TRACY HUMBY: PhD DISSERTATION

SUPPORTING DOCUMENTS

1. LECTURE DATA

LECTURE 1

001 **LECTURER:** Ladies and gentlemen, um we have uh Katy … Kay here

002 **RESEARCH ASSISTANT:** [States name] What did you say? [laughing] [states name]

003 **LECTURER:** [states name] uh uh and she is going to uh record our sessions uh together uh The reason why she's doing it is because I'm so attractive uh and they want to keep it for posterity … Uh no I'm lying, one of my colleagues is doing a PhD research in um uh not sure exactly what but but she's doing research in something to do with didactics and she needs this as a field project. So don't worry about that, she's just going to take the photographs or film and she will be just in the background. Tracy-Lynn Field or Humby is going to – I thought she was going to be here today – but she'll still come and talk to you to get your permission so that they may film you as you answer the questions. So if you've got a great objection against that, from a legal point of view ladies and gentlemen you know you mustn't answer questions today I suppose, as a solution.

004 OK um can I first of all before we start with the lecture just ask you to write down your name and student number on a list of paper so that I at least have a very broad outline of a class list so that I can start learning your names. Will you do … will you start that? OK. Just write your name and um your name and your student number so that I can um compile a class list.

005 OK um ladies and gentlemen we started off last week uh rather haphazardly um with the very vexing question of what is law, and just to summarize that lecture to refresh your memory we uh gave a tentative definition of law as a system of rules that organizes society. Um uh that is not a that is not a satisfactory definition uh it's a very vague definition and we and we then moved on to say it is perhaps better to define law from what it is not than to define law in exact terms and we then looked at the difference between law and morality, law and religion and law and ethics. Do you still remember that? [A few student murmurs] OK! Well we finished with that and you must uh obviously still think uh think about that but um we're finished with that part of the work.

006 The object of today's lecture is to give you just a bird's uh eye view on the different philosophies um of law, the different philosophies relating to law um and how philosophers have in the past defined law. Now uh uh hopefully by the end of this lecture you will be able to say 'look there are five different schools of thought concerning law and I feel myself at home in uh one of these schools of thought.' You mustn't force yourself into it, um, there must be there must be a resonance between your own uh framework of reference and this uh school of thought. So that is that is what we're going to try and achieve uh with this lecture and we will come back to that at the end to see how successful we were.

007 I asked you to go and read about the Spelunchean Explorers Now before we're going to start with the formal part of the lecture, I wonder if I may call upon one of you to tell us the story and only somebody who's really read the part … the piece that I gave to you for your homework for today must volunteer now. Um, it's a .. I'm not trying to catch you out I'm just trying to ascertain um whether you've understood the narrative because I'm going to use uh the narrative in my lecture. Is there anybody that … yes? First of all [inaudible] give us your name?

008 **STUDENT 1:** Um, [states name].

009 **LECTURER:** [state's student's name] Is that Scottish?

010 **STUDENT 1:** Yes.

011 **LECTURER:** Oh yes. Ok?

012 **STUDENT 1:** Um …

013 **LECTURER:** Please concentrate on the detail, you don't you know … Ok?

014 **STUDENT 1**: Um its basically five explorers who have made their way to a cave and become trapped in the cave. Uh, so they launch a rescue operation in which [ten] rescue officers die trying to rescue these five men from the cave ….

015 **LECTURER:** Slowly, slowly slowly slowly slowly … you're going to forget things … Ja?

016 **STUDENT 1:** Um …

017 **LECTURER:** They go into the cave, why are they launching a / I know it's a stupid question but …

018 **STUDENT 1**: They're explorers …

019 **LECTURER:** Huh …

020 **STUDENT 1:** Because they're explorers …

021 **LECTURER:** Yes that's wonderful, but why are they launching a rescue operation? [A few students say out loud 'because they're trapped]

022 **STUDENT 1:** Because they, because [looks bemused] I'm not sure why … its just a given

023 **LECTURER:** [Laughs falsely] They're trapped?

024 **STUDENT 1:** They're trapped.

025 **LECTURER:** Ja ja [class laughs]… ah that's, you know, very logical. I know its stupid but its very important to tell people because this gentleman will not

understand why they start eating one another, you know because they're trapped. Yes?

026 **STUDENT 1:** Uh eventually they're able to establish a radio connection with the people who are trapped [L: Mmm Hmm] and they ask them about their supplies and what they actually have with them and they establish it will take about ten days to rescue them from this cave. And based on the amount of supplies they have they won't be able to survive ten days trapped in the cave. So …

027 **LECTURER:** How long will they be able to survive?

028 **STUDENT 1:** Uh, I think its about five days … [checks reading again]

029 **LECTURER:** Yes, ok … a shorter period.

030 **STUDENT 1:** Yes, um and eventually one of the five named Robert Redmore I think it was um suggests that if they kill one of the men in the cave they might be able to survive for the ten days [L: Mm Hmm]. Um, and they establish that they would be able to survive for ten days but um people on the other side of the radio connection say they don't want anything to do with it uh its not under their control. Then they lose radio communication. Then um Robert Redmore says maybe we should throw dice and see uh whoever loses the game will be killed. And uh he decides to pull out at the last minute. But the other four people have decided they think its quite a good idea so they [inaudible] and he Robert Redmore loses and is killed. And the other four people survive the ten days and when they're released they they're taken to trial …

031 **LECTURER:** [states student's name] you you've skipped some of the most important things. I know its gory but you must refer to it. He's killed um why is he killed? What did they want to do with him?

032 **STUDENT 1:** I assumed to eat him?

033 **LECTURER:** Yes they they … this is the whole point Um I mean ok if they kill him that's not a nice thing to do but um uh …

034 **STUDENT 1:** I wasn't sure that maybe they thought they would be able to survive with four people with the supplies they had um I'm assuming they didn't have to eat him …

035 **LECTURER:** Well, then you must say that. You know that is us, that is an interesting alternative argument but you must present us with that ok … uh .. The idea is survival … um you know um they didn't just play a game of dice to amuse themselves. They were threatened with um uh extinction and their basic instincts kicked in and this is where we talk about, this is where we refer to natural law. Um so they fall back not on their morality, not on their ethics but way way back on survival of the fittest on a very basic uh intrinsic natural law. Yes, and then?

036 **STUDENT 1:** Once they were um were rescued from the cave [L: Mmm] they were taken to trial for murder.

037 **LECTURER:** OK and that's where um, that where the interesting thing starts, that's where you have the different judges uh who gives on the same set of facts uh four or five different judgments. Um we will do the judgments in some kind of detail but before we do the judgments um I think it is important just to give you a background on the different schools of thought.

038 Now (coughs) to find a connecting point between the Spelunchean explorers and the different schools of thought um, of course, the easiest connection is that this piece, this hypothetical study was done by a philosopher called Lon Fuller. Do you all know him [turns to write 'FULLER' on the blackboard]. Um, it is worthwhile getting to know his name because he is going to be one of the philosophers that you study if not now then in jurisprudence in your final year. Lon Fuller wrote this article in the, um, Harvard Law Journal because he wanted to answer the philosophy of the then flavour of the month or the then very important um philosopher uh Herbert Hart. Now before we get to that, um, let us just take it back, right back to the beginning.

039 The first school of law that we encounter when we we um study uh philosophy of law or jurisprudence is the natural law school. The natural law school, the school of philosophy that believes that the law that secular law man-made law is merely a reflection of a system of higher laws and norms. In other words, if you're a natural lawyer, you must have a system – somewhere – against which you can test your positive law, your man-made law, the laws on earth. Man-made, woman-made, person-made law. OK that is, that is very straight-forward what um natural law is.

040 The great um exponents of natural law of course were the Greeks Plato and Aristotle. Plato and Aristotle and of course eventually the medieval church fathers [turns to write 'PLATO' and 'ARISTOTLE' on the board], Plato and Aristotle, these are two classical Greek philosophers and then St Augustus, or, its not St Augustus sorry St Augustine [writes 'ST AUGUSTINE' on board]. St Augustine and [writes 'ST AQUINAS' on board without stating name].

041 These were all church fathers and of course where the where the Greek where the Greek philosophers said we are directed by the gods – you know that the Greeks believed in a world above our own that was dominated by the gods. They sat on the Mount Olympus and the decided what would happen to us. Now their natural law was based on this principle, that our fate is in the hands of the gods. If you read any Greek tragedy like Antigone or Homeros the the Journeys of Homeros the [inaudible] and the Iliad, then you will see uh mere mortal man is not in charge of his own life. You cannot decide who you are going to fall in love with. Uh, the gods are playing games. If they want you to fall in love with the girl next door uh, just to create a family fight then that is what happens. In other words this system of higher law that we have in the ancient Greeks is based on the uh Greek concept of uh gods being in charge of the fate of human beings.

042 Of course it is just one little step – there was a Roman philosopher in between here called Cicero who said its not the gods who decide but your 'recta ratio' your rationality, your brain that decides what is your fate and what is law. Law is then, good law is what is in harmony with logical rationality. And that logical rationality comes from nature.

043 It's a very small step from that to what the church fathers said um St Augustine and um St Thomas Aquinas and they said [pause] 'No, the law, the higher law is the law of God [pause] the Christian God that we have on earth through the Word of God.' And who interprets that? Who interprets the the law of God? The church. In other words we've gone through steps, from the ancient Greeks who said that the gods on Mount Olympus is the higher law, to the second step where the Romans said 'no it is our rationality' that is the higher law, to this third step where the uh medieval church fathers said 'no, it is the word of God as interpreted by the Church' and of course the question is who in the church interprets the word of God? Hmmm? The church fathers.

044 So you could see everybody had a secret little agenda, although that's my own cynical view, don't be influenced by that.

045 Now, if you are intelligent which I know you are, I'm not putting a preposition (sic) that I'm you must prove, I'm putting it as a challenge, if you are intelligent you will immediately see what is the major problem with this school of law. [pause] Is there anybody that can venture … Yes, you must be right now ne, don't …

046 **S2:** Well I would think that the interpretation could be quite subjective. Um …

047 **LECTURER:** [Allows for a pause] You are right you are right but you um I'm very worried that you're going to say something more because then I'm going to see you're going on a wrong track. Why do you say its subjective?

048 **STUDENT 2:** Well, uh its um its interpreted by man and you know [inaudible]

049 **LECTURER:** No, no, no the church father says this this higher law comes from God. Its not man. It is given by God to man, yes, because you must have a practical way to know what it is. And we know about it through the Bible which is divinely inspired. It is a holy book like the Koran or the Talmud or whatever, it's the same thing, its your holy scripture that is inspired by God, was given by God to Moses in a in a thunderstorm on a mountain and, you know, all those fairytales and uh uh all those holy scriptures have a uh origin like that. So that is quite objective the Bible's quite objective that is [slaps one hand against the back of the other] the ten commandments, there's nothing more objective – its there 'doof' in stone tablets. You can't have something more more objective than that. [sniffs, longer pause]

050 Shall we move on from you and see what other people say? She's of course right but she's not she's not getting to the point. You made you made the point last lecture, lots of people made the point.

051 **STUDENT 3:** I'm a bit confused, surely if um law is governed by surely if this school of law is governed by belief in a higher power then is it … aren't you basically saying that law is religion? Which is what …

052 **LECTURER:** No um uh its not necessarily because Cicero said that the higher power is your own rationality. The recta ratio. He went a little further and he said 'Ok that comes from nature'. And, you know, I don't know exactly what he means by nature, he's also not a philosopher he's more a orator so he doesn't write very well on these uh you know write like a philosopher. He he writes within a system of rhetoric he's trying to convince you so he doesn't go into detail things that he can't prove, you know, he just he talks, like an advocate in a trial you know he's not going to say 'Oh excuse me judge here's a very good point against me if you don't mind looking at this' – it's what they should do but they don't.

053 So uh Cicero [inaudible] but he is not equating it to religion and certainly the the Greeks um you know the the gods were not a religion. Um we use the word gods but it was almost like a play, I mean you know the um the Greek mythology, I mean the golden apple and the um uh uh uh Venus turning into um uh a laurel tree because Apollos raped her it was like a play. Its not like the Gods that we know. You know. So no, its different. Its very different. And that's not the … there's one major problem here … I was so encouraged last week because you all knew what it was and now you're all quiet.

054 **STUDENT 4:** You can't prove that God exists, or there can't be any consensus that God doesn't exist either …

055 **LECTURER:** So … I'm not sure what you want to say ….Yes?

056 **STUDENT 5:** Um I would think that the problem would be, if God is the higher law then who is going to hold you accountable if you go against that laws and what is your punishment going to be? Like if somebody went against the law of God um …

057 **LECTURER:** No um uh I mean that

058 **STUDENT 5:** Everyone knows you get punished when you lie …

059 **LECTURER:** Fire and brimstone my dear, in all religions you go against the God you burn in hell. That is very straightforward there's not a lot of speculation about that. You know you burn in hell that's finished and its not nice. That's not the major problem, no they're very specific about punishment, um … Yes?

060 **STUDENT 6:** I think that the problem that I've seen uh not everyone believes in God so those guys …

061 **LECTURER:** No but they but they believe in something else if … you don't have to have God as your higher law. You can have your rationality as your higher law or you can have nature with a small 'n' in other words the birds

and the birds and the trees outside could be your higher law you don't have to you don't have to have God. But what is the, what is the fundamental problem, you're not going to get it ne? Must I tell you?

062 **LECTURER:** The law of nature, natural law [crosses floor] is one of the schools of thought that equates morality with law. You remember last week you were all very worried about that now this week you don't remember it [pauses with hand raised in front of students]. OK What is wrong with equating morality with law? Now I've led you up to the up to the water you must be able to get this one. Why is there such a huge hue and outcry against equating morality and law? [S2 raises hand] No no somebody else. Yes?

063 **STUDENT 7:** Morals differ according to the people.

064 **LECTURER:** No but you must put it like a lawyer now that's not …

065 **STUDENT 7:** Each person has their own set of morals and principles ….

066 **LECTURER:** Yes yes that's what you said and now you're just putting it in other lay terms, I want you to talk like a lawyer. What does that mean? You are hundred percent right. You are hundred percent right. Talk like a lawyer. Morality is subjective. Morality is subjective. You cannot equate something that is subjective to a higher law. Because we are not all bound by that law. We don't all believe in that law [pauses for a few seconds].

067 OK the second great problem with the natural law school is, and this is slightly more complicated, I'm only going to mention it don't break your heads about it, natural lawyers can never take the step of saying – I'll rephrase this so that you can write it down – natural lawyers can never, they haven't got the moral courage to say, 'if a law is unjust, you as a just citizen have got the right not to obey it.' Must I say that again? OK. Natural lawyers, no natural lawyer has ever admitted that you can use force or revolution to overthrow a government that makes unjust laws.

068 Look, if you are really a natural lawyer then the logical consequences of unjust laws – bad laws – is that if this law, take for instance the apartheid laws, if this law that says 'a black man cannot fall in love with a white woman' that these are the laws of the apartheid, you may not remember it but um but I remember it very well, that is a law against nature, You agree? Its against your its against your brain, it is against what God says, the Christian God, it is against all religions its is against everything that it natural and that is logical. You cannot tell people that they may not fall in love because of the colour or their skin. This is what the apartheid government did. So you have a bad law. You have a law that is not in rhythm with the higher set of laws. So what do you expect a natural lawyer to do? I expect a natural lawyer to say 'sorry, is not in accordance to the higher law. It is an unjust law and therefore the citizens that is oppressed by this law have the right to disobey that law. Did they do it? [Pauses]

069 No. St Augustine, both St Augustine and Thomas Aquinas said [pause] 'Order is more important than justice'. Order is more important than justice. And therefore, you do not as of right, as a citizen, have the right to disobey an unjust law. What do you have, according to these church fathers? You have the right to ask the church fathers to decide whether this law is just or unjust and then take the steps that they may, that they deem necessary to oppose the law within the status quo. OK.

070 You've got two points there, there are many other points but these are the two major points of critique against the natural law: (a) natural law equates morality with with law. That is unacceptable because morality is subjective and law is, should be, objective. It should be it should be valid for everyone that is subjected to it. And you can therefore not let subjective laws and norms in and objective system. The second point of natural law is that natural law is a conservative system of law and it does not have the moral conviction to say that you may oppose an unjust rule. OK. Are there any questions on this vexing issue? Yes.

071 **STUDENT 2:** Um, but if natural law is the law and morals aren't the law then there's not a disconnect between morality and legality so therefore …

072 **LECTURER:** Look if you agree to it, like I said last time … If you agree to your state being a religious state like in Iran. Everybody or the majority of people in Iran wants to live under the Ayatollahs. They want to live under a Muslim fundamentalist state. They agree to that, they are happy with that and that's' … they live in such a state. Their system, their law is the law of their religion. There is no secular law in Iran. The the the country is ruled by um uh religious elders. And the whole country says we want the religious law to be our only system of law. We don't want another system of law. That's only in Iran.

073 You saw what happened the past weekend with the Archbishop of Canterbury [who] said 'Well there are so many Muslims now in England perhaps we must have a bit of Shari'a in England.' I mean he's almost asked to resign, well he's asked to resign its just, you know, he doesn't want to resign, It is a huge outcry because the English says we've got our civil law, we fought for our civil law for centuries long, it is our country, people who come from other countries, other religions to live in our country must conform to our law. We don't want their law in our country.

074 **STUDENT 8:** I thought that when he made that statement he meant that only parts of Shari'a …

075 **LECTURER:** Ja ja ja I don't even know what he said but it's a it's a touchy subject. He touched on a very raw nerve. Um, you know, what he suggested is that because there are so many Muslims in England certain parts of Shari'a should be incorporated to accommodate theM I think is what he said, or what he meant, um I don't know exactly what went into his mind … Um and that is a no no I mean the hue and outcry that happened should be proof that um that people in England is not ready for that.

076 The same happens in Turkey. In Turkey you have two parts of the population, you have a secular part of the population which is um under the leadership of the army and you have um not a religious group but the democratic government of the day, the elected government of the day is sympathetic towards Muslim customs. They have now of course, and if you know the history of Turkey – there was a huge fight between the secular and the religious groups in Turkey and one of their great heroes [inaudible] eventually won this fight in favour of secularism. The the large part of Turkey's population don't want religious government in their country. They now have uh a government that is not religious but is sympathetic towards uh uh religious customs uh and they have now lifted the ban on the veil in Istanbul University and, well if you watch television you'll see every weekend there's a huge, twenty five to thirty thousand people protesting against the lifting of that ban. [breathes in deeply]

077 So there are a few states that are inbetween, there are a few states that are completely secular like the United States of America although they've also got the bible belt and they've got a strong Christian influence in their government but its not overt it is its very hidden. You got England [burbles] an overtly secular State, the church and state is completely separated and most of industrialized Western Christian countries are separated. And then of course you have the religious states the fundamentalist states such as Iran and Iraq under Saddam Hussein and to a lesser extent and this is controversial perhaps, Israel.

078 **LECTURER:** OK. Any other questions? Are you are you happy? Do you like natural law? Can you live with natural law? OK you must now think, why I'm talking like this and while I'm explaining natural law to you, what must you be doing … You must be applying this to the mind of the judge sitting in the Spelunchean Explorers … case. You must think, how will a judge who believes in natural law, how will he judge these four people that ate their compatriots. Um hmm? Um hmmm? Are you confused? As long as you feel a little movement up there that's all I'm asking for.

079 **LECTURER:** OK now what do you think was the reaction against this? Yes, you must tell me what is your name?

080 **STUDENT 8:** [Student states name]

081 **LECTURER:** [repeats name]

082 **STUDENT 8:** Yes

083 **LECTURER:** But that's not enough [states student's name] [student laughs] [name] of where? I know that's [refers to S1] of Scotland

084 **STUDENT 8:** [States name] of the Free State!

085 **LECTURER:** Yes [class laughs] OK no that's too much information, just lets stay with [states student's name]. OK that's a nice name lets go, what did you want to know?

086 **STUDENT 8:** Yes um your belief is sort of your religion so if a judge believes in natural law if the law if the law is um uh objective and he's believing in natural law then he's not following the law of the country which is …

087 **LECTURER:** Mmm mmm be careful be careful Mmm mmm Mmm mmm I'm not going to answer your question because that is what we're going to do on Friday, um but that's not true. You can be a natural lawyer. You can believe on a metaphysical level – do you understand the word metaphysical – it means behind the physical, you can believe on a spiritual level, you can believe 'this is how law works, law is just a reflection of a higher law' and still be a judge and sit in judgment of others objectively.

088 **STUDENT 8:** Yes but …

089 **LECTURER:** Ny ny no think about it, this is our our task for Friday. Each one of you is are going to present a case and then we're going to attack you, OK? What is the what is the result? Why that very ugly face? No! the one behind you [refers to S1, class laughs] You're much nicer when you smile! OK.

090 Is there a genius here that can tell me what is the r / what is the reaction, the jurisprudential reaction against natural law? [pause] You can hear a pin drop ne? [One student interjects: Can you rephrase the question?] How must I rephrase it? How / what school of thought would have developed as an antithesis against the natural law school? And that's more difficult I don't know if that helps but … Hmmm?

091 **STUDENT 2:** I have a question.

092 **LECTURER:** Yes?

093 **STUDENT 2:** I'm a bit confused because … the law of nature, you know, as human nature would not be wrong, it would not be wrong to eat someone because that's based on your survival instinct. But the law of nature as a deity whatever – its wrong to eat someone else [inaudible] So which natural law is it?

094 **LECTURER:** Umm no that's a good question. The one um the one is nature with a small 'n', in other words survival of the fittest that's a law of the jungle, that's a they say it's a law of nature but that's a law you get in the animal kingdom. The survival of the fittest, the strongest will survive and the species will then only thrive on the strongest examples. Ne? That's the evolutionary theory of Charles Darwin. Have you / you've hear of that hey? Um that's not a that's not what we're talking about here. That is that's a that's a biological uh a very interesting theory but that's not that's the uh that's not what we're talking about. We're talking about Nature with a capital 'N'. In other words um Nature can be God, Nature can be your mind, uh

Nature can also be um a kind of a a kind of a rhythm, a kind of a cosmos, a kind of a um, the Greeks had this thing of the logos and the cosmos. In other words your rationality, your logos, your being in the whole cosmos. And to survive you must do certain things. You must be in the rhythm of nature. You know what I'm talking about? That is that is what we are talking about. [Refers to S3 who has raised her hand – lest just hear from this gentleman – refers to S6 who has also raised his hand]

095 **STUDENT 6:** [inaudible] it was about the point that's just passed, about positive law ….

096 **LECTURER:** Positive law, what is positive law?

097 **STUDENT 6:** Um its based on the assumption that law and morality [inaudible]

098 **LECTURER:** The positive law is a system of law we'll stop with this um with this school of law … Positive law is the school of law which believes that there should be no morality in law. You should distinguish morality and law. Law is not what it ought to be, but law is what it is.

099 The great the greatest um philosopher uh of this school of law is the Englishman H.L.A Hart [writes 'H.L.A. Hart' on the board] old Herbert Hart from the University of Oxford. He was the professor of jurisprudence in the university of Oxford and through a very complicated set of uh philosophical ideas he wrote a book called 'The concept of law' and in this book the concept of law he said that positive law, in other words man-made law, should be rid as far as possible from any morality or natural law. He revised his ideas later and he said there is a minimum content of natural law um you know he doesn't want to deny, you know, that there's a sun and a moon and that there's a universe. There is a basic content to the law, but the law that we work with, the laws that are passed in Parliament, the laws that are on our statute books should be pure law and should not be contaminated by morality.

100 Now this is this is an Englishman and he was followed by lots of lots of people in America and in England. And he was one of the greatest philosophers of the twentieth century [breathes in deeply] and you can imagine what Herbert Hart would have said if he heard the Archbishop of Canterbury saying no no no no no, because our society is changing we must also change our law to incorporate some fundamentalist law which is based on morality. He would have / I think that any case he turned in his grave when he heard this. You know, he would have called for the immediate removal of the Archbishop. The immediate removal of the Archbishop.

101 Yes? Your name?

102 **STUDENT 3:** [states name]

103 **LECTURER:** [States surname] Are you related to the [refers to person with same surname]?

104 **STUDENT 3:** No …probably not.

105 **LECTURER:** He was a very clever man, very eccentric though.

106 **STUDENT 3:** Um He might be related to my dad but anyway …

107 **LECTURER:** Well then I think

108 **STUDENT 3:** Um I just wanted to ask, I know it's a bit off the topic but if you did incoroporate Shari'a law into English law what would the consequences be of somebody who who, OK somebody who does not subscribe to Shari'a law, somebody who is not Muslim, in England, but they stole from a Muslim … which law, which legal system, Shari'a or the normal one would convict that person?

109 **LECTURER:** I don't know, I can answer you from the Roman law perspective, but that won't help you. In Roman law, you're doing Roman law aren't you? In Roman law, when Rome came to a fall, when Rome um was overrun by the barbarians in 467 uh AD Rome the city came to a fall uh the emperor moved to the east uh and everything uh that was Roman was burnt to the ground. But, of course, the population didn't disappear. The whole of Italy, the whole of the Mediterranean was filled with Romans. So those Romans went throughout the Empire and they clashed, or not clashed, they interacted with the barbarians, the Franks, the Goths, the Vandals, the uh Germanic tribes, and when they um when they interacted with those people, after the fall of Rome, in other words Roman law was no longer intact anymore, after the fall of Rome, if a Roman entered into a contract with a barbarian, the system that would be used to adjudicate that contract would be Roman law because of the personality principle. The personality principle is that you carry your law in your heart. The territorial principle is that you follow the law of the territory. If you go from South Africa to Botswana, you follow the Botswana law. But the Romans carried the law in their heart. In other words if they went from Rome to Gaul, here [steps up a few steps], Roman law was such a sophisticated system of law that you would have adjudicated it terms of Roman law, not barbarian law. That's Roman law.

110 I don't know, I don't know what the Archbishop had in mind [laughs] you must go and ask him, um, but I imagine it would be English civil law. As soon as an Englishman, in England uh uh is involved, then it would be English civil law. Definitely. Um but its its you know why he did it I don't know, but it's a can of worms. You start opening that and you know it is really a can of worms. OK.

111 What is the – this is the end of the lecture – what is the critique on positive law? (Waits for students to answer) Yes, your name?

112 **STUDENT 9:** [states name]

113 **LECTURER:** [states student's name], I'm not going to remember everyone's … [names some of the other student's names he has learnt during the lecture] … Yes?

114 **STUDENT 9:** I would venture to say that maybe its because / it tends to make the law very static. So where people's cultures and norms tend to change over time if you if you're separating out something so completely almost from the people um there's no room for it to change. As people's ideas ideals change.

115 **LECTURER:** No don't you think the opposite is true / I'm just asking I'm not saying you're wrong / because it is not connected to something morally or something God-given is it not much easier to change it? All you have to do is put it through Parliament, you just put it through Parliament – that's all. You don't have to go to God [makes curious gesture between a Catholic sign for the cross and a Muslim intonation] that's … [shakes head]

116 **STUDENT 9:** Um …

117 **LECTURER:** No, one bite at the cherry. Somebody else … [S8 raises her hand] No, you've also answered a lot. What about you sir? The gentlemen are very quiet in this class. Nobody / you said something intelligent ja, your name is?

118 **STUDENT 10:** Its [states name]

119 **LECTURER:** [states student's name] Yes?

120 **STUDENT 10** I have no positive input to this, I don't know …

121 **LECTURER:** What?

122 **STUDENT 10:** I don't know [makes gesture indicating he does not know with hands]

123 **LECTURER:** You know but your're just very, you're just very nervous. There's no reason /

124 **STUDENT 10:**I just don't know like its strict. I don't know who its I don't know …

125 **LECTURER:** It's the opposite, you're going in the wrong direction.

126 **STUDENT 10:** Oh

127 **LECTURER:** I would say, and this is my own, my own critique, I would say um sorry [looks at watch] I'm not taking your answers but we must finish now. I would say the problem with positivism is exactly that what it stands for. It has no metaphysical dimension. It has no higher authority. It is so … it is so mundane …um [pauses] that it tends to lose, that law tends to lose its spirituality [pauses] You don't have to agree with me ladies and gentlemen. I'm just one little person albeit very very intelligent and have done these things many times but I'm still just one individual with with views. You don't

have to agree with me with anything. I'm just trying to stimulate you to think yourself. Yes?

128 **STUDENT 7:** Couldn't it also be?

129 **LECTURER:** And you are?

130 **STUDENT 7:** [states name]

131 **LECTURER:** [states student's name]? Whoooo, if you're an economist you would have been a contradiction in terms [class laughs] Yes?

132 **STUDENT 7:** Could it be that because this law is man-made um that obviously men have come up with his law so wouldn't it in effect be based on the morals of the men who made the law? Cos I mean who /

133 **LECTURER:** No but they set out specifically not to base it on morals …

134 **STUDENT 7:** But then how would they have done that because each man does have his own morals?

135 **LECTURER:** They set it aside, they specifically set it aside and say, now we are making laws, and we are not making laws with our morals. We are making laws objectively based on our tradition. Ok, its very good question and with that question I'm going to give you your homework for Thursday.

LECTURE 2

001 **LECTURER:** [Holding class list] Where … is he not here? Why do you look so different? Did you put your name on my list?

002 **STUDENT 14:** I think I did …, yeah its there. At the bottom.

003 **LECTURER:** At the bottom?

004 **STUDENT 14:** Yeah

005 **LECTURER:** Are you [states name]? But you said your name was [states name]?

006 **STUDENT 14:** It's the surname

007 **LECTURER:** OK [pretending to look very confused]. I think you must just, you know, after class come and explain to me. I'm not / I do have a very high intelligence but this gets a bit confusing.

008 OK what we're going to do today um is we're going to finish off our lectures on the philosophy of law, we're going to um uh finish uh the uh introduction to this course and the definitional part of the course. You will remember, just to recap our previous lectures, we started by asking the question 'what is law', we gave a definition of what is law and we then moved onto the period where uh law is less clearly defined to areas where we know certain things are not law like morality is not law, religion is not law, ethics is not law. You must be able in the exam to distinguish these terms from one another. Um with examples etc etc We then went on uh to the Spelunchean explorers and um we spoke about the Spelunchean explorers and we tried to explain to you the difference between natural law and positivism [inhales deeply] We finished that last lecture and at the end of the lecture a student asked a question that it seems to him as if natural law, morality and law can be the same thing. And there was a uh uh um confusion between how do you distinguish between morality and law. And you had to go and read the case Rex v Brown for me for this lecture. OK. So that's where we are and what we are going to do this lecture, we are going to look at two practical work, homework pieces that you received, the Spelunchean Explorers and Rex v Brown and we are going to talk uh about law and certainty. Which will then end off this uh this part of the uh of the syllabus.

009 Now is there anybody who can start with Rex v Brown, is there anybody who can give us the um facts in Rex v Brown. [Two students a male and a female raise their hands, L addresses the male] Yes yes your name?

010 **STUDENT 4:** I can try this …

011 **LECTURER:** Yes yes you must try. This is what to, why you …. Your name?

012 **STUDENT 4:** [States name]

013 **LECTURER:** [Repeats name] … Ok [student name] can we hear what you have to say?

014 **STUDENT 4:** Um there was a group of sadomasochistic homosexuals …

015 **LECTURER:** OK now you must explain what all those words mean to us, we don't know what that means.

016 **STUDENT 4:** All right ….

017 **LECTURER:** What is a homosexual?

018 **STUDENT 4:** Um, homosexual is a man who has sexual interest in another man (said with slightly mirthful expression).

019 **LECTURER:** Can you have female homosexuals?

020 **STUDENT 4:** Course you can … oh well

021 **LECTURER:** [Laughs together with whole class] A ha course you can .. its not so of course. No, we call people who are interested in the same gender we call them, well the popular name is gay but that also seems to be a bit problematic. But gay people, I've heard people of this persuasion call them 'queer', the word 'queer' is no longer considered to be um offensive. Um queer legal theory is an acceptable word. But there is this distinction. Homosexual is the word referring to men preferring to have sexual intercourse with their uh own gender, men and men, and lesbian is where you have female, um, variety. Ok? What is sadomasochist?

022 **STUDENT 4:** Um sadomasochism is like deriving pleasure from pain, as far as I understand [looks to JL for approval] …

023 **LECTURER:** Um hmmm its more complicated than that but lets go with that …

024 **STUDENT 4:** And this group of men willingly participated in the commission of acts of violence against each other for like purposes of sexual pleasure.

025 **LECTURER:** Umm Hmmm For how long?

026 **STUDENT 4:** Sorry?

027 **LECTURER:** For how long?

028 **STUDENT 4:** For how long – I think it was over a period of ten years?

029 **LECTURER:** Yes for a long period. Its not something that they you know its not their first try that they get to bed/together you know whatever they call themselves – the leather fairies or whatever. They – it was for a very long time that they did this, once a month or once a week its their social um social recreation. Uh huh?

030 **STUDENT 4:** And the passive partner, the victim in this case um consented to these acts and also suffered no permanent injury.

031 **LECTURER:** Mmm Hmmm

032 **STUDENT 4:** Also, these activities took place in private and were recorded on video tape. Um The applicants were tried on charges of assault occasioned by actual bodily harm and unlawful wounding.

033 **LECTURER:** OK now [student name], you've made a huge leap now ne? Um, you've said they're doing this, um, they they're doing all these things and then they were charged? [Makes a questioning gesture] uh uh … there's something in the middle… that's missing.

034 **STUDENT 4:** Um, well obviously these activities were seen as / well obviously the plaintiff or/

035 **LECTURER:** Who's the plaintiff?

036 **STUDENT 4:** The victim …? I don't know, they didn't say the victim's name they just referred to him as 'Kay'

037 **LECTURER:** No but the victim is not the plaintiff, he didn't complain.

038 **STUDENT 4:** Was it the state that complained? [inaudible, lecturer starts laughing] What I'm saying is whose the plaintiff, whose the defendant?

039 **LECTURER:** By way, by way of speaking it was the state. It was a criminal case. Ok. I think we've tortured you long enough ne and you don't derive pleasure from this. What about you? You wanted to say something?

040 **STUDENT 3:** Ah no I was just going to say we couldn't really be sure who the plaintiff was in this case. We knew there was … I kind of got a little bit confused, I knew that basically it was the younger members of the group who were then brought into the group under the age of 21 initially.

041 **LECTURER:** Ja

042 **STUDENT 3:** But were now over 21 years old. And knew that they were the ones that were ….

043 **LECTURER:** Hurt

044 **STUDENT 3:** hurt

045 **LECTURER:** No but um …

046 **STUDENT 3:** But I couldn't understand who Rex was (confused smile).

047 **LECTURER:** Who? Rex?

048 **STUDENT 3:** I couldn't understand ,.. It was Rex v Brown …

049 **LECTURER:** [Laughs] ah ha you thought that Rex was one of these hairy old men that [student carries on talking inaudibly]. No Rex is the king my dear. Rex, that's the Latin for king. I'm sorry I should have told you. Uh its in

England the case is in England so it is the King versus Brown who was the perpe .. the main uh the main uh uh ring leader. But I still wanted to know from the facts how did this case come to court? Yes?

050 **STUDENT 14:** Uh the police were investigating him for something else and they stumbled into these activities and reported them ..

051 **LECTURER:** Um [looks quizzically at student]

052 **STUDENT 14:** [inaudible]

053 **LECTURER:** No, I think that there were, there were complaints. The police were investigating similar uh similar things and then there was a complaint by a neighbour of noise from this from this uh from this house, And so the police there was a police raid and that's how they discovered it. Um … Yes?

054 **STUDENT 4:** How did the police come into possession of the tapes?

055 **LECTURER:** No but they raided the house, they raided the house, that's easy. That's what, that's how I remember it, I could be wrong. Um uh but it was definitely a neighbour complaining.

056 OK, so the case is now before the court. What did the, what did the judge, what did say or what did some of the judges say? [Student raises hand] Yes?

057 **STUDENT 9:** I wanted to ask you something because according to this it says in the trial they were found guilty. Um. They pleaded guilty.

058 **LECTURER:** Yes

059 **STUDENT 9:** Um the judge said that consent was not wasn't a defence, wasn't a decent defence. Um and then and I wanted to ask you /can you / see / well this is what happened / it seems strange that they pleaded guilty and then and then appealed that, their conviction. Surely … are you entitled to appeal once you've pleaded guilty?

060 **LECTURER:** Yes! No of course, it happens very often. No no no that's quite /

061 **STUDENT 9:** It seems contradictory [continues inaudibly]

062 **LECTURER:** Well, you're opening a whole can of worms now because um uh uh towards the end of the course we will do the difference between a review and an appeal and this is also in England, they've got different rules than what we have in South Africa so I'm not quite sure how it works but certainly if there is something fundamentally wrong in a case. If [there are] things which have not been taken into consideration or if they think that the judge made a mistake then of course you can appeal, even if you pleaded guilty. And even after you pleaded guilty, you know, you had a change of heart you can still appeal. It is a natural it flows naturally from a trial that you are entitled to an appeal. Um so but don't I forgot to tell you you know it's a very long case and there are many many things in the case and I didn't want you

to read the whole case I just wanted you to read the [sneezes] sorry excuse me [sneezes again silently]

063 Um so the important thing that I want you to take from this case is uh what the judge said um and I can't get the quotation right now but um, one of the judges said 'look, when we sit in judgment on a matter like this you don't bring along with you your own personal baggage. You don't / because this is abhorrent to everything you stand for / first of all you don't agree as a judge, you don't agree that males should have intercourse with one another. That is something that is abhorrent to you. That's not strange, five years ago in this country it was against the law. That's not strange at all. But you don't bring your personal subjective view to court. Secondly, you might find it from a Christian point of view or from a decency point of view completely abhorrent that uh people have to hurt themselves to … in order to get sexual gratification. That is not relevant. What you think of it while you are uh busy with recreation with your family and your friends and uh socializing and your view in society outside the courtroom is is one thing. What you must do when you sit in judgment on a matter like this is you must look for the law.

064 Now, granted, this was done in England, it was done in 1993 um it was not done in South Africa where we have a beautiful, liberal Constitution and this case would have been completely different in South Africa. But the point remains very clear. That when you sit in judgment you do not bring your own ethics, your own religion, your own morality to court. In this case they looked for the for what the law said. And the only piece of legislation that they could get was the so-called Offences against the Person Act of 1861. [licks lips] They then interpreted / what they did they interpreted this Act um and they found in terms of this Act of 1861 what these men did was against the law. Um you know and then you had many legal arguments as to whether you can have consent, whether such an old law can still bind people etc etc but the fact is, the first station, the first point of departure is you must apply the law as it is. That is the first rule of positivism. Of course, uh in natural law its different. But the first rule of positivism, and this is in England where positivism was uh uh discovered and it was the home of positivism. And the rule that they have is that you look at the law as it is. Now … and this brings us to / are there any questions about this case? Are there still things that people don't understand about this case? [No questions]

065 It is a very good idea to go and read this case to see what your own feelings are. To see how you react personally against this. And then to see what you feel uh what you feel about the judgment.

066 OK um the important thing I think you can say that you have in this instance is that certain elements, both Spelunchean explorers and Rex v Brown, you have existing law, you have um certainty and you have grey areas. And where you move into the grey areas is where you get legal. Now the worst thing of a of a legal system is to have uncertainty. So throughout the years all legal systems have tried to avoid having uncertainty. The first the first way in

which there can be uncertainty, I've showed you now the philosophical way with Spelunchean explorers, and the way um with Rex v Brown, in a criminal case um how uncertainty can make law very difficult.

067 But the very first thing that we work with as lawyers, the very first thing that can create uncertainty of course is language. As you saw in Rex v Brown they went back to the language of the leg… of the law of the statute. Now language is a human construct. Its not God-given um its not Godly-inspired, certain texts people may say is godly-inspired, the Sanskrit and the Bible and the Torah and the Talmud and all those texts are holy texts and are Godly-inspired and I'm not talking about them. I'm talking about an ordinary text that you have. An ordinary law book, an ordinary statute, that you have.

068 Do you know what a statute is? [pauses for a few seconds] A statute is a technical name for an Act of Parliament. In other words a law. We will we will get to how you make laws but laws are made by Parliament and once the law is passed by Parliament it changes into a statute when it becomes signed by the State President, and that statute is the is the name for the laws um of a country.

069 Now in a statute uh you use ordinary language and ordinary language can be, because it's a human construct, can be very confusing. It can cause enormous uncertainty. The case that is quoted in your textbook is uh the case of um Ex Parte Doe 1987 (3) SA 829 (D). I'll teach you how to go and look for cases and um what all those little figures mean, but in this case somebody wanted to annul his marriage because the legislation, the statute governing marriages said that a marriage must be concluded in a house. [Writes 'IN' on the board]. This was the little word that caused the confusion. If you in / if you get married to somebody you must get married in a house with open doors. Why open doors? Because people don't / people didn't want to have uh secretive marriages, you have witnesses. Uh you can't secretly get married to somebody and then nobody knows about it. Marriage is a public thing, it is a social thing, the legislation, the legislature has decided the doors must be open that's why if you get married in a church the doors are also open. Anybody who wants to can come in and witness these two people getting married. Same in a court, if you get married in a court there's a special room and the doors of that room are also kept open so that whoever passes can see that these two people are getting married. There are witnesses etc etc that's not important. The statute said if you want to get married in a house it must be in the house.

070 He got married to somebody and after a little while [smiles] he he you know you know well you're still too young to know but you'll discover you know, if you get married to somebody, not that I'm married but if you get married to somebody after a little while it becomes tiresome, um it becomes boring, depending on how much you love this person and he wanted to out, he wanted out he probably had a wife that was nagging him very much, I don't know, I didn't I didn't read the facts of the case so um he wanted to annul the

marriage based on the fact that when he got married he was not in the house in the garden [using African accent]. So the legal uncertainty that existed was about this what does it mean to be in in in the house.

071 Now obviously, here you have a judge that has to interpret whether this man's marriage is uh uh valid or not. On the on the surface of it, purely, on the / without investigating it, what we call as lawyers prima facie, on the first face of it, looking at it, this guy's correct because it wasn't in the house. They were in the garden. They w .. got married in the garden. But the judge said 'no, marriage is a very very serious and a very solemn um contract between two people and uh it shouldn't be handled frivolously and meaning 'in' the house also means in the garden.

072 You don't, you can't get out of marriage just by saying no I got married in the garden. Um and there were subsequent cases even uh where somebody got married on a mountain top, you know how mad people can be, under the sea and even in an airplane where you couldn't obviously open the doors, you know. But the the the th judges uh uh remained steadfast and said all these funny places where people get married um you cant' get out of a marriage just because it is not in a house. There on page 15 of your textbook you can read: 'A marriage is such an important contract and relationship, and the consequences of a decree of nullity can be so far-reaching that I do not consider that the legislature intended non-compliance with the two letters 'in' to be visited with nullity. Of course the judge is using English and it's a difficult sentence, what he means is just 'No! In the garden and in the house is the same thing'

073 OK What do I .. What do I want to illustrate with this case? I want to illustrate to you that legal certainty is very elusive. Legal certainty is very very important. Your society is based on legal certainty. If you have a society where there's no legal certainty; if you don't know how fast you must drive on the highway; if you don't know uh at what age you can consent to marriage or if you don't know when you must start paying tax or ex/ all these things …then you live in chaos. Then you lived in an uncivilized an anarchic society. Now there is an argument to say that that is not so bad but we won't visit that now. What we're trying to expl/ establish here is how important is legal certainty. In this case there was uncertainty in the language of the statute, uncertainty about the word 'in', and the judge didn't follow the letter of the law, but he rather preferred to give a decision whereby certainty would be confirmed. Certainty would be confirmed. Do you understand that? Hmmm … Any questions?

074 **STUDENT:** Just say that again he didn't follow the letter of the law …

075 **LECTURER:** He didn't follow the letter of the law because then 'in' would mean 'inside the house'. Um, the ordinary Oxford English Dictionary if / and that's what he used / means uh if you look at the ordinary Oxford Dictionary in means … 'In' is defined as follows: inclusion or position within limits of space.' That is what the Oxford English Dictionary says about 'in'. So if you

follow the Oxford English Dictionary the judge should have said 'mmmm … sorry .. your marriage is, is over.' But, it is a characteristic of law of good law, of a ordered society that we strive towards certainty. So the judge looked beyond the dictionary meaning of the word 'in' and he extended it mean also in an open space, outside the closed space. There's very good reason why the legislature used the word in because people get married within an enclosure. The legislature said you must have open doors and when these people went through the open doors and outside, the judge said, no that is also inclusive.

076 **STUDENT 3:** How about – sorry I attended a wedding a while ago which was outdoors – and to sign the marriage contract they had to go indoors and sign it under a roof. Does statute or marriage law say that you have to sign a marriage contract under a roof?

077 **LECTURER:** I don't know, I think that sounds to me like uh .. was it a Jewish marriage?

078 **STUDENT 3:** No it was an Afrikaans wedding.

079 **LECTURER:** Oooh you know boere [class laughs] No no no no no eh eh you know I think they were just making sure that the formal part of the marriage takes place indoors because the statute says it must be indoors. So you can have the ceremony outdoors, you can have the reception outdoors but when you get to the formal part – the signing of the register – it must be indoors. But they could rest assured even if they signed out … in the garden, if they signed outdoors, it would still be valid.

080 Um I'm not sure you understand this concept the uh concept is very important here. The law will be interpreted to give um law will be interpreted to preserve something that people believe in. I mean and that is that is what the judge based his decision on. The ma .. the contract of marriage is so important that the judge said 'I'm not going to be bound by what the dictionary says. I will ex … I will use my discretion' – we'll get to discretion now. 'I will use my discretion to to widen this concept of "in", just so that we have certainty. That we don't have people thinking that if they just go over a threshold that your marriage can be null and void.' Your marriage is null and void for substantial reasons. If you go to court and you want to to divorce and there are / and you've got irretrievable breakdown of the marriage that is the ground on which a divorce will be granted and its also a divorce not a null and void. Only if you know if if if there was a blatant disregard of all the formalities will a judge uh consider uh declaring the marriage null and void. Uh for instance if you marry somebody who is 8 years old. That's against the law, you can't do that, not even with the permission of the Minister of the Interior. The judge would have interpreted that as null and void because that that goes to the core of the marriage, you can't marry somebody whose eight years old, there can be no real consent from that person. Yes?

081 **STUDENT 8:** Sir can I ask regards to the law what is a marriage section?

082 **LECTURER:** Uh [inaudible]

083 **STUDENT 8:** In the eyes of the law how is marriage defined? Why are there legal grounds to marriage?

084 **LECTURER:** Um it well that's a that's a very complicated question um uh and there's a whole branch of law um that we call the law of marriage and you will be doing this in your first year. Um but essentially I think it boils down to what we're talking about here. It's a very serious contract. People are committing their lives together, they are committing their patrimony together, there's something such as the accrual system which says that yours your things are yours, my things are mine, but what we do together belongs to both of us fifty/fifty. Or you can get married in community of property where you can say, you know, everything we own goes into one pot and belongs to us. So … and when you have children, the legitimacy of the children are extremely important. So for an ordered society, and for legal certainty it is extremely important that you have very firm and certain legislation concerning marriage. Um it's the building bricks of society.

085 I always say, you know, but this is now just flippant, I always say marriage is uh a conspiracy, um you know, its just a way of keeping society going um, there's pressure on you to get married and have children, because that's what western society looks like. And that reason has has collapsed long ago, cause now there are too many people uh earth and not too few. But that just my view, that's just by the way. Ooh I can see lots of people are interested in this topic … yes?

086 **STUDENT 6:** Um, I just wanted to find out, can't they just reword the law, I ,mean, get rid of this whole confusion with the 'in'. Can't they reword the law and …

087 **LECTURER:** No (splutters) this is exactly what I tried to explain to you, This is the way the law works. The legislature creates a piece of legislation. Because it is a human construct, because its language, there is of necessity, as is here, there is uncertainty, or there can be uncertainty. You can't for every time there's uncertainty run back to the, to Parliament and tell them they must make a new law. They are already overburdened as it is. They are already behind with what they are attempting to do … And there's no reason so change it, the in, how you going to change it?

088 **STUDENT 6:** [Mumbles] What is the wording of the law?

089 **LECTURER:** The wording is 'in a house, A marriage must take place in a house' . Now they got married in a garden, how are you going to change it?

090 **STUDENT 14:** If the marriage takes place in a house then the doors must be open.

091 **LECTURER:** But that's what it is at the moment.

092 **STUDENT 14:** No they can put an 'if'

093 **LECTURER:** If .. a house

094 **STUDENT 14:** If the marriage takes place in a house then the doors must be open as opposed to a marriage must take place in a house …

095 **LECTURER:** But how are you going to encompass the garden? The mountain. Under the water?

096 **STUDENT 14:** If it doesn't take place in a house [L: In an airplane!] then it doesn't' say anything about the doors.

097 **LECTURER:** No, you can't legislate for all possibilities [student looks at him quizzically], No you can't – then you're legislating for an airplane and then people start uh, you know, getting married in a submarine. Then you must legislate for a submarine ….

098 **STUDENT 14:** No, you just need to legislate for a house

099 **LECTURER:** But then … what … if you say 'in a house'

100 **STUDENT 14:** If its in a house then the doors must be open, but if its not in a house then [shrugs shoulders]

101 **LECTURER:** You leave just that open

102 **STUDENT 14:** Ja

103 **LECTURER:** [Laughs cynically] Don't, I don't recommend that you go for politics in your career [class laughs]. Yes, ja ja

104 **STUDENT 8:** Why do we have all this nonsense anyway if there are going to be marriages be if there are going to be marriages wherever you are, why waste space and paper and ink saying in a house if they're going to be married in a garden? [other students mumble responses to this]

105 **LECTURER:** But look, 99.9% of all marriages take place in a house or in a structure. But there are 1 or 0.9% of mad people who want to get married in funny places. The legislature can't accommodate that. But, for legal certainty, what we do is we have the courts. So, what will happen is exactly the same as this one. If you get married in a submarine, and then you subsequently want to declare it ann … null and void um because it was not in a house then you have to go to court and the judge will then decide whether he will interpret the legislation and he will decide whether it was valid or not. It is the best way … why … how do you want to do it?

106 **STUDENT 8:** Just take out the whole house thing completely ….

107 **LECTURER:** No no you don't understand, you missed the whole point of the lecture. 99% of people get married in a house because that is the prescript, that is how you should get married and you must remember, you can't just

throw things away. You know, law was not thought out / its not a thumb suck, it's a serious business. The reason why its in a house is because um it must be, there must be witnesses, it must be a public thing, um it must be uh uh uh for some reason it must not be in the outdoors. There are very good traditional reasons why the law is as it is. Why the legislator has written that into the legislation [STUDENTS 8, 14, and 3 have their hands raised at this point]. Because that is what gives certainty to 99% of the population. You can't throw that out and say 'Ag ja well we can get married just how we want …' Its problematic. If you get married, you know, wherever, its invalid. Marriage is a contract. Its very serious and it should have uh prescripts because you need certainty …

108 **STUDENT 8:** I agree with you there but even the prescripts there regardless … I just, I'm confused on this matter …

109 **LECTURER:** OK, lets take a few other questions and see if you can gather yourself. Yes?

110 **STUDENT 3:** Um I just, I wanted to ask, basically [inaudible] you said you need very serious infringements, you need [inaudible]. Is there any actual basis for when people say, they say well marriage can be annulled based on the fact that it wasn't consummated. Can you annul a marriage based on the fact that you … didn't …

111 **LECTURER:** Yes … That used to be …I can see that you're very interested in the law of marriage, um the idea is not to give you a lecture on the law of marriage … But in the old days, before the most recent Marriage Act um it was. If um if marriage was not consummated then that was grounds for the divorce. As in the old days when you could prove adultery. That was grounds for a … nowadays its no longer ….The grounds for divorce is an irretrievable breakdown of affection between the two parties. Now, if you can prove that your marriage has not been consumed, uh consummated, and that caused an irretrievable breakdown in the affection between both parties, then the divorce will be granted. But if you just go to court and say, 'look … we haven't slept together so I want a divorce, no ways, no ways. I wanted to say, especially if there are children but of course those, that's a bit difficult. Yes?

112 **STUDENT 1:** Um I'm not quite sure on the term 'certainty'. How does one judge decide what the preservation of a concept that the people understand is? Like are there any like requirements or … or …

113 **LECTURER:** Look, a judge has got a discretion. A judge has got a discretion to interpret um uh legislation and the judge will always in a case where he has to interpret something like this, will always favour the interpretation that gives the greater legal certainty. And that's not difficult to establish. Um uh what you what you must establish is, if I interpret this [points to the word 'in' on the blackboard] as the dictionary says, and declare these people's marriage null and void, what will the result be? The result will be hundreds of people are now going to come to court and say 'Ja but we also got married in

strange places and we are now also tired of our spouses and we don't want, we also want it null and void. You understand? That will lead to massive uncertainty. Even people who don't want to declare their marriage null and void may now think 'Oh, but I also got married in a garden, is my marriage now valid?' [Makes a gesture that seems to say 'You see?]

114 **STUDENT 1:** So he's just referred to what the majority of society would … find acceptable …or

115 **LECTURER:** Uh no no it's a it's a you know I can't its it's a it's a common sense thing Its more than common sense it's a … you know the judge doesn't go out and have a census of society um …

116 **STUDENT 1:** No that's why I was just wondering ….

117 **LECTURER:** Uh ow uh the judge the judge is the representative of us on the bench, of society on the bench. And the judge must make the decision that will create the greatest amount of certainty in society. In other words, uh huh uh uh uh you, if you judge a case, you are not, you must avoid creating chaos.

118 **STUDENT 1:** It's the opposite of certainty …

119 **LECTURER:** Yes, so um if you do / but of course you can't do this at all costs. If the overwhelming legal argument is, to take a decision where you even make some uncertainty, but, you know, there is just no other decision to take, then you can. But in general the judge will always decide on the minimum change in society. Where / in a society like South Africa you know that is very uh its its very almost flippant to say that because um where the judges had to decide about um uum the gay marriages uh that would cause enormous friction in society [coughs]. But they had the Constitution to consider, and the Constitution is an overwhelming authority. So you can't go against the Constitution. So, they decided to declare gay marriages valid, to declare it valid that people of the same sex can get married, create some uncertainty, but in accordance with the Constitution. OK, now everybody is nice and confused. Any, any other questions?

120 **STUDENT 14:** Just one question, I don't know if I should ask this, I missed your second lecture, I read in the textbook, just this is a little off the topic, completely actually, um but blasphemy is a crime in South Africa with regards specifically to Christianity and um I just …

121 **LECTURER:** All religions.

122 **STUDENT 14:** It said I think it was specific to Christianity … in the book.

123 **LECTURER:** Yes but um post Constitution it would be all religions.

124 **STUDENT 14:** Oh ja so its …

125 **LECTURER:** No obviously the obviously I mean you saw the the the chaos that was caused with the co with the Muslim cartoons

126 **STUDENT 14:** Ja

127 **LECTURER:** Uh so in South Africa, and that's the second point I want to make um quickly if I may. In South Africa, after having said this whole thing about certainty, which you obviously don't agree or understand but hopefully during the course of the year you will start understanding, but in South Africa we are even in a more precarious position. Why? Because we live in a society of changing values. We live in a society where our where our values have changed remarkably um just a small thing like um like marriage, you seem to be very interested in marriage. In South Africa um before the Constitution it was illegal for people to enter into polygamous marriage relationships, It was even illegal for people to enter into a marriage contract when there was a possibility of polygamy. So Muslim marriage contracts were regarded as illegal. In the pre uh the pre Constitutional South Africa. And they were regarded as illegal not because they did something wrong but just because there was a possibility of polygamy. Of course now in the uh post Constitutional dispensation we have whole set of new values. South Africa's values used to be, in the apartheid years, used to be white middle class Christian values. We have a a term which means which says 'the reasonable man'. Now OK even that must change, it is the reasonable person. We can't just say the 'reasonable man' because what about the reasonable child the reasonable um uh woman and you know … what about reasonable gay people reasonable, you know, you must consider all these things. So in South Africa is it extra difficult to attain what I've been preaching about: Certainty.

128 Because give years ago sodomy was a crime, it was a common law crime. Two men couldn't sleep together. Now, in South Africa, it is embraced. It it is not [throws up arms] … you know. It is absolute standard practice and procedure in South African society for two men to be gay. Leading figures in the public world are are openly gay and, you know, they profess their sexual preferences with pride. That is complete change, and it's a value change. A legal, a lawful change of the values on which our entire legal system is based. So um [sighs] in South Africa this whole thing of certainty of law is taken one step further because our entire constitutional framework has changed. [Pauses] OK. Any questions? Why are you now so quiet? All your marriage problems solved? OK I'll see you on Thursday and on Thursday we will do um a …

129 **STUDENT 3:** Don't you mean Tuesday?

130 **LECTURER:** Ah Tuesday, same thing, Tuesday we will do um the history of South Africa, very briefly because you will do this in Roman law as well. I will just give you a birds-eye view on um on the development of the history of South Africa and if you can go uh read chapter 2 in your in your book. ,history of South Africa page 19 to 42. Um I will be very very glad. OK, thank you very much. Is there anybody that needs to put his or her name on my list? Is everybody on my list? OK. Thank you, I'll see you next week.

LECTURE 3

001 **LECTURER:** [After waiting behind the lecturn silently while students chatted] Still waiting for four people … can you believe it … shall we start? [stands right in front of first row of desks] mmm? Do you know who we're waiting for?

002 **STUDENT 1:** Uh … (mentions a few names, students mumble some names)

003 **LECTURER:** Waiting for Godot … have you seen the film, uh the play 'Waiting for Godot?'

004 **STUDENT:** Yes?

005 **LECTURER:** looks with interest] Yes, and?

006 **STUDENT:** [laughs] Its very, uh, existential.

007 **LECTURER:** [laughs a little forcedly] U hahahaha .. What does that mean?

008 **STUDENT:** [still in a laughing manner] I don't know, I didn't really enjoy it ….

009 **LECTURER:** You're not supposed to enjoy it [student: 'I know'] Two, its these two people, two old men. And they're waiting for somebody, they are … [inaudible] it's a two hour long play.

010 **STUDENT:** The guy they're waiting for, is his name Godot?

011 **LECTURER:** [looks quizzically at student while class laughs] They're what?

012 **STUDENT:** [louder] The guy they're waiting for is his name Godot?

013 **LECTURER:** Yes yes .. [inaudible] they're waiting for Godot. Um and um, you know, the whole play is about waiting for Godot. Um and when I saw it, I saw it several times but when I saw it in South Africa. Coincidentally, or perhaps I don't know the South African director was more brilliant than the French one. Because when I saw it in France it was really a very intense thing because [smiles falsely] I couldn't really understand what they were saying, which was, which made it worse you know to sit two hours while people are saying [imitates some French speaking] (class laughs) you don't understand. Ag I had pidgin French so I understand small little bits um but as she says, the real existential depth passed me by. But when I saw it in Johannesburg, or rather when I saw it in Pretoria, not in Johannesburg, it was extremely uncomfortable. And then, um, during interval I uh I went to the … as it my wont, I always do this much to the embarrassment of my wife … go to the manager, the manager's office and say 'you know why uh, what is going on? I mean where is the air conditioning? Its December in Pretoria um, you know, there're not a breath in there .They closed … it's a small theatre, it is packed to capacity. Um and we're just dying in there. And he said, 'Ja a I'm glad you've noticed. We made it like that so that you can suffer'. The directors made it like that so you could feel the waiting. And of course, Godot never

arrives [student 1 says 'Yes'] Yes yes, they made it, they switched off the air conditioner. And they took all the the padding off the the seats. So you sit on a hard seat, close to one another. Full. And you sit for two hours listening to these two guys. You know. 'I wonder when Godot's coming' [looks at watch]. 'Oh, well, he may be coming just now' Um, and that's the whole play. Um … and of course, who's Godot? Godot is God. God Godot God. Well that's my interpretation, I might be wrong.

014 Ok can we start with the lecture? Um, we um uh um we did some investigation into judicial discretion and the certainty of law and it was very clear to me uh uh from the lecture um last Thursday that um those are are areas of law that you are not comfortable with and that perhaps we shall um leave them until you have uh have a more sound footing um in law. Um I'm not, I'm not criticizing you but it was clear to me that it was not a rip-roaring successful uh uh lecture and you perhaps left the lecture theatre with less than a clear idea of what I was trying to say, And uh that is because it is it is a difficult concept. So we will we will return to that concept, not in the second lecture but perhaps during our lectures during the year uh so that uh we can see if we can uh um understand it better.

015 In any case we have now done the jurisprudential approaches. The natural law approach, the um difference between law and justice, the difference between law and religion and the difference between, um, law and ethics. Um, and you should um be able to write a little essay about that. Its not impossible that it can crop up in the exam, You should be able to write 5 or 10 marks about that, Spelunchean explorers etc etc

016 Today, the object of the lecture is to give you a very brief bird's-eye-view on the history of South Africa. I say its very brief, it's a birds-eye-view, because it is um already done in Roman Law. So I'm not going to repeat everything that we're saying in um Foundations of South African law, but I concentr … I'm concentrating rather on these things that we don't way, that we don't tell you in Foundations of of South African law. Um, you'll also see the structure in the reading list um, I've moved the history to the uh jurisprudential part so that um we finish with the historic and the philosophical part and then [moves hand in a circular motion] then go into the sources of South African law.

017 OK, first of all I want to place uh in your midst uh a concept of law. Um and we've seen from the jurisprudential view that um that law is something that orders society. Is that right? We are all ad idem with that. Law is also something that creates certainty in society. It creates structure, it creates certainty in society. That we've seen, from the jurisprudential uh overview. Now, how does law succeed in doing this?

018 One of the most important characteristics of law is that good law survives the test of time [longer pause] In other words, a law that is freshly made, a law that has been just made and is fresh off the statute books, is not a law that has been tested uh in society. Its not a law that has been tested by time. But

a law that has survived two thousand years or more, or not specifically a law because very few laws survive two thousand years, but a concept that survived s-several different societies, several different continents for two thousand years, that is good law. That is prima facie good law because it has served so many people.

019 And that is of course what we have in South Africa. As you know, in South Africa we have a hybrid system, the system of Roman law that was rediscovered, blended with the Roman-Dutch law and brought with Jan van Riebeeck and Het Pappagaai, [starts moving to behind lecturn once again] the legislation, uh of 16th/17th century Dutch Republic to South Africa [clears throat]. Now in that one sentence I've given you a summary of South African law.

020 Roman law – the legal system that was developed [clears throat] two thousand, three thousand years ago in Italy, by the Romans. It started from a small agricultural village up to an entire world empire. OK, um I don't know how much you know of um of Roman law, I don't want to tell you too much or bore you too much with it, um, but let me just give you the highlights. After, after the three periods in Roman law, the three periods of development, that is the first of all the Republic, which goes from 754 BC to 510. No no that is the monarchy, the monarchy 754 to 510. The Republic 510 to 27 BC and the Empire from 27 or approximately the birth of Christ until 5 uh 69; 569 is the end of the Empire. The Empire was divided in two, you have the Eastern Empire and the Western Empire. The Eastern Empire survived the Western Empire. The Western Empire came to an end in 467, when the barbarians um uh sacked Rome and destroyed everything that they could find in their path. They did however keep the legal system through the p the personality principle, uh they kept the Roman legal system because they knew the Roman system was better than the barbarian system.

021 Do you understand the concept of 'personality principle'? Have we done that? [looks sharply at students] I'm sure we've done it [moves from behind lecturn and forwards to first row of desks]. I've done it somewhere, perhaps it was in the jurisprudence class, who knows. Personality principle is, if you are born in a country, such as Rome. You take yourself out of that country, say for instance to Gaul, which is now France. If you enter into a contract with a barbarian, with a Gaul and there is a dispute, the law that will regulate that dispute will be Roman law. Why? Because the personality principle is applied where you carry your law with your heart. The law of your fathers is the law that you use. And if it is Roman law it always trumps, Roman law is the golden law, Roman law is stronger than any other system of law therefore if it comes into confrontation with an other system of law, Roman law is always preferred. That is the personality principle and that personality principle caused Roman law to be spread throughout Europe. You understand that? Every single Roman that left Italy and that went into uh the Continent spread Roman law. You understand that concept? Ok.

022 The territorial principle is now not relevant here but it's the principle we use in South Africa and all modern systems that if you're in South Africa, the territory of South Africa, you adhere to South African law. If you go to Botswana you adhere to to that system's law.

023 The end of [move to behind lecturn again] of the West did not mean the end of Roman law. Roman law was spread throughout Europe with the uh personality principle and Roman law was transferred to Constantinople which was the capital of the Eastern Empire. The Eastern Roman Empire. Constantinople, today Istanbul. That Empire only came to an end when it was invaded by the Ottoman Empire in 1456. OK. Don't worry about the dates. Just vaguely get your get your timeline right. You must go from, you must know from 750BC [starts sketching timeline on board], this is the founding of Rome up to 1456/7 which is the end of the Roman Empire in the East in Istanbul. Now after that, after 1456, or even long before 1456 the people from the Byzantium, the people from Istanbul fled back to Rome because of the threat of the Ottoman empire.

024 Very very important date here is 529 (refers to timeline) anno domini and that date is the date of the codification of Roman law by the great, well he wasn't great, by the well-known Roman emperor Justinian. And that codification was called the Corpus Iuris Civilis. The body of the civil law. Do you know all these things? You look either very bored or very confused. I don't know which, I don't know which expression I must choose.

025 You know that the Roman Empire started off in 450 BC with the Lex Duodecim Tabularum. You know that? The law of the Twelve Tables. OK. That was the first codification in Roman law. It contained all the old ius civile. Roman law lived through the Republic, through the Empire up to the post Empire to Justinian in 529 when Justinian thought it was time again to codify the Roman law and the law was codified in exactly the same way as in the Lex Duodecim Tabularum but it was only called the Corpus Iuris Civile. (Writes CORPUS, IURIS and CIVILE on board saying the English words as he writes them). In other words, the body of the civil law. OK? Its enough for you to know about that codification, I don't want to uh bore you with further details of how it worked and [inaudible], you'll learn all of that in Roman law.

026 That codification ladies and gentlemen is an extremely important source of law. Extremely important source of law in South African law and it is still quoted today, up to this day, in the Supreme Court of Appeal. In South Africa. The Corpus Iuris Civiles and commentary on the Corpus Iuris Civiles is still valid South African law. OK. Interesting thing that happened, this wonderful collection of books, the body of the civil law uh got lost, it got forgotten. It was filed in libraries, it was never used. Until the 11th and 12th centuries in Italy when it was rediscovered by intellectuals from the Italian universities. And that rediscovery is called the reception of Roman law into European law. In other words, it was dormant law, it was lying in the libraries and all of a

sudden in the 11th and 12th century in Bologna in Italy they rediscovered the glories of Roman law. They rediscovered the glory of the Corpus Iuris Civiles.

027 And through a long process, which is difficult to explain. But through a long process the entire Europe, with the exception of Paris, northern France, but the entire Europe received into its legal system the ancient Roman law. So that Roman law became by the 13th/14th century, Roman law because the common law of the entire Europe. And the word that we use for that (turns to write IUS COMUNE), it became the Ius Comune). It became the common law of the entire Europe. OK? Are you happy about that?

028 Now of course, now it becomes interesting [moves from behind lecture to be closer to students]. How did it get to South Africa? How did this wonderful system of law, that was once the common law of the entire Europe. How did that end up in South Africa. Well its very easy to say Jan van Riebeeck brought it to South Africa. That is true but its also not true. Jan van Riebeeck was an agent for the so-called VOC (pronounces the Dutch words of the acronym), or the Dutch East Indian Company. It was uh uh it was a merchant company. It was a company that uh uh was controlled by the State in Holland but it was a commercial company. It exploited the colonies. It was a company that was set up to the exploit the colonies. OK. Now this company was managed, was administered by a group of men called the Heer Sewentien. Die Here Sewentien, or seventeen gentlemen. Seventeen gentlemen and they were 17 of the most influential and wealthiest merchants in Amsterdam.

029 Who's ever been to Amsterdam? Ooh, only two people've been to Amsterdam. O-key. The others of you should go. It's a magnificent city, it's a very beautiful city and if you see Amsterdam you will understand this part of the law much much much easier. Amsterdam is a port city. It was the capital of uh the then thriving Dutch empire. The small Dutch country in Europe was a sea-faring country and through their navy, first they defended and won, they defended themselves against the great Spanish navy, and then they ruled the waves. They were they were equal to the British in maritime power. And all along the Atlantic rim.

030 Do you know what I'm talking about when I talk about the Atlantic rim? Oooh … wena [Moves to the blackboard and proceeds to draw a map depicting the Atlantic rim]. Here here's America ne? I can't, I'm not a cartographer. Ok and it goes something here, Mexico. And there is South America ne? And here is Spain, Spain. And here is our wonderful continent ne … The wonderful Afrika [said somewhat sardonically or sarcastically]. Now this is the Atlantic ocean, and all this coastline here, all this coastline here is called the Atlantic rim. Now the Dutch are up here. They first colonized many of the countries on the Atlantic rim. Here in South America you will find Surinamia where people still speak Dutch. Here in Africa you will find pockets of Dutch and, of course, round the nose of Africa you will find a strange group of people speaking a derivative of Dutch and we call them the Boere [writes an encircled 'B' on the board].

031 Now [clears throat] they dominated this area and of course the whole idea was to go to the east so of course you will also find some Dutch here [indicates East Africa] and in India, in Batavia. Now the idea of Jan van Riebeeck was never to start a colony in South Africa. He was sent by the Here Sewentien to to man a refreshing post. A refreshment post in the Cape of Good Hope. He was sent out to see if he could cultivate vegetables, he can train animals with the indigenous people to supply onto ships, to Dutch ships going to the east. That's all. He was never given instructions to build a castle. Never given instructions to build, to start a wine industry. And definitely never being the idea that some of the Dutch burghers would remain behind and start a whole new nation.

032 So when Jan van Riebeeck came to South Africa with his three ships – you have to remember two important things: Where did he come from and what did he bring with him. He came first of all from Amsterdam. Amsterdam is in the province of Holland. You must remember the Dutch uh Republic at that stage was made up of 16 or 17 provinces. Utrecht, Groningen. Ghent, Leiden [seems at a loss to remember more] … all those places. Holland was the province surrounding Amsterdam. It was a province, it wasn't a wasn't a country. The the laws of the province of Holland in 1652, as it was handed down in two sources; Het Pappagaai, the legislation, and the decisions of the Hoogeraad. Those are the only sources that we recognize from Roman-Dutch law, besides the old authorities. Besides the all the jurists. Please remember that. If you become, if you go to court one day and you are looking for authority for a point, in civil civil law. Don't go look in Friesland or in [inaudible] or in Gelderland or wherever. Its not valid. Jan van Riebeeck came from the province of Holland, the highest court in the province of Holland is the Hoogeraad. And all the decisions of the Hoogeraad have been translated so you can easily get them. And the Pappagaai. The Pappagaai is the parrot which is uh um a summary of all the legislation the current legislation of the province of Holland. That is what Jan van Riebeeck brought on his three little ships, De Reigher, the Domredaris and De Goede Hoop, to South Africa. And that is the Roman Dutch law.

033 He also brought, of course, I forget myself, the works of famous Dutch jurists such as Voet, De Groot, Van der Keesel, Van Leeuwen, Damhouder, Nestadius, Strubius, etc etc Don't want to give you all the all the .. but in other words all the old Dutch authorities. So we've got three sources of law from Holland: we've got the Pappagaai, the legislation; we've got the decisions of the Hooge Raad, of the province of Holland and we've got the old authorities. And the old authorities commented on the Corpus Iuris Civilis. They were commentaries on the Corpus Iuris Civilis as applied to the 16th and 17th century Dutch jurisprudence of the day. That came to the Cape of Good Hope and that was the common law of the Cape of the Good Hope. And, or course, there was a clash between the unwritten law of the indigenous people, the Khoi-San people and later the Xhosas. Those laws were not written and the laws of Jan van Riebeeck of course was written down, and those laws, like Roman law, was followed when the two legal

systems clashed and the Roman-Dutch law eventually um crushed the the vernacular, indigenous unwritten law. OK.

034 [Moves to behind lecturn] Sjoe … that's a lot of information. I wonder if you if you understand it. Lets hear if you have questions. There are two things that you could .. yes?

035 **STUDENT 1:** So sir you're saying that when the indigenous and the common law clashed that's when they reverted back to Roman law?

036 **LECTURER:** No no no …

037 **STUDENT 1:** Sorry I just got a bit confused …

038 **LECTURER:** No you're quite right its very confusing [coughs as walks up towards first row of desks]. What is common law? There are two meanings to the word common law. First of all, common law can mean that part of the law that is accepted as being part of the law without it being legislated, in other words, common law is your legal history. That is that part of the law when there's a gap in the law that you fall back onto. Say for instance there is a trans-border adoption in South Africa. There is no legislation on trans-border adoptions in South Africa, There's no international state, there's no law on the matter, there's no case law on the matter. Where are you going to look for the law?

039 **STUDENT 1:** Common law.

040 **LECTURER:** Common law. You're going to go back to uh Holland and Dutch Roman-Dutch law of the 17trh century and you're going to see if the Hoogeraad had ever had a case where a child was adopted from Friesland in Holland. And you will see what the judges say about that, there will be references to the Corpus Iuris Civilis and there you get your authority. [Student 1: OK]. That is the common law. Indigenous law is the law that is indigenous to the first-nations of South Africa or the first nations of any country. So that is the unwritten law, what the apartheid people called customary law or um .. what is the other word that they use? Um Bantu law or whatever, native law or whatever. The indigenous law of South Africa is the unwritten law of the indigenous tribes of South Africa. Now, how are we going to know the indigenous law of the Khoi and the Khoi-San? Uh uh you know what the Khoi and the Khoi-San [Student 1: Ja] They were the indigenous people of Cape town, they were hunter-gatherers, they were still in the bronze era when Jan van Riebeeck's people were arrived here, almost in the modern era with weapons and everything. So a huge clash and uh um and Jan van Riebeeck had no sympathy or no um inclination to record Khoi-San folklore and Khoi-San tribal customs in a book so that we can refer to them today and say: 'look, this was the indigenous law of South Africa, we must take it into consideration when we have a dispute'. So the clash between the European Roman-Dutch law and the indigenous law uh left the indigenous law virtually slaughtered, there was nothing left. That is the big

problem that the Constitutional Court has today when they must interpret something like the indigenous law, there's no, there's no source material, they have to call in oral evidence. And that is, you know, that is very difficult to evaluate in a court of law.

041 So, the common-law is the Roman-Dutch law of South Africa, indigenous law is the law of the first nations of South Africa. You understand the term "first nations"? [Student 1: Yes, ja] Yes?

042 **STUDENT 9:** I know you've been on this .. but this concept of common law um does it come from case law? Would you say that its not case law? Its purely from the commentary of the ju/

043 **LECTURER:** No it can be case law. It can be, cases of the Hoogeraad. It can be case law of course it can be.

044 **STUDENT 9:** So the fundamental of it is that its from Roman-Dutch days.

045 **LECTURER:** Ja Common law is, if you stand where I'm standing [in front of first row of desks], all these children in front of me are the different Acts and different um sources of law that we have in South Africa. What we get from Parliament. We've got the Constitution, we've got the law on adoption, we've got the law of marriage, we've got all these laws. But there are lots of gaps, Can you see the gaps? Lots of gaps. Now if I want to interpret those gaps, if I get one of those gaps what do I do? I must look at the background. The background. There at the back, that wooden paneling there. [Student 9: OK] That is the background of our law and that is the common law. And it can be anything from Roman-Dutch law. So if it if you can get a case from the Hoogeraad in um the province of Holland, that's brilliant. That's what we call legal historical research. People don't do it anymore because [somewhat sarcastically] you know, what we do now is we look at what section of the Constitution applies and that's the end. We don't have true intellectual academic researchers anymore, you know, the Constitution is everything. [Student 9: Ja ja] I don't like it but, you know, I can't say it [makes a gesture of hopelessness] … I'll be hung, drawn and quartered but OK um I think constitutional law, all the wonderful things that its brought about uh and changed the apartheid and everything, you know, all the laudible things, it did uh it killed true legal research. I think .. I don't know, you might disagree with me. OK. Nog vragies?

046 **STUDENT 1:** I'm sorry, this is a bit off the topic but in our readings it says that in the British colonies of South Africa they made like a Black Administration Act with special courts. Did they not write down any of the indigenous laws there?

047 **LECTURER:** Yes yes yes but that was in um, that was in the second British occupation of the Cape so that was in the late [Student 1: Late 1920's] … in the late 19th, early 20th century. The Native Administration Act was 1927 [Grace: Yes]. But you're running, you're running ahead of us [Student 1: Yes,

I'm …] but you that the Native Administration Act already had the seeds of apartheid in it. So you can look at it but its not really … [Student 1: I just ja] It was written by British colonial liberal-minded, half you know [Student 1: So it was interpreted slightly different from what it should be …] Ja aaf its not indigenous law, it wasn't made by the chiefs, it wasn't recognized by the chiefs, it was forced upon the chiefs. Um and was made by colonial officers while they were drinking gin in their club. Um that's hardly indigenous law. [Student 1: (softly) OK].

048 OK Any more questions? [walks back to behind lecturn] Do you understand the concepts? The concepts are more important than the detail at this moment. Um, I won't mind if you don't know the dates but I want you to know where our law came from, um, interesting point that I can just make here … Some Roman law, some Roman law, very little, but some Roman law still exists in South Africa today. Um, and one of the things that exists in South African law is the so-called Ideletian actions. An Ideletian action was an action that was originated in the courts of the idilis curulis. Ideletian action, it came from the courts of the idilis curulis. The idilis curulis were the traffic cops of Rome. You remember them from your Roman law? We're doing them at the moment in Roman law, they were one of the magistrates.

049 **STUDENT:** The market people?

050 Student 1: The market people. What they instituted .. they made an edict. (Moves to front row of desks again). The idilis curulis made an edict and they said: If you make a dicta et promisa, that's very easy, you don't get frightened with the Latin … If you make by word or promise a guarantee about your product; if you say or promise something about your product then you are bound to it. And if it proves later that it is not true, if it proves later that there's a latent defect in your product, such as your slave you said would be a wonderful teacher and when you when you got back home he couldn't read or write, that's a latent defect. Um you couldn't establish right there how good his intellect was, you spoke to him and he looked reasonably intelligent. The slave trade said 'yes he's brilliant, he's an intellectual from Beirut, he's one of the best, he'll be brilliant for your children, he'll teach them everything' and, you know, when the lesson started the children taught him …

051 You know there's this old story of the Dutch teacher, in the old days, um there weren't a lot of teachers on the platteland and you'd get very poor Dutch teachers, usually criminals and drunks that was kicked out of Holland and they came to the colony, came to South Africa and Australia. That's where Olive Schreiner's stories comes from. And uh they would then come to the farms, uh, and teach the children high Dutch because people uh although they kind of spoke this kind of kitchen Dutch, this kind of Afrikaans, they remember high Dutch, they could read the Bible, they didn't know the grammatical uh uh um nuances in high Dutch. So these teachers would come to teach the children high Dutch. And my grandfather always told the story of

one of these teachers who was perpetually under the influence of gin, the Dutch whiskey, of gin, because I don't know they invented gin I don't know why gin is always um associated with Dutch … Dutch courage [One of the students says 'yes'] you need gin to make yourself strong. In any case and he would he would try to teach them, I don't know if this is really going to work in English I'm here telling the story and I think I'm going to miss the punchline, but um uh bah one of the things of course that they teach them is how to spell and one of the difficult words to spell um of course is quagga. Um I don't know if you know what a quagga is it's a zebra but a um ancient zebra that lived on the Cape flats and in the mountains, and it only had stripes on its hind quarters. Um quagga. So that's a very difficult word for a Dutchman to spell because there are no quaggas in Holland. So this Dutchman um uh decided no, you know, in his drunken stupor, he would just do it phonetically. And he said: 'Give me a kwa give me a ga, kwaga' Uh, its very funny in Afrikaans, not so funny in English. [Some students giggle] But that is uh .. but now why did I tell that story ….[More students laugh] Um uh that is the probable influence of the Dutch.

052 Um things that I have not mentioned to you that is also an influence on our common law, is canon law. With with the reception of um with the reception of uh Roman law into uh the European continent, the ius commune, the church played a very role in preserving classical Roman law, because all the church proceedings were in pure Roman law. Roman-Catholic church, Roman law is the is the medium. And of course they did it in the purest form possible. So everything to do with um, everything to do with welfare, everything to do with family law, everything to do with churches or uh looking after orphans, looking after adoptions, um uh abuse of children, all those things you will in the canon law, And here is a here is a very good tip for you for the rest of your legal profession. One thing of commercial law that was taken over from canon law is the maxim pacta sunt servanda est. And that is Latin for: 'You agreements must be honoured'. Pacta sunt servanda est. You must serve your agreements. And that was taken into Roman-Dutch law as a principle. And it doesn't come from Roman law, it comes from canon law. So our our um our common law also has a good smittering uh of of church law in it. Not a lot, not a lot. But there is something of church law in it.

053 Of course, after Jan van Riebeeck [glances at watch], after Jan van Riebeeck left the Cape, his son uh took over and there was a succession of governors and eventually the Dutch lost the Cape to the English uh first for a very short while just for three or four years, then they took it back, the um the um Batavian uh Dutch empire took it back for the second time and uh in um the late nineteenth century the English uh finally reoccupied the Cape um as a colony. And from there it remained an English colony until 1910 when uh it was the Union of South Africa and uh of course South Africa was um placed under the Commonwealth of England until 1961 when South Africa unilaterally declared itself to be a Republic.

054 What is the result of this? A very interesting result. The English had a principle [moves from behind lecturn to first row of desks] that said: If the indigenous laws work well, it was the principle of English law not to change the indigenous laws. So the strange thing in South Africa was that despite the fact that the English um occupied the Cape twice and for the second time for a very very long time, they did not impose their law on the Roman-Dutch law that existed in the Cape. They didn't impose English law on the Roman-Dutch law because Roman-Dutch law was truly well-founded and it worked well. The people in the courts, the landrost and heemraden in the districts, understood Dutch, they understood Dutch law and it operated vey very well. So what did the English do? They only changed the adjective law in the Cape of Good Hope.

055 What is the adjective law? It is the opposite of substantive law. Who knows? Don't /nobody talks to me today! What is ad-jective law? [pauses for a few seconds] oooh now everybody's quiet … Anybody want to take a try? Think a bit out of the box. OK, you don't know the word now, is that right? [Some students say 'mmm'] OK, that's fine there are lots of words that I don't know, well not such a lot but um, think now on the other side. What form of law in South Africa is influenced by English law? No no no no [Student: constitutional law?] (slowly) ja, yes its not wrong, but its not right [some students laugh] What part, what branch of our law is influenced by English law? [Student: Case law] No no branch luvvie, branch, not what part, what branch, such as um law of things, law of property, cheque law, mercantile law uh uh company law [Student: Public law? No] [L grimaces] What … I've just told you the story of pacta sunt servanda est that comes from the canon law [Student: Commercial law?] Yes yes, where did you get that? [Student: because you said earlier …] Did I say it earlier? Oh, I thought you're a genius.

056 Yes! Yes ladies and gentlemen, commercial law. South African commercial law. You know what is commercial law? Everything to do with commerce, not contract! Contract comes from Roman law. You will know that by the end of the year. So everything to do with commercial law. The law of cheques, the law of insurance, the law of negotiable instruments, the law of the sea, maritime law. All those parts of the law are strongly influenced by English law, because the Dutch law, the Roman-Dutch law didn't was not well developed in those areas. Because they didn't have cheques in Rome. OK?

057 And what other part of the law … as well? Commercial law and? What other adjective part of the law? [waits for a few seconds but students are silent] Civil procedure, criminal procedure and evidence. Adjective law, ladies and gentlemen, means those parts of the law that are hangers-on and passers-by. Uh, civil procedure is not really law, its the rules of the game. If you're going to uh uh if you're going to litigate in a civil action, you must know how to serve your documents, you must know when to serve your documents what you must put in … that is civil procedure. That's not law, its rules. Evidence, you must know what you can ask in a court, no hearsay, no character evidence, no opinion evidence, etc. Those rules the English are extremely

good in in doing those rules. Why? Because they've got this concept of equity and fairness. So the English law influence in South Africa is restricted to our adjective law, criminal procedure, civil procedure and evidence. And our substantive law, commercial law.

058 If you go into uh, if you go to do your articles one day, ladies and gentlemen and you go to a commercial firm to do your commercial articles, you do it in a commercial department of a commercial firm, once you've finished and you've qualified as an attorney that's the only way you can transfer to England or to another part of the Commonwealth. They will immediately take you, even with a South African LLB, because you've got a practical training in commercial law which is the same the world over. So the only way in which you can transfer, in South Africa, over the law degree is commercial law. And the reason is the commercial law is English law so anywhere in the Commonwealth you can go. Australia [in mock Australian accent] if you want to sit every evening and sift your garbage in ten different bags, then you can go to Australia. If you want to go to England and you want to live with those hideous people then you can go there. They'll make you.. they'll not make you a partner, they'll make you an associate, they'll pay you nothing, and you'll work like a dog. For the rest of your life. You'll never become a partner. That's what the English are like. And America [in mock American accent] perhaps you can go there. I don't know why you want to go there you'll probably also work, you know, 24 hours a day.

059 **STUDENT 9:** Did you say the commercial is substantive law?

060 **LECTURER:** No, the commercial law is substantive law, yes.

061 **STUDENT 9:** And the criminal procedure, civil procedure and evidence is adjective law.

062 **LECTURER:** Adjective law, ja.

063 **STUDENT 3:** But you said adjective law is the opposite of substantive law …

064 **LECTURER:** Ja it is, in a certain sense it's the opposite. But you understand what is substantive law? Substantive law is the law that we teach you in Roman law, the law of property, the law of succession, the law of divorce, law of adoptions, law of things, law of persons, law of contract, law of obligations, you know, where you study law … What happens if you drive into another man's car? What is the law? That is substantive law. How you prove your damages, how you go to court, those are the rules of the game, Those are those are adjective, its around the law. You have the centre which is the substantive law and then the adjective law tells you how to how to bring your claim to a court …

065 OK I've given you a very a very brief bird's eye-view of the history of South African law. I don't think more than a lecture is warranted, you're going to do

all these things in detail in Roman law. If you are more interested in legal history, there's some, there's lots of readings in the book … you've got a whole chapter on legal history, welcome to come and ask me um it is examinable uh so you may get a question on this, its not an unimportant part of the of the curriculum. Ok any questions, don't get up, run away [looks at watch] our time is up I see.

LECTURE 4

001 **LECTURER:** OK, ladies and gentlemen, good morning. Anything of the previous work that you have thought of that you have thought of and and that you have uh any questions about? Um The problem with if you don't ask questions is that I of course [coughs] am going to start asking the questions. So you must think about the work. And you must come and tell me if there's something that you don't understand. [pause] Are there no questions whatsoever? Of the history part? You understand how Roman law got to South Africa? You can write a little a little essay about five or ten marks about that? [coughs] Yes well, OK.

002 **STUDENT 3:** Sorry sir …

003 **LECTURER:** Yes, there's a question …

004 **STUDENT 3:** Um, I'm feeling a little shaky about assignments and essays and writing in a 'legal way [L: Mmm] Cos we're used to/ well all of us are used to ways of writing [L: Mmmm mmmm] Will it be possible to go over some of the … I don't know if there's a specal technique ….

005 **LECTURER:** Yes, there is some, there is a/ Have you got/ have you got the course coursepack, um, in here, as I remember correctly um … Legal writing skills, page 217. Um there is a quite a good uh chapter chapter ten on exactly how to write in a legal way. Um I did not plan to do that but if ah if you are interested it's ah its ten fifteen pages, if you are interested we can add that to um the the chapter we're going to do next week on uh legal precedent uh we can do how to read a court case and how to write a legal argument [Student 3: Yes] Is that would you like that? Ok Then you must however uh go and prepare that chapter. Its chapter ten uh in this coursepack that is used uh for the undergraduates. So please go and get yourself a coursepack and just read through chapter ten. It is very self uh self-explanatory but uh we can go through it its no problem.

006 Um and it is difficult to write uh in uh to write a legal argument. There is a there is a certain art to it … its its not something that you just pick up along the way. You must practice it and its um and it can become very tricky, And it is very important although the university's not the place to learn to write (grimaces) um it is perhaps the place to learn to write properly in a technical manner. OK we'll do that, that's a good suggestion. Uh so for next week your work is to go and read chapter ten, I will also give you a court case to go and look for and to go and read. And when you've all done that we will do a lecture on how to read a court case. Because that is very important um very few people uh know how to find and read a court case.

007 What we are going to do today however, if there are no further questions on the previous work, um, what we are going to do today, after we've done the philosophy and the history of law, is we're going to start doing the nitty-gritty. You are um you are um candidate lawyers, you all want to become

lawyers or hopefully all want to become lawyers of some kind. Um and if you're a lawyer you must know the tools of the trade. There are certain things uh that you must know and certain things uh that you must be able to do. Uh its uh its like uh a doctor must be able to work with the human body. You must be able to know how to handle a scalpel, even if you want to become uh a h psychiatrist which is also a kind of a doctor, you must still go through the training of using a scalpel, you must be able to dissect the human body, you must know the nervous system, you must know, um all the technical things about the human body. Lawyer, its exactly the same thing, you have to gain certain uh specialist knowledge about certain specialist things so that when people come to you and ask for legal advice that, you wouldn't necessarily know everything immediately but the important thing is you will know where to go and find it. Uh no lawyer can say that he knows the law, the law is very difficult, um, very difficult mistress and nobody can claim to know everything that there is to know about the law. It is a vast field, but what you must know is you must know where to find the information, and this is what this course is all about, is to assist you in finding that information.

008 Now, the didactical heading that we put this under is 'The sources of law'. In other words we're going to teach you the skeleton, where does everything, where does the law come from and where do you find the law, all the sources where you can find uh law. And um there are uh .. quite a number of sources just briefly we are going to look today uh at legislation.

009 Legislation um is a very specialized source of law, its not the only sources of law but perhaps one of the most important sources of law. Uh judicial precedent, in other words what the courts say. Judicial precedent is the court cases that we will do next week and further. Uh common law, we touched on that when we did the history. That is the old authorities, we'll give you some birds-eveview on that. Customary law or indigenous law. That is the law that existed uh before we started legislating. The um uh law of the indigenous people of South Africa, or the law that is based on custom. Customary law has also got a meaning in that sense that uh if a custom is longstanding and reasonable it may be incorporated into law. Um and then there are also other sources. Um that are not necessarily primary sources. Indigenous law is a secondary source, the writings of academics, writings of modern writers is a secondary source, it may be used but it hasn't got the same value as legislation for instance. And then of course the most important source of them all which is also part of legislation uh is the Constitution. Those are just some of the sources there are uh there are other sources um uh that we will also refer to in the course uh of our deliberations …

010 For today we are only going to um we are only going to concentrate on 'what is legislation.' We are going to look at the nuts and bolts of legislation and we are going to do in the second half of the lecture, we are perhaps going to do a small uh practical example of uh legislation.

011 **LECTURER:** OK. Now what is what is legislation? Legislation is just another word, a more complicated and technical word, 'legislation' for uh Acts or laws being passed by an organ of state. Uh an authorized organ of state, in this instance the organ of state that we uh think of is of course the South African Parliament. Um legislation emanates, most importantly, from the South African Parliament, in Cape Town. Legislation is made, that is the function of Parliament, inter alia it has many other functions, but one of the most important functions of Parliament is to pass legislation.

012 Now Parliament is not the only uh organ of state that can pass legislation. Uh there are also other organs of state that can pass legislation, uh, such as uh a p-provincial authority, um a municipal authority, uh town councils, city councils, um even go so far as to say um voluntary associations uh if you belong to the SPCA the the SPCA has um a Constitution, it has a uh decision-taking body, and it has rules and regulations. Um and if those rules and r-r-regulations are passed by the decision-making body um that can, won't be won't be strictly speaking legislation, but it would have the same function uh as legislation in that it organizes society. It organizes the life of its members.

013 OK. But legislation is passed by an organ of state um and it is a very specific um instruction. It is what uh the the ancient or the 18-century philosopher Austin called 'the command of the sovereign'. The command of the sovereign. It is the instruction from the government um to the people uh in order to order society so that you can have uh a decent civilization. [pause] OK. Does everybody / is everybody comfortable with that [what I] concept?

014 OK let us look at um what – bearing in mind that Parliament is not the only organ of state that can create legislation – um uh Parliament is the most important source of legislation. OK now what is Parliament? What does Parliament look like in South Africa? Um Parliament in South Africa consists of two houses and why does it consist of two houses? Does anybody know? [pause] Does anybody know what the two houses are called? Yes?

015 **STUDENT:** [inaudible]

016 **LECTURER:** No no no that's not right. No no no no no. If you were now an immigrant and wanted to immigrate to South Africa I would have failed you! It was, yes, the house of assembly, and who is in the house of assembly?

017 **STUDENT:** Representatives …

018 **LECTURER:** The elected representatives of the whole of South Africa. And how many people are there? These are all good citizen questions, you should know this. Its not l-l … its got nothing to do with law. There are four hundred. There are four hundred of these little people that we elect every five years. When you go to elect um the next government those are the people you are electing. They represent you in in uh Parliament, they sit uh in the assembly and they are mmm this is contentious, but they are who who make the most of the legislation. They are important because they can make legislation. And

they are called [pause] the legislative authority. You have the executive which is President Mbeki and his Cabinet, and a couple of other people. You've got the legislative authority which is Parliament, the two houses of Parliament, we'll get to the second one now. And then, the judicial authority.

019 And the judicial authority is made up of? [pause] Ja all the judges and the magistrates ne? The judges and the magistrates. OK all those people that sit in judgment. Even a tribunal uh you can even say that the Competition Commission that you hear such a lot about in the news nowadays is is part of the um uh judiciary, because they sit in judgment about people who form monopolies and who uh form cartels etcetera etcetera. Do you follow this? Do you know what I'm talking about? About Tiger Brands and the about Adcock Ingram? Do you know this? Please ladies and gentlemen if you're a lawyer you must follow the news. Its one of the things, like if you're a doctor you must read up on the drugs. You must know what drugs to prescribe, what is new on the market. Its no use I tell you ..

020 **STUDENT 6:** Yes I know about Tiger Brands and Adcock Ingram. About the competition what is the …

021 The competition what what ja … aah

022 **STUDENT 6:** They are being sued for colluding in the sale of drugs.

023 **LECTURER:** What did they do?

024 **STUDENT 6:** They colluded with express /

025 **LECTURER:** Yes but but that you know that's a nice word its like if you /

026 **STUDENT 6:** They fixed the prices of certain drugs. They said this drug we're not gonna, we're gonna ….people collude, it's a cartel of people .. so pharmacies they come up together they say OK instead of a drug to be R2 they say we're going to be selling it at R3 which is illegal without following the eh the um prices which are supposed to be … stipulated by the competition what …

027 OK, you've got a very good idea, you've got a very good idea. Does everyone follow him and do you know what is going on? People like uh Adcock Ingram uh not only drugs but uh stupid things like a [Student 6 something but L ignores it] um like an injection. A stupid syringe that you're going to use only once. Adcock and a company like [Company X] which comes from Switzerland or wherever they come from, uh and they make the drips and the and the and the syringes. But they are in competition. Adcock Ingram makes a certain kind of syringe, [Company X] but it's the same thing [inaudible] … they then get together because there's no structure to say how much you must ask for for this medicine. There's no uh there no uh prescribed quota, the government tried to to publish a schedule of drugs but for medicine and peripherals like this there's no schedule. So they collude they say, OK it costs us 4 cents, listen to this ladies and gentlemen, 4 cents to make a syringe. 4

cent. We will ask R4 for it. We will ask R4 for it. That is like something … like 700 million percent markup. And if only one did that, if Adcock Ingram said OK my syringes are R4 each, and [Company X] said 'No, you know, please, we're going to ask 15 cents' which is a 120% markup then of course the price would come down because nobody would use Adcock Ingram uh uh syringes. But now they get together and they say mmmm lets make a little bit of money and, you know, its good to make money, but who do they make money of? People with Aids, people who are desperately ill, people who need injections every day. I don't need an injection every day. I think the last time I had an injection was when I was ten years old, at the school you had an injection for small pox or something like that. I you know I don't need I'm a middle class wealthy person I don't need, a syringe doesn't matter to me. But people who are indigent, they don't have money and they've got this terrible disease, they must now pay R4 for the for the syringe to get the uh to get the price. That's the people that they're making money of … So they are going to … And this is the second time. Tiger Brands has also been found guilty for colluding on milk and uh on bread. And they've been fined R100 million. R100 million. And it they're going to be found guilty of colluding here in the medical industry they're going to be fined uh four five hundred million rand. So much so that it could cause the downfall of something like [Company X].

