

ANNUAL REPORT



University of the Western Cape

Community Law Centre

1994

ANNUAL REPORT
OF THE
COMMUNITY LAW CENTRE

UNIVERSITY OF THE WESTERN CAPE

1994

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A. AN OVERVIEW OF 1994

1. BACKGROUND

The Community Law Centre was reconstituted in 1990 and under the direction of its director, Adv A M (Dullah) Omar, was to play an important role in the realization of a new constitutional order. Adv Omar established an important research institute which was influential in the multi-party negotiations for a political settlement in this country. The Centre embarked on a programme of constitution-making. The contents of the Constitution and Bill of Rights - especially regarding the structures of government, the powers of the regions, the constitutional court, electoral systems, and the reincorporation of the homelands - were to a large degree influenced by the presentation, research results, conferences, workshops and study tours undertaken by the Centre. This was done through the tireless work of Adv Omar, deputy director Bulelani Ngcuka and senior researchers Dr Zola Skweyiya and Ms Brigitte Mabandla.

Ms Mabandla initiated the Children's Rights Research and Advocacy Project. A major conference on the rights of the child was held and the Centre contributed to the inclusion in the interim Constitution of a special section on children's rights.

Ms Mabandla also established a gender project including a resource centre.

2. DEPARTURE TO PARLIAMENT

These staff members also held high office in political organizations and when the first democratic election was held in April 1994 all four staff members were included on the election list of the African National Congress. All four were elected to Parliament; Adv Omar, Dr Skweyiya and Ms Mabandla to the National Assembly and Mr Ngcuka to the Senate. All four were subsequently appointed to high office in Parliament and in government. Adv Omar was appointed Minister of Justice and Dr Skweyiya Minister of State Administration. Mr Ngcuka was elected chief whip of the Senate while Ms Mabandla was elected to the Constitutional Committee of the Constitutional Assembly.

Ms Sunita Dalla, the Centre's secretary for the past five years, also left in June and took up a position in the Ministry of Justice.

Adv Omar, Mr Ngcuka, Dr Skweyiya and Ms Mabandla have done the University proud, not only for the positions that they now occupy but for the work they have done in the Community Law Centre. Within a very short time they placed the Centre on the map as the pre-eminent centre where the conceptualization of the new democratic legal order was taking place.

At the last annual general meeting in February 1994, Adv Omar expressed the desire to continue their association with the Centre. It is indeed hoped that the Centre will be privileged to draw on their expertise and experience in the future, and, in return, that it may also be of assistance to them in their new positions.

Their departure left the Centre depleted and a new complement of staff had to be appointed and a new role forged.

3. DEFINING A ROLE IN A NEW DISPENSATION

In terms of the electoral law, all persons on election lists in the employ of state institutions had to take leave from the time the election lists were published and the four members were on leave as from the beginning of March 1994. Prof Nico Steytler was appointed as acting director from March 1994 to the end of the year. With the departure of the core members, the Centre was faced with the difficult task of defining a new role within the new democratic dispensation and rebuilding a new complement of researchers.

3.1 FOCUS OF ACTIVITIES

A new role for the Centre was soon apparent. The Centre under the direction of Adv Omar dealt with constitution-making. This process is, however, still incomplete. The new constitution and particularly the bill of rights require interpretation. Moreover the final constitution has to be written within two years. The focus of the Centre's activities should thus be, as in the past, to play a meaningful role in the shaping of the new constitutional legal order. This can be done through critical and innovative research on the interim Constitution and through a contribution to the drafting of the final constitution.

The primary focus of the Centre's activities has continued to be research in the three areas in which the Centre has developed expertise and resources over the years. The areas are (a) constitutional law and human rights, (b) gender studies, and (c) children's rights. In each of these areas a number of distinct research projects were conducted.

3.2 RESEARCH AND COMMUNITY OUTREACH

In the preceding four years the focus of activities of the Centre was on policy formulation in the area of the emerging democratic constitutional dispensation. Policy was developed through research and the holding of a number of influential conferences. The Centre has continued with this approach; priority was given to research and policy formulation. This is also where there is the greatest need. The reconstruction of the legal order requires extensive, rigorous and innovative research. The research will be policy-orientated, i.e. dealing with issues of practical and imme-

diate importance. Within the broader context of universities in South Africa, it is also important that the research capacity of historically black universities should be further developed in the service of the reconstruction and development of South Africa. As the Centre has a small complement of researchers, assistance has also been sought from colleagues in the Law Faculty of UWC and other universities through the awarding of research grants.

Research assistance will thus be given (if and when requested) to any state institution or organization operating in the area of focus.

In the past community outreach was taken place in two ways: first, advice and assistance were given on an ad hoc basis whenever the need arose. Second, community organizations were always involved in conferences and deliberations. The Centre is committed to continuing this policy.

B. PERSONNEL.....

1. STAFF MEMBERS

Director:

Adv A M Omar (until April)
Prof Nico Steytler (acting from March)

Researchers:

Mr Bulelani Ngcuka (until April)
Dr Zola Skweyiya (until April)
Ms Brigitte Mabandla (until April)
Ms Charlotte McClain
Ms Fayeeza Kathree (from June)
Ms Julia Sloth-Nielsen (from August)
Ms Sandra Liebenberg (from November)

Secretary:

Ms Sunita Dalla (until June)
Ms Celia Jack (until September)

Office Administrator:

Ms Natasha Emmett (from October)

Youth Advocates:

Ms Shireen Said
Ms Alethea Percival
Ms Violet Abrahams
Ms Jenny Eksteen (until July)
Ms Zoelpha Carr (until June)

Student assistants:

