Southern African Law Teachers Conference 2020
A conference of the Society of Law Teachers of Southern Africa
Presented by the Faculty of Law, University of Johannesburg

‘Law, Nature and Sustainable Development’

Skukuza, Kruger National Park
20 – 24 January 2020

BOOK OF ABSTRACTS
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Reconciling the irreconcilable? Patrilineality in the age of constitutionalism

Raymond Msaule  
University of Limpopo

Traditional leadership in Southern Africa is based not only on patrilineality but also on the principle of male primogeniture. This means that only the eldest male descendants of the male common ancestor may ascend to the throne of traditional leadership. The limitation of ascension to the throne may be explained by the fact that unilineal descent creates corporate kinship with a single group identity. Female members of the kin are not allowed to ascend to the throne because they shall “contaminate” the blood lineage to the throne. However, in a right based society such as ours where unfair discrimination based on gender and sex, among others, is prohibited, it has become difficult to justify patrilineality. In this regard, the Traditional Leadership Framework Act forbids gender discrimination in the succession of traditional leadership positions. This suggests women, whether married or not, are entitled to succeed to the throne. Nonetheless, foregoing patrilineality in relation to succession to the throne is befuddled by the fact that the legislature regards a customary marriage as a marriage where woman foregoes the identity of her folk and adopts that of her husband. This is signified by parliamentary recognition that a customary marriage must be negotiated and entered into or celebrated in accordance with customary law. Our courts have held that one of the enduring features of a customary marriage is that the bride must be integrated into the groom’s family. This underscores the principle of patrilineality. This raises the question, at least in relation to a woman married in terms of customary marriage: how could a person who does “not belong” to the royal family be entitled to ascend the royal throne? However, this is equally applicable to unmarried woman as the prospects of marriage are perennially present.
Sengadi v Tsambo 2019 (4) SA 50 (GP) and the requirements for validity of customary marriages: Muddying the waters?

Siyambonga Heleba

University of Johannesburg

The South Gauteng High Court has recently handed down a decision on the validity of a customary marriage. In contention was whether one of the key requirements for the validity of customary marriages – the handover of the bride to the groom’s family – had been complied with. At the centre of the dispute was the place where what appeared to be the handover had taken place (i.e. at the bride’s home). The court held that a handover had indeed taken place and that this requirement had been met despite the defendant’s averments to the contrary. This paper will show how the court got it wrong by pointing out the defendant was correct in arguing that the bride had not been handed over to the groom’s family and that therefore there could not have been a valid customary marriage in this case. It will be shown that the court had in fact misrepresented customary law. The paper will argue that the manner in which the court arrived at its conclusion is not supported by the authorities relied on (at least not by some key cases cited by the court). It will be concluded that what the court has done does not amount to the development of customary law envisaged by section 39 of the Constitution, 1996, and can only be described as unwarranted judicial activism by the court.
Goodbye, ‘official’ and ‘living’ customary law

Anthony Diala
University of the Western Cape

For the past three decades, scholars, especially in southern Africa, have propagated the notion of ‘official’ and ‘living’ customary law. While they categorise official customary law as the version codified in legislation and described in treatises and judicial precedents, they define living customary law as the norms that regulate the daily lives of people. Against the backdrop of empirical evidence from the south, west, and east of Africa, this paper exposes scholarly categorisation of African customary law as experientially flimsy, historically inaccurate, and theoretically confusing. In so doing, it draws a distinction between indigenous law and customary law. Indigenous laws are precolonial, fast fading norms, which people observe in their ancient forms. Examples include the male primogeniture rule and women’s lack of matrimonial property rights. Conversely, customary laws are the norms that emerge(d) from people’s adaptation of indigenous norms to social, economic, legal, religious, and cultural changes in normative fields. These adapted norms, which manifest as people’s daily practices, often reflect codified customs, restatements, and case law. Due to its radical impact on the normative behaviour of Africans, the advent of colonial rule and its accompanying socioeconomic changes mark the historical point for the adaptation of indigenous norms. The paper concludes that the current classification of customary law diverts policy attention from the manner people are adapting indigenous norms to modern conditions that differ remarkably from indigenous laws’ agrarian origins.
The legal protection of African Traditional Medicine in South Africa: The road to parallel and equal existence of Allopathic health care system and African tradition health care system

Mokgadi Mokgokong
University of Limpopo

South Africa has one of the most diverse biodiversity life in the world. Various herbs, shrubs and trees have been used for medicinal purpose for a long time. African Traditional Medicine has been used to heal and maintain the health of the indigenous people since time immemorial. In pre-colonial Africa, this was the only health care system that was known and practised by indigenous people. It contributed towards sustaining the health and wellbeing of these people. The advent of colonialisation and the introduction of westernised medical science saw African traditional medicine being relegated to the status of an alternative health care system, practised by rural individuals and viewed as primitive in nature. African traditional medicine is a health care system used by millions of people in Africa. The Constitution of the Republic of South Africa, 1996, recognises the right to practise one’s culture. The research paper argues that this right includes the ability to access African traditional medicine in an enabling environment, and that African traditional medicine and health care should enjoy actual parallel existence with allopathic health care system. The paper also highlights the fact that the indigenous knowledge system, specifically knowledge of the medicinal purposes of the biodiversity life in South Africa, is not adequately protected by the intellectual property laws of the Republic. The environmental and economic benefits of the African health care system will also be highlighted. The adequate protection and promotion of the African health care system in South Africa is for the benefit of the people and can also play a role in alleviating the allopathic health care system that is overburdened, reform is thus imperative.
From Paws (trained dogs) to Paws (artificial intelligence) – All in the fight against the poaching of our wildlife

Dawie de Villiers
University of Johannesburg

Dogs play an essential role in humans' lives. Their profound sense of smell has been noticed and utilised for more than a century by law enforcement agencies all over the world. The scepticism, however, that originated from a well-known appellate division judgment in South Africa, dated precisely one hundred years ago and ever since being followed, created the need to re-visit the issue. This paper acknowledges the fact that trained dogs are unique assets; also that the findings of the historically most critical court cases may not be equally relevant anymore. These facts were evident in a recent rhino poaching case where two poachers were arrested in the Kruger National Park and successfully prosecuted with the assistance of a trained tracker dog and its handler. In this paper, a brief comparison to international trends in this field will be followed by a discussion on how new technology is strengthening the trends set by detector or sniffer dogs. This discussion will point out that developing and evolving artificial intelligence is already assisting in the detection of perpetrators. It is also useful in a pro-active way to predict poaching patterns and alert law enforcement agencies as to locations and times when poachers are most likely to strike. This paper concludes with a short discussion of the admissibility of evidence gathered by trained dogs and artificial intelligence, from a law of evidence and constitutional law perspective. With the poaching of our wildlife now recognised as organised crime, nothing should stand in the way of effective investigation methods that will result in the active combat of wildlife poaching.
The role of the criminal justice system in the fight against the crime of rhino poaching and other related offences – a critical analysis

Annette van der Merwe  
*University of Limpopo*

Sello Rangoato  
*University of Venda*

Due to high demand of rhino horns in countries such as Vietnam, China and Taiwan, the crime of rhino poaching has accelerated in South Africa. It would appear that the reason why rhino horns are in such a high demand is, inter alia, because it is believed that it can cure various illnesses, like cancer, and can also treat ailments, such as high fever, delirium and epilepsy. Fuelled by this perception, the number of rhinos poached in South Africa between the years 2008 and 2013 reached alarming figures. For example, in 2007 it was reported that only 13 rhinos were killed, while it steadily rose with the number in 2008 being 83, in 2009 – 122, in 2010 – 333, in 2011 – 448, in 2012 – 668, and finally in 2013 – 1 004. The demand for rhino horns remains very high as the statistics (made available by the Department of Environmental Affairs), revealed that in South Africa it has increased by a shocking 1 215 rhinos killed during the year 2014, and in 2015 – 1 175. South Africa became a member of CITES in 1975. CITES imposed a restriction on the trade in rhino horn internationally, which our country must observe and uphold.

This paper seeks to investigate the role of the criminal justice system in the attempt to combat the crime of rhino poaching and other related offences. Relevant legislation and selected judgments are examined in order to determine trends, as well as any shortcomings in current measures and their application. It appears that corruption within the law enforcement agencies, fuelling the crime, is a reality that needs investigation and action. The crime of rhino poaching (and related offences) further resort under organised crime, as syndicates operate within a multinational context. This necessitates an altered approach in the criminal justice system.
Controlling ivory trade through WTO law: is CITES really an impediment?

Lonias Ndlovu  
University of Venda

Although the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) entered into force on 1 July 1975 as a multilateral treaty to protect endangered plants and animals, CITES activities and interventions have largely been biased towards the protection of endangered fauna. In the African and Southern African Development Community (SADC) context, international trade in rhino horn and ivory from African elephants has fuelled increased levels of poaching, leading to bans on rhino horn and ivory trade in some countries and calls for the opening up of trade in others. Ahead of the 23 May to 3 June 2019 meeting of the Conference of the CITES Parties in Colombo, Sri Lanka, proposals and counter proposals for the relaxation of the ban on ivory trade were submitted on behalf of Eswatini, Namibia, Zambia, Botswana and Zimbabwe. Using the sustainable development theory, this paper juxtaposes selected WTO Agreements with the CITES text and argues that the solution lies in the deployment of trade rules to deal with the subject of international trade in ivory. WTO Law as encapsulated in the exceptions provided for in Article XX of GATT should be relied upon in order to find a solution to the ivory trade conundrum, and if WTO Law is applied, trade may be allowed subject to specific circumscribed conditions and CITES will no longer be regarded as an impediment. This will ensure that countries with burgeoning elephant populations achieve their sustainable development goals by allowing humans to live in harmony with nature (elephants) rather than leaving at the expense of nature.
The sustainable place of punishment in the fight for nature conservation

Stefan Terblanche
University of South Africa

In an environment where crime is rife and resources limited, there is increased pressure for drastic measures when an offender has been convicted. The scarcity of natural resources further increases this pressure. In the sphere of sentencing, the imposition of punishment following conviction, this situation can result in very heavy sentences indeed. The paper will note and explain several relevant examples. Unfortunately, research on heavy sentences brings little comfort to the conservation effort. In fact, heavy sentences can even work to its detriment. In this paper, these considerations will be considered against the foundation that exists for sentencing, both in South Africa and internationally. It will show why these matters are not as simple as they might appear at first blush. Finally, based on 30 years of research experience on the topic of sentencing, the author will make proposals for what can be considered a sustainable place for such punishment.
Sustainability of South African law clinics in a technology driven world

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South African Law Clinics in the past have been sustainable due to their voluntary nature, their ability to work independently and proceed to run matters with limited resources and staff. Due to an increase in student numbers, law clinics have been required to provide permanent structures and greater access to technology, such as computers and internet resources. The feasibility of these technological advancements creates a technological gap for students who struggle with typing and the client who has never completed an online form. The real question is how to ensure the sustainability of Law Clinics with the growth of technology. Sustainability needs to be examined alongside ensuring the needs of clinical legal education and access to justice are met. The aim of addressing this question is to minimise the technological gap and improve the basic legal foundation at universities.
Addressing cyber bullying as a form of cyber harassment in South Africa

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Bullying is behaviour that plagues many countries; however, it is not a new phenomenon. It has received a wide interpretation despite many other academics providing definitions for this concept. Bullying itself may take various forms, and throughout history, bullying has developed to adapt to the changing times. One of these adaptations arose due to the expansion of the internet and this in turn created acts of cyber harm. The internet may characterise acts of cyber harm in various forms. These acts are often labelled differently or named interchangeably. Cyber harassment, cyberstalking and cyberbullying are all terms commonly used to describe harmful cyber acts and although they may share similar traits, they may not all have corresponding meanings. In a general sense, electronic devices and social media applications may be used for the purposes of cyber harassment, victimisation and other online harmful acts and these are the general aspects of cyberbullying.

Cyberbullying has also been described as a subcategory of cyber harassment with its own multiple forms. Although cyberbullying is not a new phenomenon, there has been difficulty in providing an exact definition for the concept, however, it may be defined as any intentional, repetitive and harmful conduct towards another through electronic means, usually involving a power imbalance between the parties. The main characteristic of cyberbullying is that an electronic medium is used to carry out this behaviour, usually by means of the internet through social media, email or text messaging.

Despite the growth in cyberbullying, South Africa has no legislation defining this exact concept. Other jurisdictions have indicated that cyberbullying only applies to the electronic bullying of children and does not include adults, as the electronic bullying of adults will fall under the broader term of cyber harassment. Most of the South African research on cyberbullying relates to addressing cyberbullying in schools. Although this may be a key area to focus on, given the nature of online bullying, it can occur anywhere and is not limited to the schoolyard.

This paper will therefore focus on establishing a proper South African definition of cyberbullying and how it should be legally addressed in South African law. Currently, there is no clarity on how cyberbullying should be regulated and one has to rely on South African scholarly articles and websites. As cyberbullying may have far-reaching and devastating consequences, it is necessary to formulate a legal response to try and curb this phenomenon. A comparative analysis of the UK and Canada will be provided to illustrate how these jurisdictions have regulated cyberbullying.
Digital content and the online consumer: Quo Vadis?

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Trust is essential to maintaining the social and economic benefits that technology brings. People who feel protected feel free to engage in commerce and to participate meaningfully in an economy and for this reason effective consumer protection measures are essential to give impetus to a growing digital economy. In the modern e-consumer market, one of the most prevalent dynamics is the move away from the supply of mostly tangible goods or services acquired via an electronic transaction towards acquiring intangible ones. A plethora of services serve consumers' demands for information, entertainment, education and communication such as music and movie downloads, online gaming, online publishing, e-books, subscriptions to podcasts, webcasts, streaming services, cloud storage, social media et cetera. This demand is the key driver of the information economy.

There are, however, noteworthy differences between tangible goods and services and intangible ones that go beyond the mere fact of physical and non-physical formats. Intangible goods and services (hereafter collectively referred to as digital content) are never static and their functioning depends on their technical environment. Furthermore, some forms of digital content may have a hybrid character and combine the characteristics of the sale of goods and the provision of services. For example, software sales may involve the sale of a copy of the software (on a physical medium or disc or downloaded from the internet), secondly an online, automated update service and thirdly a real-time, remote software support service or help desk.

The contracts for the acquisition of or access to digital content are framed in what have become known as EULAs or end-user licensing agreements, which advise that consumers are not purchasing any goods but are entering into contracts for the use of intellectual property only. Intellectual property rights set up a unique tension in consumer protection law as they influence the classification of digital content as a good or a service and therefore also the application of consumer laws. The tension is further evident in the conflicting approaches to rights and duties in consumer law and copyright law in the acquisition of digital content, due to differing concepts of property. With digital content, the consumer does not stricto sensu get ownership of the e-book but a licence to use a copy of the data in a particular way. The problem is exacerbated because with a physical hardcopy book the consumer has certain freedoms under the principles of ‘fair use’ of the copyrighted product. These abilities do not have equivalents in e-books where, through the application of technological protection measures (TPM’s) or digital rights management measures (DRM), the copyright holder has a complete monopoly or control over what consumers may or may not do with their copy of the data.

This paper aims to provide an analysis of the classification of digital content for purposes of consumer contract law. Classification of digital content as a good or as a service is essential as it often determines the answer to questions such as whether information duties apply, and if so, which information must be disclosed; whether the provider of the digital content may be held liable for hidden defects or lack of conformity; which remedies are available for which type of deficiency; and whether the consumer may invoke a right of withdrawal. The analysis considers the extent to which the consumer law in South Africa is equipped to protect the legitimate interests of e-consumers in their acquisition of digital content.
The role of robo-advisors in the South African insurance industry: Is South Africa ready?

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Artificial Intelligence (AI) is playing an increasing role in the financial services industry worldwide. The insurance industry is no stranger to incorporating the benefits if AI technology into their products. Insurers are using big data to better analyse risks and premiums of policyholders as well as incorporating various types of Insuretech all aimed at making insurance products more accessible and beneficial for the consumer. Insurers are thus aware of the increasing advantages of including AI technology in various insurance products.

Robo-advisors are the next big thing in insurance. With South African insurance companies, like Naked Insurance, already jumping in on this bandwagon, it is only a matter of time until robo-advisors become the norm in insurance. In a society where humans are becoming more and more used to interacting with technology on a daily basis, it is inevitable that AI technology will have a significant impact on the way people deal with insurers. Already, people are able to procure various types of insurance at a click of a button.

The question is, how will robo-advisors change the face of insurance and the way that people take up insurance as well as with insurers? Will the human element eventually become obsolete due to this technology? Or is there still a place for human interaction in the various stages of the insurance life cycle?

Insurers, like Naked Insurance, are claiming that policyholders’ premiums will be reduced because policyholders will work only through an app when purchasing insurance as well as submitting and managing claims. This means that policyholders will be interacting with robo-advisors instead of human beings. This will reduce the human resource element in the company and therefore lead to lower premiums for the policyholder.