028 Ok that is also part of the judiciary, ne? So please distinguish those three branches. What we are interested in today however is the legislation, the legislative branch. And the legislative branch is, consists of two houses. The first house is the house of assembly and the second house is the [slight pause] national council of provinces. The national council of provinces. That's the second house. It used to be the senate, and those of you who do Roman law will immediately recognize the word. Senate, comes from the word 'senex', means 'old man' or 'wise old man'. The senate uh is the second house which is used as a testing chamber for all legislation. Now where does that ladies and gentlemen, where does that come from? Where does the bicameral system come from?

029 **STUDENT:** [inaudible]

030 **LECTURER:** Where?

031 **STUDENT:** [inaudible]

032 **LECTURER:** No no no …

033 **STUDENT:** English law?

034 **LECTURER:** No no

035 **STUDENT:** English law

036 **LECTURER:** English law! The house of commons and the house of lords ladies and gentlemen. All our constitutional law – not all – but lots of our

constitutional law when we were still a parliamentary sovereignty uh when Parliament was still the highest authority and not the Constitution, most of our institutions, most of our uh constitutional institutions comes from the Westminster system, the Westminster system being the English system. OK we've adapted it to African standards and our own um needs, but for you important to know that um that there are two houses. One is the house where legislation is created, is started in and the second is what we call a revision chamber, a chamber where people have lots of time to look uh at the principles and the philosophy of the legislation, to test whether the legislation is indeed sound um uh and not just rushed through. It is a kind of checks and balance for the house of assembly. OK. What is the difference between the house of assembly and the council of provinces? Mr […]?

037 **STUDENT:** Sorry?

038 **LECTURER:** The house of assembly and the council of provinces – there's a one major difference that I want you to know of. [pause] You can't think? Um huh? No today? Not today. Perhaps, perhaps next week ne? No no you've already answered, you've already answered.

039 **STUDENT 15:** I think the national assembly draft laws at a high level. Draft laws ..

040 **LECTURER:** Uh uh no no its to do with their composition. How they get there.

041 **STUDENT:** Is it possible that the national assembly is elected [inaudible] put there by the [inaudible]

042 **LECTURER:** No it just its not as bad as that, but they are nominated, they are nominated. Some are nominated. Half of the members are nominated and the other half are elected. OK. Please remember that. Why do you [pulls face] why do you make your face like that? You are w- did you miss that?

043 **STUDENT:** No I didn't I was wondering how many …

044 **LECTURER:** Half. 50 per cent. Roughly 50 per cent …

045 **STUDENT:** How many are in the N-

046 **LECTURER:** No they are they represent the nine provinces, uh I don't know how many members they have.

047 **STUDENT 3:** So half are nominated and the other [inaudible] the provinces.

048 **LECTURER:** Yes

049 **STUDENT 3:** And the house of assembly is ….

050 **LECTURER:** Is fully elected, that is the that's our commons that is fully elected. Yes?

051 **STUDENT 3:** Who does the nomination?

052 **LECTURER:** Uh the Cabinet, the President, the provinces. Um not to worry too much about that, you'll learn that in constitutional law. You know all the figures and how, the mechanisms. All I want you to know is how is it how do they make legislation. Where, ladies and gentlemen does the – yes?

053 **STUDENT 9:** Sorry the other thing is that I'm not completely clear on the distinction between the legislation and executive authority. [L: Yes] Like [inaudible] completely different or … \

054 **LECTURER:** That's a very good question because they are they are often confused. [STUDENT 9: Ja] The uh there was a French philosopher [break in audiotape] … for a separation of powers. One of the greatest problems in France was there was no separation of powers. The king was the judge and the executioner, he was the legislator, and he was the executive. He was everything. So Montesquieu wrote a um very thick book called the Spirit of the Laws. L'esprit de droit. Don't don't ask me how to spell it, there's lots of commas. Um and in this The Spirit of the Laws he said, for a good government. For a democratic and good government you need to separate the government into three parts. And there should be absolute watertight divisions between these three parts. And that is the executive, the legislate…ive and the judiciary.

055 Ok so what were the … in South Africa what are these parts. The executive is the people who have power to exercise or to implement legislation. And that is the president and his cabinet. Uh lots of people will say there are other there are other people involved in the executive um cabinet ministers and deputy ministers … um I would say premiers of provinces and their cabinets. Those are the those are the people of the executive. They have they have certain functions they have certain rights. But there are things that they are not entitled to do. Ok. One of the things they cannot do is they cannot legislate. They cannot legislate. The legislative function is left up to the houses of Parliament, uh the house of assembly and the council of provinces. Those people are also not entitled to take any executive decisions. They have not got the authority that the President has got to take executive decisions. And then of course the judiciary is uh the judiciary, they are completely independent. This is the theory, it is not possible in practice to have an absolute watertight division of powers. Yes?

056 **STUDENT 1:** In constitutional law we've been taught that the US system, they have total division of powers.

057 **LECTURER:** [slight pause] That's a lie.

058 **STUDENT 1:** And in South Africa the executive also forms part of the Parliament so they kind of overlap.

059 **LECTURER:** Yes, that that's closer to the truth. It is an organism. It is impossible, it is absolutely impossible to have a watertight division between

the executive and the legislature. Even the executive and the judiciary. Who appoints, who appoints the judiciary … in South Africa?

060 **STUDENT 1:** The executive …

061 **LECTURER:** No no no its not as bad as all that. [STUDENT 1 makes another attempt – inaudible] No no no wait a little bit.

062 **STUDENT 2:** The judiciary.

063 **LECTURER:** Yes, who appoints them?

064 **STUDENT 2:** Themselves.

065 **LECTURER:** No no no its not that good either [laughs]. They have got / the President appoints a kind of committee called the Judicial Services Committee. Uh and the Judicial Services Committee consists of a wide spectrum of people involved in the legal world. And it's a huge panel consisting of the Minister of Justice, other law lords [laughs wryly] hmm other law lords, other justices, the chief justice, ummm even a representative from the magistrates' commission. Lots of people involved in in law. And then they interview all the possible candidates, but where do they get the candidates from? [pulls face]

066 **STUDENT 3:** Aren't they nominated by their peers?

067 **LECTURER:** Yes, partly. But who compiles the list that goes to the Judicial Services Commission? The President. The President gives the list to the Judicial Services Commission and say[s] 'These are the people I think you should interview'. Then they interview them. They interview the people on the list. They can, strictly speaking, they can add, it is possible, but they never do. And then they make a shortlist. And then they send the shortlist where? To the President and the President appoints who he wants on the shortlist. He can also appoint everybody, which he usually does.

068 But if he, if he's got a problem with somebody … with a political appointee, if there's somebody on that list that the Judicial Services Commission wants to uh appoint and he doesn't want to appoint, the person doesn't get appointed. It has never happened. It has never happened, uh, the only the only time that there was any kind of contro controversy and it's a very slight controversy, was when Justice Mohammed was appointed Chief Justice uh and its was that strange time when South Africa was in transition so what you had was Justice Corbett, who was the old chief justice, and who swore in minster Mandela as the first president, he retired, and of course he had a deputy in the Supreme Court of Appeal that was waiting in the wings to become the chief justice, Hefer, who was who a-a-a- white uh old judge from the old uh dispensation. He wasn't he wasn't a bad judge, he was as a matter of fact a very good judge but he was a judge appointed by the previous

government. And the President instructed the Judicial Services Commission, or the President made it known to the Judicial Services Commission that his candidate for the position of chief justice is not Hefer but Mohammed, who was at the Constitutional Court. And then of course, you know, strangely enough, the Judicial Services Commission appointed uh uh Mohammed. That was the only slight slight controversy that the President gave his impressions to the Judicial Services Commission. Strictly speaking that that's you can't do that you know. If you say there must be watertight division, then that shouldn't be, that shouldn't be. But we live in a broken reality, you know, it doesn't happen. Not even in the United States. Ok are you all rights now Ms [Student says name] you all right? You know understand 100% what's going on?

069 Ok (clears throat). The power of legislation is inherent in government. The main function, and we might not think it in this wonderful glorious land of ours, but the main function of government is not to reserve uh jobs for other people who've done service, it is to legislative. And why, why do you need legislation? To fill gaps, to make sure that legislation is kept up to date, in other words to change, to change old legislation, and to close loopholes and defects in existing legislation. It is an art to legislate ladies and gentlemen.

070 Uh, I might hasten to add on a personal note that I don't think South Africa has ever mastered the art of legislation and we, in South Africa, unlike uh countries like uh the United Kingdom, where people are very cautious of legislating, we tend in South Africa to over-legislate. In uh-h-h the year 2002 we passed more than 156 full … blown Acts. Full full Acts, from A to Z. 156. The Romans in three, the Romans in 1300 years only passed 800 laws. We in one year passed 156. So, what we do in this country, because we are such a diverse bunch, because there are so many different languages and because we are so many different races and groups and cultures. If there's a problem, If there's a problem we legislate. If there's a shortcoming, uh, we legislate. We overuse legislation uh to solve social problems. And is that possible? Is it possible to legislate against social evils? [Students murmur amongst themselves] Be careful now. Be careful now. Its not an easy question. She says no [pointing to one particular students] And she's partly right. Yes [says student's name]?

071 **STUDENT 14:** Its not very easy, you can't just get it right in one time.

072 **LECTURER:** It is very very difficult. If there's one lesson that we should have learned from the apartheid government, that it should be: Don't try to legislate society. Don't try to tell society what they should do. Where they should live. Who they should fall in love with. It won't work [wags finger in front of class] It doesn't work. Law is a very blunt instrument. You can only legislative in so far as the society is able to absorb that legislation. Yes?

073 **STUDENT 3:** What would be an example of where they've over-legislated? And they've used it to solve a social problem?

074 **LECTURER:** Um I think um I don't have I don't have I mean don't ask me the details but I think um with the whole um the whole issue of um of pharmacies and of prescription drugs. The government tried to , and it is it is a noble cause, it's a noble thing to do, the government tried to standardize the prices of all drugs, and to force people to use generic drugs rather than new uh new prescription drugs. They also tried to force uh uh international pharmaceutical companies to forego their patent protection in South Africa. That is too … they went a step too far. They went a step too far. What and um and um although the legislation is on the is on the book, there is uh-uh there is a pharmaceutical legislation with schedules on what should happen, um, it's a mess, um because nobody knows what to do because they were too ambitious. They were just too ambitious. So, uh and its not something you can legislate, you must allow the market to determine, uh to determine what to do. That is just one of the things um uh I think you can say, um, ummm.

075 **STUDENT:** The National Credit Act …

076 **LECTURER:** The National Credit Act, thank you, that's another one. That's a wonder uh-uh-uh far better example. [portion missing from tape] Wonderful, wonderful idea to … Do you know FICA, sorry. Um uh, I beg your pardon. Yes, well now that FICA is working and everybody's gone through it, I suppose it is good, and I suppose um I don't know but I hope I hope to God that all this trouble that we went through and the millions of rands that it cost the banking industry which is passed on to the customer again, result in a in netting some people who are trying to launder money. I don't think it does. You know, I think people who are real criminals, um, will find a way around this very, very naïve piece of legislation. You know if before you before you must give your address and the bank must know who all its clients are uh before they can extend credit or before they can take deposits [sighs deeply] Its just not going to work.

077 The same with the stupid bloody plastic bags. You know. [class laughs] Its just you can't tell people, you can't legislate and tell people to be neat or to look after the environment. People must do that out of a feeling of national pride or a feeling of of global pride, you know, looking after the environment. [shakes head] Uh they've all they've done is they've created a new industry whereby the supermarkets can charge yet more. They've put up the price of food yet again [angrily] Um, you know. So there are many examples. Wonderful ideas. You know.

078 There are many examples that work. Old Nkosazana Zuma. Everybody said, nobody will stop smoking in public places. You know she's completely whacko. And it worked like a bomb. Better than anywhere in the world. Because, you know, we just followed like sheep. We said: 'Ok, the government says no, so we don't smoke. We stop smoking. Enormous repercussions for the tobacco industry. That is also true. But you know

[shrugs shoulders] perhaps that is also a good thing. Um, there are many many many instances. Did somebody else have a question? Ok.

079 Uh, let us just quickly go through the steps uh how legislation is made in this country. Also something you will do in constitutional law but I just want you to know uh how its made so uh that you at least you're exposed to it either here or in constitutional law. There was a great um Austrian ag great Prussian um Prime Minister called Otto van Bismarck, he had [a] long name but his short name was Prince Otto van Bismarck. And he was a very prominent um uh Prussian general which became a politician. And uh he became the um Prime Minister of Prussia and he was the architect of the unification of Prussia into modern Germany. And he said, making laws, I wish I could say this in German because it sounds much better in German than in English. But making laws is just like making sausages. [class laughs] The less you know about it the better. You know uh the the the nicest sausage is usually the sausage that is made up of all the bad bits of the animal. I don't know if you know that. Um if you ever buy sausage, you know, boerewors, or Italian sausages, please don't think its fillet steak that goes in there. Um its all the parts that they can't use like your testicles and hooves and liver and lung and things like that. And the the strange thing is, the more rubbish they chuck into the wors or into the sausage, the better it tastes.

080 Um. So. Its just like that. That is how they make laws. Its, you know, they put lot of / they have – I must be careful what I'm saying now, this is just a joke, I'm not serious but um. They take the worst people. They make them MPs. They make them members of Parliament [class giggles]. You know if a lawyer is a failure, a dismal failure, the only thing that tha remains open to him is to become a politician. They take these people now that can succeed at nothing else but sitting there and and making noises, And then they bombard them with absolute, hopelessly drafted legislation, and then they expect these two things to come out on the other side with something coherent. Uh and strangely enough it does, you know, our laws are not great, our laws are not drafted with any kind of elegance, ours laws are very poorly drafted in this country. And this was true of the apartheid years and its now true of the new government, so its not a criticism against the new government. But in South Africa we don't make good laws, they're drafted by civil servants … so … your bright lawyers are in private practice. And only the duds go into civil service and they draft laws. So what do you expect.

081 OK so what happens? Usually, and this is the ideal course of a piece of legislation, there's a need for legislation. Somebody writes to an MP, somebody writes to a Minister, somebody writes to the President, and he says please investigate this thing people want um people say that they want uh the following, please investigate it. The government then drafts a green paper, a green paper which is the suggestion of proposed legislation. A green paper that is open uh for discussion by the public um and it puts out the various philosophies and the p-p-public policies that the government intends to put into the legislation. This is followed by a white paper. I don't know if

the paper they use is actually green and white, it might be but is probably also comes from the from the Westminster system. A white paper which is then not just a suggestion of the bill but is the suggestion of what government sees as the ideal uh way to legislation on a certain topic. So the first one green paper is just open for discussion for general discussion for people to indicate whether it is it is possible to legislation on this issue. The white paper is then the government's policy. What does the government feel about this? This is once again sent to the public and interested parties for comment, and the white paper is then drafted by civil servants, into a bill. And a bill is the first document that appears in Parliament uh for discussion. Ok um I wanted to finish this bit um this lecture but let us stop here and give you a fifteen minute break and then we'll take it from the white paper through to the signature of the President. OK I'll see you in fifteen minutes.

LECTURE 5

001 **LECTURER:** [Laughing loudly] OK! And who else is going to do that one? No that's a difficult one my dear. Wo wo wo even I wouldn't think of that. Yes?

002 **STUDENT 9:** I haven't thought through the specifics of it but I'm quite interested in the logic of … the logic of argument and how it fits into … um …

003 **LECTURER:** Eeeeh … there is something there but jong its also very difficult. There's a there's a there's a English philosopher that um had a theorem and um [waves hand] but that's very its not um but perhaps I'm underestimating the class. What do you think?

004 **STUDENT 14:** What is the question now? I didn't hear.

005 **LECTURER:** Oh … no but you don't have to worry I know.

006 **STUDENT 14:** Ok can I ask you?

007 **LECTURER:** Yes you can. She said she wants you to do an assignment on how lawyers think and how do you use logic in law and in a legal argument, and how do you formulate legal arguments and things like that. Is that almost what you said?

008 **STUDENT 9:** Ja

009 **LECTURER:** Ja. And there's lots on that, there's lots on that, its not a bad suggestion but its difficult, its difficult, I'm not sure. Hmmmm? Nothing uh? Nothing. Isn't there something? Why do you study law? Why? Isn't something …. Where anything curious?

010 **STUDENT 2:** Something that interests me is the difference between um like the different legal systems like the Westminster and the Roman and our system and … [much softer] how they work.

011 **LECTURER:** And the communist system and the American system …

012 **STUDENT 2:** Not all of them! But like three …

013 **LECTURER:** Ja all very general ne? All very general …Umm … I was thinking of giving you just a case. Uh and say uh here's a case, it's a leading case. You know with a majority and a min … but then you know its going to be a thick case of 50 pages. Um …. Oooh I wish you could have seen that one's face, your expression now! Uh and then you analyse the case. Um .. you know.

014 **STUDENT 3:** And analyze the case you mean look at whether …

015 **LECTURER:** Look at the law, any way any way that you want to analyze the case. First of all, do you understand the case? Which is already half of it you know if you can read a difficult case you understand and you can say well there are the arguments, these I accept those I think are bad arguments [throws up hands as if in gesture of respect] Whoa you know I'm satisfied,

that's enough for that's enough for me if you can do that by the end of the term that's fine. Yes, Mr [states student name].

016 **STUDENT 6:** I wanted to to know the difference between positive law and natural law and then you contrast.

017 **LECTURER:** No but that you can do in jurisprudence when you're in your final year.

018 **STUDENT 6:** OK.

019 **LECTURER:** Hmm it's a good one it's a good one but its too philosophical. It doesn't teach you about the law you see this is a, this is a skills development course, you know. When you walk out here the end of the year end of the month end of the term you must be able to look up legislation like we're going to do now. You must go and find a case, you must be able to read a case, you must be able to write commentary on a case on something. Its an outcomes-based course. You know. I must teach you things. Not just, not just philosophy [waves arms in air above head] you know. That's what I'm good at you know. I'm not good at the .. at that thing. Hmmm now everybody wants to say … yes?

020 OK I will make uh will make a finding and hopefully you will be able to understand what he's saying. And then you must tell me whether you agree with him, yes and why, or no and why. And if it's a if it's a majority and a minority judgment then you say you know I agree with this one because of these reasons and I agree with that one because of these reasons, but of course these are all very complicated legal cases. Um the one case that I'm thinking of at the moment um is Nortje v Pohl which is an unjustified enrichment case uumm where there was two to three. And it was on an extremely important issue to South African law; i.e. if we can have a general enrichment action or whether we must still go on with the old Roman law condictiones. But all those things … you don't understand what I'm talking about now ne? [touches arm of black female student who is sitting in aisle seat] Its very very advanced law.

021 **STUDENT 6:** Are we going to part from a from a certain eh what …A certain legal framework like form delict or from contract or just generally?

022 **LECTURER:** No its

023 **STUDENT 6:** Like from what I've learnt so far

024 **LECTURER:** No no no no it's a it's unjustified enrichment comes from quasi-contract and delict. It's a um it's a freestanding part of the law. Uh and you'll do it in your final year, once again. So ... anyway, let me think about it. I will give you, I will get the assignment out by next week so that you've got a long time to work on it. Ok. Is there anything that you want to tell me that you don't want to do [pause] that you would be absolutely ab-abhorred – why did you pull your face like that? What did you now want to do?

025 **STUDENT :** It's the 50 pages that …

026 **LECTURER:** Oh the 50 pages … ja. OK we'll we'll we'll see what we can do about that.

027 OK, now um let us continue. After there was a green paper and a white paper uh ladies and gentlemen, this white paper is transformed into a bill. Now a bill is a document distributed to all the representatives in the house of assembly. Where does the bill come from? Now now I'm not a member of parliament and I've never had the privilege of uh of sitting in Parliament and going through all these stages so its also hearsay evidence that I can tell you about its not its not firsthand experience. But wh- what I gathered when I had friends in the um department of justice and more specifically the um um what do they call it – legal advisors, the um there's a um um a group of people that are uh state legal advisors and then there's the law commission. The law commission is a group of very intelligent people sitting uh in building in Pretoria and they uh help draft uh new legislation and uh they assist the department of justice with the drafting of legislation.

028 Now the bill, which emanates from the white paper, is usually the labour of the law commission. Um but please don't write this down now because its not always the case. I'm telling you now I'm telling you behind the scenes that I know of. It can be just ordinary the department of justice. Um people at the department of justice drafting the bill.

029 Because what happens to the bill of course it goes through two stages um at the uh the in Parliament. The first stage is called the first reading debate. So in the national assembly uh there was a first reading, and what happens in the first reading is that everybody is made aware of the bill. The bill is read the first time. And the only really important thing that happens in the first reading, ladies and gentlemen, is that it is decided which portfolio committee is to discuss this bill.

030 Now what is a portfolio committee? A portfolio committee is a bipartisan, now I wonder if you know what the word bipartisan is … yes, yes you may know […] Do you know what a bipartisan committee is? No! Anybody that doesn't know? You know? You don't know. A bipartisan party is a party [corrects himself with a shake of the head] a committee consisting of all the parties, political parties, in Parliament. So its not just the ANC uh you see […] you see you need oxygen, you're yawning again I can see that. I can see your beautiful teeth from here. It is a bipartisan party it is representative of the DA the PAC the ACDP the ACDC – all those funny parties. They sit on the portfolio committee. They are elected to the portfolio committee – why? Because of their specialist knowledge. In other words if you are an authority on … uh what can I think .. uh uh child molestation or international criminal justice then you will be elected to the justice portfolio committee. You understand? That is the, once again that is the ideal, sometimes people are on the justice portfolio committee [draws in breath and closes eyes] hmmmm and they're not really experts but what happens in the portfolio

committee after the first reading is that all the detail of the bill is being thrashed out. Because it's a bipart- a bipartisan committee, all the parties are presented, that is where all the details are thrashed out. So for instance, if there's a child offender, if there is a child molestation and there's a regulation or there's a suggestion in the bill that if somebody is found in possession of child pornography he may be kept for 72 hours without bail or without uh without trial. That kind of detail will then be discussed at the portfolio committee. The party will say 'no this is unconstitutional, you can't keep somebody for 72 hours' and the people who suggested this will say ' no, but these people are extremely difficult to find once you let them go, they disappear and they run away and they go to different countries and the go to Bangkok where there's no extradition uh uh order' etc etc. That's were this kind of detail is thrashed out.

031 Once the portfolio committee is satisfied, and this is what happens during the year and during the session in Parliament, people fight about legislation. When that is finished it comes back to the National Assembly for a second reading. The second reading takes place within the National Assembly. No details are discussed, only the policy and philosophy of the legislation. Because it is now only broad strik- strikes that can be changed. The minutiae, the detail has been changed already. Once the second reading is finished, the general – the national assembly goes over to vote and the Bill is then either accepted or rejected or accepted uh with variations. With amendments. Still possible to do amendments. Once the second reading is finished it goes to the Council of Provinces for the same process in the Council of Provinces. So you can see it is a long arduous, tedious um way to get a piece of legislation through the houses of Parliament. It is not necessary that all legislation will start in the National Assembly. It can also, if it is a specific provincial issue. It can start um in the Council of Provinces. Once it is – yes?

032 **STUDENT 3:** Sorry I just missed what you said about National Council of …

033 **LECTURER:** Provinces.

034 **STUDENT 3:** Provinces. What do they do, what do they do to the Bill?

035 **LECTURER:** Exactly the same as the National Assembly. First reading, portfolio committee, second reading, vote … Am I going too fast for you? No but I've said all this before. You just say the bill goes from the National Assembly to the National Council of Provinces, the second house and the exactly same procedure is followed uh in the Council of Provinces. There's / it is introduced, first reading, portfolio committee, second reading, vote, accepted with amendments, accepted without amendments or rejected. Yes?

036 **STUDENT 14:** What's the case if you have committees and they amend, would the bill then have to go back to the assembly to amend again or …?

037 **LECTURER:** Yes um everything / the democratic principle is the majority plus one, fifty plus one must agree on everything that is passed into legislation.

The debates in the second reading are recorded ladies and gentlemen and they are called the Hansard debates. Uh this word Hansard comes from the Westminster system, it comes from the English system um and I suspect um I suspect I used to know this very well but I suspect it is the first person, it is the name of the first person who kept the records in in Westminster was a Mr or Lord Hansard and the debates are now still called Hansard and they are green books where you will find in the Parliament in Cape Town and every single word that is said in Parliament in the second reading of legislation is recorded in Hansard.

038 **STUDENT 3:** I'm sorry [inaudible]

039 **LECTURER:** Ja Um uh it is h-a-n-s-a-r-d. Hansard. On page 46 of your book. The debates are published in Hansard.

040 Now the question of course is, and I'm going to ask you to answer this, can you use the Hansard debates to establish what the legislature eventually intended, in the legislation? [pause] Who says yes? Two, three […, …], four. And the others?

041 **STUDENT 3:** I'm not sure what the question is.

042 **LECTURER:** You're not sure what I'm asking. [student interjects] I'm asking, the debates on the second reading, the debates about philosophy and policy, they are published in Hansard, [Student: yes]. So say for instance the Act is now passed, and it is now an Act of Parliament, and the Act comes before a court of law, to interpret. Which happens. May you, as the advocate, use the debates of Hansard to prove the intention of the legislature in the legislation. [long pause] You must think about this. Because remember it's a debate. So everything was argued pro and contra. So what are you going to use in Hansard, what are you allowed to use in Hansard? Are you allowed to use both arguments? Are you only allowed to use the arguments that eventually won the day? Its not such a clear-cut matter. There's a French philosophy, there's a French um doctrine and I'm just going to answer the question by saying this and you must think about it. There's a French doctrine in interpretation of international um uh uh instruments – you know what an international instrument is? Y-umm, the documents published by the United Nations. Um the um the Charter of the United Nations, the Charter on Economic, Social and Cultural Rights, the Chapter against uh Trafficking in People, Refugees, everything that is binding internationally. And that doctrine is called travaux preparatoires. And don't ask me to spell it! Travaux preparatoires. And that means that in international instruments, in diplomatic international law when you want to interpret an international instruments, the Convention on the Rights of Women or the Convention on the Rights of the Child, you may use the travaux preparatoires – the preparatory talks about the instrument, in international law. Do you follow the concept? OK. Now you can go and ask yourself whether the travaux preparatoires is also applicable to South African legislation. OK.

043 After it comes back from the from the uh the house uh the chamber uh the council of provinces the legislation goes to the President, the President signs the legislation and the moment the President signs the legislation, the Bill becomes an Act. It becomes an Act of Parliament and depending on which language the President signed the Act of Parliament that is the Act that will be kept and will be used for interpretation. And where are all these signed Acts kept? [pause] I wonder if anybody knows, where are all these signed Acts kept? Hmmm [student murmurs an answer]. No say say you might be right. [Student states her answer, but inaudibly] We don't have a supreme court anymore, we have a high court and then we have the High Court of Appeal and then we've got a Constitutional Court. Where are all the Acts kept that are signed by the President, the originals …

044 **STUDENT 15:** Government Gaz / Government Gazette what ..

045 **LECTURER:** The what what what government what is the government what is this thing Government Gazette You can't talk like that like a lawyer you can't use 'what what', its not legal phraseology ….

046 **STUDENT 15:** It's a document keeps the [gestures with hands] Act and ..

047 **LECTURER:** OK I don't understand what you're saying … Anybody else? Where are the signed Acts kept? Yes?

048 **STUDENT:** In the library of Parliament?

049 **LECTURER:** No! No! No no no no no no ….This gentleman in the middle here?

049 **STUDENT:** I have no idea [inaudible] law library?

050 **LECTURER:** Take a chance, law library no! Behind him … No take a chance, who's the most important man in law? Yes?

051 **STUDENT 1:** [Inaudible]

052 **LECTURER:** No no take a chance.

053 **STUDENT 1:** [States her answer but with hand over mouth – inaudible]

054 **LECTURER:** Yes yes yes there

055 **STUDENT 9:** With the Chief Justice

056 **LECTURER:** In the safe of the chief justice [Student: Where is he though?] The chief justice sits here in Braamfontein. He is, who is the chief justice of South Africa?

057 **STUDENT 6:** Pius Langa

058 **LECTURER:** Pius Langa, you should all know this ne? Who's the deputy chief justice (sshhh sshhh) Who's the deputy chief justice, he's on sabbatical at Wits now … he's sitting here in Wits, he's doing sabbatical work, he's also the

chancellor of this university ….[Student: Edwin Cameron I think it is - other students murmur their disagreement or assent] Ooohh Edwin is the chairman of the council, who is the chancellor [Franco: Chaskalson] No no Chaskalson is long retired, we long forget about Chaskalson. Who is the chancellor of the university of the Witwatersrand? [Another student attempts an answer but L already starts whistling incredulously] Ladies and gentlemen, I am going to kill myself [class laughs] I give you a hundred bucks if you can tell me. [Student: Is it a contract?] [Class laughs] It's a verbal contract, ja [more students laugh] [One other student attempts to answer] Justice? What? ….Does anybody know? [slight pause] Have you ever heard of Justice Dikgang Moseneke? [cries of 'oh' from class and chatter] Oh yes of course Dikgang ja ja ja ja ja [imitates class]

059 You must know these things ladies and gentlemen, if you are going to become a lawyer you must be informed if our so-ciety, in your comm-unity and if he's the chancellor of your uni-versity … you are going to run into trouble, you must know this, ladies and gentleman, I'm making a joke about this now because its-a hot and it's a long lecture but please don't underestimate what I'm saying: A lawyer in society is somebody who's informed. People come to you / and they pay you a thousand to three thousand rand an hour, to get advice from you because you know. And if you don't know what's going on in your immediate vicinity you're not going to make it. Please you must read your law reports every year/ month, you must read your newspaper every day, you must know a a read the professional journal every uh month or every week two weeks when it comes out, you must know what's going on in the university in the bar in the side-bar, you must know things. You must know which cases are before the courts, you must know who are the most important movers and shakers in the country [gestures 'no' with his hand before the class]. That's your work, I'm sorry, that's the that's the that's the um course that you've chosen uh and if you're not going to do it um you're not going to be a successful lawyer. OK.

060 Dikgang Moseneke is the Chief Justice. In the Chief Justice, Pius Langa, he's got a huge safe in his office and in this safe all original Acts are kept. All the Acts signed by Thabo Mbeki and Mr Mandela before him and all the other uh creepy crawlies before them. All the Acts that are still valid are kept in that safe so that if there's any interpretation question they can have recourse to the original language. In the old days it was Afrikaans and English depending on which uh uh Act the President signed, that will be used for interpretation. Now its nine languages, still the same principle. If the Act was passed in Xhosa then you use Xhosa version to interpret the Act. OK.

061 There are two more things I would like us to do before we um before we say goodbye. Uh and that is the testing right of our courts and the application of legislation. Now after legislation has been made, ladies and gentlemen, why is legislation made? Legislation is made so that it can order society. And it orders society by being applied. And when legislation is applied you work with words. And you work with a human construct. Then there will be

conflict. And when there's a conflict on the interpretation of a statute, interpretation of an Act, then the courts in South Africa – very few other countries have it – modern democracies always have this, the courts in South Africa has a testing right of all legislation. The courts and more specifically the High Court and the Constitutional Court has got the jurisdiction to test legislation against? The Constitution. [pause] Not the magistrates' court but the High Court and the Constitutional Court has got the authority to interpret legislation and test whether the legislation is compatible with our Constitution.

062 The part of the Constitution that the Constitutional Court, the High Court and the Supreme Court of Appeal uses is of course the Bill of Rights. Our Constitution has a bill of rights and you will of course learn much more about this in Constitutional Law but as far as legislation is concerned you must know that legislation is not holy in this country. In other countries without a Constitution such as the United Kingdom, there is no testing right for the courts. The words of Parliament is the highest authority. And there is no testing right of a piece of legislation against a Constitution. No testing rights in a Parliamentary sovereign State. In other words where Parliament is the highest authority like South Africa was before 1994, there's no testing right. [pause] OK. Ok any questions … on all these difficult topics? Now / yes?

063 **STUDENT 9:** Um I understand the concept, but in practical terms what do you mean 'to test'?

064 **LECTURER:** Oh um its very simple [moves around front row of chairs and leans against this row in front of her as he responds to her question] In the uh past it was possible um to use force to extract a confession out of a prisoner. There was a section in the Criminal Procedure Act, section 171 … (d) … (4) that said if a prisoner does not want to co-operate and there's a reasonable suspicion, then he may be forced to make a confession, And that confession will be allowed in court subsequently. Now your legal feeling, such as it is at this moment, should already tell you that there's something wrong with that. Uh-h-h you can't have (a) the right to silence; uh (b) the presumption of innocence, (c) decent ordinary human rights of dignity. You can't have that and a Criminal Procedure Act that says you can be forced to make a confession, the confession can be accepted against you and you can uh be tortured, your dignity can be um uh affected. So that was one of the first things, in the case of State versus Zuma, that was one of the first things that went to the Constitutional Court, to test whether the confession was made by a prisoner can be accepted by a subsequent court. And the constitutional court, by the mouth of the then Judge Kentridge, he was a judge for a very short time, he's now in England, um, he found that its unconstitutional and he struck it out. So that piece of legislation was found unconstitutional and it was literally scrapped out of the legislation. And that's what I mean by testing right. The Constitutional Court has got a uh uh right to do that / well from the High Court onwards, the High Court, the full bench of

the High Court, the Supreme Court of Appeal and then the Constitutional Court. They've all got this testing right of legislation. OK.

065 Here's your homework: Besides going to uh look at what? At chapter 10 I want you to go – and I'll give you a hint, I'll help you – you fill find these books [holding up red Butterworths folder of statutes], you will find these books in the library. If you walk into the library … well I'm not going to tell you where you're going to find them. These are the Butterworths Statutes. This – this is called the Statutes of the Republic of South Africa, and this is number 28. OK. I want you to go and find …. What is an interesting topic? I want you to go and find properly, by going through the whole process, I want you to go and find uh all the legislation and you must write down the names of the leg/ of the Acts regarding pornography, pornography. All the Acts concerning pornography. I want to know where they are, how you found them. OK? And then I will / next Tuesday I'm going to appoint individuals to come up uh to the podium and tell us viva voce – with a live voice – here how you found the Acts on pornography. And this is my tip – this is what it looks like, so its not too difficult. It won't take you more than fifteen to thirty minutes to do this. But please go and do it. Remember what I said what a laywer should do – you should know where to find the knowledge. OK gentle children thank you very much for your attention.

LECTURE 6

001 **LECTURER:** Has anybody got my list?

002 **STUDENT 8:** Uh uh I emailed it to you?

003 **LECTURER:** Oh I didn't get it?

004 **STUDENT 8:** Didn't you?

005 **LECTURER:** No. What email did you use?

006 **STUDENT 8:** The one in the book.

007 **LECTURER:** Uh no …

008 **STUDENT 8:** This one here … Um ja, this is the email I sent it to.

009 **LECTURER:** [inaudible]

010 **STUDENT 8:** It's a [lecturer's name] dot wits dot ac dot za.

011 **LECTURER:** Ja that's mine that's right.

012 **STUDENT 8:** It's the one I sent it to.

013 **LECTURER:** No [shakes head). [states name]

014 **STUDENT 8:** Ja and the … all in capital letters [inaudible].

015 **LECTURER:** Nope.

016 **STUDENT 8:** I'll send it again.

017 **LECTURER:** Can't you just give it to me?

018 **STUDENT 8:** I haven't printed it …[inaudible] I sent a message as well telling you to enjoy your weekend!

019 **LECTURER:** No no I missed all that. Yes (in nasal tone) … sawubona. Are you …

020 **STUDENT 8:** I can give you the written one back [L; Ja ….] And then I'll email you the electronic one again.

021 **LECTURER:** I need to I need to have the names … today. Because I must talk to the children. OK Um …. Are we is it about time? Morning ladies and gentlemen [STUDENT 14 enters from front door – he is late]. Hello [acknowledging late student who says 'sorry'].

022 Um today we are going to do um [setting up transparency on OHP] we are only going to do the uh um legislation statutes. We are only going to look at that so that so have a very clear idea of what a statute uh is. Now I asked you last time when we looked at the mechanics of legislation how legislation is made, how it goes through different readings, and how it is eventually signed

by the President and it is lodged in the office of the Chief Justice. Do you remember that? [Some students answer 'yes'] Yes ok, those are all important things. You must know those things. Um you know you work with laws you must know as much as possible about laws um uh that you can. You must not um you mustn't have any uncertainty about legislation. Legislation and cases uh the the the court cases um those are the things that you are going to earn your money with one day. Those are the things those are the tools of your trade, you must know what's going on there.

023 OK I asked you to go and find some legislation on pornography is that right [another student enters late]. Yes. OK. Who's going to volunteer to tell us how they did this? Yes um [says student's name].

024 **STUDENT 6:** I did it but to be honest I couldn't get some tangible. I got …

025 **LECTURER:** No I don't want ….

026 **STUDENT 6:** I went to the index

027 **LECTURER:** OK, no, step-by-step …Yes OK.

028 **STUDENT 6:** I went to the index …

029 **LECTURER:** No you went to the library ….

030 **STUDENT 6:** To the library

031 **LECTURER:** [laughter] OK and then what happened there.

032 **STUDENT 6:** There were all these books ….

033 **LECTURER:** I don't know … fra …

034 **STUDENT 6:** [turns to some other students for help] Butterworths ….

035 **LECTURER:** Butterworths, ja Butterworths.

036 **STUDENT 6:** Yes.

037 **LECTURER:** Tell us about the Buutterworths [elongates the 'u' sound, as a person with an African accent would] where do they, what do they look like and what do they do?

038 **STUDENT 6:** They look like a big encyclopaedia. And uh ….

039 **LECTURER:** Yes

040 **STUDENT 6:** With a hardened cover

041 **LECTURER:** What colour?

042 **STUDENT 6:** Uh maroon.

043 **LECTURER:** Who who wants to join us?

044 **STUDENT 6:** Maroon.

045 **LECTURER:** [Talking to some other students] Is it you [inaudible]

046 **STUDENT:** No.

047 **LECTURER:** Who is it? OK maroon in colour. Ladies and gentlemen it might seem like a very stupid trivial detail um but if you are looking for a piece of legislation and you're in a hurry and its not the law library uh where you now know, hopefully all of you now know where the Butterworths and the Jutas um uh statutes are. Go to a um uh uh client's library or you go into another attorney's library you must immediately be able to go to the Butterworths. Um you know, its no use you falling around there saying 'um we oh we oh where will I find the ….' You must know. What's going on. Yes? OK I'm going to …

048 **STUDENT 6:** I find out [inaudible]. Its arranged chronologically and alphabetically.

049 **LECTURER:** Yes, yes, that is good. What do you mean by chronologically?

050 **STUDENT 6:** Um ….

051 **LECTURER:** How is it arranged chronologically?

052 **STUDENT 6:** [inaudible] the topic

053 **LECTURER:** Yes but wh …how? How does it work?

054 **STUDENT 6:** I used the alphabetical one to be …

055 **LECTURER:** [Laughs]

056 **STUDENT 6:** So that was easy, ja ….

057 **LECTURER:** So you looked at the …Tell us how you used the alphabetic, the alphabet …

058 **LECTURER: STUDENT 6:** I looked at what I wanted, you see pornography …

059 **LECTURER:** Yes

060 **STUDENT 6:** Pornography cannot be found on its own so it went under Sexual Offences Act …

061 **LECTURER:** OK now where did you find this ….

062 **STUDENT 6:** Then I went to …

063 **LECTURER:** No no no no answer me, you can't just carry on. Where did you find this sexual offences?

064 **STUDENT 6:** OK from the other what, from the index, I went alphabetically, to found out from the other books, I don't know how you call them. That the first one, is just a guide, the index. So when you look at the sexual what offences act, you go on the cover is written sexual offences act, it falls under criminal, criminal cases.

065 **LECTURER:** Yes

066 **STUDENT 6:** So from criminal you look at the sexual offences act.

067 **LECTURER:** Umm hmmm

068 **STUDENT 6:** So you go to the page. So when I went to the page I found yeah the sexual offences act there. It took me to / I went to criminal, sexual offences act, from there I got stuck because I couldn't go anywhere, I was looking at the word 'pornography on the [inaudible] because there was uh child trafficking [L: Umm hmmm] uh what child pornography what what, I got stuck, I didn't know what to do there.

069 **LECTURER:** Ok that's a very good thing. Yes?

070 **STUDENT 16:** Umm ..

071 **LECTURER:** Can you tell us where he went wrong?

072 **STUDENT 16:** He should have looked under censorship instead of pornography

073 **LECTURER:** OK now that's just something you know or you don't know ne? And where do you look for censhorship?

074 **STUDENT 16:** Well um like him I also went to the index to look for pornography at first but I didn't find it …

075 **LECTURER:** In in ah the maroon Butterworths?

076 **STUDENT 16:** In the Butterworths yeah …

077 **LECTURER:** In the first volume, you looked for pornography you didn't find it, you looked for?

078 **STUDENT 16:** It was eh well looked for I don't know things like media we tried to find stuff that had to do with media [L:Umm hmmm]

079 **LECTURER:** You tried other things, yes?

080 **STUDENT 16:** Ja and eventually we came across the Film and Publications Act [L: Mmm] which goes under censorship and then we just ja

081 **LECTURER:** And then?

082 **STUDENT 16:** And then we went to volume 5 I think it was …

083 **LECTURER:** And what did you find in volume 5?

084 **STUDENT 16:** We found this page which has a whole bunch of other Acts

085 **LECTURER:** OK, this is the .. no this is not going to …. This is the preliminary note and it says there it's the Publication and Entertainments Act 26 of '63, do you think that that will help you? Mmm it's a bit old ne? Publications Act of 42 of 77 and the Films and Publications Act 65 of '96. That's probably what you were looking for ne?

086 **STUDENT 16:** Ja, there's another one …

087 **STUDENT 17:** There's another one, Indecent and Obscene Photographic Matter Act

088 **LECTURER:** Is it why's it not on here?

089 **STUDENT 17:** Is there, it's the second one. Ja and the amendments so …

090 **LECTURER:** OK. You carry on .. wait wait wait he's now [inaudible] What how did you find the Indecent thing?

091 **STUDENT 17:** No its under that censorship, if you … you missed the second one

092 **LECTURER:** OK

093 **STUDENT 17:** Its in there and its got all the amendments to it …

094 **LECTURER:** OK. The Indecent, Obscene Photographic Materials Act 37 of '67 as amended by 72 of '83. Yes and could you find that Act?

095 **STUDENT 17:** Yes, we found it, I read it, it just told you, it gave all the definitions of the words [inaudible]

096 **LECTURER:** Mmm so there's not a Pornographic Act?

097 **STUDENT 17:** No this is well this is it, ja ….

098 **LECTURER:** OK. Umm … yes?

099 **STUDENT 7:** I found a few other things but not under Butterworths, I found them under the Law of South Africa, the Juta books. Um … [L: Umm hmm] I think they called them LAWSA.

100 **LECTURER:** Yes LAWSA but that's something completely different but that's interesting ….

101 **STUDENT 7:** [inaudible while L is talking] interesting, I found I think I managed to get to censorship through that book. But I also found another um section one of the Films and Publications Act 65 of 1996 which refers to child pornography. And also a whole lot of, I even found one page on volume 5 part 2, which is on pornography itself.

102 **LECTURER:** OK …

103 **STUDENT 7:** But not an Act, just lots of information [L: Ja] on it.

104 **LECTURER:** OK, um d-d-d that's very good but, you know, LAWSA's something we're going to do separately. But it is a very good resource, it is a wonderful place to go and look for for things in in law … I just don't know if everybody with us knows what's going on …

105 **STUDENT 6:** What I think is as I say I think I was stuck. I went to the Internet, then I looked at uh I went to Google and I put uh pornography what what what It gave me the child pornography Act 1996, Act of 1965 of 96. Section one [inaudible] of 1999 and sub what substitution by Act 18 of 2004.

106 **LECTURER:** Now you found that on the Internet?

107 **STUDENT 6:** Yes

108 **LECTURER:** Mmmm but why didn't you go to the electronic, uh uh index of the statutes?

109 **STUDENT 6:** I didn't know how to do it.

110 **LECTURER:** Mmmm Did anybody go to the electronic? Yes … wonderful, my dear, tell me exactly what you did …

111 **STUDENT 3:** Um …

112 **LECTURER:** Tell everybody what you did, now, step for step. Knowledge ladies and gentlemen if you're a lawyer is not very valuable. If you can't share that knowledge, if you can't convince somebody else, of your point of view, you can't tell somebody what you did, its useless. Its dead gold in the safe. Its not in anybody's interest, its not, its not worth anything. It is very important that you project yourself, that you convince people, that you tell them step by step what you did. OK …

113 **STUDENT 3:** OK, I had it all written down but I left the piece of paper at home. But I think I still remember …

114 **LECTURER:** OK but now that is not a good start …

115 **STUDENT 3:** No I know [laughing] But I went to look on the computer and they've got, its under the Jutas …

116 **LECTURER:** Why did you decide to go and look on the computer?

117 **STUDENT 3:** I looked at the Butterworths statutes [L: Yes] and everybody else was busy with those so I thought to save time I could look on the computer first.

118 **LECTURER:** Yeah OK that's very good that's very good that's

119 **STUDENT 3:** And then you look under Jutas, its um 'SA Statutes'

120 **LECTURER:** Yes very good

121 **STUDENT 3:** And you go on there, and if you look at the bottom of, it comes up there with a screen, if you look at the bottom of the screen there's a little a pair of binoculars at the bottom, and you type in pornography [L: Mmm that means you searched] Mmm and thebn it you you do a wide search

122 **LECTURER:** In the statutes?

123 **STUDENT 3:** In the statutes, yes

124 **LECTURER:** Ja

125 **STUDENT 3:** And the ones that I came up with were the Criminal Sexual Offences Act, Films and Publications Act and the Child's Act ….

126 **LECTURER:** Mmm Child's Act

127 **STUDENT 3:** which looked at child pornography [L: Mmmm] and pornography [L: Ja]

128 **LECTURER:** And not the Indecent, Indecency …?

129 **STUDENT 3:** Um no I didn't seen that ….

130 **LECTURER:** Didn't find that OK … Ummm [STUDENT 6 raises hand] can I just say … ladies and gentlemen, this is the easiest way to solve the problem. The question the point of course is first of all, you must know that it exists. You must know what is going on out there. So, a very good exercise is spend some time in the library in front of the computer to find out how you work with electronic resources. Now, you know, I'm a very bad preacher to talk to you about electronic resources because um you know to me the texture of the paper, the sound of the turn of a book, the smell of the book, the notes of the previous person …. Those are all things why I like law. Um … and those you don't get on a computer. Um so a … although I'm forced when I do research myself to do uh to do electronic research, I prefer to do it on the hard copy. I also read much easier in a real book than on a screen. But those are all personal considerations, and it might be very valuable for you to separate the two. To find your information, use the electronic resources. And once you've found what you wanted then you can go to the real fons et origo, to the real origin.

131 **STUDENT 3:** Um I also learned something quite interesting while doing that exercise …

132 **LECTURER:** Mmm

133 **STUDENT 3:** I think it was [turns to another student – STUDENT 18] … right? [student confirms name] … showed me how to export cases and and parts of statutes and things like that and what you do is you look under um .. you find the index and then they have a lot of sort of crosses and um sorry pluses and

minuses and if you press the plus on something it comes with a whole list of things and pluses, you press the plus it then brings up everything underneath that main topic, and you can tick which / you look in each of those individually and its just takes you quickly to that particular part [L: Yes mmm], what you're looking for .. And if you tick that then you go 'File' and then 'Export', you can export that piece of information, you just save it under an MS-Word document and you save it straight into MS-Word [L: mmmm]

134 **LECTURER:** And then you can print it and you can do whatever …

135 **STUDENT 3:** Ja ..

136 **LECTURER:** Now … are you are you a computer boffin?

137 **STUDENT 18:** No I'm not, I just actually learned that by experimenting with the program …

138 **LECTURER:** Oh

139 **STUDENT 18:** Yes

140 **LECTURER:** No I thought you could give us a lecture on electronic resources. Ladies and gentlemen the electronic resources um in South Africa is very very very good. Virtually every journal article, virtually – not virtually – every single reported case, every um uh uh uh legal new piece of legislation be it from the from the Parliament in Cape Town or from provincial, is on electronic resources. So uh in the old days if you had to set up shop as a one-man uh attorney, you had to buy a whole set of Law Reports from eighteen voetsek till today. And that would cost you something like fifty to eighty thousand bucks, depending on whether they're bound or not. You had to buy all the statutes. You had to get a librarian to put the statutes up to date, well you still need that. Nowadays, if you know what you're doing, you need a pile of CDs and you can start your practice. You can really start practicing with a pile of CDs, you know. Not taking up more than five square inches on your desk. Ja?

141 **STUDENT 8:** Just for personal interest how much would that set of CDs cost? Would you be paying fifty to eighty thousand rand ….

142 **LECTURER:** You've got strange questions! You must ask the .. the rep comes the rep comes around on Mondays I think. And if you can catch her, you know they'll give you a brochure or you can go to the librarian and she will give you a brochure. But they're expensive, you know and of course we've got this wonderful thing called copyright. So there's um you know there's copyright on it so you can't get just one disc and let the whole university use it. Its only twenty users or whatever. Its very limited. And then of course it gets updated uh every month or every quarter or whatever, Um ….OK. Please, if you fo research try the electronic research first. There is virtually nothing – I'm not talking about obscure Nigerian statutes of … I don't even know, perhaps they are on CD-ROM but um uh you know, you might have a

problem with that – uh but as far as South African stuff is concerned, um, even the textbooks, are going to be on on CD-ROM or some of them are already interactive, and they've got a CD-ROM coming with them. Your Roman law book, Bukowski, has got a CD-ROM. And if you get the CD-ROM then there are exercises and things telling you how to study for Roman law and outlines and things um and etc. Constitutional law, there's a constitutional law book with a CD-ROM um uh uh attached to it. So that is the way that the law publishing is going in South Africa um uh to make it more um electronic friendly so that you can eventually have a paperless office. That sounds like an absolute disaster to me um but uh that is the future. OK. Anybody else who wants to share an experience they had in looking? You had your hand up? [Moves to front row of desks]

143 **STUDENT 2:** We actually went on to the online Lexis Nexis [inaudible] whatever and

144 **LECTURER:** No sorry to interrupt you but both you and um Mr [states name] there, you have this uh [sighs] what shall we call it, [L's cellphone rings in his pocket and he takes it out to turn it off, class laughs] um sorry You have this, when you don't know what to say you say 'what what' or you say 'whatever' [student smiles and agrees with him] or you say 'what' you know … please I beg you on my bended knees don't do that. If you talk formally, you know, like in a class, we have / this is a formal situation. It's not strictly formal because you know we [makes to and fro gesture with arm suggesting dialogue or interaction between himself and students] we're on a certain level. But if you talk in a class or in a lecture or in a court you must think about what you're saying. And when you it you must formulate it without things like uh 'what what' or 'whatever' or undef / unspecified words. It takes a little while. It's going to take him [gestures towards STUDENT 6] to get rid of that 'what what' Um, and and because it's a new discipline, you don't know what you what words to use. And half of the words are Latin so its difficult but you must try, it ie very important. Sorry, its just a little lecture.

145 **STUDENT 2:** Yes, we went on to Lexis Nexis electronic resource on the Internet [L: Ja, ja] to look up the um what do you call it, pornography and [class starts laughing] I'm sorry I don't [inaudible] [L: No I don't want to make you nervous] I know what I want to say [L: Yes go on go on you know what you must do]. So we went on we looked up pornography and it came up with like obscure things like the Electronic Communications Transaction Act which and Preventing and Combating of Corruption Act which also had pornography in it [L: mmmm] but it did come up with the Films and Publications Act …

146 **LECTURER:** But you see what that is is probably a word search. It looks for pornography in any kind of statute. And as we've now discovered there is no such a thing as the pornographic act. Um it is called something else, so that is a very valuable lesson, it can be very dangerous to do a word search. Um because as we will see when we do interpretation of statutes words can have different meanings. Uh and then there's nothing worse than getting more

information than you want. Uh you know um so that's a very very good exercise – now you know. Caveat! Beware! If you do a word search you're going to get a huge amount of information that you probably don't want. OK, anybody else?

147 **STUDENT 6:** What is the [inaudible] Like for instance you gave us the [inaudible] Films and Publications Act, something like that. Um what is [inaudible] .. word search?

148 **LECTURER:** Uh you know you can do pornography … um then you know there's a wonderful book called a thesaurus where you can go look for synonyms, you look for similar words, perhaps you know you don't even have to look in a book, you know that pornography, what is associated with pornography? Indecency, child pornography, um uh photographs, magazines, artwork and you look under all those. And then eventually … if you're a clever intelligent person it takes you five minutes and then you're sorted out, then you know where you are and you zoom into on the statute that you want. Which is the Indecen Indency Indecent Materials Act. OK. I'm very impressed. I think you did well. That is very good of you to do that. Um uh it's a very good exercise um and the only way of getting to know the uh getting to know the statutes and the legislation is to go and work with it. There's no other way. I can stand here and shout for hours and hours, you're not going to … understand unless you do it yourself. So this was a very very good and a very successful exercise we'll do exactly the same when how to read a court case. I'll give you a court case you go and find I'm just … I must find a court case myself, uh because it must be a difficult one to find and then you're going to find it. And I'm not going to help you and we'll see what happens. OK.

149 Let us now do an in-depth analysis of what a piece of legislation looks like. Because if you work with it you must know what to look for. Now what we have here is the first is the eh is the um Sundays and Public Holidays Act um its in the it's the Act that's in your in the in the coursepack for the undergraduates um so u its page 155 onwards. Ok what have we got here. We've got um the table of contents. Very important to know that every Act, every piece of legislation has got a table of contents. Its very neat because it tells you exactly what is going on. It tells you exactly where to get what. OK.

150 Statutes of the Republic of South Africa, that is standard, its always uh always on top. Uh [inaudible] and annotated, the title of the Act is the Sundays and Public Holidays Act. Is that a full title? No! What do we call that? The short title. That is what is called the short title and that is how you refer to the Act. It is called the Sundays and Public Holidays Act. OK. Then there's a preliminary note uh just uh uh telling you about the history and telling you interesting things about the Act.

151 Um then there's the um uh statutes um uh related to Sundays and public holidays, Prohibition of the Exhibition of Films on Sundays and Public Holidays Act 16 of 77 what is that? What is that? The Prohibition of the

Exhibition of Films on Sundays and Public Holidays Act comma number sixteen of 1977. Yes?

152 **STUDENT:** Is that not the full title?

153 **LECTURER:** No, its not called the full title, but you are very close. It is the ….

154 **STUDENT:** Long title.

155 **LECTURER:** Long title. It is the long title. It sounds funny but uh lawyers are like / you must / if you don't use the right word it doesn't work. OK Then there's the prohibition of the exhibition of films Amendment Act, the Public Holidays Act and the Public Holidays Amendment Act. Those are the Acts concerned with Sundays and Public Holidays. Uh subject matter main and supplementary and that there's reference to decided cases, and reference to other regulations. Not uh very very important if you are going to research the Act but uh not all that unclear. Here is the preliminary note, the note that uh many of you photostatted for me. Um and it says uh it gives you short summary of uh the history of all the Acts concern concerning Sundays and public holidays. Um it starts with the old 1917 Act, the pre-Union Statutes, then the '52 Act, then the '77 Act and then finally the '94 Act. OK. This you do only if you do if you do legal historical research, if you want to see how the mores, if you want to see how the boni mores, the the societal values have changed, then this page this page is extremely valuable. Because there you have in one, in a glance what the society thought of Sundays and public holidays. And you can write an essay of 50 pages just on those few Acts. And all research is done for you. Yes?

156 **STUDENT 7:** Um we've got amendment acts, like right at the bottom it says 36 of 1994 as amended by Act 48 of 1995. Um when you've got an Amendment Act does the original Act get written of or …

157 **LECTURER:** MmMm no no um … this is part of the trick … to know what's going on. The the Act only gets written off if there's a new Act, you know written off as you now mean it. So the Prohibition of the Exhibition of Films and Public Holidays Act 16 of 77 was changed in toto by the Public Holidays Act. So the Public Holidays Act – and it would also say that – you must go look at the Act, it will tell you, it repealed the following Acts.

158 **STUDENT 3:** So if it repealed it …

159 **LECTURER:** Then its dead and its finished. But the current Act at the moment, the current Act at the moment is the Public Holidays Act. If you want to go and see what we do about Sundays and public holidays that is the Act to go and look at. There might be, accidentally or on purpose, there might be some of the old Acts that are still valid. There might be some of the old Acts that are still valid and the new Act will tell you that. OK. So when you do research you read the latest Act. At the end of the Act – we'll look now – it will give you all the sections in the Act that was amended. It will give you the amendment history. So if an Act has been amen amended, the Act is still in

force, but certain sections have changed. OK. But its very very very difficult sometimes to see if any of these old Acts are still in operation. If its not repealed specifically it remains in operation.

160 **STUDENT 17:** Don't the amendments also add [inaudible] to the Act? The pornographic one is just included film and then one amendment was added to include Internet …

161 **LECTURER:** Yes or uh artwork or uh whatever ja uh amendment is any change to the Act. Uh addition take away, change it completely, whatever. OK. [pause] Any questions? [pause]

162 Ok ladies and gentlemen, here is the Act itself. Here is the Act itself, statutes of the Republic of South Africa, Sundays and Public Holidays, so you know exactly what you're what you're reading. You know its right on top there, you know exactly what you're reading. Uh uh. Its called the Sundays and Public Holidays Act number 36 of 1994. Uh and it was passed in Parliament 23rd November 1994 and uh it came into operation 1st January 1995 and the Afrikaans text was signed by the President. What does that mean? You're now going to ask me how much does he get paid for every Act that he signs? [laughter]

163 **STUDENT 8:** No-o. Its just that this signing Acts by the President thing is bugging me. Kay fine, Acts can be published in all official eleven languages right [L: Mmm hmmm]. Now in contract we've learned that you never sign a thing that you haven't read first now does the President know all official languages that he actually signs it?

164 **LECTURER:** He only signs one …

165 **STUDENT 8:** The English one?

166 **LECTURER:** No no no no [shaking head] any one of the official languages. If it's a language that he knows then obviously … you must remember that he's supposed to sit in Parliament so um uh he went through all the stages of making the Act. So when it gets to him in the final stage he should know what's going on. Um you know he obviously also initiates lots of these Acts. He or his department. So uh he knows what's going on. Uh uh if its an Act if he's [inaudible] for whatever reason uh to sign an Act in Ndebele and he doesn't understand Ndebele then he gets somebody to interpret it for him. He gets someone to to to translate it for him or tell him what it is about. Um he could also read the English, Afrikaans or the Xhosa which he will understand but if there's a certain term that he doesn't understand then you know obviously … Yes?

167 **STUDENT 7:** Is each Act written in all eleven languages or are each Act written into differently …

168 **LECTURER:** No um you're asking me a technical question now. I think they are in all eleven languages um I I [sighs] I think they are published in all eleven

languages whether they go over all the stages in all eleven languages that's I don't know I think they go through in the old days you know they went through in both official languages, but whether they do it on eleven official languages that's difficult to say. The practical thing, of course, as you know is, that most Acts are now English, everything's English, um and only when its very very specific, like an Act on the Khoisan uh would also be in their language. Or an Act on the Venda people will be in Venda. Um something like that. Uh but for the rest I think they stick to they stick to English. Um I don't under/ I don't know I don't uh I don't know what Parliament does it it would cause such a huge amount of work to have everything in eleven or nine languages. Is it nine or eleven?

169 **STUDENT 8:** Eleven …

170 **LECTURER:** Ja. I don't know. OK. Did anybody want to answer why is it important to the President sign? Yes?

171 **STUDENT 1:** When the Acts can be changed or interpreted it must be done in the language in which he signed it.

172 **LECTURER:** In which he signs it so that it important and that is also the copy that is kept … in the Chief Justice's office. OK. And this Act as amended by Public Holidays Amendment Act number 48 of 1995. Right upfront it tells you that this Act has already been um amended. OK.

173 Here starts the Act. This wh this wh this is what an Act looked like looks like. It starts off ladies and gentlemen with what is called a definitions clause. And when you do a contract one day you will also start off with a definitional clause. You will say 'The parties mean this and this uh, a merger means between these two companies, major director means this etc etc' And this is what the Act does um uh days to be observed as public holidays or rather definitions public holidays means the days mentioned in section 1 and any other days declared to be a public holiday under section 2(a). When is a day declared to be a public holiday? When did this happen? Shht I'm asking this lady here [gestures towards BF2 who looks surprised]. I can ask you.

174 **STUDENT 12:** Ja I know [smiling]. When can a day be declared a public holiday?

175 **LECTURER:** Yes, can you read what is up there?

176 **STUDENT 12:** Yea

177 **LECTURER:** It says the definition of public holiday. A public holiday means the days mentioned in Schedule 1 so those are things like Easter, Christmas, New Year's Day, you know they're all mentioned in Schedule 1. And any other day declared to be a public holiday under section 2(a). When is a day declared to be a public holiday? So its not Schedule 1 holiday [BF2; I think …] Mm Hm the President declares it.

178 **STUDENT 12:** I think like when a day is of significance to a country or something like that …

179 **LECTURER:** No no this is South Africa my dear this is a South African statute. OK so we've got our set holidays. So when is there an additional holiday?

180 **STUDENT 12:** Oh when a holiday falls on a Saturday or Sunday …

181 **LECTURER:** Hmmm ja that's clever! That's a clever one. Its not exactly what I was looking for but that is probably one of them. The holiday falls on a Sunday then the State President declares the Monday a public holiday. Ja you are very clever. Yes? When did the President declare a normal day to be a public holiday? Can you remember? You're probably too young. How old are you?

182 **STUDENT 16:** [Laughs] 23

183 **LECTURER:** No you should have you should remember.

184 **STUDENT 16:** Was I here?

185 **LECTURER:** Yes you were here, 23 years ago yes.

186 **STUDENT 1:** Is it heritage day?

187 **LECTURER:** No

188 **STUDENT 17:** Youth day?

189 **LECTURER:** No

190 **STUDENT 2:** The 27th of April.

191 **LECTURER:** No Those are all scheduled holidays my dear.

192 **STUDENT 6:** Maybe …

193 **LECTURER:** Mebbe …

194 **STUDENT 6:** A very prominent person dies in the country

195 **LECTURER:** Give me an example [one students says softly 'Steve Biko'] [inaudible muttering by students]. No [laughs] there wasn't a public holiday. Mr Nice Guy? Whatever.

196 **STUDENT:** I was too young.

197 **LECTURER:** You were too young or you were asleep while it was happened.

198 **STUDENT 8:** Wasn't it round about the 1994 elections?

199 **LECTURER:** Yes, yes. What happened? What happened? Were you around the 1994 elections? Where were you?

200 **STUDENT 11:** Some other country.

201 **LECTURER:** Ah well then I can't help it.

202 [Interlude where researcher comes to explain the purpose of the research]

But first I want my answer. Mr Nice Guy?

203 **STUDENT 10:** No we've got a [inaudible].

204 **LECTURER:** If you've got a [inaudible] you must stick to it. No uh you you're … somebody else? The first election, the 1994 election! Don't you remember? [S: It is Oliver Tambo?] No not Oliver Tambo day, there's no such thing as Oliver Tambo day. Ladies and gentlemen when we had the first elections we one day was set aside for the election and it was declared a public holiday. By then president FW de Klerk. So then everybody went to the polls. You remember those queues going right around the block? Remember that? Good South Africans will remember that. Then when it became four o clock in the afternoon they said, but we are never going to finish, the people are not going to be able to finish voting. There are so many people who want to vote, there's not enough time. So Mr de Klerk and Thabo Mbeki and Mandela came together and what did they decide? We will declare the next day a public holiday or two days public holidays so that the people can go and vote. That is what the section means, by 'any other day declared to be a public holiday. Eish you must have knowledge ne.

205 **STUDENT:** What's that day called?

206 **LECTURER:** No no its not called anything. It was once off.

207 **STUDENT:** Ah it was once off, oh all right.

208 **LECTURER:** Yes ,it was finished.

209 **STUDENT 17:** Does the President have the power to declare any day a public holiday?

210 **LECTURER:** Yes.

211 **STUDENT 17:** So if he decided his birthday was important enough he could …

212 **LECTURER:** He can do, you know if you're in Zimbabwe it would probably happen. It won't happen here, you know, in a modern constitutional democracy, but yes the President can. And if he wants to declare Oliver Tambo day he can do that, uh but usually its done in consultation with Cabinet you know and there's broad consensus with the with the people you know its um … South Africa already has a lot of public holidays.

213 **STUDENT 7:** If the President wanted to declare a public holiday would it be every year or like that [inaudible] its just once off?

214 **LECTURER:** How long is a piece of string? It depends on the needs. The legal point is that he has, in terms of this section he has the right to declare any day a public holiday, for whatever reason.

215 **STUDENT 7:** So he can declare …

216 **LECTURER:** Ja well … there's a process, there's a process. I don't want to get into technicalities now. Don't ask me, you know …OK.

217 **STUDENT 16:** Would an example be in the United States after 9/11 year I think people want ….

218 **LECTURER:** Yes …. Think a little bit about what they have done ,eh? I don't know how it works in the United States, I don't know people say it doesn't exist I don't know I've never been there. So I don't know how their law works. Probably George Bush declared a day of mourning or a day of remembrance or whatever and now its every every uh eleventh of September is a holiday. OK Tracy would like to talk to you now.

LECTURE 7

001 **LECTURER:** Good morning ladies and gentlemen. How are you this morning? Let us … let us um quickly finalize these pages um … um uh we were talking. Last time we were talking about the legislation [inaudible] some legislation [inaudible] are you sure?

002 **RESEARCH ASSISTANT:** Can still see ….

003 **LECTURER:** Can you still see me

004 **RESEARCH ASSISTANT:** Ja

005 **LECTURER:** Um that is what an Act looks like and we got up to days observed as public holidays, those are the sections of a Act. Um … the most important thing or one of the most important things of course concerning uh legislation is how do we cite, how do we cite legislation in uh a piece of a piece of work that we have done. [clears throat] The reference uh the citation uh if you put a footnote and you want to refer to an Act, it is simply um section, with a small s no punctuation uh section 2, in brackets 1, in brackets b, in brackets small roman 1 of Act, with a capital letter, 92 of 96. Let me write that down for you, uh, perhaps it will make more sense if you see it. Section, small alphabet ne, this is now footnote 1, section 2, 1, section 2(1), b, roman (i), of, now this is capital again, of Act 92 of 1996. Full stop and that's the only punctuation that you have. This refers to section 2, there [motions towards OHP], section 2, of the Act, first paragraph, first subsection of section 2, subsection b of subsection 1, and subparagraph 1 of subsection b. So section 2, subsection 1, sub-subsection b, um paragraph (i). Or sub-sub-subsection (i). Of Act, capital, 92 of 1996. That's how you put it in your in your essay when you refer to legislation. You do not say, you do not say the um the Public Holidays Act or Sundays and Public Holidays Act, just Act 92 of 1996. We will have a full lecture on um uh footnotes and citations uh once we once we need it, Uh but I'm just mentioning this in passing so that you know uh what all these things are.

006 OK. Then the Act carries on, until the end. That is the last end of the Act. Um section 5, subsection 2. Um and that is the last um page of that Act. And then after that you have the schedule of all the Acts ever published or schedule of all the Acts that has ever been published and the history of all the Acts from 52 to uh 81. Here you see repealed the whole repealed the whole repealed the whole repealed the whole [quickly reads off overhead the text of the schedule]. Uh and there. So you can very quickly and immediately see which Act is still in force. And what is the history of public holidays and Sundays in South Africa. OK.

007 Do you have uh any questions? On legislation? The technicalities of legislation. Are we … is it a is it a silent class today again? Ooo I'm not even getting a response on that. Huh? Any question on legislation ladies and

gentlemen. Must be something that uh something that bothers you? Something that you're not clear of? Yes yes, Che Gevara. Your name is?

008 **STUDENT 9:** It just, its semantics but the difference between statutes and legislation ..

009 **LECTURER:** Uh the difference between a son and a boy, same thing. Exactly the same thing but um uh you can use them as synonyms [STUDENT 9: OK]. They're there's no um technical difference between them. They are interchangeable. The better word is probably legislation. Because that gives you um uh an idea of how it came about. Statue or statute is usually when you refer to um old Roman statutes, statutes which um also laws but they're not legislation in the same sense um as uh [inaudible]. So if you want to be modern and up to date you use the word legislation um if you want to use an historical word that can incorporate any kind of legislation you use the word statute. And another one …

010 **STUDENT 9:** I don't know why I'm struggling with the concept, but the concept of the 'common law' um because when we were discussing it before we were talking about it being all the way back to Dutch law [Lecturer: Um hmm] But then when you talk about advancing the common law in line with the Constitution [Lecturer: Um hmm] it seems / I mean are they talking about the law that's understood as the [inaudible] like I mean when you say 'advancing the common law' in line with the Constitution wha … I don't understand what it means. I don't know why I'm struggling with this …

011 **LECTURER:** No no no no no it is one of the it is one of the major major uh uh that a first-year law student can uh have. Um is there anybody that can answer her? I'm going to answer her now in full um I'm not trying to uh avoid the question, I just wondered whether somebody out there can also be very clever [pauses for a few seconds, no student volunteers] Ok um the problem with the word 'common law' is that it has very distinct and very very different meanings. Um when I had to separate these words for myself, um what I did is I tried to get uh to the root of the word, what is the roo … what is the meaning .. what does the word mean um you know, everybody talks about common law common law and uh nobody really knows what it means, where it comes from.

012 Now the common law means, is simply, the law that is brought about by the common wisdom of all the judges and lawyers of the commonwealth. Now you're getting even more confused. It is simply, in England, the common law, beca .. that's where the word comes from … The common law is the law created by the jurists. By the lawyers. In England it is the judges, judge-made law, and law made by lawyers. It is not legislation, that you now know. Common law is not legislation. Yes? [Seeing student raise hand]

013 **STUDENT:** Would they then be similar to edicts?

014 **LECTURER:** No no no [makes a negative gesture with hand and pulls mouth in a cringing manner] Are you talking about the Roman [Student: It's the concept …] They're exactly opposite to edicts. But I'm talking about English edicts now not Roman law edicts. You know [makes 'no' gesture with hand again] forget about the Roman law edicts now um we're trying to establish um the meaning of a word in modern South Africa. OK. Yes? You want to ask something?

015 **STUDENT:** Oh me?

016 **LECTURER:** Yes.

017 **STUDENT:** Oh no I don't, sorry.

018 **LECTURER:** Oh, you were just putting up your hand like this [raises hand from elbow] Oh yes. Ok. Ok. Now that is the first, that is the root meaning of the word. It comes from ancient, ancient English law. So in English law you had the commons, and what was the commons? The houses of Parliament. The houses of Parliament and the King made the laws and that was one branch of the law. And those laws were then interpreted by the judges and the jurists. And they brought about the common law of England which is then the common wisdom of the judges and the lawyers of England. Ok. So that law is the law that is self evident and not contained in legislation or edicts or municipal regulations or decrees or whatever. So you understand the first div-division between legislation and common law [slight pause] I explained I explained it to you by saying that common law is the background. Its all those, those traditions and legal uh cases case law, and opinions of the lawyers that has become a part of English law. It is therefore not the law of Parliament, but the law of the bench. The law of the judiciary.

019 Now [holds up forefinger] when you step outside England, when you when you extend this term you get the term 'common law country'. A common law country is a country [slight pause] where English common law forms the basis of that country's law. Common law country is a country that has some connection with England and has taken over the common law of England as its own common law. [Softer and more resigned] Can you give me an example of such a country? [Student: Australia] Australia (said with Australian accent) that's one. [Student: America] America is one. Except for Louisiana where its Roman law. Yes? [Student: Is Canada?] Canada, yes, except for Quebec where its Roman law. Yes? [Student: New Zealand] Yes (as if acknowledging a secret), very good, and Tasmania, before you get that one. Huh? [Same student: Isn't Tasmania part of Australia?] Yes, but you know [licks lips] Ok? Another one? [Student: What about South Africa?] What about South Africa? [Student: I was wondering whether it was a common law country] Is it? You think so? And no English law? Uh … [Student: Uh commerce, isn't most of the …] Yes, all commercial law is English law and all the adjective law is English law. We learnt that last year, er week. Didn't we? So what is South Africa? Is it a common law country? [no-one answers, students murmuring] Hmmm? [bends forward as if to hear better] No no,

what are countries called that are not common law countries? [pause] Like for example, Spain, Fr-France, Netherlands, Germany, Ceylon, South Africa, Scotland? [Juts head forward as if expecting an answer? [Student: Republics? No, yes] [L pauses for a minute, smiles, shakes head and then laughs] No no no no no They are called sss-civil law countries. You have common countries where England and its common law is the basis of the law, and you have civil law countries where Roman law is the basis of the legal system. Do you understand this second division?

020 OK, what is South Africa? [Some students murmur: It's a civil law …] Ooo hoo hoo hoo hoo what about the commercial law then that I repeat … what did you say? [Student: It's a hybrid] It's a hybrid. It's a hybrid. South Africa is a hybrid. Where did you learn that beautiful word? [Same student: I think you said it] Oh [raises eyebrows, but looks pleased, some students laugh] South Africa is a mixture, South Africa is a mixture. Mixture civil law and common law.

021 OK. So what is the common law of South Africa? [pause, students are silent] This is a difficult question. What is the common law of South Africa? [pause, students are murmuring but no-one offers an answer] Come come come you know this? [STUDENT 8: Isn't it the cases that have been …] No no no which system do we use in South Africa? Which is the common law of South Africa [some students are murmuring answers but L looks as if they are incoherent to him. Then one student says 'Roman-Dutch law]. Thank you very much, thank you very much. Those people who said anything else, you are absolutely wrong and you don't know what's going on [some students laugh nervously]. Roman-Dutch law, ladies and gentlemen, is the common law of South Africa.

022 Now, now the final point. This – [say's student's name] – what does it mean when the Constitution of a hybrid country, where Roman law is the common law, and Roman law is civil law, where the Constitution says the common law must be developed in accordance with the Constitution. [Dramatic pause] If you're not right or not certain don't confuse us, huh … we are walking on eggs here. Yes, somebody knows, knows for certain? Yes, Mr …?

023 **STUDENT 6:** Which means uh all the rules which are promulgated into that country they have to be in line with the Constitution because the Constitution has got the right to strike …

024 **LECTURER:** No [emphatically]. No. Laws are legislation. And although what you say is hundred percent right, when I say section, what-what [Student: 49(2)] forty-nine two says that the common law must be developed in accordance with the Constitution, what does that mean? [Remains pointing index finger in mid-air]

025 **STUDENT 4:** It shouldn't contradict the Constitution ….

026 **LECTURER:** What, what, what? What shouldn't contradict the Constitution? [Some students mutter nervously] What is the common law? What does that mean?

027 **STUDENT 4:** When decisions are made ….

028 **LECTURER:** YES! Yes. Thank you. Thank you. Very clever. Very very clever. When the courts, not the laws like Mr … said, when the courts, the judges, when they sit, and they decide law cases, what do they use? They use legislation and they use the common law. They use other cases. Why do they do this? They develop our common law. The judges, since 1910 when we had uh a united uh appellate bench the judges and the lawyers develops the common law. The common law in South Africa is the Roman-Dutch law. So the Roman-Dutch law, now in this country must be developed now in accordance with the Constitution by the judges. That is what section forty-nine two says. Do you understand? Does everybody understand?

029 OK, ladies and gentlemen. This is exactly the kind of thing that will be expected of you as a lawyer. This is one word. Common law. And I have now in fif-fifteen minutes, I don't know how long, given you at least five or six distinct different meanings of that one word. And it would be expected of you as a lawyer one day to read a sentence and from that sentence to deduct what does the 'common law' mean … in that sentence. Because certainly, the common law, it doesn't mean in section 49(2) or 42(9) when it says the 'common law of South Africa' … it doesn't mean English common law. It doesn't mean we must now develop English common law. It certainly doesn't mean, uh, that we must um, that we must ignore our own common law. That we must forget about what the Roman-Dutch law said and now just look towards the the Constitution.

030 Many constitutional lawyers will say that. Many constitution lawyers will say that, you know, 'forget about the bloody Roman-Dutch law, that is old news, look at the Constitution if you want to interpret it'. It doesn't mean that. What it does mean is, Hugo de Groot in the 16th century – Hugo de Groot was a great Dutch lawyer – Hugo de Groot in the 16th century said, in one of his books, you can't trust with money a woman that is not a public uh a 'umbaarkoopvrou', um if a female is not a public merchant you cannot trust her with money. That was the uh uh well it is a little bit chauvinistic, but that was the going concept in the 16th century. Women who are not trained in mercantile things, women who are not trained in business, must not be allowed, in terms of the law, to work with money. That is what Hugo de Groot said. And that is one of his major uh uh pieces of writing in his [states title of one of De Groot's works]. So that is an old authority. Can we use that as part of our common law? No! Of course not. What will stop us? Section forty-nine two will stop use because it says yes, look at the Roman-Dutch law, but if you get an absurdity such as this then ignore it. Obviously that is not the way we think anymore. Um, we can't use that.

031 There's a senatusconsulta masedoneanum .. uh you may know the people in my Roman law class what a senatusconsulta is – it's a decision by the Roman Senate – and the senatusconsulta masedoneanum said, an unassisted wife may never sign surety. Masedoneanum, the senatusconsulta masedoneanum – an unassisted wife, if she's not assisted by her husband, may not sign surety. That was part of South African law until 1976. It was part, as it was promulgated by the senate in the Republic of Rome [much finger-wagging at this point] it remained in force until 1976. Now if it had not been uh discarded in 1976 by court case or by legislation, it would still be part of our law. Can you then? Can you use it? Will it be valid … law? No! Because it goes against gender equality. It goes against the spirit and purport of the Constitution. Goed! You understand? Difficult things, ne, difficult, difficult …

032 OK. We now reach the final part of our discussion on legislation. Sorry that I'm carrying on about legislation for such a long time, but it is a very very important topic. And you should know legislation very very very well. Ladies and gentlemen, we as lawyers, when you become a lawyer … one day, the tools that you are going to use in your trade will be books, dictionaries and, most of all, words. If you are not good with languages, if you are not good with words, understanding words, writing words, speaking words, then the legal profession is going to be very hostile. A very hostile environment for you. You must be literate, you must be able to understand words in their very very difficult and multifaceted way in which they they operate.

033 Let use start this lecture by saying that every communication between two human beings, every commujnication, whether you say 'I love you' or whether you say 'I will, I will put the cheque in the post or uh I will see you next week', every communication is virtually flawed. Communication between two subjects is one of the most difficult things to overcome, and in part the role of the lawyer is to identify legal arguments, legal concepts where misunderstanding took place between two parties, whether it is in a divorce proceeding, whether it is in a contract, whether it is in a will, whether it is in a [pauses slightly], partnership agreement, it doesn't matter. The function and role of the lawyer is essentially to solve miscommunication. [Breathes in deeply]

034 Now, the first way in which a lawyer will solve miscommunication is by interpreting legislation. That is, that is the easiest way of addressing this problem, because, at least as you've now seen, legislation is made by a rigorous process of going through Parliament for several readings, being drafted by highly technically skilled people, um and people who put words into legislation have a very specific idea of what they want to do. It is not something that is done slapstick haphazardly, it is something that is done with great, or supposed to be done with great uh technical skill and with great care.

035 Ok. Um when we interpret legislation there are two there are two ways of interpreting legislation and I'm just going to mention the one um and then

concentrate on the second one. The the the unimportant way of interpreting legislation, or to help us interpreting legislation is the interpretation by the legislature himself or herself … itself. What I mean by that is there are certain things that are used uh in legislation throughout um throughout the statutes. Throughout the Acts and the the laws there are certain terms that are similar to each and every statute. Can you think of such a word? [pause] Can you think of such a word, that appears, that has the same meaning, that appears everywhere?

036 **STUDENT:** Repeal

037 **LECTURER:** No, repeal can mean many many different things in many different circumstances. Um a word that remains the same. That has the same meaning or ought to have the same meaning wherever you use it, it never changes.

038 **STUDENT:** Legislation, the word legislation …

039 **LECTURER:** No no no no

040 **STUDENT:** Is it a simple word [laughs]?

041 **LECTURER:** Its not a single word its many words. Something that if you use it its like a standard … that if you use it uh uh you use it in legislation it must mean exactly the same in whatever legislation you use it. Yes, at the back ….

042 **STUDENT:** Inaudible

043 **LECTURER:** I can't /I didn't hear ..

044 **STUDENT:** Exit

045 **LECTURER:** Exit? [almost embarrassed silence] Um [sighs] If I say I'm going to exit Parliament, it means something. It I'm saying I'm exiting the highway, its another thing. If, you know, I'm saying I'm exiting the classroom its completely different…. You don't / you're not thinking ne? You just saw a word [gestures towards the exit sign above the door in the class] Yes?

046 **STUDENT:** The Republic of South Africa?

047 **LECTURER:** Yes [dubiously] ja, perhaps

048 **STUDENT:** Houses of Parliament?

049 **LECTURER:** No no

050 **STUDENT:** What about month?

051 **LECTURER:** Yes! Yes! Yes, thank you. Month. If you say, application should be entered with the department of home affairs within a month of the date on which application is made, what does that mean? [pauses] [Student: calendar month?] What does a calendar month mean it doesn't help if you give me

another word my dear [laughs] [Student: A month would be part of a normal year and there are twelve months in the year] Ja but now look, is a month, you know, is a month thirty or thirty-one days? Does it include the first and the 30th or the 31st, or does it exclude them? Hmm?

052 **STUDENT 8:** It means that the application must be taken into account at the beginning of the new next month …

053 **LECTURER:** No no no but you're just repeating what she's saying, I want to know what is a month?

054 **STUDENT:** Inclusive

055 **LECTURER:** Is it inclusive or exclusive?

056 **STUDENT:** Inclusive.

057 **LECTURER:** Is it? So a month is from the first day to the last day inclusive. So a month is from the first to the 28th [students mutter] of February ja. So if the month is February what does it mean? So what I'm trying to tell you show you here is there are many variables and when the legislature uses the word 'month' he wants to make sure that everybody will understand what is a month. What is a day?

058 **CLASS:** Twenty-four hours.

059 **LECTURER:** Is a day not just the sunshine hours?

060 **STUDENT:** No

061 **LECTURER:** Is it also the night?

062 **STUDENT:** Yes

063 **LECTURER:** So the day is the night? [class laughs]

064 **STUDENT:** A day is the day and the night!

065 **LECTURER:** Yes [laughs] No, but I just want to confuse you [laughs] I beg your pardon?

066 **STUDENT 8:** You see a day is a day if you want to define the period and say 'daytime' and 'nighttime'

067 **LECTURER:** No, unless you have, unless you have an Act. A place where you can say a day means, in all legislation, if you use the word day it means 24 hours and it includes the night, you understand, then everybody knows what we're talking about.

068 And the same with um, the same with, say for instance, a rand. What is, what is a rand? What is the value of one rand? [a number of students murmur an answer] A hundred cents? Ja I repeat my question, what is the value of a hundred cents? [A student says something – inaudible which makes the

whole class laugh] In terms of British pounds a hundred cents is about uh is about uh well we do it the other way around. But fifteen rand is one pound. In terms of the dollar seven rand is one dollar. So it has a different value. Can you see? So if you talk about a rand you must have an Act that says when there is mention of the South African currency it means the value locally in not foreign but um local currency, one hundred cents or whatever. Same with distances. Same with anything. So, what the legislature did he created the so-called Interpretation Act. And in the Interpretation Act all these things that are uncertain are defined precisely so that you can know when you talk about a calendar month, it means the first day and the last day inclusive for however long that calendar month is, thirty days, thirty-one day, inclusive of the first day and the second day. The Interpretation Act 33 of 1957. It also says, for example, that if you refer to the male gender, you include the female gender. If you say 'he' in South African legislation it is not just the male gender but also the female gender that is included and that is, that is determined by the Interpretation Act.

069 So ladies and gentlemen, the Interpretation Act is a wonderful instrument. It is a type of legislative dictionary. If you go look up something one day and you find there is something you don't understand please remember the Interpretation Act, if you want to know. If your principal tells you on the first day, you know, go and go and work out the rent for this tenant, uh and you see in the in the contract it talks about days and it talks about months and whatever, and you don't know what it is, first go to the Interpretation Act and, in your opinion to your principal say, the Interpretation Act considers a day to be such and such. Whether this is the same for this contract is an open question, because, the contract doesn't have a definitional clause. The contract hasn't got its own definition. So the first way to interpret um uh legislation is the Interpretation Act.

070 The second way of course is to look at the definition given to you in the legislation itself. You remember? When we looked at this um when we looked at this Act? Section 1 is definitions. In this act public holidays means days mentioned in Schedule 1. In this Act includes the schedules. Any reference to any law to public holidays shall be deemed to be a reference to the public holidays as defined in this Act. OK. That ladies and gentlemen is the less important interpretation. These are things that you ought to know … um … Its / you've now been exposed to it you should know that there's such an Act now.

071 The complicated interpretation is the interpretation that is done by the courts. The courts play a very very significant role in developing our law in South Africa. Because we're a hybrid system, because we've both got English and Roman-Dutch um common law background, because we've got a Constitution, because we've got eleven different languages, however many ethnic groups in this country, it is an enormously rich jurisdiction. Enormously rich to interpret and develop. Lots of things are happening in South Africa. It is not like uh in the old world where laws become very staid and very

stratified and hardly anything new happens. In Scotland for instance if there's a new case on a particular point the whole Scotland appears in uh in excitement. OK.

072 What happens is that legislation that is passed by the courts can tested uh legislation that is passed by the Parliament can be tested by the courts. That is one branch of it. The testing right of the courts is mainly concerned with interpreting our legislation to see if it is in harmony with our Constitution. That's not the interpretation I'm talking about. The interpretation I'm talking about is: If a piece of legislation comes before a court and there is doubt about the meaning of the words that the legislature has used, the courts interprets that piece of legislation, in a certain manner. I will give you examples of this, don't be, don't be afraid.

073 The first and most important thing that you must remember in the re / in the interpretation by the courts is that the court will always seek to find the intention of the legislature. The court will always look for what the legislator legislature intended with this legislation. More important than anything else. That is the most important rule that the court will strive to find.

074 OK. In analyzing legislation before the court there are three main approaches that the court will use. These are: the literal approach, the functional approach, and the teleological or purposive approach. Now these three approaches are very difficult to distinguish … yes?

075 **STUDENT:** Sorry, what's the last approach?

076 **LECTURER:** Teleological or purposive approach, the approach that follows the purpose of the legislation. Teleologic is the Greek word telos means um uh purpose goal or purpose, teleological is the approach whereby you follow the goal that was set up. The first one is the literal approach, the second one is the functional approach, and the third one is the teleological approach. OK. Um … shall we / I can see that you're all very hot and bothered can we take a five or ten minute break … Um and please go outside, don't stay in this room, this is a death trap, there's not oxygen in this room. So I'll see you in five or ten minutes back in yes?

LECTURE 8

001 **LECTURER:** Just before we start with our lecture again, um, I always tell, um I always tell this class of my um about this that I enjoy and that I hope to um cultivate enthusiasm uh with you. Hope to cultivate an enthusiasm uh about the same things. Now it is impossible, it is absolutely impossible in the twenty-first century to stay ahead um of developments uh uh as far as um economics, politics, law, sociology, literature, art, all those things. It is impossible to stay ahead. You cannot possibly, even with the Internet and everything, you cannot possibly stay ahead. So what has happened is that certain certain organizations brought out what we call the review of books. This is the New York Re-review of books and um and it is my personal favourite. It is a little bit um political, its not just art but political. And comes out every fortnight. That means every fourteen days. And what it has what what will get in here is some art – there is John Updike on Soriat, I don't know if you know the artist. That is the artist that uh painted not with his brush but with points. He had a very pointed paintbrush and he made he made uh uh little dots uh, you can see that's an example, and of course John Updike is one of the great novelists of America. So you have a very clever man, John Updike, writing about a very specific impressionistic uh art type. Uh uh uh um very good article. For those of you who are interested in (…) Vasbender, Vasbender is a German filmmaker. There's an article um by Fuller or no no by um by (…) on Vasbender. Now I could never I could never understand what Vasbender wanted to do in his films until I read, until I read this article. A very very good article and there is (…) on Noel Coward. Now (…) is a very famous very famous crit and he writes uh on the work of Noel Coward. There are also political things on here um there are also you know articles on (…) and religion and all that kind of thing and the mad Republicans, but you don't have to read those if you're interested in politics you can read those. Uh you can read you know only the articles you like. Its impossible to read this whole thing. Um it will take you it will take you most of your free time to read this whole thing, but if you read just one article in either this one or the other one I'm going to show you, if you read just one article every fourteen days um that will be good. That will broaden your horizon.

002 And you need to broaden your horizon when you are a lawyer. Because what lawyers do is they sit in their office and they wait for people to come off their / to come off the street to bring their problems to them. And it can be anything. It can be from the theft of an artwork to a divorce to a rape to a uh uh uh disputed uh uh uh uh testament, a will.

003 Uh this one [picks up copy of Times Literary Supplement] is slightly better than the New York Review of Books. First of all its important that you now know about them. It's important to know about these publications. When somebody talks about the New York Review of Books you know you should know what it is. It's a newspaper and it's got intellectual articles about art and politics. You must know this.

004 Now the more intellectual one is the uh TLS the Times Literary uh Supplement. This is a supplement that comes in the English newspaper The Times. Now um this is much much more intellectual and much more literary. It you are interested in literature and you want to pursue uh an intellectual life, if you want to become an intellectual – I'm not saying an academic – but if you want to become an intellectual, somebody that is concerned with the things of the mind, then you should read this. This is the stuff that you would be interested in. It is highly esoteric. It is written in the King's most beautiful English. The the standard of English in this uh in this thing is the highest you will get in the English-speaking world. Um and uh it covers all the new books, that is published in England. This one um covers all the books all the books that are covered uh that are published in um in America. Um uh [pages through the New York Review of Book, looking for something]. Um you know it has advertisements for virtually all the books that are published. So you also, by just browsing through this magazine, you'll get to know what is being published on what subjects. So you don't have to read it.

005 Um so please um they are extremely expensive. This one is um three pounds ninety five or five dollars fifty plus another ten dollars to get it here. Uh and this one is extremely expensive [looks at price on copy of TLS] ooh two pounds seventy plus another two pounds seventy to get it here uh that will make about fifty eighty rand. But it is worthwhile. You can buy it at the CNA, the good CNAs you can get it. Um and uh you know its worthwhile you will only read this once or twice and you'll be hooked. It really is very good. OK now I've done my part for your intellectual development um please try it don't just you know go to the Wartenweiler and ask them for the Times Literary Supplement or the Rev … New York Review of Books and just go and sit down and read on article that fascinates you um you know just do it for and see if uh if you are hooked. If intellectual life is not for you you know if you like to play with uh uh rubber balls and things then you know please don't go and do this, you will be very bored and you won't understand what's going on.

006 Um What is a bird? What is a bird – we've now back to the formal lecture. What is a bird? What is a bird? What is a bird? Mmmm? [Student: An animal capable of flying?] Really? So a ostrich is not a bird? [Student: capable of] Oh ja mm mmm [half laughs] Guinea fowl is not a bird? Guinea fowl can fly ja ja. What is a bird? [Student: an egg] A bird is an egg [inaudible] [Student: a genus; L looks quizzically at student] [class laughs] Ok probably clever birds are genuius [Student: No genus] No I heard what you said, I heard what you said.

007 Ladies and gentlemen there wha – I'm asking you what is a bird uh There was a man – and I'm trying to illustrate … to you … interpretation of statutes. There was a man in Oudsthoorn, long time ago, in this wonderful country of ours and he was extremely fond of birds. And he had not a farm in Oudtshoorn but he had a small plot in the town of Oudtshoorn. This is now a real case that I'm relating to you. And on this piece of land he started

collecting foreign birds and beautiful exotic birds. The municipal ordinance stated that you may only, in your, if you live inside the municipal area of Oudtshoorn, you may only keep pets, limited to two, domestic pets, birds and farm animals not exceeding uh say six in number on your domestic plot. Domestic animals, domestic animals birds comma birds and farm animals not exceeding six in number. That is the municipal ordinance. That is what the municipal ordinance said. So, Mr Koekemoer collected at least 18 species of birds on his property. They then charged him with contravening the municipal ordinance. And he / what was his retort? Yes?

008 **STUDENT 8:** Well firstly he would say ….

009 **LECTURER:** Um …

010 **STUDENT 8:** [says name]

011 **LECTURER:** OK, that's very close. OK [state's student's name]. Yes yes I'll yes carry on …. Yes?

012 **STUDENT 8:** Um … I've lost my train of thought!

013 **LECTURER:** OK somebody else I'll come back to you yes yes [class laughing]

014 **STUDENT 8:** Its not a domestic animal so he can't ….

015 **LECTURER:** Wait wait wait, you're making leaps and bounds! [inaudible] go slowly and do everything. Let's start from the beginning / you're right ….

016 **STUDENT 8:** OK so first ….

017 **LECTURER:** You're right …

018 **STUDENT 8:** You have to look at the category of things and see if they're coherent for starters …

019 **LECTURER:** Why?

020 **STUDENT 8:** Because you can't say in thunderstorms and hurricanes and then say in times of war they're not related, so, basically,

021 **LECTURER:** OK [name] you now officially lost me, I'm not sure what you're talking about – thunderstorms and war. Let us go back, let me just help you, look um uh I can see that you know exactly what's going on but you have difficulty in articulating it [Student 8: Yes] Yes. OK OK that's fine that's fine. The rule that I mentioned before we broke for coffee or at least I broke for coffee, I don't know if you had coffee – is that, you always look at the legislature's intention. That's the first and most important rule. OK. Now. Oudtshoorn, birds. You you can talk now.

022 **STUDENT 8:** I'm not sure where [inaudible] ….

023 **LECTURER:** I want you to …

024 **STUDENT 8:** OK so they probably / the legislation I mean I haven't read it …

025 **LECTURER:** No but I told you what the piece of com/ disputed piece of legislation said …

026 **STUDENT 8:** So they're saying birds they probably meaning domestic birds like parrots and finches and budgies and and they're probably not implying exotic birds …

027 **LECTURER:** Yes yes, so? Who's to blame here. Now what did you want to say?

028 **STUDENT 12:** I wanted to say, his retort was his not keeping local birds, they're foreign birds, or something.

029 **LECTURER:** That's right. He he was he kept exotic birds. Thinks like uh peacocks and um uh uh now this is not an exotic birds but ostriches, which he said is not a bird, its poultry ... [class laughs] um uh and and and and uh uh um parrots um uh exotic Brazilian and Australian parrots. So his argument was: You can't limit me, I am a collectors of birds. What the legislator intended was if you have pets you can't have more than six pet birds. You can't have more than six budgies, or six dogs. Or six cats for whatever reason you know uh uh you can't have more than six pets because of the noise and the uh the hygiene and the feeding and everything. That was the intention, that's what he said, birds there includes only domesticated pet birds. Yes?

030 **STUDENT 8:** If I was to have written the legislation I would have called thought it would have been a certain number of animal units …

031 **LECTURER:** No no uh uh lets get um uh lets get one back. If you read the legislation and you followed the first approach that we're going to do here; i.e. the literal approach, then you are correct. The literal approach means that you must take the meaning of the word as you find it in the dictionary. The literal approach means you must find the word in the dictionary and attach the the meaning of the word that is in the dictionary. That is the intention of the legislature. The inten/ the legislature will never intend to put another meaning to the word other than it is in the dictionary and unless he specifically or she or they s-says so. In the definitional clause. But there's a rider. This is the first literal approach and we call it the cardinal rule. The cardinal rule is you look for the intention of the legislature, where're you going to find it, you're going to find it in the dictionary. If you look what is the dictionary going to say for 'bird'? Something like you said, two-legged, feathered beasts prob probably of flight. You know, mostly, there are birds that can't fly but lets not talk about that.

032 The rider to the cardinal rule is: You follow the intention of the legislature unless it has absurd consequences. Unless it has absurd consequences. [pause] In this instance the le/ no the applicant in this case used a rule of construction, which we'll get to, these are not rules of construction these are approaches to interpretation. But he used um a rule a rule of construction that said if you use a few words in a row the one word attracts the meaning

of the other word. In other words, if you include one, you include all. There's a Latin term for it but I don't want to confuse you with Latin now. If you use one, and you use a meaning for one, it includes all of them. So if you start your sentence by saying 'domesticated pets' and 'birds' that means 'domesticated pets' and 'domesticated pet birds'. Not exotic foreign birds. You are entitled to have as many foreign birds as your property can take. Or as your neighbours will tolerate, if there is no other legislation prohibiting you from having foreign birds, and if you've got licences for them if if if. So it won the case by saying that birds there meant not foreign birds but domesticated pet birds. Also because of the third meaning, domesticated farm animals. OK.