Mr Hanief Ebrahim (until July)
Mr Mzwai Mzwandile

Student youth advocates:

Mr Martin Mackier
Ms Magdalene Tserere
Ms Parvathi Pather
Mr Mbulelo Bikwani
Mr Adnaan Jacobs
Ms Lulama Mqongozi
Mr Brenton Josephs
Mr Refaat Gierdien
Mr Danzyl van Zyl

2. NEW APPOINTMENTS FOR 1995

All the vacant posts were advertised during the year. The University appointment procedures were followed and the following new appointments were made during 1994 with effect from 1 January 1995:

Director: Professor Nico Steytler

Senior Researcher Constitutional Law/Human Rights:
Dr Seggie Nadasen (subject to acceptance)

Senior Researcher Children's Rights: Ms Julia Sloth-Nielsen

Researcher Gender Studies: Ms Sandra Liebenberg

C. RESEARCH PROJECTS

The research projects of the Centre focussed on three broad areas: (a) constitutional law and human rights; (b) gender and law and (c) children's rights.

1 CONSTITUTIONAL LAW AND HUMAN RIGHTS

1.1 THE NEW CONSTITUTIONAL ORDER

1.1.1 OPEN GOVERNMENT

The Centre, together with the Lawyers' Committee for Civil Rights under Law, held in February an international Conference on Ensuring Government Accountability, Accessibility and Transparency in the New South Africa.

1.1.2 CUSTOMARY LAW AND THE CONSTITUTION

Customary law may conflict with the interim Constitution - in particular the chapter on fundamental rights - on a number of important issues, most notably the position of women and children. Apart from a seminar on the rights of the children, discussed below, the Centre sought to promote research in this area.

1.1.2.1 WORKSHOP ON THE FUTURE OF CUSTOMARY LAW UNDER THE CONSTITUTION

A workshop was held inviting all experts working in the field of customary law to discuss the future of customary law under the interim Constitution and to map out further research initiatives. The following experts participated:

Prof T Nhlapo (UCT)
Prof T Bennett (UCT)
Dr H Himongo (UCT)
Prof Y Mokgoro (HSRC)
Prof JC Bekker (Vista)
Prof S Maitufi (Vista)
Ms M Mamashela (National University of Lesotho)
Ms P Madonsela (CALs, Wits)
Prof F A de Villiers (UWC)

1.1.2.2 RESEARCH

The Centre commissioned Prof T H Bennett (UCT) to do a comprehensive study on the impact which the interim Constitution may have on customary law. The research will be completed in 1995.

1.1.3 RETROSPECTIVE JUSTICE

One of the elements in the reconciliation process in South Africa is redressing the injustices of the apartheid era. This process has to take place within the framework of the interim Constitution. The legal regulation of the process calls for close scrutiny.

1.1.3.1 RESEARCH

In the light of the commonalities between the experience of Germany and South Africa in coming to terms with their past, a joint research project with the Humboldt University in Berlin was launched. The Centre commissioned research on the following issues: Firstly, the redistribution of land and the land court which will deal with land claims of the victims of apartheid (Prof John Murphy, UWC). Secondly, the punishment of state officials and politically motivated offenders (Prof Medard Rwelamira, UWC). Thirdly, restitution for victims of political trials and state terror (Prof Lovell Fernandez, UWC). Fourthly, the need for restructuring the civil service and the judiciary.

The research was sponsored by the Frederick Ebert Stiftung.

1.1.3.2 VISIT TO CHILE

In furtherance of research on the drafting of the Truth and Reconciliation Bill, Prof Medard Rwelamira led a research delegation of four persons (Mr Vusi Pikoli (Ministry of Justice), Ms Tiny Maya (BLA) and Mr Lex Mpati (NADEL)) to Chile, where they met state officials who dealt with the Chilean counterpart of the South African Truth and Reconciliation Commission.

This visit was sponsored by USAID.

1.2 INTERPRETING THE BILL OF RIGHTS

1.2.1. CRIMINAL JUSTICE

In practice a Bill of Rights will at first have the greatest impact on criminal justice. The South African Bill of Rights compels the Constitutional Court to consider international law and comparative foreign case law. The jurisprudence of the following jurisdictions may prove to be the most influential: the United States of America with its highly developed jurisprudence based on an archaic Bill of Rights; Canada with a modern Charter of Fundamental Rights and Freedoms functioning within the English common law tradition; and the European Court of Human Rights, combining both the common law and continental traditions.

Prof Steytler commenced the writing of a commentary on the criminal procedure provisions of the Constitution. He has also lectured a master's course on the subject and has given a number of lectures on specific aspects of the topic.

1.2.2. RIGHT TO LEGAL AID

The Centre was requested by the Legal Resources Centre in Johannesburg to conduct a feasibility study on the right to legal aid. The report was intended to be submitted to the Constitutional Court when the right to legal representation is considered. Prof Steytler and Ms Sloth-Nielsen drafted a report on the feasibility of legal aid for all accused persons who may face actual imprisonment.

1.2.3. LIMITATION CLAUSE

Central to the interpretation of any right in the Bill of Rights stands the limitation clause of s 33(1). Because of its importance the Centre commissioned Dr JR de Ville (UWC) to research an appropriate interpretation of the section. The research was completed and published in *SA Public Law* in 1994.

1.3 TRANSFORMATION OF THE ADMINISTRATION OF JUSTICE

1.3.1 CONSULTATIVE LEGAL FORUM

The Centre participated in the planning of the first Consultative Legal Forum convened by the Minister of Justice on 11 to 13 November. The Forum was the first of a series of meetings in which all the major role players in the administration of justice participated in conveying to the Ministry of Justice the need for transformation and how it should be effected. The Centre was represented at the pre-planning meeting of major role players and assisted with the drafting of the programme of this major event. At the Legal Forum, Professor Steytler presented a paper in the commission on legal education on the ladder system of legal education and practice. In the plenary session he presented a paper on the constitutional framework in which the law of bail could be reformed.

