

## FROM THE EDITOR . . .

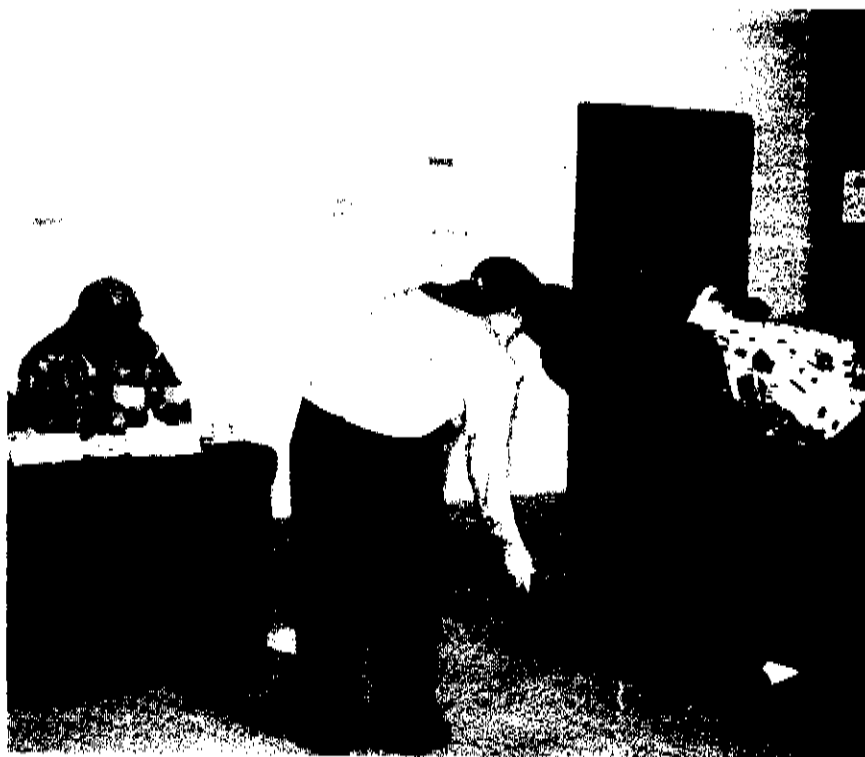
The Law, Race and Gender Research Unit is based in the Law Faculty's Department of Public Law at the University of Cape Town and has been in existence since 1993. One of our most exciting initiatives is our judicial education project in which we focus on what we call social context issues. It is our contention that it is crucial for judicial officers to understand, and be responsive to, the socio-cultural context within which your decision-making takes place. Without such an awareness, the delivery of fair and equal justice, free of race and gender bias, is not possible.

The project organises various educational events. What has continually emerged has been the suggestion that we produce a quarterly newsletter for magistrates which will not only be a communication point, but also create a forum for you to explore race and gender issues in the law with your colleagues. We have taken you up on the suggestion and here is our first edition which we hope will help to put you in touch with each other as colleagues.

We hope the newsletter will give you a chance to express your views on issues and share experiences, much as Renuka Subban has in our guest column. A short report on the findings of one of our researchers is included - we hope it will stimulate some discussion in the tearoom. We also hope that there is enough comic relief for those who wish to escape from the serious world of the "black-letter law" courtroom. On our back page, you will find some initiatives by Western Cape courts (yes, you have discovered our particular bias) which we wish to applaud as the kind of moves which will rebuild the relationship between the community and the justice system.

Please contact us should you wish to submit an item for the next newsletter. We also welcome any suggestions and letters and we hope that this first edition will entertain, educate and inspire you as you redefine what it means to be a magistrate in the context of the emerging culture of human rights in the "new" South Africa. ●

# Magistrates scrum down on domestic violence in Franschoek



*Magistrates Francois van Deventer(left) and Patrick Ross (right) pictured with Ms Tania Wentzel (centre) during an LRG icebreaker*

**M**agistrates from around the Western Cape were invited to attend a day workshop in Franschoek which was organised by LRG's judicial education project. The purpose of the day was to focus on the issue of domestic violence and particularly, to examine the impact of the Rutenberg judgment (an unreported judgment of the CPD) on the way in which interdicts are now being granted in magistrates' courts in the Western Cape. A panel discussion involving representatives of different organisations that assist survivors of domestic violence was also arranged. The general consensus of all who attended was that not only do workshops like these educate magistrates about social context issues, but they also provide a valuable opportunity for much needed interaction amongst colleagues who seldom have such opportunities in the usual routine of court life. ●