033 An example that you will find in you're a uh reading pack, course pack, is The Commissioner of Customs and Excise v Capital Meats um uh in liquidation. Now the meaning that they had to um analyse here was 'processed meats' or 'frozen meats'. Now what happened is, as you know, in New Zealand, um they more sheep than people, and they export uh a lot of the sheep to other countries. You can't export fresh meat, for obvious reasons, so they deep freeze the meat and then they export it. They chop it up they deep freeze the meat and then they send it out uh all over the world. But for some strange reason they also coat this meat and I'm talking about um bulk huge bulk pieces of meat um a leg of lamb, a shoulder of lamb, a rib-cage … you know. They coat that not with butter and egg but they coat it um with its natural liquids with some bread crumbs. I don't know why they do it, you know Australians are strange. They um have this little ritual before they start playing rugby. From that one can deduct that they're not, they're not normal [class laughs] Ok. The point is in South Africa, if the, if the meat is landed in South Africa as processed meat, as processed meat, the tax, the import tax is extremely high, why? Now you see if you can work this out, even if you've read the case, if you can work this out, then then you're becoming a lawyer.

034 **STUDENT 1:** Is it not South African … [inaudible]

035 **LECTURER:** Yes yes, did you hear that? That South Africa using import export tariffs to protect South African labour. So if you import meat that has already been processed, you are taking away jobs from the local market. So we charge you a high, a very high tax. Very good, Scottish lady, very good, that's very clever. Did everybody get that or is it … who else knew this? Hmmm … OK [class laughs]. OK.

036 So the question before the court was this piece of meat, this huge piece of meat with bread crumbs, is that processed meat or is that frozen meat because only frozen meat attracts almost no ex/import duty. So the court by, (a) using the ordinary, literal meaning of the word 'processed' said that a piece of meat just haphazardly rolled in bread crumbs does not constitute um processed meat. It doesn't constitute processed meat, these are frozen, it's a piece of frozen meat um uh the bread crumbs are brushed off very quickly, and its not processed meat. So they are taxed on the much much lower tax

scale. You understand this one, you understand how the court came to this decision? Looking at the ordinary, literal meaning of the word 'processed meat', and they looked at the dictionary and they saw that processed meat is taking meat, changing its consistency, forming it into a new product. That is what processed meat is. If you take beef intestines and other unmentionables and you mix it with bone and other gelatinous pieces of the animal and if you put it into pig intestines you have Vienna sausages, and those are called processed meat. You take meat products, you change their substance, and you create a new product. And that is the ordinary, dictionary meaning of the word 'processed'. OK. Are you all happy? Any questions about this case?

037 **STUDENT 17:** By rolling it in bread crumbs isn't it taking away jobs here because someone here could have rolled it in the bread crumbs ….

038 **LECTURER:** [laughs] I suppose so … But that's not so [stumbles over words] the court did not consider that material. Um its not you know …

039 **STUDENT 17:** Now they have people here who could brush the bread crumbs off [class laughs]

040 **LECTURER:** No … that there … I think the important thing with the case is um uh you look the case is important for other things but for our purpose here the the importance of the case is taking the ordinary meaning of the word um 'processed' and applying it to these pieces of meat. Yes?

041 **STUDENT 17:** In the court [inaudible] it wasn't processed meat, it was prepared foods. And that made it different because what they said was the definition of prepared is when something is made to be brought onto a table and eaten and that's why .. that's why …

042 **LECTURER:** Yes yes yes I see instead of the word processed they used 'prepared' but it's the same, same concept. Um [reads in textbook] …

043 OK, what now about the rider that I said, unless it is absurd? Is this judgment absurd? Interpreting this tax law, do you get any absurd result? No. But now, look at the following example. There's a case, a Zimbabwean case, a Rhodesian case, where, whereby it was prohibited to be in possession of pornographic material. The mere possession – do you kn/ do you understand the word possession – possession means being in physical control of it, that is what possession means, ordinary dictionary meaning. Possession, not ownership. Ownership is something different. Mr H is the owner of that pen but if I take it and I'm writing something here, I am in possession of the pen. Not the owner but I am in possession of the pen, I have physical control over the pen. That's the difference between ownership – is that your pen or what? If its stolen then [inaudible] So the law said that it is prohibited to be in possession of photographic pornographic material. Just being found with a paper in your possession, in your in your physical control, in your uh uh briefcase or in your hands, is punishable by law. So what happened? Yes?

044 **STUDENT 8:** Well basically then the copier and the [inaudible] and the lawyer and the judge would be going against the law ….

045 **LECTURER:** Yes, that is absurd. Do you understand what she's saying? If the the the pornography or whatever it is, is handed in at court when this person is prosecuted and it is handed to the judge and the judge is in possession of it, then he is guilty, just as guilty as the accused. What is that? [class members murmur 'absurd'] That is? That is abs/ what we call in Latin a reductio ad absurdam. That is an absurd result. And the legislature could never have intended such a result. The legislature could never have intended such as re/result so, you can look in the dictionary for possession as much as you want, the/ you can never interpret that that the judge is guilty of possession of the pornography. Do you understand? OK.

046 Um the other, the other exception is um in the case of um Molle v [inaudible] School Committee. Um the interpretation that was was given in that case was for the word European. Now what does European mean? [Motions toward a student to answer]. What is a European? [various students murmur answer] What is a European, ja [imitating a black person's accent].

047 **STUDENT 12:** Something or [inaudible]

048 **LECTURER:** Something! [laughs] something or someone that comes from Europe. Mmm mmmm and what do these things look like that come from Europe?

049 **STUDENT:** Caucasians

050 **LECTURER:** Caucasians ja what is a Caucasian?

051 **STUDENT:** Whiteness

052 **LECTURER:** A person with a white skin. In uh in the normal meaning of the word European we assume that a European would be a person from Europe as she said, and that person would be, would have a white skin. So what happened in this case? In this case it was a foreign couple that wanted to send their child to a school, and the child was adopted, they were Europeans, they came from Europe, and the child was adopted in Europe, and the child was black. But he was for all intents and purposes a European. Because he was br/ he was a child of two Europeans. And the school committee of course in [inaudible] said only Europeans may be admitted to the school. In the apartheid days. So when they brought this little black boy to the school the principle said 'hooo, no no no no no not with me ooo … ' [class laughs] And the parents came back and said 'why don't you want to allow our child' and they said 'well, he's black', and they said 'yes, but he's European and your regulation said he must be European, he's a citizen, he was born in Belgium and he's a European therefore. He's registered as our son, he's a European. So um the court had to do some very very fancy footwork and [laughs] in that case and um uh and came out with a very strange argument um uh that the meaning of the word changes depending on the geographical

area in which it is used. And when the word European is used in South Africa with its very problematic race situation, um uh then European means white. Whether you are registered there or or not it doesn't matter, it doesn't matter. OK.

053 Um the last case that uh which is which is a very interesting case as far/ for me because uh its an Afrikaans version versus English case and um like most of you I hate the English [class laughs] so uh the case is S v [inaudible]. And uh it was the difference between a 'foetus' and a 'vrug'. A f/ in the Afrikaans in the Afrikaans text, abortion of a 'vrug' – I want to say a fruit, but I can't say a fruit, its not a fruit – the English, the English version said a 'foetus'. Now foetus is a very very specific uh technical term. A foetus only exists from, well a foetus means a fertilized ovum after it has already reached a certain stage of development. So there must be there must be there must be a f/ there must be a recognizable form. Um it is not just a um fertilized ovum. So but a a in contradistinction to that, a vrug in Afrikaans, means from the moment of conception. From the moment that the sperm enters the um the um uh the fertilized egg, that is a vrug. So of course the Afrikaans is um is more comprehensive it's a um it means a long period and um it makes abortion um you know typically Afrikaans um it prohibits abortion from one nanosecond after conception. Uh whereas the English text says a foetus which is at least three or four or five weeks – I don't know, I've never had a baby so I don't know how these things work – but before something is formed, you can still have an abortion. So um [clears throat] uh I don't know what, I don't know [reading in textbook] the um what the what the … I just want to see which was … the English version was signed by the State President, and was accepted as the version um in this instance. Merely on the technical point of which Act was signed. Had it not been for that, then you know there would have been a huge discrepancy when abortion could take place. Nowadays of course its irrelevant of course because abortion is available on demand but in those days it was a big thing. Yes?

054 **STUDENT 9:** Surely in a case like this its important to look at what the intention was than the technicality of which one was signed?

055 **LECTURER:** But what was the intention here, how are you going to find that? You see they find the the mathematics the the I say now the mathematics but the technical way in which to work with the argument is, OK first, cardinal rule, intention of the legislature, how do you get intention of the legislature …. Hmmm?

056 **STUDENT 9:** You look at the literal meaning …

057 **LECTURER:** You look at the literal meaning, how do you get the literal meaning? [Student 9: Dictionary] Dictionary, OK, So what the court did is they looked at the dictionary, they found in the dictionary foetus and vrug, so what now? Um how are you who are you going to determine what is the intention of the legislature uh when you have two two different definitions in the dictionary? Well, then they go back to the ordinary rules, they go back to

technical rules which have got nothing to do with the abortion they go back to the technical rule and see which Act was signed and follow that meaning. Uh, which is very mechanistic, I mean you should rather look at the mother, you should look at what implications, you know the surrounding circumstances, you should look at the context, and this is what happens with/ when you go to the other approaches. The approaches starts with the uh literal meaning – you need to look at the ordinary meaning of the word, and then it widens because it cannot possibly always be uh be literal, it widens into the context. In this case I would say they should have widened the context further rather than go technical. Yes?

058 **STUDENT 3:** In the coursepack it says that despite the fact that the version of the Act they used was the English one, they used uh they used a wider meaning which included abortion at any stage of the child's development …

059 **LECTURER:** Yes, when they used the mischief rule. The mischief rule is the one you're going to do not now but after we're going to do the functional approach and then we do the mischief rule, um … I can explain the mischief rule quickly to you and then you will understand why the court followed that. Um but it/ when they had to follow the literal approach they would have had to follow the um the the English version. They followed ano/ another approach the mis/ mischief rule and um which is wider and its go more context bound um uh approach. And that's why they used the wider one. Which is, you know, um, which is a very, which is a good example of one, you know, if you've got one set of principles that doesn't suit you you've got another. You know, these things are very very difficult to, you know, to ascertain… what is right and what is wrong. OK? Any more questions? Yes?

060 **STUDENT 14:** What is the excipio rule?

061 **LECTURER:** Excipio rule means um uh it's a procedural word, means that you can, you can raise an exception to something that your opponent has said. So um if you go to, if you go to court and you uh you've got a you've got a case, and um your opponent in his pleadings before the court says that you um are um an adult male of um 58 years old of Willowmore. And you're an adult male of 28 year of Willowvale, then you can raise an exception. You can say I'm not this person. That's excipio rule. Uh I reject this pleading I've raised an uh objection to it. Because it is not true. It is not eh it is not the right uh description. Is that all you wanted to ask? Who whose …? [someone says something] you what?

062 **STUDENT 2:** [inaudible] …and there was a sentence in the case that said excipio and we didn't understand the meaning of the word. And it seemed like a fairly important sentence.

063 **LECTURER:** It is an important sentence, and did you look at the dictionary? [students respond haphazardly] In the legal dictionary? [again, students respond, but inaudibly] No it should be in every legal dictionary, should have that word in. Um but it means something worthy of objection. Um ladies and

gentlemen, just to close the lecture, now that they've asked this very important question, when you're now going to read – I'm preparing you for next week, when you're going to read a court case, a court case is a cosmos in the small. There are millions of things in a long court case that is not relevant to the point that you want to make. Don't make the error of reading unnecessary things in a court case. It you a heading, such as, for example, um uh the nascituris fiction, what is the requirement for the / are you doing the nascituris fiction? And you read a case like Pinchin, Santam v Pinchin, there are hundreds and thousands of references in that case as to what exactly is the nascituris fiction, where it comes from, what mea/ opinions of people that have it … those things can be interesting background but you must see that you read the ratio decidendi of the case, in other words the reasons for the judgment. Cut to the reasons for the judgment which is in the headnote, look for the reasons for the judgment and see that you understand those. If if you have long-winded complicated facts you don't even have to read the facts. But you must understand the reason for the judgment. And it there's a word you don't understand you go to a legal dictionary or an ordinary dictionary and look it up. Um you should be able to get there, um I haven't go t a case for you for next week, but I think I will bring a case to to uh to class and then we can uh analyze the case from there. OK. Have a pleasant weekend ladies and gentlemen, thank you for your attention.

LECTURE 9

001 [00:00– 07:08 Assigns various reading assignments for the following lecture to different groups of students. All the cases are from the 1800s.]

002 **LECTURER:** Ok ladies and gentlemen, if you want to commit suicide, because you can't find the books, here they are. I'm not/it's not a thumb suck, the cases are here, I brought them from my own private collection. So they do exist [smiles falsely]. But they are going to be extremely difficult to find [laughs]. To took me too the best part of two weeks to find them. Can somebody tell me what was the first case?

003 **STUDENT:** [inaudible]

004 **LECTURER:** Ja and where's that case now? Uh the page number?

005 **STUDENT:** 215

006 **LECTURER:** 215, you see, I mustn't try to be too clever, there [inaudible] OK there you are, if you can find those cases, read them – some of them are in Dutch – high Dutch, so you'll have great, great fun in reading them. Um and then you can come and report to us on Thursday what your findings were. Can you now tell me what what did the class now decide about the assignment? Have you thought about it? I must draft if this weekend. Just to give you reasonable time to work on it.

007 **STUDENT:** Didn't you just say in the [inaudible] you were going to give us a case to analyze?

008 **LECTURER:** Is it? Are you happy with that? I'm happy. Anybody else want to say something? [silence] oooh its very cold this morning here I see. OK, I'll find a I'll find a old English case for you to analyze and see what you can do. OK ladies and gentlemen I'll hand out them next Tuesday I'll hand out the assignment. Is that in is that in order? Absolutely. Did you have a pleasant weekend? I'm very sad to hear that Mr … Umm … hmmm? Too much work? Oh work is a wonderful thing it takes your mind off the other things that you want to commit suicide about.

009 OK, last week we started off and hopefully today we're going to finish the interpretation of statutes. Now ladies and gentlemen can I take you into my confidence, this is a very complicated part of the work. Uh if didactically, if I had to I had to put together the um the curriculum uh I would have put the interpretation of statutes as a six month course all by itself um uh during uh uh uh during your third year. So we're doing it with you now because it's the only space they could find for it, to put it into intro to intro to law. I think didactically speaking it's a mismatch.

010 Why I'm telling you that is because you are postgraduate students so you are up to understanding the concepts in the interpretation of statutes. Uh don't neglect it. Um it is an important part of the course. You must be able to play

around with the interpretation of statutes. You must be able to solve a problem. If I give you a piece of legislation, uh, in the exam, and there's something wrong with it, you must be able to use the rules of interpretation of statutes that we're doing now, and the rules of of construction. The presumptions … presumptions. OK? Which we will also do later this morning. Please don't underestimate this uh part. The other part the others parts of the work um you know jurisdiction and how to read a court case and blah de blah yadda de yah, those things are easy and you can you can uh you can easily do them but this is especially difficult legal part of the work. OK. So are you all right with that? Yes?

011 **STUDENT 3:** Um would it, I'm feeling a little bit um uh apprehensive …

012 **LECTURER:** [Disbelievingly] apprehensive?

013 **STUDENT 3:** Would be a good word. For for I know the exams are quite a while off but I'm feeling very apprehensive about all my exams and I was wondering, is there a set way we should answer, I mean I know you've just said we should use rules of interpretation and presumptions. Um but I was just wondering if closer to the time you could go over roughly not tell us exactly what would be in the exam …

014 **LECTURER:** But just vaguely …

015 **STUDENT 3:** But vaguely what we need to look at.

016 **LECTURER:** Ja. Ye-es I can do that. Its not really going to help you because I'm going to ask the the the combination of the uh marks as 30% for the assignment and 70% for the exam. So there are going to be 7 questions of 10 marks each. Um that's how I usually do it, if you want me to change it we can. Um nothing is cast in stone but that's how I usually do it. Which means – and that is the children usually fall down on this – which means we've got a very wide spectrum. I ask from the Spelunchean explorers right up down to the legal profession. You know, I ask five or ten questions on each chapter and there are about nine or ten chapters. So everything gets covered, Um and we will then uh uh so the bad thing the best um advice I can give you at this stage is please please please please don't spot. Its not a course in which you can spot. I'm going to ask everything. Um and what I'm not going to ask I'll tell you: 'Look this I'm not going to ask'. You wanted to ask?

017 **STUDENT 8:** Yes I wanted to ask if at all possible instead of writing the normal three hour exam we could write a three day exam. Cos we did those in [inaudible] its been very beneficial and I've learnt a bit more than I did in those ….

018 **LECTURER:** A three day exam?

019 **STUDENT 8:** Yeah [class murmurs amongst themselves]

020 **LECTURER:** [Confused] What are you talking about?

021 **STUDENT 8:** OK well what happens is you/

022 **STUDENT 3:** Its something we did in BSc.

024 **STUDENT 8:** You give us an essay questions and you give us three days to go do research and answer …

025 **LECTURER:** Oh yes, take home/ I can do that with the assignment if you want but usually people don't like it, I do it with the senior – with unjustified enrichment I give them on a Friday I give them the the problem, they've got the whole weekend plus the Monday to solve the problem and then on Tuesday four o clock they must hand it in. Mmm … but that's not the exam, that's the assignment. And people hate it. People hate it, they don't like the stress they don't like to work on the weekends, I don't know what, but its not popular. But not for the exam. It's a two hour exam its not a three-hour exam, two-hour exam. But I think we [inaudible] to talk about exams, you talk about that now. I'm sorry we started before you but we didn't really have a choice. [clears throat]

026 OK. Is that all right? 70/30 and uh you know rather know a bit of everything than know one or two uh chapters with other subjects with other large subjects – the law of contract – with the then you know you might cut out some things and study some things more than others. With this things it's a it's a skills course so I must test everything, you know, I must test whether you can do footnotes, I must test whether you know about the profession, I must test whether you know about legislation, whether you can read a case, I must test everything. OK OK OK . Um its not a difficult exam but people don't do well because they leave out sections and then you know if you do six questions you know [shakes head] you must get about 90% in the other questions to to get a first. You know, it is a Russian roulette thing. If you miss one question you're really in trouble. OK. We're really very far off from the exam.

027 We've done the literal approach, the cardinal rule and just to re-reiterate the point of the cardinal rule, the cardinal you must look at the literal uh meaning of um the words and where do you find the literal meaning? You go and look for it in the dictionary? Um it doesn't always solve all the problems like we saw last week um and therefore we have other, we have other approaches. You must see this in an organic way, you must not try to solve all the problems with one approach. Uh these things are extremely theoretical and I can guarantee you, the judge, when the judge sits in the court he does he does he or she doesn't decide 'OK I'm going to decide this interpretation on this rule'. Its an ex post facto theoretical um construct in other words you look at all the ways in which judges interpret uh rules, and then we formulate the theory. You understand? That's how all theories work. They don't, its not watertight compartments neatly stacked that you can choose like pigeon holes which one you're going to use and that's not the way its done.

028 OK, the functional approach, the second one, is the functional approach or the golden rule. Um [coughs] and that is, the only rider you get to the functional approach is that you use the literal approach insofar as you don't get absurd um uh consequences. If you get absurd consequences then you know that the literal rule cannot be applied, the golden rule cannot be applied. And then you apply the interpretation that is the most functional. That will not give you an uh absurd result. Um and we refer to some cases. Um where this um absurd result is obtained. The example we use is pornography. There's an example in your coursepack also for arms and ammunition. Uh where a person was passing through uh the airport and he had in his possession a weapon that did not have a licence so the the result uh was the result was that it was an absurd result.

029 OK. Then the third approach is the teleological or purposive approach and this is the mischief rule. And this is the rule that confused most people, uh because uh-huh it is very close to the functional rule but it eh it is more/ it has a better construction. The functional approach, or the mischief rule, is simply that you interpret the legislation firstly in view uh of the intention of the legislature and the intention of the legislature is uh divided up into what the legislature intended to uh to remedy. Let me give you the four points then you will understand it much clearer.

030 In [inaudible] Hleka v Johannesburg City Council, uh the functional the uh uh mischief rule um purposive approach was formulated as follows: The questions you must ask firstly is what was the law before the measure was passed. What was the existing law before the measure was passed. So the first question is what was the old law? What was the old law? Then, the second question is what is the mischief that was detected that the legislature intended to address. What was the defect that the legislature wanted to address. What was the mischief and then what was the remedy that the legislature used? What / how did the legislature remedy this problem? And, finally, what is the reason for the remedy?

031 Now to refer just back to the abortion case that we did last week, if you use the golden rule in the abortion case then the result that you would get was you would have to look at the intention of the legislature, you would have to look, to find the intention of the legislature, you would have to look at the ordinary grammatical meaning of the legislation and to find the ordinary grammatical meaning you'd have to look at the um legislation signed by the State President. That is just one of the aids that you use to interpret legislation. So uh the abortion case would then um use the English version because the English version was signed by the State President. And the word that would be used would be 'foetus'. And a foetus only comes into existence when there's a recognizable form. Uh and I think that is often the first trimester, whatever a trimester is. OK. If you look at the mischief rule and you interpret the same case on the mischief rule and you go through the four steps that I've just given you, you would use the Afrikaans case, the Afrikaans text, despite the fact that the State President signed the English text. Because

what did/ what was the intention of the legislature? He wanted to prevent abortion. What was the mischief that he he wanted to avoid? He wanted to avoid botched abortions. He wanted to avoid people having abortions um during the first trimester. So how do you get to this result? You follow the mischief rule. If you want to avoid abortions, then you use the Afrikaans word 'vrug' which means 'from the moment of conception'. A vrug is the moment from the union of the sperm and the egg. And that is what the legislature intended uh to address, what he wanted to give a remedy for, and uh that is the interpretation. Remember this now old, this is an old case. Don't confused this now with the uh constitutional court cases and the uh constitutional problem around abortion today.

032 Are you all with me? [silence] Hellooo! Are you all with me? Why are you all so subdued? Did you have a difficult weekend or … Last week you know I couldn't handle all the questions now this week there's not even a peep. Are you afraid of me this week? Next one is eh-yes – there's a question!

033 **STUDENT:** [inaudible]

034 **LECTURER:** In the mischief rule, you must think this thing through for yourself, I'll do it, but if you have another qu- another court case then you must use your own logic. OK. The legislature, the then apartheid government wanted to avoid any form of abortion. They were pro-life. They didn't want any life to be um wasted, any life to be driven off. OK. They then drafted the legislation, the legislation used two words, in the English and the Afrikaans. In the English they used the word 'foetus' and in Afrikaans they used the word 'vrug'. When you used/ and the State President signed the English version. So when you use uh the functional approach you must use the English version to understand the meaning of the legislature. So you use 'foetus' So in the English interpretation, in the functional interpretation uh you would interpret the legislation to say that you may have an abortion up to the first trimester. Because after the first trimester we start talking about a foetus. If however you use the mischief rule, you look at the intention of the legislature to see what is the purpose that they wanted to achieve? What is the mischief that they wanted to uh to uh pass by? What is the mischief that they wanted to wanted to to to eradicate? And then its easy – they didn't want abortion. They didn't want abortion full stop. Nothing about first trimester, nothing about anything. They didn't want any abortion. They specifically didn't want backstreet abortions uh during the first trimester. So if you interpret it according to the interpretive approach, the teleological approach, the goal according to what the legislature wanted, and you use the four criteria for the mischief rule, what was it before, what was the mischief, how was the mischief addressed, remedied, and why. If you apply that you see you cannot use the English version you can only use the Afrikaans version, talks of 'vrug'. Now I can't translate that, the word 'vrug' because it's a very problematic um Afrikaans word, but it means the result of the sperm unifying with the egg. From that moment, the moment after conception, it would be abortion and

that is against the law. [pause] OK, do you want me to do it again? Because I can still see there's a haze ….

035 **STUDENT:** No I'm covered I just don't understand why is it different from the English version? Don't they like have the same legislation [inaudible] interpreting Afrikaans?

036 **LECTURER:** Um um they they first draft the legislation. Then the legislation is passed and it becomes an Act, and it becomes the law of the land. And then there's a case, like this case, which asks for the interpretation of the legislation. And then a completely different group of people, ie the judges, sit in judgment. And they must decide how are they going to solve this problem. And in this case they decided to solve it by not looking at the English one, but looking at the Afrikaans one. OK. Goed!

037 Quickly, the next approach is the historical approach and that is the approach that I've already mentioned. It is the so-called .. . the so-called – what is the French word? [pause] Travaux preparatoires. OK. You remember that? We spoke about it? May you go and look at the preparation documents to interpret the existing documents? The example that they use here is the Harris v Minister of the Interior uh Minister of Interior and um the judge there [inaudible] used the imperial conferences in which the Statute of Westminster 1931 was uh compiled. OK? You understand what I'm talking about by historic. It is not the history of the country, it is not the history … it's the history of the piece of legislation.

038 May you use Hansard to see what people might have me/ what people might have been ah what the intention of the legislature was? The answer is yes, in a limited sense you may use Hansard. OK? Do you follow me, what I'm saying? One of the things that you may use if you're looking for the intention of the Legislature is Hansard – the debates in Parliament in the second reading to see what the legislature intended with this legislation. OK? Not complicated. The French word: Travaux preparatoires. The territory, or the field that was covered during preparations. Travaux preparatoires. OK.

039 Now besides these approaches the four approaches to legislation, those are four important things, there are also um things that you can uh uh use to help you interpreting legislation and I'm just going to run through these because I um they are self-explanatory and those are called the rules of construction. The most important uh uh rule of construction is the tertiary sources of assistance and that is the presumptions on page 190 and that we will do in some detail. Um the others I'm just going to to mention to you now uh and you must just read them through and make sure you understand them.

040 OK the um ordinary grammatical meaning. Obviously. Restrictive interpretation, you must put/ this restrictive interpretation is the bird case that we referred to last week – you must put the same things together in the same piece of legislation. The Latin word for that is eisudem, eiusdem gen-

generis. Things of the same genus, things of the same sort uh uh eiusdem, things of the same sort should be put together, so birds, domestic birds and domestic animals, foreign and exotic birds and exotic and wild animals shoud be uh put together. OK.

041 Then there is uh the interpretation by implication, diverges between different translations of legislation, um internal sources, the Act for example, uh has its own interpretation clause, it also has uh headings it has paragraph headings, it also has little indications in the side of the paragraph that you can use.

042 Extra-textual sources that you can use, extra-textual that you may uh uh take into consideration um for example uh if you want to interpret the South African uh Bills of Exchange Act you may have reference to the Canadian Bills of Exchange Act because the one was based upon the other. Uh very careful with that one, its not always the case but very often in a technical piece of legislation like Bills of Exchange uh its very very unlikely that uh it would be a brand new piece of legislation. Its usually based on either the English, American, Canadian or Australian uh uh Act or different Acts of different countries. You know that our Bill of Rights is based partly on the German partly on the Canadian and partly on the Hungarian apparently uh Bill of Rights. So if you interpret the Bill of Rights you can go and look at those jurisdictions to see what they have.

043 OK. Those uh those uh those rules of construction, those aids, uh are not so terribly important. They are of a technical nature and while you must go and look at it uh oh you know uh uh I won't base uh an exam question on those. The presumptions however are extremely important and they are self-declaratory, they are not difficult, but you must bear them in mind. You must always remember them. So that if you get a problem and it refers to something that there's a presumption against, that you will remember the presumption and say that this piece of legislation um uh cannot be interpreted in that way because there's a presumption against it. OK.

044 And what are the presumptions? The presumptions are really very simple, stupid. The legislature is presumed not to be unreasonable, or to cause injustice. The legis/ if there's a piece of legislation, if there's uh a statutory provision, that says that if you commit a traffic offence, uh that you will be sent to prison for life, uh there's a presumption that that uh is wrong. There's a presumption that that will not happen, that is injustice. It is it is cruel and inhumane. It is not only against the Constitution but it is, it results in complete injustice. A traffic offence is a minor offence although if I look at South African roads I wonder but OK that's another that's another matter … But say for instance, shoplifting, if there's a possibility that you may get uh life imprisonment for shoplifting uh that is not the intention of the legislature. It must be a blatant fault or it must be a [inaudible] or there must be some other kind of explanation. So you get a piece of legislation like that and you must interpret it.you will merely say, this – despite the fact that it is

a reduction ad absurdam – it also mitigates against the presumption that the legislature will not put something on the legis/ on the uh stuate book that is unreasonable or that will cause injustice.

045 OK. The statute is presumed not to violate a rule of international law. What people often forget, if um if there's a statute um that says uh all South Africans have the right uh a free right to fish in Mozambican waters, that is that is against international law. There's a continental shelf in international law, and the country to whom the continental shelf belongs have I think the right to fish up to three or four kilometers in in width of the ocean, that is their exclusive fishing zone and only after that are you in international waters. So if there's South African legislation that says that you can fish in Namibian or in Mozambican waters um uh off the continental shelf, um then that is a presumption uh then there's a presumption against that. It will not be valid.

046 Um presumption against not constructing a statute so as to oust or restrict the jurisdiction of superior courts. That's very self- uh self-evident I don't have to tell you, to explain that. If the law if the legislation says that the high court has no jurisdiction in this matter, then that law is functus officio then that law is is per se uh and without further ado um uh invalid.

047 OK let me just go back one because I can see that you don't understand this. The High Court of South Africa, which is the courts that sit in every province. The High Court of South Africa has got inherent jurisdiction, to hear whatever case appears before them. They are like God. You can't tell them that they can't hear a case. Now that we've got a Constitution, there are a few instances, I think three instances where they cannot hear constitutional issues. And those are very serious things concerning the the acts of the President and uh conflicts between organs of state – not things that you have to worry about at the moment. But in general, ladies and gentlemen, the High Court of South Africa has got inherent jurisdiction. They've got jurisdiction about everything. If there is legislation that tries to limit that jurisdiction, there's a presumption against it. So you don't even have to go to court to confirm that that legislation is invalid. It is as of a right invalid. There's a legislative interpretation presumption against it. Do you understand it? Do you agree with it? (pause) Don't you agree with it? Are you still here?

048 OK [said in a don't care fashion]. Um the presumption in favour of natural justice. Um there's always a presumption that the legislature would want to advance and to promote natural justice. What is natural justice? Ho, we did the schools we did the schools of jurisprudence earlier, natural justice is um in legislation it is things like you must give the other side a chance to put his case to the court. And we call that in um Latin um audi alteram partem. Not like some students say in the exam, there's an alternative spare part for audi motor cars … Audi alteram partem , that doesn't mean there are alternative spare parts for audis [no-one laughs at this]. It means that you must hear the other side.

049 Other thing is nemo iudex in sua causa – never be the judge in your own case. That those are rules of natural justice. Hear the other side, don't be a judge in your own case um uh pactu sunt servanda est – contracts must be honoured, those, those are all things of natural law. And there's a presumption that they are never altered by legislation. If you get a piece of legislation that says uh if uh if there's a dispute, if there's a dispute between parties in this case, then only the party that uh brings the case to the tribunal will be heard … that is against natural justice. And that is that is not valid. There's a presumption against it – ok?

050 A statute is presumed to apply – not to apply retrospectively, no statute can apply retrospectively. Why? Because it is unfair, it is against natural justice, it is against/ it is unreasonable, if you do something and it is not against the law .. say for instance you pick up sardines on the seashore – have you ever done that? Have you ever done that? Have you ev-ever um collected crayfish on the west coast of South Africa? Don't do things like this? Have you ever gone to pick oysters off the rock face? Have you done something like that? Yes yes. Huh?

051 **STUDENT:** [inaudible]

052 **LECTURER:** Ja you use your muscles. Yes, now say for instance you go and collect mussels or sardines on the un south coast you get schools of sardines and they wash up on the seashore and you can go and take your little bucket and shovel and fill your bucket with sardines, beautifully fresh sardines, there's no law against it. But say for instance you do that on the 1st of January and on the 2nd of January the people in Parliament decide they're going to make a law against it, and they make a law that is passed on the 31st of January saying that from the 1st of January nobody will be entitled to pick up sardines. And on the 1st of February they send sergeant Koekemoer to go and arrest you because you picked up sardines on the beach on the 1st of January. That is retrospective and can you see that its very unfair. If you commit something, if you do an act and while you are doing that act it is legal, it cannot retrospectively be made illegal. Therefore no act – especially criminal acts and the tax acts – can or/ can be made retrospective. Its not to say that it doesn't happen. You know the government is very greedy and especially with some tax acts they um and with the Constitution, the change from the interim to the final Constitution, some provisions were made retrospective, but that those dark days are over now. OK.

053 Any questions up to now? I know I'm bombarding you with information now but I would like to get this piece of the work behind us so that we can do more interesting work. But it will help if you've got questions! It will first of all confirm my suspicion that you are here and you are alive. Mr …? You always have questions and now today you've got no questions [looks for class list behind lecturn]. What is it? Is it late in the day for you?

054 **STUDENT 6:** No its fine.

055 **LECTURER:** Where's Mr [states student's name] He's not here ne? He's hiding? He's not here. Mr [says second student's name]

056 **STUDENT 16:** [corrects L's pronounciation of his name]

057 **LECTURER:** [repeats name] whatever … Mr …, tell us something, how do you feel about these presumptions man.

058 **STUDENT 16:** [pause] OK.

059 **LECTURER:** OK, that's a very very critical analysis. Um those people who came late, I direct my view to the left of me, I gave the class I divided the class into four parts and I I gave them, uh each group um a case to read for Thursday. So please make sure that you find out what the reference is of your case from all of your friends, I hope they have written it down for you. Find out which, in which group you are. If you can't find out where you fit in, you know just find out a case reference and do that case, it doesn't matter, the groups doesn't mind but please do do try and find the the cases. Because we're going to analyze them in the class on Thursday.

060 OK. The presumption that the same words used in a different place in the same statute, same word, different place, same statute, has got the same meaning. [long pause, appears to be reading from coursepack] yes?

061 **STUDENT 9:** OK if these are presumptions [inaudible] abstract [inaudible] that everybody assumes are true, um but now you [inaudible] so there's no sort of … in tax acts, if something's for example for the retrospective presumption, there's no sort of recourse for that. If …

062 **LECTURER:** Yes no no of course there's a recourse. Its not uh uh uh a presumption is a um tool that you use. Now um if you apply the presumption uh um you apply the tool and you come to a certain uh deduction, uh that should be the right deduction, it should mean that the legislation is invalid. There could however be other juridico-political policy considerations, especially with the Constitution. Why the state decided to abandon the presumption. To make legislation that is retrospective. But then they must come out and say. 'Look, we know this is retrospective, we know there's a presumption against it, we're waiving the presumption, this thing is retrospective.' Then you're stuffed. Then you can't do anything. If they don't, if it's a [inaudible] piece of legislation, then the presumption will cancel it. Yes?

063 **STUDENT 3:** Um OK I'm …(L: Apprehensive) not sure (class laughs) …[inaudible] OK so you can basically use these presumptions on top of the, what were the [inaudible] the approaches, you can use these on top of the approaches to figure out what the legislature means.

064 **LECTURER:** How do you mean 'on top'?

065 **STUDENT 3:** Well you can use them in conjunction … with the approaches ... um to sort of, if you're not sure what legislation means you can use these in conjunction with the approaches to sort of figure out what a particular piece of legislation means if there was a doubt about it.

066 **LECTURER:** Look, you must try not to think of this as a um natural science. Um uh law is a [pulls face] social science. Its actually sui generis, it's a science all by itself. As a science based on logic. And people. OK. So in natural science you would say, you've got a theory and you've got a method, how this theory works. And these two uh are integrated. And there's not a there's not the vaguest suspicion or necessity or possibility of dividing them. Of having the methodology here and the theory there. Because its natural science. You're working with determined, fixed uh natural uh phenomena. You're working with water boils at one hundred degrees. And that that doesn't change. Um that's a law it's a rule. And you can take that, you don't have to go and boil every drop of water in the ocean to find out is this really true for all water, you can take it as, you know, it is … in law it doesn't work like that.

067 Uh law is far more speculative. Um the the the theories that we have are theories that are composed, not through empirical experimentation, like you would do in natural science, but are theories that are composed, as I said in the beginning, ex post facto through deduction. We see this is what the judges do. The judges when they sit, they don't have in their minds, the old judges especially, they didn't have these theories. But through a hundred years of jurisprudence, we saw that this is what the judges do. So we sit down and we extract from that, we deduct from that the four different theories. The theories are not watertight. They ... and that's what confused you last week with the with the abortion case. They can flow the one into the other. If you take one case, you have one approach you have one result. If you take another case, another approach you have another result. So they are porous. They are not watertight. They are, what we call, lines in the dust. So they are just suggestions which were constructed through deduction ex post facto, after the fact. Ex post facto, after the fact.

068 Natural science is a priori. In other words natural science you do before the fact. You have a theory or you have a uh or something that you approach the reality with to test something else. Law is different, law is after the fact. Now no wait wait I must first finish this because it's a very complicated question. Besides the approaches, and an approach is – I call them now theories of interpretation, but they're not really theories, they are just lines in the dust – to help you to study this subject matter. If you move them off the table, then what do you get? Then you get rules of construction that's got nothing to do with the approaches. Absolutely nothing. Rules of construction is simply something that will help you to construct an interpretation. It is simply the building blocks of the interpretation. That you can use one or two or three of to help you with the interpretation. Once again, it is not a priori, it is ex post facto.

069 So you must/ you mustn't you mustn't try to marry the two. Uh its impossible. You'll just get yourself in a hopeless quandary. Um, if you view law, as follows: Law is a human construct. Law is something that happens in so-society. It is a societal construct. Ne? It is something that takes place in society. After its taken place, after the legislation has been made, after there's been problems with the legislation, only then come do we enter with our theory to try and explain what has gone wrong. It is not um – what is a nice word – it is not like natural science, descriptive, law doesn't describe the legal world to you, it is prescriptive. It tells you what to do. Are you all right?

070 **STUDENT 3:** Ja.

071 **LECTURER:** OK that's very very theoretical and its um that's not always necessary but … OK. The state does not intend to bind itself. The State does not ….yes?

072 **STUDENT 8:** Sorry, so are these presumptions binding?

073 **LECTURER:** Yes, oh yes. Unless there is some [WF: inaudible] unless there's some very special circumstances. If you get a free-standing, open piece of legislation, and that legislation binds the state, the presumption we're dealing with now, it is invalid. That piece of legislation – you use the rules of construction, you construct it, the result you get is the legislation is invalid.

074 **STUDENT 8:** So basically the presumptions are law above legislation.

075 **LECTURER:** No no no no it is [inaudible] it is a tool that you use to dissect legislation. And if it finds something um uh bad, if it finds something there that is not in line with the presumption then it declares the piece of legislation invalid. [pause] OK? This .. we are finished ne? Thank you very much for your attention ladies and gentlemen. Please uh remember your court cases, especially these people. If you want to come to me now I will also give you the court cases. Um and then on Thursday you are going to give the lecture and not me. You are going to address the class on your specific court case. There is no such a thing as 'I couldn't find it' because it is there [gestures toward books]. Its just very difficult to find. Thank you.

LECTURE 10

001 **LECTURER:** L: [spends a minute setting out papers for lecture] OK, is everybody here? Hmmm?

002 **STUDENT 3:** [STUDENT 9] is not here yet, I think she's still coming.

003 **LECTURER:** Ok, but Mr Mr … is not here and Mr … is also not here. Very exotic names these children have you know. … and … and Scottish lady's also not here – oh no there she is! Ok. Um Let us start in the meantime, um as you know we are in the process of – I can see I'm going to have lots of competition again, um from the drill department, um we are doing sources of South African law and that is a very large part of the work, so we're doing it reasonably thorough. Are you moving to the front now?

004 **STUDENT:** [inaudible]

005 **LECTURER:** Oh dear! [one student remarks that they should close the door] Ja and then we suffocate. Do you want me to close the door?

006 **STUDENT 8:** Close the one where the direction of the sound is coming from.

007 **LECTURER:** [muttering, but moving to close the doors] Well the sounds coming from all over, its not like the doors are like sound- sound-proof. OK um so the first source of South African law we did is legislation. I um I take it that um uh you know everything that there is to know about legislation. You can cite legislation, you can go and look up a piece of legislation. You know where to find it, you know what is looks like. And most important of all, you can interpret legislation. You can now use all the tools that we've done to interpret legislation. Um you will see in your in your prescribed book …. [Notices student enter class] Hello E… and …

008 In your prescribed book you will see that the part on presumptions only only a half a page long. That is not sufficient uh for exam purposes, that is not sufficient. Uh and this is the one part where this book is not sufficient and you must do the coursepack. Uh because in the coursepack you will see the presumptions are about four or five pages. Uh and we're not quite finished with that work. We'll finish that right away um uh and then move on to the second source of um of South African law, which we will do today and that is uh precedent.

009 Now precedent is just a fancy word for case-law. For um for court cases. OK [clears throat]. Uh the last few presumptions that we must do is / we finished off with the presumption that the state is that the state does not intend to bind itself. Uh the state as the creator of legislation, obviously, from a logical point of view, does not intend to bind itself. And if the interpretation of the statute is that the um State is a party to that legislation, is subject to certain legislation, there is a presumption that that is not true, the state does not intend to bind itself.

010 Um [reading from prescribed textbook] The court case there um that uh is given is the [inaudible] Vleisnywerhede v Minister of Health, Minister van gesondheid, and um there were certain fees that had to be raised and [inaudible] abattoirs and the abattoir happened to belong to the state and resourced under the Minister of Health, and uh the minister of health was asked to pay the same fees as normal abattoirs, private abattoirs. And the Minister of course refused because State is not bound to the same, to the same legislation Yes?

011 **STUDENT 9:** [inaudible] is there not controversy about that?

012 **LECTURER:** No of course sometimes there will be controversy, of course.

013 **STUDENT 9:** Why shouldn't the state pay the same for the abbatoir as everyone else?

014 **LECTURER:** Um, because it's a public service? [Student nods after a slight pause] ohhrr whatever, you know, u u u a presumption is uh is a tool that you work with. Uh um its not cast in stone. There is – uh um how can I explain this – there is, you know I want to say there is a presumption but, there's a suggestion, there's a suggestion, that the state does not bind itself. So if the state makes uh uh law, look, the state also doesn't pay income tax, um and you know that might be controversial, it would be very nice if the state could pay income tax but um it doesn't. Uh and the state also doesn't pay postage, I don't know if you know that. They don't, they don't bind themselves. Uh you must think of it as a company.

015 Um uh if you're a law firm, if you're a company, er a law firm and you enter into um er um litigation um the firm enters into litigation, not on behalf of somebody else, but as the firm itself, uh you know there was professional negligence, or whatever, but however um there's litigation that the firm does on behalf of the firm, you don't charge fees for that uh for that litigation, you do it, you know, because its your firm. You're not going to ask yourself fees to tre / to uh um to do legal work for yourself. Um [coughs] but this can become controversial. There's no doubt about that, it can become very controversial.

016 Um uh the presumption that the um uh legislation does not contain futile or meaningless provisions, um and if a uh provision is found to be futile then uh it is presumed pro non scripto. Legislation is made by made by human beings, its made by fallible people, its made in a committee, it is made in the greatest committee in the country which is called Parliament, so the greatest possibility exists that uh that uh things would be double-stated, that there will be um things in legislation that uh especially when its an amendment, and the original legislation wasn't taken into account, that there will be provisions that are doubly-stated or that are futile, that has been done under another heading and is restated in the amendment or whatever. And then the idea is uh that those provisions uh aren't taken as valid. Um [reading in coursepack] OK.

017 Um and then the final one is that the legislature is presumed not to intend to legislate extra-territorially. Uh and that is not/ that is self-evident like most of these things are self-evident, um purely because the legislature has no authority to uh legislate uh extra-territorially. If we start uh making legislation uh purporting it to be valid in Lesotho and Mozambique and um Zimbabwe, you can imagine the chaos that um will result from that. This however, ladies and gentlemen, doesn't mean that the state that the government cannot interact with its neighbours. If there's an organization such as SADC, South African [pauses – has evidently forgotten what the acronym stands for] um er Development Corporation or whatever, then the level that you that you enter into a regional treaty like SADC is that you elevate the uh arrangements that you wish to make one level and that's no longer the national level but it's the international level. So it is states negotiating with one another. If we want to negotiate a free trade deal with Lesotho, or a trade preference deal with Lesotho, then of course it is possible to enter into an international agreement with Lesotho, or Swaziland, or Mozambique, or whoever. And it is then custom to make our international arrangements valid for those arrangements to be legislated in municipal legislation. In other words, after you've signed the international agreement the State President brings that international agreement into the Parliament, and they ratify it in municipal legislation. Please just distinguish two from one another.

018 Um when we have a um when we have a speed limit in, say for instance, the Northern Cape, that you may only drive 120km on a national road, a public road, that regulation stops the moment that you go through the border post. If there's no speed regulation in the other country, then obviously you're not bound. If you are then caught by those speed officials in the other country, and they haven't got a speed regulation, then uh they can't catch you. They can't say, 'well you're travelling 125 and you saw on the South African side that you're only allowed to travel 120', doesn't work. Stops at the border post. OK. Yes?

019 **STUDENT 2:** I just want to find out, what happens in the case where a criminal is accused of …

020 **LECTURER:** Exactly, [student explains further but inaudibly] … its exactly the same as what I've explained …

021 **STUDENT 2:** Which law applies?

022 **LECTURER:** Extradition. The international extradition order. Certain countries enter into extradition exchange agreements. So if if there's a criminal, look ,,,, the exception of course – and this has got nothing to do with presumptions – the exception is hot pursuit. Uh there is an international principle of hot pursuit. If somebody's committed a major offence and the police is in in hot pursuit, of that person and he goes across the border, um and once again we've got an agreement with that country, then the hot pursuit will be tolerated under reasonable circumstances. You can't have a

hot pursuit for 24 days. Into the – you know, - have a stake out in another country. That's not allowed. But if you are charging with your um vehicles and you're following a um suspect, and while that chase is going on and you go over the border and you have very good, very good suspicion that he has got a body in the car or that he is a is a international terrorist or that he's got diamonds, uh you know, whatever, then – within reason you can follow the hot pursuit. The hot pursuit has got certain limitations.

023 But besides the hot pursuit, when when countries are adjacent and they are friendly toward one another, then their presidents come together and they sign documents – you always see the presidents sign documents, you never know what they're signing, but they/ its usually this kind of thing, um uh criminal exchange, uh uh agreements, trade agreements, free trade agreements, in other words you can import your stuff to my country I won't charge you import-export duty, if we can do the same. You know, that kind of thing. Those are the agreements. But that's on an international level. And they have different, they have different presumptions.

024 **STUDENT 6:** I found those, in that regard, Switzerland to be very very exceptional in solving things, like they don't participate in the criminal exchange internationally, no police what what with all those things. Uh what happens if [inaudible] if a person who has done something and then runs to South Africa, with them they don't participate they don't want you to like, you know a lot of people they steal money, they bump into those banks there in Switzerland, but for them its like they don't even want to disclose that information. Like for instance you can get a visa within minutes if you want to go and put money into that bank, if you want to apply for a visa to go for study it will take six months to a year …

025 **LECTURER:** Uh uh um look you know Switzerland is an exception it is coming to an end, not that this has now got anything to do with the presumptions, I don't know how we get to the banking secrets and presumptions but Switzerland is an exception, Switzerland's always um Switzerland's got a national policy of neutrality, Switzerland never get involved in any international dispute, it doesn't get involved in any international wars, it is a it has a national policy of neutrality. Um the Swiss banks, up to very recently, uh maintained that they uh that you have a numbered account and they will not divulge any information – that however, if you read the news, if you look at the news, the head the [inaudible] of Lichtenstein, which is a very small principality in Europe, and uh what happened is people put money in Lichtenstein without paying tax. And Lichtenstein's got the same policy – we don't disclose any uh information about people banking with us, because that's the way that they attract business, so people who have shady deals put the money in Lichtenstein. Money laundering happens in Switzerland and in Lichtenstein. So um uh the European Union under the under the leadership of the German chancellor, is now – because what happened is the head of the German post office um is guilty of corruption, he took lots of money, from the post office, not even his own money, and he placed it in Lich-

Lichtenstein, is what is called a stiftung, where it is completely safe and where its not its not taxable. The European Union is now trying to force Switzerland, and successfully, trying to force Switzerland and Lichtenstein to to re-remedy this. And if they if they won't do it, they will boycott them. They will isolate them from any advantage of the European Union um and they will take steps so that they at least will uh prevent money-laundering and uh criminal activities going on. Uh but its an age-old problem. Its something that's very difficult to handle.

026 OK. Now if you are happy with the, if you are happy with the legislation, let us try and carry on with the second part and that is the case law. Precedent Precedent, case law, court decisions, court decisions, precedent , case law – these are all the names that we have for the second source that we have, that we are going to investigate.

027 Now, court decisions, ladies and gentlemen, uh perhaps just as important a source of law, as legislation, but far more intellectual. Um legislation I wouldn't say is non-intellectual but legislation is is more practical, its more uh its more real its more more political, can I say. Court decisions are the decisions taken by judges in South African courts, in the South African high court, Supreme Court of Appeal and Constitutional Court. And this is an extremely important source of uh South African law. Uh you might recall from Roman law that one of the sources of Roman law was the opinion of the jurists. And the opinion of the jurists in Roman law was one of the most important sources of Roman law. Because the opinion of the jurists eventually found its way into the Corpus Iuris Civiles, the Digesta of Justinian, And the Digesta of Justinian became the cornerstone of Roman law, and up to today the opinions of the jurists as contained in the Di-Digesta, um uh is a valid source of South African law. Um please remember that, there might be an exam question uh an asking you whether you will be able in a South African court to quote the opinion of a uh ancient Roman lawyer. And the answer is 'yes'. If you can, if you can do it properly and if it is relevant and if it is um done in the proper manner you may still quote the Digesta of Justinian as a source of law in South African high court and that is done daily by the better by the better counsel.

028 OK. Precedent, like legislation ladies and gentlemen, primary source of South African law. What is a secondary source of South African law? Common law? [uncertainly] Ja. I'm not so sure about that … You're not wrong but [Student: The constitution] The Constitution? [incredulously] F… are you serious, the Constitution is a secondary source of law? No no. Its not common law. Common law is also a primary source. There's something in the common law that's a secondary source. Oooh I can I'm going to have great fun in putting together an exam this year.

029 Um secondary source of law ladies and gentlemen is something that is very very um infrequently used in South Africa that is the law of custom. Not customary law, but the law of custom. We'll get to what exactly the law of

custom is. The law based on customs and then to a lesser extent, or not to a lesser extent, also, indigenous law. Indigenous law as a secondary source of um South African law. And the writings of modern academics is a secondary source of law. OK. The Constitution, the common law, the legislation and case law – those are the primary sources. Those are the very very important and un/ you know da uh uh important sources of law. Um foreign law is also of course not a primary source but is important.

030 Only the judges in the high court, in the supreme court of appeal can deliver binding precedents. Ok we're not going to make a big hoo ha of this here now I'm just mentioning it, when we do the jurisdiction of the courts I'll come back to this. But the magistrates in a magistrates' court does not create precedent. Magistrates in a magistrates' court does not create precedent. Why? Well firstly because they haven't got the authority. And secondly, their decisions are not recorded. They don't form part of the precedent system. They cannot bind anybody with their decision. Are they however bound by anything else? Are magistrates bound by other precedents? Hmm? Yes?

031 **STUDENT 9:** The decisions of the judges that come above them, they're bound by?

032 **LECTURER:** Who are the judges above them? Have they got a double-decker bench?

033 **STUDENT 9:** In status or in [inaudible]

034 **LECTURER:** And who are these judges?

035 **STUDENT 9:** The High Court, Supreme Court of Appeal, Constitutional Court

036 **LECTURER:** Yes, in other words, the judges. [Student: Ja] Ja because you have magistrates in the lower courts and judges in the higher courts. OK. Does everybody get that point? Only the High Court, the Supreme Court of Appeal and the Constitutional Court. Only those three courts that can create legal precedent. OK. Magistrates' courts no precedents.

037 **STUDENT 1:** Sorry sir, what is the magistrate court bound by then?

038 **LECTURER:** The magistrate's court is b/ like all other courts. Magistrate's court is bound by the precedents of the High Court, the Supreme Court of Appeal and the Constitutional Court. So, if a magistrate sits in a court case, the magistrate the magistrate can't just do what he wants to do. He is bound by the South African law. Obviously. He practices South African law. So he is bound by South African law. He is bound by the precedent of the High Court. So he can't – if there's a decision in the High Court, that says 'we accept traffic photographs' you know these photo things that are now so controversial, that's the decision in the High Court, it is binding on everybody in the province. Its also binding on the magistrate. The magistrate can't say, 'well the High Court they will accept the photographs but here's my court and I won't accept it'. So he can't say that. It is binding. But, the decision of

that magistrate, is not is not – I wouldn't say its not binding, its binding on the people who are involved in the case – but it has no precedent. Its not binding on other magistrates and its not binding, obviously, on other courts.

039 The word 'precedent' is merely a technical word referring to a previous case taken as an example for subsequent cases or as justification. In the le- technical legal sense, the word pre- precedent means a court case which you quote in a court of law as a judge as authority for your decision. Now, here's a tricky part, precedents may or may not be followed by judges. I'm going to explain that now. South Africa is divided into several um well, I want to call them provinces but uh there's a state of flux at the moment because the provinces are divided between the old provinces and the new provinces, but the courts are divided [cellphone rings and he reaches to turn it off], the courts are divided into certain regions. The Witwatersrand, for instance, has got its own local division of the High Court. Um the old Transvaal, the area that was called the old Transvaal, has got its own High Court situated in Pretoria. And that is still called the Transvaal High Court. You also have a High Court in Durban which is called the Durban and Coast and Coastal Division, local division. And you have a High Court in Pietermaritzburg for the rest of Natal which is called the Natal High Court. OK.

040 Now try follow this: When a decision is taken in the provincial division of a High Court, the entire province that that high court covers, including its local divisions, is bound by that precedent. [Student asks if he can repeat that, to which he responds by laughing]. OK Ok I thought I could um do this without referring to this [takes out transparency] but lets let us show you a little scheme. There's the court structure of South Africa – can everybody see that? OK. On the top we have the Constitutional Court and next to the Constitutional Court, actually a little bit below the Constitutional Court we have the Supreme Court of Appeal which is in Bloemfontein. OK. Um you don't have to write down this scheme now, I'm just using it as a di-didactic aid, we're going to do this in a separate lecture. This, the court structure of South Africa. Under the High Courts uh under the Supreme Court of Appeal and the Constitutional Court, you get a range of High Courts. And there you see the different High Courts and let us go through them because this is how what they are called and uh how they are still called.

041 The first one there is the Cape Provincial Division, the second one the Natal uh [looking at scheme] no that shouldn't be … no that's right its not Natal that's the Northern Cape Division. Thank you very much. Cape Provincial Division, Northern Cape Division uh Provincial Division, Eastern Cape Provincial Division [pauses for a few seconds]. The Free State Provincial Division, this used to be the Orange Free State Provincial Division. The Natal Provincial Division and the Transvaal Provincial Division. Now those are all provincial divisions. They cover the old historical provinces of Cape. Eastern Cape is Port Elizabeth, Grahamstown. Uh Free State is Bloemfontein, Natal is Pietermaritzburg and Natal, and Transvaal is Pretoria and the rest of the old

Transvaal. Because certain of these provincial divisions are too large, they have local divisions assisting them.

042 And where do we have the local divisions? We have the Witwatersrand Local Division under the Transvaal Local Division in Johannesburg. We have the Durban and Coast Local Division under Natal and we have the South Eastern Cape Local Division in Clanwilliam in King William's Town uh d-uh King William's Town, Umtata and ch- what is the capital of the old Ciskei? Bisho. Bisho. One forgets these things ne. So the Eastern Cape is the court that is in Port Elizabeth. That court is assisted by several other courts in the Eastern Cape, which is called South Eastern Cape Local Division. There's a court in Grahamstown, there's a court in Bisho there's a court in Umtata. OK.

043 Now, if a judge in the Witwatersrand Local Division gives a judgment, everybody in Transvaal is bound by that judgment. Everybody in the whole of Transvaal is bound by the judgment given by the judge in the Witwatersrand Local Division. Vice-versa of course is much easier. If a judge in the Transvaal Provincial Division gives a judgment, everybody in the Transvaal, including the judges in the Witwatersrand Local Division is bound by that judgment, that precedent. The judges in Natal, Free State, Eastern Cape, Western Cape and Northern Cape can decide for themselves whether they follow the precedent or not. They are not bound to follow a judgment of a brother province … or a sister province. The only people that are bound by the decision of a judge will be the people in the same province. So that is how you often get a decision in the Cape Provincial Division that is not followed by a decision in Natal Provincial Division. That is quite possible, there's nothing illegal about that. Yes?

044 **STUDENT 7:** So then effectively, could you have two of the same precedents from different provinces? Like let's say in the Transvaal one precedent comes out which is binding in Transvaal, but the Northern Cape decides not to follow it, then another case comes up with exactly the same situation and they decide to make a precedent. So then there are two of the same ..

045 **LECTURER:** Yes, but then they would follow the Transvaal. They wouldn't make their own precedent, they would follow the Transvaal.

046 **STUDENT 7:** But theoretically they could choose to do it themselves.

047 **LECTURER:** No no that would be, it would be um well it would be unthinkable because you know South Africa works on a system of a hierarchy of courts and of precedents. We work on a system called stare decisis, in other words the lower courts are bound by the higher courts. So if you've got a case that is exactly the case as a case in the Transvaal, yes, and you are now say in Durban, yes you've got the right to come to a different conclusion, and say for these reasons, very good reasons must they be, I'm not following my brother in the Transvaal. Ok so that that you understand. When you then have a new judge and a new case, and the facts are similar to both the previous case that didn't follow the Transvaal, and the Transvaal case um

that was decided originally, the judge in the Natal case, in the Durban case, will – if he wants to follow the Transvaal case – will very pertinently state: 'My brother in the Transvaal made this decision in 1962, it was wrongly not followed by my brother in 1968 but now in 1992 I am overruling him and I am following the Transvaal judgment. Uh he wouldn't say, he wouldn't you know its unthinkable of making a whole judgment and not referring to the Transvaal judgment. Because what you're ultimately aiming at is that all the courts will agree with all the legal points that may exist. And for that reason we also have the Supreme Court of Appeal. If there's a dispute between two courts and this dispute is really damaging to legal certainty, that case then goes up to the Supreme Court of Appeal, the Supreme Court of Appeal makes a precedent makes a decision, and everybody is bound by that.

048 OK. My experience is that the students have one problem with the structure of the courts in that is that they think the local division is a court of a lower ranking than a provincial division. That is not true. The local division is not the child of the provincial division. They are absolutely equal in status, as a matter of fact, they exchange judges. There's no difference between a local division and a provincial division.

049 **STUDENT 6:** Why is it that a judge in a local division makes what a decision or make a ruling on a certain case [inaudible] or they change the decision. The guy was guilty in the lower court and a …

050 **LECTURER:** Yes well that can happen.

051 **STUDENT 6:** He gets some [inaudible] in the higher court.

052 **LECTURER:** Ja

053 **STUDENT 6:** That's a one and the same judges and …

054 **LECTURER:** No its not the same judges, if you appeal from the provincial division to the Supreme Court of Appeal, there's a whole there's eleven

055 **STUDENT 6:** But they exchange the judges ….

056 **LECTURER:** They what?

057 **STUDENT 6:** They exchange the judges ….

058 **LECTURER:** No no. The judges are promoted from the Transvaal Provincial Division to the Appeal Court. The Appeal Court is the highest court for private law matters in the country. So what you do is you become and advocate, you if you're a very good advocate they ask you to become a uh acting judge, if they say that you can do the work then they invite you to become a full-time judge in the provincial division, or the local division, after years of service in the provincial division or the local division, if you are deemed to be fit, they are invited as an acting judge to the Supreme Court of Appeal or to the Constitutional Court. So it's a hierarchy, its not the same judges and they don't exchange. You are promoted to to one. Yes? Ladies first.

059 **STUDENT 1:** So does that mean that the local division can also set precedents [inaudible] …

060 **LECTURER:** Yes yes yes indeed.

061 **STUDENT 1:** Oh OK.

062 **LECTURER:** Yes indeed. If you have a case in the Witwatersrand Local Division and the judge makes a precedent and he uh you know the case becomes an important case that is to be followed, that is to be followed throughout the Transvaal.

063 **STUDENT 3:** But not by the – oh so also by the provincial division.

064 **LECTURER:** Yes definitely definitely also by the provincial division. But not by the Free State and the other the other people. Yes?\

065 **STUDENT 11:** Can judges say from the Witwatersrand add or subtract any content from the precedent from the other provincial divisions.

066 **LECTURER:** How do you mean 'add or subtract'?

067 **STUDENT 11:** Add something [inaudible]

068 **LECTURER:** No no its not like the praetor's edict. Um if there's a if there's a if there's a, if there's a precedent there's a court case for instance in the um Cape Provincial Division and that judge made a decision on a certain set of facts, and he came to a conclusion, and that is now the law in the Cape. That case is what we call a precedent. It is used and it is followed by other judges in the Cape. If a judge in the Transvaal wants to follow that precedent, he has to say so in his judgment. Say that he is following that precedent for this and this reason and then that precedent becomes binding on the Transvaal as well. Um the facts may change, but he may not – obviously if he's following the precedent – he cannot change uh the law. OK. You understand? Yes?

069 **STUDENT 8:** Sorry, so the Supreme Court of Appeal, they follow precedents from the Supreme Court of Appeal, right?

070 **LECTURER:** No they create precedents.

071 **STUDENT 8:** Yes If they create it. So why do we have individual provinces. Do those provinces then have to [inaudible] do they then have to follow the precedents of the Supreme Court of Appeal?

072 **LECTURER:** Yes.

073 **STUDENT 8:** So basically they're first bound by the Supreme Court of Appeal and then ….

074 **LECTURER:** Yes yes obviously. The principle of stare decisis – the principle that lower courts follow higher courts. The higher the court is the stronger you know the compulsion is to follow it. So if there's a precedent from the

appeal division, you know from the Supreme Court of Appeal, then all provincial divisions and all local divisions must follow that precedent.

075 **STUDENT 8:** And then in the case if there isn't a precedent or that whatever it was then ….

076 **LECTURER:** Yes then they go on their own. They create their own precedents.

077 **STUDENT 8:** [inaudible]

078 **LECTURER:** OK.

079 **STUDENT 7:** I've just got two quick questions. Am I correct in understanding that the provincial divisions and the local divisions are exactly the same just different/

080 **LECTURER:** They're not exactly the same. Um uh you know it's a very difficult question to answer. They're not exactly the same but they're not different. Um they they the local division um uh is usually a court um uh is usually a court that is placed within the provincial boundaries uh to assist the provincial division with the work. And to make it easier for the people of the division.

081 Like the Witwatersrand is an excellent example. Paul Kruger instituted the Transvaal Provincial Division, the old ZAR. He instituted that and there's a long and very rich history of the old provincial division. And then of course they discovered gold in Johannesburg. And then for a long time, certainly during the reign of Paul Kruger, um all the people in Johannesburg, if they had a dispute, had to go, had to trek to Pretoria and in those days, you know, they didn't have luxury BMWs and Mercedes Benz's to go through to Pretoria. They had to do it with a donkey cart, with an ox cart which took two days. So you ask me now on my history but I think it is, I think it was uh Sir Hendrik Kotze who said let us institute a local division in Johannesburg so that a) we don't have all the work in Pretoria; and b) it is more convenient for the people in Johannesburg. To come to their local provincial division. And then they started the court down here. In downtown Johannesburg. The exactly the same court, it is just like a head office and a branch office. Um the judges are exactly the same, and also, they've got the same Judge President. You've got a deputy judge president in the local division; same jurisdiction, same everything. There are slight differences but I don't want to discuss those now. He's still not finished.

082 **STUDENT 7:** My second question is ok obviously provincial divisions make precedents which they are bound to follow [LECTURER: yes ja] But could there be cases where the precedents are so important or whatever that they go to the Supreme Court of Appeal to become /

083 **LECTURER:** Yes of course it happens every day! Yes of course, this is how law is made. You you go to uh the magistrate's court if you are within a certain uh uh a certain jurisdiction um s-um R100 000. If your dispute is less than R100

00 or more than uh uh then you go to the magistrate's court and the magistrate's court hears your case. If you're not satisfied with the magistrate's court, then you appeal to the – here in Johannesburg – you appeal to the local division. You don't appeal to the provincial – you go to your local division. There the judge decides against the magistrate. But that is now a precedent. The magistrate wasn't a precedent. What the magistrate decided was just you know, binding between the parties. Now in the Supr- in the High Court when the judge gives a a decision that decision is a precedent and it binds the whole of the Transvaal. Your opponent, who got satisfaction in his favour from the magistrate is now unhappy. So what is he going to do? First he's going to appeal to a full bench. But that is now technical detail. He's going to appeal from a single judge in the local division to a full bench, either in the local division or the provincial division. If that if the full bench gives judgment against you and for the guy that won in the magistrates' court then that is the precedent. Then the whole of the Transvaal is bound by that precedent and the previous precedent of the single judge disappears. Now of course what are you going to do? Now you are I mean you are I wanted to use a bad word now but we're now on camera you are not satisfied and you are going to, you want to appeal. You appeal to the Supreme Court of Appeal. Which is the highest court. And whatever the Supreme Court of Appeal decides, that's it. Unless it's a constitutional case. That's it. There's nothing higher. You can't go to God or the Privy Council or you know George Bush or whoever you think is powerful. That's it. You stop at the Supreme Court of Appeal and what the Supreme Court of Appeal says – that's law. Whoever and in whoever's favour the Supreme Court of Appeal has decided that is law. And you will – all the other things from the magistrates' court is worth nothing! It loses all its value. What the Supreme Court of Appeal says, that is where law is made. Yes? Sorry there were questions here but …

084 **STUDENT:** Ok, if you commit a crime in one province and you are caught in a different province …

085 **LECTURER:** No no ja … what I'm talking about here is private law. Criminal law has got different jurisdiction. Um uh it doesn't matter. Um uh you are heard … its in the discretion of the director of public prosecutions where you are being prosecuted. If you committed the crime in one province and you were caught in the other province it depends what is convenient to everybody and you will then prosecute it in that court. Is that all?

086 **STUDENT 8:** So the more cases the Supreme Court of Appeal and the Constitutional Court hear, the less freedom the High Court has to …

087 **LECTURER:** No no, no no no no, no no …that's not, it doesn't work like that. It's um … it's a groundswell. Its not from top down, I know it sounds contradictory but it's a groundswell. The – I told you last week – the High Court has got complete inherent jurisdiction. So the High Court can hear absolutely anything. There's no ways you can limit the jurisdiction of the High Courts. You remember when we did that presumption? [WF3: Ja ja] So

whatever the Appeal Court decide it only stabilizes that part of civil law, that part of private law. And, it is true, the only way to change that is if you bring another case with the same facts and then the Appeal Court changes its own mind, but that very very rarely happens. But the but the fact that the Appeal Court gives a final judgment, doesn't deaden the work of the high court. Because its got this inherent jurisdiction. And there will always be a multitude, multitude of cases coming to the High Court. I mean as it is in South Africa our High Courts are [shakes head] completely overwhelmed. Um so there's no question of limiting freedom, its more bringing legal certainty to certain areas of the law.

088 **STUDENT 8:** And then just a question out of curiosity because I don't know and I want to know. Is it – lets say you murder someone right and you get taken to court. [inaudible] Which court is going to put you in prison?

089 **LECTURER:** Usually if usually all criminal cases are heard by the magistrates' court first. And the magistrate will decide (a) whether you're going to be released on bail, or whether you're going to be kept in prison and he then makes an order. And you then have the right to apply for a formal bail hearing. Um … OK.

090 **STUDENT 6:** How often do the courts come up with new precedents because normally …

091 **LECTURER:** Every case that every case that's reported by the Supreme Court of Appeal is a new is a new precedent.

092 **STUDENT 6:** I meant but I meant the uh precedent authority like when you should quote [inaudible] I'm delivering this I'm concluding this according to, I'm quoting the authority of a certain case that I've passed. Now in that [inaudible] I'm a judge I don't want to quote that case, I don't – I come up with my own authority – how does it go [inaudible] ….

093 **LECTURER:** No um ….de-uh … Look I have difficulty in following you, I don't know exactly what you mean but um judges in private law matters sit and they are confronted by both sides represented by an advocate. The advocates make sure – that's their job – they make sure that the judge is informed of very single possible authority uh that their case, that their side of the case um uh that will support their side of the case. So the judge, when he sits in the provincial division has got the advantage of the entire scope of authorities, presented by the two advocates. Of course not all advocates are the same. And some advocates are more thorough than others. What then happens uh is the judge hears the case, he gains all the authorities, he then retires and then um he does his own investigation. He does his own sources he investigates the advocate's sources, he does his own research, he comes to a conclusion based on everything that was laid before him. So there's virtually no chance that if there's an authority on either for or against uh the decision the judge wants to make that he won't know of it. If he's involved in that case he will know of it, he will evaluate it and he will decide yes I'm

going to use this authority or no I'm going to decide against the authority. A judge can't make his own authority. I think what you mean his own research. Ja. Judge can do his own research, that's what he's being, that's what they do. Um OK I think we must get a move on.

094 **STUDENT 7:** So then can there be more than one precedent for the same case? If they can be …

095 **LECTURER:** No … how do you mean more than one?

096 **STUDENT 7:** You were saying now that the advocate supply you with cases ….

097 **LECTURER:** Yes

098 **STUDENT 7:** [inaudible]

099 **LECTURER:** L: No no no no what you're conf – what you're confusing is the authority of the precedent of the case itself and the cases that are quoted in reaching that authority. Um [clears throat] when a case is brought to court um you appoint an advocate and it is the work of that advocate to promote your case. So he will get all the precedents that is in favour of your case. And he will put that before the judge. And he will try everything – with his arguments, with your affidavits, with everything, he will try to convince the judge to decide upon the cases that he has quoted to the judge. The opponent will do exactly the same. And usually, if it is a moot point, if it is an open point in law then there will be authority for both sides – yes! Yes! That is very possible. As a matter of fact that's what happens every day in court. Is trying to convince a judge to accept your authorities rather than your opponents' authorities. And then? That's why you have to use logic, that's why you have to use uh rational deduction. The judge then has all these authorities in front of him with various weights that he attached to the authorities, depending on what they are, and then he does his own research and he comes to a conclusion, which authorities to accept and which to reject because every case is different. When I talk about a precedent, no two cases can be exactly the same. I mean, you can understand that for yourself. The facts will – every case will have different facts. So there will always be cases that you can argue are for, and cases that you argue are against it. And it's the work of the judge to decide which of the cases to use to support his decision. And when he makes a decision, and he reports that decision, that decision becomes authority for that specific point that was raised in court. OK. Can we take a little break? Uh five or ten minutes? And then we will start with you court cases afterwards. I know you're all asking these extremely difficult questions because you're trying to postpone the report back.

LECTURE 11

001 **LECTURER:** [after chatting with a few students and researcher for a minute] Morning ladies and gentlemen I'm so glad that you are fascinated by your by your homework. Um I just have a uh practical announcement to make before uh we start with the lectures. I've got two practical uh but not everybody's here it seems. Hmmmm … where's the Scottish lady …. Where's […]. Where's […]? Ooo hooo. The great enthusiasm has just evaporated. Ok my two um my two my two uh announcements I want to make. First of all, you will get your assignment on Thursday. Uh the assignment will be uh uh I think an analysis of a case. A leading South African case. […]

002 **STUDENT 1:** Yes hi.

003 **LECTURER:** Hi. Ok analysis of a leading South African case um and then we will see if you can do the notations and if you can read the case and you can understand it. Just three pages …. Yes?

004 **STUDENT 3:** Sir I'm a bit confused. Is the assignment for Introduction … dues next week Tuesday the 18th of March or [LECTURER: No no] is it due in May?

005 **LECTURER:** In May.

006 **STUDENT 3:** OK all right I got it.

007 **LECTURER:** Yes I can see you're very confused.

008 **STUDENT 3:** [laughingly] Ja

009 **LECTURER:** Ja OK I so … I'm handing it out to you so that you can work on it during the study break. At least read the case so that you can ask me any questions after the study break that you don't understand and help you to do further research. OK so on Thursday you will get a piece of paper with uh everything that I expect of you – how long, when it must be handed in, how you must do it, what I want you to do etc etc.

010 And read the instructions very carefully, um that is something that lawyers don't always do um they don't read their instructions carefully, their … quick, clever, and wrong is what my wife always says. If you're a, if you receive an instruction, that's your bread and butter. That is your profession. Go and sit down, read the instruction. Take it in, read it again, make sure you know what the client wants. Um you know, there's no rush whatsoever. We are not working with the lives of other people, you are not a paediatrician or a a cardiac surgeon, nobody's going to die, I've never seen anybody die in a law office. Um so there's no urgency, although I might be saying something to the contrary – sit, relax see that you know what is going on. And you don't miss anything.

011 Um so I will give you a piece of paper – an A4 folio. Uh and it will be full of instructions. And part of the test is to see whether you can follow all the instructions. OK. The other thing that I want to tell you is that on Thursday

next I will be in Greece …[class makes noise in response to this] Ee- yoo-oo. I will be in Greece um probably sipping a uh espresso on the plaka while you are all still running around here trying to finish off your first term. So there is no lecture, the double lecture for next week Thursday, Donderday, Thursday, Tollsdag, Thursday

012 **STUDENT:** That is the 20th

013 **LECTURER:** That is the 20th. I will not be here. I'm already flying on Wednesday evening … to the holy city of Athens and you will not see me uh here on Thursday. So please just cancel that lecture. Should it be necessary, if we don't finish our work which is highly unlikely – its like the oxygen falling out of the sky, the plane falling into the sea – I will organize a lunch time lecture to uh to finish the work. But that's highly uh highly unlikely. We're already far advanced and um you know I don't want you to get bored.

014 OK. Now from a didactic point of view, we have done the structure of the courts in South Africa. Very pleased with you as a class because you have uh very concise and very uh clever questions, very uh considered questions. Uh so much so that we don't always finish the work but OK that's not a problem. But we have now finished this um this structure. Is there anybody that would still like to ask a question on the structure of the South African courts? Because this is very important.

015 What you lack, what you lack here is of course the jurisdiction. Now the jurisdiction changes from year to year. And that is a separate uh part of our course. Where I'm going to tell you: This is the exclusive jurisdiction of the Constitutional Court, this is the exclusive jurisdiction of the Supreme Court of Appeal, inherent jurisdiction for the High Courts you remember that – sorry […] I'm just [she has her hand up] – then the monetary and the prison terms attached to regional courts and to the district courts. Those are things that people are fond of asking. Because its something that you should know as a practicing lawyer. I mean you should know the jurisdiction of the courts. But you don't have to worry about that now. We've not done that yet. That's a separate chapter. Yes […]?

016 **STUDENT 1:** Um I was just wondering, I got a bit confused when I was watching the news last night that now Jacob Zuma is taking his case to the Constitutional Court now but I thought that if the Supreme Court rules on something like for example that that evidence is admissible in court, surely that means that it is admissible in court, I thought only if they couldn't make a decision that it went to the Constitutional Court.

017 **LECTURER:** Grace we did this of course. […] I'm sorry we had to start before you.

018 **STUDENT 6:** I'm sorry I'm late.

019 **LECTURER:** No no. We did it but you were probably confused by something else and you didn't listen.

020 **STUDENT 1:** As far as I understood it when the Supreme Court couldn't make a decision ..

021 **LECTURER:** No no no no. Wait. Listen carefully. Its very tricky. It is very tricky. It is very tricky. The jur/ you remember I asked you which of the two courts are the highest? And somebody, one of the, one of the students said that – equality – I think it was you, said that they are equal, some said the Constitutional Court's higher; some said even that the Supreme Court of Appeal is higher. So I gave you arguments for why I thought that the Constitutional Court was the highest court. And one of my arguments, very compelling argument, is the following: the Supreme Court of Appeal in Bloemfontein is the highest court for private pub/ for private law matters. In other words, for matters between citizens.

022 **STUDENT 1:** OK.

023 **LECTURER:** If you take someone to court and you work with the common law and you work with the private law, the Roman-Dutch law, that is the highest court. That you can go to. As far as the private law is concerned there is no appeal beyond the Supreme Court of Appeal.

024 **STUDENT 1:** OK OK

025 **LECTURER:** Ok that's the substantive law. Substantive law. Now/ no I've not answered yet, you must please just [inaudible] Now as we know life – we live in a broken reality. Life doesn't come in watertight compartments. And especially in law, nothing is watertight. So it doesn't happen that your case is in a neat little box and that it only has private law matters. It sometimes happens, like in this case with Jacob Zuma, that there are constitutional court or that there are constitutional issues uh surrounding the matter. The constitutional issues in Jacob Zuma's case is of course the right to a free trial, the right to remain silent, the right to – his [inaudible] on property, because they raided his house with, according to him uh uh false warrant, many issues that's got nothing to do with private law. Nothing to do with private law or even criminal law. These issues are constitutional issues. OK. If you therefore have a private law matter wound up with a constitutional matter, which can happen very very easily. You can pull out a constitutional issue out of every case. So if you've got a mixture,what happens is the the case goes through the entire system. Up to the Supreme Court of Appeal. The Supreme Court of Appeal gives a final judgment on the private law matter. Say for instance it was contract. The Supreme Court will then say, this contract is valid or this contract is not valid for these and these reasons. Then the Supreme Court moves on, according to our jurisdiction, and it then gives its opinion on the constitutional law matter. Says, OK these matters were also raised, and it is our opinion that uh these rights were violated. Ok. If the Const/ the Supreme

Court of Appeal makes a pronouncement on the validity of any legislation, that case goes automatically to the Constitutional Court for verification.

026 **STUDENT 1:** OK.

027 **LECTURER:** OK so that is that was my argument why the Constitutional Court is higher than the Supreme Court of Appeal because if you have to send something up to another court to verify you know [makes a gesture with arms that seems to say – [then its self-evident] – then obviously one is higher than the other. Uh wait, I'm not finished yet. [Break in recording].

028 This legislation is unconstitutional and we now declare it as such. That – there the legislation is unconstitutional. Uh [motions to another student not to answer a question]. I'm still trying to answer […] question. Now, in Zuma's case, this didn't happen. What happened in the Zuma case is that the Supreme Court of Appeal declared the search warrants valid. And that was the last word on that issue. Jacob Zuma said, 'OK, if you then say that the search warrants are valid, um, I'm not satisfied, I am going to appeal to a higher court. I am going to take, not the issues that you've decided, that the search warrants are valid. I am going to take the constitutional issues now to the Con to the Constitutional Court. I am going to take it. Its not automatic, its not automatic. You appeal against those issues and take them to the Constitutional Court. And that is what's happened in Zuma's case. It is a nor/ it is a normal appeal to a higher court on different grounds.

029 **STUDENT 1:** OK.

030 **LECTURER:** Yes?

031 **STUDENT 17:** No I was going to ask a question, but its been answered.

032 **LECTURER:** Oh.

033 **STUDENT 17:** No I was going to ask whether the appeals court – if a judge had then given it to the Constitutional Court for review and then they'd given their ok, with the [inaudible] …

034 **LECTURER:** No no. Yes, Mr […]?

034 **STUDENT 14:** Does all legislation go to the Supreme Court of Appeal?

035 **LECTURER:** No no no no. What do you mean 'all legislation'?

036 **STUDENT 14:** Does the Constitutional Court ratify legislation sometimes first off or …

037 **LECTURER:** Yes, you can take a piece of legislation that you think is/ there must be very very good reasons that you can take it directly to the Constitutional Court.

038 **STUDENT 14:** OK!

039 **LECTURER:** So you don't have to go through all the uh uh rigmarole, you can directly to the Constitutional Court. But that's highly exceptional. An example of something, when that happened, is when it was the first elections and the Cape couldn't d-d- agree on the demarcation of the constituencies. So the President used his executive power and said 'Ok now you can't decide, this is now what I've decided'. You know, go to election. And the Premier of the Western Cape said 'no you can't do that'. Um and that was you know t-t- time was of the essence, the election was coming and, you know, it was an enormously important matter. And it went directly to the Constitutional Court. OK.

040 So now we are finished with the structure and what we are going to do for this lecture before I ask you to finally do your court cases, w-w- what you had to do for your um homework, let us please just uh look at what a court case looks like. Um … I'm trying to [fiddles with controls for light switches] … no, that's not going to work. Can you see there? It's a bit faint. I want to put off the lights but I think they …. [class suggests he pulls down the screen, which he proceeds to do]. You see this is the problem, it doesn't stay. Oh [as screen stays in one place]. It never did that before. Can you – is that better?

041 OK this is a simple little case ladies and gentlemen, its in your course pack and it is [inaudible] cited as Parker. Please go and read the case, you know, you must read as many cases as possible. So just go and read the case, you don't even have to look it up, its in your coursepack, on page 96 …. To the end, on page 96 to the end. It is a case about – the content of the case is not so important but you must, you know its better to know what's in a case than not to know what's in a case.

042 It's a case about the attorney's misconduct and it is a very interesting case because it's a it's a its almost a grey area. It is an attorney that um uh was a trustee, he received monies in his trust account um and he uh had various other accounts that would pay in and um and its was um it was a a housing project, and people paid monies in and he then – we don't know whether he ran into a cash flow problem, but he used his trust account, where a huge sum of money was deposited for the uh complex. He used that trust account to make personal loans to his family. Uh – he paid it back immediately, you know, when it was discovered, he had the money to pay the the the shortcoming shortcoming back, uh but the question is, you know, can you do that? What is the um what is the legal point? You go and read the case and um perhaps try and find the reasons for the decision, that is a a good exercise.

043 But we're going to use this case just to show you the structure of a case. The skeleton of a case. It is sometimes good to know what all these little figures um and things are for. You must reme - remember that the beginning of your profession, or one of the beginnings of your profession as you now know if you're doing Roman law, the profession started with the priests in Rome, who had the monopoly not only of the lex sanctiones, knowledge of the

Roman law, also the calendar. You all know what I'm talking about. Those people who are with me will know what I'm talking about but I don't know if other lectures are teaching this.

044 So the legal profession ladies and gentlemen, this profession that you so eagerly want to enter, the legal profession started with a monopoly. It started with a mystery. It started in a temple. It wo/ it sta it it you would bring your case to the temple to the priests to find out whether you had an action and whether there was a good day on which you could bring your action. So the legal profession generally is always surrounded by um things that make it mon-monopolistic or elitist. Uh I know that's a swear word and its not a good word to use in a democratic institution like Wits but a university's also an elitist institution although they don't want to agree with it. But law is an elitist or an exclusive profession. And it is exclusive because we almost have our own language, in the old days people used Latin, but we almost have our own language. And we have all these specialized tools. We know how to read a court case. We know how to read a contract. We know the mysteries behind the legal texts. And that is that is that is the origin um of the of the legal profession. Don't don't expect now if you go for your articles you know that you're going to be initiated in temple [hands become very flowery at this point] with smoke and whatever [class laughs] that's not going to happen unfortunately. But it is a profession and in a profession you are dis you are distinguished from other people because you you've got specialized knowledge and this is one of them. You need you need … [break in recording].

045 It's Rex or Regina, that is the Latin for king or queen. And that's / means the same as State just in uh English, in England. In England you don't have/ the State doesn't uh uh prosecute you but the king and now the queen uh prosecutes you. OK [clears throat]. The second line, number three there, it tells you in which division you are. This is a case that comes from um the from Cape Town, the Cape Provincial Division. And if you know your judges well then you will know that Judge King and Foxcroft and ol' are both very well-known as judges from the Cape uh Provincial Division. As a matter of fic/ fact King at this stage was the JP. What is that? Is that his initials? No. Because then all judges would have the same initials ne? What does JP stand for? [some students respond] No no no. Yes?

046 **STUDENT 11:** Its either judge or judge president.

047 **LECTURER:** JP, Judge President. In other words he is the highest judge in the Cape Provincial Division. He is the highest judge, he is the judge president of the Cape Provincial Division. OK. What other de/ what other abbreviations can you have? You can have 'AJP', which is? Hmm? [STUDENT 9: Acting judge president] Acting Judge President. You can have 'JA', not in this case but in another case. JA? Somebody? [STUDENT: Judge of Appeal] Judge of Appeal, thank you. CJ? CJ? [STUDENT: Court judge] No not a court judge, all the judges are court judges. Do you know that there's a tear in your pants? Is it?

[inaudible] that bad, but … CJ? [STUDENT:Chief Justice] Chief Justice. And then of course DCJ? Deputy Chief Justice. And then Acting Chief Justice or Acting Deputy Chief Justice and there may be, there may be um many more. I don't know if you still use the Afrikaans versions, but in Afrikaans its 'W' for Waarnemende. WCJ is Waarnemende WHR WHR Waarnemende Hoofregter that is Acting Chief Justice or Waarnemende Regter President or Waarnemende Regter.

048 Uh etc etc you know how it works, the profession. In the past if you are a very good advocate and they um the council the bar the minister and the judicial services council think you should be promoted, you are invited to act as a judge. For a couple of weeks, or a couple of months. And if you prove yourself, if you prove to be a good judge, if your judgments are sound then they invite you to become a judge. Uh but you are an acting judge before you are a full judge.

049 OK. Number five there is very confusing – don't worry about it. It's the date on which the um on which the judgment was given. Its not really relevant unless unless you know you're doing historical research um the most important um thing of the court case is the citation and that does not come into the citation. Then there's a case number, case number 8920/98 – also not important – that is the court case file number. You are never going to have anything to do with the file number unless you're going to be an articled articled clerk and you must run around and go and find the file and go and lodge some documents in the file but that you'll still discover. Yes?

050 **STUDENT 9:** I'm sorry sir, the date on the citation – is that the date of publication?

051 **LECTURER:** That is the date of publication yes. Um you see, sorry can I borrow this, this is the, this is what the law report looks like, and this is how, this is the most recent law report, they've tidied it up a bit, it looks quite…. And its not always clever to buy them, these are bound I think two-two now. In a in a in a leather binder. And its not always clever, if you're a practicing lawyer it might be clever just to keep them like this. Because sometimes you must take them to court, and then you must take your whole library to court. You now … it's sometimes much better just to have uh uh the book um and here you are um. You you're the first case here is Van der Merwe. Van der Merwe & another v Taylor & others. this case was heard on the 21st p of November 2006 and the 14th September 2007. That was the that was the date. But it is published (clears throat) January 2008. So the citation is blah-de-blah-de-blah v blah-de-blah-de-blah 2008 (1) page 1 to wherever. Um (thank you). Yes/

052 **STUDENT 3:** Sorry sir I just want to ask – some of our cases that we've had to read like for delict. Some of our important cases have actually been in Afrikaans. And my Afrikaans is good but its not/

053 **LECTURER:** Congratulations/

054 **STUDENT 3:** So I just wanted to know …

055 **LECTURER:** You see now this is extremely ….

056 **STUDENT 3:** Are there are there any ag translations ….

057 **LECTURER:** This is extremely important that you ask questions like this. Because this is a very practical question. But if you don't know the answer then you are you are stuffed. Now, there are translations. Uh the translations in our library is in the staff reading room. The translations started in 1974 and goes up to 1984 I think. They've translated a whole block in the 70s and 80s. And then they translated in the 90s four or five volumes, which was published by jutas. But because there's no, there's no … its not profitable, you know, book printers do only things that are profitable, they've stopped that. So, yes there are translations, um, if you come to my office I'll show them to you, They're about 30 thin books, its only the Afrikaans cases that are translated. Um and they stretch from the 70s through to the 90s, but not everything. Not absolutely everything.

058 Um, so if you're lucky you get the whole translation and the translation was done by an old friend of mine, Dr van der Merwe, you might remember him, I wonder, I wonder whether he's still alive. He's he was very old when I saw hi, last time. He was the uh author of Van der Merwe & Rowland, Suid-Afrikaanse Erfreg. And he was a professor at the University of Tukkies, and later on, because he was very naughty, um uh he became the head of Justice College. He [looks at researcher recording and then shrugs his shoulders] He fell in love with a professor at Unisa's wife, I'm not going to tell you who that professor is, you won't even know her. But this we're talking about in the early 40s, 50s. So he was married and he was a he was a brilliant academic. He – when I was at Justice College, he would open his door, he had a huge office like this. And he opened his door in the corridor to see when you arrived at the office. And then if you walked down the corridor, he would shout at you. He was extremely eccentric. He would shout at you and give you a piece of Latin to translate, just to [clicks fingers] to get your brain working for the morning, and um you know, very few people could do it. Um but I'm very fond of Latin and I could translate some of it. But he would sit there from, he was very nervous about the traffic in Pretoria, so he would drive in at five o clock in the morning because he didn't want to have to drive in traffic. And then he would translate Greek and Latin and then if you came in he would call you to translate, if you could translate and what you thought of the translation. But in any case, that is now way off the topic [class laughs] he well in love with another professor at Unisa's wife, and he divorced his wife and he eventually married this uh lady. But of course the professor at Unisa was of course extremely cross, that he's now taking his wife away … [laughs] you know. Its not the kind of thing that Afrikaners do, you know Boere are very, you know they are very religious and … but Van der Merwe is not a is not like that. So he got a court order, the professor at Unisa, got a court order to restrain Van der Merwe from coming close to his wife, or to

his house. And of course Van der Merwe ignored the court order and, you know, he carried on with his affair. Um he was in love with this girl. And he you know [flicks hand] of course this other professor was a real stick in the mud. So he had him arrested. And he was charged with contempt of court. And then of course in those days, if you had a criminal charge, you couldn't be a professor. Um he was a professor, I think, at the age of 24. At 24 he was a full professor and had already written his first or second book. And then this thing happened and that ruined his whole career. Um and then the nationalist government took him from the university – because the university fired him – because he had a criminal conviction. And they made him head of Justice College, which was the university of the department of justice, you know, the small little university within the department of justice that trained judges and prosecutors and things like that. And there he translated all these things, he was very very good with languages. And he translated all – he and a couple of his colleagues – the all the Afrikaans um in beautiful English. I mean he's Van der Merwe from the Free State, he's not an Englishman at all, but very very good pure English. Uh, you know understandable English that students would understand.

059 So yes, very good question, if you get an Afrikaans case, besides the fact that it is summarized, the head note is summarized, the whole case may be summarized in the translations of Dr Van der Merwe. And those you can get in the reading room of the staff, the staff reading room at the univ at the university library. Or if you're stuck you can come to my office, I've also got the books, copies of them.

060 [clears throat] But of course the ideal would be if you, if you could speak Afrikaans [class laughs and he imitates them, laughing feebly] It is a beautiful language despite all the … OK ladies and gentlemen, number seven there, the headnote, typed in italics. Please don't read that before you read the case. And, more importantly, don't think by reading that that you don't have to read the case. Students, I don't know why, but students are lazy to read the case. The cases. Um. [shrugs shoulders in despair] I don't understand it. You know that is that is what makes you a lawyer. If you don't read court cases you're now a lawyer. You know then you must go and start or study dramatic arts or something. But you must read your court cases. And you must read them in full.

061 In Stellenbosch what we had was we had lectures in the morning, full, every morning in the LLB years. We still had two degrees. In the LLB years we had full lectures in the morning from eight of clock until one o clock. And one o clock the lectures would cease, the old main building would virtually close down, and in the afternoon you were expected to go and read your court cases. And that was the routine, and everybody did it. The afternoon was full of postgraduate legal students … in the library, reading the cases. And you know that was … it was just par for the course.

062 Um so don't read the head- headnote. These are just concepts that they tell you will be discussed in the case. Its not even a headnote. The head note is the small print after the part in italics, number eight. Now the headnote gives you the facts, and the headnote also gives you the judgment. The headnote gives you the judgment where it says 'held'. Where it says held can you see there? Unfortunately, my transparency is a bit … but there all these points, held held held held held. Those are the five points that the court decided. Those are the ratio decidendi of the case. Those are the reasons of the case.

063 And although it is very beneficial for you to read the headnote before you read the case because then you get a very good idea of what's happening in the case, a kind of a pocket version of the case, the idea of the headnote ladies and gentlemen is not for students. No, I'm very serious. If you talk to the editors of Juta about the the South African Law Reports, the idea of the headnote is only for the practitioners. It is made for the practitioners. If you sit in court and you are looking very very hastily for some authority then you haven't got time, in court, if the judge asks you 'Please address me on the following point', you haven't got the time to read the whole case. But you may have time to read the headnote. And then, if you're a good lawyer, you may be able to argue on … argue on that.

064 Please don't think that the headnote is there for you as a student to summarize the case. That is not true. The only time when you have time to read a case in peace and quiet is when you're at university. So enjoy and do it, don't not read your cases. OK.

065 That is the summary then, the headnote. Which is not meant for you. Then you get the annotations, and the annotations are all the authority the authorities that were quoted by the quoted by all the parties in the case. Very valuable for research, when you're going to start reading a case for academic purposes. Like for, if it's a prescribed case. Please don't even look at it. For old cases it can be extremely tedious and long. Um this is wonderful if you're looking for other similar cases on the point, to see what was decided beforehand. But that is only for research. If you just read the case for the case's sake please don't try and study the annotations. OK.

066 Now we come to point number thirteen. And that is the word 'cur ad vult'. And that is … can you see, can you all see this? There, number thirteen. Cur ad vult. You must always look for the for these three little words because that is the abbreviation for curia adversaria vult. The court now wants to consider. In other words, that is the Latin to indicate to you what follows is the verbatim judgment of the judge uh under which name it is published. So from the word curia adversaria vult or cur ad vult, from there you start reading. The reading will start always with the word 'postea' 27 November 1998, and that only means, delivered, given [receives sms message on cellphone], delivered or given on the 27th November 1998. N … once again, not an important date, only when you do historical research uh may that become relevant. You don't have to take any notice of that now. And then

you have, in bold, you have the judges' name and his title. King JP the Judge President of the … the Judge President of the court has said the following.

067 And then it gives you a verbatim judgment of the judge. You will see it is in a narrative. The judge talks. Its not a uh uh it is a formal document of course, but it is in the form of a judgment. The judge sits, it is something that he has prepared, and he's reading it out to the court. That is the judgment.

068 Some of these judgments can become very tedious and become very long-winded and you must distinguish between what is important and not important. If you have just a certain element that you need to read, then you look for that element in the court case and you read only around that. Especially if it is forty or fifty pages long. And half of the judgment is applied to is applied to procedural rules and um uh perhaps the document was handed in late and whether it could be accepted or uh a plea that was amended … Those things are uh you will get to in civil procedure, but please, you're looking for substantive law. You know now what's substantive law. You're looking for legal principles. You're looking for legal principles, if you have a case on um causation, then that is what you're looking for, what is the judge going to say on causation. And you can scan very quickly and see where he starts talking about causation. Or uh wrongfulness, or whatever. [inaudible] Whatever. OK.

069 He then starts with his judgment. And the judgment goes on … and on … and on … and on … and on … and on … and on [while saying this he flips transparencies onto the projector, but only for a moment]. This is all still his judgment. As you can see … up to seventeen is his is his judgment and then …[cellphone rings and he takes it out his pocket to look who is calling].

070 And then … um … after the judgment has come to an end, he finally comes to a point where he gives an order. And if you don't/ if you can't understand the case, ladies and gentlemen, it is very often very wise to go and read what the what the order says. Of this case. Because very often this order will make the whole um judgment clear to you. Because that is what the judge decided.

071 Now in this case um the judgment was given by the Judge President, King, and his brother Foxcroft, J concurred. In other words that means uh they discussed the matter and Foxcroft agreed with King, they both agreed that King would write the judgment and Foxcroft had nothing to add. Is this always the case? [cellphone rings again and he looks to see who is calling before cancelling the call] Is this always the case? Sorry. No. What can/ what is the alternative? Two judges give their opinion. No that is not technically right. You must be now very careful. Somebody can tell me what can happen?

072 **STUDENT:** He [inaudible] but for different reasoning.

073 **LECTURER:** Yes, He concurs but for different reasons. And then he gives a separate judgment. Is that important? Do they look at who's the most senior

or which judge has agreed with who? Huh? No. If he concurred, if the judge concurred he agreed with him, then it is academic almost. He might differ on the reasons that he came to the conclusion, but they concurred, they agreed. They, there's no difference between the two judges. This doesn't always happen. In one of the uh great court cases in my field, in unjustified enrichment, Nortje v Poole, um the judges were split three-two. In the appellate division. And it was whether we should have a general enrichment action or not, and three judges said uh no, its not ready yet, and two judges, Roelf and Ogilve, Ogilvie Thopmson said you should have a general enrichment action. And by just missing it with one judge, the South African legal science was put back um thirty, forty, now going on for fifty years.