1.3.2. ACCOUNTABILITY OF THE ATTORNEYS-GENERAL

The Centre conducted research on the present position of the attorneys-general and their accountability towards Parliament and the Minister of Justice. The lack of accountability and uniformity was highlighted and a memorandum to this effect has been forwarded to the Minister of Justice.

1.4 INTERNATIONAL HUMAN RIGHTS

The Ministry of Justice, the Raoul Wallenberg Institute for Human and Humanitarian Law and the Centre, presented on 10 December - International Human Rights Day - a two day conference on international human rights treaties and the implications of their ratification for South Africa. Members of Parliament, the judiciary, the magistracy, the attorney-general's office, foreign affairs, the legal profession and para-legals attended.

Three staff members, Ms Sloth-Nielsen, Ms Kathrie and Ms Liebenberg gave papers, while Prof Steytler gave an opening address and chaired the closing panel discussion.

The following persons also gave papers:

Prof Goran Milander, Director of the Raoul Wallenberg Institute;
Prof Drimitrijivic, University of Belgrado
Prof Medard Rwelamira (UWC)
Prof Gerhard Erasmus (US)
Ms Raylene Keightly (UCT)

1.5 TOWARDS THE FINAL CONSTITUTION

1.5.1. ELECTORAL LAW

The Centre has played an important role in the formulation of the present electoral system. At a conference of the Centre held in August 1990, the idea of regional lists and national lists for the National Assembly was first put forward. That idea was eventually incorporated in the Electoral Law of 1993.

The next election in 1999 may demand a different system. This called for a thorough assessment of the present system of proportional representation through the list system. While the list system ensures that all political opinions are accurately reflected in parliament, the question of accountability at local and community level needs to be reconsidered.

The Centre has commissioned research on two questions: first, what has been the impact of the present proportional representation system on the conduct of election campaigns and thereafter (Mr Pierre de Vos, UWC), and secondly, how can the proportional representation system be adapted to ensure accountability to the electorate (Dr JR de Ville, UWC). The research has been completed and will be presented to the relevant Theme Committee of the Constitutional Assembly in 1995.

The Frederich Ebert Stiftung has sponsored this project.

1.6 DEMOCRACY, HUMAN RIGHTS AND ECONOMIC DEVELOPMENT

A constitutional democracy has been established in South Africa. Similar developments are also evident in countries in southern and eastern Africa. The survival of the emerging democracies and human rights regimes will much depend on economic development of the respective countries and the region as a whole. In this context it is imperative that research should be conducted on the relationship between democratic governance, the protection of human rights and economic development.

A grant has been secured from USAID to hold a major international conference on this topic in 1995 and to initiate research in the area.

2. GENDER AND LAW

2.1 OVERVIEW OF GENDER PROJECT DURING ITS PERIOD OF TRANSITION

Ms Mabandla was the co-ordinator of the Centre's Gender Research Project until her election to Parliament. Following her departure, the Gender Project was without a co-ordinator for a period of two months. In June 1994, Ms Fayeeza Kathree was appointed as acting co-ordinator of the project. In July Ms Kathree was appointed as a full-time staff member in the Department of Public Law at UWC. As such, she was not able to work full-time on the Gender Project. In October 1994, Sandy Liebenberg was appointed as the full-time co-ordinator and researcher in the Gender Project. The Project is furthermore in the process of appointing another full-time researcher.

2.2 TOWARDS THE FINAL CONSTITUTION

One of the main objectives of the Gender Project is to undertake research and policy advocacy in the area of constitutionalizing rights for women that will best advance their legal, political and social status in South Africa. In the process leading up to the adoption of the interim Constitution this formed a major part of the work of the Project under the leadership of Ms Mabandla.

Ms Mabandla produced a critique from a feminist perspective of contributions to the debate concerning the future South African Bill of Rights. Much of this research was used as a basis for making submissions to the Multi-Party Negotiating Forum which led to the adoption of the Interim Constitution. This research was also transmitted to other organisations such as the ANC Women's League, the Women's National Coalition and the National Association of Democratic Lawyer's Gender Desk who were organising to ensure that women's rights were promoted in the interim Constitution. A number of workshops and seminars were arranged by the Project during this period.

In the period subsequent to the elections, the process of drafting the final South African Constitution got under way. Women now have a unique opportunity to strengthen the protection of their rights in the final Constitution. The following are the areas which the Project has identified as critical areas of intervention for women in the shaping of the final Constitution:

- * The strengthening of the clause relating to equality and affirmative action in favour of women;
- * To ensure that the equal protection of the Bill of Rights is extended to women who are living under religious and customary laws in South Africa;
- * The inclusion of a right to reproductive choice for women;

- * The integration of social and economic rights in the Constitution;
- * The inclusion of a clause in the Bill of Rights placing a positive duty on the State to take all necessary measures to combat violence against women;
- * The creation of appropriate and effective national machinery to ensure that the rights of women are promoted and protected.

Having identified these areas, preparations commenced on the holding of a major Conference entitled, Towards the Final Constitution, A Critique of the Interim Constitution from a Gender Perspective and the Way Forward. This Conference was held in Cape Town from 27 to 29 January 1995. The purpose of the Conference was to engage international and national NGO's, lawyers, and parliamentarians in a process of debating issues and proposing solutions with strategic implications for endorsing women's rights in the final Constitution. The papers presented at the Conference by a range of international and local speakers will be published and will constitute a valuable resource in the constitution-drafting process.