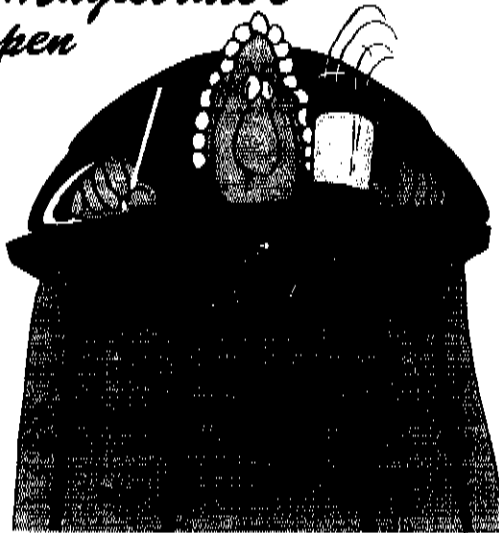
*(For more information on domestic violence, contact Ingrid Hale or Vanessa Wilson at LRG)*

**Renuka Subban, Senior Magistrate at the Verulam magistrates' court in Kwazulu/Natal, attended a conference on the Equal Status of Human Rights of Women from 23 September to 18 October 1996. The conference was held at the Raoul Wallenberg Institute in Lund, Sweden, and was sponsored by SIDA. LRG nominated Renuka to attend. Renuka writes about the way forward for gender equality...**

Centuries ago, Plato, one of the greatest philosophers of all time, was calling for equality between men and women. Societal norms have, however, evolved in a patriarchal pattern which has institutionalised women's subservience to men. The law became a powerful tool to entrench male supremacy through the development of male-dominated jurisprudence. Since the development of an international jurisprudence of human rights through the United Nations, the rights of women as human rights have come under the spotlight.

In 1979 the General Assembly of the United Nations adopted the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and, in 1982, gave the Commit-

*from the  
Magistrate's  
pen*



tee on the Elimination of Discrimination against Women the task of overseeing the implementation of CEDAW by signatory states. By the end of 1987, 94 States had ratified CEDAW and a global mobilization for the attainment of equality was in place.

In South Africa, equality between men and women has been entrenched in the final Constitution and in January 1996, South Africa ratified CEDAW without reservations. We have a new statute, the Commission on Gender Equality Act 39 of 1996, which establishes a Commission to promote gender equality. As we are in our infancy with our human rights culture in South

Africa, we should be guided by other countries who have a long track record of human rights successes.

The Norwegian Gender Equality Act 45 of 1978, for example, provides for the appointment of a Gender Equality Ombudsman and a Gender Equality Appeals Board to collaborate in the implementation of the Act. The ombudsman ensures that no offences are committed under the Act and where voluntary arrangements cannot be reached in instances of dispute, the Ombudsman may bring the case before the Board of Appeal. The decision of the Board may be brought before the courts for trial within the ambit of the Act.

It is my submission that we are all born free and equal with the same rights to equality and dignity. If we accept this premiss, then every person must accept the challenge that inequality presents us with - that every person should respect the economic, social, cultural, civil and political rights of women without reserve. With proper enlightenment empowerment and affirmative action, the dawn of gender equality cannot be too far off. ●

## LRG BRAINTEASER

### Two riddles:

1. A man is walking down the street one day when he suddenly recognises an old friend whom he has not seen in years walking in his direction with a little girl. They greet each other warmly and the friend says, "I married since I last saw you, to someone you never met, and this is my daughter, Ellen." The man says to Ellen, "You look just like your mother." How did he know that?
2. A boy and his father were driving when suddenly a large truck careered around the corner and hit their car head-on. The car was crushed, and when their bodies were removed from the wreck the father was already dead. The son, badly injured was rushed to hospital, where hasty preparations were made for immediate surgery. As the boy was brought in for the operation, the surgeon saw him and said, "I can't operate. That's my son." How is that possible?

