administration Staff, for always being willing to help us with communicating to the staff and students; and Prof Graham Glover, for taking the time to guide and assist us in producing this magazine.

Jess & Sibu

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Rhodes University Faculty of Law Annual Report

Prof Rosaán Krüger
Dean and Associate Professor, Faculty of Law

In June of 2018, the Faculty was officially notified of the reaccreditation of its LLB offering. Years of self-reflection, adaptation, adjustment and review culminated in one short but very important confirmation: the academic standard of our LLB, with its focus on research and writing skills; the format of the offering; and our plans to broaden access and ensure the academic success of our students, are in order. This approval should not, and does not, invite complacency. We are actively working to ensure the full implementation of our improvement plan to ensure that Rhodes LLB graduates are suitably equipped to navigate the unknown and unknowable future.

In this annual report, I provide an overview of news of students, staff and activities in the faculty over the past year.

Students, student news and activities

Graduation and awards

On 5 April 2018, 72 students graduated with LLB degrees from the Faculty.

One LLM-candidate graduated at the ceremony with degree by thesis:

CHIRWA, Watson Pajanji, LLB (Hons) (Malawi), in the Faculty of Law. Degree by thesis. Thesis: The regulation of subsidies and regional trade among developing countries in the multilateral trading system: the case of export processing zones in Malawi.

One PhD-candidate graduated at the ceremony with degree by thesis:

KHAYUNDI, Francis Bulimo Mapati, LLM (Rhodes), in the Faculty of Law. Degree by thesis. Thesis: The Kenya National Human Rights Commission and the promotion, protection and monitoring of socio-economic rights in Kenya. Supervisor: Professor R Krüger. Co-supervisor: Dr J Cottrell Ghai (Katiba Institute).

The Faculty celebrated graduation with our graduands, their partners and their parents at an evening function held at the Faculty. The graduation celebration was also attended by alumnus Adv Tembeka Ngcukaitobi, who delivered the graduation address, and visiting professor and alumnus Judge Clive Plasket.

At this celebration, 38 final year students (53% of our 72 LLB graduates) were awarded Dean's list certificates in recognition of academic achievement in attaining

an average of at least 65% for all their final year courses. Additionally, a number of individual prizes were also awarded at this function:

- **Lexis Nexis Book Prize:** Internal book prize for Moot winner(s) in the final year: **Abigail Butcher**
- **Fasken Martineau Prize:** Best LLB student in Competition Law: **Michaela Kinsley**
- **Judge Phillip Schock Prize:** Best final-year LLB student: **Leo Vaccaro**
- **Juta Law Prize:** Best final-year LLB student, based on results over the penultimate- and final-year LLB: **Robyn Clarkson**
- **Mtshali and Sukha Prize:** Best student in Legal Ethics and Professional Responsibility: **Robyn Clarkson**
- **R G McKerron Memorial Prize:** Best student in Law of Delict: **Robert Harris**
- **Spoor & Fisher Prize:** Best student in Intellectual Property (Patents & Copyright): **Robyn Clarkson**
- **Phatshoane Henney Incorporated medals:** Awarded to students who obtain their LLB degrees with distinction: **Robyn Clarkson, Leo Vaccaro, Jay Fischer and Ibrahim Patel**
- **Rob and Trish Midgley Prize:** awarded to the student who has contributed substantially towards a holistic educational experience for law students at Rhodes University: **Kimberley Nyajeka**
- **Tommy Date Chong Award:** Awarded to student who makes the greatest contribution to the Law Clinic in their penultimate and final years of study at the University: **Robert Harris**

Later in the year, Rhodes University honoured former deputy Chief Justice Dikgang Moseneke and Ms Yvonne Chaka Chaka with LLD degrees honoris causa at a celebration in Johannesburg.

LLB intake 2018

79 students accepted offers into LLB penultimate year this year, joining 11 LLB first-degree students in the penultimate year. This brings our penultimate year to a record size that places pressure on our lecture venues, the Clinic and human resource capacity. As in years before, the preference of our students is clear: 81% of our law students choose the five-year stream, entering the LLB only after completing a first undergraduate degree.

Postgraduate students and student research

LAW FACULTY REPORT

The number of postgraduate students in the Faculty is increasing steadily, with a total of six LLM candidates and five PhD students registered for postgraduate studies for 2017.

Student news and activities

Rhodes University Law Society

The Rhodes University Law Society hosted various successful events in the last year. In collaboration with the Careers Centre, the society hosted a CV workshop and the annual Market Day successfully in the first term. The event was well attended by students, who benefited from interaction with various law firms and organisations, ranging from talks and information sessions, to interviews for positions as candidate attorneys. The event was sponsored by law firms Bowman Gilfillan and ENSAfrica, as well as the Law Faculty.

The society secured sponsorship from Cliffe Dekker Hofmeyr (CDH) to subsidise the cost of the hoodies and keep them affordable for our students (both members and non-members). The winning design was selected from several designs submitted by the Society's members, and the hoodies delivered in time to stave off the cold of the long Eastern Cape winter.

The Society's moot club was active this year and provided training in advocacy and court etiquette for its members. The club hosted an internal moot competition and assisted in the training of Legal Theory 1 students for their mock trials.

The Society hosted the annual law ball on 29 September at the Belmont Valley Golf Club, and the guest speaker was Judge Malcolm Wallis.

The Society continues its commitment to community engagement with its book drive, collecting fiction and non-fiction books for donation to the Duna Library, and with the collection and donation of sanitary pads on campus.

Black Lawyers' Association: Student Chapter

The Student Chapter acts as an auxiliary wing of the national Black Lawyers' Association, which co-exists with statutory bodies and within the legal fraternity. The Student Chapter is dedicated to uphold and protect the interests and rights of future lawyers and to confront the challenges facing disadvantaged law students.

The highlights of the Association's 2018 included a textbook drive, which resulted in a number of disadvantaged students being loaned available textbooks for their year of study. In March 2018, the Association hosted their annual meet-and-greet which welcomed students and staff to the Association. The Association donated a sum of money to the Law Faculty's crisis fund in line with its mandate. In August, the

Association hosted its annual Women's Luncheon, which marked the closing of a yearly sanitary-pad drive that seeks to give sanitary pads to high school and university students in the Grahamstown area. BLARUSC has grown since it was established in 2015. It has larger membership and overall impact upon the Grahamstown community and students.

Moot court and mock trial programme and competitions

Internal:

After a successful internal round, four final-year students proceeded to compete in the moot final on 6 March 2018. The Presiding judge was Judge Murray Lowe, assisted by two assessors, Adv Margaux Beard and Mr Nkosinathi Mzolo. Robin Smith and Tuscany Parker were the joint winners of the final-year moot for 2018. Dylan Bouchier and Simbarashe Mupfumi were the other finalists.

The internal moot competition for penultimate-year LLB students took place from 13 to 17 August 2018, with the final taking place on 22 August 2018. The students were challenged by the question whether the sale of an insolvent subsidiary by a parent company to a third-party company where the majority of both companies directors and shareholders are identical (and these parties relied on their majority on the board to effect the sale) constitutes a diversion of a corporate opportunity as contemplated in section 76(2)(a) of the Companies Act 71 of 2008. Ian Matthews, Mfundoluntu Somandi, Jeremy de Beer and Mthokozisi Zungu argued in the final round before a panel consisting of Judge Murray Lowe from the Eastern Cape High Court Division, Ms Sue Smailes, Director of Special Projects at Rhodes University, and Ms Jaylynne Hillier from the Legal Aid South Africa. The tough and well-argued final resulted in Mfundoluntu Somandi being declared the winner, with Mthokozisi Zungu the runner-up.

External:

ELSA moot

Four final-year LLB students participated in the All-Africa round of the ELSA Trade Law Moot competition from 24 to 29 April 2018, hosted by Strathmore University in Nairobi, Kenya. Rhodes University was represented by Welsey Howe, Christopher White, Kudzanai Tsvetu and Samantha Chiunzi. Kudzanai Tsvetu was awarded the prize for Best Oralist in the Grand Final against the Kenyan School of Law in the African round. As the runner-up for Africa, our team competed against the top teams in the world in Geneva, Switzerland during the final round from 19 to 24 June. Kudzanai Tsvetu was awarded a full internship in Geneva at the World Trade Organisation, starting in January of 2019.

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25th African Human Rights Moot Court Competition

The 2018 African Human Rights Moot Court Competition was held at the University of Ghana in Accra, Ghana. The competition took place from 6 to 12 August 2018. A total of 48 teams participated in the competition. Robin Smith and Simbarashe Mupfumi were selected as the representatives for Rhodes University. The Rhodes team was guided and assisted by Professor Laurence Juma. The Rhodes University representatives did not make it to the final round, which was won by the University of Ghana. However, the Rhodes team performed commendably, and learnt a great deal from the experience.

Several of the other annual moot court competitions will only be held in October of this year.

Alumni news

The Rhodes University Law Faculty is proud of the notable achievements of some of its alumni. Mr Tladi Marumo is a recipient of the prestigious Fulbright Scholarship and is studying towards his JSD at the Notre Dame Law School, Indiana, USA. Another proud old-Rhodian, Ms Joanna Pickering, secured Skye Scholarship funding to pursue LLM studies at the Paris Institute of Political Studies (Sciences Po), in Paris, France.

Staff, staff news and activities

Staff news

Prof Graham Glover acted as Deputy Dean until June 2018. Prof Laurence Juma returned from his academic leave in July and took up the Deputy Deanship on his return.

Mr Justin Ramages joined the academic staff for a short few months from May to October 2018. Mr Shaun Bergover joined the Faculty as the first Council-funded Clinical Legal Education Lecturer in the history of the Faculty in September.

Prof Helena van Coller received a NRF Y-rating at the end of 2017, the category for promising young researchers.

Community engagement

At the beginning of 2018 the Rhodes Law Faculty Dean, Prof Krüger, requested Mr Moroeng and Mr Eilers, the two Faculty Teaching and Research Assistants, to create community engagement initiatives that could be run on an annual and sustainable basis by staff and students in the Faculty.

A decision was taken to combine the academic expertise and law student participation in the Faculty, and to target the Grahamstown communities' urgent social issues. After a brainstorming session it was decided that a pilot project should be developed to address the intersectional issues of bullying, sexual offences and conflict resolution at school level. The Grahamstown high school learners in the critical age groups of between twelve and eighteen were selected to participate in the initial pilot project. The aim was to teach and train alternative dispute resolution as an empowering life skill, using areas of conflict to which the learner cohort selected age range would identify and relate, and to introduce learners to law as a possible career choice. For the law students it was an opportunity to learn and practise the dual skills of coaching and practising mediation skills.

A three-part mediation programme was conceived, and study materials on point were developed by the team comprising of Mr Tsukudu Moroeng, Mr Paul Eilers, and which was led by Ms Brahmi Padayachi. The two hour programme was divided into three sessions, which began with a lecture on the substantive law on bullying, sexual offences, and the theory and practice of conflict resolution through mediation. The second part of the session explored various factual scenarios that may be experienced in the substantive arenas of bullying and sexual offences. The third session focused on the basics of the actual mediation process using the factual scenarios that had been discussed with Rhodes law students who would be guiding the process as the mediators. The programme had the further benefit in that that conflict resolution was already a part of most schools' Life Orientation curriculum would add to the schools' own academic requirements. Moreover, it was hoped that learners would be able to use the skills that they learnt and share them with other learners at their school, thus furthering the 'each one teach one' principle to contribute to the social cohesion goals of their communities. The pilot project aimed to use a range of learners drawn from Kingswood College, Victoria Girls' School and Mary Waters. This Conflict Resolution Mediation Workshop was successfully conducted on Friday 11 May 2018 from 14:30-17:00 at the Rhodes Law Faculty. It was managed by the same team that conceived it, ably assisted by Rhodes LLB students who volunteered their time as mediators. The reflective feedback from both the learners and volunteering law students was very positive, as both learners and facilitators gained from the engagement.

The second community engagement programme that the Faculty held this year was a basic introductory workshop with high school learners on the Constitution. This workshop focused on the importance of the South African Constitution, how it protects human rights and also on the importance of learners becoming engaged and active citizens. The workshop is called A Living Constitution, or '*UmGaqo siseko ophilayo*' in Xhosa. The format and substantive law of these workshops was compiled by Prof Krüger with the help of the two Teaching and Research Assistants.

LAW FACULTY REPORT

The Director of the Rhodes Community Engagement Office, Ms Diana Hornby, coordinated the pilot venture of this workshop with Kingswood College. The idea was to have a basic discussion about the Constitution in an interactive manner, during the course of which learners held group discussions on important issues such as the meaning of democracy, human rights and equality in the context of their lives. This led to several enlightening exchanges between the learners and Teaching Assistants, and provided invaluable insight to the Faculty as to what learners understand about the law and Constitution.

The pilot venture of the sessions on A Living Constitution was held on Monday 28 May at Kingswood College with a group of about seventy of its grade 8 learners, who proved to be very engaging and interested in the subject of the discussion. A follow-up session was held the next week on Monday 4 June, where certain introductory topics were expanded on in the context of Ms Hornby's discussion on the levels of inequality between South African learners of different schools. The aim here was to make the learners aware of these inequalities in the context of their protected rights as guaranteed by the Constitution. The Living Constitution workshop was held again during Trading Live for Mandela week. On Thursday 20 July, the Teaching Assistants, accompanied by Prof Krüger, Mr Mzolo, Ms Kruuse and Mr Jabavu visited Nathaniel Nyaluza High School for the first of these workshops during Mandela Week. This proved to be particularly interesting, given that the 12 matriculants attending the talk were all interested in studying law, which made for some insightful discussions. Furthermore, given that the vast majority of Nathaniel Nyaluza learners spoke Xhosa, this created an interesting new dynamic for the Faculty members as certain legal concepts had to be explained in their mother tongue, and this highlighted the importance of language and the law. As this constituted a trade, the learners in their turn performed Xhosa poetry to the Faculty members after the session on the Constitution was finished. This consisted of a solo performance followed by a duet, and was very well received.

On Monday 23 July another trade on the Living Constitution was held at T.E.M. Mrwetyana High School in Joza. Around sixty grade 11 Life Orientation learners were in attendance. Prof Van Coller accompanied the Teaching Assistants to the discussion. The learners were interested and engaging. In particular, they highlighted the devastating effect that drug abuse in their community has on their basic rights. Afterwards the learners treated the Faculty members to a lively *a capella* rendition of two of their choral songs, which were thoroughly enjoyed.

