The Constitution

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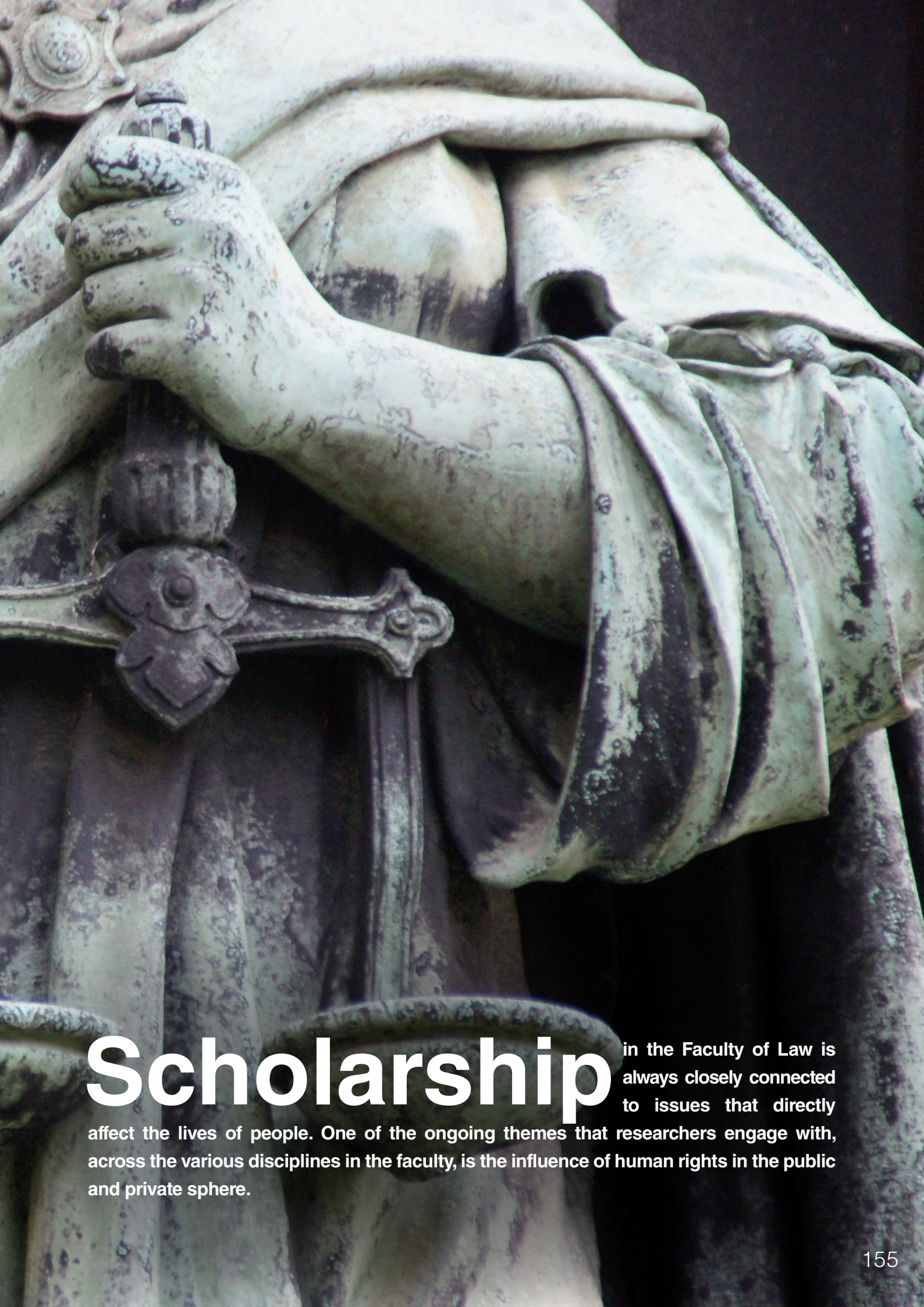

Scholarship

in the Faculty of Law is always closely connected to issues that directly affect the lives of people. One of the ongoing themes that researchers engage with, across the various disciplines in the faculty, is the influence of human rights in the public and private sphere.

Public values and private rights

Since the end of the Second World War, fundamental rights have exerted an increasing influence on legal systems throughout the world. Human rights instruments, originally conceived as only relevant to ensure the protection of the individual against the state, have steadily begun to exert pressure not only on public law – that part of the law that regulates the relationship between the state and its citizens – but also on private law – the part of the law that regulates the relationship between citizens *inter se*. Not surprisingly, then, an important theme in the research effort of the UCT Faculty of Law in 2011 has been concerned with the influence of human rights and the constitution in general on the lives of people.