074 So it is extremely important, in the Supreme Court of Appeal, you must count the heads, you must see who agrees with whom, what is the majority decision, what is the minority decision. The majority decision is the decision followed by the majority of judges and that is the ruling decision. That if you quote the case, that is the decision that you quote. The minority decision is interesting, it is academic. Uh it is only for, it is only for academic purposes. It is not binding, it has got no uh stare decisis, nothing. So it is very very important. OK. Yes question?

075 **STUDENT 9:** In this case, if the if they had disagreed, if the two judges had disagreed, then the more senior judge … his decision holds. Because if there's only two … And they didn't concur, then then ...what happens?

076 **LECTURER:** I think … I think in this case the Judge President's uh would be the binding one.

077 **STUDENT 9:** By seniority.

078 **LECTURER:** If he if they they uh if they disagreed, yes. Um. If um I wonder why there are only two because usually there are either one or three.

079 **STUDENT 9:** Ja.

080 **LECTURER:** Its very strange … I must try find out for you why there are only two in this case. In any case, the final thing that I want to say is the attorneys and the attorneys of record are written at the end of the case. Now for you its not important but if you're one day an attorney then that's that used to be the only advertising allowed in my days is the appearance of their names at the bottom of the case. Um you know and then you can uh you can discover uh who was the attorney.

081 Our time is up but I would like to allow some time for questions. Um … are there any questions? Is it just because the time is up now because usually you're full of questions. OK for Thursday ladies and gentlemen sorry …

082 **STUDENT 3:** I just want to ask, the reason I get/ the reason I don't read the case is because up till now I've read – I know its sacrilege not to read the case in your eyes and everything – but I get horribly confused, I get very confused

with what is you know, who decides on what and I never know what to quote. So I read, I try and make sense of it when I read it but when I'm actually writing summaries and things I …

083 **LECTURER:** Uh that is par for the course. If you're a first-year student which you are not, you're a senior student but you're a first-year law student, you will get confused because um this is the first time that you're being confronted with legal topics.

084 And unfortunately the only way to learn this is to expose you to the best brains in the business. Um the court the judgments are written by you know the best advocates that there were. The judges. And usually they are highly intelligent and very very good lawyers. And they they talk in a language of their own they have arguments of their own and it is extremely long-winded. You can get confused.

085 But you know, its like falling in love. The more you do it the better you become at it. No really, it is. You must just carry on reading. And then take tips like I'm giving you. Look at the order, look at the order. See that you understand who the parties are. Why does it why is it the Cape of Good Hope Law Society? How does the Law Society come into play when this guy takes money for his family? Who's Parker? OK Parker you now know is the attorney. Um look for the reasons for the judgment. You know. The judge will, when he starts giving his order, just before that, towards the end, he will say these are the reasons why I decided like I decided. Um during his judgment he will play. He will say 'the advocate for the defence' or ' the advocate for the respondent said the following, I'm not accepting his version. I'm rejecting his authority. Advocate for the other side forwarded these arguments and I find them acceptable. And for these reasons I'm going to follow that. Um but that is very confusing, you know, If you don't know what he's doing, is this now part of the judgment or what he's doing. Um … uh… you know. The best is go to the order, go to the end where you look for the ratio decidendi, the reasons for the decision, where he says, 'OK everything considered now, this is what I've decided. And then you know … and the whole thing of course read it once, if you don't understand it read it again. And if you don't understand it read it again. There's no such a thing as reading it too many times.

086 Um and if you read one court case, one supreme court of appeal court case well, If you make notes and you analyse and you take it apart, you will never have a problem again. That is the wonderful thing. You know its like bicycling .. riding a bicycle. You fall … to learn to ride a bicycle you fall yourself to smithereens. But once you can understand you know that the two wheels are behind one another, you must balance it, there you go! And then you know that uh … OK. Thank you very much for your attention ladies and gentlemen. I'll see you on Thursday. And please I will ask you on Thursday for your homework. I'm sorry I'm postponing this now so long but I will do it then.

LECTURE 12

001 **LECTURER:** [Conversation between L and student in which she claims that the class is growing and he denies it. Thereafter L goes through some names on the classlist to see you is in attendance]. Um what is going to happen today? [dramatic pause] Hello [said to student entering the class]. What is going to happen today? Today you are going to get your assignment. [STUDENTS: Yay] Yay. Its only exciting until you get it. Uh Today I'm going to give you your assignment and I think I must give it to you before I discuss it ne? So that you can know what its about. I hope, I hope I've made enough. I've made 25 and that should be enough. If anybody, if anybody does not get an assignment paper there are still some spare in Room 41. You can go and collect – if you lose your copy or if you, if you just want to see if the assignments are the same. That you can go and get in Room 41. OK.

002 Ladies and gentlemen, I've asked you to uh read and critically discuss a very famous South African court case. Um [pause] I immediately want to tell you that the court case is discussed in two pages in your um prescribed book. The discussion here in your prescribed book you can of course use but please don't think that that is the research you must go and do. If you copy or you give any indication how vaguely uh uh um that you've just read this one case, then you will get a very humble mark. Um you can of course you can read this case you can read this book but this is not what I want. This is not what I want um. What I want you to do is I want you to read the case, see if you understand the case and then answer the case in reference with or in reference to your uh syllabus this year. In other words, after you've read the case you must go to the headings of your reading list and then answer the case according to those headings. So, what I want to see is if you read this case, is if you uh have you can you apply the knowledge you've gained in this course during the first six months of this year. Therefore, I'm not only interested in the contents of this case I am interested in the contents of the case, that is very important. But I'm also interested in knowing whether you understand the citation, as simple as that. I need you to write a sentence or two, uh about the citation. This is a case of the Appellate Division of the South African Supreme Court. What does that mean? Blah-de-blah-de-blah. What does uh 883 mean? What does the big SA mean? And what, what does everything mean? OK. Not a paragraph. A line. One line. I need you to tell me about the judges. There are many judges in this case. I need you to tell me about the majority judgment. I need you to tell me about the minority judgment. I need you to tell me who the judges were and what their position within the Appellate Division was at the time. I need you to tell me what is the ratio decidendi, what is the obiter dictum of this case. I need you to tell me what sources the judges used. How the judges used these sources. What legislation did they use? What other course cases did they use? What common law did they use? What customary law did they use? And how did they use it? OK. Everything that you've studied here in this classroom, you must go and apply to this court case. That is what the assignment is about. Its not only – because you are not going to understand the case. It's a very very

difficult case. Its not about understanding the case. It is also about understanding the case, you must read the case until you understand it. Um and you must go do research until you understand the case. And then you must write a decent essay on it. OK? Are you all happy? You've got time from now until the 5th of May. The 5th of May. That's quite a long time ne? You've got the whole study break to do your research. You've got the whole of April to write it. You've got the whole of the first 5 days in May to uh to refine it. OK. Any questions? Any copies left? Yes?

003 **STUDENT:** What's the length of/

004 **LECTURER:** If you read it you will see. Uh the essay must be printed uh typed in 1.5 spacing using a 12 font for the text [inaudible] for footnotes. It must be at least three pages in length and must not exceed five pages. You may not write less than three or more than five. If you write more than five [gestures with hand] I'm not going to kill you. If you – I don't think you can write less than three, I'm not even talking about that. If you write more than five I'll be, I'll be very irritated. Because then I must mark 10 pages and then you just didn't concentrate. Um you know. I want a short, succinct analysis of the case. And everything associated with it. The form and the substance [makes a popping sound with his lips]. Form and substance. OK. So. Any questions? Are you excited? [One student responds with a half-hearted yes. L responds with a droning tone] Yes. It is very exciting isn't it. Its one of the uh its one of the uh its one of the most important cases in South African law I think. But I might of course be wrong. Uh. But it is a very good exercise. Its is a very very good exercise to uh to go and read that case.

005 OK. Ladies and gentlemen, before I am going to sit back and listen to you a little bit this uh this uh lecture I am going to give you a few uh pieces of information. Which is extremely important. Three pieces of information, uh which you must know. On page 72 and 73 of your of your book of your uh uh prescribed book. You have all the abbreviations of all the various uh branches of the courts in South Africa. I think it might be wise to just go through all of them, so that if you get, if you see them if you come across them you will know what they are. CC or KH in Afrikaans, is the Constitutional Court. Its uh CS uh CA, sorry, SCA or HHA is Supreme Court of Appeal in Bloemfontein. The replacement of the appellate division which was indicated by an A. Just a simply A for appellate division or appel afdeling. LCC – Land Claims Court its in Randburg. I don't know whether its still in Randburg. Randburg has become so … such a fall-out zone, such a nuclear fall-out zone I don't know if the court is still there but it used to be there. The Labour Court LC and the Labour Appeal Court, LAC uh in Johannesburg, they are here in downtown Johannesburg close to the uh magistrates' court. Uh if its just a C or a K it means Cape Provincial Division. E or Ok, E for um English, OK for Afrikaans, Eastern Cape Provincial Division in Grahamstown, SE South Eastern Cape Provincial Division in Port Elizabeth. N Natal Provincial Division in Pietermaritzburg. Uh Durban and Coast D Durban Local Division, Durban and Coastal Division in Durban. Northern Cape NC NK Northern Cape Division in

Kimberley. O is just for Orange Free State which is a complete contradiction because the Free State is now no longer called the Orange Free State, they've dropped the Orange.

006 Do you know where the Orange comes from? [Some students murmur responses] I beg your pardon I can't hear? Wha-do no no no no I doesn't come from the Orange River. The Orange River comes from probably the colour of the river, because its so muddy. Or it also comes from the same reason but its not – no.

007 **STUDENT:** Wasn't one of the Dutch houses/

008 **LECTURER:** Yes. The Dutch – not one – the Dutch Royal House, like in England is called the house of Windsor, in Holland its called the House of Orange. Oranje. Orange. The House of Orange. And the old flags? Do you remember before your time? Orange, white and blue? You remember that? The old apartheid flag? [clears throat] Hm ja ok. And that's where Orange Free State comes from. It's the um royal house of uh um in in the Netherlands, Prins van Oranje, lots of things. T is Transvaal Provincial Division. W Witwatersrand Local Division, its now just indicated as a W. M um NMS Namibian Supreme Court, also reported in the South African Law Reports. NM Namibian High Court in Windhoek. Um Bophuthatswana no longer exists. But B uh uh its replaced since 1994 with the um [pause] hmm its replaced by … they probably came back to the Transvaal … I don't know if there's a provincial division in Mmabatho. Is there? I don't know. There used to be a whole set of courts there but that I think came to an end. Ck is Ciskei Supreme Court – that became Eastern Cape. Tk is Transvaal uh Transkei Division in Umtata – that became the Eastern Cape. Venda Supreme Court that became uh in Thoyandou uh that became back to the Transvaal Supreme uh Transvaal High Court. The Provincial Division. Zimbabwean Supreme Court in Zimbabwe and Harare. Um and then South West African Division until 1990. And then before 1997 you still had the Rhodesian Appeal Court. And the or the Rhodesian Appellate Division and the Rhdoesian General Division but its highly unlikely that you will get to know to uh look one of those cases. OK. So there's an indication of what all the courts are called and where you can find them.

009 Um just at the end of the previous lecture somebody asked me what is, what does it mean when you say uh ex parte. OK that is very important. You must know uh uh the citations. Very important. Citation can be two parties. When its purely a civil case. There are two parties. Um the [clears throat] the plaintiff and the respondent. The plaintiff and the respondent. That changes when you go on appeal. Then it's the the appellant and the [S: respondent] Also respondent. Ja.

010 **STUDENT:** [inaudible]

011 **LECTURER:** What?

012 **STUDENT:** [inaudible] When is a respondent?

013 **LECTURER:** Hello […]. Coming later and later nowadays [laughing]. Um When is it defendant? Defendant is … hmm. I wonder whether its not the appellant and the defendant, ja. I think you're right. When its on appeal it becomes defendant, ja. So that's the two parties. When it's a criminal case it is State versus and the party's number uh name. Or Rex versus in the old days when we were still a British colony. Or if it's an English case Rex or Regina. That's for criminal cases.

014 If it is an application – in other words its just one person involved. When is an application? If you apply for voluntary liquidation, if you apply to be admitted as an advocate, if you apply to be declared [gestures with hand] something, sane or insane. If you apply for for the court to make any de-uh declaratory statement. Then it is an application – it is usually on a Tuesday morning, well in the Transvaal its on a Tuesday morning, we call it the motion court, where all the simple applications are heard. And those cour – those cases are indicated by the prefix ex parte. One party. Ex parte Bloemhof – it's the application of Bloemhof. Mr Bloemhof, to do seomthing some or another. So an application is usually indicated by the words Ex parte. [clears throat]

015 The third and last possibility is In re. In re. And usually you get um the it is indicated In re … Van Staden or it could also be In re: The Minister van Justisie v Ewals when it's a whole case. That means that … the in re means that some party has taken a decided court case on appeal to clarify a certain legal point. For example, in the Ewals case, the Minister of uh Just Minister of Justice took uh the case on appeal because uh they were not sure that the decision that was given in the case uh was correct and nobody wanted to appeal the case, so they took the case on appeal to get a decision on a certain point. On whether – I can't even remember what the point was – you put up a gun and you put up a notice if a burglar comes in, is that now manslaughter or are you allowed to do it. Um. It is a specific point, decided in a specific case that is not going on appeal, that an institution that has an interest in that case takes on appeal to have a declaration of rights. To have it clarification of what is going on. Its very seldom that it, that you get that but don't, you know, don't flip if you see re that only means 'in the case of'. It is a case that goes to the appellate division uh by a party that is not one of the parties that can take it to the Appellate Division.

016 Other things that you might encounter um in the citation is the latin title nomino officio. N capital N capital O. Um nomino officio what is it nomine or nomin-o. Nomine. Nomine officio. Or the plural is NNO. Double N O. All in capital letters. And that merely indicates that the person appearing in the case is doing so not in his personal capacity but in his official capacity. Um usually it is an executor of an estate that is defending um the estate or taking the estate to court. Or it is a uh curator or somebody who is in a official capacity. The Master of the Supreme Court or whatever. And it just indicates that this person is not um uh in his personal capacity involved but in his official capacity. Casey NO v The Master and others is an indication that the

case is a uh is not personally involved is only in a official official capacity uh involved. OK.

017 Then finally uh what I wanted to tell you is uh there are a variety of law reports. There are a variety of law of um of uh collections of law reports. The one that we use – the South African Law Reports – those are the basic ones the [clears throat] normal ones. They started in 1947 and they continue up to this day. And up till 2008 and they will probably continue until South Africa comes to an end. Before 1947, the provinces reported their court cases separately. And those are known as the pre-46 um provincial law reports. And in addition to this, in addition to the provincial law reports, there was also, from 1910 the Appellate Division um law reports which were separate from the provincial divisions. After 1947 they became one set of law reports. Before, they were [pause] different.

018 You also have, besides the South African Law Reports, you have the Prentice-Hall Law Reports. They um they are no longer so relevant and so important. But their abbreviation is PH if you see in a citation the abbreviation PH then you must know it's a separate set of law reports called Prentice-Hall. Its just a name of a publisher who decided that they would – in opposition to Butterworths, Juta – they will publish their own law reports. There's also the All South African Law Reports who in 1996 substituted the Prentice-Hall. In other words, up to 1996 it was Prentice-Hall, after 1996 it is called the All South African Law Reports. And that is called All SA. That is a separate set of law reports, uh that also reports uh uh cases law cases um but the main one that you will use is the South African Law Reports.

019 The last point that I want to make is the cases that you had to read I selected especially from the earliest cases in South Africa from the earlier century where there was no official law reports but somebody in each division took it upon himself to collect the law reports. And so you get the the various um strange collections of law reports. You get the Gregorowski law reports and that just means it is an advocate Gregorowski who collected the law reports. You get the Munro set. You get um Roscoe, um you get um there are many. There are many people who collected the uh the law reports. Uh but usually it doesn't influence the way in which you find it. It is just a historical relic. Um that they have collected these law reports. OK. Any questions on … yes?

020 **STUDENT 8:** Its sort of related but its about finding cases like with delict we were given this huge two-page long story about how we need to go and find our own cases. How do you go about finding cases? I mean you don't know what's in them unless you read [inaudible] And how do you …

021 **LECTURER:** No no no

022 **STUDENT 8:** five cases for argument …[L interrupts and they overlap in speech]

023 **LECTURER:** You go to the um you go to the um Juta or Butterworths um um online search engine. And you what ub uh uh are you given uh uh a set of facts

024 **STUDENT 8:** Ja

025 **LECTURER:** Ok well then you know what the facts are about you know what you must do. You're reading – causation – you put causation in the search engine and they will give you a list of all the cases that the word causation appears in.

026 **STUDENT 8:** Oh … as simple as that ….

027 **LECTURER:** As simple as that.

028 **STUDENT 8:** And then before the times, I mean back in the day, how did lawyers go about sorting it out?

029 **LECTURER:** Umm you have …

030 **STUDENT 8:** Finding the cases.

031 **LECTURER:** ….noter uppers. And you had indexes. And they did the same thing but just in hard copy. And you still have them, noter uppers and indexes in the in the uh uh in the library and you can find any topic uh and all the cases that are decided on that topic. In the noter upper or or the index. If you you know that's uh ub not the in that sense legal research is not difficult. If you know what you're looking for, you know, either legislation or court cases you can find it very quickly. OK. Now uh any other questions? Any other matters as far as the cases are concerned?

032 **STUDENT 6:** Sometimes the uh legal vocabulary that is there in the case sometimes is so long whereby when you read it you get lost sometimes.

033 **LECTURER:** Yes the unfortunately there's no antidote for that. The only medicine that I can uh give you is to say: 'Start from the beginning again'. Read the case again. After the five fifth or tenth time that you've read the case you will understand [Break in recording]. Yes, I'm looking ….

034 **STUDENT 9:** Ja. I don't know that I'm a good candidate because

035 **LECTURER:** D-uh uh nobody's a good candidate or everybody's a good candidate. Its not a [shakes head] its not to to to test you or to catch you out. Its uh to see what you did.

036 **STUDENT 9:** Ja

037 **LECTURER:** So you can't … it can't be wrong.

038 **STUDENT 9:** Ja

039 **LECTURER:** OK. You want to come and stand here or you want to stay there.

040 **STUDENT 9:** I'll stay here.

041 **LECTURER:** OK … um

042 **STUDENT 9:** Um basically the case was very short, the write up was only one page. Um and I struggled with it a bit because I think it had a lot to do with the laws of succession, which I'm not familiar with.

043 **LECTURER:** How did you find the case, that's what we're interested in. Um tell us what is the name of the case you see that's why I think its important you stand here so that you can write the name of the case on the board and tell us how you found it because that's what I'm interested in.

044 **STUDENT 9:** How we found it?

045 **LECTURER:** No please come come do it for us

046 **STUDENT 9:** [inaudible]

047 **LECTURER:** Ok ok we have a substitute here ladies and gentlemen

048 **STUDENT 8:** A substitute ….

049 **LECTURER:** OK. Tell us everything ma'am.

050 **STUDENT 8:** Well, considering I'm the substitute and not the actual authority I'll do my best [laughs]. So the case is Gie, Gie is the trustee and its versus Weels. Is there chalk [smilingly]?

051 **LECTURER:** Mm no usually […] hasn't got chalk. I don't know why! Nope. I'll go and run and see if I can find some. [pause as L goes in search for chalk. Returns after a few minutes] Why did you stop?

052 **STUDENT 8:** I didn't want to carry on without you here to correct me if I'm wrong.

053 **LECTURER:** Ok no fine fine.

054 **STUDENT 8:** [proceeds to write 'Gie v Weels' on the blackboard]. OK so this case was found at Oliver Schreiner Library and it was um ja … We went to the books right against the wall and there were a whole bunch of books and there were, the colour was quite confusing because the cases were very very tiny. And … ja … they were found and photocopied and read.

055 **LECTURER:** But how? [class laughs] What is the … The books against the wall? I mean, that's not enough [more laughter].

056 **STUDENT 8:** OK so um ..

057 **LECTURER:** Give the citation.

058 **STUDENT 3:** That is not currently with me it is with my colleague in the chair!

059 **LECTURER:** OK just give the citation.

060 **STUDENT 3:** Its somewhere here I'll give it to you now, its two weeks back. [paging through notes] Um.

061 **STUDENT 9:** SA.

062 **STUDENT 8:** OK. So it was found in the SA Law Reports. And its quite confusing because you have two uh three rows of book shelves. And the ones in the book shelves in the centre of the library are all the younger cases. And these were found in the older section which is in the row of bookshelves against the wall at the back of the library near the computers. And it had a royal blue cover if I remember correctly.

063 **LECTURER:** OK ja [laughter] that's not going to help you because someone is going to bind it in read and then you're not going to be able to find it [laughing].

064 **STUDENT 9:** OK so its /

065 **LECTURER:** No, we want a scientific way .., How do you go about finding it

066 **STUDENT 9:** 1864 is the year …

067 **STUDENT 8:** Ok so I went to the books and [carries on talking as L approaches black board to write 'SA 1864 Cape 215' with each word prompted by STUDENT 9].

068 **LECTURER:** OK this is this is the citation. So how/ what did you do with this?

069 **STUDENT 8:** So I went and I found the SA Law Reports by looking at the sleeve that's stuck on the side of the bookshelf. I went and took the book – I think it was the 1983 to 1970 or something and because this fell within those dates I picked that book.

070 **LECTURER:** Nineteen?

071 **STUDENT 8:** Eighteen, sorry.

072 **LECTURER:** So the books are arranged?

073 **STUDENT 9:** Um chronologically, yes.

074 **LECTURER:** Hmmm … ja.

075 **STUDENT 8:** According to their year

076 **LECTURER:** Numerically.

077 **STUDENT 8:** Numerically ja.

078 **LECTURER:** Mmm hmmm?

079 **STUDENT 8:** And then within that I saw it was the Cape Division, it said so on the … on the …

080 **LECTURER:** Spine

081 **STUDENT 8:** Spine of the book. And I then turned to page 215 and I found the case.

082 **LECTURER:** OK. So that was easy?

083 **STUDENT 8:** Yes.

084 **LECTURER:** Ja

085 **STUDENT 8:** That was the easy part.

086 **LECTURER:** OK

087 **STUDENT 8:** So from that I then photocopied the case and I read it.

088 **LECTURER:** Mmm hm mm hm,

089 **STUDENT 8:** And it/ I found it very confusing/ I'm still actually/ I know what I/ I think I know what go what went on in the case but it's a bit unclear as to who's who …

090 **LECTURER:** Tell us what … tell us about the two parties. Who did what?

091 **STUDENT 8:** OK so he had Gie who's the the plaintiff.

092 **LECTURER:** Yes

093 **STUDENT 8:** He was the trustee of an estate and he was authorized … he authorized the insolvent Weels to buy a piece of land. To purchase a piece of land.

094 **LECTURER:** Mm

095 **STUDENT 3:** Gie was the trustee of the estate of the defendant.

096 **STUDENT 8:** Yes

097 **STUDENT 3:** And from what we could gather from the case the defendant was actually Weels.

098 **LECTURER:** Yes

099 **STUDENT 3:** And du-um Weels the case was about Weels being an uncertified, sorry, an uncertificated insolvent.

100 **LECTURER:** An uncertificated?

101 **STUDENT 3:** Yes that's the n…

102 **LECTURER:** Or unrehabilitated

103 **STUDENT 3:** No uncertificated is the word they used.

104 **LECTURER:** Mm Ok.

105 **STUDENT 3:** Insolvent. And um … that's when it kind of got a bit confusing because we couldn't really ..

106 **LECTURER:** You see that's old law its not … its not

107 **STUDENT 3:** We didn't understand why the trustee of his estate would be going against him in court so … that's where it was kind of confusing. Yes?

108 **STUDENT:** From what I got from it I think I um some other person [inaudible] didn't want to give um Gie the money to pay for the land. So Gie was um – I don't know – in the court case to get money from Weels somehow. Because the other guy was saying that Weels was insolvent so that way he couldn't really … deals he made couldn't really stand … I don't know, something like that. [inaudible exchange between students]

109 **LECTURER:** OK [laughing]

110 **STUDENT:** Its quite confusing.

111 **LECTURER:** Yes a ha ha ha [laughing] when you give a legal opinion one day you mustn't do it like that! [some students laugh] You must you know you must um … The uh b ah ah the legal position is difficult to explain to you because its old law. Um you know what it is to be uh to bankrupt, to be um to be an insolvent. Insolvent, you are not authorized to do uh um t to make any legal transaction. Um and you are …Hmmm?

112 **STUDENT 3:** Don't you need a curator. That you need somebody else to do it for you.

113 **LECTURER:** Uh, you need a liquidator. Or uh uh sometimes a curator, sometimes uh uh a trustee. Um and I think uh this is what happened here. Um and the a yes thank you. [motioning STUDENT 8 to sit down]. The uh problem here was simply the buying of the land uh by the what they called an uncertified insolvent. By an insolvent. Lets just say insolvent because the word the term uncertified insolvent doesn't exist anymore. Its much more formalized today. Um and um the uh trustee wanted to annul the buying of the land because Weels was insolvent and he couldn't uh uh technically buy the land …

114 **STUDENT 3:** Um

115 **LECTURER:** But u u I don't want to get into the technical details. The most important thing – what happened in this case is not important because its no more current law. I don't want you to – I told you not to worry about what happened here. Um what I'm worried about was could you find the case.

116 **STUDENT 3:** Um we obviously could find it and it was …

117 **LECTURER:** Ja but you didn't … there was something that you didn't find which is extremely important. Ja?

118 **STUDENT 3:** I just wanted to ask a separate question about the insolvency ….

119 **LECTURER:** No no no uh I uh I'm not sure I will be able to to a answer it. Because um you know I bwa I don't know. So I must go and read the case again and find out. But I can probably answer it in terms of South African insolvency law now today um

120 **STUDENT 3:** But I'll ask you afterwards.

121 **LECTURER:** OK

122 **STUDENT:** Its off the topic but I was wondering what is the difference between an insolvent and a prodigal?

123 **LECTURER:** Uh uh quite substantial. Insolvent is somebody whose in business, or even in his personal capacity his own affairs, or let us say he's in business, uh and he's not able to proceed with his business because his income is much smaller than his expenditure. He can't pay his debts and if you if you um add up uh all his assets you will discover that he's um liabilities are far more than his assets. That is – and then you go through legal process. Where somebody does that for you. They liquidate all your assets, they pay your uh creditors as far as they can, or your debitors [unsure] people that you owe money to, as far as they can and that's where you get so many cents in the rand, uh then you're declared an insolvent, you're not allowed to partake in um commercial activities, uh until you're rehabilitated, um and um that's it. Uh either in your personal capacity or d-ub uh if you're a a partner or a director of a company, the company can get liquidated, you can get liquidated with the company. A prodigal is somebody who is um supported by somebody else. Um say for instance a um a wife, a husband and wife that is married in community of property, where the husband is responsible for the joint estate and the wife is a spendthrift, she can't resist spending. Uh suh you then to stop her spending, you then put an advert in the newspaper that you are no longer responsible for any debts that she incurs, you take away all the credit cards and you have her declared as a prodigal. As somebody that is not capable of understanding that you know a credit card has got a limit, you can't just you can't just spend as long as they accept it. It has a limit and you can only spend up to that limit and then you must pay back! You know [laughs] before you spend again. So a prodigal is somebody who doesn't understand business at all and just keeps on spending. Um uh so its almost you know its almost um uh akin to a mental a mental deficiency. Um and uh that is something completely different. From being liquidated.

124 OK what is the thing that you missed? Dearest darlings? What is this collection called? This is what I was interested in. What is the collection called? Did anybody pick that up? The collection that your court case comes

from is called something. [Students murmur responses] Hmmm? Searle perhaps, did somebody pick that up? OK that's a that's a that's a great pity because um as I said in the early – that's why I gave you these old cases – in the old ti/days there wasn't this fabulous um infrastructure that Juta's collected and published all the court cases. Uh they were done on an ad hoc basis. And the case I gave you was one of those cases collected by a person called Searle. Um and that's what I wanted you to to discover. That they come from the from the – Searle S-e-a-r-l-e- Searle. It's a it's a col/ it's a it was an advocate in that um division that collected those court cases uh an its just an additional way of finding court cases. In the old, previous century, court cases. And that is what I was interested in. In you discovering. OK is there anybody else that wants to come and report? Just one further case we can do before? Yes?

125 **STUDENT 2:** OK the case that I had to find is the London and South African Bank v the Major and Councilors of the Burrough of Durban. And it was a 19 I mean 1869 case. Shall I [motions toward the board]

126 **LECTURER:** Hmm I think so … don't write the whole thing because that's too much, just the citation. [Student writes '1969 NLR 22' on the board] OK, tell us what that means?

127 **STUDENT 2:** Um its an 1869 case and this is the Natal Law Reports page 22 and it was heard before a Chief Justice and a jury. And its basically ….

128 **LECTURER:** Ahhh [exclaims loudly] you can't / that's extremely important!

129 **STUDENT 2:** The case was heard before a Chief Justice and a Jury?

130 **LECTURER:** Yes! That's what I wanted you to find out – if you know that then you can go and sit down.

131 **STUDENT 2:** Well, it was, I don't know, there was a whole lot of [inaudible] here. But it doesn't say, it was like Mr Goodrich and Mr Conner and the Attorney General and there's also the court, as well, so I'm assuming that the court is the jury.

132 **LECTURER:** No no no no.

133 **STUDENT 2:** Its not?

134 **LECTURER:** Tell us first of all why is there a court and a jury.

135 **STUDENT 2:** Because in those days we had a jury.

136 **LECTURER:** No no that's not enough. No no use your brains!

137 **STUDENT 2:** There's a court and jury …. I seriously do not have any idea. Uh I'm assuming that the court …

138 **LECTURER:** Why was there a jury?

139 **STUDENT 2:** For the …

140 **LECTURER:** Where do we get juries?

141 **STUDENT 8:** In a criminal case …

142 **LECTURER:** In the States

143 **STUDENT 2:** Yes

144 **LECTURER:** And where did the juries in the States come from?

145 **STUDENT 2:** From Roman law?

146 **LECTURER:** No no not everything comes from Roman law.

147 **STUDENT 2:** I don't know

148 **LECTURER:** Where did most of the law in the United States come from?

149 **STUDENT 2:** From English law

150 **LECTURER:** Yes! Wonderful wonderful! You see, you do know. They have, in England, they have juries. Up to today, to listen to cases. So why, in 1869, in Natal, would there be a jury?

151 **STUDENT 2:** Because Natal was an English colony

152 **LECTURER:** Yes, you see you know everything! What is so difficult about that! And that's what I wanted you to find out. That's the importance of the case. It's a strange South African case because in South Africa after 1910 we don't have a jury anymore. We abandoned the jury system. We don't believe in the jury system in South Africa. The reason for that may also you know be colonial and racist and whatever but leave that now, we're not discussing that. OK. What else? What else?

153 **STUDENT 2:** What else about that [inaudible]

154 **LECTURER:** No no about the case, tell us about the case. Anything about the case?

155 **STUDENT 2:** The contents thereof ….

156 **LECTURER:** Yes, anything, that you found interesting.

157 **STUDENT 2:** OK what I found interesting was that … basically what it was it was a bunch of people for the municipality were trying to develop Durban, and they needed a loan from the London South African Bank [L: Mmm Hmm]. So what happened is they got a series of loans but they got the loans illegally because they were not authorized (L: Mmm). But uh I think they always kept on saying as soon as there's a law in place that will sort of authorize the loans that we got then we'll give you back the money. But there was not security

from um the debtors, so basically what the bank did was give money without any security and the debtors got money without any means of paying back.

158 **LECTURER:** So why did it go to court?

159 **STUDENT 2:** Because the bank sued, they weren't given their money back and they want their money back.

160 **LECTURER:** And they sued?

161 **STUDENT 2:** They sued the municipality.

162 **LECTURER:** Why? Why did they sue the municipality?

163 **STUDENT 2:** Because [high intonation] they weren't paying back their money.

164 **LECTURER:** Did they make the loans the municipality?

165 **STUDENT 2:** No they made the loans to like employees.

166 **LECTURER:** Two?

167 **STUDENT 2:** Two employees

168 **LECTURER:** Of the municipality

169 **STUDENT 2:** Municipality yes

170 **LECTURER:** Ja

171 **STUDENT 2:** So ja they just basically issued debentures without anything to back it up.

172 **STUDENT:** Also interest rates

173 **STUDENT 2:** Ja interest rates

174 **STUDENT:** There was a big issue about it. There was a small period where the law changed a lot [L: Mmm] and in the one year if was 6% interest [STUDENT 2: Ja], the next year it was 7% interest and it changed a lot. The big issue was whether some of those bonds, especially / because one of those bonds was on 12% quarterly, and um also the other bonds was um they wanted to do it also 12% but it was determined that it was not agreed upon the interest rate to be used. Six percent was to be used.

175 **STUDENT 2:** I think that's 8%.

176 **LECTURER:** OK Oh well, that's … And who won?

177 **STUDENT 2:** Um

178 **LECTURER:** Um

179 **STUDENT 2:** Well at the end, at the end the court ordered a bond of 42 000 punds to be handed over to the plaintiffs with a pledge. So I guess the bank won.

180 **LECTURER:** Mmm the bank got satisfaction, ja.

181 **STUDENT:** Ja the bond was 12% and the money on the open account was 8%.

182 **LECTURER:** OK something else interesting. Is that all? Of course the interesting thing about this is that it was a collection. It was a collection. Where did you get this?

183 **STUDENT:** I got it from Lexis Nexis.

184 **LECTURER:** [inspecting her copy of the case] OK you see it won't say here, but if you go and look on the, if you go and look on the book you will see that it was also um, it was also uh collected um by uh one of the advocates. Uh it's a specific collection, that was later brought together in the Natal Law Reports. Uh and that's what I hoped you picked up, but … nobody has seemed to have picked up all my ….

185 **STUDENT:** [inaudible] the interesting thing is that the way the cases are outlined in the volume its like one of um its like the court's diary of the year and say well [L: Yes] on the 21st, and on the 22nd all of a sudden it's a different case and you have to page forwards again until you find your case again. Same with the judgment then you have to page all the way to March. [L: Yes].

186 **LECTURER:** Because because they were d-uh it's a small, it was a small colony. There were very very few cases. Uh they could do it like that,. They didn't have a need for the great mechanisation and organization that we have today. You know we have/ not all our case are even reported, as you know. Uh in those days, in those days um and that's what I wanted you to pick up, it that uh the the people who collected them, these specific collections – I will go fetch my law reports now so that I can show you – um, these people's collections, it was in their discretion! Which cases to report. They decided, and they were advocates. Practitioners of the court! And they could decide at the end of the year, OK I can put this into my collection, I'm going to put that into my collection, and that's how cases got reported. And … yes?

187 **STUDENT:** Was it normal practice for the attorney-general to defend the municipality?

188 **LECTURER:** No it st-

189 **STUDENT:** [inaudible]

190 **LECTURER:** No it still is. The the uh the um the not, well, unless there was some fraud here um not the attorney-general but the state attorney. Would defend um uh the provincial, anything to do with the state. The state attorney would defend that. So in those days the attorney-general was

probably responsible for everything – for criminal and civil matters, uh and he you know because it's a, it's a state institution, the municipality is a state institution uh he defended them. OK. Will the next two people please get themselves ready? […] have you got a nice case for us?

191 **STUDENT 6:** Same

192 **LECTURER:** Same, who else is going to report? […] is going to report and? Yes you, ja ok. What is your name now again? What is your name now again?

193 **STUDENT:** [inaudible]

194 **LECTURER:** […]

195 **STUDENT:** [states surname]

196 **LECTURER:** […]. There was a judge called […], you know that. Uhh. And my mother also worked for a firm called Solomon and […]. Also […]. Fame uh legal surname. So we're looking forward to some very scrumptious report back from you. [laughs] ok I'll see you in fifteen minutes, I'm just fetch my my reports so to show you um these collections.

LECTURE 13

001 **LECTURER:** OK. Here we are. We've just got a half an hour left. [Showing a law report up for the class to see] Who used the who used the Digma editions? No you can eat … don't don't [STUDENT: Sorry] no no Um .. the Digma editions was collected by Phipson. Can you see on the spine there it says Phipson. Yes. And that's the guy who collected all these law reports.

002 **STUEDNT:** The one I used was like a big blue law reports, 1860 something [L: Ja]

003 **LECTURER:** And what is the one that you that you did? [Addressed to first group of female students, they respond inaudibly to his question]. No what was it – in the Free State?

004 **STUDENT:** Cape

005 **LECTURER:** Cape. Cape was Roscoe, can you see? Roscoe [STUDENT:OK] Hmm. That's what it is. And I think, you'll find it if you [paging through the book] .. yes. Edited by Roscoe. You see? You must also look always in the title page. Mustn't just always look inside. Under the skirts. You must look in the title page as well. OK.

006 **LECTURER:** OK […]. What are you going to do for us?

007 **STUDENT 1:** RJ and Company v J Brand.

008 **LECTURER:** And that is where?

009 **STUDENT 1:** Uh Orange Free State

010 **LECTURER:** OK. And you're going to tell us everything about that.

011 **STUDENT 1:** No

012 **LECTURER:** Yes [class laughs] You now know what I'm looking for.

013 **STUDENT 1:** Um. I don't know what you're looking for. I will try.

014 **LECTURER:** Ho ha its so feminine you know.

015 **LECTURER:** [writes 1889 – 1873 on the board with her right hand]

016 **LECTURER:** Why you writing with the wrong hand?

017 **STUDENT 1:** The wrong hand?

018 **LECTURER:** Yes

019 **STUDENT 1:** I'm right-handed.

020 **LECTURER:** Oh [class laughs] Ja you're right. It looks so strange from here. OK.

021 **STUDENT 1:** OK my case is about RJ Harvey and Company v JH Brand. And I don't know exactly what happens, it was in high Dutch, but I gave it a crack [L: OK]. Um RJ Harvey and Company basically owned this plot of land um called – where is it

022 **LECTURER:** Now du-um tell us about Brand.

023 **STUDENT 1:** Oh, he was the President of the Orange Free State.

024 **LECTURER:** Yes, that's brilliant, you see!

025 **STUDENT 1:** OK

026 **LECTURER:** It's the Scottish blood coming out. Nomino officio, nomino officio, there it is. Um have you got the – there it is, can you see, can you see it – nomino officio. Which means? In his personal/ in his official capacity. As President. So he's representing the Republic of the Orange Free State.

027 **STUDENT 1:** Yes

028 **LECTURER:** OK

029 **STUDENT 1:** K so he uh RJ Harvey and Company they own this plot of land called the number 70 district Rouxville and basically this plot of land falls over the Orange River. And they charging people for transporting their poultry and their horses and their stuff across the river. And that's as far as I understand [give nervous giggle].

030 **LECTURER:** And what was decided?

031 **STUDENT 1:** I don't know what was decided, I didn't understand. I tried.

032 **STUDENT 18:** I think I've got, I think I understand what happened is like eventually the defendant actually pleaded according to the Ordinance 23 of 1881 that um she couldn't claim for compensation because um it wasn't actually her land and the land she was actually renting from someone else during [inaudible]. And she couldn't actually claim because um the thing was only/ she was also claiming for profit, and he said that she can't claim for profit she can only claim for damages such as the ferry and the land, like any damages that were incur incurred because of the bridge. That they constructed over the river. And then later on um the judges actually decided that um the arbiter should have an annual meeting and consider the plai the plaintiff's compensation but they shouldn't be compensated for her um profit-seeking and that but then she eventually settled for the 3500 pounds that the President initially offered.

033 **LECTURER:** Hmm so she accepted the initial offer.

034 **STUDENT 18:** Ja

035 **LECTURER:** OK no you can go and sit now … unless there's something you want to add?

036 **STUDENT 1:** No [inaudible exchange between STUDENT 1 and STUDENT 18).

037 **LECTURER:** And who was the judge? [long pause] Mmmmm?

038 **STUDENT 1:** Fisher [laughter]

039 **LECTURER:** No. There was no such judge in that division. Fisher antwoord. So that's not the judge. [L doesn't look up at the students throughout these long pauses] Brand. Um. I think … prokureurs … [continues muttering to himself] De Villiers was the staatsprokureur. They don't say who the judge was. Perhaps it was all three judges. Um if you look in the front of the law report you will see there's a list of the judges, very short list of the judges. They were: Frances William Reitz, chief justice. James uh Buchanan and Melliers de Villiers. Three three um judges and um well they all have stories of course. Melliers de Villiers became the Chief Justice eventually. And um uh Buchanan was one of the people who compiled these um cases. These cases were compiled by Gregorowski. Gregorowski. If you look um I don't know where they say it [more pauses as L pages through the book] um but in any case on the spine of the book you will find the word Gregorowski. Gregorowski is one of the people who made these compilations. OK. Final case. And that case is the ….

040 **STUDENT 10:** Griqualand West

041 **LECTURER:** And where is this Griqualand West?

042 **STUDENT 10:** I don't know somewhere close by the Griquas.

043 **LECTURER:** By the Griquas. Where are the Griquas?

044 **STUDENT 10:** I don't know

045 **LECTURER:** How can you now know? Don't you play rugby? You look like a rugby player?

046 **STUDENT 10:** Once upon a time, in my youth.

047 **LECTURER:** Haven't you heard of the Griquas

048 **STUDENT 10:** No I have heard of them but I don't know where it is.

049 **LECTURER:** You don't know where it is? [WM3: No]. [Class mates prompt him] Yes North-West Cape.

050 **STUDENT 10:** I didn't do geography!

051 **LECTURER:** That doesn't mean you don't have to know anything [class sniggers] OK. Tell us about this case. OK it doesn't matter. Just write the citation, just write the citation.

052 **STUDENT 10:** [softly] Isn't that the citation?

053 **LECTURER:** Huh?

054 **STUDENT 10:** Isn't that the citation?

055 **LECTURER:** No

056 **STUDENT 10:** I don't know what this part or this is? [underlining elements in the citations previously written on the board by the other students]

057 **LECTURER:** Um G-R-I-K G-R-I-E-K sorry I-E-K dash west um

058 **STUDENT 10:** Its not much shorter.

059 **LECTURER:** Um ja 1882. Page … no we just, we just, we don't do this [crossing out student's writing of 'pg' on the board] At the most just put a full stop or a comma there.

060 **STUDENT 10:** OK. OK This is Kimberley Mutual Building Society v Others.

061 **LECTURER:** Well that gives you a good idea where it is ne? [class sniggers again]

062 **STUDENT 10:** [laughing himself] OK. Um basically [motions to class to keep quiet, also seems to be expelling nervous tension]

063 **LECTURER:** Calm down now

064 **STUDENT 10:** The Kimberley Mutual Building Society they bought a piece of property with a house on it. And now one of the others, Harbittle, sold that house to Lewis, but claiming that there was movable property. And that the Kimberley Mutual Building Society didn't in fact buy that house that was on that property.

065 **LECTURER:** Uh temporary house must be …

066 **STUDENT 10:** Ja well that's what that's what they were claiming but it actually wasn't when it went to the court um they said that – judgment against the defendant because it was proved to be movable property because it was part of the land and the soil, it was for all intents and purposes and erect structure that cannot be moved. Although they did say in internationals, in countries like America they said they could be moved. But a smaller property that didn't have to be um dissembled to be moved, would be class as moveble, but this had been like take apart.

067 **LECTURER:** Did they refer to the Roman law?

068 **STUDENT 10:** Um [sheepish smile] Dunno.

069 **LECTURER:** Because there's a fixed uh there's a fixed rule in Roman Dutch law. Um … um … what is the rule in Roman Law. [rolls off Latin phrase – STUDENT 10: looks at him and the class as if to say 'what on earth'?] Superveniens [inaudible] That which is attached to the ground becomes part of the ground

070 **STUDENT 10:** I must have missed that.

071 **LECTURER:** OK, anything interesting about this case? Besides the contents … Anything historically interesting?

072 **STUDENT 10:** Uh not particularly

073 **LECTURER:** Yes and yet they did, they spoke about accessio. Did you not …

074 **STUDENT 10:** Oh ja I saw that but I don't know what that means

075 **LECTURER:** You don't know what accessio means? [STUDENT 10: No] Accessio means exactly this: Accessio the term, the Latin term accessio means welded onto. So if you have a BMW and you've got the body and I've got the machine and I weld the machine onto the body then you become owner of that machine.

076 **STUDENT 10:** OK

077 **LECTURER:** And not me, That is accessio the two things go together. The owner of the largest and principle thing becomes the owner of the subvenient thing. [inaudible] OK. So they did refer to the uh English law. Who was the judge?

078 **STUDENT 10:** Buch, I think.

079 **LECTURER:** Yes

080 **STUDENT 10:** Buchanan … I think.

081 **LECTURER:** Yes, and what about him?

082 **STUDENT 10:** Um .. I think he made the right choice.

083 **LECTURER:** And who … ja … but what was he?

084 **STUDENT 10:** Um [looks befuddled]

085 **LECTURER:** No man, what did we learn on Tuesday?

086 **STUDENT 10:** [inaudible]

087 **LECTURER:** What are his initials? Ja look at his initials.

088 **STUDENT 10:** Oh Judge President

089 **LECTURER:** He was the judge President. Yes and who sat with him?

090 **STUDENT 10:** [inaudible]

091 **LECTURER:** Who? He was the Judge President, he gave the judgment and who sat with him?

092 **STUDENT:** Jones and Murrans.

093 **LECTURER:** Thank you. And what did they say?

094 **STUDENT:** They concurred.

095 **LECTURER:** They concurred. How does he know all these things about your case?

096 **STUDENT 10:** Maybe he read [inaudible]

097 **LECTURER:** Its his case as well.

098 **STUDENT 10:** So that's it?

099 **LECTURER:** OK, um thank you very much. Umm … I want to find something else that is interesting here. Um [paging through casebook]

100 **STUDENT 7:** Um I've got a question.

101 **LECTURER:** Yes

102 **STUDENT 7:** The case, this case is was dealt with in 1883, I found it in the 1882 book. Why is that?

103 **LECTURER:** Well, it might be, uh, it is in the 1882 book and it might have been decided in/ what is the other date you have?

104 **STUDENT 7:** 1883

105 **LECTURER:** Uh what … it might have been reported in 1883 and heard in 1882. They might have decided to/ yes?

106 **STUDENT:** [inaudible]

107 **LECTURER:** OK no no no no that's the only that's the only thing that I can that I can emb imagine … uh it to be. Um that you know the case was heard in the one year and that it was reported in the next year. And in those days it wasn't unif/ it wasn't ub uh uh homogenous as it is today. Today we've got a fixed rule. We report – the date that's put on the citation is the date its published as I sh-showed you on Tuesday. But in the previous century it was a bit more haphazard. Yes?

108 **STUDENT 1:** I know that you told us about the translations in the 1900s but in terms of these cases, the high Dutch cases I didn't find any translations

109 **LECTURER:** No no no no no. But we we are all fluent in high Dutch, aren't we? [licks lips] Definitely. No there's a very there's a one in a million chance that you'll get a high Dutch case uh its only if you do really really historical research .. And when you get a high Dutch case ladies and gentlemen that is extremely important you send it to a sworn translator and they translate it for R30 a page. Um you know but if you do if you do a PhD that's when you would be interested in things like that. You know three or four hundred rand to get a old source translated is nothing. That, you'll always have money to

do that. And it might even be you know you might know somebody who's not a sworn translator but you know who can read high Dutch. High Dutch is not …

110 **STUDENT:** Its very close to Afrikaans.

111 **LECTURER:** Its very close to Afrikaans. I have no trouble whatsoever in reading that case. Its like um you know, old Afrikaans. Its not …

112 **STUDENT 1:** Ja

113 **LECTURER:** Its like my grandmother's Afrikaans. Um

114 **STUDENT 1:** [inaudible] Afrikaans, that's probably why I struggled.

115 **LECTURER:** Ja, no no it is difficult sometimes it is I know it is a foreign European language, it is a different language. But uh you know the problem when you get into practice, um, sometimes you have to translate an Israeli case from Hebrew. And then, you know, you must get a sworn translator or you get a certificate in … in … Pakistani … and then you must translate the certificate to see what's going on in the case. Um so but there are you know, there are … uh facilities to do that. OK. Um This uh, this case was um in a uh bundle of 19 uh 1882 and it was although it was edited by um a person called PM Laurence one of the judges of the Supreme Court of the Cape of Good Hope, Laurence, um LM it is not under his name. Because um he was just officially appointed by the Griqualand West Division to do it. He didn't do it by himself he was officially appointed. And therefore it is not know uh as the Laurence collection. OK, anything else?

116 I've got one further technicality that I must share with you … before I can let you go. But I want to have some questions, if there are questions. Do you know do you think you can find virtually any court case now? …. In South Africa? OK. We'll have a little test one of these days.

117 Um. The last thing that you must know ladies and gentlemen and this is uh it's a pity we didn't actually do it before because um I can see you have difficulty in doing that um … The last thing you must do is .. The technical, the differentiation between [writes RATIO DECIDENDI on the board] ratio decidendi [writes OBITER DICTUM on the board] and obiter dictum. Ratio decidendi, the translation of ratio decidendi is .. simply … the reason for the judgment. Ratio decidendi is the reason for the judgment. Those are the specific reasons that the judge provides why he's come to the decision uh in the case. This has usually only got to do with law. Very seldom, but its not impossible, very seldom will you find that the judge will base his reason for the decision on fact. The way to differentiate between an obiter dictum and a ratio decidendi is to look for something that is involved with law. Obiter dictum is those things that the judge will say that is not binding, that is not binding but that he feels he cannot keep his mouth shut about. Just observations in passing. [pauses to open textbook].

118 Now the best example that I can throw that I can quote for you in this instance is the case of S v D in 1992 (1) SA 513 (Namibia). Its in your cour/ In your books on page 63. It was a case about the cautionary rule when a rape victim is interrogated. Before the Constitution in Namibia and South Africa there existed a rule of evidence in both our countries that said when you interrogate or when you uh evaluate the evidence of a woman that's been raped … in those days you couldn't rape a man ... we were still strong [narrows eyes to slits] … if you in/ if you evaluate the evidence of a woman that's been raped, because of the enormous trauma of the incident, and because of the enormous emotional upheaval of the incident, you must be cautious. To listen what she says. This is a rule for the judge. It's a cautionary rule for the judge. How do you feel about it? [silence from the class] A how do you feel about it? You're a sensitive, feminine type of person.

119 **STUDENT 3:** Um if it's a cautionary rule for the judge ….

120 **LECTURER:** Yes …

121 **STUDENT 3:** The judge isn't the one whose done the interrogating on the person

122 **LECTURER:** No … but the judge is the one evaluating the evidence. So the judge, if she said: 'I sat on the station bench. At quarter to four in the morning, after I'd been to a party. And I can't really remember because I had lots to drink. And then somebody with a dark brown jacket walked in front of me. And then I woke in the hospital'.

123 **STUDENT 3:** The question is what do I think about that.

124 **LECTURER:** Now the question is must you be cautious, must you be cautious about that kind of evidence or must you treat it just as normal evidence. I'm putting you on the spot now I can see I'm embarrassing you.

125 **STUDENT 3:** No no no [inaudible]

126 **LECTURER:** No you want to answer?

127 **STUDENT 3:** I can [inaudible]

128 **LECTURER:** ok

129 **STUDENT 3:** Um I [pause] by saying you've got to be cautious by listening to the evidence does that mean you've got to kind ,.. I don't understand

130 **LECTURER:** No, you must go with your gut feeling I I [nodding] go with your gut feeling. Don't be … you know … don't be um

131 **STUDENT 3:** My gut feeling is how does she know that she's raped, because if she doesn't remember anything after the person walked in front of her then she lands up in hospital how does she know she's been raped.

132 **LECTURER:** The doctor tells her that she's been raped.

133 **STUDENT 3:** OK … but then … does .. but if she

134 **LECTURER:** The question the question […] is: We are working here with the evidence of a specific gender under severe conditions. The question is: Can you infringe their rights because of the circumstances. Let me let me let me help you out uh make it easier. The cautionary rule also applied to children. When you when the judge had to rely on the evidence of a child the cautionary rule said 'Beware a child is not an adult. A child suffers from flights of fantasy the world of the child is much different than the world of the adult. If you evaluate the evidence of a child: Beware! You are working with a child'. That is the cautionary rule concerning child witnesses. Do you think that is constitutional?

135 **STUDENT 3:** Um [long pause]

136 **LECTURER:** You want to say something? You can still think […] I'm not going away from you.

137 **STUDENT 19:** Ja I wanted to say something concerning that rape issue. The circumstances differ like in like in the scenario that you're giving us that if the person says 'I was drunk and all like' [L: A hmm hm] they don't remember what they don't know what happened. Its different from a situation whereby a person since the rapist experiences and feels the rape …

138 **LECTURER:** No of course I used an extreme example but the question I'm putting to you and […] is: Is it fair to say that the judge must be careful when he evaluates the evidence of a female that's been raped. [class responds. One male says 'its fair' to which L smiles]. Yes?

139 **STUDENT 3:** By saying that the judge must be careful in evaluating the evidence does that mean the judge should, in a way, well I'm not saying that they should favour the evidence you know but I'm just saying is that …

140 **LECTURER:** No no not favour disfavor. They must beware to listen to the evidence of a female that's been raped because females that have been raped [interjections here from class] are emotional and unstable and they will tell lies and they will be fantasize and they will try and and um uh dislodge them from the situation, They will try and um uh deny that they had any that they had any involvement. That is a trait of females that has been raped … according to this rule. Yes I can see […] you're getting very hot and bothered.

141 **STUDENT 1:** No that's completely unconstitutional [L: Mmm], I mean its basically saying a woman who's been raped is not in a correct state of mind [L. Mmm] to give a pretty accurate account of what actually happened, I mean you can compare that to someone who's been shot, that's also traumatic but you don't have to be cautious when you take their account of what happened [L: Um mm and nods]. So its completely unconstitutional if if you want to talk about caution then talk about a psychological point of view

against the expert opinion, then you know you can start talking about caution [inaudible]

142 **LECTURER:** Ok ok that is what the that is what the/ anybody … you want to say something?

143 **STUDENT:** No

144 **LECTURER:** Roughly that. She's very good at summarizing your feelings it seems. [Laughter from class]. OK she qu she summarized it quite correctly. This is an old rule. It's a rule that comes from the Roman-Dutch law. Uh it's the old its very old pre-constitutional conception of females that females are emotional and they can't that they they don't know what's going on in reality and more so when they've been sexually violated. They lose touch with reality. And they fantasize and you can't trust them. [pulls face toward STUDENTS 1 and 19] That's the old concept of uh of females being raped. This judge had the unenviable task of evaluating a rape victim's uh evidence before the Constitution, uh. He did so, he came to a conclusion that her evidence was fine but, and here's the thing, he said obiter dictum: 'Listen, we live in a new era, I can't take into consideration here now the Constitution that has not been promulgated yet. But I know this rule is going to be declared unconstitutional under the new Constitution. So if I had been under the new Constitution I would not have used the cautionary rule. As it is in this instance I didn't use the cautionary rule because I believed what she said and I I didn't use it at all. She was a good witness and I accepted her word on the face of it it wasn't necessary for me to use it. That's the ratio decidendi. In this case I didn't use it but' and that's the word you must look for ' but, I just want to say in passing, for instance if you don't think I know it, that there is a Constitution and that I agree with the Constitution and in future the cautionary rule will be abandoned.' That is called obiter dictum. Do you understand? Its got nothing to do with this case because the Constitution is not has not been um promulgated yet. But the just is just saying; 'In future there won't be this kind of case. This question will not come before a court in future again. Because the cautionary rule will be declared unconstitutional.' Yes, you must put up your hand so I can see, I can't see that.

145 **STUDENT 2:** Well this is just like the details of the case. It was it was in 1992 wasn't Namibia [inaudible]

146 **LECTURER:** Ja.

147 **STUDENT 2:** So ..

148 **LECTURER:** Uh the the Constitution was not finalized.

149 **STUDENT 2:** Oh their Constitution not our Constitution.

150 **LECTURER:** [reading from prescribed textbook] Their Constitution, ja. [reads further from textbook and then quotes]. 'To sum up in my view the cau cautionary rule evolved' – this is now from the case – 'In my view the

cautionary rule evolved in cases of rape has no rational basis for its existence and should therefore not for part of our law, and is probably contrary to the provisions of the Namibian Constitution.' Uh and that was the obiter dictum. He didn't have the authority to declare it invalid, but he said – and it wasn't argued by the advocates – but he just mentioned in passing. 'It will probably be found unconstitutional'. OK.

151 If you want to do yourself a favour go and read the case of Parker – you remember the case of Parker? Yes … the the attorney that stole the money from the trust account. Yes, go and read that case. And mark for me – sommer in your coursepack – mark for me the parts that are con that are obiter dictum and the parts that are ratio decidendi. The case, you don't have to go look it up, you don't have to go photostat it, its in your coursepack, um Cape Law Society, Cape of Good Hope Law Society versus Parker, I want you to go and distinguish between the ratio decidendi and the obiter dictum. And that, ladies and gentlemen, is that for today. Thank you very much for your trouble with your court cases. Thank you for your attention. And I will see you on Tuesday. For the last time this term. OK.

LECTURE 14

001 **LECTURER:** You can come over here … very … isolated sitting over there. OK. So um today's lecture will help you uh with the with the assignment. Because today's lecture is about the common law. The the the the s- the techniques surrounding the how one approaches the common law when you do research. Now believe me, although we are doing it in one uh lecture you can spend a semester or even a whole year in studying how to unlock the um old authorities. We're just going to give you a birds' eye-view because um people don't do people don't do historical research anymore. Because of the Constitution and because it is um it's a skill that's disappearing completely. Um I know of a handful of people that can still unlock the old authorities. Yes?

002 **STUDENT 3:** Um I just can I just ask a quick question before we go onto the common law. It relates to ratio decidendis.

003 **LECTURER:** Um yes yes

004 **STUDENT 3:** Um I had to read a case for contract law and there was an excerpt from another case, there was a case of Henry v Branfield and there was an excerpt in it from a Watermeyer case. In it it talked about the general principle and the general rule; would that be, is it possible to have a ratio decidendi in another case?

005 **LECTURER:** My rule of thumb with ratio decidendi is usually it has go t to do with law and not fact. So on the first [inaudible] yes, if the if the judge is quoting another case, that is law. Um eh you can't ever have a rule of thumb, you must apply it uh to f-find whether it is indeed the ratio decidendi. So a-a judge can indeed refer to another case only in passing. Uh especially if he doesn't apply that case in his judgment. Uh that is possible, so then its obiter dictum. If the judge starts his decision, says 'Oh there's another case in Namibia and this is what the case said, um I'm not going to follow that case, I'm not bound by that case because I'm not in the Western Cape' or whatever 'I'm not going to follow that case, I think that that case was um was uh not correctly uh decided um and I would rather follow the following authorities.' Then obviously that is not ratio decidendi. That is not the reasons for his decision, that is obiter dictum. He's just mentioning it in passing, mostly to show you that he knows about this case. And that his judgment was based on the fact that he considered that case, found it uh wanting and he's just mentioning it in passing. But, of course, nine out of ten times if a judge starts analyzing a case then you can be certain that he is going to follow that case. Uh but you must first see what is the question in the in the case what wh-wh-what was put before court, what authorities did he use and what did he decide. And only then can you say, ok this is his decision. The reasons for his decision are the following. And they are supported by the following uh authorities. And that is his ratio decidendi. Ratio decidendi is just reasons for decision. Reasons for decision.

006 **STUDENT 3:** OK thank you.

007 **LECTURER:** OK. Now [clears throat] to come back to the common law, the common law um is a very slippery technical term. Uh somebody asked me about it and I gave a long uh winded explanation of all the meanings of the word common law. Do you remember that […]? You look so …

008 **STUDENT 1:** I haven't had coffee yet.

009 **LECTURER:** You haven't had coffee yet, yes well. Hmm. We can have coffee afterwards. But you remember

010 **STUDENT 1:** yes

011 **LECTURER:** Common law, England is the common wisdom of the judges and the the um uh advocates that's where the word comes from, so it's a traditional law, it's a tradition it's the background to the law. If there's a lacuna and you don't know what to decide then you refer to the common law. It is the old authorities. But you must not confuse the word common law with customary law, law of custom or customary law – different thing – customary law or indigenous law is law of the first nations, unwritten primitive law of the first nations, law based on custom is something completely different we will do that in due course; also, common law is a technical term used in uh worldwide a-analysis of worldwide systems of law, to tell you to divide the world into two categories: Common law countries, the countries that followed English law; and civil law countries countries that followed uh the Roman law. So you must you must have those terms um under control. Its difficult because, you know, common law is used for a variety of meanings and you must know immediately when we talk about common law what kind of common law we're talking about.

012 Today, this morning, this lecture is about South African common law. In other words, the old authorities. Roman and Roman-Dutch law. That is what we are going to talk about today. That is also what was used in Bank of Lisbon v D'Orelenas. One of the prime examples of a South African court case where the common law was applied to decide whether a piece of the common law was still part of South African law or not. OK. Let us start right [break in recording]

013 Ja .. it is. It strangely is a set of statutes but OK. Yes anybody?

014 **STUDENT 3:** The Twelve Tables

015 **LECTURER:** Yes do you think that is the first codification of law?

016 **STUDENT 3:** Probably not ….

017 **LECTURER:** Probably not, where would we find a more ancient codification of law?

018 **STUDENT:** The edicts?

019 **STUDENT 3:** In the

020 **LECTURER:** No

021 **STUDENT 3:** You'd find more ancient law in the

022 **LECTURER:** In the … don't don't answer everything. Yes?

023 **STUDENT:** Weren't the priests um scripts …

024 **LECTURER:** B-yes … that's only more ancient in terms of Roman law. I'm looking more ancient than Roman law. Yes?

025 **STUDENT 2:** [inaudible]

026 **LECTURER:** Yes yes yes indeed indeed. Ten commandments. Oh absolutely that is the codification of uh uh um uh Judaic law long the Lex Duodecim Tabularum. That is that is indeed. Where's something more ancient than the t-t-ten commandments? You don't know your history very well do you [said in a 'plat' way].

027 **STUDENT:** The law of physics after the big bang?

028 **LECTURER:** No no [class laughs] I'm talking about laws, I'm talking about man-made laws. What is the first um what is the first manifestation of law that we know of? Where was the – according to popular wisdom – where did civilization start? [class murmurs responses – one student says 'Mesopotamia, Nile'] No, not the Nile. You're getting closer, indeed the dictates of the pharaohs and the codifications of the pharaohs. That a more ancient system of law. What is more ancient than the Egyptian …

029 **STUDENT:** Was there Sanskrit law?

030 **LECTURER:** Yes, Sanskrit, even more ancient than that. Where did civilization start ladies and gentlemen?

031 **STUDENT:** The Cradle of Mankind?

032 **LECTURER:** The cradle of mankind [places hands on cheeks as if in a gesture of despair]. Not archeologically, that's not civilization. [inaudible]

033 **STUDENT 8:** Oh! Babylon!

034 **LECTURER:** Yes! The two-river country. Do you know, do you know where we are?

035 **STUDENT 6:** Where?

036 **LECTURER:** Where's there a country between two rivers? The Tigris and the Euphrates. [inaudible exchange] Babylon, where was Babylon?

037 **STUDENT:** Baghdad

038 **LECTURER:** Baghdad yes where's that?

039 **STUDENT:** Iraq.

040 **LECTURER:** Iraq! Did you know that civilization started in Iraq? There where there's no civilization anymore? Ladies and gentlemen in the in the uh Mesopotamian um uh uh civilization, uh the uh two river state of um uh Mesopotamia, that is where we start with uh the .. first written um legal system uh was found.

041 And what the Mesopotamians had if I'm, you know, I'm … are these two forms [drawing a triangle and an inverted triangle on the board to represent cuneiform writing] cuneiforms they are called ne? These two forms, small uh small um triangles which on the end of a stylus, like a printer's block, like a type writer ne? And this is what they used, and this is how they wrote. They in the they used literally that one and then they would have one like this (drawing different arrangements of triangles on the board] um and then you now that one and then they added to that, and then they would add a line there, or they'd add two lines there and that is how they started um writing. Uh that would be A, B, C, D etc That would be the alphabet.

042 And the first form of law that we have, as far as I can go back, um is the um is the laws of Hammurabi. Hammurabi. The codes that he got from the Sun King, also shrouded in um in the mists of history, we don't know what, where and how they worked. But Hammurabi was the first codifier of laws in um in the ancient times, in the in ancient um um near Eastern um civilization. Hammurabi and if you go to Germany nowadays and you go to Berlin, you go to the Staats Museum and you uh ask somebody there because it's a very large museum, you will find a huge uh granite slab, its about this form, its not regular, it's a huge granite slab very much like the Rosetta stone, its got a line there are here on in relief you have um you have the Sun King sitting down here, I can't I can't you know I'm not an artist I can't I can't .. but he's sitting down here, and then you have Hammurabi the ancient law giver with the laws showing the laws to Hammurabi, and then in cuneiforms, all the laws are here and they were only analyzed and they were only uh translated very recently I think it was the nineteenth century, by a clever German. That, ladies and gentlemen, is what we are interested in. That is common law. Do you think that there might be laws here that can that can still be valid in South Africa? From Hammburabi?

043 **STUDENT:** Ja

044 **LECTURER:** Ooh! I'm not talking just in principle I'm talking about physically. Do you think any of the laws of Hammurabi you can quote in a court today? [Tentative umm mm on the part of students]. Chapter two, verse five and things like that. I don't think so ne. Perhaps the principles, you know, thou shalt not kill and things like that. Um but not chapter and verse. I don't think you will be able to to take the golden thread back to Hammurabi. But it is good to know that that is the first codification of law. And that is the most

ancient system of law that we that we've got. Where do we start picking up our golden thread? [moves hands in a very refined movement] Where do we start picking up our golden thread?

045 **STUDENT 6:** Roman law

046 **LECTURER:** Yes. Ub dub F the Roman law is two thousand years old. And it's a very hu- large system of law. Where in Roman law? He's quite right, […] is quite right. Our golden thread comes from the Roman law. Where do we pick up our golden thread? I will be very impressed if you know this. Yes?

047 **STUDENT 2:** Um it probably would have been [inaudible exchange between her and L] I don't know what its called, its like

048 **LECTURER:** What do you/ just try

049 **STUDENT 2:** Delict, in delict like the Aquilian action or whatever

050 **STUDENT 3:** [inaudible]

051 **STUDENT 2:** Yes Lex Aquilia

052 **LECTURER:** No that's not the/ that is/ certainly we can go back to Lex Aquilia. We certainly can go back to the Lex Aquilia, that is quite true, the Lex Aquilia still applies is applicable to South African law of delict. That is true, that's just one little golden thread. Um

053 **STUDENT 6:** What about edicts?

054 **LECTURER:** No. Do you think F, do you think you can quote an edict of the praetor in a court of law here in South Africa?

055 **STUDENT 6:** Um you find that some of the things that were written in the edict were something that we [inaudible] but we don't quote it.

056 **LECTURER:** No we don't quote it ja. What/ where does the theme go back to where you can start quoting? At random, yes?

057 **STUDENT 1:** Could it be from where the Emperor Julian started codification ….

058 **LECTURER:** No. du-u-u its not wrong, its not wrong, But we don't quote Julian, Its not an emperor [class throws out other suggestions]. He was a jurist.

059 **STUDENT 1:** Oh was he

060 **LECTURER:** He was a jurist, he wasn't' an emperor. There's quite a difference.

061 **STUDENT 3:** Justinian.

062 **LECTURER:** Yes yes What about Justinian? [STUDENT: Codification]

063 **STUDENT 3:** I don't know exactly but I know Justinian law is important.

064 **LECTURER:** Justinian was an emperor in 529 anno domini. 529 years after the birth of Christ. There was an emperor, not in Rome, but in [class mumurs 'Constantinople] Constantinople, Byzantium or Istanbul as it is called today. In the Asian, in the Eastern part of the Roman Empire. And what did this emp-emporor do? He didn't do it – his wife did it. He didn't do it, he did nothing. He was – he was just- he was a – he was a real – he was not – he was a very poor character. He didn't even want to be he didn't want to be the emperor. He was forced to be emperor. And he almost lost his whole empire because he was he was so he was such a um he was such a weakling. He was – he wasn't even a lawyer, he was a theologian. Uh and all the wonderful things that he did in law was from his wife, and all the wonderful things that he did in law was ruined by the stupid things he did by trying to do the same for theology as he did for law.

065 But ok this is the point to tie things to. What did the emperor Justinian do? Justinian said, in um under the guidance of his emperor's Theodora, who was a prostitute, or a circus girl, I don't know what I don't know what that means. She said: 'If you want to have certainty in your empire' because there were lots of revolts in his empire, and his the empire was on the verge of collapsing. You will remember the Western Empire collapsed in 467. So we are now in 529. That is thirty, seventy years later. And his wife said: 'If you want certainty in your empire, codify the laws so that the people will know what their rights are. They are unsatisfied that you have bad administration because people don't know what is valid and what is not valid.' So he codified the law and one of the most important things that he did do, is he codified the opinion of the jurists. He codified the opinion of the jurist and he called that codification, that part of the codification, he called the Digesta. Or in Greek, Pandectae.

066 Now ladies and gentlemen that is the most important source of common law in South Africa still today. The Digesta, I wanted to bring you a copy of my Digesta but the rain prevented me from taking it out of its glass cupboard. The Digesta – I will bring it when it doesn't rain. The Digesta is um in modern printing its just about two – with translation its four books, but the Digesta the the the Latin or the Greek uh alone is about two volumes. And those two volumes are divided into fifty books. So its fifty books that summarizes the opinion of the jurists, the most famous jurists in the first two centuries BC uh AD. So the Digesta is a codification, is a condensation of all the most important jurists that wrote in the classical, golden age of Roman law.

067 And there we have the starting point of our common law. Ladies and gentlemen, if we refer to Roman law we refer to classical Roman law. We refer to the first two hundred years after the birth of Christ. That's what we refer to. The things that happened before, the Republican Roman law and the Corpus uh the Lex Duodecim Tabularum those things are of historical significance. But uh from a to to quote, what we are interested in uh uh [sigh]

mostly is the jurists in the first two hundred years after the birth of Christ. And those were the jurists that were uh taken up in the Corpus Iuris Civilis. Now of course um you must know how to work the Corpus Iuris Civilis but its very easy and I'll show you. I'll show you now, I should have, I really should have brought it along.

068 Besides the Corpus Iuris Civilis, just as an obiter dictum, beside the Corpus Iuris Civilis, there were three other works of Justinian. There were the Codex [turns to the board and writes 'Digesta'] which is the most important. Then we have the Codex[Writes 'CODEX'] and Codex is only another name for 'Laws'. So this is a compilation of laws that was valid in the time of Justinian, 529 um AD. Those are – those were the laws, those were the legislation um uh valid in Justinian's lifetime.

069 Then we have we have the Novellae [writes 'NOVALLAE' on the board] and those were the new laws of Justinian. Those were the new laws, the laws promulgated by Justinian himself.

070 And then finally [writes 'INSTITUTIONES'] we have the Institutiones, and that is a textbook … for students. And this, ladies and gentlemen, these four books, makde up the so-called Corpus Iuris Civilis, trans um abbreviated as CIC. [Writes [CORPUS IURIS CIVILIS on the board] Corpus Iuris Civilis. Corpus Iuris Civilis. And that is, the translation of that is the body of the civil law. OK.

071 If you go read Bank of Lisbon v De Orelas you will see that we still quote directly from the Corpus Iuris Civilis. The Corpus Iuris Civilis is one of the major authorities, old authorities that we use. OK. [pause] The only one that you will ever come into contact with is the Digesta, and the reference to the Digesta looks like this. [Writes 'D' on board] D, capital D. Capital D, um. [Writes ':'4'] Lets make it easy for you. D: 4: 3: 1. That is a reference to to the Digesta. And it simply means it comes from the Digesta, book 4, book 4 [writes 'book' above the 4 and underlines the 4]; the first one is the book because I told you there were 50 books. This is book 4, you simply look up book 4, its chronological order. Book 4, chapter 3. Book 4 will be divided into various chapters. Book 4 chapter 3 paragraph number one. So it's a very simply way of referring to the Digesta. Uh it gets complicated. It gets complicated but its no use trying to to to give you an instruction in uh unlocking the Digesta. This this will suffice. Um and I should actually give you uh texts to go and find in the Digesta to see if you can can do it. To understand the Novellae and the Codex you need specialized knowledge. If you find that you must get, you must refer to the Novellae or the Codex um uh that is specialized knowledge uh and its very very difficult to find um whether one of those laws were still uh valid during the time of um Justinian, but once you once you can work with them, of course they are extremely valuable. That gives you a a birds eye view of the law uh in the time of Justinian. OK. The Institutes of course is just divided into four uh four books um and uh a variety of chapters. Same as Gauis. The Institutes of Gauis. The Institutes of Justinian is based on the Institutes of Gauis. OK. Af – are you al

satisfied with this? Can you / you will you will know if somebody talks about the Corpus Iuris Civilis what is going on? OK.

072 After the Corpus Iuris Civilis the Corpus Iuris Civilis fell into disuse. It didn't disappear or it wasn't stolen like a student said last year in the exam. It wasn't stolen, it just fell into disuse. Um after the um reign of Justinian um the Roman Empire in the East became less and less prominent and the Corpus Iuris Civilis uh had within two or three hundred years after Justinian had virtually disappeared. Uh people didn't use it anymore, they used the far easier barbarian um uh barbarian codifications that were in vulgar Latin. And not in in in the good Latin uh the classic Latin of the Digesta. OK.

073 In the twelfth century the Corpus Iuris Civilis was rediscovered at the University of Bologna in Italy. And we call this the second life of Roman law. Now [clears throat] um I don't want to talk too much about this because we're going to do it in Roman law, but to refer to to to analyse the scholars or medieval roman law is extremely difficult. A) there are very many of them and B) they wrote in a vulgar Latin and there are many uh interpellations. There are many things that we don't know whether they are original or whether the medieval scholars added it to them. So just beware, when you go into the medieval era, as you will have to go with Bank of Lisbon, please beware that it is extremely difficult to find out which of the texts are genuine Corpus Iuris Civilis texts and which of the texts have been in-interpellated. Interpellation means that uh people changed the text to suit their own needs.

074 Just very briefly, in five seconds, the medieval era, the dark ages can be divided into three schools: the, first of all the commentators, um first of all rather the glossators, they were the people who discovered the um the Corpus Iuris Civilis. After the gloassators the commentators, and after the commentators the um the humanists. OK. Let us take them one at a time.

075 The greatest the greatest commen- the greatest glossators were Acur-Acur-Acursius. I suppose you want to get the spelling of all this. Let use – there were many, there were many glossators, um [writes 'GLOSSATORS' on board]. These were the first revival school in the medieval time. Um the the first and the most most famous of all the glossators was called Azo [writes 'AZO' on the board]. Azo and uh his pupil was [writes 'ACURSIUS' on the board] Acursius. Now the wonderful thing about uh the glossators is that Acursius summarized all the work of the glossators. So if you want to find out what is the view of the glossators you can look at the summa [writes SUMMA on the board] um [writes THEORETICA on the board] the Summa Theoretica of Acursius. What Acursius did is he took the whole text of the Corpus Iuris Civilis and he added to that text all the glossae of his predecessors. So this book, the Summa Theoretica of Acursius is a summary of the entire work of the glossators. If you find another glossator you will always find that they that their work is in the form of a commentary on the Corpus Iuris Civilis or most of the time, a commentary on the Digesta. They've taken the Digesta

and they've written commentaries on the Digesta. OK. [Writes COMMENTATORS on the board].

076 **STUDENT 9:** When you talk about schools do you mean actual schools or like schools of thought?

077 **LECTURER:** Um well um the glossators were were was an actual law school at the University of Bologna. And uh that's where it started. After that when they started calling themselves the commentators [gestures with head toward the board] a hundred years later it was more a school of thought. Uh because then it spread not only through the whole of Italy but over the mountain – ultra montani – over the mountain, into Switzerland and into France. The south southern part of France. And they there were more schools of thought there were people commentating on the Digesta. That's what commen- the commentators mean. And it means people who wrote commentaries on the Digesta.

078 Now there are many many commentators ladies and gentlemen and you will be confused [inaudible] The only the most important [writes BARTHOLDUS DE SAXOFRATO on the board] and you will find also that he was extensively quoted in your case. Bartholdus de Saxoferato and all that means is this is a man with the name of Bartholdus, Bert, we can call him Bert, Bartholdus from a small little university town in Northern Italy called Saxoferato. Saxoferato. Now Bartholdus de Saxoferato – are you all right? Bartholdus de Saxoferato is the most famous commentator and virtually the only one worth knowing. No that's a lie of course but I mean if you're not a medievalist, if you're not deeply interested in these things like I am, if you're just an ordinary law student and you do research, suffice it that you – just do Bartholdus. Bartholdus wrote a twenty-five volume commentary on the Corpus Iuris Civilis. He also wrote a twenty-one volume um thesis on private international law. He is the father of private international law. If you ever co- get to that part of the law he is um he is the leading authority.

079 So when you want to read Bartho- Bartholdus you must understand how the Digesta works. Because what does Bartholdus do? Just like, just like I've said here … he takes this text of the Digesta … and here's the text of the Digesta. That is the text of the Digesta um its book four, chapter one, chapter two, chapter three, paragraph 1. So this is the part that you're interested in. And he writes a commentary around this piece of text. This is now the whole page. This is the commentary of Bartholdus on that specific text uh in in the Digesta. So if you know how to work the Digesta, if you know of the Digesta, you can also find the text in Bartholdus. OK.

080 After the after the after the um after the commentators we get the humanists [writes HUMANISTS on the board] and from the humanists we get what we call the pandectists [writes PANDECTISTS on the board]. Now the humanists were people who wanted to cancel the work of the glossators and the commentators. They were the people who wanted to return to the text as it was in the first and second century after the birth of Christ. They wanted

to restore the text to its original logical and grammatical meaning. Now some of the great names of the humanists of course, should be known to you. A French one [writes POTHIER on the board] Pothier, um in Germany there is Von [writes VON SAVIGNY on the board] Von Savigny. Um and perhaps in Italy there is perhaps [writes DONELLUS on the board] Donellus. Donellus. There are many many more ladies and gentlemen, there's uh there are um there are many many many more pandectists. Uh in France, Germany and in of course the Netherlands.

081 Now it was at this time ladies and gentlemen, the time of the return to the elegant to the intellectual, pure um restructuring of the Roman law that the jurisprudence in the Netherlands reached its ultimate. It was at this time that we had the golden age in the Netherlands. It is now the sixteenth or the seventeenth century in the Netherlands [writes 16^{TH} – 17^{TH} NETHERLANDS on the board] and this is the time of the development of Roman-Dutch law. The jurists in the Netherlands that were impressed with the Roman law were the humanist uh jurists. And amongst them – there are many of them ladies and gentlemen, but the most important among them are Hugo de Groot or Grotius, the Latinification. Hugo de Groot. I'm just I'm just going to give you five. Voet. Johannes Voet. V-O-E-T. Voet. Uh Van der Linde. Van der Linde, just as you say it. Van der Linde. Um – do you want me to write these down for you? You know all these people? Um Van der Keessel. Van der Linde, Van der Keessel and um [pause] Joost Damhouder. They're no they're no particular order but um the important this that you must know about these people is that they also wrote commentaries on uh the Corpus Iuris Civilis on the Digesta.

082 And it was during this era that the Dutch India Company asked Jan van Riebeeck to come to South Africa and to start a refreshment post here. And it is these people: Hugo de Groot, Johannes Voet, Van Der Linde, Van der Keessel and Joost Damhouder. Those were the authorities that were on board the Der Reiger and De Goede Hoop and – what was the third one called? What is the third ship … De Hoop De Reiger; De Goede Hoop De Reiger and the .. Dromedaris. Dromedaris. Those three little ships came from the province of Holland. And from the province of Holland it brought with it the legislation called the Het Pappegaai. Het Pappagaai. The parrot. Het Pappegaai. The decisions of the Hoge Raad of Amsterdam. And those five authorities. Ladies and gentlemen and that is the golden thread. That is how we are connected to Roman law. That is why we still study Roman law in this country because that is the Roman-Dutch law that arrived on these beautiful shores in Table Bay in 15- in 1652. The/ sometime in April 1652. And that was the common law of the European settlement.

083 Of course, it clashed with indigenous law but because indigenous law is not written down the laws that were used in the first structures, the landdrost and the heemraden, the first structures instituted by the European settlers, were the laws of Holland. And the common law of Holland. OK.

084 I don't know how valuable this is to to [raises hands] to give you an indication of the enormous uh value of um of the common law. If you if you are really deeply interested um you can come to me and I will take you to what we call the old authorities room in the library where we have a magnificent collection, Wits has got one of the best –preserved collections of old authorities and I will show you a Het Pappegaai that comes from the time of Jan van Riebeeck, I will show you all the um uh books of the Corpus Iuris Civilis, all the medieval writers um-bw up to the up to the twelfth or I think the thirteenth century.

085 So it is a study on its own ladies and gentlemen. It is a scholarly study, it is for the connoisseur of law. If you want if you want to ascertain whether something is valid or if you have authority and you do an historical study, then it it entails a lot of work. It is much easier to say: 'Oh this is not valid because um there's a new leg- there's new legislation uh on the on the statute book' or its also much easier to say 'this is not valid because the consti- its unconstitutional.'

086 But if you want to if you want to research a fine point in private law, a fine a very fine miniscule point in delict, the way you go is you go back to Roman law, you analyse so far as you can the lex duodecim tabularum, but you won't find anything there, perhaps in delict, you carry on through the Roman law, through the opinion of the jurists, through the Corpus Iuris Civilis, through the three schools – the glossators, the commentators and the humanists, eventually landing up in the elegant school of Roman-Dutch law, thorough study of Roman-Dutch law, ascertain what the Roman-Dutch law has to say and then come to a conclusion what the old authorities uh has to say.

087 This is only for highly specialized private law matters, its not for for contemporary um constitutional matters you can't do that kind of study for that. But there's still a large part of our law that is open to that kind of research. Um um its not for the faint-hearted, but it is very rewarding if you do it. What you must know however is how to do it, vaguely. You must know uh why we say what we mean when we say old authorities, and you must know that some of those old authorities are still valid today. Obviously in the past twenty, thirty, forty years lots of the- huge pieces of Roman law – like the senatusconsultum masokonaum and the senatusconsultum omolierum – those have been demolished, the actio doli has been demolished in the case that you're going to do, uh there are many, there are many pieces of Roman law that has been taken out because they've just become uh anachronistic. Uh or not, the judges perhaps are just a little bit stupid. Um but you must you must be aware of the background, the old authorities and that's where your law comes from, and if you really want to understand law that is how you must do your research.

088 I haven't got a watch people, are we finished with our time? [Some students respond: 'Yes'] Is it? OK. Ladies and gentlemen thank you very much for your

attention this term. I hope you've learned something. Yes you want to ask something?

089 **STUDENT 8:** I've just got some questions just very very quickly.

090 **LECTURER:** Yes

091 **STUDENT 8:** And the first one was this library break-in is really really bugging me. I mean …

092 **LECTURER:** The what?

093 **STUDENT 8:** The library, sorry, break-in (smiles). With the Digesta, when they found the text in the library, I mean how could something like that be forgotten, did they randomly just brush up against this old dusty book and say 'Oh look what we have here!' How did they find it?

094 **LECTURER:** Uh there are many stories about how it was found. But it was it was Professor Azur who did research and um the the the Corpus Iuris Civilis wasn't lost, it wasn't um you know as if he walked down to the cellar and there he found this wonderful thing [raises arms]. IT was just in disuse. Its like its like old South African statutes you know um from 1840. Um they are no longer valid and they're in disuse, they're just put in the furthest corner of the libraries. And the whole of the Corpus Iuris Civilis fell into disuse because people announced their own laws, their own ordinances.

095 They forgot uh about the Corpus Iuris Civilis and then this strange old professor in the in the eleventh, twelfth century at the University of Bologna did research and he uh he chanced upon this book and he thought it was a wonderful it was a wonderful book for his students, and he started doing research and he started writing summaries, and he started writing glossae until the whole was discovered and then, you know, his students were instructed in the Roman law. That we will do in the Roman law, don't don't worry but um uh a-a it wasn't a great loss and then you know Indiana Jones kind of thing. Uh it was just gr- just fortunate that this old professor started using the Corpus Iuris again and he gave it to his students, and they started using it and as they went out into practice they started quoting the Corpus Iuris as a source of authority again.

096 **STUDENT 8:** Um and then the second question is a bit personal I was wondering your trip is it business or a holiday. If its business can you tell us about what you're doing?

097 **LECTURER:** No I'm going to do research – I told you! I'm going to do research on the Elgin marbles, so it is research but, you know, I only have one appointment with an official from, from the Greek antiquities, so I'll go to the museum, to the Acropolis because I've been to the British Museum and I've done all the research there and you can't talk to the Englishmen because, you know, they think you want to come and steal the marbles and I don't know if you've seen the marbles in the British Museum. They are they are

magnificent, you know, they are absolutely beautiful uh and that is one thing you must say the English they they um kept the marbles in very good condition. But you know they are marble blocks weighing a ton. Each. And there are 164 of them so there's no way you know I'm going to sleuth in there with my little crane and take away their marbles. But the way that they treat you, you know, the way that they talk to you, they are extremely defensive you know um w-w- we don't even want to hear that you are doing research on the return of the marbles. There's no way that the marbles will be returned, its our property and you know it is British and … and that is nonsense.

098 My argument is simply that from a from a law of property point of view Roman law property point of view which was the common law of that era, um there wasn't a decent transfer, the transfer didn't take place, the transfer was incomplete. Uh Lord Elgin didn't have permission to remove the marbles, he had a um he had a authority from the Ottoman Emporor who who occupied Greece at that stage. But that document was false. It was – and even if you take the ferman – its called a ferman – even if you analyze the ferman in ancient uh Italian, you can see that he said uh uh stones and rocks that have fallen down and in the foundation of the building may be excavated and studied, not even rocks that have fallen down can be removed. True, he later got a ferman to remove them once on the uh in the in the harbor and they were waiting to be loaded. His wife, you know, bamboozled the the emperor and he have a further ferman that they may maar be removed because they're now sitting there. Uh that is true but you know that is um you know [shrugs shoulders] very flimsy evidence. So … I've done that part of the research.

099 I'm now going to Greece to hear – and of course the Greek government and the Greek Ministry of of culture is extremely enthusiastic to talk to me because I'm saying that the – my my article is about the the return of the marbles to to where they are and one of the leading uh arguments, besides the law argument which I think is absolutely uh waterproof and absolutely um uh conclusive, but besides the legal argument, the other great argument is that the Greeks are not capable of looking after um after these marbles and they are so extremely valuable that its better they're in the British Museum where anybody could come and cosmopolitan, general cultural object – like the mummies uh and its better that there you know that there are mummies all over the world that people can share in the Egyptian um culture and the same way that people can see the Greek culture in a professional exhibited and m-m-m- and uh uh restored uh way. Well the Greeks have answered to that and they've built a multi-multi million uh new uh exhibition space for for the marbles. Uh w- they still have a quarter of the marbles left so they've taken them out of their out of the the out of the Acropolis and put them into this beautiful museum. So I'm going to see that museum to see if you know to see if they are really capable of exhibiting the things, and then wr- you know hopefully write the article and cause a huge international stir.

100 But it won't happen of course. Nobody will read it. Nobody reads journal articles. Thirty percent of all journal articles are only read uh how what does that how does the statistics work? Um the only people reading journal articles, learned journal articles, are the thirty percent of academics who are involved in the publishing of those articles. You know, peer review and editors? They read it, but uh other p- he he seventy percent of the other academics never read it. So you know it's a you know it's a its like a little mouse in one of these little wheels but nevertheless perhaps we can cause some excitement.

101 **STUDENT 9:** I would really like to see the old authorities room in the library [some other students say 'me too].

102 **LECTURER:** A hu hu (laughs almost falsely)

103 **STUDENT 9:** If

104 **LECTURER:** No it is possible. Um um [makes a strange sound] Well we can't do it this term but next term um [overlapping speech from students] and then you must put on little masks and you must promise you won't touch anything, and you must uh not take food in there. And things like that. Who wants to see the old authorities room? [STUDENTS 8 AND 9 raise their hands] And then write an essay on it afterwards [wry laugh from students] OK. No I can take say one or two at a at a time uh in there. And um its temperature controlled so we can't stay in there too long because your little breath raises the temperature. And then you know and you can have all kinds of – well my little breath as well – but you can bring all kinds of viruses that can eat the paper and things so um uh uh so we can stay for five minutes uh and then uh we must go out. So those people who are interested remind me next term and then we'll have a couple of days that we can go.

105 **STUDENT 9:** OK

106 **LECTURER:** But it is fascinating and we've just received another huge donation from a guy called Suzman. Uh and we're preparing the old authorities room to put

107 **STUDENT 3:** Would he be related to Helen Suzman?

108 **LECTURER:** I don't know. No I don't think so. I don't think so no. No he was a he was a a um senior counsel. And a bilio-biblio-bibliophile. Like like myself. He collected uh. He was an advocate and uh uh you know he had a thriving practice [inaudible] but his his passion was books. Um and he collected these old books and in his time you could still collect them you could still collect these books.

109 Um one of the great um commentators is called um uh Cujacius. And he wrote a commentary on the Corpus Iuris Civilis of 43 books. 43 volumes. On the commentary and of course because he was much later he he wrote much more understandable Latin. Um and he's extensively quoted, you will find

him in Bank of Lisbon as well. And um of these 43 one I think it was volume 4 came up for auction um beginning of last year. Um uh uh and although it was an important volume I think it was on delict um the price that they got for that one volume was $43 000 dollars. For this one volume.

110 And when Glenda, Glenda Fick and I went to to look at these books the first book, the first thing that I saw – he had a study about the size of this room – and the first book, the first thing that I saw when I walked in into the door, there was the full set of Cujacius. The full set, brand- in pig-skin. Br- not brand new but virtually untouched. The full set. So that's $43 000 times 42. Um and so he asked – his son is an engineer, this Suzman's son is an engineer, and his mother stayed in the house and his mother died and then and he's of course emigrated, and they just want to get rid of the books and he said 'Are you interested in these things?' And I said 'well, vaguely' [laughs] No no the thing is we already have Cujacius, we have the full set of Cujacius in our old authorities room. So now we have two.

LECTURE 15

001 **LECTURER:** We're going to look uh at how a judge uses these things in a court case uh and I'm going to talk a little bit more about somebody – you must have an idea of what I'm talking about – they're just restoring the old authorities room uh because we've got to make place we've just got another donation of uh old authorities so we're extending the old authorities room and as soon as that's finished I will take uh a couple of you to go and look uh at the uh old books. But see to it that you know a couple of names, not just the famous names. A couple of a couple of names of Roman-Dutch authors. When you read the case that I've prescribed for your assignment you will you will get into contact with uh a lot of uh Roman-Dutch authors. Um if there's anything that you don't understand please just come and ask me. Uh because it is a it is a difficult area to-to-to traverse.

002 Um today we're going to do [coughs] customary law i.e. the law of custom. Indigenous law, the writings of modern South African authors which is also important and then just in passing the Constitution because we're coming back to the Constitution. We must know that the Constitution is also a source of law.

003 Now, the trickiest one of the lot is uh uh as I wish to as I like to call it the law of custom. Now the word customary law uh is very confusing as is the word common law. Common law and customary law are words that have different meanings in different settings. And those words are going to confuse you right through your uh legal career if you don't fix it up now. We know that um customary law can- is also known as indigenous law in other words the law of the first nations, the unwritten oral traditions of the first nations of South Africa. It is technically probably better to refer to that as indigenous law. Although there are people with political uh uh uh perspectives and agenda that uh that does not like uh the word indigenous law but at the moment its difficult to accommodate everybody.

004 Customary law is therefore the law of custom. And its that rare part of the law where a long-held custom becomes a part of our formal law, either through legislation or through a precedent. Uh this this does happen progressively and retrogressively in other words it happens by extending our law by incorporating customs into our law. And it also happens by um taking certain parts of our law that is fallen in uh disuse and removing it from our law. So it has a progressive and a re-retrogressive uh action.

005 A custom is nothing – its not a magical thing its nothing that you should be afraid of – it is just a common usage. A custom is something that is um done by a certain group of people for a very very long time and that has amongst that group of people, recognition. It then needs, it then becomes um so important or so inf-influential that uh it needs to be formalized. And that usually happens in the form of a court case or it can also happen in the form of legislation. The example that we've got in our textbook uh page 88 and

further is the example of *Van Breda v Jacobs* 1921 AD 330 [writes '1921 (AD) 330 on the board]. OK

006 Can somebody can somebody tell me what this means? What have I what have I written on the board here now? [some students mumble an answer] Hmm? Quickly, quickly? What does this mean?

007 **STUDENT 9:** That is the year of the journal that publishes that particular case.

008 **LECTURER:** It is the year that the court case was reported. Its not the date that the court case was heard ladies and gentlemen. It was heard before. But if you look in the South African law reports you will find in 1921 um there is an appellate division report and in the appellate division report you will find this case.

009 OK I've just now blabbered my big mouth off. What, what does that mean? [referring to the '(AD)' on the notice board]. [some students mumble the answer] Hmm?

010 **STUDENT:** Appellate Div-

011 **LECTURER:** What d- that doesn't – its like saying water is water, what does that mean?

012 **STUDENT 3:** It means that the case went through a certain div- uh went through a certain section and then it was appealed and so it went further to the appellate division.

013 **LECTURER:** Appellate division. Where what is the appellate division? [a few students mumble] What is the appellate division?

014 **STUDENT 3:** Isn't it a higher court?

015 **LECTURER:** Yes. And where does it sit? Don't- you're not – please don't feel obliged to answer all the questions! Especially these gentlemen that arrived late from their holidays can perhaps also contribute. Where does this court sit?

016 **STUDENT:** I think above the Supreme Court?

017 **LECTURER:** Does it sit above the Supreme Court? It must be very uncomfortable for the Supreme Court then ne. [some students laugh] Where does it sit, locally? Location-wise?

018 **STUDENT:** Oh um [inaudible]

019 **LECTURER:** Hmm [leaning forward to indicate that he cannot hear].

020 **STUDENT:** Bloemfontein.

021 **LECTURER:** In Bloemfontein. Bloemfontein. There's a court building in Bloemfontein, up to today and its got a very interesting architecture and if

you go to Bloemfontein please go to the clerk of the court or the re-re registrar of the court and ask if you can just uh if the court is not in session just go and look at the architecture. It is 1920 1930 monumental architecture. In other words huge big uh monumental building that is very imposing and that you can see is a building of authority.

022 Um interesting building. You can see the courts of the of the of the Supreme Court of Appeal there. And most interesting of course is the library. It is one of the best equipped libraries in South Africa as far as common law sources are concerned. So old Roman-Dutch, old Roman and Roman-Dutch sources if you can't find it anywhere you will find it at the Supreme Court of Appeal. OK. And what does '330' mean? [starts writing 'Van Breda v Jacobs' on the board]

023 **STUDENT 9:** The page

024 **LECTURER:** Dankie. OK this is a case that you must go and read ladies and gentlemen. It is a case by the wonderful and very eccentric and very learned uh judge of appeal Solomon. Um and you must read the case – its not a long case, its only four pages – and you must read the case so as to so as to understand his personality. Solomon was one of the of the bright lights of the 1920 the 1920 appellate division. A brilliant, brilliant jurist.

025 Um in this case what happened is that … I don't know … [starts drawing a contour of the South African coastline on the board]. OK that's what South Africa, that's what the Cape Peninsula looks like. Are you with me? OK here is Cape Point. Have you ever been there? Ever seen the baboons in Cape Point? Any of you been Cape Point? Hmm? Has a/ What is funny at Cape Point?

026 **STUDENT:** The wind

027 **LECTURER:** Yes the wind! The wind but that's a that's endemic in the whole Cape. What is strange about Cape Point? [long pause] Ooo hoo! Yes?

028 **STUDENT:** Isn't it a national park?

029 **LECTURER:** Yes it's a natural park, the whole area here thank God is a national park otherwise you know we would have rich South Africans building disgusting architecture on the coastline and they can't do that now because it's a national park. But that's now what the important thing … what is the mythological point of Cape Point?

030 **STUDENT 9:** Isn't it supposedly the place where the two oceans meet?

031 **LECTURER:** Yes! Brilliant. That's very good. This, ladies and gentlemen is the Atlantic Ocean and this is the Indian Ocean. And this is the pay place this line is a um imaginative line imaginary line where the two oceans meet and if you stand on Cape Point you can, and you're not blown away by the wind, you will see the meeting of the two oceans. But you must look very carefully, its just a little [makes a splashing motion with his hands].

032 **STUDENT 9:** Isn't it a myth though sir?

033 **LECTURER:** It is a myth ja of course.

034 **STUDENT 9:** Because actually the furthest point is Cape Agulhas isn't it?