Is the South African insurance industry ready for this technology? In a country where unemployment is rife, is such a feature viable in the face of lack of employment opportunities? The question of where robo-advisors will also play the most efficient role in the product life cycle is also crucial to consider. Is South Africa ready for robo-advisors in insurance?
Achieving SDG 6: The Southern African Development Community (SADC) region and water governance – a legal perspective

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Water as natural resource is generally recognised as a critical issue. The critical importance of clean and accessible water is demonstrated by the fact that the 2030 UN Agenda dedicated a Sustainable Development Goal (SDG) solely to its promotion: SDG 6 calls for both developing and developed countries to consider access to water and sanitation for their citizens. The UN General Assembly, however, adopted the 2030 Agenda as a resolution, which is not legally binding, meaning that there are no concrete legal mechanisms that can promote or enforce it. This being said, the UN Agenda has thus far proven itself to be far from being irrelevant to the legal fraternity. The SDGs provide useful guidance for shaping law, policy and practice for implementation.

Informed by a regional analysis of sustainable development issues, SDG 6 provides a new opportunity for sustainable water governance in Africa, and more specifically, in SADC. Prior to the adoption of the SDGs, many African states already adopted legislative measures to address SDG 6 issues. Regional sustainable development priorities are also captured in the African Union’s Agenda 2063 and the programme of the New Partnership for Africa’s Development.

The proposed paper argues that SDG 6 provides new opportunities for sustainable water governance in the SADC region. It aims to determine 1) the extent to which the South African law and policy framework may assist in developing a benchmark of best practices to advance the achievement and realisation of SDG 6 in the SADC region; and 2) how SDG 6 can provide useful guidance in shaping the law, policy and practice for effective water governance in SADC.
Towards a sustainable legal framework for post-extractive environmental rehabilitation: Reconciling mining, environmental and water laws in South Africa

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South Africa has made huge strides towards implementing the principle of sustainable development in the management and exploitation of its natural resources. Mining remains one of the main economic activities driving the economy. Recent pronouncements of oil and gas drilling foretell a future of extractivism in Southern Africa. Angola, Tanzania, Kenya and Zimbabwe are all on the cusp of having oil and gas industries. Global demand by economies like China will continue to put pressure on African countries to provide raw materials (iron and steel, rare earths, coal, oil and precious minerals). The capitalist economic model heavily depends on the extraction and conversion of natural capital into financial and other capital forms. This was the major premise of the colonial project – the hunt for minerals and land-based industrialisation. Developing countries are themselves pinning hopes on extractives to drive their developmental agendas.

The anchoring of economies on resource extractivism was only recently subjected to environmental/sustainability regulation after centuries of unsustainable and deleterious methods of natural resource extraction. South Africa leads the way in the legislative development of environmental and mining law in Southern Africa. However, a reflection on the aftermath of mining and other extractive activities paints an unrelenting bleak picture of a scarred earth, mutilated environments, desecrated cultural sites and polluted water bodies.

Through an analysis of the interaction of the mining, environmental and water legislation pertaining to post-closure rehabilitation, this paper explores pathways towards a sustainable legal framework. Currently fragmentation and institutional misalignment remain at the core of poor closure and rehabilitation plans that our poorly financed. The research focuses on impacts of post-mining rehabilitation on water resources. The paper concludes that the current fragmented approach to the regulation of post-closure water remediation is unsustainable. It must therefore be reformed, and such legal reform must be predicated on the principle of integration that underpins sustainable development. Without such integration, the regulatory lacunae will entail persistence of a poor post-closure rehabilitation legal framework.
The impact of s24G as a corrective measure in accordance with sustainable development

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The Environmental Impact Assessment (EIA) Regulations promulgated in terms of the Environment Conservation Act aims to give effect to the right to live in an environment that is not harmful to human health and wellbeing as well as to have the environment protected as enshrined in the Bill of Rights of our Constitution. These regulations identified activities that may result in substantial impacts to the environment, thereby requiring an EIA process to be undertaken and submitted to the relevant authorities for authorisation prior to commencement of the development in respect of any of the listed activities. Commencement of any of the listed activities without authorisation is prohibited and constitutes an offence. This may be rectified by means of an application to the Minister or the relevant MEC in terms of Section 24G of the National Environmental Management Act read with Section 7 of the National Environmental Management Amendment Act.

The aim of this paper is to evaluate the Section 24G process, which includes the purpose of this provision, the application process as well as the consequences associated with the submission of such an application. Criticism will be levelled against the fairness of the liability attached to this provision in the form of an administrative fine. In the event of an emergency or as a result of necessity, such an administrative fine is also imposed on any person or entity who commence development of an environmental listed activity without the necessary authorisation. A suitable recommendation to remedy this shortfall would be an amendment of Section 24G by implementing grounds of justification or a defense, with stringent requirements, in order to be excluded from being imposed with an administrative fine in the event of an unlawful commencement as a result of urgency, and attempt to curb the potential abuse of this procedure.
Public interest litigation as an instrument to advance environmental justice and sustainability in South Africa

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In South Africa, sustainability has been defined as the integration of economic, social and environmental factors into all planning and decision making. This notion has been advanced through various pieces of legislation within the environmental law framework. Central to these pieces of legislation, is that there has to be environmental justice, which can be achieved through sustainable environmental practices. The country has seen many decisions being taken that do not promote the principle, thus forcing civil society to approach various courts for redress, that is, to achieve sustainability and environmental justice.

Environmental justice is all about the social transformation directed towards meeting basic human needs and enhancing the quality of life, environmental protection and democracy. Despite the latter, South Africa is experiencing the intensifying public interest litigation between state organs, private entities and environmental awareness civil groups.

Among several case studies of South African public interest litigation on environmental justice is the case of Arcelor Mittal v VEJA. In this case, the environmental awareness civil group (VEJA) requested access to environmental information held by the private entity (Arcelor Mittal) and such request was declined. As a result, the VEJA resorted to court for redress and the court ruled in its favour. In approaching the court, VEJA relied on the constitutional and relevant legislative framework at its disposal.

To that end, it becomes apparent that public interest litigation has turned into a very useful and effective mechanism to foster environmental justice and sustainability. Therefore, this article assesses the effectiveness of the current practices and mechanisms set to enhance environmental justice and sustainability. The assessment is carried out by firstly, conceptualising the idea of environmental justice and sustainability; secondly, giving an account of several case studies wherein litigation has been used as a remedy; and lastly, outlining possible ways of improving the environmental policy regime.
Transformative constitutionalism, fairness and administrative law reform in South Africa

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We live in a society in which there are large disparities in terms of wealth. Millions of people are living in deplorable conditions and in extreme poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health services. These conditions existed when the Constitution was adopted, and a commitment to address them and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist, this aspiration will have a hollow ring. Transformative constitutionalism is an important vehicle for accomplishing transformation, in order to address many of the issues mentioned above.

In the sphere of administrative justice in particular, transformative constitutionalism could be regarded as a constitutional philosophy that represents fairness in public administration. The notion that administrative justice is an expression of fairness is not a novel idea in South African administrative law. Under the rubric of fairness, South African courts have often reverted to the doctrine of fairness in English law.

The PAJA plays a very important role in the transformation of South African administrative law. The purpose of the Act is to give effect to the right to administrative action that is procedurally fair, as well as the right to written reasons for administrative action, as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996. The term "administrative action" is not defined in the Constitution.

This paper seeks to investigate whether the Constitution as well as PAJA explicitly negates the recognition of substantive legitimate expectations in South African Administrative Law. Furthermore, whether substantive legitimate expectation can be part of our law and as a result of becoming part of our law, it can be a new ground for judicial review in SA, thus reforming administrative law.
Once bitten twice shy?
Not the Constitutional Court

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This paper shall investigate the Constitutional Court’s disregard of the doctrine of *stare decisis* in relation to the subsidiarity principle. This would be done against the backdrop of the previous cases were the Court held that subsidiarity was an important principle of our law. Stare decisis is well rooted in the South African system. The doctrine presupposes that courts are bound by the decisions of a higher court unless such decisions have been overturned by that court. This doctrine is a manifestation of the rule of law. The importance of stare decis in a constitutional democracy cannot be overstated. This does not mean that a legal system must remain stuck with outdated principles. However, the frequency with which the court overrides its previous decisions is concerning. The concern relates to the manner this court overrides its decisions. This court has developed the infamy of overriding its decisions by implication.

*Pretorius v Transport Pension Fund* is a case in point. In *Gcaba*, the court put to bed the phenomena of “forum shopping” and “cause of action shopping”. *Gcaba* seemed to have reaffirmed the principle of subsidiarity. Subsidiarity presupposes a hierarchical relationship between the instruments of law. The principle requires the more specific and detailed norms to be applied in preference to the general and abstract ones. In *Pretorius*, the applicants in essence claimed damages for what was an essentially PAJA breach. The respondents raised an exception that was upheld by the high court. The court found that there was nothing precluding the applicants from instituting a separate claim based on the conduct that amounts to administrative action under PAJA. In *Chirwa*, this court held that framing of the cause of action as something else in order to avoid the subsidiarity principle was not permissible.
A lack of interpretive and/or institutional restraint? An analysis of United Democratic Movement v Speaker of the National Assembly 2017 5 SA 300 (CC)

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In United Democratic Movement v Speaker of the National Assembly 2017 (CC), the Constitutional Court held that the Constitution of the Republic of South Africa, 1996, and the Rules of the National Assembly (9ed 2016) permit a motion of no confidence in terms of section 102 of the Constitution to take place via secret ballot. The Court ruled that the Speaker has the authority to decide whether to conduct such a vote via secret ballot. The finding that the Constitution and the Rules permit a motion of no confidence to take place via secret ballot, instead of requiring or prohibiting it, does arguably not violate the separation of powers doctrine. It potentially does not intrude into the exclusive domain of the legislature as the Court merely clarified a position within the Constitution and the Rules on which members in the National Assembly could not agree.

Although not part of the Court’s ultimate order, the Court also outlined a number of considerations that the Speaker must take into account when deciding whether to conduct a motion of no confidence via secret ballot. Although the Court left the ultimate decision to the Speaker, the application of these considerations would arguably always require of the Speaker to order a vote to take place via secret ballot. As the lack of judicial restraint in matters concerning structural judicial review is objectionable from a democratic perspective, this paper will consider whether the Court demonstrated a lack of interpretive and/or institutional restraint (as argued by F Cachalia in (2015) 60 NYL School LR 379 with reference to Mazibuko v Sisulu NO 2013 (CC)) in setting out these considerations.
Ordinary meaning: do words mean the same for the judiciary as for a ‘reasonable person’?

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The concept of ordinary meaning is one of the best-known phenomena in legal interpretation and remains a contested issue. As a result, a lot has already been published on the matter. Some scholars have tried to define what it is (Du Plessis 2002; Devenish 1996; Labuschagne 1998; Solan 2012; Slocum 2016), while others have tried to debate whom the concept is actually meant for (Labuschagne, 1988). The existence of ordinary meaning has also been called into question (Cowen, 1980; Labuschagne 1998; Christensen 2004; Hutton 2014; Carney and Bergh 2016). According to this legal principle, ‘ordinary meaning’ is meaning assigned to words by so-called reasonable people. This contribution seeks to test if it is indeed the case. The experiment is conducted through a survey approach. The survey tests 10 words taken from South African case law that were interpreted according to the ordinary meaning principle. The survey results are then matched with the meanings assigned by the relevant courts as well as definitions taken from the iWeb Corpus, a corpus consisting of 13 billion words. Preliminary results already indicate that respondents understand and define many of the words in the same way as the respective courts.

The paper will furthermore consider what is meant by ‘reasonable person’ and why it is a legal fiction, along with ‘ordinary meaning’.
Intellectual property foresight rather than hindsight for supply chain sustainability – A concept paper for growth

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The sustainability of our planet and the responsible use of all resources have become an issue of substance within most frameworks for both strategy formulation and corporate governance. There is a powerful worldwide lobby from, inter alia, non-governmental organisations, academia and the ‘left-wing’ to contain and even reverse destructive practices of the environment. Our global village has sustained a number of substantial, and possibly irreversible hits, to key and essential systems of planet earth. Organisations have developed and continue to ensure that value adding global supply chains have access to resources via a number of legal mechanisms of trade agreements, commercial contracts and intellectual property rights, with the end result ensuring brand and market dominance translating into long-term core advantage and profit. Intellectual property rights have focused on ensuring perhaps the imperfect protection via legislation of products and processes, which have had the inherent practices of harming the environment.

Historically IPRs have focused on the protection of organisational ‘big spend’ R&D, irrespective of potential environmental damage, the hindsight of IPRs. The paper will set out to examine the roles and responsibilities of developing intellectual property rights that focus on future environmentally sustainable practices for all aspects of nature within supply chains and that will also ensure organisations retain and maintain competitive positions. Legislative changes will perhaps need to be developed, domestically and globally, to ensure IPRs are environmentally compatible with sustainable practices in the work place. Financial and non-financial reporting practices could perhaps be integrated into a single framework with IPRs disclosed as per their environmental impact footprint in association with performance. Planet earth is our only home for now. The continued abuse appears to be reducing the diversity of nature at a rapid rate. Foresight rather than hindsight of IPRs, via legislative practices should lead to improved sustainable processes along and among domestic and global supply chains.
The effectiveness of academic patents versus transformative licensing and commercialising

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The impetus, influence and experience that emanate from the great effort displayed by the United States of America (US) is commendable and appreciable in terms of university research development. The promulgation of the Bayh-Dole Act by the US has impacted positively on the enactment of South African Intellectual Property Rights from Publicly Financed Research and Development Act, which was primarily initiated with the motive of benefiting South Africans without incurring costs. It was enacted as a government core developmental strategy that safeguards intellectual property funded by government to benefit all South Africans. With the efforts exhibited by the Act, universities are required to make more efforts in enhancing IP protection. That will result in transformative and competitive commercialisation rearing more funding and improving institutional reputation. It is sensible to ensure that discoveries pass patenting tests to affluent financial profits and research expansion. Most, if not all universities accumulate quite a number of inventions through their staff inventorship. Nearly all universities commercialised research products, and other inventions accrued through university resources. On the other hand, it cannot be disputed that patents are influential to research novelty, as well as improving institutional reputation. However, while we are aware of inventions emanating from academics at South African universities, it is quite incensing that we are not alerted, vigilant, or rather observant about the quality and quantity of patents surfacing from these universities, and the challenges encountered by academics. Subsequently, denting universities insistent potencies to fully participate in an aggressive licencing and commercialisation of academic patents.
Intellectual property awareness in rural communities: A case of Thohoyandou and Malamulele within Vhembe District in the Limpopo province, South Africa

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We are aware of the inventions emanating from indigenous industry, and their pragmatic role in economic development. Rural inventors are confronted with several challenges, which include among others: illiteracy and lack of information. The latter is considered to be a stumbling block in terms of awareness and insights about Intellectual Property Rights. If indigenous inventions are not patented, they run an excessive risk of being stolen. Indigenous people are treated unfairly by those who have power to benefit and exploit the work of the most vulnerable. The responsiveness about intellectual property in rural communities lacks potential to development, because most of these communities often have low literacy levels, lack information and understanding of patent protocols. Measures should be implemented to ensure the protection of discoveries coming from the industry. Therefore, this study will examine the challenges faced by indigenous inventors in rural communities. Moreover, the study also outlines the transformative role of IP awareness in rural communities. The study adopted a quantitative research methodology and random sampling was used to select community members from Thohoyandou and Malamulele. A total of 200 questionnaires were randomly distributed to Thohoyandou and Malamulele. Researching the perception of people on intellectual property awareness in rural communities would be significant for various reasons: the results from the study will assist community members to understand intellectual property. Recommendations will be provided at the end of this conceptual paper.
Unlocking the potential of Islamic finance towards meeting sustainable development goals

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To live and prosper in oneness with nature: the worldwide definition of sustainable development has earned itself a description within the constraints of environmental law. However, an in-depth evaluation of this definition leads to a much broader spectrum over and above environmental issues. From an Islamic perspective, sustainable development is a multi-dimensional process that not only seeks to strike a balance between economic and social development on the one side, but also the environment, on the other side. Thus, it seeks for man to use resources as sparingly as possible and account for the environment in the same order. This emanates from man's duty on earth as prescribed by the Qur'an and the Sunnah in giving effect to the 2015 UN Sustainable Development Goals as well, in particular the eradication of poverty and protection of the environment. This paper will look at sustainable development through the lenses of Islamic law. The key principles being Islamic finance towards the eradication of poverty with its integrated principles that remain relevant in a world that is increasingly focused on societal and environmental wellbeing, which can only exist through a system of clear governance. With the mention of clear governance, this paper will also consider Islamic principles of halal and thoiyyib, which dictate clean, fair, compassionate, helpful, humane and pure dealings that are vital in the attainment of sustainable development within the socio-economic context.
Are disruptive protests compatible with peaceful protests? A criminal law perspective

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The South African society, which includes environmental activists, has grasped the power of protest action as a means of getting the attention of the authorities. As a result, a culture of disruptive protests is emerging at a rapid pace. In the South African context, examples of disruptive protests include: (a) the barricading of roads with burning tyres, garbage and other objects or material, (b) the disruption of lectures, schools, and businesses by unarmed protesters, and (c) the disruption of traffic flow, most notably by means of parking stationary vehicles on busy roads and highways. The concern for lawyers is that it is unclear if disruptive protests are compatible with peaceful protests and thus fall within the protective ambit of the right to freedom of assembly in section 17 of the Constitution. Clarity on this issue becomes necessary, especially in light of the extensive protection afforded to peaceful protests in recent cases such as that of SATAWU v Garwas 2013 (1) SA 83 (CC), S v Tsoaeli 2018 (1) SACR 42 (FB) and S v Mlungwana 2019 (1) SACR 429 (CC). This paper therefore examines the crime of public violence in order to ascertain whether or not the public violence jurisprudence views disruptive protests as compatible with peaceful protests.
Easing access to justice for child sexual abuse survivors