The last Law Faculty trade for Mandela Day took place on Tuesday 24 July at Victoria Girls' High School. Around forty Life Orientation learners were in attendance and Ms Kruuse accompanied the Teaching Assistants to the talk. The learners made astute observations regarding the limits of the right to protest and right to freedom of

expression. Afterwards, the learners gave a rendition of their choir performance to their piano teacher's accompaniment. A student from Rhodes Music Radio also interviewed the Teaching Assistants about the talk and the importance of student protest at the end of the session – something that was specifically raised by the learners in discussion. During each of the 3 talks for Trading Live, the Faculty gave each learners their own copy of the Constitution, as well as a pencil case, in order for them to have something tangible to remember the workshop and the Faculty by. The Law Faculty looks forward to participating in the talks on a Living Constitution with more high schools in the Grahamstown area in future, as well as hosting several more productive mediation sessions. The Faculty values this contribution to nurturing more engaged, aware and proactive citizens in future.

Law Clinic

The Law Clinic has benefited from having a stable complement of four strong attorneys in the Grahamstown office in the past year, who also fulfil the role of lecturers and student supervisors: Prof Jonathan Campbell, Mr Ryan McDonald, Mr Shaun Bergover and Ms Sipe Mguga.

In the last year, three former candidate attorneys from both branch offices have been admitted as attorneys: Ms Gugu Vellem, Ms Sipe Mguga, and Ms Thembakazi Mvemve.

Ms Siziphiwe Yuse LLB (UWC) and Ms Amanda Mngomezulu, BA LLB (Rhodes) jointed the Clinic as candidate attorneys early this year.

Ms Thandeka Heleni retired at the end of 2017 after 28 years of service, leaving a big hole at the Clinic. From 2018, reception, screening and interpreting services are supplemented by isiXhosa speaking Legal Theory 2 student volunteers, who for the first time have the opportunity of being exposed to Law Clinic work.

Prof Jonathan Campbell was formally seconded to the Law Clinic (as Director) for five years from January 2018.

Besides compulsory attendance by penultimate LLB students at the Law Clinic as part of the Legal Practice course, students have further opportunities to volunteer to work at the Clinic. A number of students have volunteered as:

- Student mentors in 1st and 3rd terms, to assist new students at the Clinic with a range of operational and administrative responsibilities.
- Vac interns during the December / January and June / July vacations.
- IsiXhosa-speaking volunteers who assist with reception, screening and interpreting services (drawn from the Legal Theory 2 class).

Advice office project

The Law Clinic is engaged in a number of projects, chief amongst which is the advice office project, involving training and back-up legal services to paralegal advice offices from throughout the Eastern Cape Province.

The Clinic also offered a one week Wills and Succession course to paralegals in October 2017.

Community education

The Law Clinic continues to conduct its community education programme on topical issues via workshops, Radio Grahamstown talk shows, and *Grocott's Mail* articles.

Research

Rhodes University is a research-intensive university and it subscribes to the teacher-scholar model. The Faculty of Law is no different in that respect. We value research in all its guises, from the informal structuring and drafting of curricula, to preparation for lectures, to the delivery of papers at conferences and publication of journal articles and books.

Publications by staff, including visiting professors, and postgraduate students over the past year in national and international publications:

Books/Chapters/Monographs

Book chapter

Kruger, R. and **Mcconnachie, C.J.C.** (2017) 'The Impact of the Constitution on Learners' Rights' In: Boezaart, T. (ed.). *Child Law in South Africa*. 2nd Ed. Cape Town: Juta.

Journal Research Publications

Juma, L. 'Protection of Internally Displaced Persons in Kenya under the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act of 2012: An Appraisal' (2018) 51(1) *CILSA* 44-65.

Juma, L and Khamala C. 'A Dynamic Approach to Assess the International Criminal Court's Performance in the Kenyan cases' (2017) 25(2*) Lesotho Law Journal* 39-73.

Kruuse, H and Mwambene, L**.** 'Marital Rape and the Cultural Defence in South Africa' (2018) *Stellenbosch Law Review* 25-47.

Kruuse, H. '*Ex Parte Mdyogolo* 2017 (1) SA 432 (ECG): Character and Carelessness' (2018) 135 *South African Law Journal* 249-261.

Van Coller, E.H. 'Administrative Law' (2018) 2016 *Annual Survey of South African Law* 49-91.

Van Coller, E.H. 'Geloofsinstellings en die Hersieningsbevoegdheid van die Howe / Religious institutions and the Review Jurisdiction of the Courts' (2017) 14(3) *LitNet Akademies* 991-1039.

Van Coller, E.H. 'Regsgeskille en die Kerk: Lesse te Leer Uit die Saak van Johannes Fortuin en die Church of Christ Mission / Legal Disputes and what the Church can Learn from the Case of *Fortuin v Church of Christ Mission of the Republic of South Africa and Others*' (2017) 14(3) *LitNet Akademies* 592-617.

Van Coller, E.H. 'The Church, the Bishop and the Missing Money: A Reflection on the Case of Bishop Ngewu and the Anglican Church of Southern Africa' *Oxford Journal of Law and Religion* (2017) 6(3) 610-618, available at https://doi.org/10.1093/ojlr/rwx033.

Research Papers Presented at Academic/Scientific Conferences

Bergover, S. 'Law Clinics Driving Impact and Impact Litigation' *Considering Some Contemporary Challenges Facing South African University Law Clinics*. Stellenbosch University Law Clinic, Stellenbosch. July 2018.

Campbell, J. 'Decolonising (Clinical) Legal Education: What Can This Mean?' *SALDA (South African Law Deans Association) Conference*. Auckland Park Bunting Road Campus, University of Johannesburg, Johannesburg. October 2017.

Campbell, J. 'Decolonising Clinical Legal Education in Post-colonial Countries: What Can This Mean? *GAJE (Global Alliance for Justice Education) Conference.* Instituto Tecnológico de Estudios Superiores de Monterrey, Puebla, Mexico. December 2017.

Campbell, J. 'Decolonising Clinical Legal Education: What Can This Mean?' *Considering Some Contemporary Challenges Facing South African University Law Clinics.* Stellenbosch University Law Clinic, Stellenbosch. July 2018.

Glover, G. 'Breach in Haste: Repent at Leisure?' *The Private Law and Social Justice Conference.* Nelson Mandela Metropolitan University, Port Elizabeth. August 2018.

Juma, L. 'African Union's ICC Withdrawal Strategy: A Move in the Wrong Direction'. *2017 ASIL Mid-Year Conference*. Washington University, St Loius, USA. October 2017.

Juma, L. 'The Role of Civil Society in Private Security Governance in Africa'. *African Coalition for Corporate Accountability General Assembly and Conference*. Pretoria. November 2017.

Juma, L. 'Collective Withdrawal Agenda in AU's Relationship with the ICC; Debating Possibilities and Challenges'. *The Doctoral Students*

Workshop. Faculty of Law, Utrecht University. January 2018.

Juma, L. 'Closure of Refugee Reception Centres in South Africa: Erosion of Rights and a Creeping Policy of Encampment., *IASFM 17 Conference.* University of Macedonia, Thessaloniki, Greece. July 2018.

Kruuse, H. 'Reforming the Public Through the Private: The Legal Practitioner's Role and the Contract of Mandate'. *Private Law and Social Justice Conference.* Nelson Mandela Metropolitan University, Port Elizabeth. August 2018.

Mashinini, T.N. 'Can Screenshot Technology be Circumvention Software?' *8th Annual Internet Law Works-in-Progress Conference*. New York School of Law, New York, USA. March 2018.

Mguga, S. 'The Life of a Law Clinician: Prioritizing and Time Management'. *Considering Some Contemporary Challenges Facing South African University Law Clinics.* Stellenbosch University Law Clinic, Stellenbosch. July 2018.

Rahim, S. 'Evaluation of the Value of Good governance within the South African Corporate Sector'. *SASUF Research Seminar on Research and Innovation.* Pretoria. May 2018.

Van Coller, E.H. 'Rituele Slagting: 'n Godsdienstige Reg? 'n Oorsig van Belangrike Wêreldtendense Binne Hierdie Kontroversiële Debat en Implikasies vir Godsdiensgemeenskappe in Suid-Afrika'. [Ritual Slaughter: a Religious Right? An Overview of Global Trends and Implications for Religious Communities in South Africa]. *Annual Symposium, SA Akademie vir Wetenskap en Kuns.* Pretoria. September 2017.

Van Coller, E.H. 'Ritual Slaughter and Religious Freedom: The Impact on the Flourishing of Religious Communities in South Africa'. *ACLARS (African Consortium for Law and Religion Studies) Conference "Law, Religion and Human Flourishing".* Faculty of Law, Abuja University, Nigeria. May 2018.

Other involvement

Besides conference participation, staff also engaged in a number of other research and teaching related activities:

McDonald, R. participated as a panel member at the 2018 African Law School Leadership Forum Conference on Legal Education. University of Cape Town, Cape Town. March 2018.

Mashinini, T.N. Part of South African-Sweden University Forum, a strategic internationalisation project running from 2017-2020 with the overall aim of strengthening ties between Sweden and South Africa in research, education and innovation - joined on 17 May 2018.

Mashinini, T.N. Awarded scholarship to participate in the 15th WIPO-WTO Colloquium for Teachers of Intellectual Property organized by the World Intellectual Property Organisation and World Trade Organisation in Geneva, 18-29 June 2018.

Mashinini, T.N. RMR Interview with Tswelopele Maputla on the Competition Amendment Bill and the history of Price-fixing in South Africa, 13 August 2018.

Mzolo, N. Guest presenter: 'Towards a Transformative Democracy: A South African Perspective of a Democratic Concept Given the Rationality Standard and the Separation of Powers Attitude' Constitutional law seminar (collaboration with Adv. Balogun) University of Kwa-Zulu Natal; September 2017.

Mzolo, N. Participant at the 5th Colloquium on Academic Monitoring & Support (AMS) Programme. University of Kwa-Zulu Natal; November 2017.

Mzolo, N. Presenter: 'The Essence of Human Rights in South Africa' Economic Freedom Fighters (EFF) Students' chapter (Organisation); April 2018.

Mzolo, N. Presenter: 'Human Rights and Ethics Issues Around Sexual Reproductive and Health-related Complications' UKZN Campus HIV/AIDS Support Unit (CHASU). April 2018.

Gugu, V.J., Vellem T. and Njoli Z. attended a NADEL workshop on human trafficking. Queenstown, October 2017.

Mguga, S., Mvemve T., Khumalo, N. and Gcaza, B. Attended a NADEL seminar on Constitutional Law. Port Elizabeth. 16 September 2017.

Mguga, S. and Bergover S. represented the Law Clinic at a two day *African Symposium on Legal Empowerment* at the invitation of OSF-SA, one of our donors. Johannesburg, October 2017.

Two attorneys and six candidate attorneys from both Law Clinic offices attended a LEAD *Consumer Protection Act* seminar (East London and Port Elizabeth, March 2018).

All professional staff from the Law Clinic Grahamstown office attended a seminar by visiting Professor Liz Ryan Cole from Vermont Law School, USA, on student supervision and feedback in the law clinic.

Four attorneys and five candidate attorneys from both Law Clinic offices attended a Children's Act seminar presented by a child law expert from the Legal Resources Centre's Johannesburg office (Grahamstown, April 2018).

Three attorneys and five candidate attorneys from Law Clinic both offices attended a LEAD Evictions and rental

recovery seminar (East London, April 2018).

Faculty events

The Eastern Cape Division Judge President SM Mbenenge's encouraging speech helped set a positive tone for the 2018 academic year.

Visiting fellow, Mr Max Boqwana delivered a thought-provoking public lecture in February entitled 'Illicit Financial Flows from Africa: What African Lawyers can do about it?' He also gave lectures to first-and penultimate-year law students.

Adv Chris McConnachie, a research associate of the Faculty, presented lectures to the Constitutional Law class and the Life Partnerships class respectively on matters in which he had acted as counsel: *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* on the requirement for parliamentary rules providing for impeachment procedures and accountability measures; and on *Women's Legal Centre v President of South Africa and others*, addressing the need to recognise Muslim Marriages through legislative enactment.

Tyron Theesen and Monde Coto (from Webber Wentzel and Rhodes alumni) addressed the Legal Skills class about the legal environment, specifically relating to multijurisdictional practice, the effects of globalisation on the practice of law, and the types of instructions to expect in a corporate law firm.

Our visiting professor, Judge of Appeal Nambitha Dambuza, delivered a well-attended public lecture in April entitled, 'Women's Parental Rights in *Ulwaluko:* A Paradox'. Judge Dambuza also gave lectures in procedural-law courses for LLB students.

Adv Wim Trengove delivered a public lecture in September on 'The Good, the Bad and the Ugly in the NDPP'. As always he gripped the attention of his audience with his succinct and cutting analysis. Judge Plasket will deliver a public lecture in October.

Conclusion and prospects

With the confirmation of the accreditation of the LLB offering, the Faculty marks an accomplishment of which we are proud. We continue to build on our successes and learn from our mistakes. May we continue to grow and learn as part of our community, town, province, country, continent and world.

Rhodes University Law Society Report

Jeremy de Beer
President of the Rhodes University Law Society

This year, like all previous years, has proven to be both challenging and eventful for the Rhodes Law Society and the student body as a whole. That being said, it falls to me to provide a short report on everything that the Rhodes Law Society has done this year to add value to the Law Faculty and the student body.

Events

Aside from the annual societies' evening and extravaganza, we kicked off the year by successfully holding the annual CV and Interview Workshop to ensure that all law students were adequately prepared to respond to any employment opportunities that arose throughout the year. It was critical to host this early, as our annual Market Day took place on the 7th of March.

Market Day is one of our most anticipated events of the year and, like previous years, it was a resounding success. We were grateful to see many firms return to Grahamstown to interact with our students and conduct interviews. Having built on the connections that were developed by previous committees, we were able to invite several new firms to add to our ever-growing list of attendees, including large international players such as Allen & Overy. I pause here to thank Bowmans for sponsoring the Market Day morning tea, and ENSAfrica for sponsoring the Market Day luncheon. We thank you for your continued support of our Faculty.

Market Day kicked off with a cocktail function to coincide with the final-year Moot Final, which took place the night before Market Day. This opening event, like the day itself, went off without a hitch and served as a smooth introduction to Market Day.

In the second term, we hosted our annual meet-and-greet at the Rhodes Sports Bar. This event is a social function which saw students of all ages mingling and having a

good time. Aside from the fact that it is highly probable that many of us will become colleagues in the future, the Rhodes Law Society has always viewed the relationship between the younger undergraduates and the older LLBs as being of significant importance. Inasmuch as we are primarily at university to learn, we are also here to make lasting connections. Needless to say, these connections should not be constrained by age or year of academic study. The meet-and-greet serves as an opportunity for all students and members of staff to interact with one another in a more relaxed, less formal, environment. We strongly believe this successful event was a giant leap towards giving all students the opportunity to start a networking relationship here at Rhodes.