2.3 CUSTOM AND RELIGION

A special area of focus of the Gender Project has been the position of women living under customary and religious laws in South Africa. This work was a continuation of the Conference organised by Ms Mabandla held at UWC in May 1993 entitled, Custom and Religion in a non-racial and non-sexist South Africa. Special research was commissioned by the Project on the effect of the recognition of Muslim Personal Law on the status of Muslim women particularly in relation to the guarantees of equality before the law in the Bill of Rights. A comprehensive paper on this topic was produced by Advocate Najma Moosa of the UWC Law Faculty entitled, The Interim Constitution and Muslim Personal Law: Whither South African Muslim Women? This paper was presented at the Conference referred to above, and will inform the submissions of various organisations to the Constitutional Assembly.

2.4 PREPARATIONS FOR UN CONFERENCE ON WOMEN TO BE HELD IN BEIJING, AUGUST TO SEPTEMBER 1995

During her period as acting co-ordinator of the Project, Ms Kathree represented the Centre at a number of African preparatory conferences and workshops for the Beijing Conference. A paper was presented by Ms Kathree on "The Legal Position of Women in South Africa" at the Annual General Meeting of WILDAF (Women, Law and Development in Africa) held in Harare in July 1994. A report was also presented at the WILDAF Consultative Process in September 1994 on preparations being made by South African women towards the Regional Conference

on Women in Dakar, Senegal, and the Beijing Conference. Ms Kathree presented a paper at this meeting on "The Gender Implications of the Interim Constitution." Research was also undertaken on comparative Bills of Rights in Africa and its application to women.

In November 1994 the Gender Project was represented at a Conference in Malaysia organised by the Institute of Women, Law and Development (Washington, DC) entitled, "From Basic Needs to Basic Rights". This Conference focused on the critical importance of economic and social rights for women. The Gender Project will share the perspectives and material presented at this Conference with women's organisations in South Africa to assist them both in their preparations for the Beijing Conference, and in lobbying for the inclusion of social and economic rights in the final Constitution.

2.5 INTERNATIONAL HUMAN RIGHTS LAW

Research has been conducted in the area of international human rights law and its relevance to the advancement of women in South Africa, commencing with the UN Convention on the Elimination of All Forms of Discrimination Against Women of 1979. Ms Kathree presented a paper at the international conference on International Human Rights Treaties and their Implications for South Africa (see C.1.4 above) on the Convention.

2.6 FUTURE DIRECTION OF THE GENDER PROJECT

The major focus of the Project at least over the next year will be to strengthen the position of women in the final Constitution. This will involve continuing research in the area of women and the law, feminist legal theory and constitutionalism. It will also involve working in collaboration with other educational and research initiatives as well as non-governmental organisations in the field of women's rights. Close links will also be maintained with the women's caucus in Parliament.

One of the long terms objectives of the Project is to build up a substantial body of research in the following two areas:

- * social and economic rights and the right to development as it impacts on women in South Africa;
- * the legal status of women living under customary and religious laws in South Africa.

This research will focus closely on recent developments in the area of international human rights law.

The research component of the Project will be accompanied by a systematic collection of materials relating to women and the law which will form the basis of a comprehensive resource centre.

This Centre will be open for reference by women's organisations and will be used to run educational courses and workshops relating to women's rights. It is hoped that this latter objective will be achieved in collaboration with other Departments and Units at UWC working in the area of gender.

3. CHILDREN'S RIGHTS AND ADVOCACY

3.1 CUSTOMARY LAW AND CHILDREN'S RIGHTS

An international seminar on "The Rights of a Child to a Secure Family Life" was held from 25 to 27 March 1994 with the financial support of Radda Barnen. The focus was on the fundamental rights of the child under the interim Constitution and the position of children under customary law. Specific aspects that were dealt with were: guardianship and child maintenance under customary law, family support, and inheritance and customary law. The seminar received valuable contributions from participants of Botswana, Zimbabwe and Lesotho. The commonality of the problem to the whole of the Southern African region was striking.

The following persons presented papers:

Prof Albie Sachs (UWC)
Prof Tom Bennett (UCT)
Dr Sandra Burman (UCT)
Ms Athaliah Molokomme (University of Botswana)
Ms Mutukwama Mamashela (National University of Lesotho)
Ms Margaret Dongo MP (Zimbabwe)
Ms Zuraya Abass (Grassroots)
Ms Tholakele Khumalo (UNICEF)
Mr Terry Dowdall (UCT)

3.2 YOUTH ADVOCACY UNIT

3.2.1. THE COURT PROJECT

The Youth Advocacy Unit comprised five senior full time youth advocates and ten court-based law students who were employed part-time by the Centre. The project entailed placing youth advocates on duty in the following courts viz. Athlone, Bellville, Cape Town, Mitchell's Plain, Wynberg and (from September) Goodwood. Their function was to assist children accused of offending as paralegals. The youth advocates would ensure that a parent/guardian was present in court and endeavour to acquire a lawyer for those children who were otherwise not represented. As children's rights activists, youth advocates would visit the children in the cells at court and explain the court procedure that might follow in an attempt to make the proceedings understandable to juvenile accused. A further function of the youth advocacy project was to gather information on juvenile courts and processes involving juvenile accused for the Centre's research. This research has been used in policy formulation on juvenile justice reform, and to pilot innovative juvenile justice procedures in local magistrates courts. With the transformation of juvenile justice on the horizon in 1995, the youth advocacy project came to an end in December 1994.

3.2.2 PUBLICATIONS

With the interim Constitution in operation, the unit prepared a pamphlet entitled "Know your Constitutional Rights" for distribution to juveniles in the courts and through the Street Law Project.