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It cannot be disputed that perpetrators of child sexual abuse escape prosecution for their acts when the abuser uses threats and coercion to prevent the victims from reporting the offence until after the prescription period has occurred, or when the victims are too young to report within the statutory period. The damages wrought by child sexual abuse are particularly complex and devastating, often manifesting themselves slowly and imperceptibly, so that the victim may only come to realise the harm she (and sometimes he) has suffered, and their cause, long after the tolling period has run its course. Levenstein v Estate of the Late Sydney Frankel presents a delicate issue of child sexual abuse and criminal tolling provisions that have posed formidable obstacles to successful prosecution. Understood in this way, Levenstein has many notorious companions. Against the backdrop of Levenstein, this paper examines child sexual abuse in the context of a 20-year prescription of sexual offences in section 18 of the CPA.
Efficacy of government strategies in the prevention and control of organised crime in Limpopo province

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The aim of this study was to assess the effectiveness of the measures in the prevention and control of organised crime by government agencies based in Limpopo province. The research was qualitative in nature and semi-structured interviews were conducted with 12 law enforcement officers from the Directorate for Priority Crime Investigation (DPCI), Department of Safety Security and Liaison (DSSL), South African Police Service (SAPS), Home Affairs, South African Revenue Services (SARS) Customs and Excess, Assets Forfeiture Unit (AFU), and the National Prosecuting Authority Priority Crime Litigation Unit (NPA PCLU). Data was analysed through thematic analysis. The results revealed that the government strategies in Limpopo still require concerted efforts in the prevention and control of organised crime. Limpopo government has identified measures to fight organised crime and has adopted three measures, namely the criminal justice response, the institutional response and the legislative response to organised crime. The measures taken by various units were found to be ineffective in dealing with organised crime, since organised criminal networks are often flexible, dynamic, innovative and resilient. Furthermore, corrupt activities and collusions by law enforcement officers hinder the effective implementation of the strategies to control organised crime. The findings of the study show that there is coordination and communication among certain law enforcement agencies, such as the DPCI, SARS, Home Affairs, and the NPA PCLU. This coordination transpires through intelligence, information sharing and interoperability. The study highlighted the poor implementation of the multi-agency approach, as one institution (the DPCI) is expected to facilitate and lead the prevention of organised crime. The findings further highlight, for example, that the smuggling of illegal cigarettes is currently a challenge for the provincial government as a highly committed organised crime. The study recommends the development, by the government, of an Organised Crime Threat Assessment in order to effectively recognise the need for responses, which should be based on a sound understanding of the nature and characteristics of the organised crime environment. In addition, it recommends the development of an Organised Crime Response Plan to align efforts to identify critical organised crime threats. The study further recommends the adoption, by the government, of relevant multi-agency approaches in addressing organised crime – both operational and policy or regulatory – which will underpin a provincial-wide government approach to organised crime.
New thinking on “food fraud”: The legal test to apply when faced with the issue of finding “horse in your wors”

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Nature has provided humans with fuel needed to sustain life. Mother earth has created all the necessary nutrients that humans need to sustain that life. The main source of life, water, creates all living beings, for without water, there can be no life.

As a marketing technique, advertisers often refer to the statement “from the farm to the table”. The latter statement would generally find credence in a utopian world; however, due to humanity’s quest for profit, one of the oldest known deceptions that humans have created relates to the misrepresentation of various aspects of the consumed product and purely for the search for “economically motivated adulteration of food products”. The practice occurs worldwide, and South African consumers have not been spared the indignity of consuming a product that presents as a viable edible product but is not. A simple example explaining this deception is a food manufacturer selling a product that does not contain the ingredients that are indicated on the product packaging.

The latter example can be directly linked to a concept, which is in legal and academic literature referred to as “food fraud”. This is a collective term that includes conduct linked to the intentional misrepresentation of a substance that causes prejudice to the consumer. This could present in a number of ways including but not limited to what ingredients food contains, mislabelling of content or false information about the source of a food product. The purpose of the deception is generally made for economic gain, which could result in financial prejudice and could possibly also lead to health risks and ultimately loss of life, which is evident from the recent outbreak of listeriosis in South Africa caused by contaminated processed products.

In this paper, I will explore whether our law provides for sufficient remedial action other than a delictual claim against the party making the misrepresentation and investigate the possibilities of pursuing criminal prosecutions against the perpetrators. My initial research findings indicate that there is a possibility of criminal action arising from either common law offences or some statutory offences. By analysing the common law crime of fraud, I can find no bar as to why the “fraudsters” cannot also be held criminally liable and face whatever punishment the court would seek to impose for the general common law offence of fraud.

No criminal prosecutions have as yet been instituted for the offence of fraud and there have been very few prosecutions for offences that have been provided for in certain legislation. What happens when the misrepresentation results in a lot more than simple embarrassment or inconvenience to the consumer from a moral or religious point of view? Perhaps the time has come to start punishing perpetrators with a stronger hand than what our current legislation provides for. In this paper, I will attempt to explore those stronger options, which could possibly lead to harsher penalties so that consumers can be better protected.
Sustainability of academics in South Africa

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University of South Africa

In this paper different employment equity measures that could be implemented to speed up the transformation of the academic workforce in South African universities are identified. The relevant pedagogic, legal and social implications of the implementation of each of these affirmative action measures are scrutinised to uncover several potential pitfalls, or potentially negative consequences. It is concluded that affirmative action measures associated with ‘fast-tracking’ would not promote the academic project. In fact, making academic appointments and promoting individuals without taking crucial factors such as experience, publications and knowledge into account is bound to have a devastatingly negative impact on the continued existence of academics. To level the playing field, enhancing skills of designated employees appears to be the best solution.
Are matric results an indication of success at university?

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North-West University

It is expected that law students should be able to think critically, and read and write properly when they enter University and it is the norm that we accept students based on their matric results. The question is whether the matric results are a true reflection of the students’ skills and success at universities? The retention rate of students is vital for universities and therefore research on ways to predict students’ success at universities plays an important role. The purpose of this study is whether matric results and to an extent first-year results are indicative of students’ success at universities. A mixed methodology approach was followed and questionnaires, interviews and data analysis were used to answer the research question. It appears from the data that a student’s performance in matric and in their first academic year does not necessarily correlate with future success at university. According to UNESCO, education for sustainable development “empowers people to change the way they think and work towards a sustainable future”. In practice, it means equipping students with the requisite knowledge, skills, attitudes and values to create a sustainable future. To that end, students should cultivate critical and creative thinking skills, engage in authentic interdisciplinary learning activities and develop a value system that emphasises responsibility to self, others and the planet. Before we can educate law students on sustainable development, we need to determine whether matric results and first-year results can determine/predict success at universities. It becomes imperative to be able to determine the students’ skills set and find ways to improve thereon. Law graduates should make meaningful contributions to society and engage on topics such as sustainable development. This will only be possible if we are able to determine their skills set when they enter university and then improve thereon.
The significance of The Independent Institute of Education (Pty) Ltd v The KwaZulu-Natal Law Society and Others (KZP) (unreported case no. 9090/18) – whereto from here?

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The process of the National LLB review that was conducted among 17 public institutions offering the programme has been previously well-documented. Within the context of the higher education (HE) legal landscape, the scope and the shape of the higher education system have changed significantly in recent years. Challenges of the national transformation agenda and the need to improve access and equity opportunities for previously disadvantaged groups have been a prerogative within education for both private and public institutions. The growth and development of economies is predisposed on well-rounded, educated and ethically trained youth. South Africa’s developing economy is reliant on having an integrated and independent legal profession to contribute effectively to systemic growth.

Private higher educational institutions have a significant role to play in broadening access to education. This is particularly important in the current milieu where some law faculties are experiencing financial constraints and the profession itself is undergoing transformation under the Legal Practice Act 28 of 2014 (LPA). The Independent Institute of Education (IIE’s) LLB was accredited by the Council on Higher Education (CHE) in 2017 and offered for the first time in 2018. This LLB programme was developed in response to the LLB Qualification Standard set by the CHE.

An examination of The Independent Institute of Education (Pty) Ltd v The KwaZulu-Natal Law Society and Others (KZP) (unreported case 9090/18) will be undertaken. The paper will have a particular focus on the status of an LLB from an accredited private HE institute, from the perspective of the effect of section 26(1) of the LPA on the cardinal section 9(1) right to equality before the law. The paper will critically examine the metamorphosis of the matter from the initial application for an urgent review of the KZN Law Society’s decision not to accept IIE graduates for admission to the legal profession, to the eventual Constitutional Court application for confirmation of the Pietermaritzburg High Court’s decision.
Male and female law students’ pre-entry expectations of first-year university studies: Is there gender parity?

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Universities have an obligation to ensure that all students who are admitted into their faculties are provided with every possible opportunity to be retained and succeed in order to promote sustainability of professions. Recent enrolment figures, locally and internationally, reveal that there are more female students enrolling at universities than male students. This gender disparity has created a serious concern with the decreasing number of male students that are accessing and participating at universities worldwide. This issue is particularly concerning in the Faculty of Law at UWC. Over the past five years, the enrolment of male students in the faculty has been steadily declining. This is a comparative study that focused on first-year students' transition into the Law Faculty at UWC. The study compared male and female students' pre-entry expectations of studying law. The aim was to gain a better understanding of who are the students’ entering the Law Faculty and if there were any significant differences between the male and female students’ expectations of university studies. An online Pre-Entry Expectation Survey was used to collect data on the diverse student profiles and university expectations. Thirty-five expectation statements from the survey collected responses to student readiness, academic and social integration, and seeking support. A descriptive analysis of the quantitative data was presented under the four areas from the survey. Tinto’s (1975) Student Integration model is used as a lens for data analysis. The model allowed us to look at how students' profiles and pre-entry factors may have an influence on their social and academic integration into university which could impact on retention and success. The findings from this study provided an initial insight into gender differences in respect of first-year university expectations. The findings also enabled the Law Faculty to take appropriate actions to design appropriate support that could assist with a successful university transition. The results from the study have created an awareness of the differences between the male and females students in the Law Faculty so that first-year lecturers plan appropriately for their students.
Assessing South Africa’s implementation of sustainable development goal 15: Lessons from the First Voluntary Review Report 2019

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Nelson Mandela University

The adoption of the 2030 Agenda for Sustainable Development signaled the international community’s universal commitment to confront environmental challenges in order to ensure humanity’s continued survival. The 2030 Agenda and its 17 Sustainable Development Goals (SGDs) provide a global blueprint for the dignity, peace and prosperity for people and the planet, for future and present generations. Four years into the implementation of the Agenda, states are translating this vision into national development laws and strategies.

Various constitutional and legislative developments in South Africa prioritise sustainable development as a guiding principle, in a manner appropriate to South Africa’s unique post-apartheid context. Section 24(b)(iii) of the Constitution, 1996, gives everyone the right to an environment protected through “measures that secure[s] ecologically sustainable development”. This constitutional mandate is directly linked to SDG 15, which aims, inter alia, to protect and promote the sustainable use of ecosystems and reverse land degradation.

The publication of South Africa’s first Voluntary National Review (VNR) in May 2019 is a testimony to the nation’s commitment to the implementation of sustainable development. However, although the VNR highlights steps taken in the implementation of the SDGs, including SDG 15, it also shows that in some areas, implementation is insufficient to meet the Agenda’s goals by 2030.

The reality is that despite sustainable development’s prominent feature in the Constitution, laws and policy, inadequate guidance is provided to ensure the full implementation of the 2030 Agenda. The effective implementation of sustainable development requires sound policy development and clear implementation guidelines, a strong commitment from government, a better communication strategy and proper coordination among all stakeholders.

This paper analyses the VNR with specific reference to the implementation of SDG 15. It identifies the challenges faced and makes recommendations to strengthen the implementation of SDG 15 in order to meet the Agenda 2030 goals and to achieve a synergy between law, nature and sustainable development.
Flooding, the environmental right and sustainable development

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National and consolidated statistical data on the socio-economic and environmental impacts of flooding in South Africa either does not exist or, if it does, is extremely difficult to access. Notwithstanding this, it is clear that South Africa experiences regular floods and that these floods can have significant impacts. According to media reports on the floods in KwaZulu-Natal in 2019, for example, damages are estimated to be approximately R1.1 billion – most of which was incurred in the Durban area alone. For some the damage can be ameliorated with relatively minor consequence. However, given the high rates of poverty in South Africa, the impacts of flooding for others may have long-term and even intergenerational impacts. While floods in South Africa may be a natural event, their frequency and intensity are predicted to increase as a result of climate change. Their effects can also be exacerbated where local government fails to discharge its service delivery mandate effectively. This suggests that both government and the courts have a role to play in ensuring a pro-poor and proactive approach to flooding so that people’s environmental right is not infringed. This paper accordingly explores judicial responses in flooding cases as one aspect of contributing to the understanding that is required to develop a cohesive response to flooding in relation to the environmental right and sustainable development.
The protection and sustainable management of soils in Africa: Legal prospects, challenges and opportunities for sustainable development

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Stellenbosch University

The protection and sustainable management of soils is a precondition for sustainable development and more so for the survival of humankind. Without sufficient areas of fertile soils, there is no food security and no chance to mitigate climate change. Degraded soils result in hunger, famine, migration and, under certain circumstances, even in wars. Land preservation and thus the sustainable management of soils is required to achieve the majority of the Sustainable Development Goals of the UN 2030 Sustainable Development Agenda, and in particular the “Land degradation neutrality” objective. Although the effects of soil degradation are global, an appropriate management of soils must be implemented locally. The challenges in Africa are multifactorial, including ecological, social, cultural, economic, political and legal aspects. Although Africa is the continent with the least land degradation, the pressure on soils is already enormous and continuously increasing due to a range of factors including poverty, over-exploitation, population growth and climate change. Drivers of unsustainable soil management include overstocking, overgrazing, water erosion, landslides, and over-application of agro-chemicals. The poor population often depends on land and other natural resources for immediate needs, which is an additional driver for land degradation.

From a legal and institutional point of view, the following shortcomings and challenges could be identified: The ecosystem services that soil could provide as a natural resource have not been integrated as a matter of sustainable management in most African countries’ legislation. Sustainable soil management is not yet commonly observed as a crucial instrument to achieve sustainable development. It has not been imposed as a legal requirement in many aspects of African law. A coherent and thorough policy with regard to sustainable soil management is still lacking in most African countries’ legislation. Insecure tenure rights pose a problem for an effective implementation of already agreed soil management standards. Lacking or insufficient enforcement, inter alia due to inappropriate capacity, additionally impedes sustainable soil management in Africa.

This paper reflects insights from an international project with the same focus. The main objective of the project was to support African states in developing an appropriate and future-proof legislation on sustainable soil management. To this end, the paper will map out options for a model legislation for sustainable soil management in Africa.
The relationship between legal education and sustainable development: lessons from the jurisprudence of business law on the relationship between persons and their environment

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University of the Witwatersrand

While there has been growing recognition of the power and influence of companies that rival even that of some states, the syllabus of business law in South African tertiary institutions has remained largely grounded in its positivist legacy. As a consequence, the social, economic and political implications of the company go without interrogation. This chasm may be attributed to the tensions created by two dichotomies. One is the distinction between public and private law where even Constitutional intervention is seen as operating as a public addendum to otherwise distinct private law. The other is the emphasis on the distinction between theory and practice that is deployed in the context of business law to suggest that the primary concern of business law in technical and pragmatic and distinct from the reach of what is often dismissed as abstract and unhelpful theory.

What this narrative of business law in our universities produces is a disconnect with the interdisciplinary reality within which business law and business entities operate. In my paper, I will provide a background that will evidence this depiction of the current state of business law, before proceeding to unpack how the current narrative limits a more critical interrogation of business law and business entities that would facilitate the recognition of the key role of business law and entities in sustainable development.

Using a critical jurisprudence approach (Douzinas and Gearey), I will make the argument that interrogating the jurisprudence that underpins company law and recognising the interdisciplinarity of the subject are key to producing graduates who are both conscious of issues of sustainable development and equipped with the skills necessary to embark on diagnosis and problem solving (Freire). Furthermore, I will seek to demonstrate the importance of business law in providing students a platform to probe the co-constitution and relationship between persons and their natural and institutional environments.