Another initiative that has really taken off, and has made great strides in bridging the gap between undergraduate and LLB students, is our Moot Club. Under the direction of our Moot Club Chair, Ryan Birkner, the Moot Club has, since the second term, taken place weekly with a focus on important practical legal skills. It is at Moot Club that we teach our members litigious skills, oral presentation, court etiquette and, above all, legal strategy in relation to how to approach a practical problem. To this end, Moot Club has provided training for any students who may wish to partake in the various moot competitions Rhodes has to offer. Beyond this, the Legal Theory 1 class has annual Mock Trials as part of their assessment, and so to ensure that our society is as inclusive of our younger members as we are of our older members, the Moot Club's mandate has been extended to include training for these Mock Trials. This has been particularly successful in terms of teaching skills that are difficult to glean from a book, such as cross-examination.

I would also like to thank our Treasurer, Dylan Bouchier, for spearheading our annual hoodie initiative. Thanks to Dylan's efforts we have had one of the most successful years in terms of hoodie organisation, as we were able to roll the final products out at the start of the third term – a whole term earlier than in previous years. I would also like to thank Cliffe Dekker Hofmeyr for their generous subsidy that helped us to keep the hoodie prices low and affordable for our students.

At the start of fourth term, ENSAfrica was also gracious enough to sponsor our Annual General Meeting at Saints Bistro. It is at this event that the new committee for 2019 was elected. I would like to thank not only ENS for their sponsorship, but all those who attended to cast their votes and partake in the democratic process. Thanks to you taking an interest in the running of the society, I am confident that the Society is in good hands for next year. We were also able to effect a long-overdue amendment to the Law Society's Constitution, which had become outdated and defunct in that it still referred to us as the 'Law Student's Council', which will from now on be a separate body with its own mandate.

The final major function for the year was the annual Law Ball, which was kindly sponsored by the Professional Provident Society (PPS). The Ball took place at the Belmont Golf Club, continuing the roaring success of the 2017 Ball. This year's theme was 'Under the African Stars', an ode to the bright and promising culture of transformation that has shaken not only our campus, but the legal community as a whole. The decor was all bright lights, silvers and blues, with a sumptuous three course meal and bottles of wine to keep our guests warm. Students and staff alike were dancing together until the early morning. We were also lucky enough to have Judge Malcolm Wallis, an eminent Judge of the Supreme Court of Appeal come down to Grahamstown as the Guest of Honour for the Ball. All in all, it was a fantastic way to thank everyone for their contributions to the faculty, bid farewell to leaving students and staff, and celebrate the end of a very successful year.

Aside from these major events, the Law Society has also organised several miscellaneous events, including a class presentation from Adams & Adams to the Legal Theory 3 Contract class in the first week of October. This presentation was most beneficial as Adams & Adams recently made law in the Constitutional Court by developing the contractual 'repentance principle', which forms part of the LT3 syllabus. As always, the Society also made sure that our members went into their exams with a little pick-me-up, this year in the form of cappuccino vouchers from Handmade Coffees.

Community engagement

Community engagement is always important, and when the year flies by as quickly as it inevitably does, it is very easy to let this become an afterthought. I am, however, proud to report that the Rhodes Law Society has once again stepped up to the plate, despite our extensive mandate. This year we have started a book drive that runs from the Main Library and Law Library, the proceeds of which will be donated in an effort to help improve the literacy of our country's youth. This is extremely important, as reading is both an integral part of the legal profession and education in general – it is the tool through which one can chart one's own course. We have also begun what we hope will be a sustainable sanitary pad drive. Our vision in this respect is to be able to utilise the sanitary pad donations for use at the women's bathroom in the Law Faculty for those in need. This is particularly in light of the fact that sanitary pads are important amenities that are all too often unfairly denied to women for various reasons.

The Law Society has also been working to develop a relationship with Duna Public Library in the hopes that we will be able to help restore the facility and potentially start a reforestation initiative by planting trees on the grounds. This is particularly important to us given the amount of paper that we consume as law students alone. We also assisted other community engagement-oriented societies such as JJH by participating in their fundraising Futsal Tournaments.

Thank you and farewells

All in all, this has been an extremely busy year, but one that has turned out very successfully. It might not have done so, however, if not for the efforts of those who have worked tirelessly to keep the ship afloat and on course. First, I would like to thank Matthew Bouah, the Vice-President of the Law Society for 2018. Your strong sense of leadership, keen intuition, and genuine commitment to the Society and your peers has not gone unnoticed, and I am extremely grateful to have had you by my side throughout this year. I would also like to thank Dylan Bouchier and Kudzie Tsvetu, who have assisted greatly in ensuring the smooth running of the Society. I would like

to especially thank Dylan for being so efficient at solving finance-related problems as they arose; without you they could have become crises!

Thanks must also go to Ryan Birker for his calm leadership of the Moot Club. Your commitment to your position and the students has ensured the successful running of Moot Club once again! Thank you to Jessica Steele and Sibusiso Ngwila, whose tireless efforts and iron will have resulted in the best edition of *In Camera* to date, as they have revolutionised the way the Law Society approaches this initiative. I would also like to thank Sethu Khumalo for keeping us on the right course in terms of community engagement, and for all of your valuable insights throughout the year, as well as Noni Tusi, our social media queen, for being so unbelievably efficient at anything and everything you set your mind to. From my side, I can say that both I and the Society are extremely lucky to have worked with such a phenomenal group of people.

Final thanks must also be made to the Law Society's mentor, Adv Renaud, for his cool guidance in times of stress. We also thank Adv Rahim for his insights, and Professors Krüger, Juma and Glover for their continued support in ensuring that the Society runs as it should – professionally and efficiently!

Black Lawyers' Association: Rhodes University Student Chapter Report

Nobuhle Sibiya
Chairperson of the Black Lawyers' Association RU Student Chapter

The Black Lawyers' Association Rhodes University Student Chapter (BLARUSC) for the year 2017/2018 was led by Nobuhle Sibiya (Chairperson) and Viwe Sokatsha (Vice Chairperson). Having had made such incredible strides in 2016/2017, the student chapter placed its focus on growth and outreach for the 2017/2018 year. The integral aspect for this year was to strike a balance between upholding the core objectives of the Black Lawyers' Association and the implementation of new and bold ideas that would cater to the current needs of our membership.

The first half of the year came with a number of challenges, mainly rooted in an explosion of ideas that were often made impossible due to a lack of funding. The committee has held regular meetings to undertake planning and fundraising initiatives. To curb the tremendous problem of a lack of funding, we have reached out to a number of possible sponsors; but these attempts were unfortunately unsuccessful.

To date, the Chapter has held its annual champagne breakfast, which is used as a platform for incoming and existing membership to meet both the committee and one another. The event was a great success, with more than half of the membership in attendance, members of the Faculty of Law in attendance, and an array of practising attorneys and academics who were present as speakers and shared insights relevant to our theme 'Asserting Yourself in the Legal Profession and the World Without Losing Your Identity'. Prior to the champagne breakfast, the Chapter hosted a textbook drive. Textbooks that we had been collecting were given out to members who were in need of prescribed textbooks and any extra material for their studies. The drive saw several first years turning out and waiting in anticipation. The textbook

drive was an incredible success and is set to be an annual event which will commence at the start of each year.

As Chairperson, I have had the privilege of sitting on the Law Faculty Executive Committee, which is a monthly meeting held by the members of the Faculty concerning issues within the Faculty and how they affect students. As the BLARUSC chairperson, I sit in a representative capacity which has had fruitful results; a number of concerns with regard to student issues which had been raised by us were resolved by the Faculty. The Law Faculty maintains a crisis fund, and because our members have over the years been assisted by this fund each executive member of the committee in their capacity as such has donated towards the fund in BLARUSC's name.

August is Women's Month, and as such marks the anniversary of the great women's march of 1956 in the struggle for freedom and women's rights in South Africa. In celebration of the remarkable achievements and the tenacious spirits of the fearless females who continue to advocate for change, defy norms and stand up for what they believe in, the BLARUSC in collaboration with the Black Management Forum: Rhodes Student Chapter hosted, the 2nd annual women's luncheon. The event set out to bring together women from different races, cultures and backgrounds for a day of discussions revolving around the issues women face. The theme for the event was 'Patriarchy, *Sifelani?* (What are we dying for?)'. The event was a huge success that resulted in over 100 sanitary pads being donated to the society which would eventually be distributed at a high school with which we have been working.

In addition, the events of the second semester included a community engagement initiative - 'Adopt a School'. We have connected with a high school in Grahamstown to have a session with the students to inform and teach them about their rights and the law concerning sexual assault, as well as a general overview of children's rights. We also hosted our annual Tea with Judge President Mbenenge in August which was an incredible success. It was a huge honour to have him with us to speak to our members.

BLACK LAWYERS' ASSOCIATION REPORT

Overall, 2017/2018 has been a fruitful year for the society. We have grown in numbers and have reached out to both the membership and the community at large, which was our objective from the beginning. As this year's Committee reaches the end of its term of service, I am grateful for the friendships formed, the memories and, most of all, the personal growth that has come with the ups and downs. BLARUSC is only 4 years old and admittedly has much more work to do. I cannot wait to see the Chapter continue to grow and make those leaps and bounds over the years to come.

Criminal Trial Proceedings: Should Media Presence and Coverage be Permitted?

Ashley Bristow
Penultimate Year LLB

'Courts … should employ their inherent jurisdiction not to value one competing right over the other. Rather, the interest of justice requires the development of counterweights, such as exceptions of witness intimidation and sensational framing, in order to give effect to procedural fairness…'

In-court media coverage has remained an academic debate for a number of years, both nationally and internationally, since the broadcast of America's infamous OJ Simpson trial. [1] Similarly, the South African trial of Oscar Pistorius,[2] which was dedicated its own broadcast channel,[3] became a mini-series for viewers who religiously watched the courtroom drama unfold. Although the SCA judgment of *Van Breda v Media 24*[4] ('the van Breda Trial') just months ago set the precedent in favour of the broadcast trial, procedural challenges remain imminent. This article evaluates the impact that procedural irregularities and the presence competing rights have on criminal procedure, and proposes an alternative approach, to ensure efficient criminal justice.

Regulation of courtroom procedure

Superior Courts have inherent jurisdiction to "regulate their own process […] taking into account the interests of justice".[5] This enables them to allow trial broadcasts and to set requirements as to how they should be carried out. However, in certain instances, courts have little choice. In *S v Pistorius*[6] ("the Pistorius trial") for example,

[1] *Rufo v Simpson* (2001) 86 CA 4th 581.
[2] *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* 2014 (1) SACR 589 (GP).
[3] D Moseneke "Media Coverage of the Oscar Pistorius Trial and Open Justice" (2015) 28 *Advocate* 2 at 32.
[4] *The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others* (425/2017) [2017] ZASCA 97.
[5] The Constitution of the Republic of South Africa, 1996, s 173.
[6] *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793.

the courtroom was flooded with journalists, necessitating broadcast regulations to simmer near chaotic conditions.[7] Although the power to regulate process remains a powerful and necessary mechanism in order to ensure efficient courtroom procedure, it remains qualified by the interests of justice.

Statute provides for exceptional circumstances in which the interests of justice will require a deviation from the norm. The Criminal Procedure Act[8] ('the Act') states that all criminal proceedings shall take place in open court, unless proceedings take place in the Child Justice Court; where the witness is a minor; where there is a likelihood that harm will result to the witness or the accused; or where the accused is charged of a sexual offence or extortion. [9] Superior Courts are therefore able to utilise their inherent jurisdiction to regulate circumstances for which the Act makes no provision, but this constitutes an exception to the usual rule, in the interest of justice.

This becomes especially controversial when courts have to strike a balance between competing rights: the recognition of the right to freedom of expression (which includes access to information);[10] the accused's right to fair trail;[11] and the principle of public interest. As Nugent J pointed out in *Midi Television v Director of Public Prosectutions*, [12] the court cannot prefer one right over the other, as all have equal value:

> "They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other."[13]

The general rule of an open court is directly linked to the right to freedom of expression,[14] in that both seek transparency and accountability as an ultimate goal. Nevertheless, I argue that the two remain distinctly separate in this analysis, as the

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[7] *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* 2014 (1) SACR 589 (GP) 590.
[8] 55 of 1977.
[9] S 153.
[10] S 16(1).
[11] S 35(3).
[12] [2007] SCA 56 (RSA).
[13] para 9.
[14] S 16(1).

former is guided by the interests of justice and the latter, by public interest. The former focuses on courtroom procedure, whereas the latter is concerned with substantive law. Therefore the constitutional right to freedom of expression remains a weak justification for media broadcast of procedure in an open court. The impact of this conflict on procedural efficiency, must be dealt with.

The s 153(2) exception as a counterweight to the general rule of an open court

The Court in *Van Breda* refrained from setting requirements for media applications to broadcast trials, but confirmed the *Midi Television v DPP* approach, in that "courts will not restrict the nature and scope of the broadcast unless (a) prejudice is demonstrable and (b) there is a real risk that such prejudice will occur".[15]

In that matter, the Court held that the broadcast of a documentary on Baby Jordan's murder did not constitute prejudice to the privacy[16] and security[17] of interviewed witnesses. Although the Act provides for an exception to open court when there is "a likelihood that harm might result to the witness or the accused",[18] the precedent requires the prejudice to be demonstrable and imminent. This case demonstrates the effect this conflict has on procedural fairness.

The general rule is qualified by the *sub judice* rule, which prohibits litigants from discussing their case with anyone other than relevant legal representatives. Some may argue that the rule has, to a large extent, fallen into disuse.[19] If this counterweight is abandoned, and trial broadcasts are allowed, balance is compromised; this, even more so when broadcasts are an extension of an open court. An abuse of the principle of an open court may lead to all sorts of prejudice if it is not qualified by a practical counterweight.

Yet, even when trail broadcasts are balanced, courtroom procedure is vulnerable. Prejudice may arise from unforeseen circumstances that simply cannot be undone after they are swallowed up by cameras and recorders. Broadcasts may enhance

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[15] *The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others* (425/2017) [2017] ZASCA 97 para 75.
[16] S 14.
[17] S 12.
[18] S 153(2).
[19] Moseneke 2015*Advocate* 34.