3.2.3 WORKSHOPS

3.2.3.1 MAGISTRATES'S WORKSHOP

Two workshops (29 July 1994 and 24 September 1994) were hosted by the unit to focus on juvenile justice reform and to elicit magistrates' responses to reform proposals. They were attended by up to 60 magistrates from the Western Cape Region.

3.2.3.2 POLICE WORKSHOP

In October a further workshop was held with police officers from the Cape Town and Bellville areas to explore aspects of juvenile justice reform, with particular reference to issues concerning police - cautioning and other diversionary programmes.

3.2.4. INTERNATIONAL HUMAN RIGHTS DAY

NADEL (Western Cape) approached the Youth Advocacy Unit to host an event in conjunction with them on Human Rights Day (December 10). A group, including all the youth advocates, visited places of safety and street shelters and explained the Children's Charter and the right to legal representation to children living in these institutions.

3.2.5. AWAITING TRIAL YOUTH COMMITTEE

This committee, which has functioned in the Western Cape since 1992, met monthly to discuss the position of children awaiting trial in the region. Ms Said, Ms Percival, Ms Abrahams, Ms Eksteen and Mr Joseph were amongst the delegates from the Centre to this committee.

3.2.6. NATIONAL CHILDREN'S RIGHTS COMMITTEE

Since February 1994 the Centre has been represented by Ms Said at the Western Cape branch of the NCRC. In this capacity, she represented the Western Cape Region nationally at the conference on the National Programme of Action organised by the NCRC with the assistance of UNICEF. She was subsequently nominated to be the Western Cape representative of the NCRC on the Resources Mobilization Strategy Team, and eventually nominated to office on the Fund Raising Committee of the NCRC at a national level.

In April, Ms Said was appointed as the acting chairperson of the

Western Cape branch of the NCRC. She has also served at national level on the Legal Committee of the NCRC as Community Law Centre representative. In this capacity she has assisted NCRC to make submissions to both the Department of Welfare (on proposed amendments to the Child Care Act (1983)) and to the Select Committee on Correctional Services (concerning juvenile prisons and detention of awaiting trial juveniles). Further legal research included investigating the bail provisions for offenders accused of sexually abusing children, and organising the simplification of the United Nation documents on the administration of juvenile justice for circulation by the NCRC.

3.2.7. CAPE TOWN COURT ASSESSMENT COMMITTEE

Ms S Said was invited to become a member of the Cape Town Court Assessment Committee. This committee functions to ensure that the process for assessing arrested children for immediate release takes place smoothly. It is a pilot project in juvenile justice reform.

3.2.8. AMNESTY COMMITTEE

Ms S Said was nominated by the Department of Correctional Services to participate in the Committee established to give effect to the amnesty granted by the State President to certain classes of prisoners. Some 300 cases concerning the release of women, children, infirm and disabled prisoners were considered for amnesty. The work of the committee was concluded in September.

3.2.9. MINISTERIAL COMMITTEE: CHILDREN IN DETENTION

The Minister of Health and Welfare (Western Cape) appointed a committee to examine regional issues concerning children in detention as a consequence of labour unrest in child care institutions and the closure of one institution as a result of arson. Two members of the unit (Ms Eksteen and Ms Said) were appointed to this committee. Ms Abrahams and Ms Percival were appointed to the task groups on the rationalisation of places of safety. The committee and task groups commenced work in June and delivered their final report in November.

3.3. TRANSFORMATION OF JUVENILE JUSTICE

3.3.1 JUVENILE JUSTICE DRAFTING CONSULTANCY

Ms Said, Ms Eksteen, Ms Abrahams, Ms Percival and Ms Carr were appointed to a Drafting Consultancy comprising a number of persons from NGOs and state departments, which was established after a conference on juvenile justice hosted by the Centre in October 1993. The consultancy met monthly during the first half of 1994 at the Centre to facilitate the development of new legislation to govern the law relating to juveniles accused of

offences. A booklet entitled *Draft Proposals for Juvenile Justice for South Africa* was produced towards the end of the year.

3.3.2. CRITIQUE OF THE DRAFT PROPOSALS

Ms Sloth-Nielsen critiqued the draft proposals in a written document responding to key aspects of the suggested Juvenile Justice reforms. Her brief has been forwarded to the Ministry of Justice and selected members of the parliamentary standing committee on justice for perusal; it will form the basis of further inputs at the policy level on juvenile justice reform in 1995. One aspect of the written comment pointed to the absence of detailed, on the ground statistics from a variety of regions in the country profiling the present system of juvenile justice. This would be required in order to assess the adequacy and feasibility of the proposals. The Centre has in early 1995 commissioned that research on the basis of a project outline formulated during December 1994.

Professor Duncan Chappell, senior researcher at UNICRI in Rome and previously director of the Australian Institute of Criminology, was invited by the Centre to advise on international trends and materials pertaining to the diversion of juveniles away from the criminal courts. He visited the Centre for a week and had extensive consultations with staff members and researchers.

3.3.3 WYNBERG ASSESSMENT CENTRE

Ms Sloth-Nielsen was invited to attend meetings as a representative of the Centre. Monthly meetings of the organising committee have been held since the inception of the Assessment Centre in September 1994. The aim of the Assessment Centre was to speed up the release procedure for juveniles arrested after hours. The researcher was invited at the end of 1994 to evaluate the operation of the assessment centre for the committee. This evaluation (in February 1995) will further the proposals from the Community Law Centre on juvenile justice reform in 1995.

