

Editorial

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1. Justification for a new law journal

The immediate question that dashes to any researcher's mind when a new journal breaks into the research space is: why have a new journal? The question is natural because South Africa is comparatively endowed with many journals across disciplines, and law in particular.¹ There is no gainsaying that South Africa is home to some of the most prestigious journals across disciplines globally. In the African continent, South Africa is doing relatively well with research output. Thus, it may be somewhat convincingly argued that perhaps South Africa does not need new journals; it needs new ideas.

However, a closer look at the fundamental realities of higher education and South Africa's research demographics reveals the contrary. The two most gaping and symbiotically related voids still exist in the South African research landscape. The first one is quantitative, and the second one is qualitative. Quantitatively, despite the existence of many law journals in South Africa, the legal academics, like all other academics in South Africa, are still far from reaching the threshold set by the Department of Higher Education and Training (DHET) for research output. In general, the DHET expects every academic in South Africa to publish at least 1.25 research outputs annually in subsidy-earning publications.² Although the Department is putting subsidies into academic research enterprise, the target of 1.25 research output per academic is still hard to attain. According to the DHET:

The average per capita research publications output for all universities in 2019 was 1.06 units. This means that the average permanently employed academic in the country produced one research publication unit in 2019. That is an equivalent of a single article in a peer-reviewed journal. However, the units are for all publication types (journal articles, books and book chapters and conference proceedings). Academics at eight universities (UKZN, SU, UJ, UP, UCT, WITS, RU and UFS) on average produced publications higher than the national average in 2019.³

- 1 Schulze, S 'Academic Research at a South African Higher Education Institution Issues' (2008) 22(3) *South African Journal of Higher Education* 644.
- 2 *Ibid* 644.
- 3 Department of Higher Education and Training, *Report on the Evaluation of the 2019 Universities' Research Output* (2021) 34 <<https://bit.ly/3m4a3ps>> accessed 13 July 2021.

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This is, therefore, a testament to a need for additional platforms to increase the number of research outputs. It is a truism on stilts that emerging scholars always find it hard to break into the research market dominated by established journals.⁴ As a result, knowledge and knowledge production continue, by and large, to be the monopoly of a small elitist group.⁵ This is contrary to the long-held postmodernist view that knowledge is not absolute. As Ratnapala pointedly puts it: ‘since there is no objective knowledge, what passes for knowledge is simply claims of truth legitimated by convention or by some “epistemic authority” that determines the criteria by which truth is established.’⁶

This ‘epistemic authority’ or what one may call ‘intellectual hegemony’ has blocked the space for multiplication of research output. One of the biennial rankings released by the Department still demonstrates that the first six places in the rankings are still reserved for previously advantaged universities.⁷ These six top research-producing universities collectively produce a whopping 60% of the entire publication output in the country.⁸ This clearly evinces the fact that academic research in South Africa is still skewed in favour of the previously advantaged universities. There is, therefore, a need for research effort and activity from the previously disadvantaged universities.

The second justification is transformational in nature. Despite the spirited influx of policies and scholarly interventions that seek to transform higher education since the dawn of democracy,⁹ the rate of transformation continues to be disturbingly slow in all its facets. This inertia for transformation is pervasive; research is no exception. Heleta most instructively articulates this view as thus: ‘[s]ince the end of the oppressive and racist apartheid system in 1994, epistemologies and knowledge systems at most South African universities have not considerably changed; they remain rooted in colonial, apartheid and Western worldviews and epistemological traditions.’¹⁰

The problem may be more pronounced in research than teaching and learning because research activity is at the coalface of knowledge production – the very same

4 Maluleka, JR and Nkwe, M ‘What Can We Learn from Prolific Researchers? Publication Patterns of the NRF-Rated Library and Information Science Researchers in South Africa’ (2020) 52(4) *International Information & Library Review* 272.

5 Sebola, MP and Tsheola, JP ‘Knowledge in Space and Time: An Editorial Perspective’ (2019) 4(1) *Journal of Public Administration and Development Alternatives* i-xiv.

6 Ratnapala, S *Jurisprudence* (Cambridge University Press 2017) 226; See also Zagzebski, L *Epistemic Authority: A Theory of Trust, Authority, and Autonomy in Belief* (Oxford University Press 2015).