"the likelihood that harm might result to the witness or the accused", as opposing parties are able to abuse the broadcast of private information, in order to intimidate witnesses. In the *Pistorius* trial, for example, a state witness was harassed by members of the public after his personal cell phone number was recited in court, and was ultimately aired on live television.[20]

These drawbacks concern both litigating parties. Witness intimidation directly affects the accused's right to a fair trial,[21] for example when witnesses are more reluctant to testify in favour of the accused due to the public demanding conviction. The principle of open court is not absolute and should be subject to exceptions provided for in the Act. It would be inconsistent to develop a common-law counterweight for other prejudices (which will be addressed below), if the court fails to apply the statutory exception of section 153(2).

Procedural challenges

The first argument against trial broadcast is the possibility and likelihood of witness interference. If witnesses have access to the testimonies of fellow witnesses, this may enable them to tailor their evidence around the previously broadcasted evidence. In the *Pistorius* trial,[22] Masipa J was of the view that "there was a probability that some witnesses failed to separate what they knew personally from what they had gathered from radio and television", [23] ultimately discarding much testimony as unreliable. Although it may be argued that social media platforms render the topic moot because witnesses are able to use this platform to access the same information,[24] one must consider the difference between a witness who sets out to attain this information, and one who is bombarded with this information from their television screen. In addition, witnesses may be intimidated by the presence of cameras in the courtroom, or by the mere knowledge that the eyes of the nation will

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[20] Sapa "Pistorius trial: Third witness's privacy is compromised" (2014) *The Mail & Guardian* https://mg.co.za/article/2014-03-05-third-witnesss-privacy-compromised-after-cell-number-revealed (accessed 20 March 2018).
[21] S 35(3).
[22] *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793.
[23] K Weyers "Television by Trial" (2014) 14 *Without Prejudice* 11 at 48.
[24] *The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others* (425/2017) [2017] ZASCA 97 para 55.

be on them. Procedural tact should therefore not be done away with when the court interprets an 'open court' as a 'broadcast court', as the accused's right to fair trial[25] may very well be impeded.

Another noteworthy prejudice is the impairment of the quality of legal representation. The media pressure placed on legal representatives of both parties inhibits their natural litigation skills. Furthermore, inescapable memes and critiques from peers may impair their self-confidence. The accused's right of access to court[26] and to legal representation[27] could be adversely affected, or even rendered meaningless, when the quality of their representation is affected by the media. Some legal representatives are unaffected by media presence in court, but the extent to which one is observed and every word critiqued, is a variable which any human being will likely succumb to.

Judges like legal representatives, are also open to undue scrutiny by the media, who may resort to personal attacks when unsatisfied with judges' findings. The immense pressure which judges face from the public may influence the conviction and sentencing of the accused. As Johnson points out,

> "[Media] coverage appears balanced or neutral (at face value). Only upon detailed enquiry of the corpus of the coverage will the framing of the trial become readily apparent (…). An expected consequence of the persistent pursuit of an accused is that the media frenzy becomes legitimised by the pack."[28]

The media are thus able to play on any insecurities shown at the trial in order to frame the parties in a particular light. This has an adverse effect on the accused's right to be presumed innocent.[29] It is often irresistible for media to combine subjective commentaries on the trial, the actual trial broadcast, and non-material issues from an accused's past, in order to justify their biased framing.

It is highly improbable that legal representatives and judges will maintain an objective view of the accused when they are exposed to the media's constant subjective

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[25] S 35(3)(f).
[26] S 34.
[27] S 35(3)(f).
[28] K A Johnson *Trial by Media, The Megaspectacle and the Competition of Narratives: The Framing of The Oscar Pistorius Murder Trial by News24* (MA thesis, UCT, 2015).
[29] S 35(3)(h).

framing of them. Not only does sensationalised framing cloud the judgement of the public, but it incites them to act upon emotional judgements. Masipa J for instance, received numerous death threats after convicting Pistorius with culpable homicide, rather than murder.[30] Whether conscious thereof or not, no stakeholder is immune to the influence of framing, especially not by the simply virtue of the office they hold.

A win for media: a win for all?

Trial broadcasts make courtroom procedure vulnerable to indirect procedural concerns such as political influence, and may eventually directly affect procedural fairness. In the *Pistorius* trial, the ANC Women's League could be seen protesting outside the courtroom, and sat directly behind the deceased's mother during the trial. This favourable positioning afforded them prime time media coverage, which was easily justified as an offer of support to the deceased's mother, rather than a publicity stunt before the national elections. One must question what political influence this had on the Justice Minister's decision to refer Pistorius' case to the Parole Review Board, despite the Parole Board having favoured his release.[31]

Those in favour of trial broadcast argue that it is in the public interest to have transparent criminal proceedings, as justice must be seen to be done. The media, I argue, cannot be said to be mere conduits in relaying broadcasted trials because they tend to concentrate their commentary on sensational material rather than de-mystifying the way courts work. The influence of editors in the version of events put to the public is undeniably determined by the economic advantages of sensationalised broadcasts.

It may also be argued that the majority of South Africans would not have access to these educational broadcasts, as they are only available on DSTV and Youtube. One must therefore consider Moseneke's comments at the National Press Club's Newsmaker of the Year 2014 Award Ceremony, and whether he was correct in

[30] Weyers 2014 *Without Prejudice* 48.

[31] T Hartleb "Parole Review Board to Decide on Oscar's Fate" (2015) News 24 https://www.news24.com/SouthAfrica/Oscar_Pistorius/Parole-review-board-to-decide-on-Oscars-fate-20150918 (accessed 20 March 2018).

saying, "the media and the courts, share a common goal".[32] Respectfully, is the goal of media not rather to achieve high ratings?

The President of the New Zealand Law Society has noted that "television's focus on entertainment (erodes) confidence in the justice system" because, contrary to what due process requires, "television introduces emotion, despite all effort to set it aside".[33] This is in stark contrast to the courts' goal of preserving the interests of justice.

An alternative approach

This article offers an alternative approach to that of competing constitutional rights. It suggests that the issue at hand, when considering criminal procedure, is primarily statutory. Although the Act derives its force from the accused's constitutional right of access to court, of a fair trial, of legal representation, and the right to be presumed innocent, it should only be used to develop the common law to provide for a counterweight to broadcast trials.

In giving effect to the principle of an open court, courts are obliged to apply the statutory exception of harm to witnesses and the accused. This is because the broadcasting of trials is simply an extension of the principle of an open court. Superior courts, I argue, should employ their inherent jurisdiction not to value one competing right over the other. Rather, the interest of justice requires the development of counterweights, such as exceptions of witness intimidation and sensational framing, in order to give effect to procedural fairness. Rather than imposing a blanket ban on broadcast trials or a free-for-all media frenzy, this approach calls for an interpretation of an open court, which renders media coverage possible, but with a less restrictive impact on criminal procedure.

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[32] Moseneke 2015*Advocate* 35.

[33] New Zealand Department of Justice "In-Court Media Coverage – A Consultation Paper" (1993) https://www.courtsofnz.govt.nz/In-Court-Media-Review/In-Court-Media-Review/In-Court-Media-Coverage_-_consultation-paper_.pdf (accessed 20 March 2018).

Conclusion

The broadcast of an absolutely open court is permissible, but not absolutely beneficial. Although the legal debate seems to have been settled by *Van Breda v Media 24*[34] – that televised trial is here to stay – the media's framing of parties and the form of broadcast should not remain uncircumscribed. Procedural fairness requires the court to develop exceptions to broadcast content and forms in order to ascertain will be most appropriate and fair in the circumstances. The reasoning behind the broadcast of the *Pistorius* trial was "to ensure that the public is indeed well informed about how the courts function".[35] Yet this may be provided for in audio form. The limitation of broadcast trials do not impede its purpose. The challenge of subjective framing and live televised trial should not be at the expense of procedural fairness. The broadcast of the *Van Breda* trial on Youtube is more limited than the 24-hour channel which was dedicated to the *Pistorius* trial, but incorrectly interprets the principle of open court. It sets a general rule in favour of media giants. The burden of proving otherwise rests on the shoulders of witnesses and those alleged to have committed crimes, but who have not yet found guilty of these.

[34] *The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others* (425/2017) [2017] ZASCA 97.
[35] *Multichoice (Proprietary) Limited and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* 2014 (1) SACR 589 (GP) para 20.

In Memoriam:

John Fieldsend, old Rhodian, and First Chief Justice of Zimbabwe

Prof Graham Glover

Associate Professor, Faculty of Law

'In a tale that has some parallels with South Africa's first Chief Justice, Arthur Chaskalson, who found himself for a long time in the legal wilderness as a result of his pro-human-rights views until South Africa's transition to democracy, Fieldsend was recalled in 1980 by the newly installed Zimbabwe government, with a request that he serve a fixed three-year transitional term as the newly independent country's first Chief Justice. He was considered the only judicial figure palatable to all political factions to assume the office.'

Students who are wandering in or about the Alastair Kerr Law Library may occasionally glance at the photographs of some of those former students of the Faculty who have gone on to hold judicial appointment, and may fleetingly wonder who these people were, before contemplating their own dreams of following in their footsteps. One of these photographs commemorates John Charles Rowell Fieldsend, who passed away on 22 February 2017, aged 95.[1] This is his story.

John Fieldsend was born in the United Kingdom in September 1921. At a young age he moved with his family to what was then known as Southern Rhodesia (now Zimbabwe), where his father was a railway engineer. Fieldsend was schooled at Michaelhouse, and enrolled for a BA degree at Rhodes in 1939 – the same year, incidentally, that Professor Kerr commenced his studies. Both were residents in the Founders' Hall. Fieldsend completed his BA degree, majoring in Legal Theory and Latin, at the end of 1941. He then postponed his further studies to join the army and fight in World War II. He saw service in North Africa and Italy at the time of the German retreat (he in fact participated in the crucial Battle of Monte Cassino), before completing the war as an officer in Greece. At the end of the war, in 1945, he returned to Rhodes to study for an LLB, which he completed at the end of 1946. It was during his BA studies that (in common with many Rhodes students) he met Muriel Gedling,

[1] See "Sir John Fieldsend: Obituary" *The London Times* 3 March 2017.

his future wife, at a hall ball. They were married soon after Fieldsend completed his LLB, and remained so for over 50 years.

Fieldsend was called to the Bar in Rhodesia in 1947, took silk in 1959, and became a judge in 1962. It was soon after that those events occurred which would result in Fieldsend's rise to international prominence. In November 1965, Ian Smith, then Prime Minister of Rhodesia, declared unilaterally that Rhodesia had become an independent sovereign state (and event known as the "unilateral declaration of independence" or "UDI"), and that it no longer considered itself a British colonial dominion bound by the British-drafted 1961 Constitution. Smith's white minority government promulgated its own constitution (the 1965 Constitution) in its stead, which included a wide variety of emergency powers and powers to detain persons without trial. Using these powers, Smith's government detained in 1967 a number of persons indefinitely whom the government considered to be "dissidents". Amongst this number were Daniel Madzimbamuto and Joshua Nkomo, two prominent black political leaders. Mrs Stella Madzimbamuto (Daniel's wife) brought a legal challenge against the ongoing detentions, assisted by one of the world's most prominent counsel of the twentieth century, Sir Sydney Kentridge QC. Madzimbamuto's challenge was based on the ancient remedy of habeas corpus, first enshrined in the *Magna Carta* of 1215 and which now forms a fundamental part of all modern democratic legal systems – that a judge may order any person detained by the executive to be brought before a court to ascertain independently whether that person's detention is lawful, and to order their release if was is not.

Madzimbamuto's argument that the detention was not lawful was premised on a very simple foundation: that all acts passed or enforced by the Smith government lacked legal validity since UDI and the 1965 Constitution was itself unlawful. The British government and the United Nations had pronounced UDI to be an illegitimate act, and that the 1961 Constitution was still the ruling law. Hence, any actions of the Smith government were null and void, and of no force and effect, including the detentions of Madzimbamuto and others. The judgment that emerged from the Rhodesian Appellate Division is reported as *Madzimbamuto v Lardner-Burke NO*.[2]

[2] 1968 (2) SA 284 (RA).

Four of the judges of appeal rejected the argument, finding that the Smith government was, politically and legally speaking, both in *de facto* and *de iure* control of Rhodesia, and did have the power to govern and create law. In doing so, the court referred with approval to the somewhat controversial views on the efficacy of legal systems of the famous Austrian jurist Hans Kelsen, who had theorised in his book *A Pure Theory of Law* (1967) how the source of law (the *grundnorm*) may be identified in cases of revolution. (Kelsen's views should be familiar to all Jurisprudence students: indeed, the *Madzimbamuto* case continues to be studied the world over, together with related cases from Nigeria, Uganda and Pakistan, in relation to the effect of political revolution on the legal system).[3]

What has this to do with John Fieldsend? Fieldsend was the one lone judge who adopted a minority view. He was not prepared to accept the technical legality of the 1965 Constitution, finding that while the Smith government may have been in *de facto* control of the country, it had not usurped the judicial function, and for that reason it was not a *de iure* government, and the Rhodesian court continued to be constituted by the 1961 Constitution, which did not permit detentions without trial. Fieldsend's stance attracted a great deal of press; he was vilified by pro-Smith Rhodesians, but lauded by human-rights activists around the world. The *Madzimbamuto* case was taken on appeal to the Privy Council, which professed to overturn the Rhodesian decision).[4] The Smith government took no notice; and, in a subsequent case which followed a similar trajectory (*Dhlamini v Carter NO*)[5] two men were sentenced to death and hanged by the Smith government, despite the Privy Council insisting once again that their sentences ought to be commuted. For Fieldsend, this was the last straw. He resigned from the Rhodesian judiciary in protest at what the Smith regime was claiming to do in the name of law, and left the country for the United Kingdom, where he began a new career working for the Law Commission of England & Wales, serving as that body's Secretary from 1978 to 1980.

Fieldsend's story does not end there, however. In a tale that has some parallels with South Africa's first Chief Justice, Arthur Chaskalson, who found himself for a long

[3] See for example the discussion in JW Harris *Legal Philosophies* 2 ed (1997) 79ff.
[4] See [1968] 3 All ER 561 (PC).
[5] 1968 (2) SA 445 (RA).

time in the legal wilderness as a result of his pro-human-rights views until South Africa's transition to democracy, Fieldsend was recalled in 1980 by the newly installed Zimbabwe government, with a request that he serve a fixed three-year transitional term as the newly independent country's first Chief Justice. He was considered the only judicial figure palatable to all political factions to assume the office. He accepted the position, taking up the position in May 1980, just after Zimbabwe's first open democratic elections held in April that year.

