GUEST EDITORIAL: LOOKING BACK TO LOOK FORWARDS

My father was born in Simon's Town in 1941, during the Second World War – his father, my grandfather, managed the only cinema, which entertained the English sailors stationed there. My father began studying law at UCT in February 1960, less than a month before the Sharpeville massacre and banning of the ANC and PAC, and just a few months before an all-white electorate would vote that the then-Union of South Africa should become a republic. The next year, South Africa was effectively ejected from the Commonwealth, and the last vestiges of the British colony fell away.

In the early 60s the law curriculum began with Latin I, Constitutional History and Law I and Comparative African Government and Law I and ended with Structure and Interpretation of Accounts and Forensic Medicine. There was no choice. It was Professor Ben Beinart's Roman Law II that was the killer course – the hurdle at which many would-be LLB graduates fell. Yet the numbers involved were minute by today's standards – a glance at the photograph of the graduating class of 1964 shows only 24 students, along with a handful of professors. Only one member of the class was female; only one was black. Nevertheless, it was a time of heightened political awareness among UCT students, far removed as most were from the frontlines of the armed struggle. The little patch of grass outside the Arts Block on Upper Campus was nicknamed Freedom Square, and students often gathered there to protest the onward march of grand apartheid and the increasing erosion of academic freedom. This seems to have led to a culture of protest – or at least inquiry – within the classroom too. Solly Leeman, a graduate of Stellenbosch who taught there for several years before coming to UCT in the early 60s, was heard to remark that at Stellenbosch you simply taught students; at UCT, you had to convince them.

Things move quickly in South Africa. The year of my father's graduation – and incidentally, the year in which he contributed an article to the very first edition of *Responsa Meridiana* – was also the year in which the Rivonia Trial concluded and Nelson Mandela began serving his life sentence. The armed struggle intensified, and global attitudes hardened; international support for economic sanctions increased, British universities initiated an academic boycott, and in 1964 South Africa was suspended from the Olympic Games. But the world itself was changing too. In my father's final year at UCT, students came to lectures in a sports jacket and tie. Indeed, Professor Tom Price expelled my father's classmate Roger Jowell (later Sir Roger), a prominent anti-apartheid activist, for coming to a lecture unshaven and tie-less. When my father returned to UCT seven years later as a young advocate to give some lectures in comparative law, the campus looked entirely different: he remembers hippies in t-shirts bearing indecent slogans. The 1960s had arrived in South Africa.

My own law studies began in 1994, which was of course the year of South Africa's first democratic election and the beginning of Nelson Mandela's presidency. The LLB curriculum looked remarkably similar to the one my father had followed, although it was now possible to choose between Roman Law II and African Customary Law. Like LLB students at UCT today, I was fortunate to be taught by some of the drafters of the Constitution. The difference, of course, is that they were then in the midst of drafting it. In fact, for much of my degree I

studied the Interim Constitution of 1993; it was only in the last two years of my LLB that the Final Constitution (as we referred to it) was in force, and there was almost no case law dealing with its impact, although I did write an article for *Responsa* in 1997 dealing with the Constitutionality of assisted suicide. Apart from the obvious – the nature of Constitutional review, the implications of section 8 and section 39(2), and the interpretation of the individual rights set out in Chapter II – I feel this lack particularly in the area of administrative law, which was in 1998 almost entirely pre-Constitutional. All that Hugh Corder could do was to take us through section 33 and explain what it might come to mean; I remain embarrassingly ignorant of PAJA. I was also taught Delict by Anton Fagan in his very first year as a lecturer in 1997. We called it 'Delict with a Difference' – thus I am not completely insensitive to the experience of studying Delict at UCT today.

After almost twenty years at the Cape Bar, and a relatively short stint on the Cape High Court, my father was appointed to the then-Appellate Division with effect from 1 January 1996 by Nelson Mandela. Having a parent on the Bench is not always easy for a law student, although of course it has its advantages. More recently, as an academic lawyer, I have had to grapple with some of my father's judgments, in particular that in *Sea Harvest Corporation v Duncan Dock Cold Storage*. Perhaps not coincidentally, the nature of the test for *culpa* in modern South African law is a question that interests me profoundly, and I hope to make it the focus of my next major research project.

Having served on the Supreme Court of Appeal until the end of 2008, my father went on to serve as a judge of appeal in Lesotho for several years, and has recently been appointed President of the Court of Appeal there. I, on the other hand, was fortunate enough to win a scholarship which permitted me to do the BCL at Oxford in 1999-2000, and after that, a series of research degrees which culminated in a doctorate and, ultimately, an academic job. But I never felt truly at home in England or the English legal system, and so I returned to South Africa and UCT, taking up a permanent position at the Faculty in May 2009. Thus it turned out that on 6 December 2013 I stood with many other UCT staff and students on Jamieson Steps at a memorial service for Nelson Mandela who had died the day before. I had thought that I would spend that day far away from South Africa; I was glad to spend it here, at UCT.

My subject is, 'Looking back to look forwards'. In some ways that is an absurdly easy brief: it is hardly necessary to point out what has changed at UCT since 1964. Most obviously, the student body has been transformed out of all recognition, in terms of both race and gender. That is wonderful to see for those who remember how things once were. More slowly, the profile of the academic staff is changing too. It is cause for great celebration that the Law Faculty's first black South African female professor recently gave her inaugural lecture. However, it is vital also to notice what has not changed, and what still needs to change. All lawyers face an unavoidable dilemma: law, even in its most radical form, is inherently a conservative discipline, in that it looks backwards, to cases, statutory enactments, and custom. Decision-making which lacks that retrospective quality, at least in some degree, is no longer distinctively legal. Yet the transformation of law and legal culture in accordance with the values of the Constitution and – more broadly – the demands of social justice is the great

challenge which South African lawyers and law teachers now face. As I see it, the task of private lawyers in particular is the rationalisation and normative justification of a body of rules which even now continues to be dominated to an astonishing degree by the forms of action of the uncodified civil law. I realise increasingly that it will fall to the next generation of private lawyers to rethink this inherited common law. Perhaps some of that rethinking will take place in the context of *Responsa Meridiana*.

Helen Scott
Professor, University of Cape Town

Douglas Scott
Judge, Supreme Court of Appeal