035 **LECTURER:** Yes but its not the furthest point that is that is the is the .. but it's a myth of course the two oceans you know you can never say the here I mean who [shrugs shoulders] where does the Indian Ocean come from, where does the Atlantic Ocean come from its man-made things. Its not its not um …

036 Two other stories about Cape Point of course. Is the story of the Flying Dutchman. The Flying Dutchman? Don't know the story of the Flying Dutchman? Der Vliegende Hollander? Richard Wagner, its an opera. You don't know it? Don't know the story? Don't know your own mythology? We have so little mythology in this God-forsaken country although after being to Greece … [sighs] with all that mythology its not um perhaps not a bad thing.

037 But that's now off the record um the vlieende, the Flying Dutchman ladies and gentlemen, have you ever heard the term the Flying Dutchman? [students answer 'yes'] The Flying Dutchman is a Hollander, is a man from Holland, as a sailor – this is now mythology please don't ask me now what is his address or can you email him or things like that – its mythology. And he comes to the Cape every year. He comes in a in a in a phantom ship uh in the middle of winter when the storms are at their worst and he comes uh to the Cape in the phantom ship and he then lands at the Cape and he is bound to stay on his ship for as long uh as he cannot find a woman that is true to him. Its his mission to land in the Cape and to find somebody that really truly loves him and to make uh to make uh make her his bride and then he will be released from his ship. And that's the that's the mythology. He has as of yet he has not been successful! He's not found his loved one. I don't know it that's got something to do with the ladies in Cape Town but that's the [class laughs] another story.

038 And then the other story about Cape point ladies is [writes 'ADAMASTOR' on the board] Adamastor. OK now I'm not going to tell you about Adamastor you must go and look that up for yourself. There's a picture at the Wartenweiler uh Library, a beautiful picture that was donated to the university uh about the exploits of Adamastor. So please go to the South Africa encyclopedia and look up Adamastor and come and tell me what is Adamastor.

039 But that is all by the way. What happens here [referring to drawing of Cape Point coastline on the board], over here is Simonstown, you know Simonstown? And then a little bit further is a little village called Fishhoek where the owner of the original farm of Fishhoek said that Fishhoek may be developed into a burrough, may be developed into a town, but with the provision that no liquor licence will ever be awarded to any business in

Fishhoek. And that ruling still stands. So if you go to Fishhoek and you go to the Spur and you want to order a bottle of wine you will not be successful unless they break the law. Because you may not have a restaurant or a hotel and a liquor licence. Very a very conservative old man. And the people at Fishhoek are also a bit funny but OK.

040 This is now Fishhoek, what is important is that this case [refers to 'Van Breda v Jacobs' on the board] is about the stretch between Fishhoek and Cape Point. This stretch. And this stretch is very famous for some very good uh fishing. Or it used to be very good fishing well the better fishing is on this side, Kommetjie and Bobbejaan's back, grot whatever, uh is where you used to find all the crustaceans and everything but in the inside of the bay, this is False Bay, in the inside of the bay you found beautiful line fish. Beautiful line fish, in the old days, the 1920s.

041 And the custom was: when a fleet of ships, or when a fleet spotted a school of fish, and they started proceeding towards the school of fish, it was a custom that another fleet or another ship may not intervene and then lay claim to the school of fish. Do you understand? You have one little ship [Draws a ship-like object on the board] , that is the ship and the ship is on the sea. And here you have another ship. OK. Over here you have a school of fish. This school of fish was first spotted by this boat. If this boat starts to proceed in the direction of the school of fish, this boat may not also proceed and cut off this boat to catch the school of fish. That is the custom. It is an old seaman's custom. It is a gentlemen's agreement between the se- the people catching fish in that area of the Cape. OK. Its not a law. It is a gentlemen's agreement. So of course what happened, this was uh Mr Van Breda and this was Mr Jacobs, they were the two skippers on the ships and Mr Breda saw the shoal of the beautiful school of fish, he went for he already as a matter of fact cast his nets to start catching the fish and then Mr Jacobs cut him off. And there was a dispute. And they went to court in the Cape and then eventually to the Appellate Division in Bloemfontein.

042 And what did what did what did Sam- uh Solomon uh JA say about this case? Now its very interesting. I want you to go and read the case but even if you don't read the case the extract in your in your coursepack in your um textbook is also very revealing. Solomon referred in this case to both English law and Roman-Dutch law. The English law that he referred to is called Halsburys.

043 Is there anybody that knows what Halsbury's are? You're not as kind as one student very kindly told me last year or the year before, they're a kind of English toffee. But its not a kind of English toffee [subdued laughter from class]. Halsburys. Halsbury anybody? Got an idea of Halsbury's? Halsbury's is the same as Joubertsbury's. Jislaaik! That's very helpful ne! It's the same as LAWSA ladies and gentlemen. Halsbury's and LAWSA [writes 'LAWSA'] on the board, the Law of South Africa, is exactly the same. Halsbury's is the English version of the South African publication LAWSA. LAWSA was done by

Professor WA Joubert at the university of Stel- uh UNISA and therefore it is known as Joubertsbury's. And Halsbury, I don't know why its called Halsbury it probably ear Earl of Halsbury, the Earl of Halsbury was probably the author of the English publication.

044 What is LAWSA? LAWSA is an enclyclopedia of South African law organized according to uh subject … so I think at the last count there were 35 volumes and in these 35 volumes you have, like the Encyclopedia Britannica, but just law topics. So you start with A 'Arbitration' and you end with 'Z', Zenophobia, but the legal implications in South Africa about those titles. OK.

045 So, Solomon started by referring to Halsburys and in Halsbury's he quotes that in the s-m law of England is that if a custom is to be made into law it should satisfy four requirements. Uh now the ancient English is very beautiful so let me read that to you. First it must be immemorial. Secondly it must be reasonably, reasonable. Thirdly, it must have continued without exception since its immemorial origin. And fourthly it must be certain. That was introduced by by Solomon to uh the cult- the custom must have existed for a long time. It must have been observed generally by the community in which it applies. It must be reasonable. And its contents and meaning must be certain and clear. Its all in the book. Do you want me to repeat it again? Yes please. OK.

046 Custom exists for a long time. Custom must have existed for a long time. What Halsbury calls immemorial. So long that you can't remember where it comes from. It must have been observed generally by the community in which it operates. It must be reasonable. Its contents and meanings must be clear and certain.

047 Not only did Solomon refer to Halsbury's but he also referred to Voet. Who confirmed these four requirements. Um and he also referred to another Roman-Dutch writer called Mer-ula. Merula. OK. So when you go and read this case make sure that you know about the sources that judge Solomon has used to come to his conclusion. Of course the most important thing is that you must know the criteria for a custom to become law is and what was decided in the case. Yes?

048 **STUDENT 8:** I want to ask a bit of a random question

049 **LECTURER:** You always ask random questions

050 **STUDENT 8:** Um when one is in a parking lot and there's competition for parking and you indicate to get a parking and there's generally a respect that no-one's going to cut in and steal that parking for you. Could that be said to be customary law?

051 **LECTURER:** No I don't think so. Um unless you go to court and the court decides that this is um um a custom but I don't think that that is …. *Especially* not in South Africa and *definitely* not in Greece. Um it is not accepted as a custom. [class laughs] Uh I think the more acceptable custom is, you know,

survival of the fittest. First comes first served I mean if I can squash you out I will you know, you've got no right or patience to say that you know a gentlemen's agreement that uh …

052 In England its different. England you know is based on tradition. England is based on customs and things like that. More probable that you could say there's such a custom. In a rural village. No in the city in England either, I can assure you. But that is very that is very its not um … It falls down on the requirement that it is not accepted by the community .. as a as a general rule. People don't accept that that if you put your indicator on then you're entitled to the parking spot. Not the whole community, definitely. Its actually a very small part of the community. OK I might be wrong I'm just answering off the cuff, I you know … You might have another answer you might argue differently, I you know, I don't know. OK um [laughter from the class].

053 The uh flip-side is just as true. If you have a custom in a certain community and that custom has become um outdated, then the court can declare that custom to be out of use and no longer uh binding. The example that is given in your in your textbook is the example of Green v Fitzgerald. Um and in that case it was decided that the view that um that adultery is a criminal offence, it outdated and doesn't fit with a uh doesn't fit with a uh modern society. So adultery cannot as of right be accepted as a criminal offence according to Green v Fitzgerald. Um it is no longer a criminal offence it is just a uh violation of uh certain marital rights. So that gives an indication that pro and contra that the that the custom can be instituted as from Breda v Jacobs, and can be removed as in Green v Fitzgerald.

054 Ladies and gentlemen there are many many customs. Um uh the uh one custom that is or one area that bristles with examples with customs that it really strange because it's a really sophisticated part of the law uh and that is um commercial law or uh trade law. Um uh and maritime law. Uh shipping law in other words. Lots of the lots of the very very important um uh agreements and um understanding between parties when they underwrite insurance for a for a uh container ship or for any ship for transport of any ship is absolutely rife with customs.

055 Um not to confuse you just an example that I'm sure that you will know of or perhaps you won't know of its also becoming less and less popular nowadays. But one of the example in trade law that we can use as as a custom is that when you go to a bank, you enter into an agreement with the bank that the bank will keep your money at a uh certain interest rate. Uh and will have the money available at all times when you want to withdraw the money. That's the normal bank-client relationship. Of course we all live beyond our means and what happens is people go to a bank and they say 'Look I'm just going to need a couple of thousand rand this month as bridging finance'. And then they arrange what is called an overdraft. Um that overdraft is usually set at a certain maxiumum. But it is custom that the bank will be lenient on uh on that limit. If your limit is a R1000 or R10 000and due to um and due to

uncleared effects in other words you've got cheques that you've deposited into your account but they've not been cleared yet. Or interest that you must pay to the bank, or a bank fault, or any other reasonable explanation. And you go over your limit.

056 Now what should happen if you go over your limit its strictly speaking theft. Because you're taking money from the bank that is not yours. And that you've not made an arrangement to take. So it is very very serious. But there's a custom, there's a custom. That that is what we call a liquid uh uh maximum. A liquid um uh border. If you go over ten or fifteen rand or a hundred rand or in some cases even a R1000 depending on what are the reasons you're going over. If you're just randomly writing out cheques um and you're not um and you're not honouring the the agreement between you and the bank the bank will be sending uh your cheques back. Uh but the bank has got a certain discretion to allow some of the cheques if it feels the money's in the bank, its not been cleared, there's a very good chance that it will be cleared, we are going to allow you to use this uh in the meantime. Or if you go over to the amount that they've raised interest or bank charges nowadays very high, they won't uh uh they won't disallow the bank charges or the interest of course its for their own benefit. So do you understand? It's a custom that its not a hard and fast rule.

057 And national and international trade law is absolutely rife with these kind of international and individual understanding uh understandings whereby things are not hard and fast and that there is a margin of appreciation. Oops [in response to student doing something?]

058 Any questions? [pause] You can you can start a custom, you can you can um confirm a custom by legislation or by um precedent, you can change your law, you can abandon a custom by legislation or precedent and um custom can also exist even if you do not confirm it by legislation or law. It is just in the nature of a specific agreement, usually a trade agreement in banking or maritime law. Sjoe there must be some question? Are you happy? Are you uh do you think, do you think these requirements for custom is … do you think that they are enough? You don't want to think today. [pause] Nothing interesting. OK.

059 Um so so what can we say, um will you be able to identify a custom if I give you one in a in a casus position, in a set of facts? Hmmm mmm.

060 **STUDENT 3:** How would you do that?

061 **LECTURER:** How will I do that? Um I will just I will just like I've just done with the word cheques, with the overdraft, I will just, I will just give you a casus positio of a set of facts and say identify the custom and uh say whether you think the custom is valid.

062 **STUDENT 8:** We'd have to identify that overdraft [L: Mmm mmm] banks are generally lenient [Mmm mmm].

063 **LECTURER:** Something like that. Yes?

064 **STUDENT 8:** What would happen in the situation where you did not want to abide by the custom? For example, the whole liquid thing. That landed up costing me like a thousand rand in interest which I didn't want to pay because I didn't I didn't want the bank to give me that extra leeway, I wanted would have rather they said 'Listen we're not taking the money out of the account' and just let it stop there, like a roof instead of letting more and more go out of the account.

065 **LECTURER:** Mmm

066 **STUDENT 8:** So if you didn't want to abide by that custom how would you go around …

067 **LECTURER:** No well uh yo the wonderful thing is we've got freedom of contract. [clears throat] When you open a bank account that's a contract. When you when you uh enter into an agreement with a bank that's a contract. If you write to the bank um 'Dear sir, I refer to the above and the meeting we've had uh uh yesterday at your offices on such and such a date and such and such a time with mr so and so or ms so and so or whatever, um, I confirm the terms of our understanding um regarding my uh overdraft is as follows: 1. It will at no time be more than such and such. Interest charged must be within the overdraft and not be allowed to transcend the limit imposed.' I mean you tell the bank that they shouldn't do it and then they will. If they then go over that then they know that you've said no and they are at risk. Um not that you can say that 'I won't pay it'. You've also got the obligation to keep to that understanding. Um you know but then you make it a firm border. Um and then they will of course just send your cheques back. Um which is even more expensive.

068 So uh you know banks and insurance [laughs] you can never win. You know. When you need, when you need money the bank will never give you money. And when you don't need money you know they can't wait to like the Americans home loan industry now they can't wait to give you more money than you can afford. Uh but now you know they've discovered that people can't repay, and now there's a credit shortage and now its five or six years we're all going to suffer. You know. I saw last night on the news Mr Soros' big guru on international international finance said the good times of the past sixty years are now over. Oops! I never I never thought it was so good but any case he said its over so … you know… you're going to suffer.

069 Believe me I don't know how people how people survive you know if you start off with a with a articled clerk's salary I don't know how you survive without credit. Because its just impossible. And now its going to be impossible to get credit. Uh so it is difficult.

070 But the best is to say its like, the short answer is n-n open a savings account. If people come to me and they ask me advice – people seem to think that I

know everything and they always come and ask me these strange questions – don't don't start a uh um current account. A) its far more expensive and b) you always go into overdraft. Its its human. Starts a savings account. There's there's no there's no problem with a savings account. You can't go in overdraft. And they pay you for the money that you've got in there. So if you, you know, if you want to make sure that the bank don't charge you exorbitant service fees and fees that they. Start off start a savings account.

071 And never never never take out life insurance. Never. Unless you've got seven hundred children. And you know you're impoverished. But even then, how you going to pay the premiums? Life insurance is is is you know is the worst thing that you can do. Its like taking good money and throwing after bad. You never get the money back. Um its it won't look after your family. And you're just taking money and giving it to an insurance agent. For his commission. So please. Second-hand car salesman, insurance salesman uh encyclopedia sellers, those are people that you don't open the door to. [class chuckles] OK. Any any more questions? [long pause] Is it just the first day of term that you're so … yes? Sorry!

072 **STUDENT 3:** I was just thinking, what are there examples, say for instance, I'm assuming that there was custom before the Dutch came to the Cape and before they invaded South Africa. Amongst the indigenous people …

073 **LECTURER:** They didn't invade South Africa but yes …

074 **STUDENT 3:** Just a figure of speech. Um

075 **LECTURER:** Before they colonized South Africa.

076 **STUDENT 3:** Um did they/ are there still indigenous customs from indigenous people that exist today.

077 **LECTURER:** Um I suppose so. Look [fumbles for words] Who you referring to? The people that Van Riebeeck encountered?

078 **LECTURER:** Yes.

079 **LECTURER:** Well those were the strandlopers and the Koi and the Koi-San. So they were the uh uh the indigenous people of the Kalahari. The the the Koi and the Koi-San were the people who lived in the desert and the Strandlopers were the people that lived off the sea. The hunter-gatherers that lived off the sea by um harvesting the the you know the sea. Um uh how will we know? You know, there are still small pockets of those people left and uh I was at a conference one day with professor uh, what is the chap, Albie Sachs and he said, you know, um he's he's quite eccentric as you know, and he sang the little song 'Wouldn't it be lovely?' You remember? You remember the 'My fair lady' song? And it was at a big conference [a few females are laughing hard at this point] a legal historian's conference and he sang this little song – 'Oh wouldn't it be lovely' if we could have a book of Khoi San customs. Or if we could have a book of Venda customs. Or um Zulu customs even. Zulu

customs are more accessible. Granted. But um all those things are oral traditions so they are lost and you can through enormous and intensive research you can discover some of the customs, but once again, who are the people who would attend to this research. It would be it would be uh in the 19th century [student's cell phone rings] that's very seductive and sensual … It would be it would be missionaries. And it would be colonial officials. And they were all westerners, they were all um you know without putting a too fine point upon it they were all white people. And you know, what do we understand? Um ..

080 **STUDENT 3:** There was yesterday, I'm just

081 **LECTURER:** Mmm?

082 **STUDENT 3:** I'm just wondering whether this is an example, yesterday in Persons and Family they were talking about domicile and they were talking about minor- uh children of minorities and things like that and how they don't recognize certain marriages but they recognize indigenous Africa … something about indigenous African marriages and Christian marriages but they don't recognize Muslim and Hindu. Or something like that. I was just wondering if the indigenous African marriages – if that was a form of custom or …

083 **LECTURER:** No no definitely, that would definitely be part of what we know, of what is known, because it's a it's a living institution, I mean lobola is a living institution. Um and those are things that we know about. Um they're still not part of the mainstream un South African law but certainly those are things that we know and that we can use. Um I don't know exactly what was said in Persons and so on, it's a bit vague to me but um uh uh u uh the only thing I can think that they tried to discuss is the polygamous nature of of of black marriages and the polygamous nature of Muslim and uh marriages. And that was in the past that was seen as offensive to Christian values. And therefore they didn't recognize it. But that of course now has changed. OK.

084 Um ladies and gentlemen I uh would like you to do the following for me. I would like you to um go read um the classification of the law, chapter four. Uh for Thursday. Its not a long chapter, um, and I would really like to to to to finalize that in um in one lecture. Um so please um I will brings some study aids to the class and some handouts so that you will understand it but please read the classification of law, chapter four, so that we can finalize that. Thank you. Bye bye.

LECTURE 16

001 **LECTURER:** [In response to student arriving late] What is that sorry? Sorry because you are you missed Tuesday or sorry because you are late for Thursday?

002 **STUDENT 14:** Because I'm late for Thursday

003 **LECTURER:** OK we'll get to Tuesday at another time. OK but we're very glad you're here. And you made it back from Greece. Its not everybody who makes it back from that small little country.

004 Um so um I can strongly recommend it. It is a very good play and um the the idea of the play, if you know anything of Tom Stoppard is um he takes the the play of Hamlet, of Shakespeare, and he turns it around. He takes two of the minor characters in Shakespeare's Hamlet, Rosecrantz and Gildenstern and he shows in his play what goes on behind the scenes with Rosecrantz and Gildenstern while Hamlet is on the main stage. So it's the flip side of Hamlet. Um and of course Tom Stoppard is extremely intelligent and clever and witty and he can work with uh he can work with words. So it is an exercise in trying to catch what Stoppard had to say. And if the students are any good because you must be very good to follow up the wit from one sentence to the second sentence, then it is a wonderful play. I don't think it can be expensive to go at the Wits Theatre.

005 And it's a very good, it's a very good exercise for for law students to go to a play like that so that you can sharpen your wits. Because what happens, in a funny way, what happens in Stoppard, what happens in the theatre is what's going to happen one day in court. Um you know. Yes, preparation is everything regardless of the details and you can't be a good lawyer if you don't prepare. But the good lawyer is distinguished from the exceptional lawyer in the areas where you are not prepared. And that's – and I'm going to say now a controversial thing, I don't know if I should say this – um, let's neutralize it and say some people are better lawyers than others because they can think on their feet. Because they've got the mental capacity to be not just witty but to be intelligent in responding to a challenge which you've not prepare for. That is the that is the exceptional lawyer.

006 And the way to sharpen that kind of that kind of uh ability aptitude that you might have is to go and listen to something like Tom Stoppard and see if you can catch what he's saying. And react and see if you can match his wit. After you've seen the play and you know what the play is – because it's a very complex play – its not a,you know, its not a, its not a jol its not like, you know the High School Musical [laughter] this is heavy, this is heavy intellectual stuff. So you know don't don't uh don't think it's a Saturday night out. After you've seen the play go and buy the play and go through the play and see um how much of the play did you, did you pick up. Because if you read it, you know, it becomes very easy. And that's how how you can sharpen that kind of of wit and intelligence that you might have. Very important, you know I

strongly recommend you to go and see uh things like that. Um compli – complicated, clever language plays. OK [coughs]

007 We're going to finish/ uh any questions? Any questions? Do you know, do you know what I'm talking about? Hmm? Hmm? Hmm?

008 **STUDENT 1:** When is it?

009 **LECTURER:** Now. I don't know, you know the thing at Wits. You know – oh dear [referring to OHP]

010 **RESEARCHER:** There's a plug there.

011 **LECTURER:** Oh no there's a graduation ceremony this evening you know and I'm going but I don't quite know where it is and I don't know what time it is but anyway it will take place and I will find out uh you know, by the end of the day. Uh, yes, but its on Saturday. At the Wits Theatre, I think, something like that.

012 **STUDENT 14:** Um just another thing with regard to thinking on your feet and everything, for everyone, the Wits Debating Society works every Thursday from uh six at the Senate House Basement if you want to come that will ….

013 **LECTURER:** Are you there?

014 **STUDENT 14:** Yeah

015 **LECTURER:** That's good […] But the better thing will be next year to enroll for the Law School's moot competition.

016 **STUDENT 14:** Can we do it next year?

017 **LECTURER:** I don't know I think so yes.

018 **RESEARCHER:** Uh yes, it's a list 2 elective.

019 **LECTURER:** We're looking for we're looking for new moot talent um and uh there's a new intake every year there's a new competition every year. And if you win, if you're good – I don't think it starts in January I think it starts somewhere in September, but we'll send out notices. Um if you win, if you're good you end up going to to Washington. For the for the for the finals. And if you win there – and I think we won, we won there once or twice – uh you come back and they, you know, put golden crowns on you and become – you know, you're a folk hero kind of thing.

020 **STUDENT 14:** That's a third year course um

021 **LECTURER:** No no no that it

022 **STUDENT 14:** Uh its code

023 **LECTURER:** that's also but the moot competition, that's the subject moot, where they teach you how to argue in court. But there's also a competition that the law school runs.

024 **STUDENT 3:** Sorry sir, can I ask you a question? What is the purpose of – ok, other than academic purposes – but what is the purpose of doing an LLM?

025 **LECTURER:** Um, well we're going to do the legal profession uh later I can answer then, but just a short potted version is: The LLB um the straight LLB that you do when you come to the Law School from school, in other words the four-year LLB um is um in uh in many aspects um not a satisfactory LLB. Its not you know its its not as good as the old LLB was with the three-year arts or commerce background and then two-year law background. Uh law studies. Um so when you you're going to a prestigious law firm um they're looking for something more than just an LLB. Um an LLB has now become an undergraduate course where it used to be a postgraduate course. A sui generis postgraduate course but nevertheless a postgraduate course. So in order to augment your undergraduate LLB um it is wise if you cannot get articles, or if you are academically inclined, to come and do an LLM. So as to get the same status and the same standard as the old LLB that was a postgraduate course so that you get the LLM which is now the postgraduate course to make you more competitive or marketable, whatever.

026 **STUDENT 3:** You can, you can, it is possible to gain articles on a plain LLB and you won't be very disadvantaged if you just have it …

027 **LECTURER:** Especially if you have, especially like you if you have a previous degree uh plus an LLB. Um it doesn't apply to you because you are doing the old route. You didn't do the arts or the commerce background but you did you know all these funny things that you did. Human you know what you did anatomy and you know sexual psychology [laughter] you did before you came here. And although that's very good, it gives you a more rounded uh degree. So it would be much easier for you to get uh articles than for a four-year LLB person to get articles.

028 **STUDENT 3:** And to study to be an advocate you do your two-year articles ….

029 **LECTURER:** No no no

030 **STUDENT 3:** and you do your attorney's exams ….

031 **LECTURER:** No if you want to become an advocate you only need to do six month's pupilage. There's a difference between articles and pupilage. Pupillage you get a master at the at the uh uh a senior advocate or an advocate that you have confidence in and you enter into a contract with him and you go with him for six months just to so that he can show you the ropes. Um you're not paid for that six months uh but you must do the six months to be admitted to the bar and um when you're admitted to the bar, after you've written your bar exam, then you become an an admitted advocate.

032 **STUDENT 3:** And that's um and then OK so you don't have to do your articles first and then do that.

033 **LECTURER:** Well, uh you know, it's a difficult question. Its like, you know, it really is a difficult question. Because if you are a the bar uh uh and when I say at the bar it means if you're an advocate, you rely one hundred percent on the um side-bar, and those are the attorneys to send you briefs, to send you um to send you work. So if you go directly from university to the bar you're going to sit in an office somewhere here in Johannesburg and wait for your telephone to ring and its never going to ring. Because nobody knows about you. So in that sense it is much much better to go, do your articles, build up your contacts as they say, during your articles you know get to know as many lawyers uh many attorneys as possible um see that you know the attorneys in your firm uh very very well so that at least they will brief you when you're an advocate, and you must also be um you must have a very good reputation. Now if you're straight through your LLB by you know getting 60 or 68% you know that's not good enough. You must get your LLM uh LLB cum laude. You must you must be distinguished. People must talk about you. Um and then you know you must get a distinction in your in your admissions exam for the bar or for the um uh attorneys' profession. Uh and people must you know there's one thing that a lawyer can't resist and that is gossip. And the whole profession is built, in a positive and a negative sense on gossip. Um its not negative gossip but people because its such a small profession people immediately talk about your performance in court.

034 Um to give you an example we had a colleague here who was a very good lecturer and he was a student of mine he was a very good student but irritating student, he asked very piercing and um tenacious questions, you know, he wouldn't let go. You know if you didn't answer the question he'd come to you afterwards and say 'look you didn't answer the question, I want the answer'. Uh so he was a difficult student but a very good student. And he became a lecturer here and he was a very good lecturer and he wrote a book and decided to go to the bar. He wrote his exam, he passed his exam with flying colours, and because um um my wife is an attorney, and I mix with lots of attorneys, uh within three or four months everybody was talking about him. Uh as the new guy at the bar whose brilliant.

035 Also professor Cockerell who was also here, who decided he doesn't want to stay in academia, and he went to the bar. Now he already had a reputation, everybody knew him, he published widely, he's a confirmed, very established academic, and he then went to the bar. And immediately he got enormous briefs, you know, um uh you know constitutional court cases and very important cases. And he's doing exceptionally well at the bar.

036 But that's what I say, people are all talking about one another. And people are all talking about whether you are good or not at the bar. So the attorneys know, when they've got a case, who to brief. They know who are the bright stars. And if you're one of those bright stars you'll make it at the bar.

Whatever you do to get there. But you must be a bright star. Uh the bar's not for mediocre people. Um you know. I can say it because I'm not there. Um its not for you know you can go to the bar and you can open your office and you can be admitted but you know the lights are going to be on but nobody's going to phone you. So it's a very tough profession. But we'll have a whole lecture on on the legal profession and then you know I'll answer some more questions. OK any more any questions about the work? Yes?

037 **STUDENT 9:** Mine OK its not about the work but it's a quick question.

038 **LECTURER:** OK

039 **STUDENT 9:** What does LLB stand for?

040 **STUDENT 8:** Yes!

041 **LECTURER:** [smiles] Um there's also a lecture about that

042 **STUDENT 9:** Oh, I thought it was a short question …

043 **LECTURER:** But I can tell you, I can tell you what it stands for but its not a short answer.

044 **STUDENT 9:** OK

045 **LECTURER:** It stands for Baccalareus Legum Legum. Now why it is Baccalareus Legum Legum is of course a long story. Um it comes from uh medieval uh law schools and in medieval law schools – and this is what we're going to do in Roman law next next week so um you know I you you're a bit previous now. But OK in the medieval law schools to qualify as a lawyer you had to sit in a class – now this is going to take very long because its one of my favourite topics you know and we're not going to get to the work [laughter] but I'll just give you a very brief overview. In in in medieval law the professors were chosen by the students and not the other way around. Um uh professors were not paid by the State like today but professors were paid by the students. So uh only the very best professors or the very best lecturers – well probably also stu- uh research professors – only those professors uh attracted a class. So what you do is you gravitate towards a university such as Bologna uh in Italy where these professors are are concentrated. Uh you then have to go to class for seven years and what you do in those seven years is you do a formal lecture in the morning, a moot after tea, or after prayers, because it was still very religious, uh you know what I mean by moot? The professor will give you a text, you must then argue both sides, pro and contra on the text. And in the afternoon the moot carries on and carries on even in the evening. And then at the end of the of the day you have one text of the Digesta which you have now argued from both sides. And you have now copied the Digesta from the professor's copy that he presents in class. After seven years you're supposed to have your own Digesta. To have all the texts in the Digesta. That is only part of it. That is the Baccalareus Legum Civilium. That is the civil part of your legal studies.

046 Besides the Baccalareus Legum Civilium, you also need to have a Baccalareus Legum Canonici, which is church law. You also had to attend classes in church law for seven years. And you wouldn't go to a professor but you would go to a priest. But this is one of the reasons why Roman law survived so long as it did, because the priests preserved the pure Roman law. And that is why the degree was called Baccalareus Legum Civilium et Baccalareus Legum Canonici that is the whole the full title of your degree which some people will be getting this evening. Um and that's why its LLB. OK Any other questions on the work?

047 OK uh let us I just want to say uh two things, um on the previous chapter, um we are going to do a full lecture on indigenous law so I'm not going to lecture you now on indigenous law, suffice to say, the thing that you must remember is that indigenous law is a secondary source of law. Students always forget this, they don't write it down, they don't know what I mean, um yes?

048 **STUDENT 6:** Does that mean that marriages done through lobola are secondary to western civil marriages?

049 **LECTURER:** Well um at the moment we're in a in a area of flux and that that aspect is being addressed by legislation. But certainly, yes. In the past, the um the um Muslim marriages and indigenous law marriages uh were uh secondary to uh civil marriages. That is why you often had uh uh Muslim people going uh to do the Muslim marriage uh in a uh according to their rites and confirm the marriage by going to the magistrate's court and have a civil ceremony. But this is going is being addressed at the moment so that it will be organized by legislation. Um I don't know if its been finalized, I'm not sure uh but there was a work paper and the Law Commission investigated that uh so not to be confused with the fact that indigenous law is a secondary source. Certainly if you have a principle in indigenous law and and you have a strong uh uh court case opposing that principle, especially a post-Constitutional court case, then the court case, being a primary source of law would be stronger than the principle in indigenous law.

050 OK now the fourth source of law which is important uh especially for us in academic, is the writings of modern authors. Um now what we do at university is first of all, we teach, we instruct the youth, we try to train you as a, as a lawyer. And secondly we do research and we try to publish um state-of-the-art articles whereby we attempt to change the law if we think that something uh that was decided in a court case or that was in legislation is perhaps not theoretically one hundred percent correct, um um there would be a series of articles or there would be uh textbooks by modern authors by modern academics and then depending on whether the courts take that into consideration next time when such a court, when such a matter comes to the court, the academics then have influence in changing the law.

051 Now the value that we place on modern authors as you can imagine, is not the same as the emphasis which we place on the primary sources of South African law. Modern authors are rated according to their status. Now as I said

earlier this this morning in in the legal profession reputation is everything. In the legal profession your reputation is absolutely paramount. And whether you are going to whether you are whether you are going to quoted by the Supreme Court of Appeal or by the Constitutional Court depends on your reputation. Um a a academic like Professor Iain Currie or Professor Cora Hoexter who are, I don't know if they've been rated but if they were to be rated they would be A-rated academics. They are excellent academics who've published standard works in both their fields. So if you need to quote an academic on constitutional law then you would go to Iain Currie, um, and if a judge quotes uh Professor Currie, every time a judge quotes him his reputation is augmented. So obviously Professor Currie has got a far more persuasive influence on the courts than a junior lecturer would have on the courts. If a junior lecturer would write an article the courts would wouldn't uh would not it could be an article that could be ground-breaking, and it could be quoted, but it is unlikely. Do you understand the principle how it works?

052 Professor John Dugard who was a professor at this university is an international, an internationally-renowned academic. He is not/ his field is international law but he is an international jurist. He is um the rapporteur for uh for the Palestinian question in the Middle East, um he was a professor at the University of Leiden. And that is the kind of person that you can quote uh with authority. And you can say that the court would follow him. If you quote John Dugard on an international issue its more likely than not that the court will follow what John Dugard said. The court is not bound to do this. It works very much the same way that the ius respondendi worked in the Roman time. If you are a senior professor with an international reputation then the courts will follow what you say. And if you are a junior academic, not impossible that the courts will listen to you, but it is very unlikely that the courts will be swayed by an un- unheard of or unknown academic. It is a secondary source secondary source of law. Its not a primary source of law. OK.

053 Modern law authors, as I've just said, can express their views in a variety of ways. You can become a commissioner for the Law Commission. And you can through the Law Commission and the work and the papers that the Law Commission publishes you can uh uh enforce or uh present your view on certain issues. By writing simply by writing uh articles, um journal articles, peer peer-evaluated journal articles, these things that are prescribed to you – even like professor John Dugard did – he was an academic member of the bar in order words he did his pupilage and was admitted to the bar as an academic member, and he often appeared in the courts for um people who were oppressed by the apartheid system. Who couldn't afford counsel, and he often appeared as *pro amico* for those people where it was where it was a groundbreaking and very important case. That's also one way that um you can present the court with your views.

054 Unfortunately, professor Dugard during the apartheid era was not uh successful, he asked the courts to look outside the scope of the legislation and very few of the judges then um considered that being possible and they rather followed the very comfortable um uh *dicta* of *ius decere non facere* – our task is to uh speak the law, not to make the law. OK that brings in lot of lot of philosophical questions but um that is that is what happened. And then of course the final the final way in which you can make your views known is through writing a textbook. If you are an authority on your field, if you're an authority and you've been a professor for a long time in your field, uh like Professor Hoexter whose just written a magnificent book on administrative law, um uh and uh that book you know, not only reflects the law as it is at a certain stage uh in life, end of 2006 I think, but it is also her view. Certain interpretations certain uh uh innuendos and slants on the law is of course what she thinks how the law of uh uh administrative justice should be. Because its her book. And she teaches from that book. She teaches to her students and the book is quoted in court. It is a leading textbook on administrative law. And through that, through process of osmosis, um her views become the views of the legal profession. OK those are the big guys, you know, I'm not uh its not everybody whose a professor that that gets to that. Um OK.

055 Any questions on that? Authors? Not too difficult. Constitution? Constitution the primary source the primary source of um South African law. We live in a constitutional democracy. We used to live in a um parliamentary sovereignty where parliament was the highest source of authority. We now live in a constitutional democracy where the Constitution is the highest source of law. Don't want to say too much about that/ there's/ I'm going to give you a lecture on human rights and we'll talk more about the on the Constitution uh uh then. Suffice for you to know that – but you will know if you follow introduction to constitutional law – the constitution is the highest law in the land. And it cancels all other laws, it uh overrides uh legislation, the Constitutional Court can declare legislation invalid, and it can also invalidate precedents. It can invalidate um uh case law.

056 OK not too many questions on that I take it? Are you happy? No response. There's a rule of English law and you know English law's very different from South African law, but there's a rule of English law that was laid down by Sir Thomas Moore. Do you know what that rule is? I wish you could say it in Latin, I've forgotten the Latin. Silence implies consent. Silence implies consent, so if you don't ask questions or you don't propose something it means that you agree. OK. Perhaps you can think about that.

057 Now, the main course for today's lecture ladies and gentlemen is the classification of the law. Um the classification of the law is on page 97 of your textbook and there's also a more thorough classification in the coursepack that is prescribed for the undergraduates. Uh somebody got the coursepack here? Can you do you know the page number of the of the of the scheme?

[student mumblings] Classification of law. Classification of the law. It's a it's a schematic um uh table [pause] ja. Well look for it, you'll find it.

058 **STUDENT:** Its 64.

059 **LECTURER:** Page 64 thank you very much, page 64 on your in the coursepack. That's slightly more slightly more complete than this one but this one's more understandable. And this one will help you to answer the questions.

060 Now ladies and gentlemen two things that I want to tell you before we before we start with uh with this thing. Two very important things. And that is, most classifications, most classification of anything, is arbitrary. Why are you frowning like that [name] don't you agree with me? There we a great Swedish, very learned Swedish man called Lineus, have you ever heard of Lineus, Professor Lineus? Huh? Have you never heard of Lineus? Never heard of Lineus? O-K. He was the man that divided the whole known uh natural world all living things …

061 **STUDENT 3:** Oh yes!

062 **LECTURER:** Uh? Ja. You did know but you [inaudible] What who do you know him by?

063 **STUDENT 3:** No we just know it as the Linean classification …

064 **LECTURER:** Yes! You should as natural scientists you should all know about Lineus. Ja well the Linean classification comes from Professor Lineus.

065 **STUDENT 3:** I recognized the name I just didn't know who he was.

066 **LECTURER:** He's the guy that divided everybody, everything into species and/ genus and species. He designed the whole classification system for the living world. And why do we remember him now? Why do we? What is so funny about him now? No you will never get this. It was his centenary in 2007. In other words he was he was born in 1807. So 2007 was 100 years since his birth. Og now I must try and remember where I saw this. Um [pause] Anyway it was some stupid museum in a country that I visited last year. I can't remember where it was but it was not a very good exhibition. It was not a very good exhibition but it was an exhibition on his life. And the museum unfortunately – I think it was in Oslo – and the museum unfortunately only had a few things of his they could show like his cabinet and his microscope and one of his coats and his glasses and things like that. But what they did do – the Scandanavian people are very good at exhibiting things, what they did do is they showed the whole classification. The whole classification that he did and it is absolutely magnificent because it is so simple. It is so absolutely basic and simple. Uh and it works up to today because it is a system that we all understand. Even lawyers can understand it.

067 But but ladies and gentlemen, what struck me at/ when I was looking at this enormous work that this man has done, what struck me is the arbitrariness of

the classification that he's done. He literally sat in Sweden somewhere, I think it was at the University of Upsala, he literally sat at the University of Upsala and he waited for people to send him specimens of plants and insects and then when they arrived he, himself, would decide that this is called now the Hortibolus tacutalis Papuanewgensius. He decided in his little library in his little room. He decided what to call it. Completely arbitrary but it works today because we all accept what he decided. There's no argument about it, you know natural science don't argue about things like that. As long as there's a system, you know, they're happy. Now that is exactly the same with this, and my colleagues don't always agree with me but that's just because they're not philosophical enough.

068 Law is a science that is between human sciences and natural sciences. And therefore it is even more difficult to classify the law into certain systems. This classification that I've given you here, and the classification you've got on page 64, is completely arbitrary. And my proof of this, Professor van der Walt of the University of Stellenbosch, whose a professor in property law, and property law was always, and has always been a very significant part of private law. Property law is the law of things, how you own things, how you transfer property etc etc. When Van der Walt came along, he wrote an article and said: 'We must stop thinking of property law as being only private law. Property law can be public law.' And of course there was a hue and outcry from every lawyer in the land. Because how can you move something from private to public law. And he's explanation of course was extremely simple: uh it was the time of the new constitution, when questions about land rights, questions about dispossession of land, restitution of land to dispossessed people, those are not private law questions. It is squarely in the in the field of the State, and it should be handled by the State and it is therefore public law.

069 So, it was very clever of him to do it, but if you are clever enough you can move anything that we've got here to the other side. Anything you can move around. You must of course give good reasons for it. But don't stare into this thing and think it's the be-all and end-all. It's not. It is a medieval jurist that sat one evening and made a few scribbles and decided to put things in certain compartments that we have it as we have it today. With a little bit of ingenuity you can move anything. Nothing is cast in stone. OK I can see that people are yawning and they want to go have breakfast, whatever. Shall we break for five or ten minutes and then uh try and finalize this classification of law.

LECTURE 17

001 **LECTURER:** L: It is a skill that you must master and it will help you in understanding the whole s-s-system of law. Um I've now already told you about the arbitrariness of systems and the second thing I want to say before we start is, I'm not going to ask you when I ask you on this part of the work, I'm not going to ask you 'where do you place uh something self-evident such as criminal law, or family law or law of property, and things like that. I am going to ask you difficult subjects I'm going to ask you where do you place unjustified enrichment, or I'm going to ask you where you place intellectual property law. Or where do you place um the law of damages. So please make sure that you understand this thing, not only physically as it is here, on the paper, but also intellectually. In other words that whatever I throw at you, you would be able to fit in here with a good reason. OK?

002 Now we start off and of course this book is a secular book and therefore it starts off with the division between international law and national law but before we get to international law and national law there's another law, isn't there? There's another division beyond this. And what is that?

003 **STUDENT:** Canon law?

004 **LECTURER:** No not everybody understands what canon law/ I had a student in the exam saying canon law is the law of war. Because canons [laughter] OK not everybody understands canon law so we say God's law and man's law. You can just write it in at the top there. Um or religious law, secular law. But that is the first division. First division is between the law of God and the law of man. And [moves to close door to shut out noise from building operations] sorry, I'm not going to say much about that, you can spend the whole, literally the whole lecture about on God's law and man's law, um some countries as you know, dominated by religious law such as Iran and the former Iraq perhaps Israel um uh some countries are not are dominated are regulated by secular law. By man's law. Such as South Africa, United States, virtually all the free free … hmm?

005 **STUDENT 14:** Turkey

006 **LECTURER:** No no Turkey is sui generis. Turkey is a difficult one, no Turkey is a difficult one. [clears throat] Turkey's inbetween I think. But exactly that problem that they have in Turkey at the moment, that they don't know whether they're a secular state or a religious state. Um so that is where that argument comes from. And that's where all that in, between God's law and man's law.

007 Then, of course, under man's law we have or under secular law we have the division of international law and national law. What is international law? International law ladies and gentlemen is the law between States. International law is the law between States. It is the law of the sea, if you recall, the law of the sea. It's the law regulating international treaties. It is

also called all the law that is generated by the United Nations. All the instruments of the United Nations. All the treaties of the United Nations. Everything to do with international co-operation or international legal systems.

008 International law, ladies and gentlemen is not when you steal something in this country and you rush across a border to another country. That is not international law. The treaty to extradite you back to the country where you committed the crime, that is international law. But the crime follows you, into another country. And for a limited period you are entitled to follow somebody in hot pursuit across an international border. That is private international law. If you go from one country. You go and settle in another country without becoming a citizen in that country and you marry somebody in that country, the question is which domicile, which country's legal system, under which country's legal system do you do you resort. That is private international law or conflicts of law. That is not international law.

009 International law is also known as public international law in other words the relationship between States. Do you understand? OK

010 National law is also called municipal law. Municipal law, in other words the law within municipal boundaries within the national boundaries of a country. National law, South African national law is the Constitution and all the legislation and all the laws that we have, all the precedents that we have, all the old authorities that we have in South Africa. It is not valid once you cross a international boundary. You go into Botswana, there's a different system of law there, Swaziland, if you go to Ghana you will find there is a completely different system of law uh in that country. Ghanaian law is the national law of Ghana. Uh and um it differs from country to country. OK.

011 National law is then divided then into two, big, important sub-divisions. Substantive law and adjective law. Now, substantive law, ladies and gentlemen, um, substantive law um is the law is – you can also call substantive law the black-letter law. Is the law uh of the land. Uh is the physical, legal rules and uh understanding of a specific country. Substantive law is the law regulating a country. Regulating the citizens of that country and regulating the government of that country. That is substantive law and if you look under substantive law everything under there, public and private law resorts under substantive law. In other words everything [coughs] that you study at university that has got to do with the structure of law, law of persons, law of things, law of succession, uh criminal law, everything that you have rules and principles that you have to study, that is the substantive law.

012 The adjective law, adjective law, are all those things that surround the law and that I call loosely, the rules of the game. In other words, how do you utilize your legal rights? Substantive law tells you what your rights are; adjective law tells you how to enforce those rights. The rules of the game. And under adjective law you have the law of criminal procedure, the law of civil procedure, the law of evidence and the interpretation of statutes. You

have done the interpretation of statutes, we have done it last term. You remember? Interpretation of statutes? Rules of construction, all those things. You remember that? Here's the first yawn [indicating to student]. You remember that? [A few students answer 'Yes']. OK that falls under adjective law because its got nothing to do with the statutes as such. It tells you the rules of the game how to interpret the statute, you understand? It is the rules of interpretation surrounding the statute. The statute itself the law on of insolvency, that is the substantive law. But the rules how to interpret it, that is a separate subject that we've done earlier.

013 The law of evidence is the law that will teach you what you may and may not do in a court, both civil and criminal. The law of evidence tells you what you may and may not do in a law court. In other words it would be things like the hearsay rule. Certainly you must have heard of the hearsay rule. It tells you when you can allow hearsay and when you can not allow hearsay. It will tell you when you can use previous convictions in a criminal case. It tells you um how fre [inaudible] previous convictions, it tells you um it what way you can present evidence to a court. How do you present real evidence to a court, because you can't just walk into a court and say: 'Aha, I've got this video, look here, look here this guy's sleeping with my wife, please send him to jail'. It doesn't work like that. If you don't follow the rules very strictly in a court of law then your evidence is not going to be accepted. There are strict rules of how to play the game. Ok that's the rule of evidence.

014 Rules of civil procedure are all civil matters where the subjects of the court case are two citizens. Two citizens, two people who've either contracted or been in an accident or however they've come to court, could be unjustified enrichment, it can be myriad of reasons why they've come to court but the two parties before court are two citizens, that is a civil case. And the rules as to how those two parties must come to court and to which court they must go, the jurisdiction of the courts, you will find in the civil procedure act. The Civil procedure act, magistrate's court and the civil procedure act for the High Court. And the same with the law of criminal procedure.

015 Criminal procedure is that part of the law which tells you how do you bring a criminal to court? The procedures of bringing a criminal to court. What may or may you not do to a criminal, you must explain to a person – well he's not called an accused (?) – first of all, you call a person that is charged, you call him an 'accused' because there's a presumption of innocence. How do you bring him to court, how do you [inaudible], what must you explain to him … or her? What are you allowed to do, how long you're allowed to keep that person without uh uh without charging him, when can that person get bail, etc etc Those are all criminal procedural acts/ uh issues. And, once again, for the High Court and for the magistrate's court. [coughs] So all four of these things tell you 'how to'. They are the rules of the game, they are adjective law, they are a separate part of the law, and they form uh a division all by themselves.

016 Now, just to come back to my first point, there is absolutely no reason why the law of criminal procedure couldn't go under criminal law. And the law of civil procedure couldn't go under private law. There's no reason why that division should be brought there. The reason why we have this division is for people like you so that you can understand the law *a priori* – before you get involved in the law, in a court case, that you know where everything fits. OK? It's a teaching aid more than anything else. [pause] You understand that these things can move around? Its like, like that uh game that you play where you put little figures … OK, not working. OK.

017 Then the substantive law ladies and gentlemen, divided into public law and uh private law. Now the division – I've just explained the division – the division between public and private law is not, as it was called at the time, is not the great wall of China. It-it was always accepted in South Africa, before the Constitution, that the division between public and private law is sacrosanct. In other words, it cannot be challenged. There is no challenge between public and private law. With the fact that the Constitution straddles both public and private law, and that the Constitution is the highest law in the land, this great wall of China has now been diminished. Its crumbling. OK. Let us in any case see what we understand about public and private law.

018 Public law, as I've said earlier, is that part of the law where one of the parties in the relationship is the State. Public law is that part of the law where the state plays a role being one of the parties involved in the relationship between the two parties. And that is constitutional law, administrative law and criminal law. In each of these the State is one of the parties in whatever relationship exists and the second party of course is an individual. Is a citizen [clears throat].

019 This public law, this element of public law cuts across private law in things such as commercial law, right at the bottom, if you, if I can just move this up a little bit. [Referring to diagram] Commercial law, at the bottom here, is something that straddles the division between public and private law. And cuts across all the private law that you see that is explained over here. So it is porous, it is not watertight. The divisions are not watertight. The same thing can be said of constitutional law. Constitutional law has an influence on all these aspects of private law. Administrative law – the same and, well not criminal law – but I'm sure, I'm sure somebody would be inventive enough to find, to find a relationship between criminal and private law.

020 Now of course I'm going to ask, are there any questions? And there's going to be no questions and people are going to look at their watches to see how much is still left of the lecture and then I'm going to ask questions.

021 **STUDENT 3:** Can I/ its going to sound like a [continues talking – inaudible]

022 **LECTURER:** There's no such thing as a stupid question.

023 **STUDENT 3:** No its not a stupid question, but its – don't know if you can actually answer it.

024 **LECTURER:** [interjects – inaudible]

025 **STUDENT 3:** Why is substantive law called 'substantive' and why is adjective law called 'adjective'? I can't understand …

026 **LECTURER:** Uh that's a very good question

027 **STUDENT 3:** Strange names

028 **LECTURER:** No no no. Substantive law you know um uh uh uh its going to sound like a stupid answer but substantive law is called substantive law because its got to do with the substance of law. Nnnn. And adjective law is called adjective law because it is additional to the substantive law. So if you if you're going to the library and you look, you're looking for something in law; if you go into the library and you're looking for anything – say on what, say on abortion – the place that you are going to look for things on abortion is going to be the substantive law sources. You are going to look in legislation, you are going to look in precedents, you're going to look in journal articles and its all got to do with the substance of this thing called abortion. If you are looking for how to legally get an abortion you are going to look in something else. You are going to look in adjective law. Its not its not the substance of the law but it is additional to that. It is it's the procedure. So while something is a procedure, then it is additional to the law, it is adjective.

029 **STUDENT 8:** Can I ask you something about that? Since we've started its come across to me that abortion was sort of like a swear word in the legal field. Um so our assignment right I've been looking for termination of pregnancy 'kay in places everywhere. Would one still search for abortion? Silly question [smiles]

030 **LECTURER:** No yes why not?

031 **STUDENT 8:** Its just the way the lecturer said you don't use the term abortion, you use the term 'termination of pregnancy'.

032 **LECTURER:** That's just PC um but you know that is being *extremely* PC. Um well I don't know I'm not I'm not I'm not always PC so I can't say … Now that I think about it ja abortion is an unpleasant word. Um and um where in pre-Constitution abortion was just what it said, it was abortion it was an illegal act it was frowned upon by society, it wasn't allowed, it was it was something um horrible. It was something, you know, unpleasant. Um its now been legalized under certain circumstances. It is a clinical part pr-pr-pr procedure, it is a legal procedure, it has been sanitized and perhaps termination of pregnancy is a better word. Um but you know if you go to do research, you can't be PC.

033 Because if you go into research um about race relations in South Africa and you're going to leave out certain certain words, you're not going to get all the research. You know a researcher can't be can't be too sensitive. You must maar get everything thing you can get. But that's not on the point, as usual.

034 **STUDENT 6:** [inaudible] Lets say for example George Bush was found to be in gross violation of human rights because he went into Afghanistan and he and Iraq [L: Yes] and he messed up the whole system, and the [inaudible] you know, called him to come to court. And of course he has the right to say ' I don't want to come to the Hague.' Can the governments of Afghanistan and Iraq still sort of like put a case against him?

035 **LECTURER:** Yes

036 **STUDENT 6:** You know if they can't do it internationally?

037 **LECTURER:** Uh no uh first of all to bring things down to the work [STUDENT 6: Yes] um that is a question of international law [STUDENT 6: Yes]. Um so what we're working with is public international law. Whether a head of state, who's declared war against another state can by the legitimate authority of that other state um be taken to court and based on violation of gross human rights in the Hague. Now, to answer that question, you know, is virtually impossible. It's a it's a very very difficult and uh tricky question. First of all you must have jurisdiction to do it. And then you must um uh it must be done in terms of the rule of law. You can't just be a freedom-fighting organization or a terrorist organization and then capture a head of state and try to take them to the Hague. There are there are very strict rules as to how you do this. It has been done – with Charles Taylor- uh uh in Africa, so … but its done with his co-operation. Uh and uh there are many many issues of jurisdiction and uh international governance and uh treaties and things that you must take into consideration. Without the state, without America's co-operation its going to be virtually impossible.

038 You must remember, international law, some people say is not really law. Its got no or very little, its now getting better and better but it has very little sanction. There are two war criminals in the former Yugoslavia, the two generals, um people say that the government know where they are, they're definitely in Yugoslavia, they're hiding, Yugoslavia's not that big. I mean if you can find Saddam Hussein I'm sure you can find uh whatever their name is Kladic or Tadic or whatever, the impossible twins and you can, you know, you can with the co-operation of Belgrade you can bring them to the Hague. Like with the co-operation of Belgrade they took Milosovic to the Hague. You can but then you need the co-operation of the of the of both States. Um but you know that is an international question and it is fraught with difficulty. It is really very very very difficult. Um yes?

039 **STUDENT 9:** Just, in the coursepack, they've got labour law under public law. Um I don't/ it seems to underline your point. Um …

040 **LECTURER:** Yes? Why wouldn't you put labour law under public law.

041 **STUDENT 9:** Well, sure ….ja. Surely its just an employer employee relationship so if you're not directly employed by the State and the State's not so involved?

042 **LECTURER:** Hmmm

043 **STUDENT 9:** But only State employee officials [inaudible]

044 **LECTURER:** No no no no no its not [stumbles over words] the division you make between privately-employed people and civil servants. B-uh uh is is not logic that doesn't come into play. That would be unfair.

045 **STUDENT 9:** Ja.

046 **LECTURER:** Umm I think I think why it is placed under public law is because there is such a thing as the Basic Conditions of Employment Act. And uh there's Workmen's Compensation Act. And there is, there's another Act. Labour Act. And many many other uh things which regulates [STUDENT 9: Ja] uh labour relations. Um and that is how the State is involved. By uh uh through those through regulating labour relations from the State's from the State's point of view, from the legislative point. But you can argue that labour relations is between employer and employee and those are two citizens [STUDENT 9: Ja] and therefore it could be private law, um I'm not saying that that's uh that's a bad argument. But you must you must argue convincingly. [STUDENT 9: Ja] You must uh you know you must answer the fact that the State plays a major role in the in the in uh labour relations. In South Africa of course its complicated of course we have a third of the government you can say is the is the is the unions. So um in South Africa we have a very strong emphasis of labour relations from the State's side.

047 Private law nuhuh more questions anybody? Everybody else satisfied? Um uh private law uh law of patrimony, patrimony is just law related to um estate I want to say relating to money but more assets, law related to assets. Law of persons, family law law of personality and indigenous law. OK um law of personality … uh law of patrimony can be divided into property law, law of succession, law of obligations and law of intellectual property. With the law of obligations of course you have the law of contract, the law of delict and the law of unjustified enrichment. So the law of obligations is divided into three: law of contract, law of delict and the law of unjustified enrichment. Uh law of intellectual property, divided into three parts: copyright law, trademark law, patents law. Copyright, trademarks and patents. Um um I'm a little worried about the law of personality, I always thought that um that the law of personality um is the law of libel and slander as they say in English law. Um but I'm not sure. Law of personality: the relation between persons in respect of aspects of the person's personality, such as a person's sense of honour, reputation, dignity and privacy. It is it is libel and slander.

048 **STUDENT 8:** Sorry I battle to understand how that can be differentiated from law of persons.

049 **LECTURER:** Uh what can be differentiated?

050 **STUDENT 8:** Law of personality

051 **LECTURER:** Uh no you-uh you-uh I don't I don't think they're the same

052 **STUDENT 8:** But why do they get their own distinct categories?

053 **LECTURER:** No but if you feel if you feel safe in putting them together …You can even put law of personality with law of delict. Ja. I think it would fit better under law of delict than under law of persons. But, you know, you can put it wherever you like.

054 OK. Now ladies and gentlemen are there any questions before I/ we've got four minutes?

055 **STUDENT 8:** Sir in an ex/ sorry in a test right when you give us a topic and you say 'Where does this fit?' If we argue it correctly [L: Yes yes!] can we put it somewhere else?

056 **LECTURER:** Absolutely! That's what that is why I made the whole thing about Lineus and about how arbitrary everything is. But, you know, don't put international law under the law of property and not you know and not telling me why. You must/ that's why you're a lawyer. That is what lawyers do. They argue to convince you. So if you can convince me that international law belongs in private law, I will listen to you but you know you will have to be very clever to do that.

057 Who who do I want to ask a question to - that was uh the Greek lady.

058 **STUDENT 20:** I'm not Greek

059 **LECTURER:** But you know about Syntagma. How do you know about that?

060 **STUDENT 20:** I was in Greece last year.

061 **LECTURER:** Well that's very close to being Greek. Listen my dear, in any case, tell me where would you – there are no questions ne? OK. Where would you put jurisprudence?

062 **STUDENT 20:** [Laughs] I don't know what jurisprudence is!

063 **LECTURER:** Jurisprudence is the law of philosophy, the philosophy of law. Jurisprudence, jurisprudence, you'll do that in your final year. Its um oh! No no no … Syntagm's going to answer.

064 **STUDENT 20:** [Laughs] Don't know.

065 **LECTURER:** Try try

066 **STUDENT 20:** The philosophy of law ….

067 **LECTURER:** Philosophy of law, jurisprudence, that thing, you remember that we did at the beginning of the year. The Spelunchean Explorers, natural law, positive law. That's part of law, where does it fit?

068 **STUDENT 20:** Um by religious law

069 **LECTURER:** What?

070 **STUDENT 20:** Would it fit somewhere, I'm trying to remember …

071 **LECTURER:** And if you're not religious?

072 **STUDENT 20:** Then secular law [laughs]

073 **LECTURER:** That's an argument that I'm not looking for. OK you think a bit about that, no no,. Where would you fit Roman law?

074 **STUDENT 3:** Oh Roman law

075 **LECTURER:** Yes [name] Roman law.

076 **STUDENT 3:** Would you put that under … it depends. Because you put it no no no no no. You put it under, you put it under substantive law.

077 **LECTURER:** E-ja where under substantive law. Yes it is right, under substantive law. Certainly [inaudible]

078 **STUDENT 3:** Even under private law.

079 **LECTURER:** Yes [name] what do you say?

080 **STUDENT 15:** Couldn't you put it under adjective law because isn't Roman law a whole bunch of remedies? That way you …

081 **LECTURER:** So where would you put it?

082 **STUDENT 15:** Um

083 **LECTURER:** Adjective law? Roman law of contract, Roman law of persons under adjective law? Does Roman law is the only purpose of Roman law to tell you how to do things? No especially now you're not going to get very far with Roman law. No its nice try but …

084 **STUDENT 13:** It can go between subjective and adjective law. 'Cos it kinds of straddles both.

085 **LECTURER:** No no. I don't think so, I don't know why you're worried about that division. There's no doubt in my mind that Roman law's substantive law. I mean, its got nothing to do with adjective law. We don't eve do the

process/ the law of procedure in Roman law. You could say the law of procedure in Roman law could go under adjective law, yes perhaps. But nothing more. Yes? Where would you put consumer law?

086 **STUDENT 6:** [inaudible]

087 **LECTURER:** Yes we could put it in commercial law but um is that all?

088 **STUDENT 20:** Could it also be constitutional law?

089 **LECTURER:** It can be under constitutional law as well. But it can also be under law of contract or patrimony, can't it? So wherever you put it you must tell me why you're putting it there. Where would you put law of insolvency? Yes, yes yes yes you wanted to try there at the back ….

090 **STUDENT 16:** Nn-ja I'm not so sure.

091 **STUDENT 6:** The law of insolvency is under patrimony.

092 **STUDENT 1:** Couldn't it be under law of personality?

093 **LECTURER:** Insolvency?

094 **STUDENT 1:** Ja cos you don't have the same legal um benefits and all rights of a normal person.

095 **LECTURER:** I understand what you, you've done too much Roman law. That's a Roman law argument.

096 **STUDENT 1:** I did insolvency last year, that's why.

097 **STUDENT 6:** It's a commercial law [inaudible].

098 **LECTURER:** Rather put it under commercial law, um. First of all its public law, its public law because its um bwha the Master of the Supreme Court is the person who's in charge of uh of your insolvency of your sequestration so that the State plays a role in insolvency. So its public law but its also private law. Because its about its between you and your debtors or creditors. So its also under private law. So it is commercial law and um it would also be called commercial law, could also be called mercantile law. And its definitely a part of mercantile law. OK cheque law, negotiable instruments. Where would that fit in?

099 **STUDENT:** Law of obligation?

100 **LECTURER:** Law of obligation? You're just confused, the frowns are getting deeper and deeper. Huh?

101 **STUDENT 6:** Contract

102 **LECTURER:** No no cheques. Not contract.

103 **STUDENT 6:** [Inaudible]

104 **LECTURER:** Cheques. Negotiable instruments.

105 **STUDENT:** Under mercantile law.

106 **LECTURER:** Under mercantile law once again I think.

107 **STUDENT 6:** Commercial law still commercial

108 **LECTURER:** Yes mercantile law and commercial law is the same thing. Ok you're not doing well. Syntagma, have you discovered where we're going to put, what did I ask you?

109 **STUDENT 20:** No

110 **LECTURER:** Jurisprudence

111 **STUDENT 20:** No

112 **LECTURER:** Roman law?

113 **STUDENT 3:** I would put it, definitely under substantive but it kind of encompasses both – no I'd put it under private law. In my mind that's where I'd put it.

114 **LECTURER:** Ja and all the work of the preator? All that work of the praetor is uh

115 **STUDENT 3:** Oh then it'd fit under commercial law, so it would sit between public and private

116 **LECTURER:** Yes it would sit between public and private, that's quite right. Legal history, Roman law in general and jurisprudence are those subjects that are superimposed on the whole scheme. You have the Roman law of procedure, which is adjective. You have substantive Roman law and, you know, Roman law fits in in virtually every compartment here. So from natural law jurisprudence, wll jurisprudence is even above Roman law. It's a layer, first of all jurisprudence permeates the whole scheme, its in every single box there's jurisprudence. And Roman law is a second layer which permeates everything from substantive law. Or from substantive and natural law. OK our time is up as Dr Freud always says. Um thank you for your attention. Please make sure that you investigate all branches of law. And that you know what the branch of law is and that when I ask you you will be able to answer and put it in a specific little box. I'll see you next Tuesday morning. Thank you very much. Bye bye.

LECTURE 18

001 **LECTURER:** In this short lecture we're going to try and look at the jurisdiction of the courts. Now this is the kind of information uh that I don't think one should be teaching at a university. Um it's the information that you should be getting in your articles. But um there is space in this curriculum now so we're doing it here. But please beware, this is not real knowledge. Um jurisdiction of the courts, the theoretical part as I'm going to tell you today, that is of course real knowledge and that you must keep the theoretical stuff you must always uh uh have to answer any question. So this theoretical part is fine. But as soon as we come to the factual part, ladies and gentlemen, as soon as we come to 'how much can this court fine a person on each du-uh-uh count, that is factual. And although I'm going to give you the figures today, and I'm going to ask you the figures in the exam, um it changes. It is just a flick of the pen of the Minister of Justice and the jurisdiction of the magistrates' courts go up. Not so much the Supreme Court of Appeal or Constitutional Court or High Courts but that can also change. So please, this is not um this is not cast in stone, it can change. Very recently two or three years ago the uh small claims court changed from R3000 to R7000. It was a huge leap and the magistrates' courts and uh regional courts also changed. And ubuhubuhubu substantial changes so you must know these things of course, if you want to be a lawyer that's just the kind of stuff you must know. In uh your colleagues' course pack, you'll find a uh table. The table is very useful its on page 136. And this contains the latest jurisdiction of all the courts. But before we get there, I'm going to give you the theory beforehand. Uh because its no use knowing the figures and not knowing the theory. OK.

002 What is the what is the theory behind jurisdiction? Well, jurisdiction is that thing that is attached to a court that gives the court its power. Now the/ most students get confused with jurisdiction because jurisdiction works on two levels simultaneously. Jurisdiction works on two levels simultaneously uh and that is on the type of case, jurisdiction on the type of case, and jurisdiction on geographical area. So jurisdiction is decided by two considerations: The type of case and the geographical area um of where the case took place.

003 There are three types, there are three types of cases. You have here type of case [writes '(a)' on the board] and (b) the geographical area. OK. First type of case is a criminal case; second is [writes 'civil'] on the board; and third is [writes 'constitutional' on the board]. Criminal. Civil. And Constitutional. Now, what is immediately strange about this?

004 **STUDENT 9:** Surely the constitutional matters kind of overarch everything else?

005 **LECTURER:** Um that's uh yes, the more elegant way to put that, the more lawyerly way to put that is to say that the Constitutional Court has got criminal and civil jurisdiction. Not not all courts have criminal and civil jurisdiction. Um you get uh criminal magistrates' courts and you get a civil

branch of the magistrates' court. Um you uh you get certain high courts that are involved in mostly criminal matters and certain high courts that are involved in uh civil matters. But the Constitutional Court hears both criminal and civil matters. Is that the only court that hears both criminal and civil matters? No. The Supreme Court of Appeal also hears civil and criminal matters.

006 But um the jurisdiction, as far as constitutional matters are concerned, is complex because certain courts do not have constitutional jurisdiction. Uh and of course the courts that doesn't have constitutional jurisdiction are the magistrates' courts.

007 Now why does the magistrates' courts not have constitutional jurisdiction. Can somebody think and tell me? It's a kind of a lawyerly question that you ought to be starting to can answer by this stage. [silence for about 3 seconds] Why would you say the magistrates' court does not have constitutional jurisdiction? What is the reason? Ja?

008 **STUDENT 7:** Wouldn't that be reserved for the Constitutional Court?

009 **LECTURER:** No no the High Court also has constitutional jurisdiction. Um um but the magistrates' court not. Nobody wants to take a chance? Yes!

010 **STUDENT 1:** Is it perhaps because magistrates' courts function more on a provincial level than a national level and in order to have constitutional jurisdiction [inaudible]

011 **LECTURER:** No but the High Courts also operates on a provincial level. Mmm mmm. Rose of the north, that is not the case. Well you must think about South Africa's history. You must think about South Africa's history. 'K now I've given you a huge tip, but it didn't, it didn't it didn't do the thing ne?

012 Uh when South Africa became a constitutional democracy, what happened? We moved over from a parliamentary uh uh sovereignty from a parliamentary uh uh uh dominated state, to a constitutional state. OK. So in 94 what happened? With the elections? Politically, what happened? Ladies and gentlemen, the questions are getting easier and easier, its like these gameshows, you are now about two cents …

013 **STUDENT:** Change of power, change of power

014 **LECTURER:** Yes! There was a change of power, from the old apartheid regime to the new ANC/Cosatu-whatever dominated regime that made up the government. Now, if you have such a change of power, what what what is what is the first thing the new government would do? Not the first thing but as far as the law is concerned, what is the first thing a new government will do/

015 **STUDENT:** Change legislation?

016 **LECTURER:** Change the legislation, change the legal system, change the law, that's what that's what the new government did. They changed the whole law. The in/ they comp/ they they composed the Constitution and they made the Constitution the highest law in the land. Now who who are the functionaries, um, in this legal system? Who's going to execute the new government's legal system?

017 **STUDENT:** Courts

018 **STUDENT:** Judges

019 **LECTURER:** Courts and judges. So when there's a new, when there's a new dispensation, what happens? What does a new dispensation do to the sitting judges, because a judge is not a – unlike in America and those funny places, but – the court is not an elected institution. A court is um uh a court is a meritocracy, it is something that is based on merit, its based on on um professionalism, its not a political appointment, you're not elected to be a judge or a magistrate. So what is what do you think the new dispensation would do to the judges, or what do you think they did [clears throat].

020 **STUDENT 4:** They would change their frame of reference, the way they …

021 **LECTURER:** Now how do you do that? A sixty-five-year, middle-aged old male? How do you change his frame of reference? Its not just like, you know, chop off his head and give him another head. How do you do that?

022 **STUDENT 8:** But I mean also every single, solitary case with regards to the past, they would have to go against judicial precedent so they

023 **LECTURER:** You are you are you are explaining the problem, you are not solving it.

024 **STUDENT 8:** But it's better to go to separate courts all together so you don't have that situation.

025 **LECTURER:** Yes, and they did that, they instituted the Constitutional Court. That they did. Good point, yes that's true. But what would you do with the sitting judges? Is the question.

026 **STUDENT:** Change them.

027 **LECTURER:** How?

028 **STUDENT 6:** Retrain them.

029 **LECTURER:** Retrain them, send them to Siberia.

030 **STUDENT 12:** [inaudible]

031 **LECTURER:** That takes time. That's takes that's only happening now. Ten years later. You don't just [clicks fingers] create 250 new judges. Ne? A judge takes a long time to train. Its not an its not an easy its not an easy job. I don't

think/ I think any one of you can jump into President Mbeki's job um and run it for a day or two. I don't know for longer but for a day or two you'll be able to do it. But I don't think anyone in this room except myself, I think, that can do a judge's job.

032 **STUDENT 9:** Do you not restrict their jurisdiction?

033 **LECTURER:** Aha. Aha! You restrict their jurisdiction. Remember the original question? Why does the magistrates' court not have jurisdiction in constitutional matters? Because the new government didn't trust the magistrates. Who were the magistrates? They were the people who implemented the pass laws. How are you now going to allow them to take your beautiful new baby, the Constitution, and interpret that? Even if its on a very low level? So the magistrates' court, up to this day has not been given jurisdiction, constitutional jurisdiction, because there was a change, a political change in the country and the magistrates were seen as civil servants and the lackeys of the previous government. That has of course changed the new government trained and has appointed their own magistrates and perhaps in the near future we will see that the magistrates will have uh constitutional jurisdiction.

034 Um [coughs] the High Court was not a big problem because apparently there was an understanding, there was a sunset clause in the interim constitution that sitting judges will be respected and they will be retrained to uh uh understand the Constitution. And indeed the sitting judges were retrained, I don't know how effective that was, its very difficult to train a judge. Believe me. Um its not a its not the easiest thing to do.

035 But so now on the type of case on this area of jurisdiction, we know that the magistrate's court does not have constitutional jurisdiction. That's a very important point.

036 What other important point about constitutional jurisdiction should you know? Other very important point, I've mentioned in class. I'm going to tell you because its going to take too long to extract it from you. The Constitutional Court has got exclusive jurisdiction over certain aspects in the Constitution. The Constitutional Court has got exclusive jurisdiction over certain constitutional aspects. Those aspects include, and I'm not sure I'm going to give you an exhaustive list here: Any action or um act of the State President. If the constitutionality of an act of the State President is called into question as being unconstitutional, the only court that can hear that is the Constitutional Court. That is one. Only the Constitutional Court can certify provincial constitutions. That's two. Three, only the Constitutional Court can solve constitutional disputes between organs of State. Um [long pause] OK. Um I hope you get a feeling for for what this is. Yes?

037 **STUDENT 9:** Would you say that the Supreme Court of Appeal has constitutional jurisdiction?

038 **LECTURER:** Yes! Yes yes yes. Definitely. What is the interesting point about the constitutional jurisdiction of the Supreme Court of Appeal? We had a whole lecture about it.

039 **STUDENT 9:** It's the issue of who the highest court is?

040 **LECTURER:** Yes. And when the Supreme Court of Appeal pronounces on the constitutionality of legislation and declares a piece of legislation unconstitutional, it must go, automatically, to the Constitutional Court for um confirmation. So that is an argument to say the Constitutional Court is the highest court in the land and not the Supreme Court of Appeal as it used to be.

041 **STUDENT 9:** But is that only constitutional issues relating to legislation? But now are there cases where the Supreme Court of Appeal can make a constitutional decision? And it doesn't have to be referred? Because if it has to be referred [continues but overlapping with L]

042 **LECTURER:** Yes if the Supreme Court of Appeal decides a piece of legislation is constitutional, then obviously it doesn't have to go. [clears throat] But only when it changes legislation it has to go higher. OK.

043 Now you know lots of things about the Constitution, constitutional jurisdiction. You know about maj court and you know about the exclusive jurisdiction of the ConCourt. These are the exceptions on the constitutional uh uh type of case. The exceptions on the jurisdiction on the constitutional type of case. OK.

044 Let us now go to – have you all got this – if you do have it please open it and please write in your notebooks you must um look at page 136. Uh and further. Um before before we get to that though. Before we get to the before we get to the um before we get to the uh uh table.

045 The table only works when you understand the difference between an appeal and a review. Now – and that is on page 195 of your textbook. Um um and it is something that you must make sure that you understand very very well. If at the *end* of a trial, one of the parties feels aggrieved and they feel that there was a um there was something was done incorrectly in the trial, and that the sentence that the court came to induces a sense of shock, or the sentence which the court came to is an inappropriate sentence, then you have the right of appeal. Then you can appeal.

046 Now appeal means you go to a higher court than the court where the case was heard in the first instance. You go to a higher court if you are convinced that uh that something was done wrong in the lower court uh and that the sentence uh that the magistrate court or judge came to uh was incorrect. The appeal rests only on the four corners of the record of the case. There is no vive voce evidence to be led in an appeal. You cannot, when you have an appeal, introduce new evidence. So, an appeal is a second bite at the cherry. You've gone through the whole thing, the magistrate or judge has made an

error. According to you, something was done incorrectly. You want to take this to a higher authority uh to rectify that in order that the sentence can be changed. You can only take it with your typed record of appeal. The record uh of what was said in court then goes as a paper application – you understand what I mean by paper application? It goes as documentary – as a documentary application before a higher court. You are limited to the four corners of the trial document.

047 You cannot in an appeal said (sic) uh yes yes yes yes um ooh after the trial we discovered that uh his wife was actually lesbian. So that was the reason why the marriage failed. But we didn't say this at the time because we were afraid that she would charge us with uh uh with uh defamation, but she has now declared this openly in the newspapers and she's now living with a live-in-lover. But this this only came into play afterwards. You cannot you cannot introduce that in the appeal. Yes?

048 **STUDENT 11:** Yes I have two questions here and I'm not sure if they will make sense.

049 **LECTURER:** [inaudible]

050 **STUDENT 11:** I just want to know if eh one can challenge the decision of the Constitutional Court. On the grounds that the judgment was unconstitutional. Can a judge make [inaudible] unconstitutional? [class giggles]

051 **LECTURER:** Now where where are you going to challenge that judgment?

052 **STUDENT 11:** [laughs] I don't know.

053 **LECTURER:** No I suggested when the when the um when the Constitution was being written I was at um Justice College. I lectured at the um Justice College and we went all around the country to lecture to all the magistrates and judges to introduce the new Constitution to them. And we also had workshops with um all the stakeholders to determine how the new Constitution's going to work because we didn't have any court cases or any precedents to go on. And then somebody asked the same question. Where do you go from here? Where do you go from the Constitutional Court? Um and um Arthur Chaskalson the judge, Chief Justice retired was in the audience and Dullah Omar was still daar, still there and the deputy Minister of Justice was the Minister of Health now, what is her name?

054 **STUDENT:** Manto

055 **LECTURER:** Tshabalala Msimang – she was very very vocal on judicial matters. Not that she's a lawyer but she was a good deputy justice minister because she wanted to know everything. And I suggested that we re-in [starts laughing] we reinstitute, of there is a necessity that we want to test the constitutionality of a case, that you reinstitute the Privy Council.

056 Now I don't know if you know what the Privy Council is, the Privy Council is a is is a Council in England for the Commonwealth, if in Jamaica or in Australian if you if you have a um uh a legitimate complaint and you've gone to the highest court in the in the Commonwealth. Then you can, with permission from both sides, you can take your case to the Privy Council, um and the Privy Council is a very prestigious uh legal body sitting in England and then deciding on these things, on the various um jurisdictions and deciding whether based on equity the um uh the case was decided correctly.

057 Now of course, if you take away the the politics, if you take away South Africa's background, where we come from, then it was a very good clever suggestion. Because here you have a very eminent panel, already instituted, already with with experience in judging uh a variety of jurisdictions on equity, but it was not, it was not received by by the by the dignitaries that day. Um a you know the thing smacks of colonialism. It means you go from our Constitution, you go to the gentlemen with the feathered hats and the lots of medals and the you know, they don't like that. They don't like that, it reflects on our independence. It was made very clear to me by the highest authority, the Minister of Justice and Chief Justice that the Constitution is the final word and the person the institution that speaks the final word on the Constitution is the Constitutional Court. There is nothing, if you are not happy with the Constitutional Court's decision then you can go to God but that is something personal and its not a legal process.

058 **STUDENT 11:** So there's nowhere else where

059 **LECTURER:** Nowhere else.

060 **STUDENT 11:** Cos in the labour court there's this thing called a pledge, I don't know if

061 **LECTURER:** Mm mm.

062 **STUDENT 11:** Its more like an appeal but the judge

063 **LECTURER:** But there's/ you can go from the Labour Court to the Labour Appeal Court.

064 **STUDENT 11:** Yes

065 **LECTURER:** So that's fine. You know that's a hierarchy that's already there. So that is/ but the Constitutional Court that is – it caps it. There's no [inaudible] higher than the Constitutional Court.

066 **STUDENT 8:** Well I've been wanting to ask you for a while but the matter didn't really come up but now that you've sort of eluded to it I thought I might as well ask. Does South Africa have anything of the equivalent to a Queen's Council?

067 **LECTURER:** To?

068 **STUDENT 8:** Queen's Council.

069 **LECTURER:** Yes, its called Senior Counsel.

070 **STUDENT 8:** Senior Council?

071 **LECTURER:** Yes its just simply called, it was called King's Counsel or Queen's Counsel until I think until '61 when we became a Republic. And then we changed just to Senior Counsel. Do you know what a Queen's Counsel is?

072 **STUDENT 8:** Yeah, sort of yeah

073 **LECTURER:** A senior, a Queen's Counsel or a King's Counsel is um QC, is a title you obtain when you become a very very senior advocate.

074 **STUDENT 8:** 'K

075 **LECTURER:** Or a very senior barrister. Um it means that um that the Minister of Justice or the State President or the Queen then in England, considers you above the others. Uh the only implication is that you get to wear now not only a cotton robe, but you can wear silk robe. Your robes are now made of silk and the more important thing of course is that it is a prestige. Um you are now senior counsel, you are only briefed in very complicated matters, and of course you charge no longer R3000 an hour but

076 **STUDENT 12:** R20 000

077 **LECTURER:** R20 000 an hour. So that's the main, that's the main consideration. [reaction from class, including laughter]. But I don't know does this [inaudible] not jurisdiction, yes?

078 **STUEDNT 8:** But is there any limits to the number of people who can be admitted to senior counsel?

079 **LECTURER:** N- I don't think so .. it's not … you know that's something in the discretion of the Minister of Justice. Um … uh … you know … uh senior advocates, senior advocates are a very rare breed. Um its not a lot of them around. So, if you've been around for ten or fifteen years then your name will be sent forward by the bar and the Minister will look at your at your practice and if you are a person of substance and you've done uh important cases and you've got stature and you've got a very solid practice, then he will make you Senior Counsel. I don't think there's a closed number. Um but its not, its not something that is granted lightly. Its not something that you get in a lucky packet.

080 **STUDENT 6:** [inaudible]

081 **LECTURER:** Its .. it carries a lot of, it carries a lot of weight. OK.

082 **STUDENT 6:** Excuse sir? This is just in passing, so if you look the these uh I just get sometimes overwhelmed by the bills which they are charged, the Jacob Zuma and the McBride .. They run into millions and millions of money. Within

a short period of time. Can we assume that those represented by something similar like a QC, a Senior Counsel, the advocates that represent them in court, cos

083 **LECTURER:** No I don't. I don't know about Mr McBride, uh I'm not following his case, but Zuma, definitely. Um you know, obviously. Um it is a very, it's a it's a … it's the most important case uh criminal case in any case that's serving before the courts at the moment. So, on both sides, from the State and from his side. He will um, he will employ uh very very senior, very senior advocates. He will employ the best he can get. And that will be, that will be senior advocates. And that's why the the … um that's why the fees are exorbitant. Uh you know, they .. and the cases are running for a very long time. So those people can't take any other cases so they are on a a um on a retainer by Zuma and probably McBride. But legal costs are something we can talk about later if we have time. Um … [clears throat].

084 A review is something completely different from an appeal. A review takes place either um uh automatically, or through application. A review takes place automatically from the magistrate's court to the High Court if a magistrate of sev- of less than seven years seniority, if a magistrate is, has been a magistrate for less than seven years, And he imposes a fine or prison sentence exceeding three months and I'm not sure, I'm not sure of the amount of money. But three months or a certain amount of thousands of rand in money, Then, because he's still a junior magistrate that case must go on automatic review to the judge of the Supreme Court to see if the magistrate is not it not um imposing too harsh a sentence. That is only magistrates that have been a magistrate for seven years or less. Magistrates that's been um more senior than seven years, if they impose a sentence of longer than six months, per count. Six months per count then it goes on automatic review. Please remember there's no, there's no nothing you can do about it, it must go to the Supreme Court or uh to the High Court for review by a High Court judge. Mostly the High Court judges confirms the the judgment of the magistrate, but if it is an over enthusiastic magistrate, uh um it can be sent uh back and the magistrate must then supply reasons why he um sentenced the person to such uh to a higher sentence than is customary uh and if the court is satisfied, if the High Court is not satisfied it will change the the judgment of the magistrate.

085 Um … the anecdote I can tell you about this matter is when I was a magistrate I had to serve for a uh limited period of time thank heavens in the um matrimonial court um the so-called maintenance court where people don't pay their maintenance.

086 Now one thing that you can learn from this uh embarrassing episode uh is that you must never, if you're a lawyer, you must never do anything if you are um in a bad mood or if you are emotionally uh unstable. If you if you've been, if you've lost your temper, don't do anything.

087 Uh this happened on a Friday afternoon. One Friday afternoon I was sitting in court and it was late, and all my colleagues had already adjourned – I was the most junior magistrate in the in the court building. And all my colleagues had adjourned for the weekend. They've closed their courts and they've gone – you know they haven't left the building but they're sitting in their offices and you know chatting and doing cross-word puzzles and things like that. So I was the only sitting magistrate. And this uh-w case was a long outstanding case with a warrant and of course somehow the police on a Friday afternoon – you know don't ask me how they manage to do it on a Friday afternoon- they caught this man and of course I was the only the only magistrate sitting to hear the case and the case was an ordinary maintenance case. You know what maintenance is? [inaudible] you have to pay for.

088 And [coughs] it was late, it was already after five o clock and I went on record, you know you have a tape machine, and I went on record saying 'It is now five past five [struggles with coughing], there are no courts available and I am reluctantly hearing this case because I'm the only sitting court that can hear this case otherwise this man will stay in jail for the rest of the for the rest of the weekend, or another magistrate must come out after hours to hear a bail application. And of course, you know, I was tired, I was irritated um uh I was cross with this man, I was cross with my colleagues, cross with the world.

089 And here he appears and he's one of those typical um people who slips through the holes in the system. He hasn't paid maintenance, his wife was in court. He hasn't paid maintenance for four years. He has a a job, he has an income, of say three thousand rand a month. But he has a girlfriend and he gives all his money to his girlfriend. He doesn't/ he's left his wife, a wonderful decent person, with four children, living without any income.

090 So, you know [clears throat], we call we call the we call the wife and she gives evidence and um I'm very um uh, I've got lots of empathy with her. Um and she's really struggling. She is uh a single mother she's um uh uh domestic worker, she gets a pittance for an income. And she must keep four children at school and this bugger is lounging around, he's drinking out his money and the rest he gives to his eighteen-year-old girlfriend.

091 So then he of course gets into the um he gets was brought up from the cells um and um the prosecutor starts asking questions, very inexperienced prosecutor so I lose my temper with the prosecutor as well um and I take over the inquisition, because in a maintenance matter you can do it. And I start cross-examining him from the bench. And that is something you must never do. But nevertheless I start cross-examining him. And of course I am – well, at that stage – I was an excellent cross-examiner because I've just been a senior public prosecutor. So I knew all the tricks of the trade. And within five minutes I've got him in a corner like a spider, I mean he is … he couldn't say a thing. And of course the more I ask him the more, you know you can hear on the tape, ja I'm getting more and more irritated because he's lying

and he's getting out he's trying to get out of his responsibilities. Um and you can you know I um I just let rip into him, forgetting that I'm the magistrate and not the prosecutor. And then I started shouting at him.

092 So, you know, long story short / and he's attitude – this … idiot [outburst of laughter from class] his attitude to me is um 'Well, you know, its my money I can do what I want.' Um and 'I haven't paid my maintenance because I must look after my my girlfriend.'

093 Now, you know, what do you do to a man like this? I said 'But you can't do what you want there's a court order. And, you know, this is the fabric of society, you don't look after your family, you know, your children are all going to become just like you!

094 And then what where we going to be? In any case, it went on for an hour or two. For an hour or an hour and a half. And um when I was finished with him of course um uh he also started shouting he said he will do what he wants and I can't do anything to him. And then of course, you know [more laughter] … um I sent him to uh you know the first thing is, he was a first offender. It's the first time that he's been before a court. So you never send a first offender to jail. Obviously, you know, you never send a first offender to jail. So uh I gave him the maximum [gestures with arm and elicits more laughter] sentence that I could which was one year. Twelve months. I have him straight twelve months twelve thousand rand fine uh uh or twelve months.

095 And of course he didn't have the tw- I knew he didn't have the twelve thousand rands, it was St Athlone's and the people don't have twelve thousand rand and he went to jail for twelve months. Finish and klaar.

096 But of course what I had forgotten, you know I was still a very junior magistrate, what I had forgotten is it goes on automatic review to the judge of the Supreme …. Now the problem with the system, is: The judge sits in his chambers, the judge is now a senior advocate who's been elevated to a judge. He sits in his chambers he's high on on on human rights and things – which is fine – but he doesn't understand what a magistrate's court looks like. He doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance. He doesn't you know they've never seen that, its just not part of their frame of reference. They are just concerned about procedural correctness.

097 So about – so this is the end, its Friday night you know I send him off to jail and I feel wonderful you know I say 'rot in hell I hope you never come out.' I just go, I just go off and well I forget about him.

098 Of course three months later on a Saturday evening, on a Saturday evening in Cape Town, um I had a dinner party, I had lots of people there, at my dinner party,and it was about se- seven o clock. You know just after after the people have arrived and they've had their first course, then there's a phone call. Now, I'm irritated because you know – the food is in the kitchen, I must look

after the food and I've got ten or twelve people to serve and I don't want phone calls now. Grab the phone: 'Yes who's this!'

099 And a very civilized English voice on the other side:' Excuse me, but um may I please talk with magistrate Serfontein?' [raised pitch] I said 'Yes its him talking I'm not on duty this weekend *please* who is this?' 'Mr Serfontein this is Judge Foxcroft'. [starts laughing] 'Do you remember the case of State v Ngobe' or whatever. I said 'No I don't remember the case your honour or my lord' or I don't know what I called him or judge um and I said 'uh-h. 'I have tonight issued an urgent mandamus' or something 'instructing Pollsmoor Prison to release this man and I would like it I you could send me a full set of reasons why you for a first offender sentenced this man to twelve months in prison. I'm forwarding the court record to you and if you could reply by Monday afternoon latest I would appreciate it'.

100 So of course I was in big big big trouble. Um and the man was released after three months and the judge – it was a reported case – my name came in the law reports as the magistrate who sent a first offender to twelve months in prison.

101 So, um that is an automatic review. It goes to the judge to see that the young magistrates don't send people to twelve years imprisonment if they're not, if they shouldn't really be, go be there. Uh but he stayed for three months and I still feel that that's a good vindication of him.

012 Um, OK, um ladies and gentlemen I need you to go and um read re-read just the difference between an appeal and a review. Uh because that has a major implication on the jurisdiction of the courts. And then please go and do not not the not the table in your textbooks, but the table in the coursepack. Which is more up-to-date. Please just go read and see if if you can make sense of it. Um and if can um memorize the figures it will help me on Thursday to go through tha very very quickly. Because we've wasted some time now with my little anecdotes. OK. Thank you very much, I'll see you on Thursday.

LECTURE 19

001 **LECTURER:** Ladies and gentlemen, before we start have you got your course outline here … Um it is quite an important document, if you start studying or if you start looking at um the the whole um the whole year's work then please don't forget this document. This document tells you exactly what you must do for the examination. Um if you look on your course outline page 2, where it starts, paragraph 4. We started with the law, the law of morality, the law and religion, law and justice. You remember that? 4.2 Jurisprudential perspectives on the law. The five perspectives, natural law, positive law, the sociological approach, historical approach, etc etc the Spelunchean explorers, you remember that? And then we spent lots of time, the bulk of our time, on the sources of South African law. Legislation, judicial precedent, common law, customary law, indigenous law, writings of modern authors and the Constitution. So you can deduct from this that that is an important chapter. Uh we spent very little time but that does not diminish the importance of the chapter on the classification of the law, uh national, international, substantive, adjective, public, private um and supplementary disciplines. OK? Important chapter, not to be neglected. We are now working, this point, we are working on 4.5 the structure and jurisdiction of the courts. Hopefully, if a if we can we will finish that today. Perhaps not alternative dispute resolution but that's just a single lecture that I will try and explain to you what's going on there. But the jurisdiction and the hierarchy of the courts, ladies and gentlemen, very important. Very important. History of South African law we have done. It's a bit of an anachronism here it should be at the beginning I will move it back to the beginning uh for next year. Uh and then from point 5 onwards fundamental skills training for law students, we will spend some time on that. Um but not as detailed as the theoretical work. It will be very difficult for me to tell you as a senior student, how to study. Its more for the first years, students who have not studied at university. You can look at that, if you have queries we can address them. But that's just, that's a skill. Research skills, well you are doing research skills with your assignment. Um uh and I've prescribed chapter 10 for you from the course pack which you must study in detail. Uh reading and writing skills for a law student. There we will do, I will give you a formal presentation on how to write, how to prepare a bibliography. Uh and how to do footnotes. Uh hopefully we will do the footnotes before you hand in your assignment. Um but if we don't get round to that please note that um the assignment does require you to add a bibliography as well as footnotes.

002 **STUDENT 8:** Sir I just wanted to ask you a question regarding the postgrad course in general. At the moment I'm feeling very very overwhelmed, sort of 'Oh my goodness'. Is it normal at this stage or …?

003 **LECTURER:** Very normal. It doesn't matter, it gets worse. [Laughter from class] No no no. Its very normal, its not a um..

004 **STUDENT 8:** So but it is expected.

005 **LECTURER:** Ja and you are you are a sui iuris you are a sui generis student. You're a completely different student from any other law student. You've got a degree and you're coming to another discipline in a postgraduate environment. So it can be, it can be overwhelming. So … just don't let it get … don't let it get the better of you. Uh but it is, it is overwhelming and towards the exam you will see it becomes much clearer. What will be what will be expected of you. And that's why I thought perhaps its just good to tell you, as a refresher, just to tell you where we are and uh in the uh in the curriculum and what we still need to do so that you don't get overwhelmed by that. OK. This is not a course that you should be overwhelmed with. But I can well understand if you are overwhelmed by your law courses. Its an enormous amount of work and it's a completely new discipline. So that's quite, its quite understandable. OK.

006 So what we are going to do today ladies and gentlemen is uh we're going to do the jurisdiction of the courts. Um and we are going to do the structure of the courts. Now um uh lot of information uh that you need that you need to get to know. Um. Its not just the amounts and the jurisdiction. But of course, that as well. Uh but let us take it from the top, and go through it systematically and see how we fare.

007 We you know by now that we have a very definite structure uh and a very definite hierarchy in South Africa. And that on top of the hierarchy is the Constitutional Court. Let use start with the Constitutional Court this morning and then work our way down to the magistrates' court. And of course strangely enough the Constitutional Court is the easiest of the courts and the magistrates' courts are the most difficult of these courts.

008 OK the first thing that we know about the Constitutional Court is that it was instituted by the um 1994 Constitution. It is a new court. Justices were appointed to that uh court which um were charged with looking after the Bill of Rights and looking after the human rights of South Africa. The courts, up to that point, as I said on Tuesday, the courts were not wholly trusted by the new regime or by the new government because they were seen as co-operating with the apartheid government and they were not a hundred percent completely trusted by the new government.

009 So the one thing that the new government did, the most or the least revolutionary or the least disruptive element that the new government put in place was the new Constitutional Court. Um in other regimes in other um uh jurisdictions where there has been a transfer of power from one group of people to another uh it happened on a much more revolutionary basis and all the old judges were simply uh dismissed. Or they were simply, they were simply uh retired. Uh if you look at the problem in Pakistan not that that is now a modern democracy, but it least it strives to be a modern democracy, one of the major upheavals in Pakistan is the fact that the President dismissed the chief justice.

010 Now this didn't happen in South Africa. We had an evolutionary change. Um uh and the chief justice of the previous regime, Justice Corbett was asked by President Mandela to officiate at the swearing in ceremony of the new President. So the chief justice of the previous regime was asked to swear in the new President of the new government. I'm making that point just to illustrate to you that there wasn't a clean sweep. The only clean sweep that there was, was that eleven new justices were appointed to a new court called the Constitutional Court. OK.

011 The Constitutional Court, highest court in the land there's no doubt about that. It there was some doubt previously, with the final Constitution there's no doubt that the Constitutional Court is the highest land the highest court in the land. The the um leader of the Constitutional Court is called the Chief Justice and that is uh Justice Pius Langa and he is assisted by a Deputy Chief Justice, Dikgang Moseneke and um uh eleven other justices. These people are selected from various areas of expertise in South Africa, usually they are people uh sensitive to human rights issues, uh usually they represent a very specific part of South Africa's population. They are not traditional Justices. They have appointed academics to this court, Justice Kate O Regan was a professor at the University of Cape Town and she was appointed as a Justice and now she is an acting Deputy Chief Justice. Made an enormous impact on the constitutional jurisprudence and she was never an advocate or a practicing member of a uh a bar in South Africa or anywhere else. She was an academic. She was an academic and she was appointed as such. Justice Albie Sachs, a fighter for human rights. Although he practiced for a very limited matter, very limited matter in Mozambique, and the neighbouring countries, and he is a qualified lawyer um he is he was appointed because of his role in the struggle, because of the sacrifices that he has made and because of his passion for human rights. You can go through all the justices of the uh uh Supreme uh of the Constitutional Court, they were all appointed specifically for uh uh very specific human rights reasons. OK.

012 The important technical thing that you must know about the Constitutional Court is that there are certain aspects of the Constitutional Court that are that they can that they only that they have exclusive uh jurisdiction. Its indicated over here, the Supreme Court of Appeal in constitutional matters they can hear everything, all but those that only the Constitutional Court may hear. And the same for the high courts. Yes?

013 **STUDENT 8:** Sir, I'm under the impression that the Constitutional Court is only in session at certain times in the year. Is that true, and if so, why?

014 **LECTURER:** Um [fumbles over words] of course its true, because all courts are only sitting for certain times of the year. Um and the Constitutional Court has got um a specific diary or r-roster and thet are in session for certain times and they are in recess for other times. So ub-h exactly the same with High Courts. The High Court doesn't sit for the whole year, and the same for the Supreme Court of Appeal. Um and that is to give the Justices times to do

research. And write the judgments. And um to come up to date with the most current law. To be a just- to be a uh um to be a justice in South Africa, to be a judge in South Africa is not easy. Um it's a very dynamic environment. So uh besides holiday they need time off from court work, so that they can catch up with their research. OK

015 Here are the four or five elements or areas that the Constitutional Court has got exclusive jurisdiction. In disputes – I've mentioned this before but I'll mention it again because it is important. In disputes between organs of state at the national or provincial sphere concerning the constitutional nature, power or function of organs of state. Short, the short potted version for your for your purposes is any disputes between organs of state provincial or national. OK. Constitutionality of any Parliamentary or provincial Bill. Bill as opposed to Act – do you know the difference? What is the difference between a Bill and an Act? [some students murmur] Uh [as if in pain]. Try [gesturing to black female student].

016 **STUDENT 12:** I think maybe a Bill is is a lesser, it's a developing Act.

017 **LECTURER:** You are reminding now of when I needed a passport urgently and I enquired by at the Department of Home Affairs where one could get a passport urgently, in a very short period of time and a very dubious looking character in a caravan at the Department of Home Affairs in Randburg gave me a little card with a name and a number on and the name on the card was something like 'Suzie'. And the number. And that's all that was on the card. So I phoned this number and somebody picked up and said 'Yes'. And I said 'excuse me, is this the Department of Home Affairs, I'm looking for a person by the name of Suzie in connection with a urgent application for a passport.' And the lady said, 'this can be Suzie.' Nja …. I got my passport very quickly I must say, it cost me a lot of money but Suzie helped me to get a passport I think within four days.

018 The difference between an Act and a Bill ladies and gentlemen, a Bill is still under consideration. A Bill is something which is being in process, still in the Parliament, national or provincial. And an Act is something that has been promulgated, that has been signed by the President and filed with the Chief Justice. A legislation. OK. So this is for a Bill. The constitutionality of any amendment to the Constitution. Any amendment to the Constitution. Where the Parliament or the President has failed to fulfill a constitutional obligation. That goes directly to the Constitutional Court. And the certification of a provincial Constitution. Those things, ladies and gentlemen, no question. If you get a question about any of those there's no jurisdictional question, it goes directly to the Constitutional Court. Yes?