Fieldsend completed his term as Chief Justice of Zimbabwe at the end of February 1983, handing over the reins to the country's first black Chief Justice, Telford Georges (albeit that Georges was not a Zimbabwean, but of Caribbean origin). Fieldsend's period as Chief Justice has an interesting, somewhat ironic, footnote. He found himself in conflict with the ZANU-PF regime and then Prime Minister Robert Mugabe about the Zimbabwe government's continued enforcement of Smith's emergency detention-without-trial laws deriving from the notorious Law and Order (Maintenance) Act: laws that in their original form had precipitated the case of *Madzimbamuto*, and which would continue to be applied in Zimbwabwe into the 2000s. Fieldsend's strong views about human rights continued to characterise him as a judge, and he in fact chose, soon after the end of his tenure, to leave Zimbabwe and to emigrate to the United Kingdom, concerned about the negative statements that were being made (mostly by the executive and members of the ZANU-PF ruling party) about the "interfering" role of the judiciary in post-independence Zimbabwe.[6]

This was not to be the end of his judicial service, however. The British government, appreciative of the role that Fieldsend had played during the transitional period, appointed him to serve as the Chief Justice of two of its remaining commonwealth outposts: the Turks & Caicos Islands (from 1985 to 1987) and the British Indian Ocean Territory (1987 to 1988). His final post was as President of the Court of Appeal for Gibraltar, from 1991 to 1997. In honour of his service to the commonwealth, upon his retirement at the age of 76 he was knighted by Queen Elizabeth II in 1998, becoming Sir John Fieldsend.

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[6] For an overview, see Jeremy Gauntlett "Zimbabwe: The war on law" (2009) December *Advocate* 44.

Sir John Fieldsend spent his retirement between two homes: one in the UK, and one in Italy, near Pisa, which he restored himself. Sadly, he contracted lung cancer, which caused his passing in early 2017. His story is one of the more colourful and interesting of the old-Rhodian judges. His bravery and independent-mindedness in the face of executive power mark him out as an alumnus worthy of recognition and emulation for students of the modern era, where such issues have a familiar refrain.

Cannabis: A Burning Issue in South Africa

Jeremy de Beer and Ferdinand Weyers
Penultimate Year LLB

'To ensure that cannabis does not contribute to the drug problem, the government should regulate drug use as opposed to imposing a blanket-prohibition that infringes upon the constitutional right to privacy.'

In 2017, the Western Cape High Court (WCHC) in the case of *Prince v Minister of Justice; Rubin v National Director of Public Prosecutions; Acton v National Director of Public Prosecutions*[1] ("*Prince* 3") was faced with a bold legal question: to what extent does South African law prohibit the private use, possession, purchase and cultivation of cannabis[2] for exclusive personal consumption and is this constitutionally valid?

First, the Court had to consider whether *Prince* 3 was *res judicata* on the basis of *Prince v President, Cape Law Society*[3] ("*Prince* 2"), which dealt with a similar challenge to the constitutionality of cannabis laws, but on the basis of the right to freedom of religion rather than the right to privacy, as argued in *Prince* 3.[4] The primary issue, however, was whether the impugned laws constituted an infringement of the right to privacy as enshrined in s 14 of the Constitution of the Republic of South Africa, 1996 and, if so, whether such infringement was justifiable in terms of the s 36 constitutional limitations analysis.[5] The applicants argued that the limitation was overbroad and that the distinction between cannabis and other harmful substances (such as alcohol and tobacco) was irrational and hence the limitation of the right to privacy unjustifiable in terms of s 36(1) of the Constitution.[6]

Prince 3 is of significant legal importance as not only because it is an important case in respect of determining the bounds of the right to privacy, but because it also has

[1] 2017 (4) SA 299 (WCC) para 2.
[2] Also commonly referred to as "marijuana" and "dagga" (as well as a plethora of other less common names that need not be mentioned here).
[3] 2002 (1) SACR 431 (CC).
[4] *Prince v Minister of Justice* 2017 (4) SA 299 (WCC) para 12.
[5] *Prince v Minister of Justice* para 11.
[6] *Prince v Minister of Justice* para 11.

far-reaching consequences in terms of the extent of the criminalisation of cannabis and the means of sanction for non-compliance with cannabis-prohibition laws (i.e. whether imprisonment and a criminal record are appropriate sanctions).[7] It is worth noting from the outset that *Prince* 3 is only concerned with acts of individuals performed in the confines and privacy of their own homes when they invoke a right to autonomy.[8] It is also worth noting that *Prince* 3 does not extend to children as, "children must be protected from any harm caused by exposure to drugs".[9]

The essential facts in a nutshell

In *Prince* 3, the relief sought could ultimately be divided into three categories. First, the applicants sought a declaration that the statutory provisions[10] against the use, purchase and cultivation of cannabis for personal consumption is constitutionally invalid.[11] Secondly, the applicants sought a declaration of invalidity of provisions referring to cannabis in various pieces of legislation.[12] Thirdly, the applicants sought (in the event that a declaration of invalidity were suspended) that the Court should:

> "…make an order that would operate during the period of suspension, preventing arrest, detention and prosecution for use, possession, cultivation and the transportation of small amounts of cannabis intended for personal use, and a stay of all pending prosecutions and release from custody of persons who are in detention pursuant to such proceedings."[13]

The Court relied on the evidence of various experts and *amicus curiae* when considering the matter, but before the Court could deal with the case on the merits, it first had to deal with the State's argument *in limine*, namely that the matter was *res judicata*.[14]

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[7] *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) para 77.

[8] *Prince v Minister of Justice* para 107.

[9] *Prince v Minister of Justice* para 109.

[10] Impugned legislation: s 4(b) & s 5(b) read with Part 3 of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992 (the "Drugs Act"); s 22A(10) read with Schedule 8 of the Medicines and Related Substances Control Act 101 of 1965 (The "Medicines Act"). Mr Acton also sought a right to use cannabis for various other purposes including medicinal, economic, transportation and trade.

[11] *Prince v Minister of Justice* para 4.

[12] See *Prince v Minister of Justice* para 4. Impugned legislation: s 21 of the Drugs Act insofar as it contains presumptions relating to the dealing in cannabis; s 40(1)(h) of the Criminal Procedure Act 51 of 1977 insofar as it relates to cannabis.

[13] *Prince v Minister of Justice* para 4.

[14] *Prince v Minister of Justice* para 12.

The first hurdle: *res judicata*

The State raised the argument that on the basis of *Prince 2*, the issues in *Prince* 3 had been previously disposed of by the Constitutional Court, and as such the matter was *res judicata*.[15] Unlike the earlier case of *Prince* 2, however, the argument in *Prince* 3 was rooted in the right to privacy rather than the right to freedom of religion.[16] After an analysis of the two cases, the WCHC held that the doctrine of *res judicata* did not apply as *Prince* 3 was distinguishable from *Prince* 2. In *Prince* 2, the applicant did not dispute that the legislation prohibiting the possession and use of cannabis served a legitimate government purpose, and the Constitutional Court in *Prince* 2 did not consider whether any prohibition as contained in the impugned legislation, specifically sections 4 and 5 of the Drugs and Drug Trafficking Act[17] ("the Drugs Act"), infringed the right to privacy.[18] *Prince* 2 was decided on a limited question, specifically a limited exemption from cannabis-prohibition laws for religious reasons.[19] As such, the Court in *Prince* 3 was faced with issues that were not in dispute in *Prince* 2 and so the doctrine of *res judicata* did not apply, leaving the Court to consider *Prince* 3 on the merits.[20]

The claim on the merits

The applicants argued that the impugned legislation (and in particular sections 4 and 5 of the Drugs Act, which prohibit the possession and dealing of cannabis respectively) is unconstitutional in that it unjustifiably limits the right to privacy, as enshrined in s 14 of the Constitution.[21] The Court therefore first had to consider the nature of the right to privacy to determine whether this right was indeed infringed by the offending legislation.[22] The Court found that the more intimate the personal sphere of life concerned, the more powerful and deserving of protection the right to

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[15] *Prince v Minister of Justice* para 12.
[16] *Prince v Minister of Justice* para 20.
[17] Act 140 of 1992.
[18] *Prince v Minister of Justice* paras 13 and 18.
[19] *Prince v Minister of Justice* para 18.
[20] *Prince v Minister of Justice* para 20.
[21] *Prince v Minister of Justice* para 11.
[22] *Prince v Minister of Justice* para 21.

privacy becomes.[23] The Court also found that the right to privacy is linked to the rights to dignity and freedom as enshrined in s 10 and s 15 of the Constitution.[24]

In considering the right to privacy, the Court found that if privacy were analysed as a continuum of rights which starts with "an inviolable inner core", moving from the private to the public realm (where privacy is only remotely implicated by outside interference), it follows that those who grow or use a small quantity of cannabis in the intimacy of their home exercise a right to autonomy which, without clear justification, does not merit interference from the outside community or the State.[25] The Court therefore found that the cannabis-prohibition laws do constitute an infringement of the right to privacy, and as such need to be tested against the s 36 constitutional limitations analysis to determine whether this infringement is legally justified.[26]

In terms of s 36 of the Constitution, a court must consider whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) whether there are less restrictive means to achieve the purpose. Having established that a limitation of a right exists, the onus rests on the State to prove that this limitation is justifiable when considering these factors.[27]

To this end, the State argued that limitation is important in its purpose as cannabis is harmful to society, particularly in respect of the health risks[28] that it poses, and it provided several affidavits to this effect.[29] The State also argued that cannabis is a

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[23] *Prince v Minister of Justice* para 22.

[24] *Prince v Minister of Justice* para 23-24; *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) para 64.

[25] *Prince v Minister of Justice* para 25.

[26] *Prince v Minister of Justice* para 27.

[27] *Prince v Minister of Justice* para 29.

[28] The State provided an affidavit to the effect that cannabis is a hallucinogen that causes a state of extreme relaxation or hyperactiveness (depending on the user) and that its harmful effects are also evident in pregnancy, the brain (in respect of learning and schizophrenia) and the respiratory tract (chronic bronchitis and lung cancer), amongst other things.

[29] *Prince v Minister of Justice* para 36-37.

"gateway drug" that is widely used with other drugs, and that there was a causal link between drug use and criminal activities.[30] Lastly, the State advocated for alternative dispute resolution, such as a process of "diversion" which seeks to ensure that the offenders take responsibility for their actions and undergo corrective measures which will be beneficial to them in the future.[31]

Conversely, the applicants argued that the distinction between cannabis and other legal drugs, such as alcohol and tobacco, was irrational as alcohol and tobacco are more harmful.[32] Furthermore, they argued that there are less restrictive means than criminalisation to regulate cannabis use in South Africa, and the State bore the onus of establishing that there were no less restrictive means.[33] The Court in assessing these claims had recourse to expert evidence in the form of "the Shaw Report" from the University of Cape Town's Law Faculty Centre of Criminology.[34]

The High Court's finding

The Shaw Report found that there was little to no support for most of the arguments put forward by the State, particularly in respect of cannabis acting as a gateway drug, causing schizophrenia, being as addictive as other serious drugs such as heroin, causing lethal damage to the heart and arteries, and lowering IQ.[35] The only moderate support was for cannabis impairing cognitive functions, and that cannabis is significantly stronger than it was 30 years ago.[36] The Shaw Report further suggested benefits of decriminalisation, such as the freeing up of South African Police Service (SAPS) resources and the court roll.[37] The Court also found that aside from the lack of support for their arguments (as evidenced by the Shaw Report), some of the State's witnesses were inadequately qualified and their evidence was

[30] *Prince v Minister of Justice* para 40-43.
[31] *Prince v Minister of Justice* para 95.
[32] *Prince v Minister of Justice* para 11 and 101.
[33] *Prince v Minister of Justice* para 104.
[34] *Prince v Minister of Justice* para 6.
[35] *Prince v Minister of Justice* para 47.
[36] *Prince v Minister of Justice* para 47.
[37] *Prince v Minister of Justice* para 58.

not only contested but insufficiently reliable.[38] The Shaw Report thus raised serious questions relating to the justification for the limitation in terms of the s 36 analysis.[39]

The Court went on to consider foreign law[40] to determine the approach of other jurisdictions towards cannabis use, and found that international developments[41] in open and democratic societies reflect that criminalising the possession of cannabis for personal use is no longer effective in preventing harm, and that there is no longer a consensus that such limitations are justifiable.[42] The Court also considered South Africa's international obligations,[43] and found that while the unqualified and wholesale legalisation of cannabis may contravene South Africa's international obligations, the legalisation of the possession, purchase or cultivation of cannabis for personal consumption does not contravene these obligations where such legalisation is a consequence of South Africa's constitutional principles.[44] In short, international law does not prohibit South Africa from decriminalising the private use of cannabis.

The Court further found that whilst it is demonstrable that uncontrolled consumption of cannabis in large doses poses a risk of harm to the user, small quantities (i.e. a few joints) will not cause harm.[45] In respect of the "diversion" approach advocated by the State, the Court found that this indicated that "the NPA [National Prosecuting Authority] already recognises the problem of the blunt instrument of the criminal law" being used for the personal consumption of cannabis.[46] Furthermore, absent "a national and uniform diversion policy with clear guidance as to its application",

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[38] *Prince v Minister of Justice* para 91-92.

[39] *Prince v Minister of Justice* para 47.

[40] The court considered judgments from Mexico, Canada, Argentina, and the United States (specifically Alaska).

[41] Jurisdictions that have decriminalised the possession of cannabis in small quantities for personal use include: certain territories in Australia (Australian Capital Territory, Northern Australia, Southern Australia), Austria, Chile, Czech Republic, Estonia, Jamaica, Portugal, Spain, Switzerland, and 12 states of the United States of America (Connecticut, Delaware, Illinois, Maryland, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Rhode Island and Vermont) - see *Prince v Minister of Justice* para 88.

[42] *Prince v Minister of Justice* para 90.

[43] The 1961 Single Convention on Narcotic Drugs (amended in 1972); the 1971 Convention on Psychotropic Substances; and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[44] *Prince v Minister of Justice* para 125.

[45] *Prince v President, Cape Law Society* 2002 (1) SACR 431 (CC) para 61.