Land, minerals and property

In South Africa, two areas where rights are hotly contested are land law and mineral law, which are inextricably bound to property law, explains Professor Hanri Mostert. So, fittingly, these are specialised sub-disciplines of private law.

Professor Mostert is intrigued by the overlap of these areas of law with very public concerns. Take, for example, how new legislation introduced by the government in 2004 expanded the state's regulatory controls over the mineral sector, giving it a greater say in how minerals can be exploited and by whom.

It's a theme that Professor Mostert explored in detail in the book she wrote in 2011, *Mineral Law: Principles and Policies in Perspective*, scheduled for release in 2012.

"I'm interested in how both land and minerals are scarce resources, and how these are very firmly grounded in our ideas of private property," she says. "But they are very strongly regulated in the public sphere."

That has much to do with the fact that, in South Africa, mineral (and land) issues and politics have never been mutually exclusive terms. One of the last things the National Party did, its exit already on the cards, was to issue new mineral legislation in 1991, says Professor Mostert; one of the first things the new government did in 1994 was to begin revising that legislation.

"It seems that big changes in mineral law always coincide with big changes in politics," she says.

Not too surprising that given those contending forces, the Constitution is never too far from mind. Consider how, in 2010, the Constitutional Court declared all of the Communal Land Rights Act, eight years in the making and on the shelf for a further five years, unconstitutional.

"It seems that big changes in mineral law always coincide with big changes in politics."

There was the risk that the Mineral and Petroleum Resources Development Act (MPRDA) of 2002 would go the same way, says Professor Mostert. Especially after the High Court ruled in favour of Agri SA in its expropriation claim against the Minister of Mineral Resources early in 2011, saying that the enactment of the MPRDA in 2002 denied them the coal rights that they had held under prior legislation. (The issue is due to go before the Constitutional Court in 2012.)

"The thing that has always fascinated me – in the case of both land and minerals – is that these are finite resources," says Professor Mostert. "There is just so much, and it has to be shared by an ever-increasing group of people.

"And to ensure fairness in that sharing, that is what's always tickled my interest," she says.

Customary law

Fairness is also at the core of the work of Professor Chuma Himonga who was awarded the DST/NRF SARChI Chair in Customary Law in 2011.

According to Professor Himonga, the position creates excellent prospects for research in an area of law that regulates the lives of millions of South Africans. Protected by the Constitution, African Customary Law (ACL) forms one of the three arms of the South African legal system – a legal pluralism made up of a civil law inherited from the Dutch, a common law system rooted in British traditions, and then customary law.

The Law, Race and Gender (LRG) Research Unit partners with rural communities to identify research priorities. Here Dr Aninka Claassens (far back), Senior Researcher and Project Leader of LRG's Rural Women's Action Research (RWAR) Project, meets with community leaders at one of RWAR's field sites.

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Naturally, such a pluralist system leads to debate and contention.

"The challenges customary law faces and creates in relation to human rights and its application by the courts in changing social and legal contexts require serious investigation and scholarship," says Professor Himonga.

The first full year in which the Chair was up and running allowed Professor Himonga to start exploring the actual workings of customary law against that backdrop of legal pluralism. Among other things, it will allow her to examine how customary law intersects with other components of the system, including common law and human rights.

"The research of the SARChI Chair is intended to increase the understanding of customary law as a dynamic system, as well as its actual workings within modern constitutional frameworks," she adds.

It was an issue she would write a chapter on in the book, *The Future of African Customary Law*, published by Cambridge University Press last year.

In particular, and in keeping with her ongoing concern, Professor Himonga will focus on women's and children's rights. Of concern to her is interpretation of what she calls "living customary law". She has argued that it should move away from a Eurocentric approach that is tilted in favour of men. Such an interpretation, says Professor Himonga, may alienate those subject to it, especially women and children, who are meant to benefit from the new legislation.

The SARChI Chair appointment also has institutional implications. Professor Himonga, who hails from Zambia, will be involved in capacity-building in other African countries, notably through the Southern and Eastern African Regional Centre for Women's Law, where she contributes to the teaching of a regional master's programme.

Writings with worldwide influence

Professor Himonga's contribution is not the only one making UCT's presence felt on the international stage. Professor Anton Fagan, head of the Department of Private Law, began a sabbatical in 2011, which took him to England, Scotland, and Germany, in the interests of enriching international perspectives.