Finally, I will demonstrate how a critical reframing of business law may be possible through employing the lens of African Philosophy (drawing predominantly on Menkiti and Ramose) to reconsider the principles and priorities implicitly in operation in the current teaching and practice of business law.
Criminalisation of poverty and the forgotten populations – threats to sustainable environmental sanitation in Zambia

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University of Zambia

A clean and safe environment is cardinal to sustainable development. Goal 11 of the Sustainable Development Goals aims at creating sustainable cities and communities. This requires states to, among others, address all forms of pollution, including water, air and land. It implies taking steps to guarantee environmental sanitation. The Zambian legal framework contains provisions that seek to achieve a clean and safe environment. However, most of these provisions are based on archaic laws that did not contemplate the kinds of changes that have occurred in the Zambian society today. The Zambian government has taken on measures aimed at achieving a clean and safe environment but has not created a supportive legal environment for effectively implementing these measures. The law seeks to attain environmental sanitation but its approaches of criminalising populations severely affected by poverty and de facto excluding closed populations from the benefits of the progress aspects of the law pose a greater environmental hazard than not. This paper seeks to discuss why the multiplicity of laws, which arguably serve to guarantee a clean and safe environment, has had little or no impact on the Zambian context. It begins with a discussion of criminalised and forgotten populations to demonstrate how marginalisation of certain groups of people impacts on the environment in Zambia. This discussion shows the link between marginalisation and environmental hazards. The paper then examines the requisite Zambian legal framework, its impact on the marginalised groups and shortcomings in fostering sustainable environmental sanitation.
The right to education threatened: A look at the Komape case

Thobile Nsimbini

University of Limpopo

The Constitution of the Republic of South Africa, 1996, provides for the right to education as a basic entitlement that every child has in the Republic. This right is also guaranteed in a number of international instruments, such as the Universal Declaration of Human Rights and the Convention on the Rights of the Child. This right is, however, threatened if there are no basic facilities to ensure that the children are safe when they are at school and these include safe toilets. This is the duty of the State to ensure that children are safe at schools. This is also one of the sustainable development goals that seek to “ensure availability and sustainable management of water and sanitation for all”. This, however seems to be something that the government is finding difficult to achieve because there are still children who die in pit toilets in South African schools. The case of Komape and Others v Minister of Basic Education (1416/2015) [2018] ZALMPPHC 18 (23 April 2018) serves as proof that the achievement of basic needs proves difficult. This violates the children's rights to dignity, the right to education and the right to a safe environment. This paper therefore seeks to emphasise that the sustainable development goals need to be achieved. Strict basic needs that are provided must be enforced and implemented.
Providing basic sanitation to rural schools in South Africa: A realisable constitutional right or an elusive dream?

Thobile Nsimbini
*University of Limpopo*

South Africa ushered into democracy in 1996 and with this South Africans had high hopes that the rights guaranteed in Chapter 2 of the Constitution of the Republic of South Africa, 1996, will be realised by all. Fundamentally, the Constitution asserts that the best interest of the child is of paramount importance in every matter. This has further been reaffirmed by the South African judiciary in several landmark cases. The rights of children further enjoy protection in several African and international instruments, such as the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child. Paradoxically, access to water and sanitation remains a challenge in South Africa and has proved to have dire consequences to children in schools in rural areas. In 2019, the Minister of Basic Education in South Africa indicated that there are currently 3,898 pit latrines in South African schools and he committed to eradicating them within a period of three years. In the case of *Komape and Others v Minister of Basic Education*, a learner fell into a pit toilet at school and died as a result. This paper argues that the *Komape* matter demonstrates the State's failure to discharge a duty of care towards learners in schools and the pace of eradicating the remaining 3,898 pit latrines within three years is fundamentally placing the lives of learners in jeopardy. This paper acknowledges the objectives by the State to provide adequate sanitation to rural schools in South Africa within three years; however, it argues that unless weak governance, inadequate project planning and management, corruption and maladministration are addressed, basic sanitation in rural schools in South Africa remains an elusive dream.
Should the natural sex-ratio be legally maintained? Thoughts on non-therapeutic preimplantation sex selection

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University of KwaZulu-Natal

Non-therapeutic preimplantation sex selection is legally banned. In this paper, I analyse the constitutional tenability of this ban. I start the analysis by considering the well-known argument that allowing non-therapeutic preimplantation sex selection will upset the natural sex ratio. I argue that (a) there is no evidence in the South African context that allowing non-therapeutic preimplantation sex selection will have any discernable effect on the natural sex ratio, and that (b) it is doubtful whether the state has a legitimate interest in maintaining the natural sex ratio. I next consider arguments against allowing non-therapeutic preimplantation sex selection that are based on objections related to sex discrimination, sexism, and an aversion in the idea of making ‘designer children’. However, with reference to recent case law, I suggest that these arguments fail to convince. I further consider the idea that non-therapeutic preimplantation sex selection should be allowed for family balancing, but reject this idea as favouring one conception of the ideal or ‘natural’ family above others, which is not tenable in a pluralist democracy. Rather, I suggest that a case for legalising non-therapeutic preimplantation sex selection can be made based on a woman’s right to bodily integrity: If a woman can use non-invasive prenatal testing (NIPT) within the first trimester of pregnancy to determine the foetus’s sex, and terminate the pregnancy for any reason, it appears to minimise risk to a woman’s health to allow her to use preimplantation genetic testing (PGT) to know an embryo’s sex and make the sex selection decision prior to the embryo’s transfer to her body.
Transferring of independent guarantees

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University of Johannesburg

Independent (or demand) guarantees play an important security role in a significant percentage of large (international) commercial contracts. These guarantees are often regulated by rules drafted by the Banking Commission of the International Chamber of Commerce, the so-called Uniform Rules for Demand Guarantees (URDG). A similar set of rules drafted by the same body, the Uniform Customs and Practice for Documentary Credits (UCP), govern letters of credit. Notwithstanding the fact that demand guarantees are primarily instruments of security, and letters of credit instruments of payment, the two are in law very similar. Both are founded on the principle that the instrument concerned is legally independent of the contracts underlying it (is not accessory to these contracts), and on the importance of the beneficiary complying meticulously with the requirements of the instrument concerned when payment is requested in terms of it. These issues have been explored thoroughly in South African legal writing and case law over the past two decades. This paper deals with another less prominent, yet very important issue, namely the transfer of the instruments concerned. Both the URDG and the UCP, apart from recognising the assignment of the proceeds of these instruments, also provide for their transfer. While the legal principles regarding the transfer of letters of credit are relatively well established and uncontroversial, the transfer of guarantees may be highly problematic and dangerous. The paper explores this issue.
Crime, policing and indirect discrimination in light of Social Justice Coalition and Others v Minister of Police and Others

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In Social Justice Coalition and Others v Minister of Police and Others (EC03/2016) [2018] ZAWCHC 181 (14 December 2018) (SJC), the applicants approached the Western Cape High Court (sitting as an Equality Court) to make a finding regarding the allocation of police resources in the province. It was alleged that the formula used to determine how police officers were to be distributed in the various districts, cities and towns, unfairly discriminated against poor and black people on an indirect basis – in violation of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Constitution of the Republic of South Africa, 1996.

The South African criminal justice system is often labeled as dysfunctional in curbing, especially, violent crime. The latest (2018) crime statistics revealed that there was an overall increase in the murder rate by 6,9%. The Western Cape, and in particular the Cape Flats in Cape Town, had the additional problem of criminal gang activity. Criminal gang activity in the Western Cape disproportionately contributes to the national crime statistics and approximately 21,6% of people murdered in the province (808) were due to gangs. Several issues contribute to the gang problem, including socio-economic issues, such as poverty, an ineffectual legislative attempt in dealing with gangs, and understaffed police stations. The last indicators show that approximately 85% of police stations nationally were understaffed.

The Court in SCJ agreed with the applicants in that the allocation, although not intentional, was indirectly discriminatory in its application on the averred grounds.

I intend to discuss the SCJ case in light of the Court’s novel recognition of poverty as a basis of discrimination, as well as crime crises in the Western Cape and the potential national impact on the national police distribution strategy.
Witnesses giving evidence by way of video conferencing link ups with the court – locally and abroad

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In the recent case of *MK v Transnet Ltd t/a Portnet A105/2004 [2018] ZAKZDHC 39 (Transnet)*, the court addressed the giving of evidence via video link in admiralty proceedings. In this presentation, the terms ‘video link’, ‘video link conference’, and ‘video conference’ will be used interchangeably to refer to technology that allows a witness to testify from a remote destination (or remotely), while being audible and visible in extremely close to real time to those in the courtroom. Where the technology used is appropriate, there may be only a few milliseconds’ delay in the transmission of sound and picture. The court allowed the applicant to testify by videoconference from outside South Africa – but found that compared to other foreign jurisdictions, South Africa lags behind (see para 29 of Transnet supra), and requires a legal framework for the giving of evidence by video link technology in the civil courts (see para 36 of Transnet supra).

The court referred to Dr Izette Knoetze, who states that “so far, in South Africa it is only s 158(2)(a) of the Criminal Procedure Act 51 of 1977 which caters for an exception [to the rule] that evidence must be given in the presence of the accused” (see Dr Izette Knoetze ‘Virtual evidence in courts – A concept to be considered in South Africa’ (2016) 30 De Rebus 30, referred to at para 36 of Transnet supra). Mention should also be made of s 170A of the Criminal Procedure Act, which is alluded to by the court at para 26 of its judgment, and which allows child witnesses to testify remotely via an intermediary. There is nothing in the Civil Proceedings Evidence Act 25 of 1965 nor in the Uniform Rules of Courts that allows for video conferencing in the civil courts (see ‘Uniform rules of court, rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa’, available at http:/ /www.justice.gov.za/legislation/rules/UniformRulesCourt [26jun2009].pdf, accessed on 20 September 2018). The court endorsed Dr Knoetze’s sentiments when she stated that “the use of technology in litigation requires that the laws of evidence recognise and provide for the various methods of taking and presenting evidence remotely” (see I Knoetze ‘Virtual evidence in courts – A concept to be considered in South Africa’ (2016) 30 De Rebus 31).

The court added that it “can see no reason why specific rules have not been developed for civil proceedings to cater for exceptional circumstances like … [in the case before us]. We are still left with the antiquated commission rules’ (see para 36 of Transnet supra). The commission rules referred to are those contained in rule 38 (3)-(8) of the ‘Uniform rules of court’, available at http://www.justice.gov.za/legislation/rules/UniformRulesCourt[26jun2009].pdf, accessed on 20 September 2018.

In the earlier case of *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern*
Africa v Perie, (2017) (1) SA 236 (GJ) (Uramin), the court allowed a witness to testify via video conference, and appeared to take the stance that such rules were not necessary, holding that:

“Neither the Uniform Rules of Court nor the Civil Proceedings Evidence Act expressly stated that more modern technology than pen and paper or living, breathing persons are permitted in the High Court. The legislature has not needed to do so. The Constitution and the Rules enjoin us to make the necessary developments on a case by case and era by era basis.” (See para 33 of Uramin supra).

In Transnet supra the court explained more carefully why it was empowered to allow video conferencing, even though it was not catered for by the rules.

In this presentation, I discuss the reasoning of the court, and consider the rules in certain foreign jurisdictions that specifically allow video conferencing in the civil courts, specifically Canada, Australia, and the United Kingdom. I will also consider jurisdictions like South Africa, where the legislation and rules are silent on allowing testimony via video conference, but where the courts have allowed it and have developed guidelines. I will show that the issues raised by allowing video conferencing in the civil courts are complex, and that South Africa needs to develop a legal framework for video conferencing as a matter of urgency.

I will also consider The Hague Evidence Convention, relating to taking testimony from witnesses situated abroad, and show how its provisions are compatible with allowing testimony to be taken via video conference link. Further, I will deal briefly with the position in the labour dispute resolution context.
Writing seminar: a personal approach

Irene Broekhuijse
University of Johannesburg

Are you too experiencing that students struggle to write an essay in which they: 1) develop a logically coherent and well-structured argument, 2) write from a philosophical perspective that fits their own believes, 3) while engaging with counter-arguments and 4) write in a style that fits their personality?

In the six years that I have been teaching legal academic writing skills, I find that students find it already difficult enough to develop a logically coherent and well-structured argument. So, why bother with the three subsequent points?

Because at the end of the day, a lawyer must be able to argue his stance in an engaging and convincing manner and I believe that this is best accomplished through a personal approach.

Engaging

According to Gadamer, time and place (cultural backgrounds) influence our perceptions. Consequentially, it influences how we look at legal matters. When we examine and articulate our philosophical preferences, we may understand that likewise, others have their perspectives. Rather than starting a right-or-wrong argument (the natural tendency of a lawyer), it is constructive to try to reach a ‘fusion of horizons’ and show understanding towards others.

Convincing

Furthermore, believing that essay writing is not a fixed skill, and that confidence is more important than writing in a style preferred by a professor, I wish to furthermore introduce a rhetorical element: it is helpful for students to contemplate which figures of speech they are comfortable to use as they seek to convince the reader of their stance. Again, not in terms of right or wrong, but to grow in their personal style of expression and presentation of argument.

During the conference I would love to present my ideas and specify the assignment; and, naturally look forward to the responses from colleagues.
Legal education and social change – challenges and possibilities

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*University of Leeds*

Pete Sanderson  
*University of Huddersfield*

The socio-economic changes experienced by national societies as a result of over three decades of globalisation, neo-liberal rationalities and new technologies converge in law, the profession and legal education. As a primary actor in the new global order, law has been central to economic development policies across the world, and everywhere we see the emergence or growth of corporate law and the large law firm. At the same time, the progressive, rights face of law assigns it a key role in efforts to produce a more equitable society – epitomised by the guarantees in the South African Constitution of the right to equality. Yet class and racial inequality remains embedded in South African society (Matthews & Samaradiwakera-Wijesundara, 2015). Similarly, in the UK, in spite of an ostensible commitment to diversity and opportunity, rising levels of inequality, accentuated by the erosion of rights and of access to justice, are structured on lines of race, class and gender (The Institute for Fiscal Studies, 2019).

The resulting socio-economic polarisation is reflected in both the legal profession and legal education. In both South Africa and the UK, the expansion and the diversification of higher education have been viewed as central to the generation of a knowledge based economy, supported by increasingly prescriptive national qualifications frameworks. Evidence suggests, however, that access to the formal labour markets, which generate most rewards, becomes more, rather than less unequal alongside the growth, or ‘massification’, in tertiary and higher education routes, as employers rely on social signifiers to distinguish between qualified candidates. Further, the marketisation policies pursued by South African and UK governments (including the rise of for-profit providers) have strengthened pre-existing hierarchies within the HE sector, reinforcing and legitimising social inequalities. This stratification is then reproduced in the profession as certain law schools act as pipelines for prestigious corporate firms, which (for instance in terms of location, modes of working and organisation and wealth) are deeply differentiated from the rest of the legal field, and whose primary referent is global capital rather than the national interest. By contrast, organisations and careers focused on supporting the marginalised, and attempting to mitigate the effects of extreme inequality operate with declining resources in liminal spaces.

The resulting tensions between law's business and rights faces, and those generated by the persistence of social justice and diversity discourses and recognition of the unsustainability of current models of economic development, have stimulated concerns with the ethical dimensions of legal practice, access to justice and curricular reform – encompassing not only decolonisation but also environmental law. Thus in South Africa, the transformation agenda highlights the need to redress the historical legacy
of an unequal system of access and participation, and HE is viewed as a key driver of 'equity, social justice and democracy' in the state's vision for 2030. Clearly, most significant is the need to ensure equal access to those from rural areas, most affected by environmental degradation, and to engage with Connell’s plea (2017) for curricular justice, in order to address the impact of the colonial legacy on space, and socio-economic distortions resulting from prioritising the needs of foreign capital. In the UK, discourses of diversity and inclusion remain high on the agenda, and exclusive elite universities are attacked for their exclusionary policies, while occupational hierarchies continue to mirror social structures.

However, in many HE institutions the radical tradition remains strong within the curriculum, challenging its raced, classed and gendered bias, sustaining the clinic tradition, and also recognising the need for legal innovation to support environmental protest. These counter-hegemonic forces indicate the continuing potential for legal education, and this presentation will reflect on this potential as well as on the challenges posed by sectoral fragmentation and marketisation. We will highlight the commonalities between the UK and South African experience – including widening access and retention rates, curricular reform (addressing both the above issues and the barriers posed by the ‘hidden agenda’), the growing significance of artificial intelligence, and the need to counter the pull of corporate law and to reinforce the significance of public service law for both social and environmental sustainability.
Sustainable development law and quest for so-called law properly

Dejo Olowu
Walter Sisulu University

Beyond polemics, sustainable development as a concept has engendered substantial policy, scholarly, and other interest at both governmental and non-governmental levels throughout the world. Nevertheless, as a result of the fluidity and dynamic nature of the concept, delimiting its legal content has been a subject of considerable speculation and uncertainty. Is sustainable development nothing more than a convenient course of romanticising a world challenged by its own evolutionary paradoxes, or at best a mere political moniker that serves interpretative functions as occasions demand, or is it a cogent instrumentality for the regulation of the conducts of states and non-state actors in ways that calibrate the perimeters of their legal obligations? In an age when legal positivism trumps all other considerations in testing the efficacy of normative rules, this paper contends that there has been no better auspicious time in history when a definite body of sustainable development law should be squarely placed on the agenda of legal discourses. Extrapolating from the array of pertinent treaties, juridical pronouncements, policy documents and treatises on the concept, this paper identifies multi-modal algorithms to birth the establishment of a distinct body of scholarly even if multidisciplinary model of sustainable development law. While acknowledging inherent challenges along the defined pathways, the essence of the advocacy here is towards the promotion and ultimate achievement of the goals of sustainable development in our world.
Sustainable management of forests in Africa: Rethinking intellectual property rights and local stakeholders engagement

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Biological diversity ('biodiversity') has been defined as the variability among living organisms from terrestrial, marine and other aquatic ecosystems, and the ecological complexes of which they are part. Biodiversity includes all ecosystems managed or unmanaged such as wildlands or forests. Forest biodiversity comprehends tropical, temperate and boreal forests, all offering a diverse set of habitat for plants, animals and microorganisms that are crucial to the protection of our ecosystems, with genetic resources of potential economic, scientific value. The conservation and sustainable management of those resources ensure long-term stability of forests in general. Unfortunately, those resources are increasingly threatened as a result of human activity. Resources exploitation has been described as one of the fundamental reasons of the growing pressure faced by African forests. Meanwhile, forests rely heavily on the commitment of nearby neighbours for their ongoing preservation. Surrounding local communities in response to their interaction with the forest have developed knowledge and skills, which promote biodiversity. The active participation of those communities is therefore a critical component to the conservation of the forests. The present paper argues that the question of long-term conservation of African forests cannot be limited to ecological aspects of preserving biodiversity. This paper questions the legitimacy of intellectual property in its interface with environmental policies. Intellectual property is the branch of law dedicated to reward creations of the human mind and ensure their protection from unauthorised use. This paper firstly assesses communities' traditional knowledge under the intellectual property system. Subsequently, the paper argues for incentives to maintain communities' traditional knowledge through recognition and validation of its use, to assist in generating income and contribute to overcoming subsistence farming and wood-fuel. The paper recommends an equitable intellectual property regime with benefit sharing to improve the livelihoods of local communities in African forest and ensure its long-term preservation.
The sustainability of child-headed households

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In Africa, due to various socio-economic factors, such as a high death rate from AIDS, an increasing number of children are orphaned; living in child-headed households – especially in Southern and Eastern African countries.