[46] *Prince v Minister of Justice* para 100.

diversion is left to prosecutorial discretion, which could lead to arbitrary and inconsistent application (which would be contrary to the right to equality as enshrined in s 9 of the Constitution).[47] This is the same problem that arises in leaving the courts to determine that personal cannabis consumption is *de minimus non curat lex*, as it has in several cases.[48]

In respect of the s 36 factor of "less restrictive means", the Court found that diversion and other policy choices, as opposed to the blunt use of the criminal law, particularly imprisonment, support the conclusion that the State cannot justify the prohibition as contained in the impugned legislation.[49] Ultimately, the Court found that "the legislative response to personal consumption and use is disproportionate to the social problems caused as a result".[50]

The WCHC therefore granted the declaration of invalidity in respect of the impugned legislation, and gave Parliament 24 months to correct the defects, and ordered that it would be a defence to a criminal charge in terms of the impugned legislation that the use, possession, purchase or cultivation of cannabis in a private dwelling was for the personal consumption of the adult accused.[51] This order was in line with the separation of powers doctrine as it is not for the Court to prescribe alternatives to decriminalisation as this falls within the realm of the Legislature.[52]

Confirmatory proceedings: the ConCourt gives the "green light"

With an order of constitutional invalidity having been granted by the WCHC, the matter then went to the Constitutional Court (CC) for confirmatory proceedings where the Court had to decide whether to confirm the order, decline to confirm the order, or confirm it in part.[53] To avoid confusion, these confirmatory proceedings shall be referred to as "*Prince* 3 (CC)". The Constitutional Court's judgment was unanimous, and confirmed the WCHC's findings in respect of s 4(b) and s 5(b) of the

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[47] *Prince v Minister of Justice* para 100.
[48] G Kemp *et al Criminal Law in South Africa* 2 ed (2015) 475-476.
[49] *Prince v Minister of Justice* para 101.
[50] *Prince v Minister of Justice* para 102.
[51] *Prince v Minister of Justice* para 132.
[52] *Prince v Minister of Justice* para 112.
[53] *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* [2018] ZACC 30 para 17.

Drugs Act (read with Part III of Schedule 2) as well as s 22A(9)(a)(i) and s 22A(10) of the Medicines Act[54] (read with Schedule 7), finding these sections to be unconstitutional for infringing the right to privacy.[55] The Court also confirmed the WCHC's finding that South Africa's international obligations are no bar to an order of constitutional invalidity as South Africa's international obligations are subject to South Africa's constitutional obligations.[56]

The Court, however, confirmed the orders of invalidity only to the extent that they prohibit the use, possession, or cultivation of cannabis by an adult person, in private, for his or her personal consumption in private. The Constitutional Court declined to confirm the WCHC's order extending protection to the purchase of cannabis as the WCHC did not engage in the s 36 limitations analysis on this point or advance reasons as to why the provisions pertaining to purchase are unconstitutional.[57] If the Court were to confirm the order declaring the provisions pertaining to purchase as invalid, the Court would indirectly be sanctioning dealing in cannabis since a purchaser of cannabis would, as a matter of logic, be purchasing from a dealer in cannabis.[58] The Court took the view that dealing in cannabis is a serious problem in South Africa, and so a prohibition on dealing in cannabis is a justifiable limitation of the right to privacy.[59] In short, buying and selling cannabis is still a criminal offence.

The Constitutional Court did, however, extend the WCHC's order in that the possession, use, and cultivation of cannabis need not be limited to a home or private dwelling.[60] This is because the right to privacy extends beyond a home and the WCHC provided no persuasive reason to confine it to these parameters; in doing so, the WCHC's order provided no protection for those who are in possession of cannabis for personal consumption in private but who happen to step beyond the boundaries of a private dwelling with cannabis in their pocket.[61] The Court therefore preferred

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[54] Act 101 of 1965.
[55] *Minister of Justice v Prince* (CC) paras 86 and 129.
[56] *Minister of Justice v Prince* (CC) para 82.
[57] *Minister of Justice v Prince* (CC) para 88.
[58] *Minister of Justice v Prince* (CC) para 88.
[59] *Minister of Justice v Prince* (CC) para 88.
[60] *Minister of Justice v Prince* (CC) para 108.
[61] *Minister of Justice v Prince* (CC) paras 98 and 100.

the term "in private" over "at home" or "in a private dwelling".[62] The Court held that provided the possession of cannabis is by an adult for personal use *in private*, it is protected by the right to privacy.[63] In terms of cultivation, the Court held that cultivation is protected provided it is in a *private place*, which would include a residential garden or a room/enclosure on private property designated for such purposes, however, a private place may go beyond these.[64]

The Court also found that s 40(1)(h) of the Criminal Procedure Act[65] does not pose a constitutional problem, as it simply confers the power on a peace officer to arrest without a warrant any person reasonably suspected of committing, or having committed, an offence under any law governing possession or conveyance of dependence-producing drugs. Since the effect of *Prince* 3 (CC) is that it is no longer a criminal offence to be in possession of cannabis in private for personal consumption in private, it follows that there can be no basis for a peace officer to have a reasonable suspicion that an adult in that situation is committing, or has committed, an offence by being in possession of cannabis.[66]

A police officer may, however, still arrest a person in possession of cannabis if they reasonably suspect, having regard to all the relevant circumstances (including the amount of cannabis found in that person's possession), that such possession is for a purpose other than personal consumption.[67] Although the Court has effectively sanctioned the use of a small amount of cannabis by an adult in private, it made no determination as to what this amount should be, leaving this matter to Parliament in line with the separation of powers doctrine, and simply declared that the amount that may be possessed is an amount for personal consumption.[68]

The Court did note that an important consideration in determining whether to arrest someone is that the greater the amount of cannabis found on a person, the greater the possibility that such possession is not for mere personal use, although the State

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[62] *Minister of Justice v Prince* (CC) para 108.
[63] *Minister of Justice v Prince* (CC) para 100.
[64] *Minister of Justice v Prince* (CC) para 85.
[65] Act 51 of 1977.
[66] *Minister of Justice v Prince* (CC) para 93.
[67] *Minister of Justice v Prince* (CC) para 110-111.
[68] *Minister of Justice v Prince* (CC) paras 80 and 111.

must still prove this beyond a reasonable doubt.[69] The Court also noted that in unclear cases, where it is difficult to tell if the possession of cannabis is for personal consumption or not, a police officer should not arrest the person as it will be difficult to prove beyond a reasonable doubt that such possession was not for personal consumption.[70] The Court remains the ultimate adjudicator in this regard and will decide whether possession is for personal consumption or not.[71]

The Constitutional Court, like the WCHC[72], suspended its order of invalidity for 24 months to allow Parliament time to cure the constitutional defects in the impugned legislation.[73] The Court also granted interim relief by way of reading in various words and sections into the legislation to ensure that there was effective relief for people in such circumstances while Parliament cures the defects. This reading-in ensures that it is not a criminal offence for an adult to use, or be in possession of, cannabis in private, or to cultivate cannabis in a private place, for his or her personal consumption in private.[74] The order makes it clear, however, that the use of cannabis in public or in the presence of children or non-consenting adults is not permitted.[75] The Court also made it clear that the reading-in will continue to be read into the legislation until Parliament cures the constitutional defects, even if it fails to do so within the 24 month period of suspension.[76]

Evaluation

The WCHC was correct to acknowledge the origins of the criminalisation of cannabis, finding that the initial justifications no longer hold weight in society, as they were

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[69] *Minister of Justice v Prince* (CC) para 110.

[70] *Minister of Justice v Prince* (CC) para 114.

[71] *Minister of Justice v Prince* (CC) para 123.

[72] It should be noted, however, that the Constitutional Court found that it is "neither competent nor necessary for a High Court to suspend an order of constitutional invalidity that relates to a statutory provision or an Act of Parliament when it grants such an order of constitutional invalidity" as s 172(2) of the Constitution makes it clear that "an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court". As such, a suspension order from a High Court is incompetent as it purports to suspend the operation of an order that is not in operation to begin with (has no force) as it has not yet been confirmed the Constitutional Court – see *Minister of Justice v Prince* (CC) para 2.

[73] *Minister of Justice v Prince* (CC) para 103.

[74] *Minister of Justice v Prince* (CC) para 107.

[75] *Minister of Justice v Prince* (CC) para 109.

[76] *Minister of Justice v Prince* (CC) para 128.

impermissibly racist, and that the private moral views of a section of a community do not qualify as a legitimate justification in terms of the s 36 limitations analysis.[77] This provides valuable context as cannabis has historically been used for a wide variety of purposes over the years by various cultures, including for religious and medicinal reasons.[78] It is now trite that cannabis has verifiable medical benefits[79] and it therefore follows, as a matter of logic, that the decriminalisation of cannabis could result in recourse to these traditional remedies without the need to approach doctors, thereby mitigating some of the problems associated with access to healthcare.[80]

It is also now widely accepted that alcohol and tobacco are more harmful than cannabis.[81] Although cannabis is not harmless, the evidence is clear and constant that it does not possess the capacity for personal and social disruption so often proclaimed.[82] As such, one of the most important reasons for the decriminalisation of cannabis flows not from a conclusion that cannabis is good, but rather that the costs of criminalisation are out of proportion to the benefits.[83] Given that cannabis is not harmless, both Courts were wise to qualify the order as only protecting use, possession and cultivation by adults, not children. This is in congruence with South Africa's liquor and tobacco laws, which also set 18 as the legal age.

The WCHC was also wise to touch on the potential benefits of controlling the legalisation of cannabis (for instance through a licensing model) as the prohibition on drugs does not obliterate their use, and as with alcohol and tobacco, it would therefore be sensible for society to manage the social costs of cannabis while regulating its supply in an effort to contain the harm.[84] Furthermore, if cannabis were

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[77] *Prince v Minister of Justice* para 33-34.

[78] *Prince v Minister of Justice* para 33.

[79] Benefits include easing the suffering of persons with various illnesses such as AIDS, cancer, glaucoma, multiple sclerosis, spinal cord injuries, seizure disorders, chronic pain, and other maladies.

[80] ML Mathre *Cannabis in Medical Practice: A Legal, Historical and Pharmacological Overview of the Therapeutic Use of Marijuana* (1997) 1.

[81] R Fellingham *et al* "The 'War on Drugs' Has Failed: Is Decriminalisation of Drug use a Solution to the Problem in South Africa?" (2012) 5 *South African Journal of Bioethics and Law* 78 at 81.

[82] KE Dawkins "Cannabis: Authoritarianism v. Libertarianism" (1973) 3 *Otago Law Review* 348 at 353-354.

[83] Dawkins 1973 *Otago Law Review* 355.

[84] *Prince v Minister of Justice* 2017 (4) SA 299 (WCC) para 62; Dawkins 1973 *Otago Law Review* 358.

to go beyond decriminalisation and into the realm of legalisation and formal regulation, cannabis could be taxed at a rate similar to alcohol and cigarettes, thereby generating significant income for the country.[85] On a point of common sense, this would be beneficial as cannabis sale and consumption is widespread and by not regulating and taxing it, the country is losing out on significant revenue that could be generated from the cannabis industry. It is worth acknowledging, however, that a counter-argument could be made that many dealers of cannabis would not be eligible to pay tax anyway as they do not earn enough income.

It follows as another matter of logic that the establishment of a legal cannabis industry would create jobs and other economic opportunities. As an example, some US states where cannabis has been legalised have shown huge potential for job creation in both the medical and recreational spheres, and in 2017 alone this accounted for over 100 000 active jobs and a several billion-dollar contribution to their economy.[86] Although the Constitutional Court did not extend its order to purchase or sale, this potential has already been recognised by the Department of Trade and Industry (DTI), which has recently commissioned research into the obstacles and opportunities to South Africa being an active player in the growing market for cannabis.[87]

The Department of Agriculture, Forestry and Fisheries (DAFF) has also stated that an inter-departmental team[88] is currently developing a new regulatory framework for the cultivation and manufacturing of hemp and hemp products.[89] These processes could potentially be the first steps towards legalisation of cannabis

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[85] Dawkins 1973 *Otago Law Review* 356.

[86] Staff Writer "Government says it's working towards new hemp laws following cannabis ruling – here's what you need to know" https://businesstech.co.za/news/business/272195/government-says-its-working-towards-new-hemp-laws-following-cannabis-ruling-heres-what-you-need-to-know/ (accessed 23 September 2018).

[87] L Ensor "DTI to research the commercial viability of dagga" https://www.businesslive.co.za/bd/economy/2018-08-23-dti-to-research-the-commercial-viability-of-dagga/ (accessed 30 August 2018).

[88] Made up of the DAFF, DTI, and Departments of Health, Trade and Industry, Environmental Affairs, and Justice and Constitutional Development, as well as the South African Police Service.

[89] Staff Writer "Government says it's working towards new hemp laws following cannabis ruling – here's what you need to know" https://businesstech.co.za/news/business/272195/government-says-its-working-towards-new-hemp-laws-following-cannabis-ruling-heres-what-you-need-to-know/ (accessed 23 September 2018).

through the normal parliamentary process. Following the ruling in *Prince* 3 (CC), Parliament has confirmed that it will consider "introducing a new Bill".[90]

In respect of the social harms raised by the State, whilst it is incontrovertible that cannabis can cause road accidents if a person attempts to drive whilst intoxicated, someone who causes an accident while driving under the influence of cannabis should be punished for driving under the influence, not for using cannabis.[91] However, a problem arises in how the police will test this as there is a lack of tetrahydrocannabinol (THC) testing equipment available to police officers (THC being the main psychoactive component of cannabis).[92] "THC can be detected in blood tests, urine tests and saliva tests – the latter producing results within three to five minutes."[93]

It also follows that there will need to be some kind of regulation as to how much THC someone can safely have in their system when driving (in the same way that there is a legal limit on alcohol). Section 65(1)(b) of the National Road Traffic Act[94] states that "No person may drive a vehicle or occupy the driver's seat of a motor vehicle of which the engine is running on a public road while under the influence of intoxicating liquor or drug having narcotic effect". A problem arises in this respect as even if the police were to test for THC, THC can remain in a person's bloodstream for any time from hours to days after consuming cannabis, but this does not mean that a person who tests positive for THC is still intoxicated.[95]

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[90] R Grobler "Parliament will consider 'introducing a new bill' following dagga ruling" https://www.news24.com/SouthAfrica/News/parliament-will-consider-introducing-a-new-bill-following-dagga-ruling-20180918 (accessed 23 September 2018).

[91] RT Paschke "Personal use and possession of dagga: A matter of privacy or prohibition?" (1995) 8 *SACJ* 109 at 113-114; Fellingham *et al* 2012 *South African Journal of Bioethics and Law* 80.

[92] "Dagga ruling raises questions around driving stoned in SA" *Sunday Times* 18 September 2018 https://www.timeslive.co.za/news/south-africa/2018-09-18-dagga-ruling-raises-questions-around-driving-stoned-in-sa/ (accessed 23 September 2018).

[93] "Dagga ruling raises questions around driving stoned in SA" *Sunday Times* 18 September 2018 https://www.timeslive.co.za/news/south-africa/2018-09-18-dagga-ruling-raises-questions-around-driving-stoned-in-sa/ (accessed 23 September 2018).

[94] Act 93 of 1996.