Research groupings associated with this theme

Centre of Criminology

The Centre of Criminology (previously the Institute of Criminology), founded in 1977, aims to initiate, co-ordinate, and develop research in the broad field of criminology, and to promote public interest in all aspects of criminology. The centre's research programme focuses primarily on state policing, plural policing, crime prevention, and environmental security. Teaching support to the criminology focus falls within the Department of Public Law and research support is provided by the centre's multi-media electronic resource library.
Director: Professor C. Shearing
E-mail: Clifford.Shearing@uct.ac.za
Web: http://www.criminology.uct.ac.za

Institute of Development and Labour Law

The Institute of Development and Labour Law was established in 1996 through the merger of the Labour Law Unit and the Institute of Development Law. The institute plays a leading role in development and labour law teaching and research. It is involved with training courses in South Africa and other countries in Southern Africa. It also regularly contributes to the training programmes of other organisations, and collaborates closely with other leading university centres and NGOs.
Director: Professor R. le Roux
E-mail: Rochelle.LeRoux@uct.ac.za
Web: http://www.labourlaw.uct.ac.za

Gender, Health and Justice Research Unit

The Gender, Health and Justice Research Unit at the University of Cape Town's Faculty of Health Sciences (Division of Forensic Medicine and Toxicology) conducts progressive research in the area of women's rights. Faced with staggering levels of violence against women in South Africa, the unit is dedicated to improving access to health and justice services for survivors of gender-based violence. The unit uses inter-disciplinary methods from various academic fields including law, the social sciences, and public health to contribute to policies and laws, and to advocate for social justice. Current projects include, among others, monitoring legislation relating to sexual and domestic violence, as well as inter-disciplinary research relating to women in prisons, domestic and rape homicide, access to post-exposure prophylaxis after rape, 'conflicting laws' and torture in post-conflict African states.
Director: Associate Professor L. Artz
Acting Director: Dr K. Moult
E-mail: Lillian.Artz@uct.ac.za and Kelley.Moult@uct.ac.za
Web: http://www.ghjru.uct.ac.za

Women's Health Research Unit

The Women's Health Research Unit (WHRU), established in 1996 in the School of Public Health and Family Medicine, is involved in research, teaching, technical health service support, and advocacy in the areas of women's health, and gender and health. It is made up of a multi-disciplinary team of researchers with expertise in public health, epidemiology, sociology, and anthropology. The unit works closely with the national, Western Cape provincial, and City of Cape Town departments of Health, as well as with other academic institutions and NGOs, in sexual, reproductive, and women's health. Key research areas include HIV and reproductive health, gender and HIV, health systems research (reproductive health), female cancers, contraception, and termination of pregnancy.
Director: Dr J. Harries
E-mail: Jane.Harries@uct.ac.za
Web: http://www.whru.uct.ac.za

Intellectual Property and Policy Research Unit

The Intellectual Property (IP) and Policy Research Unit assists in developing IP law and policy in Southern Africa and aims to contribute to the manner in which this topic is treated in emerging and developing countries throughout the world. The unit is in a position to become an influential leader within Southern Africa for research and scholarship in intellectual property law and policy. It seeks to explore many issues facing the changing world of IP and relate these to the needs of society, IP holders, and consumers. The unit is leading research projects in areas such as IP rights and innovation, development, copyright and creative commons, nanotechnology, and new technologies.
Director: Professor J. Kinderlerer
E-mail: Julian.Kinderlerer@uct.ac.za
Web: http://www.privatelaw.uct.ac.za/research/units/

On his travels Professor Fagan, who also holds the WP Schreiner Chair in the department, made some major inroads into his ambitious schedule. At least two of his projects were concerned with the influence of the South African Constitution on private law. First, he penned a chapter on the right to personal security for a book on human rights and private law in Scotland and South Africa, edited by Professor Elspeth Reid of the University of Edinburgh Law School and UCT's Deputy Vice-Chancellor Professor Danie Visser. Second, he wrote an article replying to Judge Dennis Davis's criticisms of his published inaugural lecture for the *South African Law Journal*.

Professor Fagan's November 2009 inaugural lecture, titled – pointedly – *The secondary role of the spirit, purport and objects of the Bill of Rights in the Common Law's development,* argued as follows: The Constitutional Court has repeatedly, if not always expressly, endorsed the proposition that the spirit, purport, and objects of the country's Bill of Rights may be reason enough for the development of the Common Law. This means that every court is obliged to adapt the Common Law whenever it does not live up to the spirit, purport, and objects of the Bill of Rights.