The CRC Committee first mentioned child-headed households in its General Comment in 2003. The 2009 UN Guidelines for the Alternative Care of Children specifically require states to provide appropriate support and protection measures to such households. Giving recognition to child-headed households means they are legally entitled to adequate support and protection to function as a household. Therefore, child-headed households should be recognised in a way that is least disruptive to the realisation of the rights of children and in a sustainable manner.

In South Africa, the move towards legally recognising child-headed households has resulted in the inclusion of child-headed households in the Children's Act 38 of 2005, as amended by the Children's Amendment Act 41 of 2007.

In the case of Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC), the Court discussed the child's constitutionally entrenched right to family care or parental care and to appropriate alternative care when removed from the family environment. They also have the right to basic nutrition, shelter, basic healthcare and social services. Grootboom discusses the obligation of the state to provide an infrastructure in the lives of children in areas where this is lacking. The purpose of this study is to examine the sustainability of child-headed households.
In defence of the “Pretoria Crits”

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At the last SALTC held in 2018 in Cape Town, Dr Willem Gravett presented a paper in which he aimed to show that critical legal pedagogy is destructive to South African law schools. In particular, he took issue with the brand of critique promoted by what he calls the “Pretoria Crits”. As a card-carrying member of said movement, my paper will respond to Gravett's onslaught on critical legal education. My argument is that Gravett's attack has various weaknesses. Indeed, fault lines which prove to be deadly to his case.

Firstly, he aggregates a complex body of scholarship of four scholars into one simplified account of critique.

Secondly, he creates a straw person – roughly based on American crit, Duncan Kennedy – which none of us have ever endorsed to the extent that he would make the readers believe. The side effect of this is that he fails to respond to our theoretical frameworks of critique and actually only responds to a very obscure version of critical legal studies that he sets up himself.

Thirdly, he fails to realise that a careless rejection of critical legal theory’s commitment to addressing racism, sexism, homophobia, poverty and so forth implicitly endorses the opposite politics and vision for legal education.

My ultimate goal is to show that Gravett’s attack on the Pretoria Crits is “unsustainable” (in a creative attempt to link the paper to the conference theme). In light of this critique of Gravett, I hope to conclude with some old and new ideas of my own on what critical legal education might involve by revisiting an earlier paper of mine entitled “Stop the illusory nonsense! Teaching transformative delict”.

In the end, it will be shown why it is so important to promote the critical legal education project on the grave of Gravett's great gaffes.
Two steps forward, one step back: An appraisal of the development and promotion of feminism by the South African legal framework

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The global expansion of movements, such as #MeToo, #MenAreTrash, #ImWithHer and #TimesUp, to protest sexual assault, sexism, misogyny, abuse and patriarchy are indicative of a new breed of feminism. While the extent of the mistreatment suffered by women may not always come to light for a multitude of reasons, one thing is a universal truth – women experience varying forms of inequality in their personal and professional capacities, regardless of their race, age, sexual orientation, marital status, ethnicity, pregnancy status, level of education, profession or income level. Against this milieu, this research considers the extent to which the South African legal framework has furthered the development and promotion of gender equality.

Specifically, the author examines the extent to which the judiciary and legislature have sustainably implemented measures to mitigate barriers to gender equality while having regard for South Africa’s pluralistic nature. It is argued that such an assessment of gender equality should not be delved into without considering the intersection between feminism and factors, such as South Africa’s democratic dispensation, race and culture. The author concludes by acknowledging that it is evident that the judiciary and legislature have made strides in alleviating certain challenges experienced by women in realising gender equality. However, what remains to be seen is whether the proliferation of global and national activism by numerous interest groups and increased social awareness will serve as the impetus to create a broader, sustainability-focused strategy to eradicate gender inequality notions in South African society that are rooted in tradition, patriarchy, sexism and misogyny.
Critical race technology and technological colonisation: A legal perspective on the Fourth Industrial Revolution

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Technology in its broadest sense is defined as the systematic application of collective human rationality with a view to achieving greater control over nature and over human process of all kinds. Further, it can be referred to as methods, systems and devices that are the result of scientific knowledge being used for practical purposes. Critical Race Technology and Technological Colonisation is a study of how ideologies, systems, governance or mechanisms have been used throughout human history to advance, regress, destroy, manipulate or oppress people, nations and continents. Therefore, the progression of human beings has been intrinsically linked with systems, methods and harnessing nature’s elements. These systems and methods were common to all civilisation in different manifestation resulting in the improvising and reformulation of natural phenomenon into observable experience. The interpretation of this observable experience has, however, been complicated by dialectical materialism specifically that of colonial-imperial-capitalist-racist-legalistic technology. Despite the professed post-colonial Africa, technology has had little interrogation and its inherent power as a tool of control and regression.

Today we are standing on the cusp of the Fourth Industrial Revolution. It is distinct from the first three industrial revolutions and it is characterised by the wide manufacturing environment. The fundamental background of the Fourth Industrial Revolution is the deep integration of intelligence and networking systems.

The term Fourth Industrial Revolution in often understood as the Cyber Physical Systems (CPSs). In North America, the Industrial Internet, which was put forward by General Electric, holds similar technological idea with CPSs. They are both enabling technologies that create the integration of virtuality and reality. The Global South does not own the technology it uses for most of its productions, not even the social media platforms. Thus, the dependency relationship between the Global North and Global South is cemented under the illusion of redemption of the “Dark Continent”, much like when Africa was “discovered”, which is held intact by the legal tradition practised in the Global South. Therefore, this study explores the socio-economic and legal issues relevant to how the “more things change the more they stay the same” or rather the metamorphosis of colonisation in technology.

Thus, the paper will demonstrate that the interpretation and centralisation of the conqueror’s technology has formed the fabric of colonisation and informed the characteristics of colonisation itself. This study further reveals the need to critically assess the role of technology in Africa and how it has resulted in very dire poverty, dwarfing of technological innovation and dwarfing of economic growth. Finally, the legal implication brought by the Fourth Industrial Revolution.
Making the best of existing systems to decolonise legal knowledge: A human rights perspective

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There is a burgeoning body of literature on decolonisation of education, and legal education in particular. Scholars bemoan the Eurocentric or western-dominated nature of the curriculum in most education systems in Africa, including South Africa. Some are recommending a total dismantling of the education system in Africa with a view to establishing a uniquely African education system, while others recommend a rethinking of the education system, drawing inspiration from values from around the world. A common recommendation across the literature is the need to rethink the education system in Africa. However, there is hardly any guidance for academics on how this transition could be effected. This article suggests approaches to this dilemma by focusing on the human rights system. Worthy to note, in addition to the various international human rights system internationally, Africa prides itself in a regional human rights system unique to the Africa region. Notable instruments enacted to address the peculiar realities of the African continent are the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the African Women's Protocol. This paper examines these three human rights instruments. It demonstrates how they can be unpacked with a view to developing scholarship that reflects the unique realities of African and Africa's perspective on human rights. By drawing on regional instruments already enacted, the article illustrates that decolonisation of education, human rights education in this regard, may not require us to look so far. Perhaps academics need to make the best of systems already in place.
Achieving sustainable development in South Africa through good tax policies

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The Preamble to the Constitution, 1996, expressly records the transformation goals of South Africa’s people as including to “[i]mprove the quality of life of all citizens and free the potential of each person”. In a similar vein, in 2015, the United Nations General Assembly adopted the 2030 Agenda for Sustainable Development and 17 Sustainable Development Goals (SDGs) that call on Member States, such as South Africa, to improve the quality of peoples’ lives by, inter alia, undertaking measures that bring about national economic growth. Government programmes and initiatives aimed at ameliorating undignified living conditions and creating an environment in which people can realise their potential require financial resources. To this end, taxation is pivotal. Revenue collected from taxation capacitates the government at all levels with the resources that ensure their financial stability and functional ability to carry out their mandate. In doing so, revenue from taxation finances, inter alia, National Development Plan, New Growth Path and Industrial Policy Action Plan of the South African national government. Unless finances in the national treasury are on a firm footing, governance cannot be efficient or effective. Therefore, in a developing country such as South Africa, taxation is a fiscal pillar upon which hinges the success of the constitutional enterprise and the fulfilment of the SDGs.

Taxation is an economic policy tool deployed in the public interest to generate resources required to defend democracy and fulfil a range of human rights (social, economic, cultural, civil and political). Without taxation, human rights will remain unfulfilled constitutional objectives. In this paper, I aim to discuss how good tax policies can, in a South African context, facilitate the achievement of the sustainable development objectives outlined in the Preamble and the UN 2030 Agenda for Sustainable Development. To this end, I will argue that important lessons can be learnt from the OECD 2017 Policy Coherence for Sustainable Development.
OECD BEPS Action 1 as it pertains to tax administration and tax policy: Tax challenges of digitalisation of the economy on tax administrations in selected SADC countries

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The rapid growth of the global economy in recent years has posed challenges for international tax laws. Action 1 of BEPS requires the OECD to identify the main challenges that the digital economy poses for the application of current international tax rules and develop reforms to address these challenges.

The tax challenges raised by digitalisation of the economy relate to the question – how taxing rights on income generated from cross-border activities in the digital age should be allocated among countries. Challenges brought by digital economy with respect to direct taxes relate to data; nexus and characterisation of income. On the other hand, with respect to indirect taxes, the digital economy creates challenges, especially when goods, services and intangibles are acquired by private consumers from suppliers abroad. While many developing countries are trying to implement the BEPS measures, they are faced with not only the challenge to deal with tax avoidance and evasion, but also additional administrative burden, all of which pose challenges to implementing the BEPS Action 1.

This paper will discuss BEPS Action 1, with specific focus on the challenges that digitalisation has on tax administrations in SADC developing countries. Developing countries are already struggling with tax administration concerning traditional methods of taxation. Most of the SADC countries have not modernised their tax administrations; they lack personal resources to engage in effective tax administration; lack sufficient funding; and lack advanced ICT technologies that can track the source of the digital economy transactions. Tax administration is at the centre of achieving effective implementation of Action 1, hence the relevance of this paper. This will be discussed within the obligations of these countries arising from the UN 2030 Agenda for Sustainable Development and the African Union's Agenda 2063, that mandates African governments that their national resources needs to be mobilised and enhanced for purposes of achieving sustainable development.
Insurance claims, fairness and the new Policyholder Protection Rules

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An insurer has an obligation to indemnify an insured against loss proximately caused by the perils insured against. This is the insurer’s basic obligation and it essentially is one to deliver something – to pay an indemnity – or to do something, namely to bear a risk. This basic obligation is, however, conditional upon the happening of the event insured against and the corresponding right enjoyed by the insured may be described as the insured’s conditional right to an indemnification. The insured’s right may also be described as a claim and there are a number of requirements for the vesting of a claim, such as the existence of a valid insurance contract; the fulfilment of any suspensive conditions to which the contract may have been subject; the occurrence of the danger insured against; the occurrence of the peril insured against during the currency of the contract; and that the insured must have suffered a loss which must have been proximately caused by the peril insured against. If all these conditions have been fulfilled, it may be said that the event insured against has occurred. The burden of alleging and proving these requirements normally rests on the insured and as such, the insured must “bring his claim within the four corners of the promise made to him”. Several factors complicate claims, including contractual time limits or time bars or time-limitation clauses, exclusions, average clauses, fraud clauses and misrepresentation and as a result, insurance companies are often on trial in the media for being unfair. Even though many of these media reports are one-sided and often do not provide an accurate account of the facts, it is true that claims handling often see consumers scurry off with their heads between their tails due to the fact that insures use tactics aimed at frustrating legitimate claims. The 2018 Policyholder Protection Rules (PPRs) that were promulgated in terms of the Short-term Insurance Act, 1998, and the Long-term Insurance Act, 1998, respectively, contain new rules that are aimed at treating customers fairly at claim stage. This paper considers these rules within the wider framework of insurance rules and comments on whether the PPRs can in fact create a fairer dispensation for consumers.
Global Justice: The history and intended outcome of the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

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This paper explores the drafting history and intended outcome of the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters adopted on 2 July 2019. Furthermore, it considers the potential impact of South Africa becoming a signatory to the said convention. Dr Bernasconi, Secretary General of the HCCH, described the adoption of the convention as a "game changer for cross-border dispute settlement and an apex stone for global efforts to improve real and effective access to justice". In recent years, the importance of the recognition and the enforcement of foreign judgments have grown due to factors such as the "increase in economic and social globalisation, trade and commerce combined with growing international legal relations". In its 2006 report on Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters, the South African Law Commission identified that South African common law on the topic needs to be amended in order to address existing gaps and ambiguities in order to increase certainty in legal proceedings and reduce the cost of litigation. In particular, the paper will explore the impact of the grounds for international jurisdiction.
Five tough choices policy makers face in overcoming South Africa’s energy crisis

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This article explores the hard choices that policy makers in South Africa confront in the face of an unprecedented energy crisis, an ailing economy and a fragile natural environment. Only if those policy choices are sound, can the norms, rules, and laws flowing from them stand a chance of achieving the intended results.

The first half of this year has witnessed an energy crisis, the like of which South Africa has not seen in its modern history. Widespread load shedding and blackouts, ageing infrastructure, falling electricity supply to businesses and households, and news that *Eskom* – by far the country’s largest power utility – might drown under its crippling debt, bringing on its way down the entire South African economy to its knees. To respond to this national emergency, the government must rethink its entire energy-sector strategy holistically; it must not concentrate all its efforts on short-term, stopgap measures, such as unbundling *Eskom*.

Over the long run, in tackling the country’s energy crisis, policy makers must choose between at least five options, none of them easy. First, they may decide that South Africa must go green and gradually move away from coal to the wind or the sun as main sources of energy. While these renewable sources preserve the natural environment and can sustain economic development forever, they will likely involve huge costs, without guaranteeing that they will suffice to power the major industries in the country. Second, the government may choose to massively invest in energy infrastructure, existing or new. The network character and multiplier effects of energy infrastructure imply that such move will turbocharge the economy, but it may exacerbate pollution and environmental damage, though the government can still design plans to mitigate such inevitable costs. Third, government may decide to privatise the energy sector. This alternative tends to propel the economy upward, but it will most probably benefit rich (mostly white) South Africans and foreign firms. Moreover, like the second option above, it may aggravate environmental damage. Fourth, instead of privatising the sector, the government may opt for partnering with the private businesses in supplying electricity. However, for this strategy to succeed, the government will need the kind of honest and highly capable personnel that it currently lacks. Lastly, policy makers could remain the owner and main shareholder of *Eskom* and the energy sector. Such choice would mean maintaining the status quo, which is what brought about this ticking-bomb scenario in the first place.

This article carefully scrutinises each of these options and delves into what it implies for lawmakers and relevant laws in South Africa before it puts forth its own suggestions as to the best way forward.
State liability for non-compliance with constitutional and statutory environmental duties in South Africa

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The constitutional imperative that “reasonable legislative ... measures should be taken” to protect the environment “for the benefit of present and future generations” (Constitution section 24(b)), has arguably been complied with, as a framework statute, the National Environmental Management Act 107 of 1998, was followed by a series of sector specific legislation: the National Environmental Management: Protected Areas Act 57 of 2003; National Environmental Management: Biodiversity Act 10 of 2004; National Environmental Management: Air Quality Act 39 of 2004; National Environmental Management: Integrated Coastal Management Act 24 of 2008; and National Environmental Management: Waste Act 59 of 2008.

Not only do all these statutes apply to the state’s activities as service provider (such as waste disposer), but all of these also create duties and confer powers on the state as protector of the environment.

Unfortunately, it cannot be stated that the state (national and provincial state departments, municipalities and other organs of state) is compliant with all its constitutional and statutory duties. Can the state, besides being held accountable, also be held liable as polluter or for failures to properly perform its role as protector of the environment? Can the non-execution or inadequate execution of constitutional and statutory duties or the failure to exercise such powers, lead to state liability for losses sustained by the bearers of the constitutional environmental right?