[95] "Dagga ruling raises questions around driving stoned in SA" *Sunday Times* 18 September 2018 https://www.timeslive.co.za/news/south-africa/2018-09-18-dagga-ruling-raises-questions-around-driving-stoned-in-sa/ (accessed 23 September 2018).

Another issue that arises in respect of *Prince* 3 (CC) is the Court's finding that the right to privacy is not limited to a home or private dwelling and that the possession and use of cannabis must simply occur "in private".[96] What does "in private" mean? Does this mean that the protection is limited to private property? This does not seem satisfactory, as private property can be open to the public, for instance a privately owned club. What if people are smoking cannabis on public property, but in a private, secluded area? It is submitted that the starting point might be to look the "reasonable expectation of privacy" test from *Bernstein v Bester NNO*,[97] as acknowledged by the Court in *Prince* 3 (CC)[98]. This test comprises two tiers: (1) there must be a subjective expectation of privacy; and (2) the expectation must be recognised as reasonable by society (i.e. an objective test).[99] If both the subjective test and objective test are satisfied, it is submitted that any conduct which has occurred in those circumstances could be said to be "in private".

It is also worth noting that the Constitutional Court's order does not operate with retrospective effect, as this would have a disruptive effect on the criminal justice system and cause uncertainty.[100] In light of this, the NPA has confirmed that all those who were charged with cannabis use and possession prior to the judgment will still face prosecution.[101] As for the cases that were provisionally withdrawn pending the outcome of *Prince* 3 (CC), prosecutors will be allowed to exercise their discretion and allow those cases to be closed without further prosecution.[102] The Western Cape Director of Public Prosecutions has also confirmed that "with regard to applications for [criminal] records to be expunged … if there are any such applications, each will

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96 *Minister of Justice v Prince* (CC) para 108.

97 1996 (2) SA 751 (CC) para 76.

98 *Minister of Justice v Prince* (CC) para 46.

99 *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) para 76.

100 *Minister of Justice v Prince* (CC) para 102.

101 "#Dagga: Pending Cases Will Not be Affected by New Ruling, says NPA" *Daily News* 19 September 2018 https://www.iol.co.za/dailynews/dagga-pending-cases-will-not-be-affected-by-new-ruling-says-npa-17142492 (accessed 23 September 2018).

102 "Battle Won, War Not Over, Say 'Dagga Couple'" *Cape Times* 20 September 2018 http://capetimes.newspaperdirect.com/epaper/showarticle.aspx?article=fb6af639-fcf4-4a25-980a-db7dbe1302ab&key=tFWYXBP8XKZpriicHG9CfA%3d%3d&issue=640220180920000000000001001 (accessed 23 September 2018).

be dealt with on its own merits".[103] The 'Dagga Couple', however, who played an integral role in taking *Prince* 3 to its conclusion, are planning a mass class action against the State to free those who have criminal records for the possession of dagga.[104] The outcome of this litigation remains to be seen.

Lastly, on the note of those incarcerated for cannabis, evidence suggests that sending someone to prison for the personal consumption of cannabis is more likely to turn that person into a hardened criminal, leaving them susceptible to other more serious drugs and more likely to commit other crimes as a result of their prison experience.[105] To top it all off, the harm imposed by the "blunt" use of the criminal law is completely disproportionate to the alleged harm caused by cannabis, particularly given that there is no solid evidence of a causal link between cannabis consumption and crime.[106]

Conclusion

Decriminalisation is a step in the right direction to solving South Africa's drug problem as criminalising an individual who is dependent on a substance is unlikely to change their drug-consumption.[107] The approach to cannabis consumption should therefore be remedial as opposed to punitive, and the very existence of legislation such as the Prevention of and Treatment for Substance Abuse Act[108] serves as evidence of this. The first step should therefore be decriminalisation rather than

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[103] "Battle Won, War Not Over, Say 'Dagga Couple'" *Cape Times* 20 September 2018 http://capetimes.newspaperdirect.com/epaper/showarticle.aspx?article=fb6af639-fcf4-4a25-980a-db7dbe1302ab&key=tFWYXBP8XKZpriicHG9CfA%3d%3d&issue=640220180920000000000001001 (accessed 23 September 2018).

[104] "Battle Won, War Not Over, Say 'Dagga Couple'" *Cape Times* 20 September 2018 http://capetimes.newspaperdirect.com/epaper/showarticle.aspx?article=fb6af639-fcf4-4a25-980a-db7dbe1302ab&key=tFWYXBP8XKZpriicHG9CfA%3d%3d&issue=640220180920000000000001001 (accessed 23 September 2018).

[105] A Minnar "The Legalisation and Decriminalisation of Marijuana (Dagga): A Review of American and South African Experiences" (2015) 3 *Acta Criminologica: Southern African Journal of Criminology* 131 at 147.

[106] Paschke 1995 *SACJ* 114.

[107] Fellingham *et al* 2012 *South African Journal of Bioethics and Law* 81.

[108] Act 70 of 2008.

legalisation, as acknowledged by the High Court, Constitutional Court and South African Central Drug Authority.[109]

A purely legal approach to South Africa's drug problem cannot be successful, as there are a variety of factors that need to be addressed, including educating the youth and protecting against stigmatisation and marginalisation.[110] Most importantly, to ensure that cannabis does not contribute to the drug problem, the government should regulate drug use as opposed to imposing a blanket-prohibition that infringes upon the constitutional right to privacy. As mentioned by the Courts, a widespread legalisation of cannabis may be a step too far in that it might be at variance with South Africa's international obligations, however, there are clear benefits to both the decriminalisation and potential regulation of cannabis.

To conclude, *Prince* 3 can be heralded as a cautiously progressive judgment that recognises the reality and changing *mores* of society. Given that further litigation on the subject is imminent, however, and given the number of further questions that arise in light of *Prince* 3 (for instance the effect on being a "fit and proper person" and other such questions that could not be extensively dealt with in this article) it remains to be seen whether *Prince* 3 has achieved its aim of protecting the right to privacy, or if the cost has been to open a can of worms.

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[109] *Prince v Minister of Justice* para 59; *Minister of Justice v Prince* (CC) para 78.

[110] Fellingham *et al* 2012 *South African Journal of Bioethics and Law* 81.

The Role of the United Nations in Furthering the Interests of African States

Dylan Bouchier
Final Year LLB

'Nevertheless, the ICC cannot be invalidated by its shortfalls, as every international instrument has its limitations. Despite the fact that the people currently being prosecuted are African, other regions outside of Africa are being heavily investigated.'

This article argues that modern international law, through the United Nations (UN), has taken numerous steps to further the interests of African states. The idea that international law is a tool for advancing the interests of western nations is rejected by the author. The article focuses on the International Criminal Court (ICC) and the UN's attempt to advance socio-economic rights in Africa.

International law and the UN

International law is the body of rules and principles that is binding upon, and regulates relations between states.[1] The Preamble and article 1 of the UN Charter best represents the essential features and purposes of international law. However, this article will only discuss article 1(1) and 1(3) of the Charter with reference to the African context.

The International Criminal Court

The purpose espoused in article 1(1) is to - "maintain international peace and security". This includes the UN's obligation to suppress acts of "aggression or other breaches of peace", by settling, through peaceful means, "international disputes or situations which might lead to a breach of peace". This purpose will be discussed with reference to the ICC.

The ICC was established in 1998 with the purpose of prosecuting crimes of genocide, crimes against humanity, war crimes and aggression.[2] The ICC's success is premised

[1] H Strydom *et al International Law* (2016) 3.
[2] Strydom *et al International Law* 414.

on receiving the co-operation of state parties in assisting the court in fulfilling its mandate.[3] By ratifying the Rome Statute (the founding instrument of the ICC), states agree to cede sovereignty over individual perpetrators accused of genocide, crimes against humanity or war crimes.[4] A fundamental principle of the Rome Statute is complementarity, which was adopted to balance the principle of state sovereignty and "the need to establish an international regime that effectively intervenes when the state fails to carry out their responsibilities" to prosecute crime.[5] Thus, although states maintain primacy over their criminal jurisdiction, the ICC will have secondary jurisdiction where the state fails to prosecute the offender locally.[6]

However, the practical purpose of the ICC has been criticised in respect of its relationship with African states.[7] Situations such as the ICC's failure to pursue non-African cases has created a perception of bias on the part of the ICC.[8] Nevertheless, the ICC cannot be invalidated by its shortfalls, as every international instrument has its limitations. Despite the fact that the people currently being prosecuted are African, other regions outside of Africa are being heavily investigated.[9] Africa's embrace of the ICC and the opportunity for international justice has resulted in several genocide and war-crime investigations and prosecutions.[10] Therefore, the ICC is in fact fulfilling its mandate in terms of article 1(1). This is evident in cases such as *The Prosecutor v Germain Katanga*[11] and *The Prosecutor v Jean-Pierre Bemba Gombo,*[12] in which both individuals were prosecuted and sentenced. However, in fulfilling its mandate, the ICC often encounters setbacks.

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[3] *Ibid.*

[4] L Vinjamuri "The International Criminal Court and the Paradox or Authority" (2016) 79 *Law & Contemp. Probs.* 275 at 275.

[5] CS Igwe "The ICC's Favourite Customer: Africa and International Criminal Law" (2008) *CILSA* 294 at 307.

[6] *Ibid.*

[7] Strydom *et al International Law* 415.

[8] *Ibid.*

[9] Anonymous "Situations Under Investigation" https://www.icc-cpi.int/pages/situations.aspx?ln=en (accessed 15 March 2017).

[10] F Bensouda "Is the International Criminal Court (ICC) Targeting Africa Inappropriately?" http://iccforum.com/africa (accessed 15 March 2017).

[11] ICC-01/04-01/07.

[12] ICC-01/05-01/08.

Omar Hassan al-Bashir

President al-Bashir of Sudan is accused of committing crimes against humanity, war crimes and genocide. In 2008, the ICC prosecutor applied for an arrest warrant against al-Bashir.[13] Sudan is not a party to the Rome Statute and rejected the charges, opposing the ICC and its handling of the situation.[14] Several states within the jurisdiction of the ICC have allowed al-Bashir to enter and exit their country, failing to arrest him. In South Africa, the South African Litigation Centre approached the High Court for an order instructing the authorities to arrest al-Bashir and hand him to the ICC.[15] However, he was allowed to leave before the court order was given effect.[16]

An important rule of treaty law is *pacta sunt servanda*, which "places a good faith obligation on the parties to a treaty to comply with the treaties terms and conditions once the treaty has entered into force between them".[17] South Africa has signed and ratified the Rome Statute, subsequently passing the Implementation of the Rome Statute of the International Criminal Court Act[18] (ICC Act) in 2003, to give effect to the ICC's complementary obligations. Section 4(3)(c) of the ICC Act states that a court in South Africa has jurisdiction if the person is present in the territory of the republic after the crime is commissioned.

The Court in *South African Litigation Centre v Minister of Justice and Constitutional Development* concluded that the failure to arrest al-Bashir was inconsistent with the Constitution.[19] This event of non-compliance with the ICC shows a complete disregard for the principles of *pacta sunt servanda* and complementarity. It is further evidence of the limitation on the ICC's success, the UN's ability to fulfil the obligations of article 1(1), and to be Africa's greatest allies.

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[13] Igwe 2008 *CILSA* 322.
[14] *Ibid.*
[15] *South African Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402 (24 June 2015).
[16] Strydom *et al International Law* 420-421.
[17] Strydom *et al International Law* 70.
[18] Act 27 of 2002.
[19] [2015] ZAGPPHC 402 para 2.

Advancement of socio-economic rights in Africa

Article 1(3) provides that the UN's obligation is to "achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character". This will be discussed with reference to advancing socio-economic rights in Africa through the International Covenant on Economic, Social and Cultural Rights Treaty (ICESCR). In addition to the UN Charter, the Universal Declaration of Human Rights (UDHR) was adopted, which determined a minimum set of human-rights standards.[20] The UDHR is not binding on states; however, some provisions have attained customary international law status.[21] Customary international law legally binds states even if it is not formally ratified.[22] Difficulties arose in attempting to convert its provisions into a treaty; thus, in 1966 the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR treaties were adopted.[23] The UN body, the Committee on Economic, Social and Cultural Rights (CESCR) monitors the implementation of the ICESCR obligations.[24]

The Inter-American Court of Human Rights has stated that modern human right treaties have the object and purpose of protecting the "basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting states".[25] States, such as African states, therefore assume *erga omnes* obligations ones that they owe to the international community as a whole.[26] Consequently, each state party has a legal interest in the enforcement by every other state party of its obligations under the ICESCR.[27]

ICESCR in Africa

As of July 2001, 44 African states had ratified the ICESCR. Ratification of the ICESCR indicates an impressive formal commitment to economic, social and cultural rights

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[20] Strydom *et al International Law* 330.
[21] *Ibid.*
[22] Strydom *et al International Law* 90.
[23] Strydom *et al International Law* 330.
[24] Strydom *et al International Law* 334.
[25] Strydom *et al International Law* 79.
[26] *Ibid.*
[27] *Ibid.*

by African states.[28] Articles 16 and 17 require member states to submit periodic reports to the CESCR aimed at providing the opportunity for national introspection and international inspection. This allows state and treaty monitoring bodies to identify the extent of their conformity with their treaty obligations.[29] Unfortunately, the majority of African member states have been reluctant to submit periodic state reports, or have overdue reports.[30]

However, late or overdue reporting does not reflect a poor human-rights situation, and periodic reports provide evidence that African states have adopted a variety of measures to implement socio-economic rights in addition to legislative measures.[31] This is evident is various instances, An example is Morocco, where systematic discrimination against women subsisted, but it was reported in the third periodic report in 2005 that, under article 3, the status of women had improved significantly, and legislative measures have been taken to prevent discrimination against women.[32] In the fourth periodic report, it was noted that Morocco had adopted their 2011 Constitution which attaches great importance to fighting discrimination and promoting equality between men and women.[33]

Conclusion

To conclude, the UN has implemented numerous measures all over the world in order to fulfil the obligations contained in article 1(1) and 1(3). It is evident from the above argument that the measures taken by the UN serve the purpose of furthering the interests of African states. If African states continue to comply and co-operate with the UN, then those interests can be realised in their entirety.

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[28] F Viljoen "Africa's Contribution to the Development of International Human Rights and Humanitarian Law" (2001) 1 *Afr Hum Rts LJ* 18 at 31.
[29] Strydom *et al International Law* 334.
[30] Viljoen 2001 *Afr Hum Rts LJ* 31.
[31] DM Chirwa "An overview of the impact of the International Covenant on Economic, Social and Cultural Rights in Africa" http://aihr-resourcescenter.org/administrator/upload/documents/Socio-economic_rights_in_Africa.pdf (accessed 16 March 2017).
[32] E/1994/104/Add.29.
[33] E/C.12/MAR/4.