019 **STUDENT 3:** Sir will you please repeat the last two? [inaudible]

020 **LECTURER:** The last two – any, any Act um of Parliament or the President where they failed their constitutional duty or obligation. In other words the conduct of Parliament or the President as far as constitutionality is

concerned. And the last one, the certification of a provincial constitution. I don't even know if its worthwhile asking you a general knowledge question on this. You don't think so – that one – you don't want to answer. Do you know which provinces uh have already uh prepared constitutions? [some students murmur a response] Kwa-Zulu Natal, yes I think so with uh yes yes you are you are because it was it was a uh uh um not a Kwa-Zulu – what is the political party in Natal? [some students state a response] Inkhata. Inkhata yes. It wasn't accepted. It was sent back. But Natal had a Constitution. Yes? Which oth- what other province? I think that there are only three that have attempted a uh Constitution.

021 **STUDENT 3:** Didn't the Western Cape have …

022 **LECTURER:** Western Cape yes definitely. And Gauteng. Those are the three. They've all uh presented um Constitutions and they were all rejected. Uh they were all sent back and nothing has helped, nothing has happened in the interim. Um in terms of the Constitution provinces may have Constitutions, it is not necessary for them to have Constitutions. And it seems from the fact that three Constitutions have already been discarded uh that the idea of the Constitutional Court is rather not to have constitutions. OK. Any questions on the Constitutional Court?

023 The Constitutional Court, extremely easy, it's the highest court in the land. It has absolute authority on jurisdiction geographically and type of case. There's no type of case of any area in South Africa that is outside the jurisdiction of the Constitutional Court. The only thing you must remember about the Constitutional Court is that they've got exclusive jurisdiction on those five issues.

024 Ok we then get to the next uh the next court in our hierarchy and that is the Supreme Court of Appeal. We've chatted about the Supreme Court of Appeal, the Supreme Court of Appeal sits in Bloemfontein, um it is headed up by a Judge President. This was not the case in the old dispensation, the Chief Justice was, in the Appellate Division, in Bloemfontein – that was the highest court. Um there was no constitutional court and the Appellate Division was the highest court. There was a dispute about that in the early history of the twentieth century. Do you know about the dispute? That somebody challenged the Appellate Division as being the highest court? You should know this – this is general knowledge for any lawyer. You should know this. Are you not doing Constitutional Law? Come, think a little bit. My throat's getting dry, somebody must now also help talk. Yes, yes, yes a spark, a spark.

025 **STUDENT 3:** Harris versus [continues talking]

026 **LECTURER: LECTURER:** Yes, Harris, just the Harris decision. That's fine, that's fine. And what is the Harris decision – let somebody else answer. What is the dispute between the – what other court was higher than the Appellate Division? Hoo poo poo poo poo poo poo poo poo, as the Greeks would say.

Everything, if you see something in Greece that's strange they say ho po po po po po So?

027 **STUDENT 8:** Wasn't the Harris case something about the government wanting to go above the Constitutional Court?

028 **LECTURER:** No not the Constitutional Court my dear, it was the Appellate Division [STUDENT 8: Ja was it the SCA?] How did they do that? What did they …

029 **STUDENT 8:** They passed a, they tried to pass a Bill that gave them power over the courts.

030 **LECTURER:** Yes, so what did they do? How did they trump the Appellate Division?

031 **STUDENT 8:** They made themselves a court.

032 **LECTURER:** Yes and what was that court called? Somebody else, you've now said enough. [Pause] The High Court of Parliament. The High Court of Parliament. Uh but that that was completely unconstitutional, um and it was you know, it was the shenanigans of the apartheid government. They wanted to remove the coloured people from the common voter's roll and the way in which they did that is they enlarged the Senate uh and then uh the Appellate Division said 'No, this is unconstitutional, you can't do it'. Um and then they created the High Court of Parliament and the High Court of Parliament said 'Yes, you can do it' strangely enough. OK. So the only challenge to the superiority of the Appellate Division the old apartheid Appellate Division, though its unfair to call them the apartheid division of the Appellate Division, there was some sterling judges in the Appellate Division uh especially white, of course white but English liberal judges um uh also some Afrikaner professional judges that were above he apartheid nonsense um uh but the new dispensation, the new government still saw the Appellate Division as a bit tainted and uh as not supporting but standing quietly by while the apartheid government ravished human rights. Yes?

033 **STUDENT 8:** Uh wasn't it Oliver Schreiner that was the only judge that was uh against the whole Harris case issue? Wasn't he the only judge saying that it should not be allowed?

034 **LECTURER:** Ja Oliver Schreiner is one of the great judges of the Appellate Division. He never became Chief Justice but he is one of the people I'm talking to now.

035 **STUDENT 3:** Wasn't there, wasn't there a woman name Olive Schreiner?

036 **LECTURER:** Yes there was a woman called Olive Schreiner [laughs heartily].

037 **STUDENT 3:** Its been confusing me for weeks now.

038 **LECTURER:** Ja Oliver Schreiner [STUDENT 3: … came from the Eastern Cape or Cradock]. Oliver Schreiner is the very very famous and very intelligent and wonderful judge that we've called our law school, that we've named our law school after. So it's the Oli*ver* Schreiner School of Law. And if you go into the library you will see pictures of Oliver Schreiner. And he is indeed related to Olive Schreiner who wrote 'Pictures of an African Farm' or whatever. Um who was a um supporter of human rights even in the beginning of the twentieth century. And she was a novelist, a very famous novelist.

039 **STUDENT 3:** Cos I was wonder, a friend of mine always has these arguments with me. 'Its not Oliver Schreiner School of Law, its Olive Schreiner'. I said its rights, its Oli*ver*, they wouldn't have made that kind of mistake.

040 **LECTURER:** [Overlapping] No no [laughing]

041 **STUDENT 3:** [inaudible] But Olive was a girl, Oliver was a boy …

042 **LECTURER:** No no two different people but they are related. So um you can go and read about Oliver Schreiner. Um there are many articles in the law journal about him. Professor Kahn wrote a beautiful obituary about him when he passed away. Um but he was indeed involved in the Harris case and he was one of the few judges that stood up against the apartheid regime. Uh he was a brilliant judge. Uh even his technical cases, on things like mining rights and um uh administrative law, he was a true blue lawyer, you know, one of the … one of the greats. And of course, from this university. OK.

043 The Appellate Division sits in Bloemfontein, it is under the guidance of a Judge President, and now if you ask me who is the current Judge President, I don't know. Of the Supreme Court of Appeal, I'll go try and find out, I wanted to find out from my colleagues this morning but I don't know. But if you can go and find out that will be very helpful. Who is the current Judge President of the Supreme Court of Appeal? I'll ask Carol Lewis if I see her. OK. Um and they're assisted by a Deputy Judge President.

044 And the Appellate Division, um is a court of last instance, in other words you don't approach the Appellate Division directly. You don't take, you can't take your case and go to the Appellate Division, or the Supreme Court of Appeal, sorry, the Supreme Court of Appeal directly. You can only reach the Supreme Court of Appeal via a appeal, that's why its called the Supreme Court of Appeal. So it's a court of the final, final instance. It is a court of the final instance in all criminal and private law matters which is non-constitutional. It there's if the matter is purely criminal or private law orientated then you can go no further.

045 You remember […] who's not here today asked on Tuesday, can you go anywhere beyond the Constitutional Court. No, and you can also not go any further in the Supreme Court of Appeal in criminal or private law matters which is not uh constitutional. OK. The Supreme Court of Appeal has got national jurisdiction, there's no area limitation. And there's no type of crime

or amount of money that is too high for the Supreme Court of Appeal. The Supreme Court of Appeal's got inherent jurisdiction. And no amount is too high and no crime is excluded. OK.

046 So, if you look at our table here [referring to OHP], the Supreme [fumbles over words] the Supreme Court of Appeal, the area, geographical area is the whole of South Africa, all criminal cases, any kind of sentence, all civil cases, any amount can be uh uh imposed, and the only exception is only those cases that are exclusively in the jurisdiction of the Constitutional Court *and* if the Supreme Court of Appeal alters, based on constitutionality, alters a Parliamentary Act. Piece of legislation, that must be confirmed by the Constitutional Court. Yes?

047 **STUDENT 13:** If you have to take a case on appeal to the Supreme Court of Appeal, do they actually uphold the original findings and sentencing or do they change it? Do they ever have the jurisdiction to change the original sentencing …

048 **LECTURER**: Yes yes of course

049 **STUDENT 13:** So they can increase it or decrease it?

050 **LECTURER:** Whatever, when you work with these high, with these lofty courts, the superior courts, you know, jurisdiction is usually not a mat- not a question. They can do whatever they like. Um because you're going higher. Its at the bottom, with the magistrates' court that, you know, they are very restrictive. Yes […]?

051 **STUDENT 15:** Does it mean if they reckon your punishment was too lenient they can increase it?

052 **LECTURER:** Yes, and they usually do.

053 **STUDENT 15:** Oh wow …

054 **LECTURER:** They usually do. No they can definitely increase it, oh yes. OK. Um, did you all catch this last thing that I sent here, before I answered that question? There's this exception here, but there's also the exception, if the Supreme Court of Appeal declares a piece of legislation invalid based on constitutionality, that's not the end of it, it must go to the Constitutional Court to be confirmed.

055 **STUDENT 3:** The Appellate Division still known as the Appellate Division?

056 **LECTURER:** No no no definitely not. Its called the Supreme Court of Appeal, it stopped being the Appellate Division in 1994.

057 **STUDENT 14:** Then it stopped being Supreme …

058 **LECTURER:** Hmm

059 **STUDENT 14:** Nothing … How does the Supreme Court of Appeal get to judge, ratify legislation. Do you have to bring it to them or can ..

059 **LECTURER:** Yes ..

060 **STUDENT 14:** … they take it upon themselves.

061 **LECTURER:** No no no. They're a court of last instance, its an appeal court, so they can only, they only react on things brought to them. They can't, they can't go out and say 'A-ha, this new Marriage Act, we don't like it, uh uh lets take it'. They can only hear what is brought to them. That is what we call judge-made law. That's how the slow wheels of the court work. OK. Now, I don't want to get involved in this but I'm going to mention it in passing. So that you know about it. I'm not going to ask you questions on this because its too complicated and it's a lot of nonsense.

062 The the Supreme Court of Appeal covers the whole country. The next court below the Supreme Court of Appeal are the High Courts. These courts were known as Supreme Courts in the old dispensation. The name was changed to the High Court. Now the first thing I must tell you about the High Courts, is that its in a state of flux. The names and the geographical jurisdiction of the High Courts are being considered or they have been considered and a Commission of Inquiry under Judge Hoexter who is the father of Professor Hoexter who's one of our leading academics at the Wits Law School. The Hoexter Commission has designed a new structure for the whole of South Africa. But because you can't just with the stroke of a pen change the hierarchy of your courts, because they're dependent on what goes on on the ground, you can't say 'OK we've got eight courts now, we want ten courts' with the stroke of a pen. You must first build ten courts, man them and then can you change your um your structure. So we are still working with an ancient structure that was devised in 1910. And that structure is based on, loosely based on the four provinces, the old provinces, Transvaal, Orange Free State, uh Natal and Cape. Each of those provinces has got a provincial division and some, like Transvaal, has got a provincial division in Pretoria and a local division in Johannesburg. Durban, provincial division in Pietermaritzburg, local division in Durban. Durban and Coast Local Division. OK. That, coupled with the High Courts of the apartheid dispensation, High Court of Bophuthatswana, High Court of Ciskei, High Court of Transkei, High Court of Venda. Those courts are still operating, they are still – they're not being called by their apartheid names, the High Court of Bophuthatswana is now the court of North-West, its been brought up-to-date with the uh uh different provinces. Soon, hopefully before the, before 2010, a new system, a hope new system of local and provincial is going to do divisions or however the Hoexter Commission is going to do it, will be instituted and all courts will get new names and will get uh a new status. At the moment we have that structure that I showed you earlier this year when we did the structure of the courts. OK. So please don't get confused with that, its not necessary that you

memorize these things but you must know that the names of the courts are extremely confusing.

063 We are talking for children, for post-apartheid children like yourself who never – I don't know – I'm an old man, I don't know if you ever lived in a place called the Transvaal. Do you still remember the Transvaal? Well for a modern twenty-first century South African you know the word Transvaal is non-existent, they don't know what you're talking about. It's a difficult concept. Because its no longer a province. Gauteng uh didn't exist. So it is extremely confusing. I wouldn't break my head about it. Know about the basic divisions that there are. The important thing is you mustn't confuse local divisions and provincial divisions. Yes?

064 **STUDENT 13:** Is it very difficult to build new courts and shuffle around [inaudible]

065 **LECTURER:** Apparently, apparently. Because they've been, they've had time since, I don't know, I don't know since when the Hoexter Commission um, when the Hoexter Commission um was appointed but [reading from textbook], 'the Hoexter Enquiry made its recommendation …'. The Hoexter Commission was appointed post-1994. And it has already made its recommendations and it must now just be implemented. Apparently it is very difficult. Uh but it would be a huge help for intro teachers if they can now finalize this. So that you have a uh nice clean division and you can tell the students exactly what's going on.

066 Theoretically, the point that you must know, the thing that you can be examined on, is the difference, if any, between a local division and provincial division. The literature uses the word a 'parent division' and that is *extremely* misleading. The judges that sit in the local division are the exact same judges that sit in the provincial division. They are interchangeable. It's a roster. You sometimes sit in the provincial division, sometimes in the local division.

067 So what is the big difference then? What is the big difference between the local and the provincial division? Here is the only difference that I know of: If you have an appeal in the High Court, now you know what an appeal is. An appeal is a call upon a superior court to investigate the record of a lower court because you are convinced that something was decided incorrectly. If you appeal from a single judge, in the prov- in the local division. The difference between provincial and local divisions is only as far as appeals is concerned. The appeal jurisdiction in the High Courts work as follows: If you have a decision by a single judge, the appeal is to a full bench, which are three judges, in the provincial division. The appeal is then heard in the provincial division. For the rest, the local division and the provincial division, its one and the same thing.

068 There's no such a thing – and please don't fall into that trap by looking at the word 'parent', there's no such a thing that the local division is lower in status than the provincial division. As a matter of fact, in your own province here in

Gauteng, the provincial division in Pretoria does all the routine matters, and all the boring matters, and the local division, here in Johannesburg does all the complicated commercial matters. So the local division here in Johannesburg, the local division is where the action is. Not the provincial division in Pretoria. OK- have you got that in your minds? Yes?

069 **STUDENT 8:** Is it possible, in for the judge acting in the local um division on appeal to be one of the judges, one of the three judges so

070 **LECTURER:** [overlapping] No no no [STUDENT 8: so it will always be …] Obviously not, you can't uh what is the Latin? You can't you can never be the judge in your own case. Uh suo iudex non [inaudible] est – you remember that Latin? No. You can never be/ its like um its like um audi alteram partem, the other side must always be heard? Its natural justice, you can never be a judge in your own case. So a judge sits in the local division, who has an appeal against his judgment, cannot be a judge in the full bench in the provincial division. Natural justice. Uh-um, when there's an appeal, remember this, important, both courts must give permission. If there's an appeal from a single judge to a full bench, both the full bench and the single judge must give permission for that appeal to go forward.

071 Last point before we break. Very few people know this. But, you only have three bites at the cherry as far as appeals are concerned. You can only appeal three times. No more. So if you have a case in the magistrates court, the appeal from the magistrates court is to the High Court. That is one. Single judge, High Court. If you appeal against the single judge, High Court the appeal is to a full bench, High Court. Two. If you are not satisfied with the full bench, the appeal is to the Supreme Court of Appeal. Three. After that, game over. You can't appeal from the Supreme Court of Appeal to the Constitutional Court. Not available. Only three times.

072 **STUDENT 14:** What about Zuma?

073 **LECTURER:** No no he didn't appeal from the magistrates' court, he he came from the High Court, the Supreme Court of Appeal to the Constitutional Court. Three times.

074 **STUDENT 14:** So its just three times …

075 **LECTURER:** Ja. OK. Please remember this, uh especially if you work out a question on what is the characteristics of, or what is the difference between appeal and review. This is one of the characteristics of an appeal. You can only have three appeals. Yes?

076 **STUDENT 9:** When you want an appeal you've got to justify why you think you deserve one, or is it automatic?

077 **LECTURER:** [overlapping] Yes yes yes. You must convince the judge that has given the judgment and the judges that are going to listen to the appeal. You must convince them that there's good grounds for them to listen to it.

078 **STUDENT 9:** So that's part of when you get permission from them ..

079 **LECTURER:** [overlapping] Yes, ja. OK. Are there any questions on the um on the High Courts, we're still going to spend some time on their jurisdiction. We're not finished, but so far any more questions? No. You want to go. OK. Can we break for 10 minutes? Have a cup of coffee quickly and then we'll be back at ten past. OK. Thank you.

LECTURE 20

001 **LECTURER:** [Resuming lecture after break] And that's what a … [laughter from class] what? There's what a lawyer looks like ladies and gentlemen [shows picture of an old white male figure] [class laughter] No true … [more laughter] this is what a true blue lawyer looks like. If you want to become a good lawyer see to it that you can look like this.

002 **STUDENT 3:** Sir, who was Denis Reitz?

003 **LECTURER:** Denys Reitz. [WF2: Denys Reitz] He was the Minister of Justice. He was um uh a politician. He was a – has everybody got one [referring to books he has been handing out] – he was um he was an attorney, he started the firm Denys Reitz which is one of the great firms in Johannesburg today. Um he was also a boer. And not a boor as in um an uncouthed and unwashed man. He was a farmer. He wrote a trilogy of books um um called Outspan. Um I can't remember the all three books, can somebody remember the three books? The one is Outspan, the one is On Commando and the other one is … I can't remember. But he wrote a trilogy of books, so he was an intellectual, he wrote books. Uh uh and he was a friend of General Smuts. Um uh he did a lot for, both his work in Parliament and as a Minister of Justice, he did a lot for labour relations in South Africa. Specialized labour relations and that is why Denys Reitz still today is a major player in labour law. Um and it was a very impressive very impressive man. He was an Afrikaner, um uh but he was taken up by the English establishment. You have these rare Afrikaners that becomes part of the English establishment or the liberal establishment and then they become stars in that establishment. Like like Jan Hofmeyr, uh like Bram Fischer. Those were all Afrikaans speaking people that became very prominent um lawyers. Um so he's a he's a he's a very very impressive character.

004 You know few of us succeed in writing creatively. Um I like to write creatively and it takes me absolutely an age to write a short story. I'm writing a short story about taking a bus journey. Um. Overnight. Through South Africa. And, things that happened in the bus journey. Uh and I've been working on that, you know, since December. And its not like its ten hundred million pages. Its about forty pages. And its not/ you know/ its not getting there. Just it is excruciatingly difficult.

005 My colleagues always complain that legal writing is difficult and you will now complain to me that legal writing is so difficult because everything must be footnoted and authorized and you must be very careful not to commit plagiarism and its *really* difficult not to, to write academically, legal academic writing is one of the most difficult things to do. And the only thing more difficult than legal academic writing is creative writing. Writing something you know that you think people will want to read and would add to their experience. Or knowledge or whatever. Uh that is that is that is very difficult.

006 Now Denys Reitz wrote creatively, wrote three books. He was, ok, he was a successful politician, that's not so difficult. You know, anybody can become a successful politician. Well, perhaps not anybody. I'm very skeptical about politicians you know. They always say, if you can't do law then do politics, you know, there's always a back door. But OK that's very cynical and there are good politicians. And Denys Reitz was one of the good politicians. But he was a Minister of Justice in the Smuts cabinet. And he started one of the major law firms in South Africa. Its *amazing* how some people just have an aptitude to to do all these things. I mean, some of my colleagues … I can't even get around organizing my own day. You know I can't/ leave alone writing a PhD and writing a textbook and writing articles and serving on all the academic committees and being an editor. But some people can do it and other people, you know, we're not all equal. That is unfortunately true. Its very cruel but it is true. Um, so that's Denys Reitz. Are you planning to do your articles at Denys Reitz?

007 **STUDENT 3:** No no no I was just wondering because I know the law firm is named after him and I kind of figured that he was a prominent figure …

008 **LECTURER:** [overlapping] No, he was the founder of the law firm …

009 **STUDENT 3:** [overlapping] But its just because I drive past a road called Denys Reitz drive every single day.

010 **LECTURER:** Nja, that's Denys Reitz is a very impressive character. He wasn't attractive, he was very fat. He was a real old boer oomie. He had his pants up to here [indicating his diaphragm region] and then suspenders his jacket would reach over here [indicating knees, laughter from class]. He would walk like this, but very/ besides being a bit old-fashioned he was a very impressive character.

011 OK. Let us/ any questions on the/ on this very, on this uh on this very very mechanical view on the High Courts? I can see yawning breaking out on this plateau here, one after the other. I'm sorry, its not, you know, its very difficult to make this very exciting and you know … But it is something that you must know, it is the tools of your trade. You must if you leave this course you must know how the uh um courts work. Otherwise, you know, you can go and ask for your money back. So you must just maar bear with me. OK.

012 Let us just do the High Courts. Now difficult concept of the High Court that students have, they don't understand is the question of the inherent jurisdiction of the High Court. The inherent jurisdiction – do you understand the word 'inherent'? [pauses] Inherent – do you understand the word? The High Court, because it is a High Court, is not limited in jurisdiction as far as the type of case or the amount of money is concerned. You fix jurisdiction in the High Court, (a) the place where the defendant lives, or where the action happened, the action took place.

013 The High Court, however, is limited in jurisdiction as far as geographical area is concerned. We are now getting the first limitation on jurisdiction. The High Court [pauses] for the Transvaal, as it is now still known, is limited to the jurisdiction of the old Transvaal. The High Court for the Witwatersrand is limited to the jurisdiction of the Witwatersrand. OK?

014 In civil cases, if you want to go to the High Court directly, you can, it is a court of first instance. And you vest jurisdiction either by instituting the action where the defendant lives, in a civil action, or where the action took place. In a criminal case, the jurisdiction is decided by the Director of Public Prosecutions based on the same considerations: Where the accused lives, or where the crime took place. That is in the discretion of the Director of Public Prosecutions but those are the general outlines.

015 So there's a dichotomy here, isn't there? On the first/ on the one hand I tell you that the High Court has got inherent jurisdiction. Inherent means nothing can limit it. And then directly after that I say that that the High Court is limited as far as geographical area is concerned. It is it is a contradiction but, you remember the scheme we did yesterday. You look at jurisdiction through two lenses: The one is the type of case and the other is the geographical area. And they differ, they differ. OK.

016 The High Court, as far as area is concerned, is limited to specific provincial areas. They can hear all criminal cases. There are no criminal cases beyond the jurisdiction of the High Court. All – they can impose any sentence whatsoever – of course not the death sentence because that's not available. Civil cases they can impose any sentence whatsoever. No amount is too high or too low. And uh amounts, they can hear any case. Um which is in dispute. There's not a top or a bottom. Now … Yes?

017 **STUDENT 13:** Is there automatic review with the High Courts?

018 **LECTURER:** No, no no no. Where would you to review? Who will review the High Courts?

019 **STUDENT 13:** I was just wondering …

020 **LECTURER:** Custos custodius … What does that mean? Custos custodies. Oi oi oi. [Student H] what does custos custodies mean? These are the words you are going to use when you're a lawyer to impress your clients. So that they will pay you R20 000 an hour.

021 **STUDENT 14:** I guess …

022 **LECTURER:** Yes, you must guess!

023 **STUDENT 14:** … something like the guardian of guardians?

024 **LECTURER:** The guardian of the guardian? There's no custos custodius for the High Court. Except of course the Constitutional Court when it goes on review in the Constitutional Court. But no no automatic review for the High Court.

You must also remember, a district court magistrate, and a regional court magistrate, to a lesser extent, is *far* removed from a judge. Judges are appointed the best of the best. Well … some people will not agree with that. But the idea is the very *best* senior advocates. The very best of the practicing advocates are appointed as judges. So uh when you reach the stage where you are invited to become a judge, uh you really know your business. You've been through the mill and you really know your law. Um you know its not guess work.

025 While a magistrate, nja, is just trained here in Pretoria for six months and you know par de par. Here they didn't even have to have an LLB. Now they must have an LLB. But in the old days mje just a public service diploma or you know walking past a few law books would have sufficed. Um, nowadays its more formalized. But magistrates and judges are very very far removed.

026 Having said that, and we'll do this when we do the profession, please remember that it was one of Dullah Omar's objectives, the previous Minister of Justice, that the curriculum vitae, the cursus honorum, the career path of a magistrate and a judge would eventually in South Africa become one. You would start by being a junior prosecutor, senior prosecutor uh being elevated to the bench becoming a magistrate, senior magistrate, regional court magistrate, senior court magistrate, regional court president and then be invited to become a judge in the High Court. He tried to bridge that gap. And some senior regional court magistrates on criminal matters have made it into the High Court.

027 As a matter of fact, one of my colleagues, who is now a very controversial character Mr Andre LeGransie, he was with me a magistrate in Cape Town. And he was very bright, very bright young guy. He was really very very clever. And very fair, you know he was a – I find it embarrassing always to refer to this, but he was a man of colour. From the Cape. And he did his LLB at the University of the Western Cape and when he was a magistrate, he was very, deeply concerned about human rights. You know, obviously. Um and so he was a magistrate.

028 He became a regional court magistrate um and in the beginning of this year he was the magistrate in the case with that other buffoon, that politician in the Western Cape that was found not guilty on um corruption charges … with that development of that golf course … You remember him … Pipi, its not Morkel, Pieter somebody, van der Westhuizen or you know was an absolute buffoon, he was always, like Rajbansi in the apartheid years 'The tiger is here again', you know, he was found guilty on every single thing uh charge of corruption uh who always came back, you know, if you [inaudible] he's on the voter's roll again and he's standing for himself or he's standing for a new party. Now he was like that what was his name? Can't you remember? In any case, he was the magistrate in that case and he found him not guilty based on facts and the Scorpions were very upset and they asked him for reasons and he said um his reasons are evident from his judgment and it was not a

matter based on law it was merely on facts of the case he found it um that there was enough grounds uh for doubt, it was not proved beyond reasonable doubt that this Pieter van der Merwe or Pieter Vermeulen or I don't know what his name is … and he was found not guilty.

029 Uh and he's now in the High Court. Andre Legransie. And I think he will be you know an excellent High Court judge. He's got the gravitas and the knowledge and the professionalism to become a High Court judge. OK so it is possible to become a magistrate, a High Court but the run of the mill magistrate is very far from the High Court. And a judge in the High Court, especially with some standing, a couple of year's standing, you don't need to review his work, you know. They know what they're doing. OK.

030 Um what else can I tell you? The High Court has also got uh special constitutional jurisdiction. The High Court can, as a court of first instance, hear constitutional matters and then of course, if they decide that a Bill or an Act of Parliament is unconstitutional it must go for uh confirmation to the Constitutional Court. Um but they can declare, they can declare an Act of Parliament, uh unconstitutional.

031 OK any more questions on the High Court, I can't remember if there's anything else I should tell you. Um the High Court is not, is not the difficult one.

032 We get to the difficult ones now, in the regional magistrates' court. Unfortunately, they are very very important. Ninety-eight percent ladies and gentlemen, you won't believe this, ninety-eight percent [writes '98%' on board] of all legal work criminal and civil, is done in the magistrates' court. Unbelievable, I couldn't believe it but its true. Ninety-eight percent of all legal work is done in the magistrates' court so it is an enormously important court.

033 Um uh. Jurisdiction is difficult, because they are limited. The regional court is in the Johannesburg regional, in the Johannesburg magistrates' court you will have for the region of Southern Transvaal, the regional court will be for the region of southern Transvaal.

034 The district court, which is the court lower than the regional court is only for Johannesburg. The district court is only for the municipal area of Johannesburg. So the regional and the magistrates' district court is both, they are both limited as far as geographical area is concerned.

035 The magistrates' court is also limited in all other aspects. As far as criminal cases are concerned, the regional court can hear any every case except treason. I think, its safe to say, except treason and sedition. Um I don't exactly know what the difference between treason and sedition is, I think sedition is with violence. Is treason with violence. So treason and sedition cannot be heard by the regional magistrates' court.

036 Now you must be very careful, because the system operates as follows: When you are caught, say for instance the Boeremag people, who committed

treason. Those people you will find, when you see them on television, when they appear in court they will appear in the magistrates' court. And especially for young aspiring little lawyers like yourself, you will then be confused. How is it possible that people charged with treason can appear in the magistrates' court? They appear in the magistrates' court purely to be directed to the High Court. The High Court is very very busy, although they only do two percent of the work, they're very very busy it's a very formalized court, their court rolls are very full and you can't bring somebody off the street to the High Court. On a criminal case. Because it would just be chaos. So what happens? In order not to let the people rot in jail, you bring them to the magistrates' court to what we call a directional court, Court 13 in Johannesburg. And the magistrate, the regional court magistrate in Johannesburg, has got a diary for the High Court, and they place the matter on the roll for the High Court in the magistrates' court. Doesn't mean that the magistrates' court has got authority to hear that matter? They've only got authority to send it to the High Court. Why do they do this? The main reason is so that the prisoners or the accused not remain in custody until the High Court can hear them in five or eight or ten weeks or months time. So they appear in the magistrates' court a) to be directed to the High Court; b) to consider whether they can get bail or not. You understand the practicality? But the regional magistrate's court … yes?

037 **STUDENT 13:** If you appear in the regional magistrates' court, what makes the difference for appearing in the High Court for murder? Is it the severity of who did it … or?

038 **LECTURER:** That's you know, that's a very very good question. Because, when I was still a young lecturer, a student asked me this, not about murder but about r-r-rape. And I said, 'well that's very easy', I didn't know the answer so I busked. And I said, 'Its very easy, because if it's a serious rape then you go to the High Court and if its' not so serious you go to the magistrates' court'. Oe [lowers head and touches top of head as if ducking a blow]. And of course I had all the Women's Auxiliary and Rape Crisis and feminists for rape on me like bees on a piece of honey. Um which is true. There's no such thing as a serious or a not serious rape. Rape is rape. Murder is murder. You don't you know, you don't murder with good intentions. You kill people and, you know, that's bad. Its, you know, some murders are more gruesome than others but so what, there's only life imprisonment that you can be imposed.

039 So … when it was the death penalty then I can understand. When the death penalty was a possibility you go to the High Court otherwise you go to the magistrates' court. That is what it was in the old days. But that has fallen away. So they've instituted a little character called the Director of Public Prosecutions. There's a Director of Public Prosecutions in each province and he's represented by his public prosecutors in every court.

040 And every public prosecutor, if you're going to become a public prosecutor, the first you you qualify is you get your delegation. A delegation is a piece of

paper signed by the Director of Public Prosecutions saying this person can take decisions on my behalf. So the prosecutor in the court takes the decision where this rape or where this murder should go to. If he or she thinks it should go to the regional court, it goes to the regional court, whatever reason they advance or whatever instructions they get from the Director of Public Prosecutions. You know, obviously there are directives. But its not serious or not serious. So if it is a / its things like high profile, things like um ub-h a very important case, like a test case, things like a new legal principle perhaps that nay be tested should go to the High Court, because that can get reported, and that will then form part of law other than in the regional court, things like that. But I means its, how long is a piece of rope? What who decides where it goes? It is *not*, I mean, to fix my blunder of ten years ago, it is *not* decided on whether it's a serious or not serious crime. OK.

041 So the High Court, the regional court can hear any crime, except treason. Any other crime except treason and I think also sedition. Its not mentioned here, but it's the same as treason. The uh yes?

042 **STUDENT 9:** Which area did you say the Johannesburg regional magistrates' court covered?

043 **LECTURER:** The district court is just the municipality of Johannesburg, the greater Johannesburg municipality, and they've got branch courts, but just the district is Johannesburg district. And the regional court in Johannesburg is southern Transvaal. You know, from Johannesburg down to the borders of the old Transvaal. And not you know not more north of Pretoria. But south south of Johannesburg. But that's a region, it's a much larger area. And they also have um rondgaanhowe, travelling courts, courts going from city to city in that region.

044 The regional court is limited in its jurisdiction as far as sentencing is concerned. For up to fifteen years per count. Ladies and gentlemen, people forget this, its per count. And a fine of R300 000 per count.

045 When I was a when I was a specialist prosecutor one of my glorious cases that I prosecuted was sommer a very quick case that was sent to my court, I prosecuted credit card fraud as a specialist uh uh court. So all the credit card fraud was brought to my court and you know to to see to it that uniform sentences and harsh sentences and to prevent credit card fraud uh was done they centralized all credit card fraud in my in my court. And credit card fraud is not difficult to prove. You know, you have the real evidence there you have the credit card, the slip, you have the bank statements, that's not difficult its not a difficult case to prosecute, but the credit card fraud is one of the fraud matters, and we'll deal with that soon, the magistrates' court's jurisdiction is extended in certain circumstances, for drugs and drug trafficking, credit card fraud, uh human trafficking, etc etc the district or as we call them the specialist courts have increased jurisdiction.

046 So, there was this guy and he had thirty offences of credit card fraud for American Express. He stole an American Express card and he used it for on thirty individual times. We had all the evidence there, and the prosecutor that forwarded the case to my court, um entered into a plea bargain with the accused, saying: 'If you plead guilty on one count, we'll find you guilty on one count and, you know, you'll only be charged on one count. And, you know, that's the end of it. OK then you plead guilty, there's no trial, thank you very much. But that was the previous prosecutor.

047 When it came to my court I said: 'I am not going to accept this.' Because you can imagine, American Express, if this guy's only found guilty on one count they only, when they institute civil action they've only got grounds for one offence. Its true, whether you're found guilty for one offence or thirty offences the criminality is the same. But the commercial implications differed. So when the person, the accused came to my court, I said: 'Look, you're now in a new court, a new prosecutor, the previous prosecutor said that you could plead guilty and we will only sentence you on one count. That's not going to happen. Um, you know. If you want to plead guilty you're welcome, but I'm going to charge you on all thirty counts.' So he asked: 'Well, is that the same … as one count?' I said: 'No its not the same, you know, you're found guilty thirty times, its not the same.' Like if you use this card thirty times, you're going to be penalized thirty times. And somehow he was tired or he just didn't understood what I said and he, I put the charge to him, all thirty counts, from a to z, all thirty counts, took half an hour to read the charge sheet, and he said: 'Ag ja' you know, just wanted to finish it and not plead guilty, thinking he will pay a penalty, a fine.

048 Which is, for the first offence, quite normal to pay for one credit card transgression, to pay a fine, even if it's a lot of money. But, you can, if you are a good prosecutor, ask the magistrate to impose a fine, a jail sentence without the option of a fine. So he pleaded guilty on all thirty charges, and I asked for the maximum sentence on all thirty charges. And the maximum sentence is twelve months per charge, per count. So he went to jail for thirty years, without the option of a fine.

049 He's still there today. He's still in jail, unless he was released on one of these ridiculous amnesties. Thirty years. This was about twenty years ago. So he's still rotting away in jail somewhere. So please be careful. I mean I was a small little prosecutor in a dirty dingy little court and he went to jail for thirty years which is longer than life ... imprisonment, because life imprisonment is twenty-five years.

050 And went on review and was confirmed on review. By the way, if you think all my cases were turned over [laughs, amid class laughter]. It was confirmed by no lesser luminary than judge Eloff, who was Judge President. It was confirmed on review. Yes?

051 **STUDENT 13:** Ok, it's a bit of a silly question. You keep on referring it to your court. Does each, when you were a judge, does each judge literally have their own court.

052 **LECTURER:** Yes, oh yes, yes.

053 **STUDENR 13:** So you don't [inaudible]

054 **LECTURER:** No no no, it depends. If you become a magistrate and you're so unlucky to get this court that I talked to you about, the transitional court, the the directional court, uh that's a hideous court because its like a supermarket. You you get there at nine o clock in the morning and you must take a decision every five minutes and all you get is the worst criminals in Johannesburg appearing before you and all you must do is decided which court they must go to. Um and because its such a horrible court if they put a magistrate there permanently he will go mad, not that magistrates are not mad, I mean they are all mad [more laughter from class]. But if you put a person there permanently they will, I mean they will just resign after a week, I mean, its like casualty … uh ward in Hillbrow.

055 You know, you can do it for one day but they rotate that one, but if you're a nice senior magistrate, especially senior regional court magistrate, you pick and choose what cases you want and then you've got court 13, or court 25. And your offices is attached to the court. You walk out of your office into the court. Um and that's your court. Its your court orderly, its your interpreter, its your prosecutor, its uh … the whole organization is yours. You are the king, you are the king of the of the dung heap. Yes?

056 **STUDENT 3:** Sir, I was under the conception that um if someone pleads guilty in court the magistrate or judge is more likely to give a tiny bit less of a harsher sentence because of a …

057 **LECTURER:** Yes, it could be, it could be. If you plead guilty, it save an enormous amount of time, it saves an enormous amount of time, um and um you are helping the court. And it shows remorse! You admit 'Look, mea culpa, I'm guilty, I'm here, I'm throwing myself on your mercy.' Then of course the court will take it into consideration.

058 But not if it is an endemic crime, an easy crime, like credit card. Um, you know, if you steal people's credit card and you um use the credit card to enrich yourself, its not a question that you were poor or that you were hungry or that you had to look after your children or whatever, you used it for your own luxurious ends buying Mont Blanc pens and going for luxury dinners and things like that, on somebody else's expense? That is something that the court takes an extremely dim view of. And, secondly, if you steal from your employer.

059 Never steal from your employer. If you steal from the hand that feeds you, you can, I can remember when I was a prosecutor, one Friday, the sentences are always postponed to the Friday so that you do all your sentencing on

Friday, and I had an old battleaxe for a magistrate. She's now senior magistrate here in Johannesburg. But she was *extremely* strict. And we had a case of a bookkeeper, a lady, single mother, wonderful wonderful civilized, first-class citizen. Worked thirty years for her employer, she stole ten thousand rands every month. Every month for thirty years. And she stole it for her children, to put her children through university and you know she had her psychiatrist and everybody there and everybody came to give evidence. First offence. First offence. No criminal record. Wonderful, wonderful employer. You know, the manager was there, the owner of the business was there. Said 'never a better person, we don't want her to go to prison we just want, you know, basically, to remove her. We want her to be found guilty and she must not come back. That's what we will ask the court to do.' And everybody, including myself, was expecting a, perhaps, house arrest, you know this provisional supervision. But, you know, it was a first offence as a mother looking after her children! Its, you know .. .

060 And old Mrs Gradiz walked in there and I could see [indicates that the magistrate was frowning], *not* in a good mood. And she sent her, she sent her to jail for a very, very long time. And the woman, everybody in court broke down crying, you know, they were not prepared, they didn't, they didn't expect it *at all*. And they said they will go for rehabilitation, they will go for courses she said 'yes, go do that in jail, there are lots of wonderful courses that you can do. Go stand down …' I think it was something like twelve and a half years. Stand down.

061 On a Friday morning you pack your bag and you go to magistrates' court and you think you're going to get a fine perhaps and a reprimand, and you get twelve and a half years. And it was confirmed. So, if you steal from your employer, do anything, you know, steal from anybody but don't steal from your employer: a) because its so easy and b) because you never its so the courts take an *extremely* dim view of it. And there's no mercy. As far as .. drug dealing, credit card fraud, things like that. Very little mercy. Even if you plead guilty, even if you plead guilty. OK.

062 Just lets finish the regional court quickly. Uh the regional court does not have civil cases. There is a uh Bill making provision for a higher civil court in the magistrates' court but the Bill has not been passed yet. And we're all looking forward to that but at the moment there's no regional court civil court. And, of course, no constitutional jurisdiction. Although that is also subject to a uh law commission recommendation that constitutional jurisdiction be given to both the regional and the civil court. The district magistrates' court, only for a specific district, sorry I'm in your way here, only for a specific district, like Johannesburg. And here you can see, limited in every single way.

063 Now this is what you must know because this is the complicated one. Criminal cases: Everything, but treason, murder and rape. Treason, sedition, murder and rape can never be heard in a district court. The regional court,

magistrates' court can also never make a decision on the status of a person. On the status of a person. No status, such as divorce, wills etc.

064 As far as the sentence is concerned, the district magistrates' court is limited up to three years – in my day ha, its good I'm no longer there – look, its three years per count so its onlt ten counts and that's thirty years. Three years per count and sixty thousand rand per count.

065 Ladies and gentlemen this looks very innocuous, it looks very innocent, um and most, very few magistrates, district court magistrates will go up to the three years and the sixty thousand rand but if you get a serious matter, if you get a serious matter you can be hurt very very badly in the magistrates' court. OK.

066 Even, I remember one of the first cases that came before me in Cape Town, was a man that was driving on the blue route, those of you who know the blue route. He was driving two hundred and sixty kilometers per hour. On the blue route. And the blue route is notorious for aqua-planing. So you know if it rains your car just slids off the uh off the highway. And I phoned the senior state prosecutor and I asked what penalty should I impose and he said: 'Take away his licence, don't endorse it, take it away, twelve months suspend his licence, and the highest possible um uh penalty. So he lost his licence, in those days it was one year with the option of a fine of thirty thousand rand. Even for just speeding. So now it would be three years and sixty thousand rand. OK.

067 So, and then civil court, the civil magistrates' court can only hear matters up to a hundred thousand rand. This can be changed ladies and gentlemen. If you have a case for a million rand but you don't want to uh incur the expense of the High Court, you, by mutual agreement say, ' we will reduce our claim to a hundred thousand, but we want to go to the magistrates' court because its quicker, its cheaper and its faster. So, by mutual agreement you may admit to a lesser amount in the magistrates' court. Do you understand that? OK.

068 And then as I say um there are there are moves afoot to give uh the constitutional jurisdiction to the magistrates' court um but we don't know when that's going to happen. Any questions ladies and gentlemen? On the on the yes? Or any questions on the court?

069 **STUDENT 9:** Well, its not [overlapping] strictly speaking jurisdictional question, I want to go nad have a look at a I want to go and watch a court case. Are most, are courts open to the public?

070 **LECTURER:** Yes, of course, a court all courts except if the judge rules that it is in camera. In camera means that because of the sensitivity of the case uh it shouldn't be held in public. Those cases are usually where children are involved. If the child has been molested then obviously you don't want the public to sit there and look at the poor child giving evidence. Um you know if

its high priority – Zuma asked that his case be heard in camera and the judge said 'No'. Um but usually if its high profile or if its very sensitive. If it concerns national security as Zuma said it did, national security on the weapons, whatever, then the judge can decide that the court will be heard in camera. And that the court doors are closed and that there are notices that this court is in camera.

071 But all other courts must be open. There's a public gallery, you don't have to apply or … you just walk in, into the High Court and the magistrates' court and go and sit there. Magistrates' courts are very grimy, the district courts are in the basement and they are very dirty. If you want to see what law in practice looks like it's a very good idea. To go and sit there for a day and then you know you will come back and enroll for dentistry. [laughter]

072 Um And the High Courts are more are more beautiful especially Pretoria, they've got a new building. And the old building specially is very very beautiful. I don't know if they still use the old building, but the old building on Church Square is exquisite its beautiful, beautiful building. Its French Renaissance building and of course you can write an article on the architecture of courts, but the High Courts in Pretoria are very beautiful. In Johannesburg they're also a bit grimy, its in City Centre, but they are more beautiful and they are also um they are also more acceptable than the magistrates' court.

073 The regional courts are upstairs, some of them have been renovated and they are quite, they are quite beautiful. Wood paneling and you know high chairs and it looks like a proper court. And those might be interesting but they're very very you know, its just criminal matters and its um its very depressing. You know people being hacked to pieces by axes and things like that, its not uh its not for the sensitive, you know. If you're on Valium, don't go. Its not, it really is not pleasant.

074 So um its very good experience. Both High Court and magistrates' court. Um and nobody will stop you, they might want to search you of course for security reasons but that's it. OK other questions ladies and gentlemen? Greek lady? No questions, no? Nothing all? OK. Thank you very much I'll see you on Tuesday again.

LECTURE 21

001 **LECTURER:** ... perhaps if we can [adjusting OHP] … start … start where we stopped last, last time, because we we rushed last time. We rushed the .. magistrates' court a little bit. And the magistrates' court as you know is very very important. OK [clears throat] what we're going to do today is. We're just going to do the do the final part of the jurisdiction of the magistrates' court and then uh we can talk about the legal profession. Please uh although this is not a difficult chapter don't think that its not examinable. Um I will ask you difficult questions um about the legal profession. Um so don't don't think its not its not important.

002 OK, the regional magistrates' court ladies and gentlemen, the jurisdiction of the regional magistrates' court (a) as far as geographical area is concerned, it is limited, very strictly limited to a very specific geographical area. Uh in Johannesburg the regional court sits in Fox street just across uh just where main street uh forms a T-junction with Fox street.

003 Uh its an old um a very interesting building, uh its an old, one of these monumental architectural buildings, art deco in places. It's a very very very uh neglected building and it took me uh about six months to discover that in this building you have four great murals by the great South African artist Pierneef. Um uh granted they are not his best work, they are early examples of his work, but at each entrance / the building is is uh covers a whole block, a whole city block. It's a huge building, and at each entrance um as you come into the building um and you look back, there's a huge mural by Pierneef. Yes?

004 **STUDENT 8:** Sir, isn't it the case that when these buildings are so neglected and especially judicial buildings, isn't it I mean a really sad sort of affairs, doesn't the building itself represent the strength of the judicial system and if they neglect it it seems to be representative of the system itself. I'm sorry, maybe I've got a skewed view of things …

005 **LECTURER:** No no, no no you can I mean / there's an academic at UNISA called professor Wessel … professor Wessels. Or is it professor Wessel something … I don't know. He writes about the architecture of judicial buildings. He writes, he compares the new constitutional court with the Supreme Court, the High Court in Pretoria for example uh where one is open and reflective of human rights and the other is a monumental building reflective of the State uh power at that state uh at that stage uh when Paul Kruger and his government built the building. So if you're interested in that you can go and read, he's written several articles on judicial buildings, as a reflection of the society that we are in.

006 Um uh I think it's a bit, um I can't spend time on this now here but I think it's a bit glib. I don't think you can look at a building and say 'This is an apartheid building' um it you know I think, I think its far more complex than that. Um and the architect might not even have been a supporter of apartheid or um

aah I don't know, it's a, its very glib to say, you know, these buildings represent human rights and they are open and they've got lots of windows and these buildings are dark and neglected and they represent the apartheid state. Uh its just too easy.

007 But OK uh when you go to the Johannesburg magistrates' court don't forget to go and look at the Pierneef panels, they are quite impressive.

008 Uh the regional court sits at the Johannesburg magistrates' court and it is limited in so far as it is southern uh for the southern Transvaal region. Anything south of Johannesburg. All the old part of Transvaal, anything south of Johannesburg. And so every regional court has got its own geographical area. The district court, district magistrates' court is only for Johannesburg, for the district of Johannesburg.

009 OK, uh what I've forgotten to tell you and which was a major political problem in the old dispensation, who is the, who is the leader of the regional magistrates' court? Do you know? Who's the chief in charge, chief bottlewasher in the regional court? In any regional court? [pause] And in the magistrates' court? In the district court? Did I not do this with you?

010 OK in the district court it's the chief magistrate, the chief magistrate. Now the chief magistrate is an enormously influential person. Uh he decides whether you can have um gatherings in his city. He's the person to decide where the court's going to be, uh what court will listen to what case, uh the organization of the court, the organization of the regional court even uh enormously politically powerful person. Everything, whether there's going to be a march, whether he will give permission for a march to be held, um uh whether you can have / if you have a huge pop concert you must get permission from the chief magistrate. So the chief magistrate is a *hugely* influential political person. Uh its also a very high senior public uh um service uh appointment. No longer because the magistrates now have their own act and they see them as no longer being civil servants. But that's more perceived than real. They are still being paid by the civil service, they work in the civil service, their buildings, they've got their own commission. But um they're not completely independent.

011 The head of the regional court is the regional court president. The regional court president. Now a regional court president is, in status, in protocol, is higher, he is more senior than a chief magistrate, but the chief magistrate has got more political power than the regional court president. The regional court president is only concerned with the organization of the regional court in his region. He's got nothing to do with the district court, he's got nothing to do with political issues, he's got nothing to do with the outside world, he's only a president for the regional court.

012 Now, in the past, there were lots of very interesting clashes between regional court presidents and chief magistrates, especially if they are of two different political persuasions. Then you can get quite a lot of fireworks. OK.

013 The regional court, regional court is limited in area, uh only insofar as its area is demarcated by the Act, you must remember that district, uh the magistrates court is a creature of statute. It is created by a statute and everything it does is done in terms of the statute, so it is limited in terms of area as prescribed by the statute. As far as criminal cases is concerned, it can not do treason or um sedition. Sentences, it can impose up to fifteen years for a first offence, and a fine of R300 000. That is quite a hefty jurisdiction. That is quite a hefty jurisdiction. It is, for all intents and purposes, virtually the same as the Supreme as the High Court. Um, its virtually the same as the High Court.

014 Now, the interesting thing is, what happens with civil cases, in the magistrates' court. Now please listen carefully because first of all its in a state of flux and students always confuse this. In the magistrates' court there is only, up to now, there's only one civil branch, and that is equivalent to the district magistrates court. [pause] There is only one civil branch in the in the magistrates court. In other words you have got your criminal division, which consists of the regional court and the district's court, and you've got your civil division which consists only of the districts' court. Ordinary magistrates, with an LLB sit in the civil court. The civil court has got no status / no jurisdiction to alter the status of anybody. Cannot pronounce upon the legitimacy of a will, cannot change the status of anybody, no divorce, no adoptions, nothing of the sort. And it cannot order specific performance. [laughter from class arising from one student who has entered late] What is it now? Have you heard what I've said now, its important. No status, no interpretation of wills, no specific performance of contracts. OK. So they are limited in that. And then they are also limited, they can only hear cases up to R100 000. I've told you they can go higher if they abandon the excess.

015 OK. This is being investigated. The idea is that it will be changed, that a senior civil court will be introduced, where senior magistrates would sit. It would have a jurisdiction of R300 / well, when I, when I last heard they were considering a jurisdiction of R300 0000. Jurisdiction of the amount, the cases they could hear, R300 000, but that may change to R500 000, depending on when this court is going to be instituted. And that unopposed divorce matters might be moved to this senior civil court. Ladies and gentlemen, this court does not exist. It is it is only proposed. I don't know when its going to be instituted, um, it is only in the pipeline. OK.

016 Are you all right with the regional court? With the jurisdiction of the regional court? Just quickly let us run through the jurisdiction of the district court. Now the district court, the district magistrates' court ladies and gentlemen, is the lowest court that you can get in the hierarchy, um it doesn't mean that its not important, it does virtually all the work. Between the regional court and the district court it does virtually the lion's share of the work. So the district court is is very important, although it is um very neglected. It is restricted in its jurisdiction as far as area is concerned, it can only hear matters that arose in the specific district. So the Johannesburg district court can only hear

matters that arose within the Johannesburg, the municipal district of Johannesburg. It can not hear any treason, sedition, murder and rape cases. In terms of criminal cases it is limited in that it cannot hear treason, murder, rape and sedition. Its jurisdiction, as far as sentencing is concerned, it can impose a sentence of up to three years or R60 000 per count. Three years or R60 000 per count.

017 Uh of course the civil district court can hear lower status cases, the jurisdiction is limited to R100 000 and the magistrates' court is under consideration for being given constitutional jurisdiction. You remember when we started this series of lectures on jurisdiction, I told you that the magistrates' court was introduced, the new government was introduced and there was a, I wouldn't say an animosity but a mistrust between the magistrates' court and the new government. Because the magistrates courts were those courts that sat in judgment on the pass laws, they were the primary movers for the implementation of apartheid, they were seen as civil servants and lackeys of the apartheid government. This has now changed, we are fifteen years later into the new government and uh the whole magistracy has changed and they are now, it seems as if they are now ready for constitutional jurisdiction.

018 OK. Any questions ladies and gentlemen? Any questions? [no response from class] Must I ask a few questions?

019 **STUDENT 3:** Sorry sir, you said something …

020 **LECTURER:** I seek, now … yes. Yes yes I'm listening.

021 **STUDENT 3:** With the district magistrates' court you said something about it hears no status cases and something about R100 000. I missed it.

022 **STUDENT 1:** [inaudible]

023 **LECTURER:** The district civil court. The magistrates court, divided into a regional and a district court. The district court is divided into civil and criminal. The criminal jurisdiction is there, the civil jurisdiction is: No status, no interpretation of wills, no specific performance. And, it is limited to R100 000. You may change that – if your case is R200 000 then you waive the first R100 000, and then you can take your case to the civil magistrates' court, but then you can only get an order for R100 000, nothing more. But it is much quicker and much cheaper than the High Court. OK. You will take about two years to get onto the roll for the High Court and about six months for the magistrates court. And the scale of costs are vastly different between the High Court and the magistrates court. So people reduce their claim from R500 000 down to R1000. Better to get something, than to waste money and wait two years to hear that you're not going to get anything.

024 OK.

025 **STUDENT 9:** Prof?

026 **LECTURER:** Now, ladies and gentlemen, we get to the … yes! There's another question.

027 **STUDENT 9:** Um you said this proposed senior civil court, that would sort of be the equivalent of a regional magistrates' court ….

028 **LECTURER:** Yes, regional civil magistrates' court, ja.

029 **STUDENT 9:** Ok, ja.

030 **LECTURER:** So what's the question?

031 **STUDENT 9:** That was the … question.

032 **LECTURER:** Oh.

033 **STUDENT 9:** Just where it would sit.

034 **LECTURER:** Its more a statement, ne.

035 **STUDENT 9:** Well no, it was more of a question, it wouldn't be higher than the High Court.

036 **LECTURER:** No no no of course not, no. The idea is that they would help to alleviate the pressure on the High Court. And unopposed divorces, why do you need a High Court to listen to unopposed divorces. Have you ever heard an unopposed divorce? I mean, three three minutes. Um if there's an agreement, the judge says 'Ok, the agreement is now an order of the court and the parties are divorced. Thank you' Chup [makes as if he is slamming down with a gavel]. You know, why do you need a judge for that? And it clogs up the High Court. So that that's going to be moved down to the lower courts. Yes?

037 **STUDENT 2:** Why is there so much of a backlog? Is it because there's not enough judges or magistrates and all that?

038 **LECTURER:** Jong, that's a very difficult, that's a very difficult question to answer. Um … mmmm. You know, um justice is not something that you can rush, on the one hand. Um uh justice is not something that uh you can use a sausage machine for. Its um you know, you must consider the cases. It takes time. And then, you know, we've been through a transformation. We've expected an enormous amount from our justice system. And its it's the price that we have to pay instead of having a complete breakdown and no courts and no and chop off the heads of the old judges, that's on the one hand. The price that you have to pay is you must slowly but surely appoint new judges, the old judges must train the new judges and the new judges must get used to the work. And that takes time, that you don't / you know, a judge is not made overnight. Um uh uh you know even a plumber, if you ask me now to become a plumber it will take me, well, me specifically, about 28 years [laughter] but you know you can't send somebody in to do a complicated electrical job if he's not trained electrician. Or even if he's a trained

electrician if he hasn't got experience. You know, it takes time, it really takes time. Um and what we want from our judges is common sense. And, you know, the tree of common sense is very high. You don't, you don't get to it very easily.

039 So, um and there's lots of work. You know, that's the other thing that people forget about the stupid electricity problem as well. Um you know, there's a shortage of electricity, yes perhaps because there wasn't maintenance and because there wasn't transformation and affirmative action and all those arguments but the main reason why the electricity is in short supply is the fact that South Africa's economy is booming so much. That we need such an enormous amount of electricity. Um, you know, the courts are full because there's lots of commercial activity, there's lots of criminal activity, there's lots of work, because it's a society in transformation. There is just an enormous amount of work. Couple that with the fact that we're in transformation situation then, you know, you have your answer. Um and its going to take a generation to solve it. Not not not a decade. Its going to take a generation to solve it.

040 **STUDENT 8:** But doesn't the system need to grow? I mean the population is growing quite, isn't it … Shouldn't there be more court houses and more judges …

041 **LECTURER:** Yes yes

042 **STUDENT 8:** To accommodate them?

043 **LECTURER:** Yes, its been done. All those things have been done. But, you know, you don't build a court house, as you call it, overnight. A court is an enormously expensive thing and you must decide very carefully where to build it. And then the Department of Public Works must build the court, the court house. Its it's a nightmare. Its an absolute nightmare. But OK.

044 Let us talk about the legal profession now shortly ladies and gentlemen. Its something that fascinates you, um, and, uh, let us start, uh, not at the top but, um at the part of the profession which would probably be, uh, the part where you're going to enter the profession. South Africa's got a divided bar, we've got a bar, um, where we have, um advocates, and I will come to the advocates just now. And then we've got what we call a side-bar, Uh, and in the side-bar we have the attorneys.

045 Now attorneys, um, are people who work in partnerships or in incorporated companies, in other words they work in teams, they sit in big large buildings or in derelict old renovated houses, um but they have a whole office structure. An attorney is somebody who works in co-operation with other lawyers to do the administration of a legal case. Um, an attorney is the place of the, uh, the first contact for the man on the street. If you go, if you're looking for legal advice you, what you most probably do is you look for an

attorney first. You cannot go to an advocate directly. The attorney must refer you to an advocate or the attorney appoints an advocate on your behalf.

046 OK, to become an attorney you need to study for the LLB degree, either the 4-year LLB or the LLB that you are doing, an undergraduate course plus then the postgraduate LLB which is preferable. Which is preferable and the profession, um, uh, has very clearly indicated that they prefer the 5-year LLB, uh, alternatively an LLM, a 4-year LLB followed by one year postgraduate study, um, specializing in some field of the law, uh, with an LLM. Which makes if five years.

047 After you've passed your LLB exam and obtained your LLB degree either post- or undergraduate, you must find a principal. In other words somebody that you know and that you trust that will be willing to train you in the legal profession. If you've found such a person, you make an appointment and you go see such a person and you request him or her, uh, to consider you for articles of clerkship. Articles of clerkship is an old hangover of the medieval training of jurists. It is where you are trained by, uh, in-service training. It is for two years. You enter a contract for two years. The contract may be ceded, but it is frowned upon, it is not something you must try and do. And during this two years you get a smallish salary, you are, you are salaried and you do, um, all kinds of legal work so that you can pass the Society, uh, the Law Society's admission exam.

048 Hmm .. now there're lots of configurations to be trained, uh, for this, um exam, um, nowadays there is the law, uh, School of Legal Practice where you can go for two years and get one year remission of articles. Two years full-time. And after that you write, uh, you write the articles, uh you write the exam and you're admitted as an attorney. Um, there are also short courses which of course, you know, I recommend you to attend. There's a six-month course and for people who really don't need any further training there's a four-week, uh, exam preparation course. So its either two year's full-time, six months' crash course or just a four week, uh, exam preparation. Then you write the admissions exam and when you pass the admissions exam you are admitted in court as an attorney. You can then practice for your own account, in other words you can open your own business. You can practice for your own account, or you can join a firm as a professional assistant or they also call them associates, or if you are very lucky, perhaps get two or three of your friends and you can start your own firm and you will be a director or partner of that firm.

049 The work of an attorney is not glamorous. It is not glamourous work, it is hard, boring, slogging work. It is administration for 95 per cent. You are not going to find in the ordinary work of the attorney great intellectual challenges or great innovative, uh, law changing challenges. If you are looking for that then there are other places where you can join the legal profession but that is not what you're going to do if you become an attorney. I'm not saying that the attorney's profession is all boredom … um, if you, if you join

the attorney's profession and it is your specific niche, uh, patents or commercial law and that is what you want to do, then you can become a leader in the field and you can (a) make lots of money and (b) you can have a stimulating profession. Ordinary work for the attorney however, uh, divorces, estates, trusts, transfer of property, uh, general attorney's work it not, uh very challenging. Its not intellectually very challenging. It is routine rather than intellectual effort. Perhaps that's unfair. I don't know. If you've done your articles come and tell me whether you agree with me or not.

050 The attorney's profession is organized, uh, organized by an organization called the Law Society of South Africa and they have representatives in each province and you will be invited once you have been given articles, you will be invited to an interview with one of the leading lights of the Law Society, uh, and you will have to convince him, or he will have to be convinced that to join, to eventually join the profession. Um, in other words its a formal interview, uh, where they will ask you ethical questions and they will ask you where you come from, what kind of person you are just to vet that you are a fit and proper person, uh, to become an attorney.

051 Why is this important? Ladies and gentlemen, the great prob … the great temptation of the attorney's profession is of course trusts money, trust money. Um, attorneys act as custodians for huge transactions (breathes in loudly), for example, if you are an attorney or a conveyancer and somebody wants to buy a huge building in the north of Johannesburg, you attend to all the formalities and you are also the receiver of the deposit of the buyer of this building. Now this building can be, uh, 600, 700 million rand and 10 per cent of that is then placed in your care. You have absolute control over that money, uh, of course it is not your money, it must go into the trust account, but uh, you as the partner or as the responsible person have got absolute one hundred per cent control over that money. So the temptation to say 'ag, I'm just going to borrow R30 000 for the weekend, I've forgotten to draw money, I'll put it back on Monday' is very great. And if you go and look in the *De Rebus* which is uh the professional magazine for the uh, professional journal for the attorneys, you will see there is a column, um of the attorneys being struck from the roll and the reason, mostly, the reason given, mostly, uh, is contravention of the trust or the trust monies Act or the Trust Act. Attorneys take, I don't know why but they can't keep their hands off the trust money.

052 Please [wry laugh] if I can give you some very good advice today, uh, make it impossible in your firm for anybody to get to trust monies. And make it *extremely* difficult to withdraw money from the trust account. Insist on at least two or three signatures plus original, foundational documents. The original document, not copies or a fax copy or a note 'IOU' by partner [gestures 'no' with his hand]. A foundational document, you know what I mean by a foundational document? The reason why that monies has to be transferred, attached to two or three signatures of the partners plus the

accountant. Its its not a joke. It is a lot of money and attorneys cannot resist, uh, the temptation to take some of that money.

053 OK in the legal profession in the profession of an um an attorney you can also do a further examination and become a conveyancer, a specialist immovable property transfer, transfer agent. In other words you do an exam and you are qualified as a conveyancer. And you are then qualified to appear before the registrar of deeds. And you are then entitled to charge a higher fee when buildings or residential properties are transferred from one party to the other. Very lucrative but uh not, you know, it's a routine thing its not a, you're not going to get, after three or five years great intellectual stimulation from transferring properties. Whether you transfer a property of R600 million rand or an ordinary house of R1.6 million rand, same thing. Two or three little different things but no great shakes.

054 OK. You can also become a notary. A notary is a further examination that you can do. And a notary is a person that certifies the content of certain things. Notary is very difficult, its very difficult to do the notary's exam. You must know exactly what you're doing. A notary, for example, is a person that will go to a ship and issue a notarial certificate as to the value and the contents of that ship. So the notary must make sure that he knows what's going on on that ship. Because the insurer wants to know and he will insist on a notarial certificate.

055 Um a notary is a person that goes to a warehouse and he then certifies what is in that warehouse because you can sometimes get a bond, a notarial bond on uh movable stock. You need uh cash flow, you need money. You go to the bank and the bank says 'What security are you going to give me?' 'I've got nothing, I've only got my stock.' Then you send a notary to to the warehouse, the notary then gives you a notarial certificate that the stock in the warehouse is worth R10 million. As is. You understand what a notary does? Yes?

056 **STUDENT 2:** You know when, like the certification of documents, do notaries not get paid for that?

057 **LECTURER:** I beg your pardon?

058 **STUDENT 2:** Lets say if I want to certify my ID …

059 **LECTURER:** No no you don't get paid for that.

060 **STUDENT 2:** Ok is that why they don't really want to do it?

061 **LECTURER:** Yes

062 **STUDENT 2:** Cos I went there yesterday and they told me [inaudible]

063 **LECTURER:** Look, um you know its like, if people come to me and they say 'Professor can you please give me a reference letter.' Ag [shrugs shoulders with slight smile] you know … It's a bore. Its terrible to do it. We must all do it

you know all I mean everybody / where are the students going to get reference letters if you don't do it? But I would rather make as if I'm not there, you know, if students ask me for a letter. I've now got a basic letter that I just jazz up with the information that a student gives me. But its one of those things you know. You are exposing yourself. You know, if that students becomes an attorney and he steals from the from the firm, then they're going to say 'Oh but you said this student is so wonderful and so reliable and loyal and look now here!' This man that stole from Societe General, five million rand, can you imagine if I gave him a testimonial that he's honest and um a good person? So you're exposing yourself and it is, you know it is, its other people's administration. Especially if you have to certify something is a true copy of the original. Or if you must do an affidavit. I mean, that takes ten minutes! If you do the affidavit properly, it takes ten minutes. Um you know, so people are reluctant to do that. The best is to go to a police station, they must do it. They haven't got a choice. Go to a police station, they must do it. And you know, they've got, they've got time to do it. [laughter from class]

064 Ok, um, uh the other thing I must tell you ladies and gentlemen if you become an attorney, you need a BSc degree in social sciences. You really do, um, my dearly-departed mother was an attorney and when I, when I wanted to study law I worked in her firm during the vacs, um, and you know, I was a sweet little boy and very nice personality and everybody loved me and I thought well this is what legal practice is going to be like. But, um, I discovered that its *not*. Um, and if you enter a law firm you will discover this within a year or so.

065 If you enter into a law firm as an articled clerk you are a threat to everybody. You are a threat to everybody and you don't know that. And the people who are most threatened by you are of course the … office personnel that's been there for years and years and who, uh, has got a vested interest in the firm and all they see is this young upstart's coming from university and within two or three or four or five years they become partners and then, you know, they start earning more than they do and they start shunting them around. So they've got a window of two, three years to make sure that they, that they use their seniority to make life difficult for you. My mother always said, there's nothing, nothing worse, and I hope I'm not offending somebody here but it is *true*, I mean as my personal experience there's nothing worse than a professional typist, uh, in a law firm, a secretary. There is nothing, nothing worse. They always have personal problems, they never have enough money, they always want to borrow money and they are absolute *terrors*.

066 I can remember the first time wha, uh, when I did my articles at Adams and Adams and we rotated on a six month basis so you would have a general six months – uh it's a very large firm so you're trained in the whole firm and then the next six months you are posted out in various branches, uh various branches of the firm. And my principal was a trade mark agent so I was automatically placed in the trade mark department. Um, which is fine, you know, I was interested in trademarks and its fine, but the trademark's section

is one of the biggest earners in the company, uh, and therefore it is … uh, you have far more infrastructure than in the rest of the company because it was the great fee … uh. So if you come, if you arrive as a qualified candidate attorney you get your own secretary, your own desk, your own office, your own files, everything. First day (slams hand on lecturn) you get everything you are, you start you get your own number that you can charge fees you get everything because they haven't got time not to give it to you. You must start earning now. You must start doing trademarks.

067 And there I got a corner office, a beautiful large office with an inter-leading door to my secretary's office and there was my secretary sitting in the corner. And she was *enormous*. She was really, you know, she was an *enormous* person and she had, uh, make-up, you know, false eyelashes and dark dark makeup. And I thought, well this is wonderful, she is going to help me to do this trade, these trademarks. And she also said, 'Well now we're going to work together and uh you must just listen what I say and then you'll be very successful'.

068 And of course I didn't you know, I had to learn, you know, you know if I wanted to learn something I went to the partner and I said how do you, how do you redeem a trademark in Papua New Guinea? And I didn't know that I should have asked her first and if she says I don't know or I haven't got the book here *then* go to the manager or the partner to find out. I didn't know that I was just working 18 hours a day trying to get these *mountains* of files out of my office.

069 And of course, uh, you know, I irritated the living daylights out of her because I didn't ask her anything. Uh, because I was afraid of her I must admit. I was really afraid of her and then instead of getting off on the right foot she then decided she would boycott me. And everything I did, uh, she sabotaged. You know. She would take a file, every file that I did and she would listen to my dictation. If I made an error she would take my dictation to the senior partner and said 'You're going to lose money here this man doesn't know what he's doing'. And I *didn't* know what I was doing, I was there for my fourth day or, you know, for a month.

070 So it was an *absolute* nightmare, I, uh, I cannot tell you, it was an absolute nightmare. So please, if you go to, if you go to a firm of attorneys see to it that you get on with the secretaries, because they can make your life an absolute misery. Um, and don't, you know, its only two years, you know, just count out them and just say yes sir no sir or whatever you say. We eventually got to that stage and then we became very good friends and everything went very hunky dory but it took us three, four, five months before we could get there and by that stage my reputation in the firm was ruined. Because everybody thought I couldn't do a thing. Um, ah, and the whole legal, the whole legal profession is built on reputation.

071 So please, don't underestimate the office personnel in a legal office. You must, you must, if you want to become an attorney, must be able to get on with the office manager and the office personnel uh in the office.

072 OK. We will do uh we will do the advocates the judges next week, um and then we'll talk about the exam. How are you, how are you doing with your assignment? [pause] OK. This is wonderful, absolute silence! Not even a word. Has anybody started? I beg your pardon?

073 **STUDENT 11:** I'll start this week.

074 **LECTURER:** Ja I heard that last week as well. So … ladies and gentlemen please start. Uh you've got time till the 5th of May. Please start because I need to know from you if you have problems! Uh and you will have problems because you're not going to know what to do.

075 **STUDENT 3** Sorry sir, can I just ask you, what do the words *exception doli* mean?

076 **LECTURER:** *Exceptio*, no it's a very good question, no no it's a very good question. *Exceptio* / I did this in Roman law …. *Exceptio* means 'except', its an exception, and *doli* means 'fraud'. So, it comes from the praetor, it is something that is added to the formulae of the praetor, the praetor, the Romans didn't have provision for fraud, because they trusted one another. And then all the other people came into the Empire, or into the Republic and they had to make provision. They had to change the ius civile. And they had to make provision for fraud. Because Roman to Roman there's no such thing as fraud. You understand? So what the praetor said, he wrote the formulae to the judge, he said: 'Numerus [inaudible] you be the judge.' He appoints the judge. He says 'Numerus [inaudible] you be the judge. Listen to what these people have to say. If A owes b such and such, then find in favour of B. If there is another reason why A shouldn't pay, take it into consideration.' He tells the judge what to do.

077 The people that appeared before him, well one of the parties, indicated to him he will not pay because this guy sold him a chariot that is made of balsa wood and not of poplar. So the chariot fell out, fell fell apart. And uh that is fraud. So the praetor at the very end of the formulae, say: 'Exceptio doli. Do all these things, unless, with the exception, if there is fraud.' Exceptio doli. If there is fraud, then find the person who committed the fraud guilty. And that's all, its an exception.

078 And of course I've given you the origin of where it comes from. This was now developed through millennia, to eventually become an exception that you could use for not paying. In other words A, in South African law, sues B for one million South African rand. B says, 'Yes, I admit I owe you the one million rand, but there's an exception because you committed fraud in convincing me to enter the contract so that I owe you one million rand. So I'm not going to pay you.' If there's an exception, and the court must listen to the

exception. That's all. It's a wonderful thing. And it was chucked out by the court … in [inaudible].

079 But please ladies and gentlemen don't get yourself tied up in the technicalities. Remember I'm looking for the things that you were taught in intro. So what you must do is you must tell me: How did the thing get to the appeal court? Why were there so many judges? What, which judge's decision is the important one? That's the things that I'm looking for. I'm looking for the things that we did in class here. You know, you must tell me its an appellate division case. And, if you say its an appellate division case, where did it come from. You know, that is what I'm … not for the technical things. The technical things are far uh your capabilities. Don't worry about that. I want to know which authorities the judges looked at, what weight they attached to the authorities, that kind of thing. What, what do we call those authorities, why those authorities specifically …

080 **STUDENT 8:** So you want us to look more at the specifics of the case …

081 **LECTURER:** Yes I want to know the structure of the case. Not the not the substance of the case.

LECTURE 22

001 **LECTURER:** A lawyer – no you mustn't put it on.

002 **STUDENT 3:** Oh, I've already put it on …

003 **LECTURER:** If you're a lawyer then things have a legal meaning. This is a legal commercial legal uh journal with a name 'Without Prejudice'. What, what does that mean? Yes?

004 **STUDENT 12:** [Inaudible]

005 **LECTURER:** Yes, that's good that's good. That's good, no no no no no no um I'm hesitant to allow you to go on because I can see you're going to say something wrong.

006 **STUDENT 12:** [laughs] OK.

007 **LECTURER:** A minor, if he enters into a contract, he might be prejudiced. Ne? Because he hasn't got full capacity to act. Now that's a legal answer. That's a nice answer. But that's still not the truth ne? What is 'without prejudice'? Oooo … Yes?

008 **STUDENT 8:** Without imposing your own opinions or views.

009 **LECTURER:** Yes, but I mean why would they call their magazine 'Without Prejudice'?

010 **STUDENT 8:** Because they're putting it down as it is they're not putting in their own thoughts or comments …

011 **LECTURER:** OK, from a journalistic point of view that's right. But we're not journalists ne, thank … heavens. Yes because you know journalists are … boring. Yes?

012 **STUDENT 9:** I suppose in the broader sense it means [inaudible] to anyone.

013 **LECTURER:** Yes, but now how / you're hundred percent right. Where did you get that?

014 **STUDENT 9:** Prejudice means 'harm'.

015 **LECTURER:** Where did you get that? What is your authority for that?

016 **STUDENT 9:** [inaudible]

017 **LECTURER:** Yes yes yes! [laughter] Yes! The dictionary. Ladies and gentlemen did we not do interpretation of statutes? The first way, the functional approach, the first thing that you do, is you look at the dictionary meaning. OK, so now you've got the dictionary meaning: Without harm to anybody. You've got the dictionary meaning. That's very good um uh dictionary meaning. But, in law, it means something else. Do you know this or not? Must I tell you. You don't know what I'm talking about ne?

018 Ladies and gentlemen if you are opening litigation, you know what litigation is? When you are starting in the first phase of litigation, in other words exchanging documents. If you are just feeling the water, if you exchange your first documents, before you start exchanging pleadings, you are writing to the other side and you say: 'Look', according to my client, this is what happened. My client says this is what happened. Um … if this is true, we are going to sue you. Um … if you want to, if you want to negotiate, if you want to talk, you know, lets do so.' Your first opening. *That* letter, gets a stamp [bangs fist on lecturn]: 'Without prejudice.' Without any harm, nobody is bound by what you say in that letter. Its without prejudice. You are reserving your rights. Did you know that? No? oh dear. OK. Um you must know that. But you'll probably pick that up in articles, ne? But remember now if you get that stamp what it means.

019 Now, why I'm showing you this magazine ladies and gentlemen, is because this is the magazine, this is the latest one, April 2008, and this is the kind of thing that you, that that a reputation is built on. Now here you see a gallery of little pictures. A gallery of little pictures and it tells you what these people did. There are three persons – Chris Joe, Lauren Ross and Bjietjies Rasool uh they – the two ladies, for Adams and Adams, Adams and Adams is a firm, Adams and Adams, these two ladies have been appointed partner, the picture in there plus a short CV, and this middle-aged white male on the top, has been appointed head of the firm. Appointed chairman of the firm, Chris Joe, I know him reasonably well.

020 More importantly, more importantly, because there's Mr Woolman, you all know Mr Woolman, he's slightly off, but very clever, but here, ladies and gentlemen, look here! Who is this? Who is that? Who is that? That is one of my students?

021 **STUDENT 9:** Oh!

022 **LECTURER:** Yes, Taryn Sefton. She lectured Roman Law here last year uh she was one of my Roman Law students. She became a tutor, she qualified, and now she's at uh candidate attorney at Bowman Gilfillan and part-time attorney at University of the Witwatersrand. Hi [addressed to two students coming in late]. This ladies and gentlemen – she wrote a small little note – I mean, one, two, three, four [referring to paragraphs in the magazine]. How long can it take you to write that? But she took the trouble, she did the research, its on some difficult subject, prescription and the limits placed on access to the courts. It's a difficult topic, some of the people would like to know. And she wrote a short note. And what now? All of a sudden, her picture's here. OK it helps that she's an attractive Jewish lady, obviously. But the fact is anybody that opens this, and this is the whole legal profession reads this article. When they have a problem, they're going to call her. They're going to say, 'Look you wrote an article on this, uh you obviously know what's going on, can you can you help me?' And that is, ladies and gentlemen, how you build up your reputation.

023 If she's going to the bar, she's now a candidate attorney, she's working to qualify, she qualifies at the end of this year. If she then stays on another year or so at Bowman Gilfillan, big firm, lots of contacts, she then goes to the bar, everybody knows that she's an authority on prescription. And that – that's how you get people to phone you. That's how you get people to phone you. That's how the legal profession works, ladies and gentlemen, that is unfortunately how it works.

024 And the whole magazine is full of this. You will see, I mean its not coincidental that they have a very beautiful, professionally-taken colour photograph of her here. Its not just her name and qualification. Her face is here. Uh and the whole book, the whole book is full of it. There you have, on every page. You have these people. Can you see?

025 **STUDENT 3:** So sir, its not really any different to writing a journal article under BSc because if you write a journal article in a BSC and people read it and if they need your help with something then they'll still phone you.

026 **LECTURER:** Look, journal articles in law is mostly reserved for academics. Um people in practice don't have time to write journal articles. They've got time to write these short little superficial things. Um in the De Rebus and in Without Prejudice. But they haven't got time to go and do thorough research like we have, the academics. So, journal articles, serious journal articles, are mostly academics writing them. Perhaps a judge here and there. Perhaps a very very academically-oriented practitioner, but very rarely. Its not like its not like in national sciences.

027 What is this ladies and gentlemen? Purple pages! What is that? [murmurs from class]. Top students! In all the universities. Why do you think they're spending half of the magazine to / top students at the universities. And who have we here? Another student of mine [laughter from class]. Two students of mine: Abigail Diamond and Fatima Bham. And ffoulkes, well, these people … are these all, are these all .. are they all Wits? Ja. One, two, three, four, five, six, seven, eight, nine, ten. Ten Wits, ten wits graduates. Best wits law students. I cannot tell you how valuable this is. I cannot tell you how valuable this is, for the legal profession.

028 In the legal profession reputation is everything. Reputation is absolutely everything. And of the whole class of two three hundred people they chose ten people to publish in a little journal. Now, that's what you must aim for. That's what you must aim for. OK. You can have a look at it and send it around so that people can see.

029 Um, we are almost finished with our work, um what we must still do is we must do footnotes, or how to write a um how to write a piece of law, which we will do next week. And we must do another, another uh um, another topic which is um indigenous law of customary law. Indigenous law. Um, which I will still decide what to do with that because a) its *passé* and b) its

very boring and c) I don't really agree with everything they say in the book, so its difficult and I don't have my own notes. Yes?

030 **STUDENT 3:** Sir, I was wondering if I could ask you, if fifteen fifteen minutes or so before we finish off the intro to law course if we could spend some time on pronouncing Latin terms.

031 **LECTURER:** [shakes head] There's no, there is no, there's no guideline. We don't know how the Romans pronounced the terms. I can teach you the English pronunciation but even there people have different views. Um but we can do a few Latin terms if you like.

032 **STUDENT 3:** Because its really quite troublesome when you're reading something and you try and pronounce it and it sounds completely absurd.

033 **LECTURER:** What do you have trouble with?

034 **STUDENT 3:** Just when you're reading a normal article and something's in Latin and you try to pronounce it, it would be nice if there were guidelines or rules on how to pronounce …

035 **LECTURER:** You pronounce / in English you pronounce it like the English. Um if you go to the back of your, if you go to the back of your um coursepack, there's a gloassary. Unfortunately um it's a very short glossary. I worked out a long glossary but that was rejected as being too difficult for the poor students [clears throat]. So … and you pronounce it just as you read it: 'a contrario', 'a fortiori', 'a priori', 'a quo', 'ab initio' um 'ad hoc', 'ad idem', 'ad litem', um 'aliter', uh 'beneficio', 'bona fide', 'cadet quaestio', [inaudible] uh whoopsie, 'cuitus', 'condictio', 'consensus', 'consortium', 'contra bonos mores', 'contumelia', 'cur ad vult', or 'curia adversari vult', 'curator ad litem', 'curator bonis', 'de bonis propriis', 'de facto', 'de jure', ja de jure or de iure, same / uh writing it differently, 'de lege ferenda', 'de minimis non curat lex', [inaudible] 'dies cedit', 'dies venit', 'error ex abuduntia cautela', 'ex facie', 'ex legel', 'ex mero motu', 'ex parte', 'ex post facto', uh 'facta probanda', 'functus officio', [inaudible] don't know, 'in casu, 'in esse', 'in extenso', 'in extremis', 'in fieri', infinet', 'in limine', 'in loco parentis', 'in re, 'in solum', 'in stricti sensu', 'in toto', 'in transitu', [inaudible], 'inter alia', 'interim', [inaudible], 'ipse dixit', 'ibsissima verba', 'ipso facto', 'ipso iure', 'iusta causa', 'lex', 'lis pendens', 'litis contestatio', 'locus standi in judicio', um 'nexus', 'nomino officio', 'noncompos mentis', 'obiter dictum', 'onus' [inaudible], 'partum', 'pari pasu, 'per se', preticio principe', 'poster', 'prima facie', 'qualitate qua qua', [inaudible], 'ratio', 'ratio decidendi', 're', 'res', [inaudible], 'res iudicata', 'restitutio integrum', 'semble', [inaudible], 'sine', 'spes', 'sponsaria', 'status quo ante', 'stante matremonium', [inaudible], 'struptum', 'sub judice', 'sui iuris', 'sui generis', 'summa ratio', 'supra', 'infra', [inaudible], uh 'ubi [inaudible]' … the thing about Roman Law 'ultra vires', 'verba ipsissima', 'verbis', 'vissa', 'vice versa', uh 'vide upsi', 'vide lecit', [inaudible], is what we did yesterday 'viva voce' and 'voetstoots'.

036 Um, this was usually, this was part of the curriculum. Um but / and then what I did, when when I was coordinator, I gave the students ten of these maxims, at the end of the year in the exam. But they always failed, they always you know they just threw away the ten marks, they just didn't want to learn Latin. Which is very strange if you think we had to do two years of Latin at university.

037 **STUDENT 3:** Sir, could you, are you allowed to do that for us?

038 **LECTURER:** For you …

039 **STUDENT 8:** In our exam, like give us like five bonus marks, give us Latin words to interpret. [various comments from other members of the class]

040 **LECTURER:** I don't think I can do that. Um but you can study the Latin words all by yourself. Um [clears throat]. Um its not part of our syllabus. But it is good to know the Latin words. Um um you would you would uh save yourself if you if you uh memorized them off by heart.

041 OK, we were talking about the office personnel of an attorney's office, um, and you know to beware of the typists, Please beware, its very good advice one day you're going to say I though that I spoke a lot of nonsense in the first year but it is *so* true You are really going to discover that.

042 OK, um, a legal advisor of a company. Now ladies and gentlemen this is something completely different. It is somebody that has an LLB, a BA or preferably a B.ComLLB who does not want to practice law. Is usually not the sharpest tool in the shed, um, people who become legal advisors to a company are people who can't practice. You know what they say about academics, you know people who can do and people who can't teach … but that's not true, ah well, I don't think its true …

043 Um but legal advisors, or what we call them a better word for them is in-house counsel, it's a nicer word for it, in-house counsel. That is an attorney or advocate that joins a *huge* firm like Billiton or Anglo-American or Old Mutual or Sanlam or whatever and they sit in a large office and they are the first line of defence for that firm. In other words they are the in-house lawyer for that firm. And they don't do anything. You get a problem if they can do it they, the the most simple things they do themselves. But as soon as it gets complicated then they appoint an outside lawyer or outside advocate to do the practical side, to do the practical side of it. They do some of the work themselves, but very little only the, um, only the very menial, the very basic things. Collections and bad debts and things like that. They do however, on a personal note, they do however get a very large salary. Um, and they are privy to some very very sensitive information. So, if you have friends becoming legal advisors to large firms, they are very good to know. Uh, these are people who will brief you if you are going to become an advocate. They will brief you and they will give you *fat* briefs. Do you know what the word brief means? Have we done that?

044 A brief is a, um, is a document in blue that is folded like this, and we have discussed this I'm sure. It comes from the formula of the praetor, It's a document like this, its blue, its this colour, slightly light, it's a light blue like your jersey (gestures towards one of the students). It's a light blue and its got printed on such and such versus such and such, the attorneys and the advocates and its tied together, inside there are, uh, papers or whatever and its tied together with a pink ribbon. I don't know why its pink. I don't know if it must be a pink ribbon but its tied together by a pink ribbon. And this is what the advocate takes to court with him and this is called a brief. B-r-i-e-f it is his brief, his instruction from the attorney. It it's the instruction that the advocate receives from the attorney.

045 So, if you're an advocate this is what you take to court with you, this is your bread-and-butter. This is what you make and this is what people, legal advisors in a company will send to you when they brief you, you know, on the restructuring of the company or whatever. So very very very valuable.

046 OK, um, the second one, the second possibility is if, and we've spoken about this, is an advocate. Advocate is more, uh, the work of an advocate is more intellectually stimulating. You work on your *own*. You work on your own. You have your own office, you have your own secretary which you appoint and you pay for. You've got your own law reports. You've got your own work, you've got your own telephone, you've got your own dictaphone, you've got *nothing* to do with anybody else. There's not somebody who will come and knock on your door and five o clock and say: 'Why are you still … ' or 'Why are you not here' or 'Why are you still working' or 'Have you finished this or that. You work for yourself. You charge by the hour and what you do is you prepare everything for the court. You appear in the High Court. You appear on behalf of an attorney. You appear in the High Court.

047 Ladies and gentlemen, if you stand up in court, and you will feel that (shakes head) I hope every one of you will at least once in your life have that feeling of appearing in a court. You are, and I don't care *who* you are, if, you can be Sydney Kentridge, if you appear in court you are *scared*. And if you are not scared then you are not prepared. You are scared, uh uh .. appearing in a court is very very intimidating. Um, so if you're a good advocate you will see that all your papers are in order. What are your papers?

048 The papers are the things filed in the court file and served upon the other side that you are going to base your case upon in the form of affidavits, expert witnesses, whatever, I don't, I can't go into all those technical details. But it is a paper file that is opened for your case in the court and that file goes to the judge, not to you, that file goes to the judge. If there's *anything* wrong with that file, the judge will only keep you responsible. The judge will ask *you*, um, Mr [state's student's surname] why is the file not properly paginated? And its no use saying, uh my lord I'm terribly sorry but that must have been the clerk, the clerk of the attorney who did not attend to the pagination. You must see to it that everything is in order. Up to such a small

detail as pagination. You know what pagination is? You have a file of ten thousand pages and every day a new document arrives to be put into that file. Sometimes, the order changes. So before the document goes to the judge on the day of the trial, somebody, usually the clerk of the, the candidate attorney of the attorney's office, must go to the file and see to it that it is paginated, in pen, in pen, you paginate it in pen because it changes. And its paginated from page one to page ten thousand. Correctly. If it is not correct then the judge can throw out your case.

049 It's a small detail ladies and gentlemen, but God in the law, lives in the detail. (waves hand as if saying 'no') If you don't have an eye for detail if you're a, if you're a more of a forest type person and you can't see the detail, you can't see the leaves for the forest (gestures 'no' once again). Stay away. Don't even try to become an advocate. You must be able to see every single thing. If there's a spelling error in your pleadings, oh please. If there's a grammatical error. If there's a technical error, a legal error, if you've made an aversion on a statement that is wrong technically, legally, your case is thrown out. The judge will give you an opportunity. He'll say, uh, please Mr [state's student's surname], address me on this novel interpretation that you have in clause 3. And then you will be able to address him but I mean if you, uh uh, if he talks like that you know you're stuffed. You can just as well, you know, pack up and say 'I'm sorry my lord, um uh, I'm relatively inexperienced in these matters and uh, it slipped in, I beg your lordship's indulgence to amend it. And your lordship will not give you an indulgence. He will say, well the indulgence I will give you is that I will take the case off the roll for you completely and then you can put it back again when its correct. And then you've wasted costs. You've wasted *thousands* of rand by appearing and preparing to appear for that day for trial in court and its just thrown out because you've made something wrong. You've referred to section 2(1) instead of section 1(2). Uh a. And the guy sitting on the bench, the judge is a senior advocate of twenty-five year's standing. So, for twenty-five years he's been looking through these pleadings. So he, it *jumps out* uh uh at him. As soon as he reads the pleadings and you've made an error it jumps out. He's an expert, he knows everything.

050 So (clears throat) advocate is the person who appears in court. If you're not a good public speaker, well, I must say, I have seen some very poor public speakers being reasonably successful at court, but it will help you know. Then go for elocution lessons, um, if you are shy and you don't like conflict, you don't like uh, intellectual violence, don't become an advocate. Please, its not .. it is a *very* very demanding job. You are fighting from the morning you open your eyes, from the first thing you do to the last thing you do and your hours are *long*. You work from 4, 5 o clock in the morning to get everything ready for court until 12 o clock the next evening. So you have three four hours every night that you can sleep. If you want to have a family, then, you know, then try to get to sleep. (class laughs) Really, its not … yes?

051 **STUDENT 8:** What are the incidences when attorneys appear in court, when …

052 Um, it's a new thing that has happened with the new Constitution and with this whole thing of opening up the profession. Um if you ask me personally, I think it's a, it's a, its wrong, its stupid, because the attorney's profession has got certain things that they must do and the advocates have got certain things that they must do and it is stupid to mix the two. But sometimes you get a very good attorney. Like Dr Dale now, Professor Dale here at Denys Reitz, he's an honorary professor at Wits and he's in mining law and he's mostly the the the worldwide expert on South African mining law So if there's an application for the prospecting of new mineral rights, then obviously you can appoint uh Dr Dale uh to appear in the High Court. He's the best there is. It's a very specialized field, He knows absolutely everything and he then, with the permission of the judge, can appear in the High Court. (Breathes in deeply). This is … its an exception. You must apply, you must have extreme expertise. You must be a leader in your field.

053 Or there must be some compelling reason why you must now appear. Say for instance now, you know, um there's a specific divorce that um, its your god daughter that is getting divorced and you wanted to do the divorce, then the judge will allow it. If it's an uncontested divorce. If you know, if you're a senior, uh, practitioner, the judge will of course allow it uh because you know uh want to do it yourself. Uh, but usually, it is better that the advocates do the court work and the attorney does, uh, the off-the-street work, the preparation. Um, but it is possible now that the attorneys can appear in the High Court. But you do need, you do need permission from the judge. Yes?

054 **STUDENT 9:** What … so when you join a big firm, it's a firm of attorneys period …

055 **LECTURER:** Yes

056 **STUDENT 9:** … then what does the litigation department do?

057 **LECTURER:** The litigation department prepares, does all the backroom work. The litigation department, um is the fall-back of the advocate. The litigation department – well they do maj court, maj court litigation obviously, that's what they do and when it goes to the High Court you do, um, all the backroom work, you get all the expert witnesses together, you get all the statements together, you get the file together, because the advocate can't do that. The advocate is is is is office bound. You drive around, um and get the statements from witnesses, you drive around and um uh do inspections in loco, and things like that. You do all the prep [becomes tongue-tied] preparatory work so that you can give the, uh, advocate a decent file that he can work from. And that's what the litigation department does. Not lucrative, not lucrative. Um, even in, even in *commercial* litigation or insurance litigation where you're talking about *millions* of rand, not lucrative. Um, you know, uh it (sighs) what can I say, that's a fact of life. Rather do

something more lucrative like trademarks or patents or the.. uh, commercial work straight-forward commercial work, um uh mergers and acquisitions, management buy-outs, things like that. Very, very lucrative.

058 OK, um [clears throat] advocates are specialist uh uh litigators. They are specialist, um, in appearing in court. Um, uh, what must you have, what must you be to be a good um advocate? You must have an enormous reputation, You must have a very good reputation. I told you about my colleague who started here, well he was first my student. Extremely irritable, irritating student because um, he was in my jurisprudence class and he um, he wouldn't stop asking questions until he had the answer. Um, which was irritating for me but, you know, he was a very good student. He then came … he then tried to do his articles which he hated. He then came to Wits and he lectured for two three years here and he's gone to the Bar. And, I mean, within six months, um everybody, every single person at the Bar was talking about him. Uh, because of how brilliant he is and how perceptive he is and how *tenacious* he is. Um, he's a, he's a small unopposing little man. He's not a, you know, fiery lion or something. But, he chips at you until you crack. And he doesn't .. I remember I gave a paper on unjustified enrichment (coughs) and I gave th paper first thing in the morning, it was a day session, um and he was fascinated at the, at my view, that I had on this, uh specific issue .. its complicated and I can't even remember it. But it was a novel view on extending unjustified enrichment. And he, as soon as the session was over he came to me and, you know, he .. it was teatime I can remember and he was standing here and he said: 'Um you said this and this .. what exactly did you mean?' And he went on and on and on .. throughout teatime, throughout uh the second session the the mid-morning session, throughout lunch time. And I said 'Andrew, please, dear God, can I *eat* I mean, I don't want to be rude but, you know, can I just have a break?' And he said 'Yes but uh um what exactly did you mean, you can eat you can talk to me while you eat. And he stayed with me until that afternoon that we, that the conference was over, he did not give up until he understood exactly what was going on. And he didn't uh, he didn't accept uh my version of it at all. First of all I had to explain it to him and then, you know, he started attacking me on why, why it couldn't be.

059 So, um, that is the kind of person that you want, uh, as an advocate. Razor-sharp, you must have, uh, a razor-sharp intelligence. You must be very good analytically. You must have an extremely well-founded, um, and developed legal feeling. If you see something you must know what is the law. Is it right? Is it not? You must have a encyclopaedic knowledge of the law. Um, and then of course you must be able to present yourself. Must be able to present yourself. Very hard work, um, very very tough profession. Always very lucrative, very well paid. Wonderful profession, nobody's your boss. Um, but if you don't work you don't get paid. If you go for ten days to Athens then for ten days you don't get paid. And, you know, you must pay the bills, you know, you must pay your chambers, you must pay your secretary, lots of

things that you must pay. Um, so it is only for the very best, reserved for the very best lawyers. Yes?

060 **STUDENT 1:** Um, sorry Mr Serfontein, I was just wondering, I spoke to someone on the weekend and they were telling me that … I remember you telling us the process that once you got your LLB you do six months pupilage and then only you go on, um to practice um

061 **LECTURER:** Plus the exam.

062 **STUDENT 1:** Ja, plus the exam. Someone else was also telling me that its better to rather do, uh, your articles first and, um, become qualified as an attorney and then only go …

063 **LECTURER:** Mmmm, but I, we discussed that as well. Yes, I said, um, I said that you can, if you finish your LLB, you can, technically, you can do that. You can go directly to the bar. But I mean you're a, you're a fool because as I've just shown you by the the the magazine, it all depends on your reputation. And what kind of reputation have you got? Um, you know, you're a beautiful girl from Scotland and that's not going to help. It helps with other things but its not going to help with the law. But, if you do your articles first then at least you're getting to know the attorneys. And you're getting to know the partners at that firm and other firms because every case that you do in your two years' articles you have to work with other attorneys. And if you impress them, even in the magistrates' court, you appear there and you make a name for yourself, far far better, Not only do you do your articles, um, but also stay on a little while as a professional assistant or associate, uh, its at a better salary and there you get more senior work. And you can, you know, you can specialize especially if you go to a very large firm. Um, you know. I would agree with that. Um. I would say nobody can go to the Bar before they've been to the side-bar. But there's no such rule. It's a split bar so you can do what you want. But I can assure you there are people sitting here, um, in town or at um, Sandton, *praying* for the telephone to ring. Uh, and they're sitting there week after week, hopefully only week after week and not month after month. Um, because, you know, I've heard of people sitting on the library steps of the, of the chambers in Sandton, uh, trying to conduct a practice from the library steps. I mean, can't go into the library because the library is, is preserved for the members of the Bar. Sit on the steps and trying to get your practice going. I mean that's not [clears throat] that's not, you know, nobody's going to employ an advocate on the library steps.

064 Um [clears throat], three things that you must have tech .. formally. LLB, six month's pupilage without payment, nobody pays you, you must have financial support to live for six months, uh, without support uh to live for six months without a salary. Perhaps you might, you might think its easy to do that as a student it is, you know, because you've got lots of support structures, but if you are in a profession you must have a car, you must have a cellphone, you must have money to entertain people, you must have money to go out, you must have money to buy books, you must have money

to buy, money to buy make-up, you want to buy nice clothes … you can't, you know, not be well-dressed, you're an advocate, you must dress very very well you must impress the people. You can't sit there with uh a denim and slacks … it just doesn't work. If you, if you if you've got a multi-million contract that is a bit shaky and you want to take it to court and you get to this guy and he looks like you look now today … Not that, not that you don't look beautiful but, um, you know, this is not, you know, he's going to say 'uuuh, you know, please, this guy doesn't know what he's doing or this girl doesn't know what she's doing. She's in a pink Oxford tracksuit [gestures towards one of the students] please, you know'. You must power dress: black, red, white; high heels, silk stockings, pencil-striped skirt, jacket, neat hair, and, you know, power, power, power. You mustn't, you know, there's no softness there.