It is often difficult to prove a causal link between losses sustained by private individuals or juristic persons due to environmental pollution, degradation or other environmental impacts, and the actions of identifiable individuals and/or juristic persons. Litigants may therefore consider recouping losses from the state either in its capacity as (co-) polluter or protector. This paper will analyse the possibility to succeed with a delictual claim, claim for statutory compensation or constitutional damages against the state.
Public procurement and sustainable development: An African perspective

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Public procurement is the process by which government departments obtain the goods, services and works (construction) needed to function and maximise public welfare. Public procurement is an aspect of public financial management that is subject to increasing legal regulation, and it is also subject to public and media scrutiny, given that it is often characterised by fraud, corruption and failed outcomes, which impact service delivery. In many countries, public procurement has been used as a means of achieving outcomes beyond the purchase of the required goods and services, so for instance, procurement is used to support a government’s environmental, social, economic or other agenda. In many African countries, including South Africa, public procurement regulation has also been designed to ensure that procurement spending achieves social and economic outcomes. In other words, that the government supports other areas of public policy through its procurement spend. This paper examines the approach taken to promote sustainable development though public procurement in Africa, with a focus on the procurement framework of South Africa. The paper will consider the challenges to using procurement to achieve sustainable development and the limitations of the legal framework in South Africa. The paper will propose measures by which the concept of sustainable development may be mainstreamed in the procurement framework in South Africa and other African countries.
Public interest litigation as an instrument to advance environmental justice and sustainability in South Africa

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In South Africa, sustainability has been defined as the integration of economic, social and environmental factors into all planning and decision making. This notion has been advanced through various pieces of legislation within the environmental law framework. Central to these pieces of legislation, is that there has to be environmental justice which can be achieved through sustainable environmental practices. The country has seen many decisions being taken that do not promote the principle, thus forcing civil society to approach various courts for redress to achieve sustainability and environmental justice.

Environmental justice is all about the social transformation directed towards meeting basic human needs and enhancing the quality of life, environmental protection and democracy. Despite the latter, South Africa is experiencing the intensifying public interest litigation between state organs, private entities and environmental awareness civil groups.

Among several case studies of South African public interest litigation on environmental justice is the case of Arcellor Mittal v VEJA. In this case, the environmental awareness civil group (VEJA) requested access to environmental information held by the private entity (Arcellor Mittal) and such request was declined. As a result, the VEJA resorted to court for redress and the court ruled in its favour. In approaching the court, VEJA relied on the constitutional and relevant legislative framework at its disposal.

To that end, it becomes apparent that public interest litigation has turned into a very useful and effective mechanism to foster environmental justice and sustainability. Therefore, this article assesses the effectiveness of the current practices and mechanisms set to enhance environmental justice and sustainability. The assessment is carried out by firstly, conceptualising the idea of environmental justice and sustainability; secondly, giving an account of several case studies wherein litigation has been used as a remedy; and lastly, outlining possible ways of improving the environmental policy regime.
The enclosure and capture of wild animals, an infringement of the right to freedom of culture and religion

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The Constitution of the Republic of South Africa, particularly sections 30 and 31, protects the rights to freedom of culture and religion, respectively. Section 30 provides, ‘Everyone has the right to use the language and to participate in the cultural life of their choice’. Additionally, section 31(1)(a) provides, ‘Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practice their religion and use their language’. Section 8(1) of the Captive Wildlife Regulations provides, ‘No person shall hold wildlife other than a native wildlife when operating a commercial wildlife farm’. Furthermore, Section 9(1) of the Captive Wildlife Regulations provides, ‘No person shall obtain wildlife to be held in captivity except from a person who holds that wildlife under a valid licence or unless authorized by a director’. Sections 4(1) of the regulations set out requirements for a valid licence inter alia, operation of a zoo, wildlife farm, or native upland game bird. In the context of the constitutional right to freedom of culture and religion, black and African indigenous people define and identify themselves in relation to wildlife animals. However, the legal regulations in place impede such spiritual, cultural, and religious imperatives. Accordingly, such regulations do not constructively give effect to rights in the Constitution nor are they reflective on the historical dispossession of land and contemporary challenges surrounding section 25 of the Constitution. The Regulations arguably turns a blind eye to the true nature and realities of our society insofar as both licensing and monetary pricings for access and entrance into reserves are concerned. This is notwithstanding the crucial environmental and social safety role played by the Regulations in place; however, a review of and subsequent alignment with the lived realities of our societies are imperative.
Emotional support animals: Fur-ever changing the concept of emotional distress damages in loss of companion pet cases

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Traditionally pets have been treated as chattel; thus, damages for negligent treatment typically are limited to the value of the property lost, with damages for emotional harm generally not being recoverable (Goldberg, 2013; Zitter, 2001). Some commentators, however, argue that companion animals are special property with economic worth as psychologically usable and useful objects derived from nature (Duckler, 2002; Parker, 2015). The US laws, such as the Fair Housing Act and the Air Carrier Access Act, require accommodations for emotional support animals (Hernandez-Silk, 2018). Arguably, this legislative mandate recognises implicitly the emotional connection of owners to their companion animals, along with the potential for emotional harm stemming from their loss in contrast to the historic common law approach.

This paper first discusses the traditional property classification for companion animals, and the typical damages recoverable for their loss, along with the existing exceptions to the general rule. It then examines US legislation that recognises and protects emotional support animals. The paper next advances the proposition that the recognition of the psychological benefit in such legislation inherently suggests that damages for emotional harm should be recoverable, whether or not the animal is a trained emotional support dog. In other words, damages may be greater if the owner’s emotional need was greater, but the recognition of the psychological support function of the companion pet can be generalised to owners without a medically recognised need. Finally, it examines how such a recognition could hold harmless agreements in bailments involving companion animals.
Sustainable development: an elephant–human dignity dimension

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All too often socio-political fragmentation hinders sustainable development. One example is the compartmentalisation of conservation and socio-economic challenges. When looking at elephant conservation, the focus is often elephant-centric. A disconnect is created between the environmental value and the social and economic value of this iconic species. Furthermore, the intrinsic value of elephants for a South African citizenry may be overlooked or ignored. This loss or non-recognition of the intrinsic value of nature, in general, can arguably be ascribed to the forced removal of communities for the purposes of conservation, as well as past and present models of fortress-conservation, among others. It can be argued that past injustices as portrayed here are a contributing factor to human-elephant conflict, specifically, and human-wildlife conflict, generally.

This dichotomy between conservation and socio-economic aspects may, however, present an opportunity for sustainable development. This opportunity presents itself when the value of natural resources is coupled with human dignity and equality, central themes to South Africa’s Constitution. Recognising that natural resources are inherently part of human dignity creates the opportunity for beneficiation to be implemented into conservation strategies, visions, and policies. It furthermore creates the opportunity to move away from eco- and human-centered strategies that perpetuate fragmentation. As South Africa’s population grows at an exponential rate, South Africa needs to recognise the interface between citizens and the environment. South Africans need to acknowledge that they rely on services rendered by ecosystems and that the continued loss of biodiversity has and will continue to have a direct effect on human dignity.

Based on the above, this paper proposes to explore the importance of recognising elephants as part of human dignity. More importantly, this paper will expound on how this recognition must translate into beneficiation (socio-economic development), better conservation, and better policy creation for sustainable development.
Sustainable properties – does ownership in land heal or hurt the environment?

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Occasionally, property is presented as a balm to the environment: Environmental obliteration (the ultimate tragedy of the commons) can be “averted by private property, or something formally like it”, asserted Garrett Hardin in his seminal, yet often misinterpreted article. But Hardin also warned about the pitfalls of private property: “Indeed, our particular concept of private property, which deters us from exhausting the positive resources of the earth, favors pollution” (Hardin, 1968: 1245). My paper examines the plausibility of claims made in favour for or against property in the light of sustainable development.

Many definitions of sustainability exist. Three conceptions of sustainability are widely held: Sustainability as environmental efficiency (when a resource use does not waste other resources), environmental justice (when a resource use neither burdens nor benefits anybody unfairly), and environmental recognition (when a resource use acknowledges conflicting interests). Property can be conceived of as private property (when the right to use a resource is restricted to an individual or a group), common property (when the right to use a resource is shared by a community of users), or no property (when nobody is allowed to claim the use of a resource).

Does property in land harm or help the sustainable development and use of natural resources (such as water, soil, air, or bio diversity)? Can we expect private property, common property, or no property in natural resources to result in a more efficient, more just, and more inclusive way? Rather than accepting property in land as ‘neutral,’ in my paper I shall point out the polyrationality – the many meanings and functions – of property in land (B. Davy, 2016).
Oproep van verband vir vreemde skuld

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In NPGS Protection and Security Services CC v FirstRand Bank Ltd (314/2018) 2019 ZASCA 94 (6 Junie 2019) is die beskikbare inligting vervat in die twee uitsprake van die hoogste hof van appèl onduidelik dat daar ruimte is om met verwysing na die gerapporteerde uitsprake te bespiegel oor die implikasies van ‘n oproep van ‘n verband wat oënskynlik dien ter versekering van ‘n onsekere toekomstige skuld van ‘n ander regsubjek as die verbandgewer wat in 2007 ter versekering van sy eie lening as kredietnemer by die bank aan laasgenoemde ‘n eerste verband oor sy woonhuis in Elton Hill, Gauteng, verleen het. Dit gaan dus prima facie oor ‘n geval waarmee ‘n enkele verband ten gunste van die bank ter sprake is, maar waar deur die hoogste hof van appèl oënskynlik klakkeloos aanvaar word dat daardie enkele verband ter versekering dien van verskillende vorderingsregte van die bank as verbandhouer teen verskillende regsubjekte vir verskillende prestasieverpligtinge uit uiteenlopend onderskeie skuldoorsake.

Re-assessing the notion of ownership in a constitutional system

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In the context of South African law, property law has changed considerably in line with the Constitution. Ownership (property rights in the broader sense) cannot only be perceived in terms of its absolutist or exclusionary element, since it involves a constitutionally required balance between the interests of both owners and non-owners. The nature of ownership has been radically affected by the Constitution and court judgments. For example, the Constitutional Court’s decision in Daniels v Scribante and Another (Daniels case) shows how the nature, content and concept of ownership has changed and continues to change in light of the legal and constitutional system in which ownership functions. In other words, the decision provides some insights into the understanding of ownership in the constitutional era.

The aim of this paper is to look at the implications of court decisions on the nature of ownership; and to re-evaluate the notion of ownership in light of the current needs and changing circumstances of society, and of the constitutional system that recognises competing rights, and of which limitations are to be expected.

I argue in this paper that the court decisions force us to think of land, property and ownership in terms of relationships and social context, rather than purely on the basis of the owner's rights – what he can or cannot do with regard to his property. The point is that the Constitution requires us to reject the idea that ownership is absolute and that the right of ownership will always trump the rights of others in society.

In conclusion, I argue that the limits and content of property are determined by law and hence the strong notion of absolute ownership has no place in the constitutional setting.
Protecting quasi-possession of rights with the *mandament van spolie*: has *Bon Quelle* finally been overruled? *Eskom Holdings SOC Limited v Masinda* (1225/2018) [2019] ZASCA 98 (18 June 2019)

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The *mandament van spolie* protects peaceful and undisturbed possession of tangible things. It also protects the quasi-possession of certain rights, like servitutal rights and incidents of possession (so-called "gebruiksregte"). In *Bon Quelle*, the *locus classicus* on quasi-possession, the former Appellate Division of the Supreme Court held that it is unnecessary to prove the existence of a right to protect its quasi-possession with the *mandament*. The *spoliatus* merely has to prove that he performed acts that are normally associated with that right, which right must be a servitutal right or incident of possession of land.

In a line of cases, starting with *Telkom v Xsinet* in 2003, the Supreme Court of Appeal started to investigate the source of the right to determine whether its quasi-possession enjoys protection under the *mandament*. In terms of this approach, only quasi-possession of limited real rights, registered rights and public law rights, but not personal rights, enjoys protection under the *mandament*. This is a departure from *Bon Quelle*, though this decision was never overruled explicitly.

Recently, the Supreme Court of Appeal, in *Eskom*, ruled that whether quasi-possession of a right is incidental to the possession of land itself is irrelevant if the right is merely a personal right. It also held that previous cases that reached an opposite conclusion (like *Bon Quelle*) “must be regarded as having been wrongly decided” (par 22). This approach is at odds with the established principles governing the *mandament* in the context of quasi-possession and also flouts the fact that this remedy does not investigate the merits of a case. The source of a right is only relevant for determining whether it is a servitutal right or an incident of possession. The mere fact that it is sourced in contract (as was the case in *Bon Quelle*) does not, on its own, mean a right does not fall into one of these categories. The *Eskom* case therefore perpetuates the incorrect approach towards quasi-possession laid down in *Telkom*. 
The establishment of the International Criminal Court (ICC) in the year 2002 was hailed by many as a progressive step towards ending impunity against those who commit gross violation of human rights. Seventeen years later, there appears to be serious challenges facing the ICC such as the refusal by member states to the Rome Statute of the International Criminal Court (Rome Statute) to cooperate with it. This is evident from the position taken by the African Union not to cooperate with the ICC and the United States of America’s refusal to grant visa to the ICC prosecutor. The argument presented in this paper is that the source of the ICC’s strength is cooperation from member states to the Rome Statute (including members of the United Nations Security Council). Without the necessary support from either member states to the Rome Statute (or members of the United Nations Security Council), the ICC will be reduced to a toothless institution which has no power to end impunity.
An argument for an African Union framework on individual criminal liability for environmental damage during armed conflict

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For a long time, the closest that environmental concerns have come to making it onto the discourse on African conflicts has been through the so-called resource curse narrative. Indeed, in 2014, when the African Union was called upon to deliberate on a continental criminal justice system, the AU Assembly simply reiterated this narrative, limiting any criminal liability vis-à-vis the environment to “... exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff”. While this is commendable, it falls short in situations where the environment is itself a target during an armed conflict as was the case in the Darfur crisis in Sudan where government forces and militias aligned to Al Bashir reportedly poisoned water wells and other critical water installations. Because environmental protection concerns have altered the traditional conception of human security, there is consensus that certain thresholds of deliberate environmental damage must give rise to prosecutions. However, it is unclear under what legal framework such prosecutions must be instituted. Studies on the subject tend to test the notion of a crime against the environment against the core international criminal law crimes, namely genocide, crimes against humanity and war crimes. This paper argues that in its quest to establish an Afrocentric brand of international criminal law, the AU must adopt a clear legal framework on individual criminal liability for environmental damage caused during an armed conflict. This is necessary for three reasons. Firstly, following the adoption of the Malabo Protocol in 2014, which provides for the establishment of a criminal law section of the revised African Court (ACJHR), it is necessary to ensure that crimes against the environment committed during armed conflict are brought within the jurisdiction of the court. Secondly, although there have been some developments in the context of the International Criminal Court (ICC), the animosity that exists between some AU member states and the ICC suggests that efforts to punish perpetrators of environmental damage stand a better chance of success if pursued through a regional framework. Lastly, the status quo in international criminal law shows that there is a glaring lacuna as far as individual criminal liability for environmental damage during armed conflict is concerned hence it would be worthwhile for the AU to adopt a progressive approach on the matter.
Obstacles to the prosecution of international crimes

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The prohibition of the commission of genocide and crimes against humanity forms part of *jus cogens* norms, and the obligation imposed upon the international community as a whole to prevent and prosecute these gross human rights violations is *erga omnes* in nature. Prevention and prosecution are inextricably linked: if states are unsuccessful in preventing these international crimes, they are still obliged to prosecute their commission, and the prosecution of such perpetrators can in turn impact on preventing its commission in future. The deterrent nature of national or international criminal prosecution is critical, as the failure to hold perpetrators individually criminally responsible will inevitably result in creating the perception that international crimes may be committed with impunity, and that the international community is nothing more than callous spectators.

Throughout history, the international community has repeatedly breached the *erga omnes* obligation to prevent and prosecute genocide and crimes against humanity. True awareness of the full extent of the horror of these atrocities typically only dawns in the aftermath hereof, and when investigation for the purpose of prosecution is initiated. The purpose of this paper will be to examine various obstacles that can reasonably be expected to be dominant after the commission of gross human rights violations, causing the repeated failure to fully comply with the *erga omnes* obligation of prosecution. Obstacles that will be discussed in the paper will broadly include the principle of state sovereignty and its effect on immunity; the impact of international and regional politics; denial; the impact of amnesty and truth commissions on prosecution; and finally, certain challenges faced at both international and national criminal courts and tribunals.
International law’s estimate: apartheid, colonialism and South Africa’s international legal academy

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Within South African international legal scholarship and teaching, apartheid is generally figured in opposition to international law, both historically and theoretically. The histories of international law found in most academic texts, in addition to being thoroughly Eurocentric, tell a story of international law’s (and the international community’s) opposition to and eventual triumph over apartheid. Similarly, the absence of colonialism from these histories suggests that international law had nothing – or at least very little – to do with the colonial project. However, even ‘mainstream’ international legal academics outside South Africa have acknowledged the role that international law played in colonialism, albeit to differing extents. Moreover, the history of international law and apartheid – both its establishment and continuation – is more complex than the simplistic oppositional narrative suggests: South Africa’s exclusion from the ‘international community’ was belated and partial.