7 These universities are: University of KwaZulu-Natal (UKZN), University of Johannesburg (UJ), University of Pretoria (UP), Stellenbosch University (SU), University of Cape Town (UCT) and the University of the Witwatersrand (Wits) – in that order. According to Kupe, ‘the next eight institutions, North West University (NWU), University of South African (Unisa), University of the Free State (UFS), University of the Western Cape (UWC), Rhodes University (RU), Nelson Mandela University (NMU), University of Limpopo (UL) and University of Fort Hare (UFH), in that order, collectively produce 30% and the remaining institutions, including all the Universities of Technology (UoTs), produce the final 10% of the system’s publication units’. Kupe, T ‘Research outputs do not make a university ranking’ *Mail and Guardian* 15 April 2021, <<https://bit.ly/3yOxTJc>> accessed 13 July 2021.

8 Department of Higher Education and Training (2021).

9 See, for instance, Department of Higher Education and Training, *Research Outputs Policy, 2015* No. 188, 11 March 2015 <<https://bit.ly/3xLrOvY>> accessed 13 July 2021.

10 Heleta, S ‘Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa’ (2016) 1(1) *Transformation in Higher Education* 1.

knowledge that forms the content of teaching and learning.¹¹ The content, structure and demographics of research still pre-eminently mirror the pre-democratic outlook.¹² Therefore, there is an urgent need for efforts across the higher education spectrum to deconstruct the old narrative that is persistent and recurrent – that knowledge production is a preserve of certain systems, structures and institutions.¹³ The intricacy of this 'old narrative' is ably captured:

If Western civilisation and culture are responsible for colonial racism, and Europe itself has a racist structure, then we should not be too surprised to find this racism reflected in the discourses of knowledge that emanate from this civilisation and that they work to ensure that structural dominance is maintained.¹⁴

As the leading research centres, there is overwhelming evidence that South African universities still mirror the discourse of knowledge emanating fundamentally from the European civilisation.¹⁵

Within this broad justificatory framework, the School of Law of the University of Limpopo deemed it appropriate to launch a law journal to contribute towards decoloniality and transformation in the South African legal research landscape.

2. The nature and purpose of the journal

Hence, the purpose of the journal is to give a platform for high-quality research on transformative perspectives about the law in South Africa. While the journal mainly seeks to respond to legal questions in South Africa, comparative perspectives from Africa and beyond are most welcome. The journal further welcomes contributions that take multi- and inter-disciplinary perspectives to law. This approach is premised on the conviction that '[n]o discipline is an island entirely in itself. That is to say; disciplines are by no means discrete entities – they necessarily overlap, borrow, and infringe upon one another'.¹⁶ Conceptually, multi-disciplinarity is an approach in research in which 'members of two or more disciplines cooperate, using the tools and knowledge of their disciplines in new ways to consider multifaceted problems that have at least one tentacle in another area of study'.¹⁷

In particular, the journal is targeting high-quality research from emerging scholars and non-conventional perspectives from established researchers.

11 Hattie, J and Marsh, HW 'The Relationship Between Research and Teaching: A Meta-Analysis' (1996) 66(4) *Review of Educational Research* 507.

12 Waghid, Y 'Knowledge Production and Higher Education Transformation in South Africa: Towards Reflexivity in University Teaching, Research and Community Service' (2002) 43(4) *Higher Education* 457.

13 Heleta, S 'Decolonising Knowledge In South Africa: Dismantling The 'Pedagogy Of Big Lies' (2018) 40(2) *Ufahamu: A Journal of African Studies* 47.

14 Sardar, Z 'Foreword to the 2008 Edition. I Think It Would Be Good If Certain Things Were Said: Fanon and The Epidemiology of Oppression' in Fanon, F (ed), *Black Skins, White Masks* (Pluto Books 2008) xv

15 Zembylas, M 'Decolonial Possibilities in South African Higher Education: Reconfiguring Humanising Pedagogies As/With Decolonising Pedagogies' (2018) 38(4) *South African Journal of Education* 1.

16 Youngblood, D 'Multidisciplinarity, Interdisciplinarity, and Bridging Disciplines: A Matter of Process' (2007) 3(2) *Journal of Research Practice* 1.

17 *Ibid* 2.

3. The summary of contributions in this issue

Motseotsile Clement Marumoagae, in the article titled *Artificial Barriers that Prevent Underprivileged Law Graduates from Accessing the Legal Profession*, flags one of the unfortunate legacies of apartheid – the inequality in accessing and practising law. The author highlights the plight of underprivileged graduates, the majority of whom are black graduates seeking to join the legal practice. Inequities still mar the post-university training of law graduates, particularly vocational training. The author makes a recommendation to the newly established Legal Practice Council to ensure that the dictates of social justice guide legal practitioners in South Africa to eradicate barriers that make it difficult for underprivileged law graduates to access the legal profession.