065 Ok, um, and then the third thing you need is your bar exam. Bar exam – difficult but not impossible. Bar exam – lots of work – but you must know your Rules of Court. And your *ethics*. Ethics, remember that, if you prepare for the bar exam those are the things that they're going to ask. Your Rules of Court. You must know your etiquette, your Rules of Court and your ethics. What may and may you … can't you do.

066 OK. Those are the two, um, parts of the profession that I think most of you are going to go into. Um, there .. those are the two private, uh, private parts of the profession. Um, and in both these, um, uh, professions, you will make, you'll make a living. Definitely. You'll make a good living. And the higher up you go in these professions the better your living is.

067 Um, my, my wife, um, I met my wife when she was in the publishing industry. Um and she was, she was making lots of money she was a very capable person. And she landed up in the publishing industry because she studied up to her Master's degree in South Africa and then she went overseas and she got her PhD in, uh, in languages, in French from the Sorbonne in France. Now, that's not, that's very impressive, I mean that's why I fell in love with her because she is so clever. Um, and um, and she, its not uuuh, I can tell you, in the days, this was in the high days of apartheid, uh, to get a bursary, to go to Paris, to stay there for four years, to do a PhD in French, uh, on French literature mmmm I don't think, you know, not a lot of people can do that. That's very impressive, that is very impressive. So she came back when, with her PhD from the Sorbonne, and the only job that she could get was, uh, teaching immigrant children, French immigrant children English at a secondary school. That's the only job she could get. And she did that for a couple of months and that was not very stimulating so she started doing translating and from translating she landed up in the publishing world and she became a publishing, uh, executive. And then, she was doing publishing, she was doing books for the the company that I was working for and that was where I met her, and, after I got to know her I said but why are you in publishing with a PhD in in in languages. Why are you not, you know, doing something in languages. And she said no she's done with languages. She's very happy where she is. So I got to know her much better and I said, 'but

you are not a teacher' and she's not, she's really not a teacher, although, perhaps, if she really wants to do it, but she's not a teacher she's a good lawyer. I said why don't you go and study LLB after uh uh at RAU after hours.

068 So she did that and she got her LLB cum laude and she started working for Denys Reitz as an articled clerk. this is late in life, ne, this is, she was in her forties. And and she did, uh articles with Denys Reitz and she didn't like Denys Reitz because at that stage, I don't know if they still are and I shouldn't say this, they were very chauvinistic, you know, it s very boy's orientated firm. Its better now but, you know, they don't think that girls can really become partners. They've changed now I think they've got *one* female partner, out of 85 and she clashed with the senior partner, you know, he came to her and said, um, you probably want to become um uh an partner now but uh and you've you're on your way you will become a partner but its our discretion and it will cause a lot of unhappiness in the firm if we make you a partner now because other people came with you cannot be made partner and they will feel that we are um putting you to an advantage and she said take your partnership and shove it and she started her own firm. She with three other people started her own firm. And she, I think, I don't know exactly, but she works extremely hard um try not to work during hard, works extremely hard and I think you know its now a bit personal but I think her salary is about 3, 3.5 per year. Um, so that is what you can achieve if you are in a commercial firm if you are top of your class and if you work very hard within seven years after after qualifying at university, you can achieve that kind of salary. But, it doesn't come easy, its now, you know, you can't sit in your office and twiddle your thumbs like I do to earn that kind of salary. Hmmm?

069 **STUDENT 3:** Sir, would you recommend languages? European languages. Well, not that you have to study European languages to do law …

070 **LECTURER:** No no no I would always recommend European languages. For a lawyer, languages is like the secret. If you don't / if you're not good at languages you will never be a good lawyer. And that's why, in the apartheid days unfortunately they prescribed that you must have English, Afrikaans and Latin. And I would say English, Afrikaans, Latin plus a European language. And an African language. Yes say Afrikaans and or any other African language. English at a first-year level, Latin at a first-year level and a European language at a first year level. Otherwise you can't become a lawyer. Um and then they must gear the languages towards the lawyers. They mustn't you know they mustn't give you um Goethe to translate in German or Moliere in French, they must give you legal texts and make it easy for you to learn French.

071 Um you know I've been to Greece now for ten days and far be it for me to say that I can speak Greek I can almost help myself out, I could I can't remember I only remember 'paragalo' but you pick it up so quickly of you are language orientated, if you are humanities orientated. You pick it up so quickly. And the thing of languages is it makes you think like a lawyer. Because if you put

together, if you think what you put together, that is what you do in law. You must think how the grammar works, you must think how the law works, and then you've got an argument. And if you're not good at languages [shakes head quickly]

072 **STUDENT 3:** Aah so of French versus Italian, which one would be most useful?

073 **LECTURER:** No I would say Italian because its closer to Latin. Um but it depends on your own personal uh it depends on your personal taste. [Isobel] my wife was mad about French from the day that she was born. She loved she's a Francophile. She loves everything French. Um so she decided that she's going to study French. She's not using it today, she hardly speaks French but when there's a French client she speaks to them and she's also not as good as she used to be. But French, you know, is a Roman language like Italian and it depends on your own passion. If you like you know warm-blooded Mediterranean culture then Italian is a wonderful language. Italian of course is Latin, Italian is one step back from Latin. So to study the Italian if you've got Latin is not so difficult. Portugese and Spanish is something else. But um anyway …

074 Um OK now the set / yes?

075 **STUDENT 6:** [inaudible]

076 **LECTURER:** Are you are you an Italian teacher?

077 **STUDENT 6:** No I studied my first degree in Italian [continues but inaudible]

078 **LECTURER:** Aah so you're a man of the world [student's name]. We mustn't think that you're just a sommer from here. Mr [name] you can speak French?

079 **STUDENT:** I was learning when I was a kid but I've forgotten it [inaudible]

080 **LECTURER:** Bad. Yes?

081 **STUDENT 1:** When you're applying for vac work in articles what sort of thing are they looking for apart from [inaudible]

082 **LECTURER:** Um um you know, will you be able to do the work? Will you be a will you be a asset for them or will you be a liability? Do you understand law? Are you clever? Your marks, they look at your marks. Will you be you know have you got any previous experience? Um things like that.

083 **STUDENT 1:** … and extracurricular activities?

084 **LECTURER:** Yes yes volunteer have you been a volunteer for something, have you taught other people. Have you, you know, what kind of person are you? Do you care for your environment? Are you involved in community? Those things are all important. They're also important to get articles but vac work is

not so difficult to get. Um don't you know, if you get reasonably good marks you will get in with one of the big firms.

085 In the public service ladies and gentlemen, there are a variety of jobs available. In the public service, um, (pauses and looks at watch) I know that the lecture's at the end now but I wonder if we could carry on from half past and then end the lecture there. Is that, is that all right?

086 Because its not very taxing – these people are only coming for the last part. OK of course the most important civil service and they will kill if I say that they belong in the civil service but the most important civil service job that there is is of course a judge. Um judge's doesn't belong in the civil service but they get paid by the government, they get a car, they get a government car, um uh and um just for you know for interest's sake, its they're certainly not private I mean they don't earn their own salaries, so its just to put them somewhere I put them under the civil service.

087 Judges ladies and gentlemen should be, they were always in the past, the best senior advocates. Uh, are asked to act as judges and then they if they are good then they prove themselves then they are asked by the Minister of Justice to consider becoming a judge. Their names are then sent to the Judicial Services Commission. That is how a judge is appointed. You must know this. The, uh, names are vetted by the State President, the State President sends, the State President gets them from the Minister of Justice. The Minister of Justice gets it obviously from the Bar association, Um and those people are then scrutinized uh albeit behind closed doors which I think is wrong. But they get they get scrutinized by a panel which is called the Judicial Service Commission. Judicial Services Commission is made up of the Minister of Justice and lots of other important people in the legal field. People like George Bizos who is a well-known advocate, um the Director-General of Justice, Minister of Justice, Deputy Minister of Justice, other judges, Chief Justice, Deputy Chief Justice, Judge Presidents. It's a very high-powered, a very high-powered panel that you appear before. And they ask you everything. They ask you about your personal life, they ask you about your political views, they ask you about your sexual orientation, they ask you about your health, they ask you everything.

088 And this is where – perhaps you will remember – this is where it happened, that uh when Judge Cameron was interviewed uh for the Supreme Court of Appeal, he was already a Judge but he was interviewed for the Supreme Court of Appeal, uh he took the very bold step of saying – they didn't ask him – everybody knew that he was gay bit they didn't ask him, they asked him about um uh about his sexual orientation and of course he explained that to them and what he will do and how he thinks that will add value to the job, and then on his own he said: 'Look, before you move on I think it is necessary for you to know that I am HIV-positive and I have been for seven years. I am on uh retroviral medicine, thank heavens I can afford it, and I am being looked after by very high qualified medical people and it is under control and

there's no reason why I shouldn't be able to carry out my job as any other person if I am if I keep on using my medication.' And of course that was that caused front frontpage highlights and everybody was everybody was asking whether it was necessary to do that and or was it very courageous to do it.

089 Well I don't know you must maar decide for yourself. I know Edwin very well and he is a very courageous person. Sometimes of course everybody's got a got a political agenda and sometimes he is very enthusiastic about HIV/Aids. And the new role that gay people have in the community but perhaps, you know, it is necessary. Uh its something that you must decide for yourself. But that's where it came out. At the Judicial Services Commission.

090 And they appointed him, despite his uh revelation before the committee, they appointed him and as you know he's still going strong. Ooh it was about ten years ago or how long was it ago? Five years ago? Six years ago? Do you know about this or …

091 **STUDENT 3:** [Few murmurs from other class members] Not really, I remember something, I was still at school so [continues speaking]

092 **LECTURER:** You didn't really take notice. OK. Um uh judge must be have an LLB. Must have a good practice and they must be a senior uh advocate. Uh nowadays of course its no longer compulsory that you must be a senior advocate. Uh uh attorneys have been appointed as judges. Judge Kathy Saxwell Sax sax Sacks Sackswell is an attorney. She specialized in family matters. And she's now a judge here at the Witwatersrand Local Division.

093 **STUDENT 6:** [inaudible] defeats the whole purpose of, I mean [inaudible] hierarchy. If you are an attorney you become …

094 **LECTURER:** Well,

095 **STUDENT 6:** [inadaudible]

096 **LECTURER:** I think it makes the bench more representative. Um I think it makes the bench more diverse. Its not just old middle-aged white men that were successful advocates that can now become judges. Um you know obviously you must have something to do with law. You can't be a teacher, a secondary school teacher and then all of a sudden become a judge. Um but if you're an academic, Judge Carole Lewis who was the Dean of this law school became a judge in the Witwatersrand, and now she's at the Supreme Court of Appeal. And, according to everybody that I've spoken to, a brilliant judge. So, I think it brings more diversity to the bench. It creates more attributes to the bench, she is more academic and her judgments are far better theoretically-founded than her colleagues, um I don't know, I don't think its I don't think its um its cast in stone that only senior advocates can become judges. I think you need, you need something else .. magistrates have even become judges, as I told you.

097 **STUDENT 13:** When you go to the CCMA are those judges? Are the people who you stand in front of the CCMA are those judges? Do they have any legal …

098 **LECTURER:** Ja, no I think so. Um uh they specialize in labour law I think .. Ja no they are labour law lawyers.

099 **STUDENT 13:** OK

100 **LECTURER:** But they are appointed as judges. So they are full / they've got the same status as uh as a High Court judge. And then the Appeal, the Labour Appeal Court no that's something else but they've got the same the same status as judges. Um the problem with becoming a senior advocate and then a judge is what? [some murmurs from class] Hmm?

101 **STUDENT 3:** The salary.

102 **LECTURER:** The salary. A judge gets about a, a junior, a newly appointed judge gets about seven six hundred thousand a year. And a senior advocate, well as I said, gets from four to five up to eight million in a year. So that's a *big* drop uh in salary. You must be very comfortable, uh and have whatever you want, and then you can become a judge as a kind of retirement.

103 [Clears throat] OK. Other professions in the civil service where you will start is uh public prosecutor. You'll prosecute ordinary cases in the district court. Once you are au fait with that – that's the best training you can get for court. Who asked about the articles, yes, that's another thing, if you don't do the articles then go and join the Department of Justice for two years. Um you won't build up contacts, well perhaps, but you will know how to sit and stand in a court. That's also excellent, *excellent* experience because you do it not on your own account, you do it on the state's account. So if you want to become a good practitioner, if you want to know what to do in a court, become a public prosecutor. I don't know what they pay public prosecutors now, its not much, um 'bout two hundred thousand a year, to begin with, I think so, I'm not sure.

104 And anycase if you become a senior public prosecutor, you prosecute specialized cases like I told you about the credit card fraud, or uh environmental law or tax law, or um labour law, or – there are specialized courts for all these things in the magistrates' court. And you can become a public prosecutor there. You can then become a senior public prosecutor um and if you're a senior public prosecutor, the director of public prosecutions invites you for a interview and if you pass the interview then uh you become a state advocate. Now that's excellent, excellent experience. Uh and everybody wants to become a state advocate but you can't do that off the street. You must first become a public prosecutor.

105 Uh state advocates does the work of an advocate but he only works for the State. So most of the work is civil but there are also civil work. There's also civil matters that the state advocate's do. And you have virtually the same

kind of working conditions that an ordinary advocate has. You've got your own office, your own set of law reports, but you work for the State, you work for the Director of Public Prosecutions.

106 And in my days it was a very very obnoxious character called Klaus [inaudible], who was a Prussian military officer. And he invited me for an interview … and the moment I sat down, he had a huge office and his whole office was full of military military uh memorabilia, little swords and pictures of little men in uniform and rifles and things and I thought that this is hugely inappropriate for an attorney-general – that is even what he was called at that stage. So I sat down and I looked around and I was *very* uncomfortable. I was really extremely uncomfortable. Because its very important you know, its an important interview. And so he says: 'Why are you so nervous?' He was a very brash tall Prussian. 'Why are you so nervous' he asks. And so fortunately, I had an answer ready. I said 'People are like race horses you know, the more intelligent you are the more nervous you are.' And so 'that's a slick answer, I don't like that.' And so he asked me three or four questions and um and I answered them, I think correctly. One of the questions he asked me is 'can you exhume a body if you've got new evidence?' and I said, 'Yes if you get the necessary certificate' and I told him what the requirements for getting the certificate was, you can exhume a body, *obviously* you can exhume a body. Um and I can't remember what the other questions were but legal technical questions. And then he started asking me political questions. At that stage he was prosecuting Winnie Mandela. Um and he started asking me questions what I would do if I had been the attorney-general. And I just refused to answer the questions, I said 'sorry I consider those questions inappropriate and I don't, I can't answer them. And that's a political decision and I can't answer them. Um I don't want to seem unthankful or unpleasant but I really can't answer …' And then he stopped. Immediately. HE said 'thank you, yes go back to the magistrates' court.' Uh so if you don't get on with the character, if you don't get on with the personality, of the director of public prosecutions, then then its difficult. In the Cape, when I was a magistrate, there was – what was his name, Frank Kahn – he was the director of public prosecutions. And we got on famously, did some very interesting cases. Um and um we, you know, he wasn't a pleasant guy, but he was intelligent and you could talk to him. Um so it's a question of personality …

107 But if you do go, if you do become a public prosecutor, you know, that is where you want to end up. To be a state advocate and do work for the state because then you get High Court experience at the State's expense, you know. You know whether you lose or win its not really important, you don't want to make a lifelong career out of it, you only want to, you only want to get experience. Unless you want to become a civil servant, that's also possible, there are lots of things that you can do.

108 If you don't want to become a prosecutor and you don't want to do criminal work, and you want to do civil work, then you can become a state attorney. Um state attorneys exactly the same as ordinary attorneys, but they just act

for the state. If there's an accident with a government garage vehicle, then they will uh they will do that case on behalf of the state – or anything where the state is responsible – Minister of Justice has got a claim against him, that goes to the state attorney. Wonderful, wonderful experience of course. But they are getting very very sticky. What people do of course is you go to the state attorney to do your articles which you can do. But you then get paid what a state attorney gets paid which is two hundred three hundred thousand rand a year. And an articled clerk gets far far less than that. So it's a wonderful way to do your articles. But too many people have now done that, and I think they're closing the loophole, saying 'You can do your articles here but for every year that you work your articles you must work back for us. So if you do your articles for two years here you must work back for two years. And sign a contract. Which is reasonable, I don't think that's bad. And its not the best articles that you can get obviously. It doesn't prepare you really for the exam, because you're always on the state's side. You see everything from the state's side. Um …. So beware of that.

109 And then a very interesting position if you're not ambitious and you just want a calm intellectual life, is state legal advisor. State legal advisor are the people who are responsible for drafting of most of the legislation. You can also, State legal advisor can also become a member of the Law Commission, and that is a very very stimulating job. Law commissioner, what you do then is if the Minister of Justice decides to do something new, such as for example, rewrite the Customary Marriages Act, he gives it to the Law Commission and they do research and they prepare the papers with all the alternatives for customary unions. Um so that is very that is a very very um, a very reasonably paid job, but a very very stimulating and uh [pause] – I want to say entertaining job, but its not entertaining – its an um interesting job. Um its not boring like being a public prosecutor or even a state attorney. It is a stimulating and interesting job. Um, if you are interested in that. And the wonderful thing with this is you earn a reasonable salary. You earn a senior – the longer you are there the higher your salary of course, you earn a senior civil service salary and you've got none of the pressures of private practice, which you will discover is quite a benefit.

110 Then there are lots of other factotums, such as the registrar of the High Court, whose just the person in charge of the administration of the High Court, the clerk of the magistrate's court, person in charge of the administration of the um magistrate's court. Master of the High Court. Is a person responsible for uh standing in for people who can't represent themselves. Children, deceased estates, um insolvent estates. The Master of the High Court looks after those people, um the widows and the orphans. But its also, its also the insolvencies. He organizes, and he chairs all the all the meetings of creditors for insolvency. Eh supervises and controls the administration for deceased estates, liquidation of companies and funds on behalf of miners. Uh now that is a very important job, its not a very stimulating job, its very routine, but you know somebody has to do it. Registrar of deeds is a person uh that is responsible for the administration of

the deeds office, and every transfer of immovable property must appear before him. And you can't just appear before him, he's like the oracle of Delphi, you must be a certain person to appear before him, and that is a conveyancer. Conveyancer, you appear before the Registrar of Deeds and then if your documents are in order the registrar of deeds will sign them and then uh you can get a transfer of from one person to another person. That's when you buy property, it must uh it must happen.

111 And then there's also the registrar of patents and trademarks and copyright. Um who keeps unbelievable registers of every single trademark and patent that has been registered in South Africa. They sit in Pretoria in a huge building, don't know what the building is called now, in my days it was called what, it was a little elephant. I will never forget the little elephant. But they have in this building, they have um hard copies, not computer copies, they've got hard copies of every single patent and every single trademark that was published in South Africa. That was registered in South Africa. So go and look for coca cola, you can go and look for when it was published, when it was registered, when it was renewed, where it was renewed, what is the history, what classes it was registered in etc etc AT a fee of course.

112 Then there are a lot of other things: A family advocate was introduced to mediate in family matters, uh if you are a, if you are deeply involved in, deeply interested in family law, then obviously that is something that you can consider. It is public service position, family advocate, you can appear in the High Court, in other words you can bring your own applications, but you are involved with things like adoptions, child abuse, uh single mothers, maintenance, uh family violence, all those things. Uh a little bit too much detail for me, uh and a little too depressing for me, I wouldn't like to sit in an office everyday and listen to other people's problems. But um you know if that is the kind of thing that you like to do, that is the job that's cut out for you.

113 Public protector, um [clears throat] is also an office in Pretoria, is actually called an ombudsman. Um if you know of any corruption or if you've been bribed, you take it to the ombudsman, he investigates it and he brings out a report and he reports to Parliament every year. So he is also a powerful person, he can refer matters to the Director of Public Prosecutions, um and he's a watchdog. So if that's the kind of thing that you enjoy, catching people out, corruption, then you can go and work for his office.

114 Human Rights Commission, the Human Rights Commission is just here in Johannesburg, just in Braamfontein, next to the Medical, Wits Medical School. They've got commissioners but the Human Rights Commissioners are appointed. I think there are ten or eleven of them. And they are, there's a chairman, uh Joey Kollapen I think is the chairman at the moment, and then there are ten or twelve commissioners that are appointed, and these commissioners investigate human rights abuses. Uh if uh a school somewhere in the platteland doesn't want to admit black children into the

school for some strange reason, then the human rights commission investigates. And brings out a report. Any human rights violations, gets sent to the Human Rights Commission. I have heard that they're not really busy. Yes?

115 **STUDENT 14:** What's the human rights advocate in Pretoria? What are the [inaudible] I know there's one in Pretoria that you can do [inaudible] as well? What's the difference between …

116 **LECTURER:** No no no

117 **STUDENT 14:** Worked with John Dugard once …

118 **LECTURER:** No you're talking about the University of Pretoria, the Centre for Human Rights. And you can do your masters' degree there and they – its like we have CALS. CALS is the Centre [students murmur 'for applied legal studies as he hesitates] for Applied Legal Studies, TUKS has got the Human Rights Centre, uh or Centre for Human Rights. And it's the same thing, its an academic institution. But the Human Rights Commission is a statutory body sitting here just in Pretoria, uh in Johannesburg. They've got, you know, commissioners go out all over the country. But their main offices … and they're not academic. They they're very practical. Public defender / yes?

119 **STUDENT 15:** I just want to know, how authoritative is the Human Rights Commission?

120 **LECTURER:** How do you mean how auth ...

121 **STUDENT 15:** Is there um

122 **LECTURER:** ...oritative?

123 **STUDENT 15:** You know about the black journalists forum?

124 **LECTURER:** Black journalism what what … yes I know about them.

125 **STUDENT 15:** Yes, apparently the Human Rights Commission declared that they are convening unconstitutionally. So I want to know does the authority of [inaudible]

126 **LECTURER:** Look, I don't know what the powers of the Human Rights Commission is. Certainly they can, like I'm sure, like the Public Protector, refer a case to the Director for Public Prosecutions. They I think they've got that authority. Um they bring out a report and the report carries a lot of weight. They report to Parliament every year. Um and if they are asked to investigate something like the black journalists thing forum, they investigate it and they bring out their um report. And whilst that report I don't think has the power of law, it is extremely, it has a lot of authority. I think if the Human Rights Commission finds that you've committed a human rights violation, then they've got the authority to force you not to do it again. Uh and if you do it again, if you carry on, with your violation, they will refer it to the

Director of Public Prosecutions. So they're not to / they haven't got, they haven't got a lot of teeth, its not as if you know they can send you to jail, or they can chop off your head, but they have some teeth and uh like in many many instances this dependence on the standing and the respect that people have for the commission, which is quite healthy at the moment. I think.

127 [Clears throat] Public defender. Is an office that was instituted by the State and the Lawyers for Human Rights, um for indigent people, people who do not have money to appoint a lawyer, you can go to the office of the Public Defender. And if you meet the criteria, it's a needs criteria, and a means criteria, if you meet the means criteria then um they will take your case. Uh they will defend you in a court of law on a criminal charge, they don't take civil cases.

128 And then finally ladies and gentlemen there's of course the best profession of all. Yes. The best place to be in the legal field is an academic. Legal academic, they teach at tertiary institutions, they train lawyers, they write journal articles, and they they have the ability to change the law, if you are a legal academic of very high standing, and people listen to you – like John Dugard – or Iain Currie or Cora Hoexter, people follow what you say, the courts quote you, the courts follow on on what your views are, um it is sometimes a difficult profession because uh there's lots of there's lots of jealousy, there's lots of um competition, there's not a lot – in South Africa its not so bad but in a country like Scotland or England where very little new develops you know its very difficult to think of anything novel in a legal system that's been going for centuries. So the competition is fierce, and um to make it more appetizing the conditions, the working conditions are very very pleasant. You have all the books and materials, computers whatever you need at your disposal, um you don't have fixed office hours, you can work at home. Um you have the opportunity to go to conferences, one international conference per year, two local conferences. Unfortunately the bad part of an academic's life is you must mark scripts, that is really the bad part of it but … you know the first ten is fine but after that it does become very boring. Um and uh you also get a title. If you are promoted you become an associate professor or professor and people uh think very highly of you. There's opportunity to get advanced degrees. University stimulates further degrees, LLMs and LLDs, you can study for free. And you can obtain those degrees at the university's expense. Um there are many many grants many many opportunities to get money for books and for study. Uh it is not place you should go if you are very materialistic. Salaries are very humble – well, it depends, if you are a full senior professor or the Head of School which is now also not a pleasant job because its all administrative – but if you're a full professor like Cora or Iain Currie, I'm sure that you can survive on the on the salary. I don't know what it is, I think … I don't know what a full professor and I think it is about forty or fifty thousand a month. Between forty and fifty thousand a month, um but I stand to be corrected, please don't quote me now you'll get the labour unions on me or things, I don't, I really don't know, it also differs from university to university but that's about what they should get uh about forty

forty-five fifty thousand rand a month. So you can make a pleasant living, you can't have a Porsche or you can't have a vintage rolls Royce, unless of course you marry a very successful lawyer. Yes?

129 **STUDENT 2:** But if you publish books you get money for that …

130 **LECTURER:** Yes, you do. If you publish books like Professor Skeen, you don't know you don't remember Professor Skeen. Professor Skeen was the Dean of this Law Faculty and he was a very dear old man. He was a great friend of mine, I was very fond of him. Uh and what he did is he wrote a series of books on criminal, he did a uh he did a PhD or Masters degree in criminology from Oxford [break in recording].

131 Because they could just as easily become practitioners and earn five times what the academics earn. So to sugarcoat that there was a rule that if you become an academic you may use twenty percent or your time, at university, for your practice. If you are a practitioning uh a practitioner, either at the bar or at the side-bar. You may use twenty percent of your time to attend to your practice. And that's what's happening. But it's a two- is a double-edged sword because if you allow your academics to go to court they get experience in court, and, you know, when they come back they are better teachers. Because they can tell you what happened in court. Um you don't want people without any practical experience uh being academics ,you want a well-rounded person being an academic. So it is sometimes uncomfortable and you can't tell the court that they must wait because you've got a lecture, you know that's unfortunately doesn't work that way, so it is sometimes, it is a problem but they must maar organize, make up lectures.

132 But still, this is the best place and you don't have to believe me. Being an academic at a reputable university, with international standing like Wits is the best place in the legal profession to be. Um for a variety of reasons. But you know you must be independently wealthy and you must be able to support yourself you know its difficult to support yourself on the salary, and on writing books and journals, but uh stimulation, for interaction with other people, for challenges, for intellectual stimulation, intellectual ability uh uh being able to be uh on top of what is going on in your field, there is no better place .. to be. OK. Any questions? [pause]

133 Have you got no questions on anything, on all the professions?

134 **STUDENT 3:** I don't have a question but I just had a / I don't have a question but when you were saying, when you were talking about advocates being scared in court, I remember when I was in standard nine, we had to do work experience and I went with a friend of mine, her dad works for Bell, Dewar and Hall.

135 **LECTURER:** Hmmm

136 **STUDENT 3:** And I went with Nigel and I spent a week with him. And he took me to a court in Joburg Centre, I just remember it was close to the Brazilian

Coffee Shop, and I sat in court that day and I've never been / I didn't know what was going on and I could feel the nervous tension in that room it was just too awful for words.

137 **LECTURER:** No well some people thrive on that, some people live / like like [Isobel], I mean if she doesn't have an adrenalin rush every five minutes you know she gets bored. So some people really like that, they thrive on that nervous tension and they are their best and sharpest when they have … but you know you can't its impossible to sustain it for weeks and weeks and months and months and then you must take a break um you must look after yourself, you must you know / it's a very / it's a high tension job.

138 **STUDENT 3:** I met a lovely / after the case and everything because we spent the whole day in court, and Nigel was worried and said 'Aren't you tired, aren't you hungry?' And I said 'No no I'm actually fine I'm enjoying this quite a bit, its different' and I met up with, well I met some of his colleagues, there was a lovely tall blond lady – I don't recall her name – lovely tall blond woman and she was an advocate and she was wearing her robes and walking, you know we all walked across the road and it was very romantic and everything we sat in the Brazilian [class and lecturer laugh], we had lunch and she asked me all questions about school and then she said 'Oh you studied French at school!', she started rattling off in French for like half an hour and I just sat there with a mouth full of teeth.

139 **LECTURER:** Ja that's the stereotypical, that's the stereotypical idea that I have of a of a female advocate but I'm uh I shouldn't talk to you about that but um tall, long, blond, um you know multi-faceted, multi-functioning, multi-tasking uh super elastowoman, you know three children on the hip and uh you know five hundred thousand briefs on this side, that's what you must be.

140 OK next week we'll do the footnotes ladies and gentlemen, um are you, how are you doing with our assignment? Questions?

141 **STUDENT 3:** Is it really as simple as …

142 **LECTURER:** Ja

143 **STUDENT 3:** I'm getting the impression it is. Well its just that you said we have to write in our assignment about how the case was written …

144 **LECTURER:** Also about that, also about that. Not just about that. I want something of the case as well, you know, I want you to look at the actio doli and to see what they've done about it. Um but the idea is that you apply everything that we've done in the in this course.

2. ANALYTICAL TABLES

ADVOCATE: ANALYTICAL TABLES

1: SOCIAL ACTION (A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material)

ADVOCATE QUOTATION NO.	SOCIAL ACTION (SA) QUOTATIONS	A	T	S	P	NT	M	Object (not calculated – for guidance only)[1]
1	a. he just he *talks*, like an advocate in a trial	X		X		X		-
	b. he's not going to *say* 'Oh excuse me judge here's a very good point against me if you don't mind looking at this'	X	X	X				OTHER LAWYERS (JUDGE)
2	May you, as the advocate, use the debates of Hansard to *prove* the intention of the legislature in the legislation.	X	X	X				INFORMATION LEGISLATURE
3	if you're a very good advocate they ask you to become a uh acting judge			X	X	X		-
4	a. judges in private law matters sit and they are *confronted* by both sides represented by an advocate	X	X	X				OTHER LAWYERS (JUDGE)
	b. The advocates *make sure* - that's their job - they make sure that the judge *is informed* of every single possible authority uh that their case, that their side of the case um uh that will support their side of the case. So the judge, when he sits in the provincial division has got the advantage of the entire scope of authorities, *presented* by the two advocates.	X	X	X				OTHER LAWYERS (JUDGE)
	c. he comes to a conclusion based on everything that was *laid* before him.	X	X	X				OTHER LAWYERS (JUDGE)
5	a. when a case is brought to court um you appoint an advocate				X	X	X	-
	b. it is the work of that advocate to *promote* your case	X	X	X				CLIENT
	c. So he will *get* all the precedents that is in favour of your case	X	X	X				LAW
	d. And he will *put* that before the judge. And he will try everything - with his arguments, with your affidavits, with everything, he will try to *convince* the judge to decide upon the cases that he has	X	X	X				OTHER LAWYERS (JUDGE)

[1] I have not calculated the number of objects of social action in the same way as I have calculated active/passive, transactive/non-transactive; and semiotic/material actions where the categorization is 'either-or'.

	quoted to the judge.							
	e. So there will always be cases that you can *argue* are for, and cases that you *argue* are against it.	X	X	X				LAW
6	In the past if you are a very good advocate and they um the council the bar the minister and the judicial services council think you should be promoted, you are invited to act as a judge.			X	X	X		-
7	He will say 'the advocate for the defence' or ' the advocate for the respondent said the following, I'm not accepting his version. I'm rejecting his authority. Advocate for the other side forwarded these arguments and I find them acceptable. And for these reasons I'm going to follow that.			X	X	X		-
8	if you *apply* to be admitted as an advocate	X		X		X		-
9	You get the Gregorowski law reports and that just means it is an advocate Gregorowski who *collected* the law reports.	X	X				X	LAW -PHYSICAL (LAW REPORTS)
10	it was an advocate in that um division that *collected* those court cases	X	X				X	LAW – PHYSICAL (LAW REPORTS)
11	a. the people who *collected* them, these specific collections - I will go fetch my law reports now so that I can show you - um, these people's collections, it was in their discretion!	X	X				X	LAW – PHYSICAL (LAW REPORTS)
	b. They *decided*, and they were advocates. Practitioners of the court! And they could decide at the end of the year, OK I can put this into my collection, I'm going to put that into my collection, and that's how cases got *reported*.	X	X	X				LAW
12	it wasn't *argued* by the advocates	X	X	X				LAW
13	NONE							
14	Um and he *collected* these old books and in his time you could still collect them you could still collect these books.	X	X				X	LAW (OLD LAW BOOKS)
15	NONE							
16	a. you rely one hundred percent on the um side-bar, and those are the attorneys to send you briefs, to send you um to send you work.				X	X	X	-
	b. So if you go directly from university to the bar you're going to sit in an office somewhere here in Johannesburg and wait				X	X	X	-

	for your telephone to ring and its never going to ring.							
	c. Because nobody knows about you.			X	X	X		-
	d. see that you know the attorneys in your firm uh very very well so that at least they will brief you when you're an advocate				X	X	X	-
17	a. No if you want to become an advocate you only need to *do* six month's pupilage.	X	X				X	ONE'S APPRENTICESHIP
	b. Pupillage you get a master at the at the uh uh a senior advocate or an advocate that you have confidence in and you *enter* into a contract with him and you *go* with him for six months	X	X	X				OTHER LAWYERS (PUPIL MASTER)
	c. just to so that he can show you the ropes.			X	X	X		-
	d. you're not paid for that six months				X	X	X	-
	e. but you must do the six months to be admitted to the bar and um when you're admitted to the bar			X	X	X		-
	f. after you've *written* your bar exam	X	X				X	BAR EXAMINATION
18	a. he *asked* very piercing and um tenacious questions	X	X	X				WITNESS (AS THE OTHER)
	b. he *wrote* a book and decided to *go* to the bar	X	X	X				OTHER LAWYERS (BAR AS ADVOCATE COLLECTIVE)
	c. He *wrote* his exam, he *passed* his exam with flying colours	X	X	X				BAR EXAMINATION
	d. within three or four months everybody was talking about him			X	X	X		-
19	a. But that's what I say, people are all talking about one another. And people are all talking about whether you are good or not at the bar.			X	X	X		-
	b. And if you're one of those bright stars you'll *make it* at the bar. Whatever you *do* to get there.	X	X	X				OTHER LAWYERS (BAR AS ADVOCATE COLLECTIVE)
	c. you can *go* to the bar and you can *open* your office	X	X				X	PHYSICAL CONTEXT
	d. and you can be admitted			X	X	X		-
	e. but you know the lights are going to be on but nobody's going to phone you				X	X	X	
20	a. he *went* to the bar	X	X	X				OTHER LAWYERS (BAR AS ADVOCATE COLLECTIVE)
	b. And immediately he got enormous briefs			X	X	X		-

21	a. Um it means that um that the Minister of Justice or the State President or the Queen then in England, considers you above the others.			X	X	X		-
	b. you get to *wear* now not only a cotton robe, but you can *wear* a silk robe	X	X				X	PHYSICAL CONTEXT
	c. you are only briefed in very complicated matters			X	X	X		-
	d. you *charge* no longer R3000 an hour but **STUDENT 12:** R20 000 **LECTURER:** R20 000 an hour	X	X				X	CLIENT
22	So, if you've been around for ten or fifteen years then your name will be sent forward by the bar and the Minister will look at your at your practice and if you are a person of substance and you've done uh important cases and you've got stature and you've got a very solid practice, then he will make you Senior Counsel. I don't think there's a closed number. Um but its not, its not something that is granted lightly.			X	X	X		-
23	he will employ uh very very senior, very senior advocates				X	X	X	-
24	the judge is now a senior advocate who's been elevated to a judge			X	X	X		-
25	The very best of the practicing advocates are appointed as judges.				X	X	X	-
26	NONE							
27	The attorney must refer you to an advocate or the attorney appoints an advocate on your behalf.				X	X	X	-
28	a. If she's *going* to the bar, she's now a candidate attorney, she's working to qualify, she qualifies at the end of this year. If she then stays on another year or so at Bowman Gilfillan, big firm, lots of contacts, she then goes to the bar	X	X	X				OTHER LAWYERS (BAR AS ADVOCATE COLLECTIVE)
	b. And that - that's how you *get* people to phone you. That's how you get people to phone you.	X	X				X	OTHER LAWYERS
29	a. But as soon as it gets complicated then they appoint an outside lawyer or outside advocate to do the practical side, to do the practical side of it.				X	X	X	-
	b. Uh, these are people who will brief you if you are going to become an advocate. They will brief you and they will give you *fat* briefs.			X	X	X		-

30	a. And this is what the advocate *takes* to court with him and this is called a brief.	X	X				X	BRIEF CLIENTS
	b. It it's the instruction that the advocate receives from the attorney.			X	X	X		-
31	a. So, if you're an advocate this is what you *take* to court with you, this is your bread-and-butter.	X	X	X				BRIEF CLIENTS
	b. this is what people, legal advisors in a company will send to you when they brief you, you know, on the restructuring of the company or whatever.				X	X	X	-
32	a. You *work* on your *own*. You *work* on your own.	X				X	X	-
	b. you have your own secretary which you appoint and you pay for.	X	X				X	OFFICE PERSONNEL
	c. You *work* for yourself.	X				X	X	-
	d. You *charge* by the hour	X				X	X	-
	e. you *prepare* everything for the court	X	X				X	COURT PAPERS
	f. You *appear* in the High Court. You appear on behalf of an attorney. You appear in the High Court.	X				X	X	-
33	a. You are, and I don't care *who* you are, if, you can be Sydney Kentridge, if you *appear* in court you are *scared*. And if you are not scared then you are not prepared. You are scared, uh uh .. *appearing* in a court is very very intimidating.	X				X	X	-
	b. Um, so if you're a good advocate you will *see* that all your papers are in order.	X	X				X	PAPERS
34	a. The judge will ask *you*, um, Mr [state's student's surname] why is the file not properly paginated?			X	X	X		-
	b. And its no use saying, uh my lord I'm terribly sorry but that must have been the clerk, the clerk of the attorney who did not attend to the pagination.	X	X	X				OTHER LAWYERS (JUDGE)
	c. You must *see* to it that everything is in order. Up to such a small detail as pagination.	X	X	X				PAPERS
	d. If it is not correct then the judge can throw out your case.			X	X	X		-
35	a. You must be able to *see* every single thing.	X	X	X				CONSTRUCTION OF FACTS
	b. if you've *made* an aversion on a statement	X	X				X	CONSTRUCTION OF THE FACTS
	c. your case is thrown out			X	X	X		-
	d. He'll say, uh, please Mr [state's			X	X	X		-

	student's surname], address me on this novel interpretation that you have in clause 3.							
	e. And then you will be able to *address* him	X	X	X				OTHER LAWYERS (JUDGE)
	f. if he talks like that you know you're stuffed.			X	X	X		-
	g. You can just as well, you know, *pack up* and *say* 'I'm sorry my lord, um uh, I'm relatively inexperienced in these matters and uh, it slipped in, I *beg* your lordship's indulgence to amend it. And your lordship will not give you an indulgence.	X	X	X				OTHER LAWYERS (JUDGE)
	h. And then you've *wasted* costs. You've *wasted thousands* of rand by *appearing* and preparing to appear for that day for trial in court	X	X				X	COSTS CLIENTS
36	NONE							
37	a. advocate is the person who *appears* in court.	X				X	X	-
	b. You are *fighting* from the morning you open your eyes, from the first thing you *do* to the last thing you *do*	X		X		X		-
	c. You *work* from 4, 5 o clock in the morning to get everything ready for court until 12 o clock the next evening.	X	X				X	COURT PAPERS
	d. So you have three four hours every night that you can *sleep*.	X				X	X	-
38	the advocates have got certain things that they must *do*	X				X	X	-
39	the advocates *do* the court work	X	X				X	CLIENTS
40	The litigation department - well they *do* maj court, maj court litigation obviously, that's what they do and when it goes to the High Court you do, um, all the backroom work, you get all the expert witnesses together, you get all the statements together, you get the file together, because the advocate can't *do* that.				X	X	X	CLIENTS, PEOPLE AND OBJECTS RELATED TO A CASES
41	They are specialist, um, in *appearing* in court.	X				X	X	-
42	a. he's *gone* to the Bar.	X	X	X				-
	b. And, I mean, within six months, um everybody, every single person at the Bar was talking about him			X	X	X		-
	c. he *chips* at you until you crack	X	X	X				WITNESSES OR OPPONENT (BY IMPLICATION)

	d. he was *fascinated* at the, at my view, that I had on this, uh specific issue	X	X	X				POINT OF VIEW
	e. And he, as soon as the session was over he came to me and, you know, he .. it was teatime I can remember and he was *standing* here and he *said*: 'Um you said this and this .. what exactly did you mean?' And he *went on and on and on* .. throughout teatime, throughout uh the second session the the mid-morning session, throughout lunch time. And I said 'Andrew, please, dear God, can I *eat* I mean, I don't want to be rude but, you know, can I just have a break?' And he said 'Yes but uh um what exactly did you mean, you can eat you can talk to me while you eat. And he stayed with me until that afternoon that we, that the conference was over, he *did not give up* until he understood exactly what was going on.	X	X	X				WITNESSES OR OPPONENT (BY IMPLICATION)
	f. he started *attacking* me on why, why it couldn't be	X	X	X				WITNESSES OR OPPONENT (BY IMPLICATION)
43	a. If you *see* something you must know what is the law. Is it right? Is it not?	X	X	X				LAW
	b. you must be able to *present* yourself. Must be able to present yourself.	X	X				X	CLIENTS
44	a. if you don't work you don't get paid. If you go for ten days to Athens then for ten days you don't get paid.				X	X	X	-
	b. you must *pay* the bills, you know, you must pay your chambers, you must pay your secretary, lots of things that you must pay.	X	X				X	DEBTORS
45	I would say nobody can go to the Bar before they've been to the side-bar.	X	X	X				OTHER LAWYERS (BAR AS ADVOCATE COLLECTIVE)
46	a. there are people *sitting* here, um, in town or at um, Sandton, *praying* for the telephone to ring	X		X		X		-
	b. they're *sitting* there week after week, hopefully only week after week and not month after month.	X				X	X	-
	c. I've heard of people *sitting* on the library steps of the, of the chambers in Sandton, uh, trying to *conduct* a practice from the	X				X	X	PRACTICE

	library steps							
	d. *Sit* on the steps and trying to get your practice going	X				X	X	PRACTICE
	e. nobody's going to employ an advocate on the library steps				X	X	X	-
47	a. you must have money to *entertain* people, you must have money to *go out*	X	X				X	PEOPLE (CLIENTS?)
	b. you must *dress* very very well	X				X	X	-
	c. you must *impress* the people	X	X	X				PEOPLE (CLIENTS?)
	d. If you, if you if you've got a multi-million contract that is a bit shaky and you want to take it to court and you get to this guy and he looks like you look now today … Not that, not that you don't look beautiful but, um, you know, this is not, you know, he's going to say 'uuuh, you know, please, this guy doesn't know what he's doing or this girl doesn't know what she's doing. She's in a pink Oxford tracksuit [gestures towards one of the students] please, you know'.			X	X	X		-
	e. You must power *dress*	X				X	X	-
48	but you must *know* your Rules of Court. And your *ethics*. Ethics, remember that, if you *prepare* for the bar exam those are the things that they're going to ask. Your Rules of Court. You must *know* your etiquette, your Rules of Court and your ethics.	X	X	X				RULES OF COURT AND ETHICS
49	Um, and in both these, um, uh, professions, you will make, you'll *make* a living. Definitely. You'll make a good living.	X	X	X				MONEY
50	NONE							
51	NONE							
52	NONE							
53	NONE							
54	NONE							

2: CIRCUMSTANCES OF SOCIAL ACTION (CSA)

ADVOCATE QUOTATION NO.	CIRCUMSTANCES OF SOCIAL ACTION (CSA) QUOTATIONS	CIRCUMSTANCE TYPE
1	like an advocate in *a trial*	LOCATION (IMPLIED)
2	May you, as the advocate, use *the debates of Hansard*	RESOURCES
3	NONE	
4	The advocates make sure - that's their job - they make sure that the judge is informed of *every single possible authority* uh that their case, that their side of the case um uh *that will support their side of the case*.	RESOURCES
5	a. it is the work of that advocate to promote your case. So he will get all the *precedents* that is in favour of your case	RESOURCES
	b. And he will try everything - with his *arguments*, with your *affidavits*, with everything, he will try to convince the judge to decide upon *the cases that he has quoted to the judge*.	RESOURCES
6	NONE	
7	NONE	
8	NONE	
9	it is an advocate Gregorowski who collected the *law reports*	RESOURCES
10	NONE	
11	And they could decide at the end of the year, OK I can put this into *my collection*, I'm going to put that into *my collection*, and that's how cases got reported.	RESOURCES
12	NONE	
13	Common law, England is the *common wisdom* of the judges and the the um uh advocates	RESOURCES
14	NONE	
15	he had *a study about the size of this room*	RESOURCES
16	a. you're going to sit in an office somewhere here in Johannesburg	LOCATION
	b. you must have *a very good reputation*	RESOURCES
	c. Now if you're straight through your LLB by you know getting 60 or 68% you know that's not good enough. You must *get your LLM uh LLB cum laude*.	RESOURCES
	d. you must get *a distinction in your in your admissions exam* for the bar or for the um uh attorneys' profession	RESOURCES
	e. because its such a small profession people immediately talk about your performance *in court*.	LOCATION
	f. from *university* to *the bar*	LOCATION
17	NONE	
18	And he became a lecturer *here* and he was a very good lecturer and he wrote a book and decided to go *to the bar*.	LOCATION

19	you can go *to the bar* and you can open *your office*	LOCATION
20	a. Also professor Cockerell who was also here, who decided he doesn't want to stay in *academia*, and he *went to the bar*.	LOCATION
	b. he already had *a reputation*	RESOURCES
	c. he's a confirmed, very established academic, and he then went *to the bar*	LOCATION
21	a. A senior, a Queen's Counsel or a King's Counsel is um QC, is *a title you obtain when you become a very very senior advocate*	RESOURCES
	b. the only implication is that you get to wear now not only a *cotton robe*, but you can wear *silk robe*	RESOURCES
22	the Minister will look at your at your practice and if you are a person of substance and you've done uh important cases and you've *got stature* and you've *got a very solid practice*, then he will make you Senior Counsel	RESOURCES
23	the advocates that represent them *in court*	LOCATION
24	NONE	
25	NONE	
26	South Africa's got a *divided bar*, we've got a *bar*, um, *where we have, um advocates*, and I will come to the advocates just now. And then we've got what we call *a side-bar*, Uh, and in the side-bar we have the attorneys.	LOCATION
27	NONE	
28	a. If she's going *to the bar*	LOCATION
	b. *everybody knows* that she's an authority on prescription	RESOURCES
29	So, if you have *friends becoming legal advisors to large firms*, they are very good to know. Uh, these are people who will brief you if you are going to become an advocate. They will brief you and they will give you *fat briefs*.	RESOURCES
30	a. A *brief* is a, um, is *a document in blue that is folded like this*, and we have discussed this I'm sure. It *comes from the formula of the praetor*, It's a *document* like this, *its blue*, its this colour, slightly light, it's *a light blue like your jersey* (gestures towards one of the students). It's *a light blue* and its *got printed on such and such versus such and such, the attorneys and the advocates* and its *tied together*, *inside there are, uh, papers* or whatever and its *tied together with a pink ribbon*. I don't know why its pink. I don't know if it must be a pink ribbon but its *tied together by a pink ribbon*….B-r-i-e-f it is his brief, *his instruction from the attorney*. It it's the instruction that the advocate receives from the attorney	RESOURCES
	b. And this is what the advocate takes *to court* with him	LOCATION
31	a. if you're an advocate this is what you take *to court* with you	LOCATION
	b. this is *your bread-and-butter*. This is what you make and this is what people, legal advisors in a	RESOURCES

	company will send to you when they brief you	
32	a. Advocate is more, uh, the work of an advocate is *more intellectually stimulating*	EMOTION
	b. You work on your *own*. You work on your own. You have *your own office*, you have *your own secretary* which you appoint and you pay for. You've got *your own law reports*. You've *got your own work*, you've *got your own telephone*, you've got *your own dictaphone*, you've got *nothing* to do with anybody else.	RESOURCES
	c. You appear *in the High Court*. You appear on behalf of an attorney. You appear *in the High Court*.	LOCATION
33	a. Ladies and gentlemen, if you stand up in court, and you will *feel* that (shakes head) I hope every one of you will at least once in your life have that *feeling of appearing in a court*. You are, and I don't care *who* you are, if, you can be Sydney Kentridge, if you appear in court you are *scared*. And if you are not scared then you are not prepared. You are scared, uh uh .. appearing in a court is *very very intimidating*	EMOTION
	b. *in court*, and you will feel that (shakes head) I hope every one of you will at least once in your life have that feeling of appearing *in a court*. You are, and I don't care *who* you are, if, you can be Sydney Kentridge, if you appear *in court* you are *scared*. And if you are not scared then you are not prepared. You are scared, uh uh .. appearing *in a court* is very very intimidating	LOCATION
34	a. The *papers* are the things filed in the court file and served upon the other side that you are going to base your case upon in the form of *affidavits*, *expert witnesses*, whatever, I don't, I can't go into all those technical details.	RESOURCES
	b. But it is a paper file that is opened for your case *in the court*	LOCATION
	c. You know what pagination is? You have a file of *ten thousand pages* and *every day a new document arrives to be put into that file*. Sometimes, *the order changes*. So before the document goes to the judge on the day of the trial, somebody, usually the clerk of the, the candidate attorney of the attorney's office, must go to the file and see to it that it is paginated, in pen, in pen, you paginate it in pen because it changes. And *its paginated from page one to page ten thousand*. Correctly. *If it is not correct then the judge can throw out your case*.	EMOTION
	d. If there's anything wrong with that file, *the judge will only keep you responsible*. The judge will ask *you*, um, Mr [state's student's surname] why is the file not properly paginated? And its no use saying, uh my lord I'm terribly sorry but that must have been the clerk, the clerk of the attorney who did not attend to the pagination. *You must*	EMOTION

	see to it that everything is in order.	
35	a. preparing to appear for that day for trial *in court*	LOCATION
	b. You *must be able to see every single thing*. If there's a *spelling error* in your pleadings, oh please. If there's a *grammatical error*. If there's a *technical error*, a *legal error*, if you've made an aversion on a statement that is wrong technically, legally, *your case is thrown out.*	EMOTION
	c. if he talks like that you know you're *stuffed*	EMOTION
	d. And then *you've wasted costs*. *You've wasted thousands of rand* by appearing and preparing to appear for that day for trial in court *and its just thrown out because you've made something wrong*. You've referred to section 2(1) instead of section 1(2).	EMOTION
36	It's a small detail ladies and gentlemen, but God in the law, lives in the detail. (waves hand as if saying 'no') If you don't have *an eye for detail* if you're a, if you're a more of a forest type person and you can't see the detail, you can't see the leaves for the forest (gestures 'no' once again). Stay away. Don't even try to become an advocate.	RESOURCES
37	a. advocate is the person who appears *in court*	LOCATION
	b. If you're not *a good public speaker*, well, I must say, I have seen some very poor public speakers being reasonably successful at court, but it will help you know. Then go for *elocution lessons*,	RESOURCES
	c. if you are shy and you don't like conflict, you don't *like uh, intellectual violence*, don't become an advocate	RESOURCES
	d. your hours are *long*. You work from *4, 5 o clock in the morning* to get everything ready for court *until 12 o clock the next evening*. So you have *three four hours every night that you can sleep*. If you want to have a family, then, you know, then try to get to sleep. (class laughs)	RESOURCES
38	NONE	
39	the advocates do the *court* work	LOCATION
40	a. *The litigation department*, um is the fall-back of the advocate.	RESOURCES
	b. The advocate is is is *is office bound*.	LOCATION
41	They are specialist, um, in appearing *in court*.	LOCATION
42	a. what must you be to be a good um advocate? You must have an *enormous reputation*, You must have a *very good reputation*.	RESOURCES
	b. I told you about my colleague who started here, well he was first my student. *Extremely irritable, irritating* student because um, he was in my jurisprudence class and he um, he wouldn't stop asking questions until he had the answer. Um, which was *irritating* for me but, you know, he was a very good student.	EMOTION
	c. he then tried to do his articles which he *hated*	EMOTION
	d. He then *came to Wits* and he lectured for two three years here and he's *gone to the Bar*.	LOCATION
	e. within six months, um everybody, every single	RESOURCES

	person at the Bar was talking about him. Uh, because of how *brilliant* he is and how *perceptive* he is and how *tenacious* he is.	
	f. Um, he's a, he's a small unopposing little man. He's not a, you know, fiery lion or something. But, he *chips at you until you crack*. And he doesn't .. I remember I gave a paper on unjustified enrichment (coughs) and I gave th paper first thing in the morning, it was a day session, um and he was fascinated at the, at my view, that I had on this, uh specific issue .. its complicated and I can't even remember it. But it was a novel view on extending unjustified enrichment. And he, as soon as the session was over he came to me and, you know, he .. it was teatime I can remember and he was standing here and he said: 'Um you said this and this .. what exactly did you mean?' And he went on and on and on .. throughout teatime, throughout uh the second session the the mid-morning session, throughout lunch time. And I said 'Andrew, please, dear God, can I *eat* I mean, I don't want to be rude but, you know, can I just have a break?' And he said 'Yes but uh um what exactly did you mean, you can eat you can talk to me while you eat. And he stayed with me until that afternoon that we, that the conference was over, he did not give up until he understood exactly what was going on. And he didn't uh, he didn't accept uh my version of it at all. First of all I had to explain it to him and then, you know, he started attacking me on why, why it couldn't be. *So, um, that is the kind of person that you want, uh, as an advocate*.	RESOURCES
43	a. Razor-sharp, you must have, uh, a *razor-sharp intelligence*. You must be *very good analytically*. You must have an *extremely well-founded, um, and developed legal feeling*. If you see something you must know what is the law. Is it right? Is it not? You must have a *encyclopaedic knowledge of the law*.	RESOURCES
	b. must be *able to present yourself*. Must be *able to present yourself*.	RESOURCES
44	you must pay *your chambers*	LOCATION
45	a. You can go directly *to the bar*	LOCATION
	b. it all depends on your *reputation*	RESOURCES
	c. And what kind of reputation have you got? Um, you know, you're a *beautiful* girl from Scotland and *that's not going to help*. It *helps with other things* but its *not going to help with the law*.	RESOURCES
46	a. But I can assure you there are people sitting here, um, in town or at um, Sandton, *praying* for the telephone to ring. Uh, and they're sitting there *week after week*, *hopefully only week after week* and *not month after month*.	EMOTION
	b. people sitting on the *library steps of the, of the*	LOCATION

	chambers in Sandton, uh, trying to conduct a practice from the *library steps*	
	c. I've heard of people *sitting on the library steps* of the, of the chambers in Sandton, uh, *trying to conduct a practice from the library steps*. I mean, *can't go into the library* because the library is, is preserved for the members of the Bar. *Sit on the steps and trying to get your practice going*.	EMOTION
	d. I mean that's not [clears throat] that's not, you know, *nobody's going to employ an advocate on the library steps*.	EMOTION
47	a. three things that you must have tech .. formally. *LLB*, *six month's pupilage* without payment, nobody pays you, you must have *financial support to live for six months*, uh, without support uh to live for six months without a salary.	RESOURCES
	b. but if you are in a profession *you must have a car*, *you must have a cellphone*	RESOURCES
	c. *you must have money* to entertain people, *you must have money* to go out, *you must have money* to buy books, *you must have money* to buy, money to buy make-up,	RESOURCES
	d. you want to buy *nice clothes … you can't*, you know, *not be well-dressed*, you're an advocate, *you must dress very very well* you must impress the people. *You can't sit there with uh a denim and slacks* … it just doesn't work. If you, if you if you've got a multi-million contract that is a bit shaky and you want to take it to court and you get to this guy and he looks like you look now today … Not that, not that you don't look beautiful but, um, you know, this is not, you know, he's going to say 'uuuh, you know, please, *this guy doesn't know what he's doing or this girl doesn't know what she's doing. She's in a pink Oxford tracksuit* [gestures towards one of the students] please, you know'. You must *power dress: black, red, white; high heels, silk stockings, pencil-striped skirt, jacket, neat hair*, and, you know, *power, power, power*.	RESOURCES
48	a. the third thing you need is your *bar exam*	RESOURCES
	b. Bar exam - lots of work - but you must *know your Rules of Court*. And your *ethics*. Ethics, remember that, if you prepare for the bar exam *those are the things that they're going to ask*. Your *Rules of Court*. You must know your *etiquette*, your *Rules of Court and your ethics*. What may and may you … can't you do.	RESOURCES
49	NONE	
50	NONE	
51	NONE	
52	NONE	
53	NONE	
54	**STUDENT 3:** And I went with Nigel and I spent a week with him. And he took me to a court in Joburg Centre, I just remember it was close to the Brazilian	EMOTION

	Coffee Shop, and I sat in court that day and I've never been / I didn't know what was going on and I could feel the *nervous tension* in that room it was *just too awful for words*.	

3: SOCIAL ACTORS (SAct)

ADVOCATE QUOTATION NO.	SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	like an advocate in a trial you know *he's* not going to say 'Oh excuse me judge here's a very good point against me	CLASSIFICATION – Gender – Male (1 instance of 'he')
2	NONE	
3	NONE	
4	they are confronted by both *sides* represented by an advocate. The advocates make sure - that's their job - they make sure that the judge is informed of very single possible authority uh that their *case*, that *their side of the case* um uh that will support *their side of the case*.	PARTIES – Excluded
5	a. Um [clears throat] when a *case* is brought to court um *you* appoint an advocate and it is the work of that advocate to promote *your case*. So he will get all the precedents that is in favour of *your case*.	PARTIES – Included
	b. And *he* will put that before the judge. And *he* will try everything - with *his* arguments, with your affidavits, with everything, *he* will try to convince the judge to decide upon the cases that *he* has quoted to the judge.	CLASSIFICATION – Gender – Male (4 instances of 'he', 1 instance of 'his')
6	NONE	
7	He will say 'the advocate for the defence' or ' the advocate for the respondent said the following, I'm not accepting *his* version.	CLASSIFICATION – Gender – Male (1 instance of 'his')
8	NONE	
9	NONE	
10	NONE	
11	And they could decide at the end of the year, OK I can put this into my collection, I'm going to put that into my collection, and that's how *cases* got reported.	PARTIES – Excluded
12	NONE	
13	NONE	
14	No *he* was … a a um senior counsel. And a bilio-biblio-bibliophile. Like like myself. *He* collected uh. *He* was an advocate and uh uh you know he had a	CLASSIFICATION – Gender – Male (4 instances of 'he', 2 instances of 'his')

	thriving practice [inaudible] but *his* his passion was books. Um and *he* collected these old books and in *his* time you could still collect them you could still collect these books.	
15	a. he had a study *about the size of this room*	CLASSIFICATION – Class
	b. his son is an engineer, this Suzman's son is an *engineer*, and his mother stayed in the house and his mother died and then *and he's of course emigrated*	CLASSIFICATION – Class
16	NONE	
17	Pupillage you get a master at the at the uh uh a senior advocate or an advocate that you have confidence in and you enter into a contract with *him* and you go with *him* for six months just to so that *he* can show you the ropes.	CLASSIFICATION – Gender – Male (2 instances of 'him'; 1 instance of 'he')
18	a. And *he* became a lecturer here and *he* was a very good lecturer and *he* wrote a book and decided to go to the bar. *He* wrote his exam, *he* passed his exam with flying colours, and because um um my wife is an attorney, and I mix with lots of attorneys, uh within three or four months everybody was talking about *him*. Uh as the *new guy* at the bar whose brilliant.	CLASSIFICATION – Gender – Male (5 instances of 'he'; 1 instance of 'him'; 1 instance of 'guy'
	b. new guy at the bar whose *brilliant*	CATEGORIZATION
19	a. So the attorneys know, when they've got a *case*, who to brief.	PARTIES – Excluded
	b. They know who are the *bright stars*. And if you're one of those *bright stars* you'll make it at the bar. Whatever you do to get there. But you must be a bright star. Uh the bar's not for *mediocre* people.	CATEGORIZATION
20	a. Also professor Cockerell who was also here, who decided *he* doesn't want to stay in academia, and *he* went to the bar. Now *he* already had a reputation, everybody knew *him*, *he* published widely, *he's* a confirmed, very established academic, and *he* then went to	CLASSIFICATION – Gender – Male (7 instances of 'he'; 1 instance of 'him')

	the bar. And immediately *he* got enormous briefs, you know, um uh you know constitutional court cases and very important cases. And *he's* doing exceptionally well at the bar.	
	b. he's doing exceptionally well at the bar.	CLASSIFICATION – Class
21	a. **LECTURER:** Or a *very senior barrister*. Um it means that um that the Minister of Justice or the State President or the Queen then in England, *considers you above the others*. Uh the only implication is that *you get to wear now not only a cotton robe, but you can wear silk robe. Your robes are now made of silk* and the more important thing of course is that it is a *prestige*. Um you are now senior counsel, you are only briefed in very complicated matters, and of course *you charge no longer R3000 an hour but* ***STUDENT 12:*** *R20 000* ***LECTURER:*** *R20 000 an hour*. So that's the main, that's the main consideration.	CLASSIFICATION – Class
	b. you are now senior counsel, you are only briefed in very complicated *matters*	PARTIES – Excluded
22	you've done uh important *cases*	PARTIES – Excluded
23	a. **STUDENT 6:** Excuse sir? This is just in passing, so if you look the these uh I just get sometimes overwhelmed by the bills which they are charged, the *Jacob Zuma* and the *McBride* … **LECTURER:** No I don't. I don't know about *Mr McBride*, uh I'm not following *his case*, but *Zuma,* definitely. Um you know, obviously. Um it is a very, it's a it's a … it's *the most important case uh criminal case in any case that's serving before the courts at the moment*. So, on both sides, from the State and from his side. He will um, he will employ uh very very senior, very senior advocates. He will	PARTIES – Included

	employ the best he can get. And that will be, that will be senior advocates. And that's why the the … um that's why the fees are exorbitant. Uh you know, they .. and the cases are running for a very long time. So those people can't take any other cases so they are on a a um on a retainer by *Zuma* and probably *McBride.*	
	b. I just get sometimes overwhelmed by the bills which they are charged, the Jacob Zuma and the McBride .. They run into millions and millions of money. Within a short period of time.	CLASSIFICATION – Class
	c. He will employ the best he can get. And that will be, that will be senior advocates. And that's why the the … um that's why the *fees are exorbitant*.	CLASSIFICATION – Class
24	The judge sits in *his* chambers, the judge is now a senior advocate who's been elevated to a judge.	CLASSIFICATION – Gender – Male (1 instance of 'his')
25	NONE	
26	NONE	
27	NONE	
28	If *she's* going to the bar	CLASSIFICATION – Gender- Female (1 instance of 'she')
29	NONE	
30	a. It's a light blue and its got printed on *such and such versus such and such*, the attorneys and the advocates and its tied together	PARTIES – Excluded
	b. And this is what the advocate takes to court with *him* and this is called a brief. B-r-i-e-f it is *his* brief, *his* instruction from the attorney.	CLASSIFICATION – Gender – Male (2 instances of 'his')
31	NONE	
32	You appear on behalf of *an attorney*.	PARTIES – Excluded
33	a. Sydney Kentridge	NOMINATION
	b. Um, so if you're a good advocate you will see that all your *papers* are in order.	PARTIES – Excluded
34	a. The *papers* are the things filed in the *court file* and served upon the other side that you are going to base your *case* upon in the form of affidavits, expert witnesses, whatever, I don't, I can't go into all those	PARTIES – Excluded

	technical details.	
	b. The judge will ask *you*, um, *Mr* [state's student's surname] why is the file not properly paginated?	CLASSIFICATION – Gender – Male (1 instance of 'Mr')
	c. You have a *file* of ten thousand pages and every day a new document arrives to be put into that file.	PARTIES – Excluded
35	a. your *case* is thrown out	PARTIES – Excluded
	b. He'll say, uh, please *Mr* [state's student's surname], address me on this novel interpretation that you have in clause 3	CLASSIFICATION – Gender – Male (1 instance of *Mr*)
	c. you've wasted *costs*	PARTIES – Excluded
36	NONE	
37	NONE	
38	NONE	
39	NONE	
40	NONE	
41	NONE	
42	*he's* gone to the Bar. And, I mean, within six months, um everybody, every single person at the Bar was talking about *him*. Uh, because of how brilliant *he* is and how perceptive *he* is and how tenacious *he* is. Um, *he's* a, he's a small unopposing little man. *He's* not a, you know, fiery lion or something. But, *he* chips at you until you crack. And *he* doesn't … *he* was fascinated at the, at my view, that I had on this, uh specific issue ... And *he*, as soon as the session was over came to me and, you know, *he* ... it was teatime I can remember and *he* was standing here and *he* said: 'Um you said this and this .. what exactly did you mean?' And *he* went on and on and on .. throughout teatime, throughout uh the second session the the mid-morning session, throughout lunch time. And I said 'Andrew, please, dear God, can I *eat* I mean, I don't want to be rude but, you know, can I just have a break?' And *he* said 'Yes but uh um what exactly did you mean, you can eat you can talk to me while you eat. And *he* stayed with me until that afternoon that we, that the conference was over, *he* did not	CLASSIFICATION – Gender – Male (21 instances of 'he'; 2 instances of 'him')

	give up until *he* understood exactly what was going on. And *he* didn't uh, *he* didn't accept uh my version of it at all. First of all I had to explain it to *him* and then, you know, *he* started attacking me on why, why it couldn't be.	
43	NONE	
44	a. Always *very lucrative*, *very well paid*	CLASSIFICATION – Class
	b. so it is only for the very best, *reserved for the very best lawyers*.	CATEGORIZATION
45	NONE	
46	I mean, *can't go into the library* because the library is, is *preserved for the members of the Bar*. Sit on the steps and trying to get your practice going. I mean that's not [clears throat] that's not, you know, *nobody's going to employ an advocate on the library steps*.	CLASSIFICATION – Class
47	a. six month's pupilage without payment, nobody pays you, *you must have financial support to live for six months*, uh, without support uh to live for six months without a salary. *Perhaps you might, you might think its easy to do that as a student it is, you know, because you've got lots of support structures*	CLASSIFICATION – Class
	b. but if you are in a profession you must have a car, you must have a cellphone, you must have money to entertain people, you must have money to go out, you must have money to buy books, you must have money to buy, money to buy make-up, you want to buy nice clothes … you can't, you know, not be well-dressed	CLASSIFICATION – Class
48	NONE	
49	NONE	
50	the *best senior* advocates	CATEGORIZATION
51	George Bizos	NOMINATION
52	*senior* uh advocate	CATEGORIZATION
53	*senior* advocate	CATEGORIZATION
54	a. I met up with, well I met some of his colleagues, there was a lovely tall blond lady - I don't recall her name - lovely tall blond woman and she	CLASSIFICATION – Gender – Female

		was an advocate and she was wearing her robes and walking, you know we all walked across the road and it was very romantic and everything we sat in the Brazilian [class and lecturer laugh], we had lunch and she asked me all questions about school and then she said 'Oh you studied French at school!', she started rattling off in French for like half an hour and I just sat there with a mouth full of teeth.	
	b.	Ja that's the stereotypical, that's the stereotypical idea that I have of a of a female advocate but I'm uh I shouldn't talk to you about that but um tall, long, blond, um you know multi-faceted, multi-functioning, multi-tasking uh super elastowoman, you know three children on the hip and uh you know five hundred thousand briefs on this side, that's what you must be.	CLASSIFICATION – Gender – Female

4: VALUES

ADVOCATE QUOTATION NO.	VALUES (V)	CONTENT	FORM
1	he just he talks, like an advocate in a trial you know he's not going to say 'Oh excuse me judge *here's a very good point against me* if you don't mind looking at this' - it's what they *should* do but they don't.	ADVOCATES' THEMSELVES – negative	MORAL EVALUATION
2	NONE		
3	*if you're a very good advoc*ate *they ask you to become a uh acting judge*, *if they see that you can do the work* then *they invite you to become a full-time judge* in the provincial division, or the local division, after years of service in the provincial division or the local division, *if you are deemed to be fit*, *they are invited as an acting judge to the Supreme Court of Appeal or to the Constitutional Court*. So it's a *hierarchy*	EXTERNAL GOODS – Status	PURPOSIVE
4	Of course *not all advocates are the same*. And *some advocates are more thorough than others*.	ADVOCATES' THEMSELVES - Ambiguous	MORAL EVALUATION
5	As a matter of fact that's what happens every day in court. Is trying to convince a judge to accept your authorities rather than your opponents' authorities. And then? That's why you have to use *logic*, that's why you have to use uh *rational deduction*.	INTERNAL GOODS – Logic and rationality	MORAL EVALUATION
6	a. In the past *if you are a very good advocate* and they um the council the bar the minister and the judicial services council think you should be promoted, *you are invited to act as a judge*. For a couple of weeks, or a couple of months. And *if you prove yourself*, if you prove to be a good judge, if your judgments are *sound* then *they invite you to become a judge*.	EXTERNAL GOODS – Status	PURPOSIVE
	b. if your judgments are *sound*	INTERNAL GOODS – Judgments are 'sound'	MORAL EVALUATION
7	NONE		
8	NONE		
9	NONE		
10	NONE		
11	NONE		
12	NONE		
13	NONE		
14	NONE		
15	NONE		
16	you must have a *very good* reputation. Now if you're straight through your LLB by you know getting 60 or 68% you know *that's not good enough*. *You must get your LLM uh LLB cum laude*. You must *you must be distinguished*. *People must talk about you*. Um and then you know *you must get a distinction in your in your admissions exam for the bar or for the um uh attorneys' profession*.	EXTERNAL GOODS (Reputation)	MORAL EVALUATION

17	NONE		
18	He *wrote his exam*, he *passed his exam with flying colours*, and because um um my wife is an attorney, and I mix with lots of attorneys, uh within three or four months *everybody was talking about him*. Uh as the new guy at the bar whose *brilliant*.	EXTERNAL GOODS (Reputation)	MORAL EVALUATION
19	And people are all *talking about whether you are good or not* at the bar. *So the attorneys know*, when they've got a case, *who to brief*.	EXTERNAL GOODS (Having work)	PURPOSIVE
20	*he* then *went to the bar*. *And immediately he got enormous briefs*, you know, um uh you know constitutional court cases and very important cases. And *he's doing exceptionally well at the bar*.	EXTERNAL GOODS (Material rewards)	PURPOSIVE
21	**LECTURER:** A senior, a Queen's Counsel or a King's Counsel is um QC, is *a title you obtain when you become a very very senior advocate*. **STUDENT 8:** 'K **LECTURER:** Or a very senior barrister. Um it means that um that the Minister of Justice or the State President or the Queen then in England, *considers you above the others*. Uh the only implication is that you get to wear now not only a cotton robe, but you can wear silk robe. Your robes are now made of silk and *the more important thing of course is that it is a prestige*. Um you are now senior counsel, you are only briefed in very complicated matters, and of course *you charge no longer R3000 an hour but* ***STUDENT 12:*** *R20 000* ***LECTURER:*** *R20 000 an hour. So that's the main, that's the main consideration.*	EXTERNAL GOODS (title, distinction, status, prestige, material rewards)	PURPOSIVE
22	a. if you are a person of *substance*	INTERNAL GOODS ('substance')	MORAL EVALUATION
	b. you've *done uh important cases* and you've *got stature* and you've got a *very solid practice*, then he will make you Senior Counsel	EXTERNAL GOODS (status, material rewards)	PURPOSIVE
23	He will um, he will employ uh *very very senior, very senior* advocates. He will employ *the best he can get*. And that will be, that will be senior advocates. And that's why the the … um that's why *the fees are exorbitant*.	EXTERNAL GOODS (material rewards)	MORAL EVALUATION
24	NONE		
25	NONE		
26	NONE		
27	NONE		
28	If she then stays on another year or so at Bowman Gilfillan, *big firm, lots of contacts*, she then goes to the bar, *everybody knows that she's an authority on prescription*. And that - *that's how you get people to phone you*. That's how you get people to phone you	EXTERNAL GOODS (Reputation)	MORAL EVALUATION
29	So, if you have friends becoming legal advisors to large firms, *they are very good to know*. Uh, these are people who will brief you if you are going to become an advocate. They will brief you and *they will give you fat briefs*.	EXTERNAL GOODS (Material rewards)	PURPOSIVE
30	NONE		

31	if you're an advocate this is what you take to court with you, this is *your bread-and-butter*. This is what you make and this is what people, legal advisors in a company will send to you when they brief you, you know, on the restructuring of the company or whatever. So *very very very valuable*	EXTERNAL GOODS (work, material rewards)	MORAL EVALUATION
32	a. Advocate is more, uh, the work of an advocate is *more intellectually stimulating*.	EXTERNAL GOODS (intellectual stimulation)	MORAL EVALUATION
	b. You *work on your own*. You *work on your own*. … *You've got your own work*, … you've got *nothing* to do with anybody else. There's not somebody who will come and knock on your door and five o clock and say: 'Why are you still … ' or 'Why are you not here' or 'Why are you still working' or 'Have you finished this or that. You *work for yourself*.	EXTERNAL GOODS (mode of working)	MORAL EVALUATION
	c. You *charge by the hour*	EXTERNAL GOODS (Material rewards)	MORAL EVALUATION
33	NONE		
34	its *paginated* from page one to page ten thousand. Correctly. *If it is not correct then the judge can throw out your case*.	EXTERNAL GOODS (favour with the judge)	PURPOSIVE
35	And then *you've wasted costs*. *You've wasted thousands* of rand by appearing and preparing to appear for that day for trial in court and *its just thrown out because you've made something wrong*. You've referred to section 2(1) instead of section 1(2).	INTERNAL GOODS (using client's money efficiently)	MORAL EVALUATION
36	NONE		
37	Please, its not .. it is a *very very demanding* job.	EXTERNAL GOODS (ease of work)	MORAL EVALUATION
38	it's a new thing that has happened with the new Constitution and with this whole thing of opening up the profession. Um if you ask me personally, I think it's a, it's a, *its wrong*, *its stupid*, because *the attorney's profession has got certain things that they must do and the advocates have got certain things that they must do* and *it is stupid to mix the two*.	EXTERNAL GOODS (hierarchy and division between the professions)	MORAL EVALUATION
39	it is *better* that the advocates do the court work and the attorney does, uh, the off-the-street work, the preparation	EXTERNAL GOODS (hierarchy and split between the professions)	MORAL EVALUATION
40	NONE		
41	advocates are *specialist* uh uh litigators	EXTERNAL GOODS – Specializing in a particular aspect of legal work	MORAL EVALUATION
42	he lectured for two three years here and *he's gone to the Bar*. *And*, I mean, *within six months*, um everybody, *every single person at the Bar was talking about him*	EXTERNAL GOODS (reputation)	PURPOSIVE
43	NONE		
44	a. *Very hard work*, um, *very very tough* profession.	EXTERNAL GOODS (ease of	MORAL EVALUATION

		work)	
	b. *Always very lucrative*, *very well paid*.	EXTERNAL GOODS (material rewards)	MORAL EVALUATION
	c. *Wonderful profession*, nobody's your boss.	EXTERNAL GOODS (mode of working)	PURPOSIVE
45	a. But, if you *do your articles first then at least you're getting to know the attorneys*. And *you're getting to know the partners at that firm and other firms* because every case that you do in your two years' articles you have to work with other attorneys. *And if you impress them, even in the magistrates' court, you appear there and you make a name for yourself*, *far far better*	EXTERNAL GOODS (reputation)	PURPOSIVE
	b. Not only do you do your articles, um, but also *stay on a little while as a professional assistant or associate*, uh, its at a *better salary* and there you get *more senior work*. And you can, you know, *you can specialize* especially if you go to a very large firm.	EXTERNAL GOODS (material rewards, status, specialization)	PURPOSIVE
46	NONE		
47	a. you're an advocate, *you must dress very very well you must impress the people.*	EXTERNAL GOODS (impression)	PURPOSIVE
	b. You must *power dress*: black, red, white; high heels, silk stockings, pencil-striped skirt, jacket, neat hair, and, you know, *power, power, power*.	EXTERNAL GOODS (power)	MORAL EVALUATION
48	*Bar exam* - lots of work - but *you must know your Rules of Court. And your ethics*.	EXTERNAL GOODS (passing the exam)	PURPOSIVE
49	in both these, um, uh, professions, you will make, *you'll make a living*. Definitely. *You'll make a good living*. And *the higher up you go in these professions the better your living is*.	EXTERNAL GOODS (material rewards)	PURPOSIVE
50	NONE		
51	George Bizos who is a *well-known* advocate	EXTERNAL GOODS (reputation)	MORAL EVALUATION
52	Um uh *judge* must be have an LLB. Must have a good practice and they *must be a senior uh advocate*.	EXTERNAL GOODS (promotion to a higher status)	PURPOSIVE
53	a senior advocate, well as I said, *gets from four to five up to eight million in a year*	EXTERNAL GOODS (material rewards)	MORAL EVALUATION
54	NONE		

ARTICLED CLERK: ANALYTICAL TABLES

1: SOCIAL ACTION (A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material)

ARTICLED CLERK QUOTATION NO.	SOCIAL ACTION (SA) QUOTATIONS	A	T	S	P	NT	M	Object (not calculated – for guidance only)[2]
1	You are never going to have anything to do with the file number unless you're going to be an articled articled clerk and you must *run* around and *go and find* the file and go and *lodge* some documents in the file	X	X				X	FILES
2	if you start off with a with a articled clerk's salary I don't know how you *survive* without credit.	X				X	X	-
3	a. you must *find* a principal	X	X	X				OTHER LAWYERS
	b. In other words somebody that you know and that you trust that will be willing *to train you* in the legal profession.				X	X	X	-
	c. If you've found such a person, you *make* an appointment and you *go* see such a person and you *request* him or her, uh, to consider you for articles of clerkship.	X	X				X	OTHER LAWYERS
	d. you *do*, um, all kinds of legal work	X	X				X	CLIENTS
4	d. If you *enter* into a law firm as an articled clerk *you are a threat* to everybody. You are a threat to everybody and you don't know that. And the people *who are most threatened by you* are of course the … office personnel that's been there for years and years and who, uh, has got a vested interest in the firm	X	X	X				OTHER LAWYERS OFFICE PERSONNEL
	e. all they see is this young upstart's coming from university and within two or three or four or five years … they start *earning* more than they do and they start *shunting* them around.	X	X	X				OFFICE PERSONNEL
	f. within two or three or four or			X	X	X		-

[2] I have not calculated the number of objects of social action in the same way as I have calculated active/passive, transactive/non-transactive; and semiotic/material actions where the categorization is 'either-or'.

		five years *they become* partners							
	g.	So they've got a window of two, three years to make sure that they, that they use their seniority *to make* life difficult for you.			X	X	X		-
5	a.	when I did my articles at Adams and Adams and we *rotated* on a six month basis so you would have a general six months - uh it's a very large firm so you're *trained* in the whole firm and then the next six months you are *posted* out in various branches, uh various branches of the firm.				X	X	X	-
	b.	So if you come, if you arrive as a qualified candidate attorney … you get your own number that you can *charge* fees you get everything because they haven't got time not to give it to you. You must start *earning* now. You must start *doing* trademarks.	X	X				X	CLIENTS
	c.	And of course I didn't you know, I had to *learn*, you know, you know if I wanted to *learn* something I went to the partner and I *said* how do you, how do you redeem a trademark in Papua New Guinea?	X	X	X				LAW
	d.	And I didn't know that I should have *asked* her first and if she says I don't know or I haven't got the book here then *go* to the manager or the partner to find out.	X	X				X	OFFICE PERSONNEL INFORMATION
	e.	I didn't know that I was just *working* 18 hours a day trying to get these *mountains* of files out of my office.	X	X				X	FILES CLIENTS
	f.	And of course, uh, you know, I *irritated* the living daylights out of her because I *didn't ask* her anything.	X	X	X				OFFICE PERSONNEL INFORMATION
	g.	instead of getting off on the right foot she then decided she would boycott me. And everything I did, uh, she *sabotaged*. You know. She would take a file, every file that I did and she would listen to my dictation. If I made an error she would take my dictation to the senior partner and said 'You're			X	X	X		-

	going to lose money here this man doesn't know what he's doing'.							
	h. So please, if you go to, if you go to a firm of attorneys see to it that you *get on* with the secretaries, because they can make your life an absolute misery. Um, and don't, you know, its only two years, you know, *just count* out them and *just say* yes sir no sir or whatever you say.	X	X	X				OFFICE PERSONNEL
	i. We eventually got to that stage and then we became very good friends and everything went very hunky dory but it took us three, four, five months before we could get there and by that stage my reputation in the firm *was ruined*. Because everybody thought I couldn't do a thing.			X	X	X		-
6	a. there're lots of configurations to *be trained*				X	X	X	-
	b. you *write* the exam … Then you *write* the admissions exam	X	X				X	EXAMINATION
7	a. you will be invited once you have *been given* articles			X	X	X		-
	b. you will *be invited* … you will *be invited* to an interview with one of the leading lights of the Law Society				X	X	X	-
	c. he will have to *be convinced* that to join, to eventually join the profession. Um, in other words its a formal interview, uh, where they will *ask* you ethical questions and they will *ask* you where you come from, what kind of person you are just *to vet* that you are a fit and proper person, uh, to become an attorney.				X	X	X	
8	NONE							
9	a. This ladies and gentlemen - she *wrote* a small little note - I mean, one, two, three, four [referring to paragraphs in the magazine]. How long can it take you to write that? But she took the trouble, she *did* the research, its on some difficult subject, prescription and the limits placed on access to the courts. It's a difficult topic, some of the people would like	X	X				X	LANGUAGE

	to know. And she *wrote* a short note.							
	b. this is the whole legal profession reads this article. When they have a problem, they're going *to call* her. They're going to say, 'Look you wrote an article on this, uh you obviously know what's going on, can you can you help me?'				X	X	X	
	c. that is, ladies and gentlemen, how you *build up* your reputation	X	X	X				REPUTATION
	d. she's *working* to qualify, she qualifies at the end of this year. If she then *stays on* another year or so at Bowman Gilfillan, big firm, lots of contacts, she then *goes* to the bar, everybody knows that she's an authority on prescription.	X	X				X	OTHER LAWYERS
	e. And that - that's how you *get* people to phone you. That's how you *get* people to phone you.	X	X				X	OTHER LAWYERS
10	have you been a volunteer for something, have you taught other people. Have you, you know, what kind of person are you? Do you care for your environment? Are you involved in community? Those things are all important. They're also important *to get* articles but vac work is not so difficult to get. Um don't you know, if you get reasonably good marks you will *get in* with one of the big firms.	X	X	X				ONE'S APPRENTICESHIP
11	a. she got her LLB cum laude and she started *working* for [Smith, Brown and Mngomezulu] as an articled clerk. this is late in life, ne, this is, she was in her forties. And and she *did*, uh articles with [Smith, Brown and Mngomezulu]	X	X				X	ONE'S APPRENTICESHIP
	b. she *clashed* with the senior partner, you know, he came to her and said, um, you probably want to become um uh an partner now but uh and you've you're on your way you will become a partner but its our discretion and it will cause a lot of unhappiness in the firm if we make you a partner now	X	X	X				OTHER LAWYERS

	because other people came with you cannot be made partner and they will feel that we are um putting you to an advantage and she *said* take your partnership and shove it.							
	c. and she started her own firm.	X	X	X				OTHER LAWYERS / INTELLECTUAL PROPERTY

2: CIRCUMSTANCES OF SOCIAL ACTION (CSA)

ARTICLED CLERK QUOTATION NO.	CIRCUMSTANCES OF SOCIAL ACTION (CSA) QUOTATIONS	CIRCUMSTANCE TYPE
1	a. you are never going to have anything to do with the *file number* unless you're going to be an articled articled clerk	RESOURCE
	b. unless you're going to be an articled articled clerk and you must run around *and go and find the file* and go and *lodge some documents in the file*	COURT (IMPLIED)
	c. you *must run around*	EMOTION
2	I don't know how people how people *survive* you know if you start off with a with a articled clerk's salary I don't know how you survive without credit	EMOTION
3	NONE	
4	a. If you enter *into a law firm*	LOCATION
	b. you are a *threat* to everybody. You are a *threat* to everybody and you don't know that. And the people who are most *threatened* by you are of course the … office personnel that's been there for years and years and who, uh, has got a vested interest in the firm	EMOTION
	c. they've got a window of two, three years to make sure that they, that they use their seniority to make life *difficult* for you	EMOTION
	d. My mother always said, *there's nothing, nothing worse*, and I hope I'm not offending somebody here but it is true, I mean as my personal experience *there's nothing worse* than a professional typist, uh, in a law firm, a secretary. *There is nothing, nothing worse*. They always have personal problems, they never have enough money, they always want to borrow money and they are *absolute terrors*.	EMOTION
5	a. I can remember the first time wha, uh, when I did my articles *at [Ahmed and Achoo]* and we rotated on a six month basis … uh it's *a very large firm* so you're trained in the whole firm and then the next six months you are posted *out in various branches*	LOCATION
	b. And my principal was a trade mark agent so I was automatically placed *in the trade mark department*.	LOCATION
	c. So if you come, if you arrive as a qualified candidate attorney you get your own *secretary*, your own *desk*, your own *office*, your own *files*, everything. First day (slams hand on lecturn) you get everything you are, you start you get *your own number* that you can charge fees you	RESOURCES

	get everything	
	d. because *they haven't got time not to give it to you. You must start earning now*. You must start doing trademarks.	EMOTION
	e. And there I got *a corner office, a beautiful large office with an inter-leading door to my secretary's office*	LOCATION
	f. I didn't know that I was just *working 18 hours a day* trying to get these *mountains* of files out of my office.	EMOTION
	g. And of course, uh, you know, I *irritated* the living daylights out of her because I didn't ask her anything.	EMOTION
	h. because I was *afraid* of her I must admit. I was really afraid of her	EMOTION
	i. So it was an *absolute nightmare*, I, uh, I cannot tell you, it was an *absolute nightmare*.	EMOTION
	j. So please, if you go to, if you go to *a firm of attorneys*	LOCATION
6	a. nowadays there is the law, uh, *School of Legal Practice* where you can go for two years	LOCATION
	b. you are admitted *in court* as an attorney	LOCATION
7	you will be invited to an interview with one of the leading lights of the Law Society, uh, and … he will have to be convinced that to join, to eventually join the profession. Um, in other words its a *formal interview*, uh, where they will ask you ethical questions and they will ask you where you come from, what kind of person you are just to *vet* that you are a fit and proper person, uh, to become an attorney.	EMOTION
8	a. I worked *in her firm* during the vacs	LOCATION
	b. and you know, I was a *sweet little boy* and very nice personality and *everybody loved me*	EMOTION
	c. and *I thought well this is what legal practice is going to be like.* But, um, I discovered that its *not*.	EMOTION
	d. if you *enter a law firm*	LOCATION
9	a. now she's at uh candidate attorney *at [Bower and Gowar]*	LOCATION
	b. And part-time attorney *at University of the Witwatersrand.*	LOCATION
	c. that is, ladies and gentlemen, how you build up your *reputation*	RESOURCE
	d. If she then stays on another year or so at [Bower and Gowar], big firm	LOCATION
10	a. *get in with one of the big firms*	LOCATION
11	a. she started working for *[Smith, Brown and Mngomezulu]* as an articled clerk	LOCATION
	b. she *clashed* with the senior partner	EMOTION
	c. you probably want to become um uh an partner now but uh and you've you're on your way you will become a partner but its our discretion and it will cause *a lot of unhappiness* in the firm if we make you a partner now because other people came with you cannot be	EMOTION

		made partner and they will feel that we are um putting you to an advantage	
	d.	she said take your partnership and shove it	EMOTION

3: SOCIAL ACTORS (SAct)

ARTICLED CLERK QUOTATION NO.	SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	NONE	
2	NONE	
3	you do, um, all kinds of *legal work*	PARTIES – Excluded
4	And the people who are most threatened by you are of course the … office personnel that's *been there for years and years* and who, uh, has *got a vested interest in the firm* and all they see is this young upstart's coming from university and within two or three or four or five years they become partners and then, you know, they start earning more than they do and they start shunting them around. So they've got a window of two, three years to make sure that they, that they use their *seniority* to make life difficult for you. My mother always said, there's nothing, nothing worse, and I hope I'm not offending somebody here but it is *true*, I mean as my personal experience *there's nothing worse than a professional typist, uh, in a law firm*, a secretary. There is nothing, nothing worse. They *always have personal problems,* they *never have enough money*, they *always want to borrow money* and they are *absolute terrors*.	LEGAL SECRETARY
5	c. if you arrive as a qualified candidate attorney you get *your own secretary*	LEGAL SECRETARY
	d. You must start doing *trademarks*.	PARTIES – Excluded
	e. And there I got a corner office, a beautiful large office with *an inter-leading door to my secretary's office* and there was my secretary sitting in the corner. And she was *enormous*. She was really, you know, she was an *enormous* person *and she had, uh, make-up, you know, false eyelashes and dark dark makeup*. And I thought, well	LEGAL SECRETARY

		this is wonderful, she is going to help me to do this trade, these trademarks. And she also said, *'Well now we're going to work together and uh you must just listen what I say and then you'll be very successful'*.	
	f.	And of course I didn't you know, I had to learn, you know, you know if I wanted to learn something I went to the partner and I said how do you, how do you redeem a trademark in Papua New Guinea? *And I didn't know that I should have asked her first and if she says I don't know or I haven't got the book here then go to the manager or the partner to find out*. … And of course, uh, you know, *I irritated the living daylights out of her because I didn't ask her anything*. Uh, *because I was afraid of her I must admit*. *I was really afraid of her* and then *instead of getting off on the right foot she then decided she would boycott me*. And *everything I did, uh, she sabotaged*. You know. *She would take a file, every file that I did and she would listen to my dictation. If I made an error she would take my dictation to the senior partner and said 'You're going to lose money here this man doesn't know what he's doing'*. And I *didn't* know what I was doing, I was there for my fourth day or, you know, for a month.	LEGAL SECRETARY
	g.	She would take a *file*, every *file* that I did	PARTIES – Excluded
	h.	So it was an *absolute* nightmare, I, uh, I cannot tell you, it was an absolute nightmare. So please, if you go to, if you go to a firm of attorneys *see to it that you get on with the secretaries, because they can make your life an absolute misery*. Um,	LEGAL SECRETARY

	and don't, *you know, its only two years, you know, just count on them and just say yes sir no sir or whatever you say*. *We eventually got to that stage and then we became very good friends and everything went very hunky dory but it took us three, four, five months before we could get there and by that stage my reputation in the firm was ruined*. Because everybody thought I couldn't do a thing.	
6	NONE	
7	NONE	
8	I was a sweet little *boy*	CLASSIFICATION – Gender – Male (1 instance of 'boy')
9	*a. Taryn Sefton*	NOMINATION
	b. *she's* at uh candidate attorney at [Bower and Gowar] and part-time attorney at University of the Witwatersrand.	CLASSIFICATION – Gender – Female (1 instance of 'she')
	c. she's an *attractive Jewish* lady	CATEGORIZATION
	d. *she's* now a candidate attorney, *she's* working to qualify, *she* qualifies at the end of this year	CLASSIFICATION – Gender – Female (3 instances of 'she')
10	NONE	
11	a. Um, my, my wife, um, I met my wife when she was in the publishing industry. Um and she was, she was making lots of money she was a *very capable* person. And she landed up in the publishing industry because she studied up to her Master's degree in South Africa and then she went overseas and she got her PhD in, uh, in languages, in French from the Sorbonne in France. Now, that's not, that's very impressive, I mean that's why I fell in love with her because she is *so clever*. Um, and um, and she, its not uuuh, I can tell you, in the days, this was in the high days of apartheid, uh, to get a bursary, to go to Paris, to stay there for four years, to do a PhD in French, uh, on	CATEGORIZATION

		French literature mmmm I don't think, you know, not a lot of people can do that. That's very impressive, that is very impressive. So she came back when, with her PhD from the Sorbonne, and the only job that she could get was, uh, teaching immigrant children, French immigrant children English at a secondary school. That's the only job she could get. And she did that for a couple of months and that was not very stimulating so she started doing translating and from translating she landed up in the publishing world and she became a publishing, uh, executive. And then, she was doing publishing, she was doing books for the the company that I was working for and that was where I met her, and, after I got to know her I said but why are you in publishing with a PhD in in in languages. Why are you not, you know, doing something in languages. And she said no she's done with languages. She's very happy where she is. So I got to know her much better and I said, 'but you are not a teacher' and she's not, she's really not a teacher, although, perhaps, if she really wants to do it, but she's not a teacher she's *a good lawyer*. I said why don't you go and study LLB after uh uh at RAU after hours.	
	b.	she started working for [Smith, Brown and Mngomezulu] as an articled clerk. this is late in life, ne, this is, she was *in her forties*	CATEGORIZATION
	c.	it s very boy's orientated firm. Its better now but, you know, they don't think that girls can really become partners. They've changed now I think they've got *one* female partner, out of 85	CLASSIFICATION – Gender – Male

4: VALUES (V)

ARTICLED CLERK QUOTATION NO.	VALUES (V)	CONTENT	FORM
1	NONE		
2	Believe me I don't know how people how people survive you know *if you start off with a with a articled clerk's salary* I don't know how you survive without credit. Because its just impossible.	EXTERNAL GOODS (material rewards)	MORAL EVALUATION
3	And during this two years you get a smallish salary, you are, *you are salaried* and *you do, um, all kinds of legal work so that you can pass the Society, uh, the Law Society's admission exam*.	EXTERNAL GOODS (material rewards, passing the exam)	PURPOSIVE
4	all they see is this young upstart's coming from university and within two or three or four or five years *they become partners* and then, you know, *they start earning more than they do* and *they start shunting them around.*	EXTERNAL GOODS (status, power, material rewards)	PURPOSIVE
5	And my principal was a trade mark agent so I was automatically placed in the trade mark department. Um, which is fine, you know, I was interested in trademarks and its fine, but the trademark's section is one of the *biggest earners* in the company, uh, and therefore it is … uh, *you have far more infrastructure than in the rest of the company because it was the great fee …*	EXTERNAL GOODS (material rewards)	PURPOSIVE
6	NONE		
7	in other words *its a formal interview*, uh, where they will ask you ethical questions and they will ask you where you come from, what kind of person you are *just to vet that you are a fit and proper person*, uh, to become an attorney.	INTERNAL GOODS (being 'fit and proper')	MORAL EVALUATION
8	NONE		
9	And *she wrote a short note*. And what now? All of a sudden, her picture's here. OK it helps that she's an attractive Jewish lady, obviously. But the fact is anybody that opens this, and this is the whole legal profession reads this article. When they have a problem, they're going to call her. They're going to say, 'Look you wrote an article on this, uh you obviously know what's going on, can you can you help me?' *And that is, ladies and gentlemen, how you build up your reputation.*	EXTERNAL GOODS (reputation)	PURPOSIVE
10	volunteer *have you been a volunteer for something*, *have you taught other people*. Have you, you know, what kind of person	EXTERNAL GOODS (getting work, getting in	PURPOSIVE

	are you? *Do you care for your environment*? *Are you involved in community*? Those things are all important. *They're also important to get articles but vac work is not so difficult to get*. Um don't you know, *if you get reasonably good marks you will get in with one of the big firms*.	with one of the big firms)	
11	NONE		

ATTORNEY: ANALYTICAL TABLES

1: SOCIAL ACTION (SA)

[A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material]

ATTORNEY QUOTATION NO.	SOCIAL ACTION (SA) QUOTATIONS	A	T	S	P	NT	M	Object (not calculated – for guidance only)[3]
1.	c. the only way you can *transfer* to England or to another part of the Commonwealth. They will immediately take you, even with a South African LLB, because you've got a practical training in commercial law which is the same the world over. So the only way in which you can *transfer*, in South Africa, over the law degree is commercial law.	X		X		X		-
	d. They will immediately take you			X	X	X		-
	e. If you want to go to England and you want to live with those hideous people then you can go there. They'll make you.. they'll not make you a partner, they'll make you an associate, they'll pay you nothing, and you'll work like a dog. For the rest of your life. You'll never become a partner. That's what the English are like.				X	X	X	-
2	a. if you are *looking* for a piece of legislation	X	X				X	LAWS
	b. Go to a um uh uh client's library or you go into another attorney's library you must immediately be able to *go* to the Butterworths.	X	X				X	LAWS
	c. You must *know*. What's going on.	X	X	X				LAWS
3	e. in the old days if you had to *set up* shop as a one-man uh attorney	X	X	X				FIRM
	f. you had to *buy* a whole set of Law Reports from eighteen voetsek till today	X	X				X	LAWS
	g. You had to *buy* all the statutes.	X	X				X	LAWS
	h. You can really start *practicing* with a pile of CDs	X		X		X		LAWS
4	h. he received monies in his trust				X	X	X	-