Is International Law a Vice to Protect the Interests of the Most Powerful?

Sibusiso Ngwila
Penultimate Year LLB

'In discharging its duties, the United Nations is unable to ensure compliance from more powerful states because of the powers these states have to forgo sanctions which are against their interests.'

This article aims to investigate whether international law perpetuates the power of the "most powerful". This can be achieved by considering the way in which the United Nations relates to countries which are well resourced; as compared to African nations, which mostly belong to a less resourceful group of countries. Article 1 of the Charter of the United Nations, 1945, ('the Charter') purports to explain the objects in terms of which the United Nations was established. These mainly pertain to the maintenance of peace and security in an international context, and to ensure that this prevails against any threats which may be imposed, as well as to foster cooperation and friendly relations between states, ensuring equality and fundamental human rights. This article will argue that international law has become susceptible to being a paradigm through which powerful states have become immune to the discharge of the United Nations' efforts to ensure compliance with its objects as outlined in article 1 of the Charter; while the position with regard to African states remains the opposite.

Discrepancies in international law enforcement of article 1 of the Charter

The United Nations has - as the modern principal embodiment of international law in the present context - throughout its existence, sought to ensure that the objects of article 1 of the Charter are being met. This is in accordance with article 2(4) which proscribes member states from infringing on the territorial and political independence of another state by the use of force. Article 39 suggests that the United Nations has jurisdiction to determine when a breach of article 1 has occurred, and includes the measures that ought to be taken to restore the peace.

An instance of this occurring can be evidenced in what began with a resolution,[1] by the United Nations General Council, to declare that South Africa's administration of South West Africa (now called Namibia) was no longer valid due to its transmittal of apartheid policies to the region, which amounted to a breach of article 1 of the Charter. The resolution assigned administrative responsibilities to the United Nations itself. This resolution followed the judgment of the International Court of Justice (ICJ) in the *South West Africa Case*,[2] supporting the dismantling of South Africa's administration of South West Africa.

Following South Africa's non-compliance with the resolution requiring it to relieve itself of its occupation of South West Africa, another resolution[3] was passed in order to mount pressure on the South African government. This resolution required states to disassociate themselves with any conduct of South Africa purporting to act as controller of South West Africa.[4]

A subsequent opinion by the ICJ in 1970,[5] determined that the continued occupation of South Africa over South West Africa could not be considered to have been lawful, keeping in mind the breaches it had made in terms of international-law principles. South Africa would eventually cave to pressure from various means, including that of the international community, and in doing so ultimately recognised the independence of Namibia (formerly South West Africa) by passing the Recognition of the Independence of Namibia Act.[6]

With the above being said, the reaction to a powerful state transgressing on international law values should be considered. An example of this would be *Nicaragua v United States of America*,[7] heard by the ICJ. In brief, the United States was found to have breached its obligations under considerations of international law for essentially intervening into the domestic affairs of Nicaragua and disregarding its

[1] UN General Assembly Resolution 2145 of 27 October 1966.
[2] 1966 ICJ 6.
[3] UN General Assembly Resolution 269 of 12 August 1969.
[4] para 7.
[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ 16.
[6] Act 34 of 1990.
[7] 1986 ICJ 1.

sovereignty.[8] However, the United States used its power to veto enforcement of this judgment, rendering it essentially ineffective in terms of its practical application.[9]

Conclusion

While the United Nations, through its enforced sanctions against South Africa in order to pressure it into withdrawing from occupation of South West Africa, could be considered successful because they contributed to South Africa eventually ceasing its control. This must be viewed against the backdrop of United State's permissible veto to enforcement of an order by the ICJ against it. Both were instances in which principles of international law were not complied with. However, one of the states, the United States, had used its power to absolve itself from responsibility in terms of its transgressions, while South Africa, on the other hand, eventually had to account for them. Hence, international law can be said to perpetuate the power of powerful states. In discharging its duties, the United Nations is unable to ensure compliance from more powerful states because of the powers these states have to forgo sanctions which are against their interests, as seen in the *Nicaragua* case.

[8] A Tanzi "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations" (1995) 6 *European Journal of International Law* 539 at 547; N Krisch "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 3 *European Journal of International Law* 369 at 371.

[9] Tanzi 1955 *European Journal of International Law* 548.

To the Final Year Class of 2018

Saying au revoir to a life unencumbered and hello to the world of responsibility and creative and boundless possibilities ...

Welcome to the philosophy of the poet Rumi and let us infuse the next exciting phase of your life with his thinking. I hope you will take as many lessons from his acceptance and celebration of a higher spirit that exists externally as the Universe and within the soul each of us, as you begin your exciting life preparing for success.

"You are the Universe in ecstatic motion. Shine like the whole Universe is yours."

Life has at its core a rhythm of beginnings and endings. You will recognise your own as you trace your transition from pre-school to primary and secondary schooling. You are now at the end of the tertiary phase of your education where you began at the lowest and ended at the highest rung. This dialectic of life will start anew in 2019 when you enter the threshold of a community of law professionals and ascend again to great heights to wherever your journey leads you.

"Everything in the Universe is within you. Ask all of yourself".

Each phase preparing you for the road that lies ahead has to begin like a grain of sand within an oyster. Despite all the odds, the higher spirit of the Universe will ensure that you will emerge a beautiful pearl with many layers of rich life experience.

"If you are irritated by every rub, how will your mirror be polished?"

The two constants in your journey will be change and choices. You are the captain of your ship and the master of your fate. You chart the course and make the choices…. the only things subject to your total control are your thoughts, words, deeds…..all observed by the silent witness within each one of us. It is to this silent witness that you should always be true and do the right thing.

"The inspiration you seek is already within you. Be silent and listen."

Life is a balance of holding on and letting go. So guard your constants with wisdom, grace and dignity. You must do your best to be able to hold up a daily mirror and claim every success in life with pride and joy.. Accept that you are whatever you love, so your best has to be good enough.

"The tailor of time has never sewn a shirt for anyone without tearing it to pieces."

Carpe diem, seize every moment to be the best authentic version of yourself. Be open to new experiences, take the lessons out of every challenge to grow and nurture your sense of self. Take responsibility to stand up and show up. There is gentility in strength and strength in gentility. Strive to be a generous spirit, to be that person for whom the Universe will come searching.

"You are not a drop in the ocean. You are the entire ocean in a drop."

Go well and be gentle with yourselves. Start the way you mean to continue. Make a difference and leave your mark. Do not take things personally. Finally, we know that good luck and hard work are not mutually exclusive so as always have fun, but the harder you work the luckier you get!

"Be watchful, the grace of God appears suddenly. It comes without warning to an open heart."

Ms Brahmi Padayachi

RHODES UNIVERSITY

Where leaders learn

LLB Final Year Class 2018

Chris WHITE

"This was nothing like Suits..."

Olivia MUKOZHIWA

"Happiness comes when we stop complaining about the troubles we have and offer thanks for all the troubles we don't have." - Unknown.

Agnes CHEKERA

"Optimism is the faith that leads to achievement."

Micaella SNYDERS

"Every day during class I was looking for snacks, not knowing I was the snack all along."

Nash BAIJNATH

"Better late than never, but never late is better. I'm still working on the latter."

Nkcubeko BALANI

"Tell the truth through whichever veil comes to hand - but tell it. Resign yourself to the lifelong sadness that comes from never being satisfied." - Zadie Smith

Stuart BENTLEY

"A weak test for a weak class and you still failed."

Mikaella BODEUX

"I can't complain about having too much on my plate when my goal was to eat."

Matthew BOUAH

"Never let them see you sweat."

Dylan BOUCHIER

"The illiterate of the 21st century will not be those who cannot read and write, but those who cannot learn, unlearn and relearn." - Alvin Toffler

Rowan BROMHAM

"Speak only if it improves upon the silence." - Ghandi

Tanatsa CHAWANDA

"Love is love is love."

Maxine CHISWETO

"I am what I am by the Grace of God."

Samantha CHIUNZI

"Live your truth."

Tatenda CHIWESHE

"Whatever your labours and aspirations, in the noisy confusion of life, keep peace with your soul. With all its sham,
drudgery and broken dreams, it is still a beautiful world".

Tinoe CHIZANGA

"Studying isn't all about reading through everything, from left to right across the lines; (sometimes) all you have to do is read down the middle!"

Greg **CURTIS**

"I imagine, somewhere in the future, there is a better version of me. He is watching this moment, brandishing a smile and saying to himself, I knew everything would work out."
- Rudy Francisco

Munyaradzi **DENHERE**

"No one can make you feel inferior without your consent." - Eleanor Roosevelt

Kgothatso **DLAMINI**

"They tried to bury me. They didn't know I was a seed."

Ndzalama **DUMISA**

"6 Months in and I don't know the difference between admin action and executive action."

Taona **DUNCAN**

"Without commitment, you'll never start, but more importantly, without consistency, you'll never finish." - Denzel Washington.

Joshua **DUNN**

"Life is what you make of it. Don't fear. Change the things you can and accept the things you can't."

Tazz FOSTER

"I give myself very good advice, but I very seldom follow it" - [Alice in Wonderland]

Josh GELDENHUYS

"The world bullies men and boys into believing they're not capable of beautiful things. I'm here to show they are."

Nick GREEFF

"Greatness is a journey that begins with the impossible and ends in the unforgettable."

Andi HOOLE

"I need feminism because I intend on marrying rich and I can't do that if my wife and I are making .73 cents for every Rand a man makes."

Wesley HOWE

"Law tries to drown you, so we learnt how to breathe under water."

Silke JOSEPH

"Never forget that justice is what love looks like in public."

Nimu KARAGO

"When in doubt, nap it out."

Bronwyn KODISANG

"Money talks.
Wealth whispers.
Bad behaviour screams.
Elegance is completely unheard."

Christine KARIUKI

"Damu, jasho na machozi tu mwanangu, uliza kiatu."

Sethu KHUMALO

"Don't let yourself get attached to anything you're not willing to walk out on in 30 seconds flat if you feel the heat around the corner" - Robert De Niro [Heat] 1995

Lance KUNDIONA

"Hold the vision and trust the process."

Nadene KUPEMBA

"You either die a hero, or you live long enough to see yourself become the villain." - Harvey Dent

Tariro MAFA

"I've never read S v Makwanyane. I swear I know what it's about though."

Trecia MAKHUBELE

"Eliminate anything that doesn't help you evolve."

Tiffany MAPHALA

"I put the 'fun' in dysfunctional."

Lauren MARTHINUS

"They said she couldn't... so she did."

Takudzwa MAUNGWA

"Everyday is a hustle. Do I get tired? ... YES ... Do I give up? ... NO!"

Chantal MTHIYANE

"Was released from her 5-year sentence."

Sol **MTSWENI**

"What happens to a dream deferred?
Does it dry up like a raisin in the sun?
Or does it explode?"

Simbarashe **MUPFUMI**

"Don't let the fear of losing be greater than the excitement of winning."

Mati **MUTSEYEKWA**

"How to get through 4 years of law school? Drown yourself in loads of wine. Trust me, you need it. Thank me later :)"

Chido **MUVINGI**

"You are not ordinary but you may be ignorant of that truth."

Kelly **MZOBE**

"Let the Lord judge the criminals." - 2Pac

Silungile **NCAMA**

"... part-time law student; full-time faculty SNACK :)"

James **NDEMERA**

"Never go to a Doctor whose office plants have died or withered!"

Ruvimbo **NDORO**

"Do not be terrified, do not be discouraged, for the Lord your God will be with you wherever you go" [Joshua] 1:9

Sarah-Leigh **NEL**

"This too shall pass."

Tich **NHEMACHENA**

"At the end of the day its just an LLB, it's not that deep. Wake up, go to lectures and drink lots of coffee."

Bradley **NYAMWIHURA**

"Bury me in the ocean, with my ancestors that jumped from the ships, because they knew death was better than bondage." - Killmonger, a misunderstood black man

Mholiwethu **NYATHI**

"Claim I'm laundering money but where the washing machines?" - Radric Delantic Davis a.k.a Gucci Mane

Dan **NYATSANZA**

"Just read the case ... "

Rachel **NYAZENGA**

"If you can't convince them confuse them."

Sabreene **ORABI**

"I do believe it's time for another adventure."

Eulitah **PARATEMA**

"Whatever you vividly imagine, ardently desire, sincerely believe and enthusiastically act upon MUST inevitably come to pass"- P.J.M.

Tuscany **PARKIN**

"Home is behind, the world ahead
And there are many paths to tread
Through the shadows to the edge
of the night,
Until the stars are all alight."
- J.R.R Tolkien

Amanda **PHEPHU**

"It's handled."

Munyaradzi **PUNUNGWE**

"I am not perfect, but at least I am not a fake."

Rethabile **RATSOMO**

"You are not the product of what they say. You are bigger, greater, mightier. Continue to be you, even when its tough. Push through. Time reveals everything."

Sam **SHAVA**

"The word studying is made up of two words originally, 'students', 'dying'. But there never was a plan B. Was always sold on plan A."

Nobuhle **SIBIYA**

"Bathong Iona."

Robin **SMITH**

"What's a GOD without a little OD? Just a G."
- Mac Miller

Viwe **SOKATSHA**

"Nolite te bastardes carborundorum."

Jessica **STEELE**

"Everyone is entitled to their own opinion, but not to their own facts."
- Daniel Patrick Moynihan

Dylan **STEPHENS**

"I promise I was in your class."

Aaliyah **TSHABALALA**

"If there is anything that I have learned in my 23 years of life: life is a lot easier when you use your white voice over the phone."

Kudzanai **TSVETU**

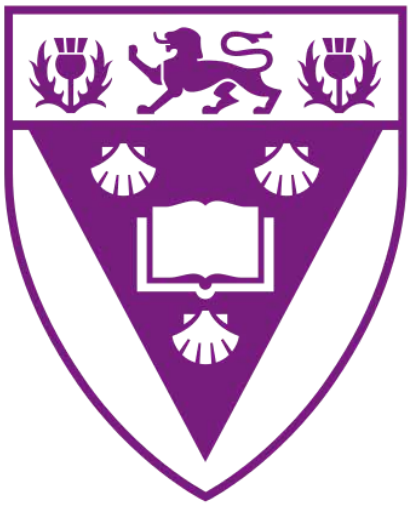
"There are no marks awarded for bravery."

Nontando **TUSI**

"When one door closes don't wait for another one to open. Go build your own door so that it will always stay open, because now you own that door and you can close it whenever you want."

Tegan **VOGES**

"You can choose to be whoever you want to be. But always be the best version of yourself."



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