Often, scholarly attention is given to the direct rights of the child, but rarely do we look at the rights of the child as they extend to the caregiver. In the article, *The Right of a Child to Care and the Involvement of the Family Advocate in the Sentencing of a Child's Primary Caregiver*, **Bongani Nkosi** traverses one of the most sensitive issues in the children's protection law – the question of imposing a sentence on the caregiver.

Nkosi amplifies the jurisprudence already championed by the Constitutional Court in the 2008 seminal decision in *S v M*.¹⁸ The effect of the decision is that when sentencing the caregiver, the interest of the child must be considered as one of the prominent factors. After a wide-ranging survey of the law and practice on the subject, the author contends that, in giving the caregiver a custodial sentence, the doctrine of the best interest of the child should be an animating factor.

Melvin Mba, in the article *The Vicissitudes of Constitutional Interpretation in Zambia*, puts the Constitutional Court of Zambia under the spotlight. Mba picks on two of the court's most controversial decisions since its establishment – *Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others*¹⁹ and *Milford Maambo and Others v The People*.²⁰ After a thorough analysis of these two critical decisions of the Constitutional Court, Mba is critical of how the court discharges its mandate as the ultimate repository of the power to interpret the Constitution, and draws on the rich experience in respect of constitutional interpretation in comparable jurisdictions. The author contends that the manner in which the court has discharged its duties in these two cases may have given credence to the already prevalent allegation of gross incompetence.

Madimetja Phakeng untangles a longstanding question in company law – the role of the shareholder during a takeover. *Shareholder Activism and Acting in Concert during Takeovers under the Companies Act 71 of 2008* critically discusses the interaction between shareholder activism and the concept of acting in concert as applied under the takeover provisions of the Companies Act of 2008.²¹ The author argues that by highlighting how the provisions of the on acting in concert seek to strike a balance between shareholder activism and the powers of directors to manage the affairs of the company.

18 2008 (3) SA 232 (CC).

19 2016/CC/0031.

20 2016/CC/R001.

21 Act 71 of 2008.

Finally, the author makes suggestions on how shareholder activists should proceed so as to avoid falling foul of the takeover provisions. Much more importantly, the article argues that takeover laws should not be static but should develop and be adaptable to accommodate new practices, such as the actions of hedge fund activists, who may agitate for better financial performance by regulated companies or changes in the management of companies.

The perennial question of land continues to linger on in many, if not all, African countries. In the article titled *The Political Economy of Land Ownership Rights: Lessons from Nigeria, South Africa and Zimbabwe*, Taiwo Ajala weaves together a discernible pattern throughout Africa where there has been a steady change in landholding since pre-colonial times. The author observes that during pre-colonial time landholding was primarily based on a customary system which, as the article contends, gave families and communities collective ownership and equitable access to land use. However, colonialism disrupted the customary systems, confined land ownership rights to privileged minority groups and established dualistic agrarian systems that discriminated against local populations and impoverished their livelihoods.

Through a comparison between Nigeria, South Africa and Zimbabwe, the author examines an aspect of the land question in Africa; how to adequately achieve equity in access to land while resolving colonial legacies which suppressed indigenous land ownership rights, displaced communal land administration structures and marginalised the poor majority in access to land.

The regulation of the Nigerian petroleum industry has been a subject of intense engagement for a very long time. To streamline the regulation of the sector, the country hatched a new Bill styled Petroleum Industry Governance Bill (PIGB). The Bill has been in the making for a very long time until it was passed by parliament in 2021. In the article titled *An Analysis of the Petroleum Industry Governance Bill in Nigeria: Prospects and Challenges*, Oladiran Akinsola Ayodele gives an in-depth analysis of the ramifications of this newly approved Bill on the country's economy.

The author critiques the Bill and contends that it is fraught with some challenges. The most prominent critique is that the government, through the concerned Minister, still possesses substantial powers over the governance of the sector. For instance, the Minister has pre-emptive power over all petroleum and related products. The Minister may increase the fine imposed by the Bill through regulation. Another critique is that the Bill dispossessed the Ministry of Environment of power over environmental affairs, which is its area of expertise, and gave it to the Nigerian Petroleum Regulatory Commission (NPRC).

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