
LSE-UCT July School 2016

Justice and Transparency in Africa

Course code: LCS-LL301

Course Outline and Reading List

COURSE SUMMARY

Africa is making huge strides, in all areas: economic growth, peace and stability, governance, and in the area of constitutionalism and rule of law. Yet, the progress is precarious, with many a setback. There are still enormous challenges to be addressed that encompass, region to region, a large number of issues that imperil constitutional democracy, including abuses of executive power and electoral laws; threats to judicial independence; weaknesses in the legal protection of minorities; overlap between religion and state; over-bearing secrecy and a lack of access to information; a lack of independence in key institutions of public office and constitutional governance. This course provides an opportunity to examine some of these issues, within the conceptual framework of the 'rule of law' (broadly defined), and through the lens of a number of case studies – both country or regional (eg South Africa or Southern/East Africa) and thematic (eg Transparency/the Right of Access to Information). The course is convened and co-convened by the leadership and senior researchers of the UCT research unit whose primary programme is the new African Justice and Transparency Initiative (AJTI). Hence, it draws heavily on the primary research that is being conducted by the unit on issues such as judicial appointments in comparative African perspective and the law & the internet in Africa. The course also includes a number of 'outside' experts and will use a highly inter-active, facilitated dialogue approach to learning. Although primarily a law course, the approach is inter-disciplinary, noting that the rule of law is now one of the new sustainable development goals that were launched in September 2015 to replace the Millennium Development Goals (MDGs). Thus, the course places development in the rule of law in Africa within a broader development and governance framework, drawing on insights and perspectives from political economy and sustainability.

COURSE STRUCTURE

Each day is divided into three sessions: two morning sessions (*Session I* and *II* on the outline) separated by a tea break; and an afternoon session (*Session III*) that may be a tutorial, practical or other activity.

PREREQUISITES

None, other than an active interest in the future of justice and transparency in Africa. Previous study or practice of law would be an advantage but is not essential.

PRESCRIBED READINGS

Prescribed readings will be assigned for each session. Required and recommended readings will be provided in due course, ahead of the start of the programme. Readings will be made available on the course Vula (learning platform) site.

ASSESSMENT

The course will include two elements for learning and evaluation: (i) making a presentation to the class (40%); and (ii) writing an exam (60%). All students will have the opportunity to participate in a panel debate or to summarise a paper to the class. Everyone will write a final exam on the last day of the course.

INSTRUCTORS

Course Convenor & Principal Instructor:

Professor Richard Calland, *Associate Professor, Department of Public Law; Director of Democratic Governance & Rights Unit, UCT.*

A/Prof Richard Calland has for almost twenty years been working in the fields of democratic governance and sustainable development in South Africa and beyond. Based at the University of Cape Town (UCT), where he is Associate Professor in Public Law, Calland specializes in freedom of information law and serves as a member of the Independent Access to Information Appeals Board of the World Bank. At UCT he also heads its Democratic Governance & Rights Unit and its new programme, the African Justice & Transparency Initiative (AJTI), which was launched in early 2015. Before moving to South Africa in 1994, Calland practiced law for seven years at the London Bar. From 1995-2011, he headed the Political Information & Monitoring Service and then the Economic Governance programme at Idasa - Africa's leading democracy Institute. A senior associate of the University of Cambridge Institute for Sustainability Leadership, he is also a founding member of the Council for the Advancement of the South African Constitution and with others he also founded the Parliamentary Monitoring Group (PMG) and the Open Democracy Advice Centre (ODAC). He is a regular commentator in the media and his political column has been carried in the Mail & Guardian newspaper since 2001. Calland's latest book 'The Zuma Years: South Africa's Changing Face of Power' was published in August 2013 by Zebra Press.

Co-Convenor:

Justice Oagile Dingake – Botswana High Court

Oagile Dingake has served as a judge of the High Court of Botswana since 2005 and as a judge of the Residual Special Court for Sierra Leone since 2013. He also served as a judge of the Industrial Court of Botswana from 2002 to 2005. As a judge of the Industrial Court he facilitated at various judge seminars on International Labour Standards. Prior to his appointment as a judge Dingake lectured in the Faculty of Law at the University of Botswana (1993 to 2000). He continues to pursue his interest in academic teaching as an honorary professor of Public Law at the University of Cape Town. Oagile Dingake holds a Ph.D. from the University of Cape Town, an LL.M. from the University of London and an LL.B. from the University of Botswana. He has published three books: *Constitutionalism and the Rule of Law in Botswana*, *Individual Labour Law in Botswana* and *Collective Labour Law in Botswana*.