3.3.4. RESEARCH ON SUBSTANTIVE ASPECTS OF JUVENILE JUSTICE

3.3.4.1 AGE OF CRIMINAL CAPACITY AND ARREST

Ms Sloth-Nielsen undertook research on the concept of juvenile status in South African Law, with the view to suggested amendments to bring legislation in line with the standards laid down in international law concerning children. She also prepared a written summary of the current law relating to pre-trial procedures, with the emphasis on arrest and interrogation of juveniles. These papers will be used in the development of policy inputs in the juvenile justice reforms proposed in 1995.

3.3.4.2. PROSECUTORIAL DISCRETION AND POLICE CAUTION

Prof Lovell Fernandez (UWC) was commissioned by the Centre to prepare a document outlining the use of prosecutorial discretion in juvenile criminal cases, with a focus on the possible inclusion of new rules on police cautioning - under prosecutorial direction - in the South African legal system. The research will supplement and critique further the Juvenile Justice Draft Proposals (see above). The research will be completed in 1995.

3.3.4.3 COURT PROCEDURES

Mr T Thipanyane (UWC) was commissioned by the Centre to research the current law and practice in juvenile courts. The paper will draw, inter alia, on the experiences of the youth advocacy project. The research, to be completed in 1995, will also form part of the policy development on juvenile justice reform.

3.3.5 JUVENILE WHIPPING

3.3.5.1. CONSTITUTIONALITY OF WHIPPING

In September, Ms Sloth-Nielsen was approached by the Legal Resources Centre in connection with a pending case on the constitutionality of juvenile whipping. At that stage, argument on the constitutionality of the sentence had already been heard (in June 1994), but the State had elected to lead further evidence prior to argument in the Constitutional Court. The Legal Resources Centre asked the researcher to provide research materials to assist counsel in the preparation of argument. The research that was provided has been extensively incorporated into the heads of argument of the advocate who will argue the case for the abolition of whipping.

3.3.5.2 EXPERT EVIDENCE

After further deliberation, counsel decided also to lead evidence to counter the affidavit provided by the State. Ms Sloth-Nielsen was asked to appear as an expert witness in this regard.

The basis of the state's affidavit was that whipping of juveniles should be retained because there were insufficient alternative sentences available to sentencing officers and because the abolition of juvenile whipping would therefore inevitably lead to an increase in the juvenile prison population - an undesirable consequence.

The researcher researched the field of juvenile sentencing law and practice and prepared an affidavit showing that there are in fact numerous alternative sentences available to judicial officers faced with the task of sentencing juveniles; that in recent years parastatal organisations and State departments have developed innovative non-custodial alternatives to replace whipping as a

sentence; and that international trends in juvenile justice support the move towards choosing welfare type options for juveniles who conflict with the law rather than traditional incarceration, and that the welfare options which are currently available to magistrates in the present legislation, are underutilised. Consequently, the abolition of whipping as a sanction would not therefore lead to an increase in the juvenile prison population.

This expert testimony was accepted by the Cape Supreme Court when the matter served on the roll for the hearing of evidence in October, and the case is now destined to be argued in the Constitutional Court in 1995.

3.3.5.3 MEMORANDUM ON STATE'S ROLE IN THE WHIPPING CASE

In a follow-up to the whipping case, the researcher sent a memorandum outlining a summary of the facts surrounding the defence of whipping by the Attorney-General of the Cape to the Minister of Justice in late December 1994. The thrust of the brief was that it seemed anomalous that while the State (as represented by the Attorney General) was on the one hand arguing for the retention of whipping, the Ministry (also part of the State) was on the other hand supportive of the Convention on the Rights of the Child, which clearly does not encourage State authorised whipping.

Draft legislation abolishing the whipping provisions in the Criminal Procedure Act 51 of 1977 has now been prepared by the Ministry, although it is not clear whether the introduction of this legislation in parliament will precede the Constitutional Court deliberations or not.

3.4. DETENTION OF JUVENILES

3.4.1. SUBMISSIONS TO STANDING COMMITTEE ON CORRECTIONAL SERVICES

In September 1994 the Correctional Services Standing Committee in Parliament circulated draft amendments to section 29 of the Correctional Services Act 8 of 1959, which is the section under which awaiting-trial juveniles are referred either to police cells, prisons or alternative awaiting-trial facilities. Ms Sloth-Nielsen prepared a detailed comment on the proposed amendment.

3.4.2. MAGISTRATES' WORKSHOP

The new legislation was discussed at the magistrates' workshop held by the Centre in September 1994. Ms Sloth-Nielsen presented a paper on the topic. The views of magistrates on the new legislation (the content of which was not known to them since the parliamentary deliberations had taken place but a few days previously) were invaluable in preparing a written comment on the new legislation to be published in 1995.

3.4.3. WHITE PAPER ON CORRECTIONAL SERVICES

The White Paper on Correctional Services was presented to Parliament by the Minister of Correctional Services in October 1994. Thereafter it was circulated for comment. Ms Sloth-Nielsen prepared a comment on the White Paper insofar as the Paper addressed the future position of juveniles in prisons. Proposals submitted include the establishment of a complaints mechanism for incarcerated juveniles (the appointment of an Ombud-type person), and the establishment of a Board to inform the Department on policy decisions affecting juveniles in prison. The Board should ideally include children's rights specialists, child psychologists, nutritional experts, educationalists, and other participants from outside the ranks of the Department itself. The proposal is based on international documents such as the Standard Minimum Rules for Juveniles Deprived of their Liberty. The Parliamentary standing committee on Correctional Services will hear submissions on the White paper in 1995.