The ‘myth’ of international law’s wholehearted opposition to apartheid is both the cause and effect of the continued dominance of formalist approaches to teaching and writing about international law in South Africa, and the absence of any discussion of critical or ‘new stream’ theoretical accounts of the discipline (including Third World Approaches to International Law (TWAIL)). This paper will critically consider the place of apartheid and colonialism within South Africa’s international legal discourse; and argue that the ‘otherness’ of apartheid (and absence of colonialism) is not simply the product of a conservative approach to the discipline, rather it is central to its construction and the self-understanding of the academy. Moreover, it will argue that the deconstruction of these dominant historical and theoretical accounts – and introduction of critical histories and theories – are the ‘conditions of possibility’ for the decolonisation of international law in South Africa.
Perpetuity, of concern to the international community? A doctrinal study of the inclusion of environmental crimes in the Rome Statute

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International criminal law, like all areas of law, must continue to develop to reflect contemporary realities. Similarly, international environmental law, notwithstanding its importance, is an area of law that is often overshadowed by other more eye-catching issues. The establishment of the Malabo Protocol, and the controversies associated therewith, has ignited a new focus towards international criminal law and has highlighted the potential for international criminal responsibility for environmental crimes. The Protocol proposes to adjudicate over a range of transnational crimes, including certain environmental infringements. This paper will, from a doctrinal point of view, demonstrate that the subject matter jurisdiction of the Rome Statute is capable of development, notwithstanding the fragile and fluctuating political realities that deter the establishment of new international criminal responsibility. First, this paper will consider past attempts at establishing international criminal responsibility for environmental transgressions and identify the Achilles’ heel of previous attempts. Second, this paper will argue that the divide between the core crimes and other international crimes flow from meeting a set of criteria that have historically created ‘the most serious crimes of concern to the international community as a whole’. Finally, this paper will then apply the criteria, as set out in part one, to international environmental law and argue for the potential inclusion of environmental crimes within the Rome Statute. Environmental crimes, along with many other international crimes, are underpinned by the same concerns that gave rise to the core crimes. This paper will therefore suggest that it is time for the international criminal law landscape to develop in order to reflect contemporary realities and current day threats with a primary focus on environmental crimes, which threaten sustainable development and the perpetuation of the international community as a whole.
Prescription of consumer debt: The impact of the National Credit Act

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The prescription of consumer-credit debt is jointly governed by the National Credit Act 34 of 2005 (NCA) and the Prescription Act 68 of 1969 (the Prescription Act). The Prescription Act regulates the exact prescription periods, interruptions, delays and general aspects of prescription, while section 126B of the NCA regulates and prohibits the behaviour of credit providers regarding the selling, collecting and re-activation of prescribed debt. There is some overlap between these two pieces of legislation as they relate to debt resulting from credit agreements falling within the scope of the NCA. In our paper, we will consider the impact the NCA, particularly section 126B, has on the prescription of consumer debt. Certain shortcomings of the current legislation are also pointed out. In this paper, a number of aspects of the draft Prescription Bill proposed by the South African Law Reform Commission are also considered with a specific focus on the impact the Bill may have on the consumer-credit industry.
Mare Liberum in a new age of Imperialism?
Analysing the role of the International Tribunal of Law for the Sea

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This age is marked with resurgent nationalism, populist politics and a nostalgia for lost empires. The Post World War II consensus is under threat and the role of international law, treaties and organisations are challenged by states emphasising their national interests. The jurisdiction of international bodies with regard to resources and environmental protection is also being questioned.

With the recent case of Ukraine v Russian Federation (ITLOS/PV.19/C26/1), the International Tribunal of Law for the Sea (ITLOS) made it to the top of international news stories. The specifics of the case involve the sovereignty of warships, and the entitlement of coastal states to take policing measures (UNCLOS article 298, paragraph 1(b) read with articles 32, 95 and 96), but it allows for the development of a perspective on the broad scope of UNCLOS – United Nations Convention of the Law of the Sea, and its role as ‘the Constitution’ of the Sea. In academic circles, there is a concern about the fragmentation of International Law, and it has been argued that the increasing number of international institutions and the specific conventions attendant on them pose a risk to the application of international law. The current withdrawal of political support for internationalism is an additional threat.

The scope of UNCLOS and the jurisdiction of ITLOS mean that the disputes potentially covered by it can cover a wide range of issues and also intersect with WTO and other international legal norms. The origins of International Law can be traced to Grotius and the Free Seas (mare liberum) and this paper aims to make an assessment of the scope of the Law of the Sea and the challenges of the 21st century, with political forces echoing nationalist and imperialist languages of the past.
Demand guarantees in the construction industry: recent developments in the law relating to the fraud exception to the independence principle

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Over the last few years, South African courts have had to decide numerous cases relating to demand guarantees in a construction context. This paper is, however, concerned with recent case law which dealt with fraudulent calls on demand guarantees in construction disputes. In dealing with this development, I explore, first and concisely, the construction context and fundamental aspects of demand guarantees. I then deal with the fraud exception to the independence principle. This is followed by an analysis of recent South African case law namely Phenix Construction Technology Ltd v Hollard Insurance Company Ltd and Group Five Power International (Pty) Ltd v Cenpower Generation Company Ltd, which has explored the parameters and standard of proof of this exception. Thereafter, the principle of documentary compliance and the emergence of bad or good faith on the part of the beneficiary will be discussed as regards their respective relations to the fraud exception. In this respect, attention is paid to the judgements in the Bryte Insurance Company Ltd v Raubex Construction (Pty) Ltd (high court) and Raubex Construction (Pty) Ltd v Bryte Insurance Company Ltd (Supreme Court of appeal) cases. Finally, the paper concludes with a brief reflection of the principles analysed in the case law, and confirms that the recent developments in the law relating to fraud is in alignment with international trends.
Contemporary sea carriage requires evolving law, is South Africa falling behind?

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The majority of globally traded goods are transported by sea from consignor to consignee. It is important for successful international trade that the transportation of goods from seller to buyer is efficiently regulated. Domestically the transportation of goods by sea to and from South Africa is regulated by the Sea Transport Documents Act 65 of 2000 and the Carriage of Goods by Sea Act 1 of 1986. The Carriage of Goods by Sea Act gives domestic effect to the “Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading”, 1968 (The Hague Visby Rules). Among other aspects, The Carriage of Goods by Sea Act deals with the obligations of parties to a carriage arrangement, accountability for lost or damaged goods and the extent of liability for loss or damage. The Carriage of Goods by Sea Act, however, fails to meet the needs of modern transport law. Although sea-carriage usually makes up the longest leg of transportation of globally traded goods, other means of transportation are involved in the transportation process. The Carriage of Goods by Sea Act only accommodates unimodal port to port transportation and not delivery to the consignee’s door. Multimodal carriage presents consignees with difficulty in establishing which carrier is responsible for any loss or damage that may arise. Multimodal carriage must thus be efficiently regulated to remove hurdles of recovery for consignees. The Sea Transport Documents Act additionally fails to accommodate present day carriage agreements by inadequately addressing electronic transport documents. The Carriage of Goods by Sea Act and The Sea Transport Documents Act fail to cover practical aspects of the carriage process. The South African sea carriage regime must be developed to accommodate contemporary carriage. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009, may be the solution to updating the South African sea carriage regime.
Stabilising good governance of SDGs in SADC: A normative intervention

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State subjectivity serves as a core obstacle for good governance towards the achievement of the SDGs. This hypothesis is underpinned by the notion that countries as a default primarily focus on what serves their national interest. The transnational impact of state subjectivity on good governance is irrationality and instability among states in the implementation and enforcement of SDGs. The Southern African Development Community (SADC) has introduced a number of mechanisms to stabilise good governance by negating the irrationalities that state subjectivity produces in the implementation and enforcement of SDGs. This paper interrogates these mechanisms against the prevailing international law normative order for SDGs. The research employs the concept of normative reflexivity, which establishes an experimental, introspective, and participatory decision-making environment that provides for a better response to the moral-epistemic challenges underlying regulatory action. The potential to introduce reflexivity within SADC’s governance regime is subjected to tests for rationality and objectivity. Good governance under a sustainable development paradigm needs to be conceptualised broader than the traditional governance models of technique. Consequently, this paper seeks to answers the question of whether normative reflexivity can serve as a stabilising factor for the achievement of good governance of SDGs in SADC?
The spatial overregulation of sensitivity: an unintegrated system of protection

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Sensitive protected areas have received much policy and legislative attention since the dawn of democracy in South Africa. Supported by a stand-alone constitutional right to environmental health and wellbeing, the South African protected area discourse has steadily developed over the last decade and half by consistently infusing contemporary notions of integration and holistic understandings of environmental and spatial justice. Although the rapid evolution of the environmental sector has seen impressive progress, this has led to the proliferation of tools and mechanisms that are available to the state in order to manage and balance the social, economic and environmental considerations that make up the foundational principle of sustainable development. The principle of sustainable development must be considered during any developmental or planning decision, thus these tools and mechanisms are the practical realisation of the principle.

The current status quo sees protected areas, such as the Mapungubwe National Park and World Heritage Site, being the subject of much invasive developmental applications. These applications can be seen as being fundamentally in conflict with the sensitive nature of the broader area, yet many are allowed to proceed. The state, in the form of national, provincial and local environmental and planning authorities, have responded by utilising a vast majority of these legislatively available tools to attempt to manage and restrict certain incompatible activities. These tools and mechanisms include the utilisation of buffer zones, environmental management frameworks (EMFs), bioregional plans, biosphere reserves, spatial development frameworks (SDFs) and integrated development plans (IDPs).

The unfortunate reality is that these plans are not designed in an integrated, coordinated and aligned manner, making their operation fraught with various implementation challenges.
Commercial ecotourism in Ghana: The need for a coherent legal approach

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The regulation of commercial ecotourism as a vital component of Ghana’s tourism industry has proven to be difficult, particularly because commercial ecotourism somewhat straddles two distinct legal regimes – tourism, and environmental and ecological protection. These two distinct legal regimes, however, do not specifically deal with the inner complexities of sustainable commercial ecotourism. This paper critically appraises the current legal regime on commercial ecotourism in Ghana and the degree to which the laws of Ghana ensure biodiversity conservation and sustainable development in Ghana. The paper analyses pockets of legislation that govern ecotourism in Ghana, such as the Environmental Protection Agency Act 490 of 1994, the Forestry Commission Act 571 of 1999, the Wild Animal Preservation Act of 55 of 1983 (as amended), the Tourism Act 817 of 2011, among others, and indicate their insufficiency to fully regulate this growing sector. The paper makes a key claim that the pursuance of commercial ecotourism should not displace the need for biodiversity and ecological conservation in Ghana. Accordingly, the paper takes the position that the current fragmented legal regime, on one hand, regulates nature/environment and, on the other hand, tourism does not strike a proper balance between optimisation of commercial potency of ecotourism and conservation of bio-cultural diversity in Ghana. The position of this paper is rooted in the fact that law can be used as a tool or enabler to strike a proper balance between the pursuance of commercial ecotourism and biodiversity conservation and sustainable development in Ghana. The paper therefore calls for a properly coordinated, coherent and streamlined legal regime that mirrors the positive impact of commercial ecotourism on the destination areas as well as conservation of natural reserves in Ghana for future generations.
Supervision of doctoral level research in environmental law

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Doctoral level research is crucial for the development of environmental law as a scholarly field and in raising a next generation of environmental law scholars and thinkers. The conceptualisation, writing and finalisation of a doctoral study involve several stages and role players. This paper aims to focus on a) the relevance and importance of doctoral level research for the development of environmental law as a field of teaching, learning and scholarly research; b) some of the typical challenges in terms of seeing doctoral studies to completion; and c) the dynamic, yet hands-off role to be played by supervisors. The point of departure is that supervision requires of a supervisor to be a combination of guide, mentor, information-source, coach and inspiration. Supervision should furthermore be aimed at doctoral candidates who grow into competent environmental law researchers and who develop as individuals.

The paper will draw on a combination of available literature in social and natural sciences concerning doctoral study supervision, and the more anecdotal experience of the two authors (who at some point worked together as supervisor and doctoral candidate). While focused on environmental law, this paper is also relevant to supervision in a broader range of research fields. This paper is especially relevant in view of the upcoming CHE National Review of Doctoral Studies.
When less is more: Relaxing building codes to accommodate eco-friendly alternatives to traditional home ownership

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Section 26 of the Constitution guarantees the right to access adequate housing. This right is arguably one of our less clearly defined rights, although it is established that this means more than just "bricks and mortar" but should allow the rights-holder to access basic services, benefit from the city infrastructure and be able to engage in the economy.

The hows and whats of a “house” are largely determined by practical standards such as the National Building Regulations (NBR). The NBR mandates that houses be at least 27 m² in overall size, with a general height of 2.4 m. While this is by no means a massive home, it is incompatible with a growing movement of cost and environmentally minded people who wish to "live small." Pod houses, tiny houses or modular homes – each has its own flavour – can often run the risk of falling on the way-side of these regulations. These homes can span various sizes – some falling below the minimum size requirement – and others meeting that requirement but falling short of the minimum height dimension.

This is a problem as these alternatives to home ownership can often reduce carbon emissions in all stages of a building’s life cycle: material extraction and production, transportation, construction, operation, demolition, and recycling. Small living is often material extraction and production, associated with using sustainable and locally sourced materials to build a home and recourse to green energy sources, such as solar panels, to sustain the home’s operation.

And while small homes are cheaper, they are not free. Financial institutions should be encouraged to provide financing to small homeowners, and government subsidies – especially for gap-housing – should be available for these alternative housing schemes.
The liability and legal consequences for social media-related misconduct in the South African workplace

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Employees have a duty to act in the best interests of the employer. This fiduciary duty is owed to employers by employees in many countries, including South Africa. However, the advent and the use of social media platforms in the workplace pose potential risks on the employer-employee relationship, especially in respect of the liability and legal consequences for social media-related misconduct. This article discusses the liability and legal consequences for social media-related misconduct in the South African workplace during office working hours on the part of both the employees and employers. In this regard, the author submits that employees could be held liable for their social media-related misconduct committed in the workplace during office working hours. In the same vein, employers could also be held liable for their own social media-related misconduct or that of their employees, if it was committed in the workplace during office working hours. Accordingly, the article is focused on the liability and consequences for social media-related by both employees and employers in the workplace during office working hours. To this end, the article analyses the detrimental consequences of such social media-related misconduct on the employees as well as the employer’s business, personal reputation and related aspects. Thereafter, possible recommendations to curb the legal consequences for social media-related misconduct in the South African workplace will be provided.
Is the employer obliged to provide a safe working environment to non-striking employees and replacement workers during a violent strike?

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The prevalence of violence during industrial action has called into question the employer’s obligation to provide a safe working environment to all its employees including non-striking workers. Employers are occasionally confronted with difficult choices, especially when their employees fall victim to threats of violence in the workplace. It is common knowledge that the right to strike is a right to cause economic harm. It is also common knowledge that prolonged and violent strikes have detrimental effects on striking workers and their families, the employer, the economy and community at large. The biggest concern is that in most cases striking workers tend to attack non-striking employees and replacement workers as they believe that these workers are behind the delays in the settlement of dispute(s) with the employer or employers’ organisation. The idea behind the withdrawal of labour in the form of strike is to put economic pressure on the employer so that he or she will see the need to bargain fruitfully with unions or attempt to meet their demands before huge damage to the business takes place. In trying to force the employer to heed to their demands, unions and their members engage in a variety of conduct some directed at non-striking workers posing risk to their lives. The question that this paper attempts to address is how far does the employer’s right to provide a safe working environment go during a violent strike?
Disgruntled and veering off the course:
SAPS now (SANDF & nurses before)

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Indeed, hell like a woman scorned hath no fury. This was enlivened in 2009 when a troop of over 1 000 members of the South African National Defence Force (SANDF) took to the streets in demand for better terms and conditions of employment (30% salary increase). Things turned violent so much that the South African Police Service (SAPS) armed with water cannon, rubber bullets and tear gases were deployed to control this regrettable situation, which was later declared a threat to the national security. A decade later, an irony happens. The SAPS under the auspices of South African Police and Allied Workers Union (SAPAWU) threatens to strike over more or less the same issue (promotions). Interesting question is, who will police the police? Meanwhile, nurses affiliated to Democratic Nursing Organisation of South Africa (DENOSA) threatened to strike in support of the Congress of Trade Unions of South Africa (COSATU) earlier in 2019. The popular language is that SAPS, SANDF and nurses are essential service employees, bringing in the question, how or when are one's services ‘essential’ or rather, whose service is essential in terms of the labour laws, the Constitution and the International Labour Organisations (ILO)? This article is aimed at clarifying the position or status of being declared ‘essential service’ – what that means or implies.
The legislative possibilities and challenges relating to the private possession and use of cannabis in South Africa

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Even prior to 18 September 2018, cannabis was the most commonly used illicit substance in South Africa, having been prohibited by a suite of legislative provisions, which provided for the criminalisation of its use, possession and sale. In South Africa, the National Survey of Youth Risk Behaviour indicated that 12.8% of South African students in Grades 8-10 have used cannabis and 9.2% of those in the last month. A further study, the South African Stress and Health Study (SASH), surveyed 400 adults and found 8.4% lifetime use. So it is clear that use of cannabis recreationally is fairly common among South Africans.