Contributors:

Judge Dennis Davis, Justice of the Cape High Court & Judge President of the Competition Appeal Court, South Africa

Christopher Oxtoby, Senior Researcher: Democratic Governance & Rights Unit, UCT

Tabeth Masengu, Researcher: Democratic Governance & Rights Unit, UCT

A/Prof Aninka Claasens, Director: Land & Accountability Research Centre, UCT

Mukelani Dimba, Executive Director: Open Democracy Advice Centre, Cape Town & Co-Chair, Civil Society Sector, Open Government Partnership

Dr. Colin Darch, Senior Associate, Democratic Governance & Rights Unit, UCT and Co-Author of Freedom of Information & the Developing World.

Prof Danwood Chirwa, Faculty of Law, UCT

Prof Halton Cheadle, Faculty of Law, UCT

Dr Olutoyin Badejogbin, Programme Manager, African Legal Information Institute

Mariya Badeva, Head of African Legal Information, Werksmans Attorneys, Johannesburg.

COURSE OUTLINE

Date	Session & Instructor	Purpose of the Session: Critical Thinking Questions
Monday 27 June	<p>Session 1.1: The Rule of Law: Conceptual Issues [Calland with Justice Key Dingake]</p> <p>Session 1.2: Judicial Independence & Separation of Powers – case studies from Africa [Calland with Justice Key Dingake]</p> <p>Session 1.3: Rule of Law & Sustainable Economic Development: Relevant, Necessary or Wishful Thinking? [Calland]</p>	<p>The Rule of Law is often viewed as a traditional Western Liberal Democratic concept or principle. As Africa begins to forge its own governance course, it is important to think critically about the concepts of justice and transparency and to ask difficult questions, such as: What are the legal and political foundations of the rule of law? Why is justice and transparency important for modern, African democracy? And, moreover, now that the rule of law is part of the Sustainable Development Goals (SDGs), what is the relationship between the rule of law and sustainable economic development?</p>
Tuesday 28 June	<p>Session 2.1: The State of the Rule of Law in Africa [Calland]</p> <p>Session 2.2: The State of Constitution-building in Africa, with Special Reference to electoral laws; more particularly the jurisprudence of presidential election petitions [Dingake]</p> <p>Session 2.3: Building a Problem Statement and a Theory of Change for Justice & Transparency in Africa: Facilitated Small Group Work</p>	<p>What progress has been made in strengthening the rule of law in Africa in recent years? What is the state of the art? Are things improving in a substantive sense, or is it 'fig-leaving'? With the 'globalisation' of constitutionalism, do the new constitutions of Africa represent more than a weak form of mimicry induced by the Washington consensus pressure of international organisations, or do they have deeper, more authentic legitimacy? What will make the new constitutions endure? Can we speak of 'African Constitutionalism'?</p> <p><u>Electoral Laws</u></p> <p>The matter of electoral laws as part of creating and consolidating constitutional democracy continues to be a Cinderella subject in</p>

		<p>our constitutional discourse.</p> <p>There is a need to interrogate jurisprudence on the determination of presidential election petitions in Africa. Is it a mere coincidence that no presidential petition in Africa has ever succeeded or some other appropriate formulation? The courts use "substantial effect test" in which violation of the law does not translate into elections being declared a nullity because the courts ask whether the violation had any substantial effect on the results. Some jurists argue that substantial violation of the law that undermines the integrity of the electoral process irrespective of whether it has substantial effect on the results is sufficient.</p>
<p>Wednesday</p> <p>29 June</p>	<p>Session 3.1:</p> <p>Has the South African Constitutional Court Over-reached? A Case Study on the limits and possibilities of Separation of Powers [Calland, with Christopher Oxtoby]</p> <p>Session 3.2:</p> <p>Falls the Shadow: the Gap between the reality and the promise of the South African Constitution [Calland & Aninka Claasens]</p> <p>Session 3.3:</p> <p>Critical Thinking Exercise on the Political Economy of Socio-Economic Rights [Calland & Aninka Claasens]</p>	<p>South Africa's 1997 Constitution is internationally much lauded by academics and practitioners alike. But it is now the subject of considerable 'fetishism': from those who see the constitution as a silver bullet to solve all of South Africa's ills; and from those who blame it for a lack of economic and social transformation. Where does the truth lie? What would a more reasonable assessment of SA's progress in implementing its constitutional settlement find? With particular attention to the ground breaking socio-economic rights contained with SA's bill of rights, the sessions invite an analysis of the relationship between (constitutional) law and political economy, with special reference to the vexed issues of land ownership and reform, and mining and natural resources.</p>
<p>Thursday</p> <p>30 June</p>	<p>Session 4.1:</p> <p>The Rule of Law & Socio-economic context (with special</p>	<p>Building on sessions 3.2 & 3.3, Session 4 takes a deeper dive into the</p>