But, says Professor Fagan, this proposition is false. Rather, the role of the Bill of Rights in the development of the Common Law is merely a secondary one, he argued. If this is the case, it could serve only as a 'tiebreaker'. "The Constitution regards the spirit, purport, and objects of the Bill of Rights only as reasons for choosing between ways of developing the Common Law that are already justified by reasons that have nothing to do with the spirit, purport, and objects of the Bill of Rights." This thesis was challenged by Judge Dennis Davis (*South African Law Journal, Vol. 129*) and it is to this challenge at which Professor Fagan's rejoinder is aimed. It is a topic that is likely to generate further stimulating debate in the years ahead.

Race, redress and remembrance in the South African Constitution

Other interesting debates, and another perennial in South African discourse, is around race, redress, and remembrance. Even the Constitutional Court does not always get race quite right, says Professor Pierre de Vos in his inaugural lecture, *The Past is Unpredictable: Race, redress and remembrance in the South African Constitution*, delivered in 2011.

Professor De Vos, who holds the Claude Leon Foundation Chair in Constitutional Governance in the Department of Public Law, started his lecture close to home, with UCT's admissions policy (one of the countless issues he's covered in his many media commentaries and in his [in] famous blog, *Constitutionally Speaking*). If the university

Two areas where rights are hotly contested are land law and mineral law, which are inextricably bound to property law.

has taken a beating in the media and in various corners of the country for this policy, which uses race as a proxy for disadvantage, says Professor De Vos, it is because its critics have overlooked the reality that the issues of race "continue to permeate every aspect of both public and private life" in South Africa.

> *"The Constitution regards the spirit, purport, and objects of the Bill of Rights only as reasons for choosing between ways of developing the Common Law that are already justified by reasons that have nothing to do with the spirit, purport, and objects of the Bill of Rights."*

There is a paradox at the heart of attempts to rely on race in order to overcome the effects of past and ongoing racism and racial discrimination. While it is necessary to invoke racial categories in order to address the effects of racism and racial discrimination effectively, a reliance on those categories runs the risk of perpetuating the inequalities and race-based hierarchies of Apartheid.

The Constitutional Court, too, has not always taken sufficient care when bandying about those racial categories, especially when tackling the issues of race and redress, says Professor De Vos.

It is true that the Constitution prohibits unfair discrimination on the basis of a range of criteria – race included. On the other hand, it does not prohibit (and sometimes even

DST/NRF SARChI Chairs associated with this theme

Land Reform and Democracy in South Africa

Professor Lungisile Ntsebeza holds the DST/NRF Research Chair in Land Reform and Democracy in South Africa. He has conducted extensive research on the land question in South Africa, specifically on land rights, democratisation, rural local government, traditional authorities, and land and agrarian movements. Professor Ntsebeza has published *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (Brill Academic Publishers, Leiden in 2005 and the HSRC Press in 2006). He has also co-edited *The Land Question in South Africa: the Challenge of Transformation and Redistribution* (HSRC Press, 2007, with Ruth Hall), and *Rural Resistance in South Africa: The Mpondo Revolts after fifty years* (Brill Academic Publishers, Leiden, 2011 and UCT Press, 2012, with Thembela Kepe). His current research interests, apart from land and agrarian questions, include an investigation of African Studies at UCT and a related project on the political and intellectual history of the late Archie Mafeje.

Security and Justice

Professor Clifford Shearing is the Chair of Criminology and Director of the Centre of Criminology, Faculty of Law. He holds the SARChI Chair in Security and Justice and is an National Research Foundation A-rated scholar. Professor Shearing's research and writing has focused on the development of theoretical understandings that can be used to enhance the quality of security and justice. A particular focus of his work has been contributing to the development of institutions and processes that enhance the ability of collectivities to both direct and add value to their security and justice. In addition to his established areas of research in the area of security governance, he is exploring the governance of environmental security.

Customary Law

Chuma Himonga is Professor of Law in the Department of Private Law and holds the SARChI Chair in Customary Law. She has an LLB from the University of Zambia, as well as a master's degree in Law and PhD, both from the University of London. Her research interests are in the areas of customary law; family law, including comparative African family law in Southern Africa; legal pluralism; women's and children's rights, and human rights. Working on Zambian law, she has helped to produce socio-legal research on the effects of family law on family members, especially women and children. The award of the SARChI Chair in Customary Law has given Professor Himonga the unique opportunity to engage deeply with what has become her life's work and passion of furthering the development and understanding of customary law regimes that shape and influence the lives of millions of people in Southern African contexts, as well as contributing to the development of a critical African worldview aimed at grounding research and writing in law in African realities.

requires) the use of race when addressing the "effects of past unfair discrimination or when addressing the lingering effects of racial discrimination and racism", he pointed out.