3.5 CONVENTION ON THE RIGHTS OF THE CHILD

South Africa has signed the 1989 Convention on the Rights of the Child and the government has committed itself to ratifying the convention. Such a step will have a profound effect on the position of children and research on the legal consequences is thus imperative. The Centre has commenced research on the Convention and Ms Sloth-Nielsen delivered a paper on the Convention at a conference hosted by the Ministry of Justice, the Raoul Wallenberg Institute and the Centre.

3.6 CHILDREN'S RIGHTS IN THE FINAL CONSTITUTION

Section 30 of the Constitution provides for the protection of certain rights of children. The rights entail socio-economic rights. Research on their implications and enforceability is necessary, as well as how such rights should be formulated in the final constitution. The Centre commissioned research (Mr P de Vos (UWC)) on these vital questions.

3.7. SEXUAL ABUSE INVOLVING CHILDREN (RAPCAN SUPPORT GROUP)

Ms Sloth-Nielsen was approached to participate in an interdisciplinary committee to explore the legal rights and court process in sexual abuse cases involving children, and particularly children in institutions. The committee meets monthly, and decisions taken thus far have included the development of a roster of expert witnesses for child abuse cases in the Western Cape, and the collation of data on sentencing patterns in child abuse cases.

D. MISCELLANEOUS MATTERS

1 STREET LAW

Although the Street Law Project does not fall directly under the Centre's control, close ties have been kept and regular consultations with the Director of the Street Law Project were held.

2 COMMUNITY PEACE FOUNDATION

The Centre initiated the establishment of the Community Peace Foundation which focussed on research and training in the area of policing. During the year the Foundation was made autonomous of the Centre by being established as an independent institution outside the University.

3 SOUTH AFRICAN CONSTITUTION STUDIES CENTRE

The South African Constitution Studies Centre (SACSC) was located in the Centre for the past two years. The SACSC under the direction of Professor Albie Sachs secured its own funding and reported separately. With the appointment of Professor Sachs as judge of the Constitutional Court in October he decided to dissolve the SACSC. The presence of the SACSC and Professor Sachs added stature to the Centre and will be missed.

4 INTERNATIONAL HUMAN RIGHTS AND CONSTITUTIONAL AND COMPARATIVE LAW LIBRARY

Through donations from the Raoul Wallenberg Institute for Human Rights and Humanitarian Law, US Information Service, and the South African Education Trust Fund (Canada) a valuable collection of international and comparative materials has been established. They have been classified and will in due course be placed on a computer catalogue. The collection is at the disposal of University academic staff and senior students.

E. FUNDING

The main funders of the activities of the Centre were the Ford Foundation, Radda Barnen (Swedish Save the Children Fund), Swedish International Development Agency, USAID, Carnegie Corporation of New York, the Frederich Ebert Stiftung, and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund, Sweden.

1 FORD FOUNDATION

The Ford Foundation has provided core funding for the Centre since its inception. During the year meetings were held with Mr Aubrey McCutcheon and Mr John Gebhardt of the Foundation. The funding grant has been renewed for the period August 1994 to July 1996.

2 RADDA BARNEN

The Swedish Save the Children Fund (Radda Barnen) has been supporting the Children's Rights Project for the past two years. Ms Gunilla Larsson, regional representative in Southern Africa, has been very supportive of the project and has assisted the Centre in numerous ways.

The Directorate of Radda Barnen also visited the Centre. The delegation was led by its President, Ms Karin Söder, a former Swedish Minister of Foreign Affairs. Other members were: Mr Lennart Lindgren, the secretary general, board members Ms Monia Dahlstroem-Lannes and Ms Maria Grahn, Mr Johan Stangren, and Ms Gunilla Larsson.

3. SIDA

SIDA has supported the Gender project for the past two years and has agreed to an extension of the project grant.

4. CARNEGIE CORPORATION OF NEW YORK

The Carnegie Corporation of New York has provided a grant for a Gender Resource Centre.

5. USAID

USAID has supported the Centre in a number of projects: the visit to Chile as part of the retrospective justice project; democracy, human rights and economic development conference and research and street law.

6 FREDERICH EBERT STIFTUNG

The Frederich Ebert Stiftung has continued its support of the Centre's activities and has sponsored the electoral law and the retrospective justice project.

7. RAOUL WALLENBERG INSTITUTE FOR HUMAN RIGHTS AND HUMANITARIAN LAW

In terms of a two year grant the Centre received the second consignment of a book donation of international law materials from the Institute.

F. VISITORS.....

The Centre received the following foreign visitors:

Mr Leo Zwaak, Netherlands Institute of Human Rights, Utrecht

Professor Jose Miguel Vivanco, executive director, Centre for Justice and International Law, Washington D.C.

Delegation of the Law Court Education Society of British Columbia, Canada:

Ms Mary Beeching, Ministry of the Attorney-General

Mr Brian M Neal, Deputy Attorney-General

Mr Justice Wallace Oppal, Judge of the Supreme Court (BC)

Ms Maureen Maloney, Deputy Minister, Ministry of the Attorney-General

Mr John Willis, School of Law and Legal Studies, La Trobe University, Australia

Professor Randolph Scott-McLaughlin, Vice president, Centre for Constitutional Rights, New York, Associate Professor, Pace University

Prof Deutch, Centre for Constitutional Rights, New York

Delegation from the Law School of Howard University, Washington, DC:

Professor Henry Ramsey Jr (Dean)

Professor Zaeed Motala

Ms Denise E Mitchell

Mr Paulos Tesfagiorgis, Executive director, Centre for Human Rights and Development, Executive Member of the Constitutional Commission of Eritrea, Eritrea

Professor Duncan Chappell, Member of Commonwealth Election Observer Mission, Director of the Australian Institute of Criminology, Senior Researcher UNICRI, Rome

Mr John Healy, Tara Consultants, Ireland & Professor Dale Harvey, University of New York