	<p>reference to gender equality) [Calland & Prof Sandy Liebenberg]</p> <p>Session 4.2: The Rule of Law & Political Economy - with special reference to the case of Walmart and the SA Competition Appeal Court [Calland with Judge Dennis Davis]</p> <p>Session 4.3: Re-examining and defining our problem statement and theory of change</p>	<p>relationship between justice and transparency and the socio-economic and political economy context in which the law has to operate in Africa, leading to further refinement of the 'problem statement' and 'theory of change' developed earlier, in session 2.3. The purpose is to permit the delegates to develop their own model of understanding relevant to them in their field of practice.</p>
<p>Friday 1 July</p>	<p>Session 5.1: The independence of the Judiciary [Dingake]</p>	<p>How important is the judicial independence to justice and transparency in Africa? What are the trends – is there cause for optimism or pessimism? With particular reference to the appointment, removal and accountability of judges, and the use of courts to protect vulnerable groups such as women, persons with disabilities, children and sexual minorities, a series of case studies that illuminate progress in advancing judicial independence and human rights in Africa.</p>
<p>Monday 4 July</p>	<p>Session 6.1: Judicial Governance in Africa: Judicial Appointment Process in Comparative Perspective [Oxtoby & Masengu]</p> <p>Session 6.2: The Appointments Process in South Africa: A Critical Assessment of the Performance of the Judicial Service Commission [Oxtoby & Masengu]</p>	<p>Drawing on fresh comparative research, session will encompass questions issues such as:</p> <p>What appointment systems are used in Africa?</p> <p>Is there a JSC or equivalent institution?</p> <p>Does it conduct its proceedings in public?</p> <p>If not, are there alternative ways in which it can be monitored?</p> <p>Are candidates interviewed (publically or privately) for judicial vacancies, or is</p>

	<p>Session 6.3:</p> <p>Designing an 'ideal' judicial appointments process – small group facilitated exercise</p>	<p>selection done in another way?</p> <p>What is the gender composition of the bench?</p> <p>Is there a recognition, even if only lip service is paid to it, of the need for gender transformation? Or does the engagement need to start a step before that in South Africa, and just begin to make the argument that gender balance in the judiciary is important?</p>
<p>Tuesday</p> <p>5 July</p>	<p>Session 7.1:</p> <p>Open Government: the Right of Access to Information in Africa – the state of the art</p> <p>[Calland, with Mukelani Dimba]</p> <p>Session 7.2:</p> <p>Access to information in Africa in comparative sociological and political theoretical perspective</p> <p>[Calland with Colin Darch]</p> <p>Session 7.3:</p> <p>Formulating an ATI request: Facilitated small group exercise</p>	<p>Africa is perceived as a 'laggard' in comparison with the huge advances that have been made in the law and practice of access to information around the world. Is this a fair assessment? If so, why not? If Africa is lagging, what are the reasons for it – are they cultural, political, sociological?</p>
<p>Wednesday</p> <p>6 July</p>	<p>Session 8.1:</p> <p>Administrative Justice: the right to just administrative action – the state of the art in Africa</p> <p>[Professor Danwood Chirwa]</p> <p>Session 8.2:</p> <p>The right to just administrative action in South Africa: a Case Study</p> <p>[Calland with Professor Halton Cheadle]</p> <p>Session 8.3:</p>	<p>Administrative justice is the other side of the Open Government coin. Session 8 examines progress in recognising and executing a right to administrative justice in Africa and, through a country case study (SA), considers the opportunities and constraints.</p>

	Facilitated small group exercise: the role of administrative justice in strengthening democratic accountability	
Thursday 7 July	<p>Session 9.1: Free Access to Law in Africa – state of the art [Olutoyin Badejogbin]</p> <p>Session 9.2: Law & the Internet in Africa: opportunities and constraints [Badejogbin & Mariya Badeva]</p> <p>Session 9.3: Facilitated exercise on ICT and the Law in Africa [Calland & Badejogbin]</p>	There is a growing movement around the world that challenges the corporatisation of knowledge. Legal materials, and especially law reports, are the essential ‘daily bread’ of legal academic endeavour as well as legal practice. Session 9 explores the state of free access to law in Africa (or otherwise) and considers who the ‘ICT revolution’ can support the rule of law in Africa, drawing on the work of the legal information institutes such as Saflii and those supported by the AfricanLii programme.
Friday 8 July	<p>10.1 Revision & Consultation Time</p> <p>10.2 Exam: 14:30 – 16:30</p>	