The Constitutional Court understands the need for race-based corrective measures, but also appreciates that there are limits to such corrective measures. And that redress can be a win-lose thing, where one group benefits at the expense of another.

But while race-based measures of redress are required to address the effects of past and ongoing racism and racial discrimination, this must be done by having "regard to South Africa's past", a past that not all South Africans always see in the same light. A little more finesse, more nuance, is also required when dealing with the country's history, argues Professor De Vos.

"Neither attempting to sweep the past racism and racial discrimination, and its ongoing manifestations and effects, which continue to haunt our country, under the carpet; nor reducing or simplifying the story of our past to one in which human beings only existed as markers for their racial identities."

UCT publications on the role of the **Constitution in our law**

One of the most important books published in the Faculty of Law in 2011 was the second edition of *South African Constitutional Law: Bill of Rights* by Halton Cheadle, Dennis Davis, and Fink Haysom (LexisNexis Butterworths).

Other examples of constitutional scholarship in the faculty include:

- Dennis Davis "Tony Mathews and the Rule of Law" in M. Carnelley and S. Hoctor (eds), *Law, Order and Liberty* (2011) at 43–53 (published by the University of KwaZulu-Natal Press);
- Dennis Davis and Karl Klare, "Transformative constitutionalism and the common and customary law" in the 2011 *South African Journal on Human Rights*, vol. 26(3): 403–509;
- Hanri Mostert, "Landlessness, housing and the rule of law" in H. Mostert and M.J. de Waal (eds), *Essays in Honour of CG van der Merwe* (2011) at 73–104, (published LexisNexis);
- Lee-Anne Tong "Intellectual-property rights as human rights" in A. van der Merwe (ed.), *Law of Intellectual Property in South Africa* (2011) at 435–439, published by LexisNexis;
- Jaco Barnard-Naude and Pierre de Vos "The Heteronormative Observer: the Constitutional Court's decision in *Le Roux v Dey*" in the 2011 *South African Law Journal*, vol128(3): 407–419;
- Contributions from the Law Faculty to this volume included "The environmental right" by Jan Glazewski, and "Administrative justice" by Hugh Corder.

Other examples (but not by any means pretending to be an exhaustive list) of constitutional scholarship in the faculty include:

- Dennis Davis, "Tony Mathews and the Rule of Law" in M. Carnelley and S. Hoctor (eds), *Law, Order and Liberty* (2011) at 43–53 (published by the University of KwaZulu-Natal Press);
- Hugh Corder, "Securing the rule of law", in M. Carnelley and S. Hoctor (eds), *Law, Order and Liberty* (2011), at 23–42;
- Dennis Davis and Karl Klare, "Transformative constitutionalism and the common and customary law" in the 2011 *South African Journal on Human Rights*, vol. 26(3): 403–509;
- Hanri Mostert, "Landlessness, housing and the rule of law" in H. Mostert and M.J. de Waal (eds), *Essays in Honour of CG van der Merwe* (2011) at 73–104, (published LexisNexis);
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- Jaco Barnard-Naude and Pierre de Vos, "The Heteronormative Observer: the Constitutional Court's decision in *Le Roux v Dey*" in the 2011 *South African Law Journal*, vol. 128(3): 407–419;
- Hugh Corder, "Appointment, discipline and removal of judges in South Africa" in H.P. Lee (ed.), *Judiciaries in Comparative Perspective* (2011), at 96–116 (Cambridge University Press);
- Hugh Corder, "The Republic of South Africa", in D. Oliver and C. Fusaro (eds), *How Constitutions Change: A Comparative Study* (2011), at 261–279 (Hart Publishing); and
- Thomas Bennett, "Human rights and customary law under the new Constitution" (2011), appearing in Volume 75 of *Transformation*, at 73–80.

This will mean, argued Professor De Vos, renouncing simple 'grand narratives' that threaten to reduce individuals to mere symbols or representatives of a particular racial or language group. Instead, South Africans should embrace "many small micro-narratives that recognise the individuality of each person".

"Like Jacob Dlamini did in his book *Native Nostalgia*, we want to tell stories that humanise our lives and particularise our experiences; without airbrushing away the past, and without denying the lingering effects of ongoing racial injustice around us."

Realising Constitutional values

Speaking a the launch of the successful fundraising campaign that marked the 150th anniversary of Law at UCT in 2008, the then Dean of Law, Professor Hugh Corder, says that it was essential for the faculty to have the financial and human capacity to participate in the "realisation of our Constitutional values in a sustainable manner." Four years on, and the scholarship in the faculty is continuing to do vital work in the promotion of an impartial, independent, and fearless legal process and profession that protects and upholds human rights in all spheres.