(For solutions see back page)



Renuka Subban (centre) pictured with Judy Naidoo (left) and Sophie Reddy (left) at a recent LRG conference during the Malaysian evening

# Undefended accused and the language of the Magistrates' Court

**Paul Lawrence (one of our researchers) and Debbie Aarons (Senior Lecturer in Linguistics at the University of Stellenbosch) conducted research on language in the courts and make some suggestions to magistrates about how to instruct the accused in cases where they are unrepresented.**

An accused person is no more competent in the criminal process than a judge would be in using language and obeying other rules of social organization that pertain among youths who regularly congregate in the parking lot of a hamburger stand. The difference is, of course, that the judge can leave rather than pay lip service to thoughts and actions he might find foreign or even repulsive; he would only suffer embarrassment.<sup>1</sup>

Many accused persons passing through South African criminal courts do not have legal representation. Where this occurs the magistrate must explain the rights and obligations which exist at each stage of the trial to the accused. These include the 'right to legal representation, the right to remain silent after pleading not guilty; the right to cross-examine state witnesses; the right to present his defence and the ways in which this can be done; the existence of presumptions; the right to participate in the mitigation process and the right to participate in the automatic review proceedings.'<sup>2</sup>

We examined magistrates' explanations of these rights in a sample of cases drawn from the Wynberg Magistrates' Court and found they all comply with the requirements prescribed by law. Yet it is clear that unrepresented people generally have difficulty doing what they should do or need to do. Why is this? Obviously there are a host of possible reasons. Many of the unrepresented accused person in the cases which we examined were poorly educated and struggled to articulate a defence. It is likely that the conventions of the legal process may cause confusion and nervousness to an accused appearing in court for the first time. However, we were particularly interested in the explanations of rights by

magistrates and how effectively instructions are communicated to unrepresented accused.

Based on the study we concluded that there is no 'ideal' explanation which should be prescribed. Certainly, it appears that some magistrates take more care than others to ensure that an accused understands what is required. Yet, whether an explanation is formal, abbreviated or complex, there exists the potential for confusion and misunderstanding for an accused. Nevertheless, we did feel that the following points might a) facilitate the accused's participation in proceedings and b) help the accused to better understand the requirements of courtroom discourse.

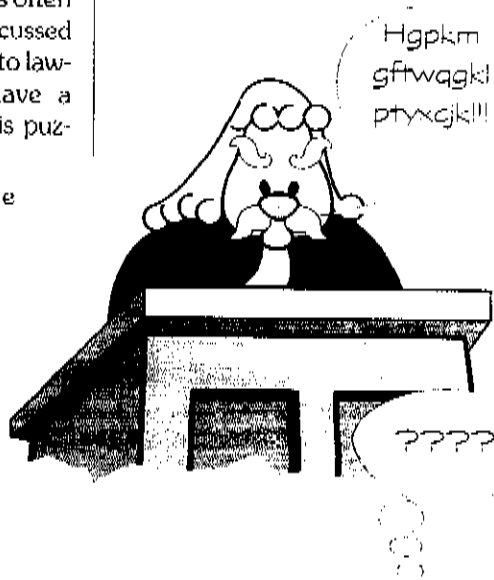
- The magistrate could make an instruction immediately relevant. For example, when the cross-examination of a State witness is explained the magistrate might suggest the type of questions that need to be asked (if discrepancies do exist) - saying something like 'perhaps you should ask questions about this incident or reply to that claim' - this we have seen some magistrates do.
- In the explanation the magistrate could explain some of the rules of courtroom language and detail some of the conventions. For example, tell the accused that extensive narration is not generally effective during cross-examination but would be more appropriate during evidence-in-chief. An accused expects to get a chance to tell his or her story in court and is often confused by being told to ask focussed questions - what seems obvious to lawyers (that an accused will have a chance to give evidence later) is puzzling to many accused.
- Magistrates should encourage accused persons to exercise their rights especially cross-examination and evidence-in-chief, as it allows them to express their side of the story, either through contesting the testimony of the witness or giving their version of events.

- The magistrate should make allowances for the accused's lack of experience of courtroom language. She might help the accused to express himself - especially where he experiences problems with the discourse. For example, if the magistrate is aware of what points are in dispute in cross-examination she might suggest questions which may clarify events. If the accused is expressing himself in an inappropriate way the magistrate should take into account his inexperience of the legal process.