The Constitutional Court, per Zondo ACJ, delivered a judgment which some of have criticised as creating more questions than answers. Although the judgment quite clearly decriminalises the use, cultivation and possession of cannabis for private purposes, the question of what constitutes “private” brings the judgment quite squarely into the terrain of a number of different areas of law.

This paper will extensively consider the judgments of both the High Court and the Constitutional Court in light of the right to privacy in an employment setting. Specifically, I will consider the gap left by the Court in relation to how long cannabis stays in the system and how employers may be able to ascertain how their employees are under the influence of cannabis at work. The central question then is whether or not a positive test result of an employee can trigger disciplinary action if an employee is able to perform his or her tasks. The paper will ultimately consider how the courts and the CCMA may deal with such matters going forward and suggestions on various forms of testing available to employers which may assist to close the lacuna in this area of law.
Widening Retirement Fund Coverage through the contemplated South African National Social Security Fund

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It is an economic imperative that employees who have worked over a period of time are able to sustain themselves when they reach retirement age. Sustainability during retirement can be ensured by adequate saving towards retirement over a period of time. This paper critically discusses the proposed National Social Security Fund (NSSF), which is intended to, among others, extend retirement funding coverage to those who are currently not contributing to pension funds. Retirement funds are important social insurance mechanisms intended to ensure that employees have access to their socio-economic right to social security by contributing money that will be invested over a period of time. Such money is intended to care for and support employees during their retirement, which is a deliberate initiative meant to prevent poverty and reliance on the government post retirement. Unfortunately, there are employees who reach retirement age without having saved enough for their retirement due to not contributing towards retirement funding during their working day and thus, cannot sustain themselves during retirement. The aim of this paper is to critically discuss the proposed NSSF and to explore how it will impact the retirement industry. I will further evaluate its proposed design with a view of assessing whether it will be able to address the challenges of employees who currently do not have access to retirement funding, and are thereby exposed to the risk of falling into the trap of poverty when they retire.
Defining the content of extraterritorial human rights obligations towards African climate migrants

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African people induced to migrate due to the change in the global climate suffer infringement of certain inalienable human rights, such as the rights to life, water and sanitation, food, health, housing, self-determination, culture and development. Being a transboundary environmental challenge, it is possible and indeed a rather regular occurrence for the activities of one country to exacerbate climate change effects resulting in climate induced migration and accompanying human rights infringements in another country’s territory. This relates to the issue of extra-territorial obligations (ETOs) of a country towards climate migrants suffering human rights infringements either in a territory other than its own. Currently, countries are seen to have ETOs where there is an international legal obligation on a country to cooperate to realise human rights across borders. This paper focuses on the question of what the minimum core obligations of African countries should be in protecting and realising the infringed rights of climate migrants in their own and neighbouring territories. In addressing this question, the principle of progressive realisation in international and African human rights law and the principle of common but differentiated responsibilities in international and African climate change law will be elaborated upon.
The treatment of Islamic marriages in South African family law – out of line with sustainable family development?

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In this paper, in line with the conference theme of sustainable development, I examine how this way of life fits with the requirements for formal validity of marriage in South Africa. I consider the prevalence of unregistered Islamic marriages, recent case law and the resultant vulnerability of many women in such relationships, who are then in the legal position of cohabitants. This has a negative effect on the sustainable development of family life and security. My paper alludes to the provisions for divorce of such unions and the resultant growth in the use of Sharia Councils. The paper concludes with some suggestions to improve the vulnerability of parties to such unions and briefly critiques such proposals for reform. Noting how Muslim law has the potential to be progressive, the paper alludes not only to the positive fact that some Muslim women have managed to find a space to negotiate within their religion, but also to the risk with religious law that those with power may use such law to advance their own interests, which have nothing to do with Islam, but only with their patriarchal interpretation in terms of their culture. This does not fit with the sustainable development of South African society in accordance with the development and growth of our human rights culture.
Medico-legal implications of imprisonment in post-democratic South Africa

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The South African legal framework has always awarded some form of rights for the benefit of prisoners. During the enactment of the interim constitution, prisoners were also included therein. The focal point in the history of prisoners with regard to rights, specifically health related rights, was with the enactment of the standing constitution, which recognised prisoners as rights holders.

With the visibility of the Constitutional Court and public interest litigation, it was not long before the courts started to hear cases of alleged prisoners’ rights. Moreover, the allegations were based on violations of the rights as contained in the standing Constitution. The confusion with regard to these violations was that the cases coming before the courts were similar in circumstances with cases that were prevalent in the apartheid South Africa.

The main motivation to undertake the study was based on the somewhat lacking and outdated literature on the rights of prisoners, moreover the rights related to healthcare of prisoners that are often violated as a matter of daily practice. The study was also motivated and prompted by the notion of liability of healthcare personnel that work under these conditions with doctors being alleged to take part in these violations, either perpetuating or concealing the violations.

The study is based on the gross violations that still occur, bearing in mind that it is centered after 1996, which is after the enactment of the final constitution. The argument is based on why are violations of this kind still prevalent in a democratic, constitutional country?

The question is posed in light of the South African Constitution and many international instruments that South Africa has ratified and is party to. The study goes a long way trying to expose the violations, and provide an in-depth view of the extent of the violations through case studies.
Perils and promises of precision medicine in South Africa: A case for equitable access to health care services

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Tyson Darling writes that the perspectives of the marginalised and socially vulnerable have historically been subordinated, muted and ignored. He further writes that given this, it is essential that the context of the current debates and engagement about emerging genetics biotechnologies be informed from these practices. The same is no doubt demanded by our Constitution. However, less debate takes place about what ought to come before, that being the unique perspective of the indigenous in informing practices such as precision medicine in the form of gene editing.

The law on precision medicine is found in various sources, ranging from primary to secondary legislation to case law. However, these are often ambiguous, outdated and not necessarily aligned with our Constitutional values and the lived experience of the indigenous African people. Moreover, South African law on precision medicine research often mimics or adapts European ethical and legal thought. The adoption of biotechnology in the African continent provides us with an excellent opportunity to start to decolonise and Africanise our legal and ethical thinking, hence the aim of this paper.
Attaining sustainable development through direct democracy and soft power: An African perspective

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African States signed the 2030 Agenda for Sustainable Development in 2015. Sustainable Development is defined as economic development conducted without the depletion of natural resources. Sustainable development involves among others, meeting the needs of the present without compromising the ability of future generations to meet their needs. Quality governance and administrative development are the *sine quo non* of the three SD interconnected elements: economic growth, social inclusion and environmental protection. In reaffirming its SD commitment, Africa needs to re-strategise in order to ensure maximum inclusion and benefits for all Africans. Sound governance is a powerful apparatus for promoting policy reforms and SD programmes. Methods of resource management requires virtuous state leadership, which is unfortunately relatively nonexistent in African leadership. Through a doctrinal approach, this paper submits two intertwined revolutionary recommendations for economic development: first, adopting direct democracy and collective presidency. African democratic systems adopted by most African States often lead to tyranny, weak administration, institutions, and widespread corruption by virtue of power centralisation. Direct democracy calls for direct involvement of citizens. To eliminate complexities that may interfere with the practicability of this system, collective presidency must be observed. When individuals commit to a joint governance structure, power is decentralised. Second, exercising soft power: The tragedy of colonialism in Africa is that Africa is the poorest continent, yet rich in mineral deposits. There is a need for collective ownership of its minerals. The acquisition of mineral ownership will rectify the current erroneous status quo of extracting minerals by foreign territories and consequently leaving Africa destitute. This challenge can also be addressed by strengthening the African Continental Free Trade Area agreement and subsequently exercising soft power in foreign states.
The utility of ‘piercing of the corporate law’ for public policy considerations in tackling illicit financial flows in Africa

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The deleterious effect of illicit financial flows on struggling African economies is, arguably, fuelled by continued alignment of corporate laws by legislatures on the African continent with laws of their former colonial masters. The indifference largely demonstrated by these laws on the possibility of disregarding corporate veil in the corporate group context for public policy considerations invariably means that the potential for stemming the tide on illicit financial flows is almost non-existent, except only in respect of abuse of the corporate form in pursuit of a fraudulent purpose. Since many of the so-called commercial transactions used to perpetrate illicit financial flows in terms of corporate laws can hardly be labelled as fraudulent – albeit unconscionable – the plausible solution of disregarding such transactions on public policy grounds remain elusive in terms of corporate laws of African countries most affected by the phenomenon of illicit financial flows.

This paper argues that commercial transactions largely responsible for the perpetuation of illicit financial flows will continue unabated under the current corporate regulatory frameworks of the major African countries, such as South Africa and Nigeria, unless corporate laws are reformed to recognise the possibility of piercing the corporate veil in corporate groups for public policy considerations.
Addressing the effects of failure to implement surface restoration measures upon termination of mining operations

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The initial lack of, and inadequate enforcement of, rehabilitation measures for mines under mining laws in South Africa has led to mining companies eschewing their responsibilities in undertaking pollution control measures and work required during and on termination of mining operations (including surface restoration measures.)

This conundrum has led to the creation of more than 380 mine dumps and slimes dams in the Gauteng Province alone, the economic hub of South Africa. In addition to being an obvious health hazard, these mine dumps and slimes dams are a serious hindrance to the realisation of South Africa’s government policy of land redistribution, particularly in the fast-growing, largely urbanised province of the country.

Prior to 1956 when the Mines and Works Act, 1956, (Act No. 27 of 1956) and the Water Act, 1956 (Act No. 54 of 1956), were enacted, it appears that pollution control and surface restoration measures upon termination of mining operations were largely unregulated, even though mining started almost immediately after the discovery of diamond and gold in the 1860s and 1880s, respectively.

Also, it was only in 1965 that the Atmospheric Pollution Prevention Act, 1965, (Act No. 45 of 1965) was enacted. Further, the South African legislature only started to regulate the rehabilitation, closure and ongoing post decommissioning management of negative impacts associated with the closure of mines in 2002 with the enactment of the Mineral and Petroleum Resources Development Act, 2002, (Act No. 28 of 2002). The result of this lacklustre and/or inexistent regulation of rehabilitation of inactive mines has led to a staggering number of mine dumps and slimes dams as previously indicated. The situation is made worse by the fact that South Africa has “in excess of five thousand ownerless and derelict mines” (DME 2007, p. 63).

Since these mines revert to the state when abandoned, it was estimated as recently as 2014 that the environmental liability facing the state is at least R30 billion for environmental restoration (Milaras, Ahmed & McKay 2014).

This paper investigates whether the state obligation to effect the environmental restoration can be enforced by the affected members of the public using extended standing provisions under the Constitution of the Republic of South Africa, 1996, particularly as this restoration and the ensuing obliteration of mine dumps and slimes dams is likely to facilitate the availability of land for redistribution and development purposes. If this problem remains unaddressed, people of South Africa will continue to be denied of their socio-economic rights which are entrenched in the Bill of Rights.
From Rio to Paris: The evolution of the principle of ‘common but differentiated responsibilities’ within the climate change regime

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The principle of common but differentiated responsibilities is a well-established principle across international environmental agreements. Although the aforementioned principle has not yet acquired the status of customary international law, it has been frequently invoked in the delicate negotiations on the future climate regime. The principle is a ‘departure from the classic notion of equal sovereignty of states and equal application of international rights and duties,’ as it prefers an approach based on equitable treatment as opposed to equal treatment. This approach is clearly illustrated in principle 7 of the Rio Declaration.

Within the context of climate change, the aforementioned principle recognises that climate change is a global issue that affects us all and needs to be dealt with as a matter of urgency. In its simplest form the principle recognises that states have not equally contributed towards climate change and further recognises that states do not equal resources and capacity with regard to the adoption of climate change mitigation strategies. The present paper intends to look at how the principle has been incorporated into international agreements, starting from the 1992 Rio Declaration, and looking at other agreements such as the 1992 UNFCCC and the 1997 Kyoto Protocol and more recently, the 2015 Paris Agreement. By analysing how the principle has been given effect to within the different international agreements, the present paper intends to look at how the principle has developed and evolved over the years. The paper will further look how the principle is given effect to in practice using South Africa as a case study against the backdrop of developed countries.
A bird in the hand is worth two in the bush: The legal protection of endangered vultures in South Africa

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The gratifying biodiversity of the South African panorama is impeded by environmental decrepitude. The Global Assessment Report on Biodiversity and Ecosystem Services, released in Paris France on 6 May 2019, cautions that some 1 million feral species might face extinction in the near future; including all carnivorous vulture species in Southern Africa. Significantly, the Egyptian Vulture is categorised as critically endangered and the White-Headed Vulture as vulnerable. Accordingly, in the absence of significant imminent interventions, the country will soon be left with vultures nurtured in captivity.

In this paper we will proceed to explore the survival threats and reasons for the declining numbers of some vulture species in the South African landscape; including destruction of habitat, deliberate or indirect poisoning by livestock farmers, collision with high power lines and wind turbines, trade for traditional medicine purposes, indirect lead poisoning and additional natural causes.

Thereafter, the current legislative and regulatory frameworks in relation to endangered animal species will be critically analysed; with particular emphasis on the inadequate remedy offered by the prosecution of environmental crimes, in view of the technical, expensive and laborious evidence required to successfully prosecute crimes of this nature. In the final analysis, we shall advance the most effective means by which the protections of vultures could be achieved in terms of the existing legal framework and also advance some additional measures that could be prudent to implement.
The critical analysis of the role of SMMEs sector in Africa: the function of legal practitioners in enhancing corporate governance in these

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The role of corporate governance in Small and Medium Enterprises (SMMEs) in developing economies has not been extensively explored, especially in the African context. Corporate governance and legal practitioners' services can play a pivotal role in assisting SMMEs with compliance, growth and sustainability. Most economies including Africa have SMMEs as big economic players. One of the biggest challenges that these SMMEs face is the issue of statutory compliance which sometimes leads to deregistration as businesses. The cost of implementing corporate governance and compliance structures within SMMEs is another challenge. These challenges force financially constrained SMMEs to operate without corporate governance and compliance structures thus leading to possible contraventions of the law. This paper investigated the role of corporate governance and corporate legal practitioners’ in the development, compliance, growth and sustainability of SMMEs in countries like Namibia, South Africa and Zimbabwe. It proposes that the role of corporate governance should be realized in helping SMMEs to contribute to the gross domestic products (GDP) of countries given the high number of SMMEs as players in the economy. The role of legal practitioners is primarily attributed to traditional legal services as per client's immediate mandate. The paper further discovers that the role of corporate governance remains pertinent to the growth and development of the SMME sector, thus implying possible investment attraction due to good corporate governance from an investors' perspective. This can be done when corporate legal practitioners provides comprehensive value to SMMEs, by widening the scope of engagement beyond the immediate mandate of clients, thus requiring a re-orientation in the thinking about the current delivery of legal services. This re-orientation must include the re-skilling of legal practitioners as well as capacity building and knowledge for SMMEs businesses.
Hearsay evidence: admissibility, probative value and procedure

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Those involved in statutory labour arbitration proceedings have long been aware of – and dare I say perhaps frustrated – by the tension between the statutory imperative to determine disputes fairly but with a minimum of legal formalities (with the Labour Court even holding that an excessive concern with legal formalities would constitute a reviewable irregularity – Naraindath D v CCMA (2000) 21 ILJ 1151 (LC)); and the Labour Courts expansive interpretation of its powers of review, and its insistence, in many instances, that the law of evidence as it is applied in the ordinary courts be applied in such arbitrations (see, for example, Karan Beef (Pty) Ltd v Mbovane NO (2008) 29 ILJ 2959 (LC)). For a discussion of this tension, and the law at the time of writing, see N Whitear-Nel "Hearsay Evidence at Disciplinary Enquiries and CCMA Arbitrations" (2001) 22 ILJ 1481.) See also Prof Halton Cheadle in his SASLAW presentation, "Over-Proceduralised," in 2006, where he speaks of “the strict monitoring of [arbitration awards]."

Nowhere is this more apparent than in the position taken by the LC, and LAC in relation to hearsay evidence. This is particularly evident in the recent decision of the LAC in Exxaro Coal (Pty) Ltd v Chipana and others (JA 161/17)[2019] ZALAC 52 (27 June 2019), where the LAC imported wholesale from the criminal context, as I will explain.
The impact of corruption on sustainable human development in South Africa

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South Africa is a constitutional democracy committed to the principles of legality and the rule of law through good governance, openness, transparency and accountability. The South African constitutional design is often praised for its fundamental rights and freedoms. However, its allocation of public power is not always ideal for the advancement of its constitutional and sustainable development. Although South Africa has solid constitutional values aimed at protecting its democracy, like many other African countries, it is not immune to corruption. Corruption poses a significant threat to democracy and contributes to government instability. Corruption undermines the objects of sustainable development which are designed to eradicate poverty as well as protect and manage natural resources for current and future economic and social development. South Africa is a young democracy and has struggled with the issue of corruption over the past decade, which has impacted on the quality of life of its citizens. South Africa's constitutional project raised the hopes of the people for an energetic yet accountable government. It promised a new era of respect for human rights and an end to impunity for abuse of state resources. These goals cannot be achieved through a government that lacks accountability. Corruption affects many disadvantaged groups and prevents social and economic inclusion and thus promoting inequality. Bad governance is the antithesis of sustainable development, and South Africa seems to have moved from its noble objective of ensuring a responsive and accountable government due to corruption and abuse of state resources. It is against this background that this paper explores the impact of corruption on sustainable development in South Africa.