Professor A M H van Leeuwen, Faculty of Law, University of Leiden

Mr Laurie S Wiseberg, Executive Director, Internet, Human Rights Centre, University of Ottawa

Mr Stuart Russel, Macquarie University, Australia

Dr Neil Hutton, University of Strathclyde, Scotland

Mr Francois du Bois, School of Oriental and African Studies, University of London

G. ACTIVITIES.....

1 PUBLICATIONS

1.1 CONFERENCE PROCEEDINGS

Land, Property Rights and the New Constitution Proceedings of conference held on 21-3 May 1993, Community Law Centre

Emerging Provinces and Governance Proceedings of Conference held 8-10 December 1993, Community Law Centre

Custom and Religion in a Non-racial Non-sexist South Africa Proceedings of International Seminar 14-16 May 1993, Community Law Centre

Children in Trouble with the Law Proceedings of International Conference held September 1993, Community Law Centre

1.2 PUBLICATION BY STAFF MEMBERS

Adv Dullah Omar

"Provincial Government in the new Constitution" in Emerging Provinces and Governance Conference Proceedings, Community Law Centre

Dr Zola Skweyiya

"The Way Forward" in Emerging Provinces and Governance Conference Proceedings, Community Law Centre

Professor Nico Steytler

Book review, South African Prison Law, 1994 Stell Law Review 120.

"Bail" Ministry of Justice National Consultative Legal Forum on the Administration of Justice: Proceedings of the First Forum (1994)

1.3 COMMISSIONED RESEARCH

Dr JR de Ville

"Interpretation of the General Limitation Clause in the Chapter on Fundamental Rights" 1994 SA Public Law 287

2 PRESENTATIONS

Professor Nico Steytler

Presented a paper "A Laddered Legal Education and Practice" Conference of the Association of University Teachers of Law, Port Elizabeth.

Presented a paper "The Independence of Court Interpreters" NADEL seminar on the Restructuring of the Court Interpreters Profession in a Democratic South Africa, Cape Town.

Address "Transforming the Constitution from a Legal Document to a Living Document", Street Law, UWC, Democracy Training Weekend, Club Mykonos

Presented a paper "A Ladder System of Legal Education and Practice" to Workshop on Legal Education at the National Consultative Legal Forum on the Administration of Justice in South Africa, Somerset West

Presented a paper "Constitutional Limitation and the Reform of the Law of Bail" to the Plenary Session at the National Consultative Legal Forum on the Administration of Justice in South Africa, Somerset West

Talk on Constitutional Litigation and Criminal Procedure, prosecutors Wynberg Magistrates' Court.

Ms Julia Sloth-Nielsen

Presented a paper "The 1989 Convention on the Rights of the Child" International Human Rights Conference, the Ministry of Justice, the Raoul Wallenberg Institute and the Community Law Centre, Cape Town.

Presented a paper "Section 29 of the Correctional Services (as amended)", Magistrates' Workshop, Bellville.

Ms Fayeeza Kathree

Presented a paper "Legal Position of Women in South Africa" Women, Law and Development in Africa (WILDAF) Conference, Harare, July.

Presented paper "Gender and the Interim Constitution" WILDAF Consultative Conference, Harare, September.

Presented a paper "A Critique of the Convention for the Elimination of all Forms of Discrimination against Women and its Implication for South Africa" International Human Rights Conference, the Ministry of Justice, the Raoul Wallenberg Institute and the Community Law Centre, Cape Town.

Ms Sandra Liebenberg

Presented a paper "Covenant on Economic, Social and Cultural Rights" International Human Rights Conference, the Ministry of Justice, the Raoul Wallenberg Institute and the Community Law Centre, Cape Town.

Ms Shireen Said

Presented a joint paper "Juvenile Justice: How the Courts should work" Human Sciences Research Council, Pretoria.

Presented a paper "The Juvenile Justice in Rural Areas in the Western Cape" Conference of Department of Social Welfare, KwaZulu, Durban.

Ms Jenni Eksteen

Presented a joint paper "Juvenile Justice: How the courts should work" Human Sciences Research Council, Pretoria.

3 TEACHING

Professor Nico Steytler

LL M course, UWC, "Criminal Justice and the Constitution"

Lecture to a SALDEF Constitutional Litigation seminar, Bloemfontein

Lecture to Goldstone Institute (Institute for the Study of Public Violence), course on Human Rights, Franschoek

Introductory Lecture on constitutional litigation to the state advocates and attorneys-general, Justice College, Pretoria

4 OTHER ACTIVITIES

Professor Nico Steytler

Member of the Subcommittee of the Continuation Committee of the Access to Justice Conference, edited the report "A Ladder System of Legal Education and Practice" (1994).

Advice to the Attorney-General's Office, Transvaal, on the right of access to police dockets

Advice to The Macquarie Southern African Legal Education Foundation, Australia

Member of the University Disciplinary Court

Member of the Senate Higher Degrees Committee

Member of the Executive Committee of the African Society of International and Comparative Law, South African Chapter

Counting officer, Mitchell's Plain district, Independent Electoral

Commission
External examiner LL D thesis

Ms Julia Sloth-Nielsen

Participated in a summit organised by NCRC to discuss the interaction between State and NGO's in developing a National Plan of Action (NPA) for South Africa.

Assessor in the juvenile magistrate's court, Wynberg.

Ms Fayeza Kathree

Secretary of the Executive Committee of the African Society of International and Comparative Law, South African Chapter

Attended the Sixth Annual Conference the African Society of International and Comparative Law, Kampala

Attended a conference "From Basic Needs to Basic Rights", Institute of Women Law and Development, Malaysia.