This last point is perhaps the most important. The law holds that an accused's lack of comprehension of the legal process need not be debilitating and makes provision for magistrates to exercise appropriate discretion when presiding over a case in which an accused person is unrepresented. To be able to do so magistrates need to be able to identify the kinds of problems experienced by accused in the courtroom and, having done so, make allowances for these when arriving at a judgement. ●

### NOTES

1. R V Ericson and P M Baranek *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (1982) Toronto: Toronto University Press 20.
2. N C Steytler *The Undefended Accused on Trial* (1988) Cape Town: Juta and Co 222.

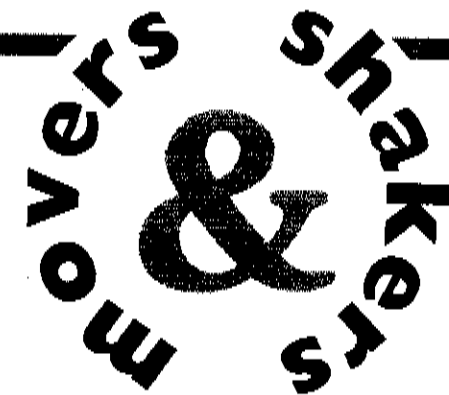


**I**an Yuill, civil magistrate at the Cape Town Magistrates' Court, took the initiative and arranged a first-ever orientation day for new candidate attorneys who expect to appear in the Cape Town Civil Courts on a regular basis. The demand was so overwhelming that three days had to be arranged in order to accommodate all of them. The purpose of the day was twofold: to assist the candidate attorneys in providing a better service to their clients and to ensure efficiency in court. All-in-all one hundred candidate attorneys attended what has proved to be a highly successful initiative and will certainly be worth repeating in the future!

**I**ngrid Freitag, also a civil magistrate at Cape Town, was appointed to the Department of Justice's Maintenance Task Team in December 1996. The team is currently reviewing all of the literature in the field with a view to developing a workable plan for immediate implementation. This is in no way meant to duplicate the work of the Lund Committee. The maintenance task team took part in a maintenance workshop hosted by the Black Sash, Port Elizabeth on 24 January. The

### **Human Rights and African Customary Law by Tom Bennet (Jutas)**

As the blurb on the back of this book reminds us, the 1993 Constitution revolutionised the position of customary law in South Africa. Customary law now enjoys equal status with common law. But, at the same time, customary law is being seriously challenged by people demanding that human rights, specifically the right to equality, are re-



workshop was well attended by magistrates, SAPS personnel and NGO's. Any suggestions, comments or references can be faxed to: The Secretary of the Maintenance Task Team, Ingrid Freitag, Cape Town Magistrates' Court 021 45393.

**T**he Wynberg Magistrates' Court has also been leading the way in attempting to make justice more accessible to the community which it serves. Two of LRG's student researchers, Claire Barclay and Cindy Elliot attended its first open day on 4 December and report as follows:

The event was aimed at making our communities more aware of the structure and operation of the court system

and to dispel widespread negative attitudes and perceptions which the community has of the courts. Chief Magistrate, Mr Van Reenen, appealed to the participants to take what they had learnt from the day back to their respective constituencies. It was clear from the prevailing attitudes that the day proved an extremely successful way for the magistracy to re-mould its image in the eyes of the community.

#### **Magistrates on the move...**

- Joe Raulinga was appointed Chief Magistrate of Bloemfontein
- Suzette van der Walt was appointed Chief Magistrate of Pretoria-North
- Heinrich Moldenhauer was appointed Chief Magistrate of Pretoria

#### **RIDDLE SOLUTION:**

1. *The friend is a woman.*
2. *The surgeon is the boy's mother.*

*If you did not immediately realise the answers to the riddles, perhaps you read them assuming that the friend and the doctor were men. This shows the extent to which even our thought-patterns are impacted by the socialisation process in a male-dominant society.*



spected and upheld by the entire legal system. These challenges are particularly strong from women and are seen to threaten the very fabric of traditional life.

Professor Bennet's book deals with the relationship between the Bill of Rights and customary law. Starting from the premise that the Constitution

does not answer the question whether fundamental rights should be restricted by customary law, he explores customary law and the way it is implemented. He then suggests ways in which conflicts between our new rights regime and customary law could be resolved. In doing this Bennet shows sensitivity both to the need to identify authentic customary law (as opposed to the codified version) and an understanding of the role of law in moulding social and family relationships. Anyone concerned about customary law and its place in our new legal order should read this book. ●



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