[3] I have not calculated the number of objects of social action in the same way as I have calculated active/passive, transactive/non-transactive; and semiotic/material actions where the categorization is 'either-or'.

	account um and he uh had various other accounts that would pay in and um and its was um it was a a housing project, and people paid monies in							
	i. he used his trust account, where a huge sum of money was deposited for the uh complex. He used that trust account to make personal loans to his family	X	X				X	TRUST MONIES CLIENTS
	j. he *paid* it back immediately, you know, when it was discovered, he had the money to pay the the the shortcoming shortcoming back	X	X				X	TRUST MONIES CLIENTS
5	the attorneys and the attorneys of record are written at the end of the case. Now for you its not important but if you're one day an attorney then that's that used to be the only advertising allowed in my days is the appearance of their names at the bottom of the case				X	X	X	-
6	the attorney that *stole* the money from the trust account	X	X				X	TRUST MONIES CLIENTS
7	d. if you're an advocate, you rely one hundred percent on the um side-bar, and those are the attorneys to *send* you briefs, to send you um to send you work	X	X				X	OTHER LAWYERS
	e. it is much much better to go, *do* your articles, *build* up your contacts as they say, during your articles you know get to *know* as many lawyers uh many attorneys as possible	X	X	X				OTHER LAWYERS
	f. Now if you're straight through your LLB by you know getting 60 or 68% you know that's not good enough. You must get your LLM uh LLB cum laude. You must you must be distinguished. People must talk about you.			X	X	X		-
8	NONE							
9	And people are all talking about whether you are good or not at the bar. So the attorneys know, when they've got a case, who to *brief*.	X	X	X				OTHER LAWYERS
10	a. Denys Reitz. [STUDENT 3: Denys Reitz] He was the Minister of Justice. He was um uh a politician. He was a - has everybody got one [referring to books he has been handing out] - he was um he was an attorney, he *started* the firm Denys Reitz which is one of the great firms in Johannesburg	X	X	X				THE FIRM

	today.							
	b. He *wrote* a trilogy of books um um called Outspan. Um I can't remember the all three books, can somebody remember the three books? The one is Outspan, the one is On Commando and the other one is … I can't remember. But he *wrote* a trilogy of books, so he was an intellectual, he *wrote* books.	X	X	X				LANGUAGE
	c. Um uh he *did* a lot for, both his work in Parliament and as a Minister of Justice, he *did* a lot for labour relations in South Africa. Specialized labour relations and that is why Denys Reitz still today is a major player in labour law.	X	X	X				ULTIMATE OUTCOMES
	d. He was an Afrikaner, um uh but he was taken up by the English establishment. You have these rare Afrikaners that becomes part of the English establishment or the liberal establishment and then they become stars in that establishment. Like like Jan Hofmeyr, uh like Bram Fischer. Those were all Afrikaans speaking people that became very prominent um lawyers.			X	X	X		-
11	d. Now Denys Reitz *wrote* creatively, wrote three books.	X	X	X				LANGUAGE
	e. And Denys Reitz was one of the good politicians. But he was a Minister of Justice in the Smuts cabinet. And he *started* one of the major law firms in South Africa.	X	X	X				THE FIRM
12	NONE							
13	a. Now attorneys, um, are people who *work* in partnerships or in incorporated companies, in other words they work in teams	X				X	X	-
	b. they *sit* in big large buildings or in derelict old renovated houses	X				X	X	-
	c. An attorney is somebody who *works* in co-operation with other lawyers to *do* the administration of a legal case.	X	X				X	OTHER LAWYERS CLIENTS
	d. Um, an attorney is the place of the, uh, the first contact for the man on the street. If you go, if you're looking for legal advice you, what you most probably do is you look for an attorney first.				X	X	X	-

	e. The attorney must *refer* you to an advocate or the attorney appoints an advocate on your behalf.	X	X				X	OTHER LAWYERS CLIENTS
14	the profession, um, uh, has very clearly indicated that they *prefer* the 5-year LLB, uh, alternatively an LLM, a 4-year LLB followed by one year postgraduate study, um, specializing in some field of the law, uh, with an LLM.	X	X	X				OTHER LAWYERS (NEW INCUMBENTS)
15	a. you must find a principal. In other words somebody that you know and that you trust that will be willing to train you in the legal profession. If you've found such a person, you make an appointment and you go see such a person and you request him or her, uh, to consider you for articles of clerkship.				X	X	X	-
	b. Articles of clerkship is an old hangover of the medieval training of jurists. It is where you are trained by, uh, in-service training. It is for two years. You enter a contract for two years. The contract may be ceded, but it is *frowned* upon, it is not something you must try and do.	X	X	X				OTHER LAWYERS (NEW INCUMBENTS)
	c. And during this two years you get a smallish salary, you are, you are salaried	X	X				X	OTHER LAWYERS (NEW INCUMBENTS)
16	e. you are admitted in court as an attorney			X	X	X		-
	f. You can then *practice* for your own account, in other words you can *open* your own business. You can *practice* for your own account	X	X	X				FIRM
	g. or you can *join* a firm as a professional assistant or they also call them associates, or if you are very lucky, perhaps get two or three of your friends and you can *start* your own firm	X	X				X	OTHER LAWYERS
17	if you *join* the attorney's profession and it is your specific niche, uh, patents or commercial law and that is what you want to do, then you can become a leader in the field and you can (a) make lots of money	X	X				X	MONEY
18	e. The attorney's profession is organized, uh, organized by an organization called the Law Society of South Africa and they have representatives in each	X	X	X				OTHER LAWYERS

	province							
	f. and you will have to convince him, or he will have to be convinced that to join, to eventually join the profession. Um, in other words its a formal interview, uh, where they will ask you ethical questions and they will ask you where you come from, what kind of person you are just to vet that you are a fit and proper person, uh, to become an attorney.	X	X	X				OTHER LAWYERS (NEW INCUMBENTS)
19	f. attorneys act as custodians for huge transactions	X	X	X				CLIENTS
	g. if you are an attorney or a conveyancer and somebody wants to buy a huge building in the north of Johannesburg, you attend to all the formalities and you are also the receiver of the deposit of the buyer of this building.	X	X				X	CLIENTS
	h. Now this building can be, uh, 600, 700 million rand and 10 per cent of that is then placed in your care.			X	X	X		-
	i. So the temptation to say 'ag, I'm just going to borrow R30 000 for the weekend, I've forgotten to draw money, I'll put it back on Monday' is very great.	X	X	X				CLIENTS
	j. And if you go and look in the *De Rebus* which is uh the professional magazine for the uh, professional journal for the attorneys, you will see there is a column, um of the attorneys being struck from the roll			X	X	X		-
	k. and the reason, mostly, the reason given, mostly, uh, is contravention of the trust or the trust monies Act or the Trust Act	X	X	X				LAW
	l. Attorneys *take*, I don't know why but they *can't keep* their hands off the trust money.	X	X				X	TRUST MONIES CLIENTS
	m. *make* it impossible in your firm for anybody to get to trust monies. And *make* it extremely difficult to withdraw money from the trust account. *Insist* on at least two or three signatures plus original, foundational documents.	X	X				X	TRUST MONIES CLIENTS
	n. attorneys ***cannot resist***, uh, the temptation to take some of that money.	X	X	X				TRUST MONIES CLIENTS
20	NONE							

21	if you want to become an attorney, must be able to ***get on*** with the office manager and the office personnel uh in the office.	X	X	X				OFFICE PERSONNEL
22	a. there must be some compelling reason why you must now ***appear***	X		X		X		-
	b. there's a specific divorce that um, its your god daughter that is getting divorced and you wanted to do the divorce, then the judge will allow it. If it's an uncontested divorce. If you know, if you're a senior, uh, practitioner, the judge will of course allow it uh because you know uh want to do it yourself.	X	X				X	CLIENTS
	c. the advocates do the court work and the attorney does, uh, the off-the-street work, the preparation.	X	X	X				CLIENTS
	d. it is possible now that the attorneys can appear in the High Court	X		X		X		-
23	a. attorneys have been appointed as judges				X	X	X	-
	b. Sackswell is an attorney. She specialized in family matters.	X	X	X				CLIENTS
24	the attorney's profession has got certain things that they must do	X				X	X	-
25	So if there's an application for the prospecting of new mineral rights, then obviously you can appoint uh Dr Dale uh to appear in the High Court.				X	X	X	-
26	so when you join a big firm, it's a firm of attorneys period	X	X	X				OTHER LAWYERS
27	a. The litigation department *prepares*, *does* all the backroom work. … The litigation department - well they *do* maj court, maj court litigation obviously, that's what they *do* and when it goes to the High Court you *do*, um, all the backroom work, you *get* all the expert witnesses together, you *get* all the statements together, you *get* the file together… You *drive* around, um and *get* the statements from witnesses, you *drive* around and um uh *do* inspections in loco, and things like that. You *do* all the prep [becomes tongue-tied] preparatory work so that you can give the, uh, advocate a decent file that he can work from. And that's what the litigation	X	X				X	CLIENTS WITNESSES OTHER LAWYERS

	department *does*.							
	b. Rather *do* something more lucrative like trademarks or patents or the.. uh, commercial work straight-forward commercial work, um uh mergers and acquisitions, management buy-outs, things like that.	X	X				X	CLIENTS
28	c. But, if you *do* your articles first then at least you're *getting to know* the attorneys. And you're *getting to know* the partners at that firm and other firms because every case that you *do* in your two years' articles you have to *work with* other attorneys.	X	X	X				CLIENTS OTHER LAWYERS
	d. And if you *impress* them, even in the magistrates' court, you *appear* there and you *make* a name for yourself, far far better	X	X	X				OTHER LAWYERS
	e. you can specialize especially if you go to a very large firm	X		X		X		-
	f. I would say nobody can go to the Bar before they've been to the side-bar	X	X	X				OTHER LAWYERS
29	c. Those are the two, um, parts of the profession that I think most of you are going to go into.	X	X	X				OTHER LAWYERS
	d. Um, and in both these, um, uh, professions, you will make, you'll make a living.	X	X	X				MONEY
30	c. She with three other people started her own firm.	X	X	X				FIRM
	d. she works extremely hard um try not to work during hard, works extremely hard and I think you know its now a bit personal but I think her salary is about 3, 3.5 per year. Um, so that is what you can achieve if you are in a commercial firm if you are top of your class and if you work very hard	X				X	X	-
31	NONE							
32	B-r-i-e-f it is his brief, his instruction from the attorney. It it's the instruction that the advocate receives from the attorney.	X	X	X				OTHER LAWYERS
33	you know to beware of the typists	X	X	X				OFFICE PERSONNEL

2: CIRCUMSTANCES OF SOCIAL ACTION (CSA)

ATTORNEY QUOTATION NO.	CIRCUMSTANCES OF SOCIAL ACTION (CSA) QUOTATIONS	CIRCUMSTANCE TYPE
1	a. you do it in a commercial department of a commercial firm, once you've finished and you've qualified as an attorney that's the only way you can *transfer to England* or to another part of the *Commonwealth*	LOCATION
	b. So the only way in which you can transfer, in South Africa, over the law degree is commercial law. And the reason is the commercial law is English law so *anywhere in the Commonwealth* you can go. *Australia* [in mock Australian accent] if you want to sit every evening and sift your garbage in ten different bags, then you can go to Australia.	LOCATION
	c. If you want to go to *England* and you want to live with those hideous people then you can go there. …	LOCATION
	d. And *America* [in mock American accent] perhaps you can go there.	LOCATION
	e. If you want to go to England and you want to live with those hideous people then you can go there. They'll make you.. they'll not make you a partner, they'll make you an associate, *they'll pay you nothing, and you'll work like a dog*. For the rest of your life.	EMOTION
	f. And America [in mock American accent] perhaps you can go there. I don't know why you want to go there *you'll probably also work, you know, 24 hours a day*.	EMOTION
2	a. if you are looking for a piece of legislation and *you're in a hurry*	EMOTION
	b. you must immediately be able to go to the *Butterworths*	RESOURCES
	c. Go to a um uh uh *client's library* or you go into *another attorney's library*	LOCATION
3	a. No I thought you could give us a lecture on *electronic resources*. Ladies and gentlemen the electronic resources um in South Africa is very very very good. Virtually every journal article, virtually - not virtually - every single reported case, every um uh uh uh legal new piece of legislation be it from the from the Parliament in Cape Town or from provincial, is on *electronic resources*.	RESOURCES
	b. So uh in the old days if you had to set up shop as a one-man uh attorney, you had to *buy a whole set of Law Reports from eighteen voetsek till today*. And that would cost you something like fifty to eighty	RESOURCES

	thousand bucks, depending on whether they're bound or not. You had to buy *all the statutes*. You had to get *a librarian* to put the statutes up to date, well you still need that.	
	c. Nowadays, if you know what you're doing, you need *a pile of CDs* and you can start your practice. You can really start practicing with *a pile of CDs*, you know. *Not taking up more than five square inches on your desk*.	RESOURCES
4	he received monies in his *trust account*	RESOURCES
5	the attorneys and the attorneys of record *are written at the end of the case*. Now for you its not important but if you're one day an attorney then that's that used to be *the only advertising allowed in my days is the appearance of their names at the bottom of the case*.	RESOURCES
6	NONE	
7	a. So if you go directly from university to the bar you're going to sit in an office *somewhere here in Johannesburg*	LOCATION
	b. see that you know the attorneys *in your firm*	LOCATION
	c. you *must get a distinction* in your in your admissions exam for the bar or for the um uh attorneys' profession.	EMOTION
8	NONE	
9	people are all *talking about one another*. And people are all talking about whether you are good or not at the bar.	EMOTION
10	a. he started the firm Denys Reitz which is one of the great firms *in Johannesburg* today	LOCATION
	b. he's a he's a very very *impressive* character.	EMOTION
11	he started one of the major law firms in South Africa.	LOCATION
12	Let us talk about the legal profession now shortly ladies and gentlemen. Its something that *fascinates* you	EMOTION
13	a. they sit in *big large buildings* or in *derelict old renovated houses*	LOCATION
	b. they have a whole *office structure*	RESOURCES
14	OK, to become an attorney you need to study for *the LLB degree*, either *the 4-year LLB* or *the LLB that you are doing, an undergraduate course plus then the postgraduate LLB* … alternatively *an LLM*, *a 4-year LLB followed by one year postgraduate stud*y, um, specializing in some field of the law, uh, with an LLM.	RESOURCES
15	The contract may be ceded, but *it is frowned upon*	EMOTION
16	you are admitted *in court* as an attorney	LOCATION
17	NONE	
18	NONE	
19	a. the great *temptation* of the attorney's profession is of course trusts money, trust money	EMOTION

	b. somebody wants to buy a huge building *in the north of Johannesburg*	LOCATION
	c. You have absolute control over that money, uh, of course it is not your money, it must go *into the trust account*, but uh, you as the partner or as the responsible person have got absolute one hundred per cent control over that money. So the *temptation* to say *'ag, I'm just going to borrow R30 000 for the weekend, I've forgotten to draw money, I'll put it back on Monday*' is very great.	RESOURCES EMOTION
	d. make it *extremely* difficult to withdraw money from the trust account. Insist on at least *two or three signatures* plus *original, foundational documents*. … A *foundational document*, you know what I mean by a *foundational document*? The reason why that monies has to be transferred, attached to two or three signatures of the partners plus the *accountant*.	RESOURCES
20	you need *a BSc degree in social sciences*.	RESOURCES
21	don't underestimate the office personnel *in a legal office*. You must, you must, if you want to become an attorney, must be able to get on with the office manager and the office personnel uh *in the office*	LOCATION
22	it is possible now that the attorneys can appear in *the High Court*	LOCATION
23	she's now a judge here at the *Witwatersrand Local Division*	LOCATION
24	What are the incidences when attorneys appear in *court*	LOCATION
25	obviously you can appoint uh Dr Dale uh to appear in *the High Court*	LOCATION
26	NONE	
27	You *drive* around, um and get the statements from witnesses, you *drive* around and um uh do inspections in loco, and things like that.	RESOURCES (IMPLIED)
28	make *a name* for yourself	RESOURCES
29	NONE	
30	a. she *works extremely hard* um try not to work too hard, *works extremely hard*	EMOTION
	b. in *a commercial firm*	LOCATION
31	No well some people thrive on that, some people live / like like [Isobel], I mean if she doesn't have an *adrenalin rush* every five minutes you know she gets *bored*. So some people really like that, they thrive on that *nervous tension* and they are their best and sharpest when they have … but you know you can't its impossible to sustain it for weeks and weeks and months and months and then you *must take a break* um you *must look after yourself*, you must you know / it's a very / it's a *high tension* job.	EMOTION
32	NONE	

33	*beware* of the typists, *Please beware*, its very good advice	EMOTION

3: SOCIAL ACTORS (SAct)

ATTORNEY QUOTATION NO.	SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	NONE	
2	Go to a um uh uh client's library	PARTIES – Included
3	NONE	
4	a. It is an attorney that um uh was a trustee, *he* received monies in *his* trust account um and *he* uh had various other accounts that would pay in and um and its was um it was a a housing project, and people paid monies in and *he* then - we don't know whether *he* ran into a cash flow problem, but *he* used his trust account, where a huge sum of money was deposited for the uh complex. *He* used that trust account to make personal loans to *his* family. Uh - *he* paid it back immediately, you know, when it was discovered, *he* had the money to pay the the the shortcoming shortcoming	CLASSIFICATION – Gender – Male (8 instances of 'he'; 2 instances of 'his')
	b. he uh had various other accounts that would pay in and um and its was um it was a a housing project, and *people paid monies in*	PARTIES – Included
5	attorney then that's that used to be the only advertising allowed in my days is the appearance of their names at the bottom of the *case*	PARTIES – Excluded
6	NONE	
7	NONE	
8	my *wife* is an attorney	CLASSIFICATION – Gender – Female
9	So the attorneys know, when they've got a *case*, who to brief.	PARTIES – Excluded
10	a. Denys Reitz	NOMINATION
	b. Jan Hofmeyr	NOMINATION
	c. Bram Fischer	NOMINATION
	d. He was the *Minister of Justice*. He was um uh a *politician*. He was a - has everybody got one [referring to books he has been handing out] - he was um he was an attorney, he started the firm Denys Reitz which is one of the great firms in	CATEGORIZATION

	Johannesburg today. Um he was also a *boer*. And not a boor as in um an uncouthed and unwashed man. He was a *farmer*.	
	e. *he* was an attorney	CLASSIFICATION – Gender – Male
	f. he was *an intellectual*, he wrote books	CATEGORIZATION
	g. he did a lot for *labour relations* in South Africa. *Specialized labour relations* and that is why Denys Reitz still today is a major player in *labour law*	PARTIES – Excluded
	h. He was *an Afrikaner*, um uh but he was taken up by the English establishment. You have these rare Afrikaners that becomes part of the English establishment or the liberal establishment and then they become stars in that establishment.	CATEGORIZATION
11	NONE	
12	NONE	
13	an attorney is the place of the, uh, the first contact for the *man on the street*. If *you* go, if *you're* looking for legal advice *you*, what *you* most probably do is you look for an attorney first. *You* cannot go to an advocate directly. The attorney must refer you to an advocate or the attorney appoints an advocate on your behalf.	PARTIES – Included
14	NONE	
15	If you've found such a person, you make an appointment and you go see such a person and you request *him* or *her*, uh, to consider you for articles of clerkship.	CLASSIFICATION – Gender – Inclusive
16	NONE	
17	a. The *work* of an attorney is not glamorous. It is not glamourous *work*, it is hard, boring, slogging *work*. It is *administration* for 95 per cent. You are not going to find in the *ordinary work* of the attorney great intellectual challenges or great innovative, uh, law changing challenges.	PARTIES – Excluded
	b. *Ordinary work* for the attorney however, uh, *divorces, estates, trusts,*	PARTIES – Excluded

	transfer of property, uh, *general attorney's work* it not, uh very challenging.	
18	you will be invited to an interview with one of the leading lights of the Law Society, uh, and you will have to convince *him*, or *he* will have to be convinced that to join, to eventually join the profession	CLASSIFICATION – Gender – Male (1 instance of 'him'; 1 instance of 'he')
19	NONE	
20	NONE	
21	NONE	
22	a. Say for instance now, you know, um there's a *specific divorce* that um, its your *god daughter* that is getting divorced and you wanted to do the divorce, then the judge will allow it. If it's an *uncontested divorce*.	PARTIES – Included
	b. if you're a *senior*, uh, practitioner,	CATEGORIZATION
	c. advocates do the *court work* and the attorney does, uh, the *off-the-street work*	PARTIES – Excluded
23	*Judge Kathy Saxwell* Sax sax Sacks Sackswell is an attorney	NOMINATION
24	NONE	
25	a. Dr Dale	NOMINATION
	b. Professor Dale here at Denys Reitz, *he's* an honorary professor at Wits and *he's* in mining law and *he's* mostly the the the worldwide expert on South African mining law So if there's an application for the prospecting of new mineral rights, then obviously you can appoint uh Dr Dale uh to appear in the High Court. *He's* the best there is. It's a very specialized field, *He* knows absolutely everything and *he* then, with the permission of the judge, can appear in the High Court.	CLASSIFICATION – Gender – Male (4 instances of 'he')
26	NONE	
27	a. The litigation department prepares, does all the *backroom work*	PARTIES – Excluded
	b. The litigation department - well they do *maj court, maj court litigation* obviously	PARTIES – Excluded
	c. You do all the prep [becomes tongue-tied] preparatory	PARTIES – Excluded

	work so that you can give the, uh, advocate *a decent file* that he can work from.	
	d. Rather do something more lucrative like *trademarks* or *patents* or the.. uh, *commercial work straight-forward commercial work*, um uh mergers and acquisitions, management buy-outs, things like that.	PARTIES – Excluded
28	NONE	
29	NONE	
30	a. *She* with three other people started her own firm.	CLASSIFICATION – Gender – Female (1 instance of 'she')
	b. I think her salary is about 3, 3.5 per year	CLASSIFICATION – Class
31	a. if *she* doesn't have an adrenalin rush every five minutes you know *she* gets bored.	CLASSIFICATION – Gender – Female (2 instances of 'she')
	b. [Isobel]	NOMINATION
32	NONE	
33	NONE	

4: VALUES (V)

ATTORNEY QUOTATION NO.	VALUES (V)	CONTENT	FORM
1	If you go into uh, *if you go to do your articles one day*, ladies and gentlemen and you *go to a commercial firm* to do your commercial articles, you do it in a commercial department of a commercial firm, once you've finished and you've qualified as an attorney *that's the only way you can transfer to England or to another part of the Commonwealth*. They will immediately take you, even with a South African LLB, because you've got a practical training in commercial law which is the same the world over. So *the only way in which you can transfer, in South Africa, over the law degree is commercial law*.	EXTERNAL GOODS (capacity to emigrate)	PURPOSIVE
2	NONE		
3	NONE		
4	It's a case about the attorney's *misconduct* and it is a very interesting case because it's a it's a its *almost a grey area*. It is an attorney that um uh was a trustee, he received monies in his trust account um and he uh had various other accounts that would pay in and um and its was um it was a a housing project, and people paid monies in and he then - we don't know whether he ran into a cash flow problem, but *he used his trust account, where a huge sum of money was deposited for the uh complex*. *He used that trust account to make personal loans to his family*. Uh - he *paid it back immediately*, you know, *when it was discovered*, he had the money to pay the the the shortcoming shortcoming back, uh but the question is, you know, *can you do that*?	ATTORNEYS' THEMSELVES (negative)	MORAL EVALUATION
5	NONE		
6	the attorney that *stole* the money from the trust account.	ATTORNEY'S THEMSELVES (negative)	MORAL EVALUATION
7	NONE		
8	NONE		
9	NONE		
10	a. he was um he was an attorney, he started the firm Denys Reitz which is one of the *great* firms in Johannesburg today.	ATTORNEY'S THEMSELVES (positive)	MORAL EVALUATION
	b. Um and it was a *very impressive very*	ATTORNEYS	MORAL

	impressive man. He was an Afrikaner, um uh but he was taken up by the English establishment. You have these rare Afrikaners that becomes part of the English establishment or the liberal establishment and then they become *stars* in that establishment. Like like Jan Hofmeyr, uh like Bram Fischer. Those were all Afrikaans speaking people that became *very prominent* um lawyers. Um so he's a he's a he's a *very very impressive* character.	THEMSELVES (positive)	EVALUATION
11	NONE		
12	NONE		
13	NONE		
14	NONE		
15	Articles of clerkship is an old hangover of the medieval training of jurists. It is where you are trained by, uh, in-service training. It is for two years. You enter a contract for two years. The contract may be ceded, but it is frowned upon, it is not something you must try and do. And during this two years *you get a smallish salary*, you are, you are salaried and *you do*, um, *all kinds of legal work so that you can pass the* Society, uh, the Law *Society's admission exam*.	EXTERNAL GOODS (material rewards, passing admission exam)	PURPOSIVE
16	*Then you write the admissions exam* and when you pass the admissions exam you are admitted in court as an attorney. *You can then practice for your own account*, in other words *you can open your own business*. You can practice for your own account, or *you can join a firm as a professional assistant* or they also call them associates, or if you are very lucky, perhaps get two or three of your friends and *you can start your own firm and you will be a director or partner of that firm.*	EXTERNAL GOODS (status)	PURPOSIVE
17	a. The work of an attorney is *not glamorous*. It is *not glamourous work*, it is *hard, boring, slogging work*. It is *administration for 95 per cent*. You are *not going to find* in the ordinary work of the attorney *great intellectual challenges or great innovative, uh, law changing challenges*. If you are looking for that then there are other places where you can join the legal profession but that is not what you're going to do if you become an attorney.	EXTERNAL GOODS (intellectual stimulation)	MORAL EVALUATION
	b. I'm not saying that the attorney's profession is all boredom … um, if	EXTERNAL GOODS (status,	PURPOSIVE

	you, *if you join the attorney's profession* and it is your specific niche, uh, patents or commercial law and that is what you want to do, then *you can become a leader in the field* and you can (a) *make lots of money* and (b) *you can have a stimulating profession*.	material rewards, stimulation)	
	c. Ordinary work for the attorney however, uh, divorces, estates, trusts, transfer of property, uh, general attorney's work *is not, uh very challenging*. Its *not intellectually very challenging*. It is *routine rather than intellectual effort*.	EXTERNAL GOODS (intellectual stimulation)	MORAL EVALUATION
18	NONE		
19	attorneys *cannot resist*, uh, *the temptation to take some of that money*.	ATTORNEYS THEMSELVES (negative)	MORAL EVALUATION
20	NONE		
21	NONE		
22	NONE		
23	Judge Kathy Saxwell Sax sax Sacks Sackswell is an attorney. *She specialized in family matters*. *And she's now a judge* here at the Witwatersrand Local Division.	EXTERNAL GOODS (specialization, promotion)	PURPOSIVE
24	NONE		
25	But sometimes you get *a very good* attorney. Like Dr Dale now, Professor Dale here at Denys Reitz, he's an honorary professor at Wits and he's in mining law and he's *mostly the the the worldwide expert on South African mining law*. So if there's an application for the prospecting of new mineral rights, then obviously you can appoint uh Dr Dale uh to appear in the High Court. He's *the best there is*. It's a very specialized field, *He knows absolutely everything* and he then, with the permission of the judge, can appear in the High Court.	ATTORNEYS THEMSELVES (positive)	MORAL EVALUATION
26	NONE		
27	And that's what the litigation department does. *Not lucrative, not lucrative*. Um, even in, even in *commercial* litigation or insurance litigation where you're talking about *millions* of rand, *not lucrative*. Um, you know, uh it (sighs) what can I say, that's a fact of life. *Rather do something more lucrative* like trademarks or patents or the.. uh, commercial work straight-forward commercial work, um uh mergers and acquisitions, management buy-outs, things like that. *Very, very lucrative*.	EXTERNAL GOODS (material rewards)	PURPOSIVE
28	NONE		
29	NONE		
30	but she works extremely hard um try not	EXTERNAL	PURPOSIVE

	to work too hard, works extremely hard and I think you know its now a bit personal but I think *her salary is about 3, 3.5 per year*. Um, *so that is what you can achieve if you are in a commercial firm if you are top of your class and if you work very hard within seven years after after qualifying at university, you can achieve that kind of salary.*	GOODS (material rewards)	
31	NONE		
32	NONE		
33	NONE		

DIRECTOR OF PUBLIC PROSECUTIONS: ANALYTICAL TABLES

1: SOCIAL ACTION (SA)

[A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material]

DPP QUOTATION NO.	SOCIAL ACTION (SA) QUOTATIONS	A	T	S	P	NT	M	Object (not calculated – for guidance only)[4]
1.	NONE							
2	the jurisdiction is *decided* by the Director of Public Prosecutions	X	X	X				ACCUSED PROSECUTOR
3	There's a Director of Public Prosecutions in each province and he's *represented* by his public prosecutors in every court.				X	X	X	-
4	whatever reason they advance or whatever *instructions* they get from the Director of Public Prosecutions	X	X	X				PROSECUTOR
5	a. And he *invited* me for an interview	X	X				X	PROSECUTOR
	b. And so he *says*: 'Why are you so nervous?' He was a very brash tall Prussian. 'Why are you so nervous' he asks. And so fortunately, I had an answer ready. I said 'People are like race horses you know, the more intelligent you are the more nervous you are.' And so 'that's a slick answer, I don't like that.'	X	X	X				PROSECUTOR
	c. And so he *asked* me three or four questions and um and I answered them, I think correctly. One of the questions he asked me is 'can you exhume a body if you've got new evidence?' and I said, 'Yes if you get the necessary certificate' and I told him what the requirements for getting the certificate was, you can exhume a body, *obviously* you can exhume a body. Um and I can't remember what the other questions were but legal technical questions. And then he started *asking* me political questions.	X	X	X				PROSECUTOR
	d. At that stage he was prosecuting Winnie Mandela.	X	X	X				ACCUSED
	e. And then he stopped. Immediately. He said 'thank you, yes go back to the magistrates' court.'	X	X	X				PROSECUTOR

[4] I have not calculated the number of objects of social action in the same way as I have calculated active/passive, transactive/non-transactive; and semiotic/material actions where the categorization is 'either-or'.

2: CIRCUMSTANCES OF SOCIAL ACTION (CSA)

DPP QUOTATION NO.	CIRCUMSTANCES OF SOCIAL ACTION (CSA) QUOTATIONS	CIRCUMSTANCE TYPE
1	its in the *discretion* of the director of public prosecutions where you are being prosecuted.	RESOURCE
2	That is in the *discretion* of the Director of Public Prosecutions but those are the general outlines.	RESOURCE
3	There's a Director of Public Prosecutions in *each province* and he's represented by his public prosecutors in *every court*.	LOCATION
4	A *delegation* is a piece of paper signed by the Director of Public Prosecutions saying this person can take decisions on my behalf.	RESOURCES
5	a. he had a *huge office* and his whole office was full of *military military uh memorabilia*, *little swords* and *pictures of little men in uniform and rifles* and things	RESOURCES
	b. I thought that this is hugely inappropriate for an attorney-general - that is even what he was called at that stage. So I sat down and I looked around and I was *very uncomfortable*. I was really *extremely uncomfortable*. Because its very important you know, its an important interview.	EMOTION
	c. And so he says: 'Why are you so *nervous*?' He was a very brash tall Prussian. 'Why are you so nervous' he asks. And so fortunately, I had an answer ready. I said 'People are like race horses you know, the more intelligent you are the more nervous you are.' And so 'that's a slick answer, I *don't like* that.'	EMOTION

3: SOCIAL ACTORS (SAct)

DPP QUOTATION NO.	SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	its in the discretion of the director of public prosecutions where *you* are being prosecuted.	PARTIES - Included
2	In a criminal case, the jurisdiction is decided by the Director of Public Prosecutions based on the same considerations: Where the *accused* lives, or where the *crime* took place.	PARTIES – Included
3	a. So they've instituted a little character called the Director of Public Prosecutions	CATEGORIZATION
	b. a Director of Public Prosecutions in each province and *he's* represented by *his* public prosecutors in every court.	CLASSIFICATION – Gender – Male (1 instance of 'he'; 1 instance of 'his')
4	NONE	
5	a. And in my days it was a very very obnoxious character called Klaus [inaudible], who was a Prussian military officer.	CATEGORIZATION
	b. Klaus	NOMINATION
	c. And *he* invited me for an interview … and the moment I sat down, *he* had a huge office and his whole office was full of military military uh memorabilia	CLASSIFICATION – Gender – Male (numerous instances of male pronoun usage in this anecdote)
	d. He was a very *brash tall Prussian*	CATEGORIZATION
	e. At that stage he was prosecuting *Winnie Mandela*	PARTIES – Included
	f. Frank Kahn	NOMINATION
	g. Frank Kahn - *he* was the director of public prosecutions. And we got on famously, did some very interesting cases. Um and um we, you know, *he* wasn't a pleasant guy, but *he* was intelligent and you could talk to *him*.	CLASSIFICATION – Gender – Male (3 instance of 'he'; 1 instance of 'him')

4: VALUES (V)

DPP QUOTATION NO.	VALUES (V)	CONTENT	FORM
1	NONE		
2	NONE		
3	So they've instituted a *little character* called the Director of Public Prosecutions.	DPP HIMSELF – negative	MORAL EVALUATION
4	NONE		
5	a. And in my days it was a very very *obnoxious* character called Klaus [inaudible], who was a Prussian military officer.	DPP HIMSELF – negative	MORAL EVALUATION
	b. he had a huge office and his whole office was full of military military uh memorabilia, little swords and pictures of little men in uniform and rifles and things and I thought that this is *hugely inappropriate* for an attorney-general	INTERNAL GOODS – Rule of law?	MORAL EVALUATION
	c. And then he started asking me *political* questions. At that stage he was prosecuting Winnie Mandela. Um and he started asking me questions what I would do if I had been the attorney-general. And I just refused to answer the questions, I said 'sorry I consider those questions *inappropriate* and *I don't, I can't answer them*. And that's a *political* decision and *I can't answer them*. Um I don't want to seem unthankful or unpleasant but I really can't answer …' And then he stopped. Immediately. He said 'thank you, yes go back to the magistrates' court.'	INTERNAL GOODS – Independence from political structures	MORAL EVALUATION

JUDGE: ANALYTICAL TABLES

1: SOCIAL ACTION (A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material)

JUDGE QUOTATION NO.	SOCIAL ACTION (SA) QUOTATIONS	A	T	S	P	NT	M	Object (not calculated – for guidance only)[5]
1	that's where you have the different judges uh who *gives* on the same set of facts uh four or five different judgments	X	X	X				PEOPLE – BACK
2	you can believe on a spiritual level, you can believe 'this is how law works, law is just a reflection of a higher law' and still be a judge and *sit* in judgment of others objectively	X	X	X				PEOPLE – FORE
3	a. If [there are] things which have not *been taken into consideration*	X	X	X				PEOPLE – BACK
	b. or if they think that the judge *made* a mistake	X	X	X				PEOPLE – BACK
4	k. Um so the important thing that I want you to take from this case is uh what the judge said um and I can't get the quotation right now but um, one of the judges said 'look, when we sit in judgment on a matter like this you don't bring along with you your own personal baggage.	X	X	X				PEOPLE – BACK
	l. first of all you don't agree as a judge, you don't agree that males should have intercourse with one another. That is something that is	X	X	X				PEOPLE – FORE

[5] Because the judge's power over things sometimes involved more than one thing, I have not calculated – see for example quotation J-SA5b, I have not calculated the number of objects in the same way as I have calculated active/passive, transactive/non-transactive; and semiotic/material actions where the categorization is 'either-or'.

	abhorrent to you. That's not strange, five years ago in this country it was against the law. That's not strange at all. But you don't bring your personal subjective view to court.							
	m. Secondly, you might find it from a Christian point of view or from a decency point of view completely abhorrent that uh people have to hurt themselves to … in order to get sexual gratification. That is not relevant.	X	X	X				PEOPLE – FORE SELF
	n. What you think of it while you are uh busy with recreation with your family and your friends and uh socializing	X				X	X	-
	o. What you must do when you sit in judgment on a matter like this is you must look for the law.	X	X	X				PEOPLE – BACK LAW
5	f. here you have a judge that has to interpret whether this man's marriage is uh uh valid or not.	X	X	X				PEOPLE – FORE
	g. But the judge said 'no, marriage is a very very serious and a very solemn um contract between two people and uh it shouldn't be handled frivolously and meaning 'in' the house also means in the garden.	X	X	X				PEOPLE –FORE LANGUAGE
6	a. In this case there was uncertainty in the language of the statute, uncertainty about the word 'in', and the judge didn't follow the letter of the law, but he rather preferred to give a decision whereby certainty would be	X	X	X				ULTIMATE OUTCOMES

	confirmed.							
	b. He didn't follow the letter of the law because then 'in' would mean 'inside the house'.	X	X	X				LANGUAGE
	c. So if you follow the Oxford English Dictionary the judge should have said 'mmmm … sorry .. your marriage is, is over.'	X	X	X				LANGUAGE
	d. So the judge looked *beyond* the dictionary meaning of the word 'in' and he extended it to mean also in an open space, outside the closed space. There's very good reason why the legislature used the word in because people get married within an enclosure. The legislature said you must have open doors and when these people went through the open doors and outside, the judge said, no that is also inclusive.	X	X	X				LANGUAGE
7	a. The law will be interpreted to give um law will be interpreted to preserve something that people believe in.	X	X	X				LAW
	b. The ma .. the contract of marriage is so important that the judge said 'I'm not going to be bound by what the dictionary says. I will ex … I will use my discretion' - we'll get to discretion now. 'I will use my discretion to to widen this concept of "in", just so that we have certainty.	X	X	X				LANGUAGE
8	a. Only if you know if if if there was a blatant disregard of all the	X	X	X				PEOPLE - BACK

	formalities will a judge uh consider uh declaring the marriage null and void.							
	b. The judge would have interpreted that as null and void because that that goes to the core of the marriage, you can't marry somebody whose eight years old, there can be no real consent from that person.	X	X	X				PEOPLE – FORE
9	a. If you get married in a submarine, and then you subsequently want to declare it ann … null and void um because it was not in a house then you have to go to court and the judge will then decide whether he will interpret the legislation	X	X	X				LAW
	b. he will decide whether it was valid or not.	X	X	X				PEOPLE–BACK
10	a. A judge has got a discretion to interpret um uh legislation	X	X	X				LAW
	b. judge will always in a case where he has to interpret something like this, will always favour the interpretation that gives the greater legal certainty.	X	X	X				LAW ULTIMATE OUTCOMES
	c. the judge must make the decision that will create the greatest amount of certainty in society.	X	X	X				ULTIMATE OUTCOMES
	d. if you judge a case, you are not, you must avoid creating chaos.	X	X	X				PEOPLE – BACK ULTIMATE OUTCOMES
11	where the judges had to decide about um uum the gay marriages uh that would cause enormous friction in society [coughs]. But they had the Constitution to consider, and the Constitution is an *overwhelming* authority.	X	X	X				PEOPLE – FORE LAW ULTIMATE OUTCOMES

	So you can't go against the Constitution. So, they decided to declare gay marriages valid, to declare it valid that people of the same sex can get married, create some uncertainty, but in accordance with the Constitution.							
12	a. And then they interview all the possible candidates			X	X	X		-
	b. **LECTURER:** but where do they get the candidates from? [pulls face] **STUDENT 3:** Aren't they nominated by their peers? **LECTURER:** Yes, partly. But who compiles the list that goes to the Judicial Services Commission? The President. The President gives the list to the Judicial Services Commission and say[s] 'These are the people I think you should interview'.				X	X	X	-
	c. Then they interview them. They interview the people on the list.			X	X	X		-
	d. And then they make a shortlist. And then they send the shortlist where? To the President and the President appoints who he wants on the shortlist. He can also appoint everybody, which he usually does.				X	X	X	-
	e. But if he, if he's got a problem with somebody … with a political appointee, if there's somebody on that list that the Judicial Services Commission wants to uh appoint and he doesn't want to appoint, the person doesn't get appointed.				X	X	X	-

	f. the only the only time that there was any kind of contro controversy and it's a very slight controversy, was when Justice Mohammed was appointed Chief Justice				X	X	X	-
	g. you had was Justice Corbett, who was the old chief justice, and who swore in mister Mandela as the first president	X	X	X				PEOPLE – FORE
	h. he retired	X				X	X	-
	i. he was a judge appointed by the previous government.				X	X	X	-
	j. the Judicial Services Commission appointed uh uh Mohammed.				X	X	X	-
13	And the constitutional court, by the mouth of the then Judge Kentridge, he was a judge for a very short time, he's now in England, um, he found that its unconstitutional and he struck it out.	X	X	X				PEOPLE – BACK LAW
14	Who's the deputy chief justice (sshhh sshhh) Who's the deputy chief justice, he's on sabbatical at Wits now … he's sitting here in Wits, he's doing sabbatical work	X	X				X	WORK
15	The common law is the law created by the jurists. By the lawyers. In England it is the judges, judge-made law	X	X	X				LAW
16	h. the judges, when they sit, and they decide law cases, what do they use? They use legislation and they use the common law. They use other cases.	X	X	X				LAW
	i. They develop our common law. The judges, since 1910 when we had uh a united uh appellate bench the judges and the lawyers develops	X	X	X				LAW

	the common law.							
17	g. when the judge sits in the court he does he does he or she doesn't decide 'OK I'm going to decide this interpretation on this rule'	X	X	X				LAW
	h. judges interpret uh rules	X	X	X				LAW
18	the judges, sit in judgment. And they must decide how are they going to solve this problem.	X	X	X				PEOPLE – BACK
19	o. this is what the judges do	X		X		X		-
	p. The judges when they sit, they don't have in their minds, the old judges especially, they didn't have these theories.	X		X		X		-
	q. But through a hundred years of jurisprudence, we saw that this is what the judges do.	X		X		X		-
20	c. If you're a very good advocate they ask you to become a uh acting judge			X	X	X		-
	d. if they see that you can do the work then they invite you to become a full-time judge in the provincial division, or the local division			X	X	X		-
	e. after years of service in the provincial division or the local division, if you are deemed to be fit, they are invited as an acting judge to the Supreme Court of Appeal or to the Constitutional Court			X	X	X		-
21	d. judges in private law matters sit and they are confronted by both sides represented by an advocate.				X	X	X	-
	e. The advocates make sure - that's their job - they make sure that			X	X	X		-

	the judge is informed of very single possible authority uh that their case, that their side of the case um uh that will support their side of the case.							
	f. So the judge, when he sits in the provincial division has got the advantage of the entire scope of authorities, presented by the two advocates.			X	X	X		-
	g. What then happens uh is the judge hears the case, he gains all the authorities, he then retires and then um he does his own investigation. He does his own sources he investigates the advocate's sources, he does his own research, he comes to a conclusion based on everything that was laid before him.	X	X	X				WORK
22	a. So there's virtually no chance that if there's an authority on either for or against uh the decision the judge wants to make that he won't know of it. If he's involved in that case he will know of it, he will evaluate it and he will decide yes I'm going to use this authority or no I'm going to decide against the authority.	X	X	X				LAW
	b. A judge can't make his own authority. I think what you mean his own research. Ja. Judge can do his own research	X	X	X				LAW
23	a. And he will put that before the judge. And he will try everything - with his arguments, with your affidavits, with everything, he	X	X	X				PEOPLE – BACK OTHER LAWYERS LAW

	will try to convince the judge to decide upon the cases that he has quoted to the judge. The opponent will do exactly the same. And usually, if it is a moot point, if it is an open point in law then there will be authority for both sides - yes! Yes! That is very possible. As a matter of fact that's what happens every day in court. Is trying to convince a judge to accept your authorities rather than your opponents' authorities.							
	b. The judge then has all these authorities in front of him with various weights that he attached to the authorities, depending on what they are, and then he does his own research and he comes to a conclusion, which authorities to accept and which to reject because every case is different.	X	X	X				LAW
	c. So there will always be cases that you can argue are for, and cases that you argue are against it. And it's the work of the judge to decide which of the cases to use to support his decision. And when he makes a decision, and he reports that decision, that decision becomes authority for that specific point that was raised in court.	X	X	X				LAW PEOPLE – BACK
24	NONE							
25	In the le- technical legal sense, the word pre-precedent means a court case which you quote in a court of law as a judge as	X	X	X				LAW

	authority for your decision.							
26	a. So if you've got a case that is exactly the same case as a case in the Transvaal, yes, and you are now say in Durban, yes you've got the right to come to a different conclusion, and say for these reasons, very good reasons must they be, I'm not following my brother in the Transvaal.	X	X	X				OTHER LAWYERS
	b. When you then have a new judge and a new case, and the facts are similar to both the previous case that didn't follow the Transvaal, and the Transvaal case um that was decided originally, the judge in the Natal case, in the Durban case, will - if he wants to follow the Transvaal case - will very pertinently state: 'My brother in the Transvaal made this decision in 1962, it was wrongly not followed by my brother in 1968 but now in 1992 I am overruling him and I am following the Transvaal judgment.	X	X	X				LAW OTHER LAWYERS
	c. Because what you're ultimately aiming at is that all the courts will agree with all the legal points that may exist. And for that reason we also have the Supreme Court of Appeal. If there's a dispute between two courts and this dispute is really damaging to legal certainty, that case then goes up to the Supreme Court of	X	X	X				PEOPLE – FORE LAW

	Appeal, the Supreme Court of Appeal makes a precedent makes a decision, and *everybody* is bound by that.							
27	a. if there's a precedent there's a court case for instance in the um Cape Provincial Division and that judge made a decision on a certain set of facts, and he came to a conclusion, and that is now the law in the Cape.	X	X	X				PEOPLE – BACK LAW
	b. That case is what we call a precedent. It is used and it is followed by other judges in the Cape.	X	X	X				LAW
	c. If a judge in the Transvaal wants to follow that precedent, he has to say so in his judgment. Say that he is following that precedent for this and this reason and then that precedent becomes binding on the Transvaal as well. Um the facts may change, but he may not - obviously if he's following the precedent - he cannot change uh the law.	X	X	X				LAW
28	g. you appeal to the local division			X	X	X		-
	h. There the judge decides against the magistrate. But that is now a precedent.	X	X	X				OTHER LAWYERS
	i. Now in the Supr- in the High Court when the judge gives a a decision that decision is a precedent and it binds the whole of the Transvaal.	X	X	X				LAW

	j. Your opponent, who got satisfaction in his favour from the magistrate is now unhappy. So what is he going to do? First he's going to appeal to a full bench. But that is now technical detail. He's going to appeal from a single judge in the local division to a full bench, either in the local division or the provincial division.			X	X	X		-
	k. If that if the full bench gives judgment against you and for the guy that won in the magistrates' court then that is the precedent. Then the whole of the Transvaal is bound by that precedent and the previous precedent of the single judge disappears.	X	X	X				PEOPLE – FORE OTHER LAWYERS LAW
	l. You appeal to the Supreme Court of Appeal.			X	X	X		-
	m. And whatever the Supreme Court of Appeal decides, that's it. Unless it's a constitutional case. That's it. There's nothing higher. You can't go to God or the Privy Council or you know George Bush or whoever you think is powerful. That's it. You stop at the Supreme Court of Appeal and what the Supreme Court of Appeal says - that's law. Whoever and in whoever's favour the Supreme Court of Appeal has decided that is law. And you will - all the other things from the magistrates' court is	X	X	X				PEOPLE – FORE LAW OTHER LAWYERS

	worth nothing! It loses all its value. What the Supreme Court of Appeal says, that is where law is made.							
29	Um the court the judgments are written by you know the best advocates that there were. The judges.	X	X				X	LAW
30	Uh etc etc you know how it works, the profession. In the past if you are a very good advocate and they um the council the bar the minister and the judicial services council think you should be promoted, you are invited to act as a judge. For a couple of weeks, or a couple of months. And if you prove yourself, if you prove to be a good judge, if your judgments are sound then they invite you to become a judge.			X	X	X		-
31	NONE							-
32	NONE							-
33	a. And then it gives you a verbatim judgment of the judge. You will see it is in a narrative. The judge talks.	X		X		X		-
	b. The judge sits, it is something that he has prepared, and he's reading it out to the court. That is the judgment.	X	X				X	PEOPLE – BACK
34	e. Now in this case um the judgment was given by the Judge President, King, and his brother Foxcroft, J concurred.	X	X	X				PEOPLE-BACK
	f. In other words that means uh they discussed the matter and Foxcroft agreed with King, they both agreed that King would write the judgment and Foxcroft had nothing to add.	X	X				X	PEOPLE-BACK
35	i. Yes, He concurs but	X	X	X				PEOPLE-BACK

	for different reasons. And then he gives a separate judgment. Is that important? Do they look at who's the most senior or which judge has agreed with who? Huh? No. If he concurred, if the judge concurred he agreed with him, then it is academic almost. He might differ on the reasons that he came to the conclusion, but they concurred, they agreed. They, there's no difference between the two judges.							
	j. This doesn't always happen. In one of the uh great court cases in my field, in unjustified enrichment, *Nortje v Poole*, um the judges were split three-two. In the appellate division. And it was whether we should have a general enrichment action or not, and three judges said uh no, its not ready yet, and two judges, Roelf and Ogilve, Ogilvie Thopmson said you should have a general enrichment action. And by just missing it with one judge, the South African legal science was put back um thirty, forty, now going on for fifty years.	X	X	X				LAW
36	a. The judge will, when he starts giving his order, just before that, towards the end, he will say these are the reasons why I decided like I decided.	X	X	X				PEOPLE-BACK
	b. Um during his judgment he will play. He will say 'the	X	X	X				OTHER LAWYERS

	advocate for the defence' or ' the advocate for the respondent said the following, I'm not accepting his version. I'm rejecting his authority. Advocate for the other side forwarded these arguments and I find them acceptable. And for these reasons I'm going to follow that.							
37	Buchanan was one of the people who compiled these um cases.	X	X				X	LAW
38	**LECTURER:** He was the Judge President, he gave the judgment and who sat with him? **STUDENT:** Jones and Murrans. **LECTURER:** Thank you. And what did they say? **STUDENT:** They concurred.	X	X	X				PEOPLE-BACK
39	a. Ratio decidendi is the reason for the judgment. Those are the specific reasons that the judge provides why he's come to the decision uh in the case.	X	X	X				PEOPLE-BACK
	b. very seldom will you find that the judge will base his reason for the decision on fact.	X	X	X				PEOPLE-BACK
	c. Obiter dictum is those things that the judge will say that is not binding, that is not binding but that he feels he cannot keep his mouth shut about.	X	X	X				LAW
40	**STUDENT 3:** The judge isn't the one whose doing the interrogating on the person **LECTURER:** No … but the judge is the one evaluating the evidence.	X	X	X				PEOPLE-BACK
41	a. This judge had the unenviable task of	X	X	X				PEOPLE – FORE

	evaluating a rape victim's uh evidence before the Constitution, uh. He did so, he came to a conclusion that her evidence was fine							
	b. he said *obiter dictum:* 'Listen, we live in a new era, I can't take into consideration here now the Constitution that has not been promulgated yet. But I know this rule is going to be declared unconstitutional under the new Constitution. So if I had been under the new Constitution I would not have used the cautionary rule. As it is in this instance I didn't use the cautionary rule because I believed what she said and I I didn't use it at all. She was a good witness and I accepted her word on the face of it it wasn't necessary for me to use it. That's the *ratio decidendi*. In this case I didn't use it but' and that's the word you must look for ' but, I just want to say in passing, for instance if you don't think I know it, that there is a Constitution and that I agree with the Constitution and in future the cautionary rule will be abandoned.' That is called *obiter dictum*. Do you understand? Its got nothing to do with this case because the Constitution is not has not been um promulgated yet. But the judge is just saying; 'In future there won't be this kind of case.	X	X	X				PEOPLE-FORE LAW

	This question will not come before a court in future again. Because the cautionary rule will be declared unconstitutional.'							
42	NONE							
43	c. if the if the judge is quoting another case, that is law. Um eh you can't ever have a rule of thumb, you must apply it uh to f-find whether it is indeed the ratio decidendi. So a-a judge can indeed refer to another case only in passing. Uh especially if he doesn't apply that case in his judgment. Uh that is possible, so then its obiter dictum.	X	X	X				PEOPLE – BACK LAW
	d. If the judge starts his decision, says 'Oh there's another case in Namibia and this is what the case said, um I'm not going to follow that case, I'm not bound by that case because I'm not in the Western Cape' or whatever 'I'm not going to follow that case, I think that that case was um was uh not correctly uh decided um and I would rather follow the following authorities.' Then obviously that is not ratio decidendi. That is not the reasons for his decision, that is obiter dictum. He's just mentioning it in passing, mostly to show you that he knows about this case. And that his judgment was based on the fact that he considered that case, found it uh wanting and he's just mentioning it in	X	X	X				PEOPLE-BACK OTHER LAWYERS LAW

	passing.							
44	Obviously in the past twenty, thirty, forty years lots of the- huge pieces of Roman law - like the senatusconsultum masoconaum and the senatusconsultum omolierum - those have been demolished, the actio doli has been demolished in the case that you're going to do, uh there are many, there are many pieces of Roman law that has been taken out because they've just become uh anachronistic. Uh or not, the judges perhaps are just a little bit stupid.	X	X	X				LAW
45	OK this is a case that you must go and read ladies and gentlemen. It is a case by the wonderful and very eccentric and very learned uh judge of appeal Solomon.	X	X	X				PEOPLE – BACK
46	a. **LECTURER:** So what is what do you think the new dispensation would do to the judges, or what do you think they did [clears throat]. **STUDENT 4:** They would change their frame of reference, the way they …			X	X	X		-
	b. **STUDENT 4:** They would change their frame of reference, the way they … **LECTURER:** Now how do you do that? A sixty-five-year, middle-aged old male? How do you change his frame of reference? Its not just like, you know, chop off his head and give him another head. How do you do that?				X	X	X	-
47	A judge takes a long time to train.			X	X	X		-
48	the High Court was not a			X	X	X		-

	big problem because apparently there was an understanding, there was a sunset clause in the interim constitution that sitting judges will be respected and they will be retrained to uh uh understand the Constitution. And indeed the sitting judges were retrained							
49	Now appeal means you go to a higher court than the court where the case was heard in the first instance. You go to a higher court if you are convinced that uh that something was done wrong in the lower court uh and that the sentence uh that the magistrate court or judge came to uh was incorrect. The appeal rests only on the four corners of the record of the case. There is no vive voce evidence to be led in an appeal. You cannot, when you have an appeal, introduce new evidence. So, an appeal is a second bite at the cherry. You've gone through the whole thing, the magistrate or judge has made an error. According to you, something was done incorrectly. You want to take this to a higher authority uh to rectify that in order that the sentence can be changed.	X	X	X				PEOPLE - FORE
50	No I suggested when the when the um when the Constitution was being written I was at um Justice College. I lectured at the um Justice College and we went all around the country to lecture to all the magistrates and judges to introduce the new Constitution to them.			X	X	X		-
51	a. Mostly the High Court judges confirms the	X	X	X				OTHER LAWYERS

	the judgment of the magistrate							
	b. but if it is an over enthusiastic magistrate, uh um it can be sent uh back and the magistrate must then supply reasons why he um sentenced the person to such uh to a higher sentence than is customary	X	X	X				OTHER LAWYERS
	c. and if the court is satisfied, if the High Court is not satisfied it will change the the judgment of the magistrate.	X	X	X				OTHER LAWYERS
52	a. what I had forgotten, you know I was still a very junior magistrate, what I had forgotten is it goes on automatic review to the judge of the Supreme	X	X	X				OTHER LAWYERS
	b. The judge sits in his chambers, the judge is now a senior advocate who's been elevated to a judge. He sits in his chambers he's high on on on human rights and things - which is fine - but he doesn't understand what a magistrate's court looks like. He doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance. He doesn't you know they've never seen that, its just not part of their frame of reference. They are just concerned about procedural correctness.	X				X	X	-
53	a. Now, I'm irritated because you know - the food is in the kitchen, I must look after the food and	X	X	X				OTHER LAWYERS

	I've got ten or twelve people to serve and I don't want phone calls now. Grab the phone: 'Yes who's this!' And a very civilized English voice on the other side:' Excuse me, but um may I please talk with magistrate Serfontein?' [raised pitch] I said 'Yes its him talking I'm not on duty this weekend *please* who is this?' 'Mr Serfontein this is Judge Foxcroft'. [starts laughing] 'Do you remember the case of State v Ngobe' or whatever. I said 'No I don't remember the case your honour or my lord' or I don't know what I called him or judge							
	b. 'I have tonight issued an urgent mandamus' or something 'instructing Pollsmoor Prison to release this man and I would like it if you could send me a full set of reasons why you for a first offender sentenced this man to twelve months in prison. I'm forwarding the court record to you and if you could reply by Monday afternoon latest I would appreciate it'.	X	X	X				OTHER LAWYERS PEOPLE – FORE
54	So um you can go and read about Oliver Schreiner. Um there are many articles in the law journal about him. Professor Kahn wrote a beautiful obituary about him when he passed away. Um but he was indeed	X	X	X				ULTIMATE OUTCOMES

	involved in the Harris case and he was one of the few judges that stood up against the apartheid regime.							
55	a. OK the first thing that we know about the Constitutional Court is that it was instituted by the um 1994 Constitution. It is a new court. Justices were appointed to that uh court which um were charged with looking after the Bill of Rights and looking after the human rights of South Africa.	X	X	X				LAW
	b. The courts, up to that point, as I said on Tuesday, the courts were not wholly trusted by the new regime or by the new government because they were seen as co-operating with the apartheid government and they were not a hundred percent completely trusted by the new government.	X	X	X				ULTIMATE OUTCOMES
	c. in other regimes in other um uh jurisdictions where there has been a transfer of power from one group of people to another uh it happened on a much more revolutionary basis and all the old judges were simply uh dismissed. Or they were simply, they were simply uh retired. Uh if you look at the problem in Pakistan not that that is now a modern democracy, but it least it strives to be a modern democracy, one of the major upheavals in Pakistan is the fact that			X	X	X		-

	the President dismissed the chief justice.							
	d. Now this didn't happen in South Africa. We had an evolutionary change. Um uh and the chief justice of the previous regime, Justice Corbett was asked by President Mandela to officiate at the swearing in ceremony of the new President. So the chief justice of the previous regime was asked to swear in the new President of the new government.	X	X	X				PEOPLE – FORE
	e. I'm making that point just to illustrate to you that there wasn't a clean sweep. The only clean sweep that there was, was that eleven new justices were appointed to a new court called the Constitutional Court.				X	X	X	-
56	a. Um [fumbles over words] of course its true, because all courts are only sitting for certain times of the year. Um and the Constitutional Court has got um a specific diary or r-roster and that are in session for certain times and they are in recess for other times. So ub-h exactly the same with High Courts. The High Court doesn't sit for the whole year, and the same for the Supreme Court of Appeal.	X		X		X		-
	b. Um and that is to give the Justices times to do research. And write the judgments. And um to come up to date with the most current law.	X	X	X				WORK

57	the new government still saw the Appellate Division as a bit tainted and uh as not supporting but standing quietly by while the apartheid government ravished human rights.		X	X	X			ULTIMATE OUTCOMES
58	NONE							-
59	The names and the geographical jurisdiction of the High Courts are being considered or they have been considered and a Commission of Inquiry under Judge Hoexter who is the father of Professor Hoexter who's one of our leading academics at the Wits Law School. The Hoexter Commission has designed a new structure for the whole of South Africa.	X	X	X				INSTITUTIONAL STRUCTURE
60	The judges that sit in the local division are the exact same judges that sit in the provincial division. They are interchangeable. It's a roster. You sometimes sit in the provincial division, sometimes in the local division.	X		X		X		-
61	NONE							
62	a. Justice Albie Sachs, a fighter for human rights. Although he practiced for a very limited matter, very limited matter in Mozambique, and the neighbouring countries	X	X				X	PEOPLE-BACK
	b. Although he practiced for a very limited matter, very limited matter in Mozambique, and the neighbouring countries, and he is a qualified lawyer um he is he was appointed because of his role in the struggle, because of the sacrifices that he has made and because of his passion for human rights. You can				X	X	X	-

	go through all the justices of the uh uh Supreme uh of the Constitutional Court, they were all appointed specifically for uh uh very specific human rights reasons.							
63	a. The guardian of the guardian? There's no custos custodius for the High Court. Except of course the Constitutional Court when it goes on review in the Constitutional Court. But no no automatic review for the High Court.			X	X	X		-
	b. You must also remember, a district court magistrate, and a regional court magistrate, to a lesser extent, is *far* removed from a judge. Judges are appointed the best of the best. Well … some people will not agree with that. But the idea is the very *best* senior advocates. The very best of the practicing advocates are appointed as judges. So uh when you reach the stage where you are invited to become a judge, uh you really know your business. You've been through the mill and you really know your law.				X	X	X	-
64	You would start by being a junior prosecutor, senior prosecutor uh being elevated to the bench becoming a magistrate, senior magistrate, regional court magistrate, senior court magistrate, regional court president and then be invited to become a judge in the High Court.			X	X	X		-
65	**LECTURER:** And a judge in			X	X	X		-

	the High Court, especially with some standing, a couple of year's standing, you don't need to review his work, you know.							
66	And went on review and was confirmed on review. By the way, if you think all my cases were turned over [laughs, amid class laughter]. It was confirmed by no lesser luminary than judge Eloff, who was Judge President. It was confirmed on review.	X	X	X				OTHER LAWYERS
67	**STUDENT 3:** I was under the conception that um if someone pleads guilty in court the magistrate or judge is more likely to give a tiny bit less of a harsher sentence because of a … **LECTURER:** Yes, it could be, it could be. If you plead guilty, it save an enormous amount of time, it saves an enormous amount of time, um and um you are helping the court. And it shows remorse! You admit 'Look, mea culpa, I'm guilty, I'm here, I'm throwing myself on your mercy.' Then of course the court will take it into consideration.	X	X	X				PEOPLE-FORE
68	a. Yes, of course, a court all courts except if the judge rules that it is in camera. In camera means that because of the sensitivity of the case uh it shouldn't be held in public. Those cases are usually where children are involved. If the child has been molested then obviously you don't want the public to sit there and look at the poor child giving evidence. Um you know if its high priority - Zuma asked that his	X	X	X				WORK

	case be heard in camera and the judge said 'No'. Um but usually if its high profile or if its very sensitive. If it concerns national security as Zuma said it did, national security on the weapons, whatever, then the judge can decide that the court will be heard in camera.							
	b. And that the court doors are closed and that there are notices that this court is in camera.	X	X				X	WORK
69	a. why do you need a High Court to listen to unopposed divorces.	X	X	X				PEOPLE-BACK
	b. if there's an agreement, the judge says 'Ok, the agreement is now an order of the court and the parties are divorced. Thank you'	X	X	X				PEOPLE-FORE
70	a. you must consider the cases	X	X	X				PEOPLE-BACK
	b. it's the price that we have to pay instead of having a complete breakdown and no courts and no and chop off the heads of the old judges				X	X	X	-
	c. price that you have to pay is you must slowly but surely appoint new judges, the old judges must train the new judges				X	X	X	-
71	a. But it is a paper file that is opened for your case in the court and that file goes to the judge, not to you, that file goes to the judge.				X	X	X	
	b. If there's *anything* wrong with that file, the judge will only keep you responsible. The judge will ask *you*, um, Mr [state's	X	X	X				OTHER LAWYERS

	student's surname] why is the file not properly paginated?							
	c. So before the document goes to the judge on the day of the trial, somebody, usually the clerk of the, the candidate attorney of the attorney's office, must go to the file and see to it that it is paginated				X	X	X	-
	d. If it is not correct then the judge can throw out your case.	X	X	X				PEOPLE-BACK OTHER LAWYERS
72	a. If there's a grammatical error. If there's a technical error, a legal error, if you've made an aversion on a statement that is wrong technically, legally, your case is thrown out.	X	X	X				PEOPLE-BACK OTHER LAWYERS
	b. The judge will give you an opportunity. He'll say, uh, please Mr [state's student's surname], address me on this novel interpretation that you have in clause 3.	X	X	X				OTHER LAWYERS
	c. an just as well, you know, pack up and say 'I'm sorry my lord, um uh, I'm relatively inexperienced in these matters and uh, it slipped in, I beg your lordship's indulgence to amend it. And your lordship will not give you an indulgence. He will say, well the indulgence I will give you is that I will take the case off the roll for you completely and then you can put it back again when its correct.	X	X	X				PEOPLE-BACK OTHER LAWYERS
	d. You've wasted *thousands* of rand by appearing and	X	X	X				PEOPLE-BACK OTHER LAWYERS

	preparing to appear for that day for trial in court and its just thrown out because you've made something wrong.							
	e. So, for twenty-five years he's been looking through these pleadings. So he, it *jumps out* uh uh at him. As soon as he reads the pleadings and you've made an error it jumps out.	X	X	X				PEOPLE-BACK
73	With the *permission* of the judge, can appear in the High Court. (Breathes in deeply). … the judge will *allow* it. If it's an uncontested divorce. If you know, if you're a senior, uh, practitioner, the judge will of course *allow* it uh because you know uh want to do it yourself. … But you do need, you do need *permission* from the judge.	X	X	X				OTHER LAWYERS
74	they will kill if I say that they belong in the civil service but the most important civil service job that there is is of course a judge. Um judge's doesn't belong in the civil service but they get paid by the government, they get a car, they get a government car, um uh and um just for you know for interest's sake, its they're certainly not private I mean they don't earn their own salaries, so its just to put them somewhere I put them under the civil service.				X	X	X	-
75	a. Judges ladies and gentlemen should be, they were always in the past, the best senior advocates. Uh, are asked to act as judges and then they if they are good then				X	X	X	-

	they prove themselves then they are asked by the Minister of Justice to consider becoming a judge. Their names are then sent to the Judicial Services Commission. That is how a judge is appointed.							
	b. The, uh, names are vetted by the State President, the State President sends, the State President gets them from the Minister of Justice. The Minister of Justice gets it obviously from the Bar association				X	X	X	-
	c. Um and those people are then scrutinized uh albeit behind closed doors which I think is wrong. But they get they get scrutinized by a panel which is called the Judicial Service Commission.			X	X	X		-
	d. And they ask you everything. They ask you about your personal life, they ask you about your political views, they ask you about your sexual orientation, they ask you about your health, they ask you everything.			X	X	X		-
76	a. And this is where - perhaps you will remember - this is where it happened, that uh when Judge Cameron was interviewed uh for the Supreme Court of Appeal, he was already a Judge but he was interviewed for the Supreme Court of Appeal			X	X	X		-
	b. he took the very bold step of saying - they didn't ask him -	X	X	X				INSTITUTION

	everybody knew that he was gay bit they didn't ask him, they asked him about um uh about his sexual orientation and of course he explained that to them and what he will do and how he thinks that will add value to the job, and then on his own he said: 'Look, before you move on I think it is necessary for you to know that I am HIV-positive and I have been for seven years. I am on uh retroviral medicine, thank heavens I can afford it, and I am being looked after by very high qualified medical people and it is under control and there's no reason why I shouldn't be able to carry out my job as any other person if I am if I keep on using my medication.'							
	c. And they appointed him, despite his uh revelation before the committee, they appointed him and as you know he's still going strong.				X	X	X	-
77	Uh nowadays of course its no longer compulsory that you must be a senior advocate. Uh uh attorneys have been appointed as judges.				X	X	X	-
78	she is more academic and her judgments are far better theoretically-founded than her colleagues	X	X	X				-
79	A judge gets about a, a junior, a newly appointed judge gets about seven six hundred thousand a year.				X	X	X	PEOPLE-BACK

2: CIRCUMSTANCES OF SOCIAL ACTION (CSA)

JUDGE QUOTATION NO.	CIRCUMSTANCES OF SOCIAL ACTION (CSA) QUOTATIONS	CIRCUMSTANCE TYPE
1	NONE	
2	you can believe on a spiritual level, you can believe 'this is how law works, law is just a reflection of a higher law' and still be a judge and sit in judgment of others objectively.	EMOTION
3	NONE	
4	e. you don't bring along with you your own personal baggage. You don't / because this is abhorrent to everything you stand for / first of all you don't agree as a judge, you don't agree that males should have intercourse with one another. That is something that is abhorrent to you. That's not strange, five years ago in this country it was against the law. That's not strange at all. But you don't bring your personal subjective view to court. Secondly, you might find it from a Christian point of view or from a decency point of view completely abhorrent that uh people have to hurt themselves to … in order to get sexual gratification. That is not relevant. What you think of it while you are uh busy with recreation with your family and your friends and uh socializing and your view in society outside the courtroom is is one thing. What you must do when you sit in judgment on a matter like this is you must look for the law.	EMOTION
	f. What you think of it while you are uh busy with recreation with your family and your friends and uh socializing and your view in society outside the courtroom is is one thing.	LOCATION
5	But the judge said 'no, marriage is a very very serious and a very solemn um contract between two people and uh it shouldn't be handled frivolously and meaning 'in' the house also means in the garden.	EMOTION
6	Um, the ordinary Oxford English Dictionary if / and that's what he used / means uh if you look at the ordinary Oxford Dictionary in means … 'In' is defined as follows: inclusion or position within limits of space.' That is what the Oxford English Dictionary says about 'in'. So if you follow the Oxford English Dictionary the judge should have said 'mmmm … sorry .. your marriage is, is over.' But, it is a characteristic of law of good law, of a ordered society that we strive towards certainty. So the judge looked *beyond* the dictionary meaning of the word 'in' and he extended it to mean also in an open space, outside the closed space.	RESOURCE
7	The ma .. the contract of marriage is so important that the judge said 'I'm not going to be bound by	RESOURCE

	what the dictionary says. I will ex … I will use my discretion' - we'll get to discretion now. 'I will use my discretion to to widen this concept of "in", just so that we have certainty.	
8	NONE	
9	then you have to go to court and the judge will then decide whether he will interpret the legislation and he will decide whether it was valid or not	LOCATION
10	c. Look, a judge has got a discretion. A judge has got a discretion to interpret um uh legislation	RESOURCE
	d. The result will be hundreds of people are now going to come to court	LOCATION
	e. Uh ow uh the judge the judge is the representative of us on the bench, of society on the bench.	LOCATION
11	where the judges had to decide about um uum the gay marriages uh that would cause enormous friction in society [coughs]. But they had the Constitution to consider, and the Constitution is an *overwhelming* authority. So you can't go against the Constitution. So, they decided to declare gay marriages valid, to declare it valid that people of the same sex can get married, create some uncertainty, but in accordance with the Constitution.	EMOTION
12	NONE	
13	c. And that confession will be allowed in court subsequently.	LOCATION
	d. Now your legal feeling, such as it is at this moment, should already tell you that there's something wrong with that. Uh-h-h you can't have (a) the right to silence; uh (b) the presumption of innocence, (c) decent ordinary human rights of dignity. You can't have that and a Criminal Procedure Act that says you can be forced to make a confession, the confession can be accepted against you and you can uh be tortured, your dignity can be um uh affected.	RESOURCE
14	a. Who's the deputy chief justice, he's on sabbatical at Wits now … he's sitting here in Wits, he's doing sabbatical work	LOCATION
	b. he's on sabbatical at Wits now … he's sitting here in Wits, he's doing sabbatical work	RESOURCE
15	NONE	
16	when the courts, the judges, when they sit, and they decide law cases, what do they use? They use legislation and they use the common law. They use other cases.	RESOURCE
17	a. when the judge sits in the court	LOCATION
	b. when the judge sits in the court he does he does he or she doesn't decide 'OK I'm going to decide this interpretation on this rule'. Its an ex post facto theoretical um construct in other words you look at all the ways in which judges interpret uh rules, and then we formulate the theory. You understand? That's how all theories work. They don't, its not watertight compartments neatly	RESOURCE

	stacked that you can choose like pigeon holes which one you're going to use and that's not the way its done.	
18	NONE	
19	Uh law is far more speculative. Um the the the theories that we have are theories that are composed, not through empirical experimentation, like you would do in natural science, but are theories that are composed, as I said in the beginning, ex post facto through deduction. We see this is what the judges do. The judges when they sit, they don't have in their minds, the old judges especially, they didn't have these theories.	RESOURCE
20	d. if they see that you can do the work then they invite you to become a full-time judge in the provincial division, or the local division, after years of service in the provincial division or the local division, if you are deemed to be fit, they are invited as an acting judge to the Supreme Court of Appeal or to the Constitutional Court.	EMOTION
	e. if they see that you can do the work then they invite you to become a full-time judge in the provincial division, or the local division, after years of service in the provincial division or the local division	LOCATION
21	So the judge, when he sits in the provincial division has got the advantage of the entire scope of authorities, presented by the two advocates.	LOCATION
22	he will decide yes I'm going to use this authority or no I'm going to decide against the authority	RESOURCE
23	a. As a matter of fact that's what happens every day in court.	LOCATION
	b. The judge then has all these authorities in front of him with various weights that he attached to the authorities, depending on what they are, and then he does his own research and he comes to a conclusion, which authorities to accept and which to reject because every case is different. When I talk about a precedent, no two cases can be exactly the same. I mean, you can understand that for yourself. The facts will - every case will have different facts. So there will always be cases that you can argue are for, and cases that you argue are against it. And it's the work of the judge to decide which of the cases to use to support his decision.	RESOURCE
24	because you have magistrates in the lower courts and judges in the higher courts.	LOCATION
25	a. In the le- technical legal sense, the word pre-precedent means a court case which you quote in a court of law as a judge as authority for your decision.	RESOURCE
	b. precedent means a court case which you quote in a court of law as a judge	LOCATION
26	a. South Africa works on a system of a hierarchy of courts and of precedents. We work on a system	RESOURCE

	called *stare decisis*, in other words the lower courts are bound by the higher courts. So if you've got a case that is exactly the same case as a case in the Transvaal, yes, and you are now say in Durban, yes you've got the right to come to a different conclusion, and say for these reasons, very good reasons must they be, I'm not following my brother in the Transvaal. Ok so that that you understand. When you then have a new judge and a new case, and the facts are similar to both the previous case that didn't follow the Transvaal, and the Transvaal case um that was decided originally, the judge in the Natal case, in the Durban case, will - if he wants to follow the Transvaal case - will very pertinently state: 'My brother in the Transvaal made this decision in 1962, it was wrongly not followed by my brother in 1968 but now in 1992 I am overruling him and I am following the Transvaal judgment. Uh he wouldn't say, he wouldn't you know its unthinkable of making a whole judgment and not referring to the Transvaal judgment. Because what you're ultimately aiming at is that all the courts will agree with all the legal points that may exist.	
	b. And for that reason we also have the Supreme Court of Appeal. If there's a dispute between two courts and this dispute is really damaging to legal certainty, that case then goes up to the Supreme Court of Appeal, the Supreme Court of Appeal makes a precedent makes a decision, and *everybody* is bound by that.	RESOURCE
27	a. if there's a precedent there's a court case for instance in the um Cape Provincial Division	LOCATION
	b. That case is what we call a precedent. It is used and it is followed by other judges in the Cape.	LOCATION
28	NONE	
29	And they they talk in a language of their own they have arguments of their own and it is extremely long-winded.	EMOTION
30	And if you prove yourself, if you prove to be a good judge, if your judgments are sound then they invite you to become a judge.	EMOTION
31	Judge King and Foxcroft and ol' are both very well-known as judges from the Cape uh Provincial Division	LOCATION
32	Judge President. In other words he is the highest judge in the Cape Provincial Division.	LOCATION
33	Some of these judgments can become very tedious and become very long-winded and you must distinguish between what is important and not important.	EMOTION
34	NONE	
35	the judges were split three-two. In the appellate division.	LOCATION
36	The best is go to the order, go to the end where you	RESOURCE

	look for the ratio decidendi, the reasons for the decision, where he says, 'OK everything considered now, this is what I've decided.	
37	NONE	
38	NONE	
39	Ratio decidendi is the reason for the judgment. Those are the specific reasons that the judge provides why he's come to the decision uh in the case. This has usually only got to do with law. Very seldom, but its not impossible, very seldom will you find that the judge will base his reason for the decision on fact. The way to differentiate between an obiter dictum and a ratio decidendi is to look for something that is involved with law. Obiter dictum is those things that the judge will say that is not binding, that is not binding but that he feels he cannot keep his mouth shut about. Just observations in passing.	RESOURCE
40	NONE	
41	a. OK she … she summarized it quite correctly. This is an old rule. It's a rule that comes from the Roman-Dutch law. Uh it's the old its very old pre-constitutional conception of females that females are emotional and they can't that they they don't know what's going on in reality and more so when they've been sexually violated. They lose touch with reality. And they fantasize and you can't trust them. [pulls face toward STUDENTS 1 and 19] That's the old concept of uh of females being raped. This judge had the unenviable task of evaluating a rape victim's uh evidence before the Constitution, uh. He did so, he came to a conclusion that her evidence was fine but, and here's the thing, he said *obiter dictum:* 'Listen, we live in a new era, I can't take into consideration here now the Constitution that has not been promulgated yet. But I know this rule is going to be declared unconstitutional under the new Constitution. So if I had been under the new Constitution I would not have used the cautionary rule. As it is in this instance I didn't use the cautionary rule because I believed what she said and I I didn't use it at all. She was a good witness and I accepted her word on the face of it it wasn't necessary for me to use it.	EMOTION
	b. This judge had the unenviable task of evaluating a rape victim's uh evidence before the Constitution, uh. He did so, he came to a conclusion that her evidence was fine but, and here's the thing, he said *obiter dictum:* 'Listen, we live in a new era, I can't take into consideration here now the Constitution that has not been promulgated yet. But I know this rule is going to be declared unconstitutional under the new Constitution. So if I had been under the new Constitution I would not have used the cautionary rule. As it is in this instance I didn't	RESOURCE

	use the cautionary rule because I believed what she said and I I didn't use it at all. She was a good witness and I accepted her word on the face of it it wasn't necessary for me to use it. That's the *ratio decidendi*. In this case I didn't use it but' and that's the word you must look for ' but, I just want to say in passing, for instance if you don't think I know it, that there is a Constitution and that I agree with the Constitution and in future the cautionary rule will be abandoned.' That is called *obiter dictum*.	
42	NONE	
43	That is not the reasons for his decision, that is obiter dictum. He's just mentioning it in passing, mostly to show you that he knows about this case. And that his judgment was based on the fact that he considered that case, found it uh wanting and he's just mentioning it in passing.	RESOURCE
44	NONE	
45	NONE	
46	**STUDENT 4:** They would change their frame of reference, the way they … **LECTURER:** Now how do you do that? A sixty-five-year, middle-aged old male? How do you change his frame of reference? Its not just like, you know, chop off his head and give him another head. How do you do that?	EMOTION
47	Its not an its not an easy its not an easy job.	EMOTION
48	NONE	
49	NONE	
50	And we also had workshops with um all the stakeholders to determine how the new Constitution's going to work because we didn't have any court cases or any precedents to go on.	LOCATION
51	Mostly the High Court judges confirms the the judgment of the magistrate, but if it is an over enthusiastic magistrate, uh um it can be sent uh back and the magistrate must then supply reasons why he um sentenced the person to such uh to a higher sentence than is customary uh and if the court is satisfied, if the High Court is not satisfied it will change the the judgment of the magistrate.	EMOTION
52	a. The judge sits in his chambers, the judge is now a senior advocate who's been elevated to a judge. He sits in his chambers he's high on on on human rights and things - which is fine - but he doesn't understand what a magistrate's court looks like.	LOCATION
	b. He sits in his chambers he's high on on on human rights and things - which is fine - but he doesn't understand what a magistrate's court looks like. He doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance. He doesn't you know they've never seen that, its just not part of their frame of reference. They are just concerned about procedural correctness.	EMOTION

53	a. I said 'uh-h. 'I have tonight issued an urgent mandamus' or something 'instructing Pollsmoor Prison to release this man	RESOURCE
	b. Of course three months later on a Saturday evening, on a Saturday evening in Cape Town, um I had a dinner party, I had lots of people there, at my dinner party,and it was about se-seven o clock. You know just after after the people have arrived and they've had their first course, then there's a phone call. Now, I'm irritated because you know - the food is in the kitchen, I must look after the food and I've got ten or twelve people to serve and I don't want phone calls now. Grab the phone: 'Yes who's this!' And a very civilized English voice on the other side:' Excuse me, but um may I please talk with magistrate Serfontein?' [raised pitch] I said 'Yes its him talking I'm not on duty this weekend *please* who is this?' 'Mr Serfontein this is Judge Foxcroft'. [starts laughing] 'Do you remember the case of State v Ngobe' or whatever. I said 'No I don't remember the case your honour or my lord' or I don't know what I called him or judge um and I said 'uh-h. 'I have tonight issued an urgent mandamus' or something 'instructing Pollsmoor Prison to release this man and I would like it if you could send me a full set of reasons why you for a first offender sentenced this man to twelve months in prison. I'm forwarding the court record to you and if you could reply by Monday afternoon latest I would appreciate it'.	EMOTION
54	Um but he was indeed involved in the Harris case and he was one of the few judges that stood up against the apartheid regime.	EMOTION
55	a. The courts, up to that point, as I said on Tuesday, the courts were not wholly trusted by the new regime or by the new government because they were seen as co-operating with the apartheid government and they were not a hundred percent completely trusted by the new government.	EMOTION
	b. Um uh and the chief justice of the previous regime, Justice Corbett was asked by President Mandela to officiate at the swearing in ceremony of the new President.	LOCATION
56	Um [fumbles over words] of course its true, because all courts are only sitting for certain times of the year. Um and the Constitutional Court has got um a specific diary or r-roster and they are in session for certain times and they are in recess for other times. So ub-h exactly the same with High Courts. The High Court doesn't sit for the whole year, and the same for the Supreme Court of Appeal. Um and that is to give the Justices times to do research. And write the judgments. And um to come up to date with the most current law. To be a just- to be a uh um to be a	RESOURCE

	justice in South Africa, to be a judge in South Africa is not easy. Um it's a very dynamic environment. So uh besides holiday they need time off from court work, so that they can catch up with their research.	
57	the new government still saw the Appellate Division as a bit tainted and uh as not supporting but standing quietly by while the apartheid government ravished human rights.	EMOTION
58	NONE	
59	NONE	
60	The judges that sit in the local division are the exact same judges that sit in the provincial division.	LOCATION
61	NONE	
62	Justice Albie Sachs, a fighter for human rights. Although he practiced for a very limited matter, very limited matter in Mozambique, and the neighbouring countries, and he is a qualified lawyer um he is he was appointed because of his role in the struggle, because of the sacrifices that he has made and because of his passion for human rights.	EMOTION
63	You've been through the mill and you really know your law.	EMOTION
64	NONE	
65	NONE	
66	And went on review and was confirmed on review. By the way, if you think all my cases were turned over [laughs, amid class laughter]. It was confirmed by no lesser luminary than judge Eloff, who was Judge President. It was confirmed on review.	RESOURCE
67	a. I was under the conception that um if someone pleads guilty in court the magistrate or judge is more likely to give a tiny bit less of a harsher sentence	LOCATION
	b. **STUDENT 3:** Sir, I was under the conception that um if someone pleads guilty in court the magistrate or judge is more likely to give a tiny bit less of a harsher sentence because of a … **LECTURER:** Yes, it could be, it could be. If you plead guilty, it save an enormous amount of time, it saves an enormous amount of time, um and um you are helping the court.	RESOURCE
	c. And it shows remorse! You admit 'Look, mea culpa, I'm guilty, I'm here, I'm throwing myself on your mercy.' Then of course the court will take it into consideration.	EMOTION
68	a. **LECTURER:** Yes, of course, a court all courts except if the judge rules that it is in camera. In camera means that because of the sensitivity of the case uh it shouldn't be held in public.	LOCATION
	b. Those cases are usually where children are involved. If the child has been molested then obviously you don't want the public to sit there and look at the poor child giving evidence.	EMOTION
69	a. The idea is that they would help to alleviate the pressure on the High Court.	EMOTION
	b. Um if there's an agreement, the judge says 'Ok,	RESOURCE

	the agreement is now an order of the court and the parties are divorced. Thank you' Chup [makes as if he is slamming down with a gavel].	
70	a. You know, um justice is not something that you can rush, on the one hand. Um uh justice is not something that uh you can use a sausage machine for. Its um you know, you must consider the cases. It takes time.	RESOURCE
	b. And then, you know, we've been through a transformation. We've expected an enormous amount from our justice system. And its it's the price that we have to pay instead of having a complete breakdown and no courts and no and chop off the heads of the old judges, that's on the one hand. The price that you have to pay is you must slowly but surely appoint new judges, the old judges must train the new judges and the new judges must get used to the work. And that takes time, that you don't / you know, a judge is not made overnight. Um uh uh you know even a plumber, if you ask me now to become a plumber it will take me, well, me specifically, about 28 years [laughter] but you know you can't send somebody in to do a complicated electrical job if he's not trained electrician. Or even if he's a trained electrician if he hasn't got experience. You know, it takes time, it really takes time.	RESOURCE
	c. Um, you know, the courts are full because there's lots of commercial activity, there's lots of criminal activity, there's lots of work, because it's a society in transformation. There is just an enormous amount of work.	EMOTION
71	If it is not correct then the judge can throw out your case.	EMOTION
72	a. The judge will give you an opportunity. He'll say, uh, please Mr [state's student's surname], address me on this novel interpretation that you have in clause 3. And then you will be able to address him but I mean if you, uh uh, if he talks like that you know you're stuffed. You can just as well, you know, pack up and say 'I'm sorry my lord, um uh, I'm relatively inexperienced in these matters and uh, it slipped in, I beg your lordship's indulgence to amend it. And your lordship will not give you an indulgence. He will say, well the indulgence I will give you is that I will take the case off the roll for you completely and then you can put it back again when its correct.	EMOTION
	b. And then you've wasted costs. You've wasted *thousands* of rand by appearing and preparing to appear for that day for trial in court and its just thrown out because you've made something wrong.	LOCATION
73	He knows absolutely everything and he then, with the permission of the judge, can appear in the High Court.	LOCATION

74	OK of course the most important civil service and they will kill if I say that they belong in the civil service but the most important civil service job that there is is of course a judge.	EMOTION
75	a. Judges ladies and gentlemen should be, they were always in the past, the best senior advocates. Uh, are asked to act as judges and then they if they are good then they prove themselves then they are asked by the Minister of Justice to consider becoming a judge.	EMOTION
	b. Um and those people are then scrutinized uh albeit behind closed doors which I think is wrong. But they get they get scrutinized by a panel which is called the Judicial Service Commission.	EMOTION
	c. It's a very high-powered, a very high-powered panel that you appear before. And they ask you everything. They ask you about your personal life, they ask you about your political views, they ask you about your sexual orientation, they ask you about your health, they ask you everything.	EMOTION
	d. It's a very high-powered, a very high-powered panel that you appear before.	LOCATION
76	a. this is where it happened, that uh when Judge Cameron was interviewed uh for the Supreme Court of Appeal, he was already a Judge but he was interviewed for the Supreme Court of Appeal, uh he took the very bold step of saying - they didn't ask him - everybody knew that he was gay bit they didn't ask him, they asked him about um uh about his sexual orientation and of course he explained that to them and what he will do and how he thinks that will add value to the job, and then on his own he said: 'Look, before you move on I think it is necessary for you to know that I am HIV-positive and I have been for seven years. I am on uh retroviral medicine, thank heavens I can afford it, and I am being looked after by very high qualified medical people and it is under control and there's no reason why I shouldn't be able to carry out my job as any other person if I am if I keep on using my medication.' And of course that was that caused front frontpage highlights and everybody was everybody was asking whether it was necessary to do that and or was it very courageous to do it. Well I don't know you must maar decide for yourself. I know Edwin very well and he is a very courageous person.	EMOTION
	b. Well I don't know you must maar decide for yourself. I know Edwin very well and he is a very courageous person. Sometimes of course everybody's got a got a political agenda and sometimes he is very enthusiastic about HIV/Aids. And the new role that gay people have in the community but perhaps, you know, it is necessary.	EMOTION

	c. Uh its something that you must decide for yourself. But that's where it came out. At the Judicial Services Commission.	LOCATION
77	NONE	
78	Judge Carole Lewis who was the Dean of this law school became a judge in the Witwatersrand, and now she's at the Supreme Court of Appeal.	LOCATION
79	You must be very comfortable, uh and have whatever you want	EMOTION

3: SOCIAL ACTORS (SAct)

JUDGE QUOTATION NO.	SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	NONE	
2	sit in judgment of others objectively	PARTIES – Included
3	if they think that the judge made a mistake then of course you can appeal, even if you pleaded guilty	PARTIES – Included
4	a. when we sit in judgment on a matter like this	PARTIES – Excluded
	b. you don't agree that males should have intercourse with one another	PARTIES – Included
	c. you might find it from a Christian point of view or from a decency point of view completely abhorrent that uh people have to hurt themselves to … in order to get sexual gratification	PARTIES – Included
	d. when you sit in judgment on a matter like this	PARTIES – Excluded
5	i. a judge that has to interpret whether this man's marriage is uh uh valid or not	PARTIES – Included
	j. They were in the garden. They w .. got married in the garden. But the judge said 'no, marriage is a very very serious and a very solemn um contract between two people	PARTIES – Included
6	the judge didn't follow the letter of the law, but ***he*** rather preferred to give a decision whereby certainty would be confirmed. Certainty would be confirmed. Do you understand that? Hmmm … Any questions? **STUDENT:** Just say that again ***he*** didn't follow the letter of the law … **LECTURER:** ***He*** didn't follow the letter of the law because then 'in' would mean 'inside the house'. Um, the ordinary Oxford English Dictionary if / and that's what ***he*** used / means uh if you look at the ordinary Oxford Dictionary in means … 'In' is defined as follows: inclusion or position within limits of space.' That is what the Oxford English Dictionary says about 'in'.	CLASSIFICATION – Gender – Male (5 instances of 'he')

	So if you follow the Oxford English Dictionary the judge should have said 'mmmm … sorry .. your marriage is, is over.' But, it is a characteristic of law of good law, of a ordered society that we strive towards certainty. So the judge looked *beyond* the dictionary meaning of the word 'in' and ***he*** extended it to mean also in an open space, outside the closed space.	
7	that is that is what the judge based ***his*** decision on	CLASSIFICATION – Gender – Male (1 instance of 'his')
8	Only if you know if if if there was a blatant disregard of all the formalities will a judge uh consider uh declaring the marriage null and void	PARTIES – Excluded
9	e. If you get married in a submarine, and then you subsequently want to declare it ann … null and void um because it was not in a house then you have to go to court	PARTIES – Included
	f. the judge will then decide whether ***he*** will interpret the legislation and ***he*** will decide whether it was valid or not	CLASSIFICATION – Gender – Male (2 instances of 'he')
10	a. the judge will always in a case where ***he*** has to interpret something like this, will always favour the interpretation that gives the greater legal certainty. And that's not difficult to establish. Um uh what you what you must establish is, if I interpret this [points to the word 'in' on the blackboard] as the dictionary says, and declare these people's marriage null and void, what will the result be? The result will be hundreds of people are now going to come to court and say 'Ja but we also got married in strange places and we are now also tired of our spouses and we don't want, we also want it null and void. You understand? That will lead to massive uncertainty. Even people who don't want to declare their marriage null and void may now think 'Oh, but I also got married in a garden, is	CLASSIFICATION – Gender – Male (2 instances of 'he')

	my marriage now valid?' [Makes a gesture that seems to say 'You see?] **STUDENT 1:** So ***he's*** just referred to what the majority of society would … find acceptable …or	
	b. declare these people's marriage null and void	PARTIES – Included
	c. The result will be hundreds of people are now going to come to court and say 'Ja but we also got married in strange places and we are now also tired of our spouses and we don't want, we also want it null and void.	PARTIES – Included
11	d. they decided to declare gay marriages valid	PARTIES – Excluded
	e. to declare it valid that people of the same sex can get married	PARTIES – Included
12	a. the only the only time that there was any kind of contro controversy and it's a very slight controversy, was when Justice Mohammed was appointed Chief Justice uh and its was that strange time when South Africa was in transition so what you had was Justice Corbett, who was the old chief justice, and who swore in minster Mandela as the first president, he retired, and of course he had a deputy in the Supreme Court of Appeal that was waiting in the wings to become the chief justice, Hefer, who was who a-a-a- white uh old judge from the old uh dispensation. He wasn't he wasn't a bad judge, he was as a matter of fact a very good judge but he was a judge appointed by the previous government. And the President instructed the Judicial Services Commission, or the President made it known to the Judicial Services Commission that his candidate for the position of chief justice is not Hefer but Mohammed, who was at the Constitutional Court. And then of course, you know,	CLASSIFICATION – Race

		strangely enough, the Judicial Services Commission appointed uh uh Mohammed.	
	b.	Justice Mohammed	NOMINATION
	c.	Justice Corbett, who was the old chief justice, and who swore in minster Mandela as the first president, he retired, and of course he had a deputy in the Supreme Court of Appeal that was waiting in the wings to become the chief justice	NOMINATION
	d.	Hefer, who was who a-a-a-white uh old judge from the old uh dispensation. He wasn't he wasn't a bad judge, he was as a matter of fact a very good judge but he was a judge appointed by the previous government.	NOMINATION
13	a.	And the constitutional court, by the mouth of the then Judge Kentridge, he was a judge for a very short time, he's now in England, um, he found that its unconstitutional and he struck it out.	NOMINATION
	b.	that was one of the first things that went to the Constitutional Court, to test whether the confession was made by a prisoner can be accepted by a subsequent court	PARTIES – Included
14	a.	Pius Langa	NOMINATION
	b.	Who's the deputy chief justice, ***he's*** on sabbatical at Wits now … ***he's*** sitting here in Wits, ***he's*** doing sabbatical work, ***he's*** also the chancellor of this university	CLASSIFICATION – Gender – Male (4 instances of 'he')
	c.	Edwin Cameron I think it is - other students murmur their disagreement or assent] Ooohh Edwin is the chairman of the council	NOMINATION
	d.	Chaskalson is long retired, we long forget about Chaskalson	NOMINATION
	e.	Who is the chancellor of the university of the Witwatersrand? [Another student attempts an answer but L already starts whistling	CLASSIFICATION – Race

	incredulously] Ladies and gentlemen, I am going to kill myself [class laughs] I give you a hundred bucks if you can tell me. [Student: Is it a contract?] [Class laughs] It's a verbal contract, ja [more students laugh] [One other student attempts to answer] Justice? What? ….Does anybody know? [slight pause] Have you ever heard of Justice Dikgang Moseneke? [cries of 'oh' from class and chatter] Oh yes of course Dikgang ja ja ja ja ja [imitates class]	
	f. Justice Dikgang Moseneke	NOMINATION
15	NONE	
16	NONE	
17	when the judge sits in the court he does he does he or she doesn't decide 'OK I'm going to decide this interpretation on this rule'	CLASSIFICATION – Gender – Inclusive
18	And then there's a case, like this case, which asks for the interpretation of the legislation. And then a completely different group of people, ie the judges, sit in judgment. And they must decide how are they going to solve this problem.	PARTIES – Excluded
19	the old judges	CATEGORIZATION
20	NONE	
21	a. So the judge, when ***he*** sits in the provincial division has got the advantage of the entire scope of authorities, presented by the two advocates. Of course not all advocates are the same. And some advocates are more thorough than others. What then happens uh is the judge hears the case, ***he*** gains all the authorities, ***he*** then retires and then um ***he*** does ***his*** own investigation. ***He*** does ***his*** own sources ***he*** investigates the advocate's sources, ***he*** does ***his*** own research, ***he*** comes to a conclusion based on everything that was laid before ***him***.	CLASSIFICATION – Gender – Male (7 instances of 'he'; 3 instances of 'his'; 1 instance of 'him')
	b. the judge hears the case	PARTIES – Excluded

22	d. So there's virtually no chance that if there's an authority on either for or against uh the decision the judge wants to make that ***he*** won't know of it. If ***he's*** involved in that case ***he*** will know of it, ***he*** will evaluate it and ***he*** will decide yes I'm going to use this authority or no I'm going to decide against the authority. A judge can't make ***his*** own authority. I think what you mean ***his*** own research. Ja. Judge can do ***his*** own research, that's what ***he's*** being, that's what they do.	CLASSIFICATION – Gender – Male (6 instances of 'he'; 2 instances of 'his')
	e. If he's involved in that case	PARTIES – Excluded
23	a. The judge then has all these authorities in front of ***him*** with various weights that ***he*** attached to the authorities, depending on what they are, and then ***he*** does ***his*** own research and ***he*** comes to a conclusion, which authorities to accept and which to reject because every case is different. When I talk about a precedent, no two cases can be exactly the same. I mean, you can understand that for yourself. The facts will - every case will have different facts. So there will always be cases that you can argue are for, and cases that you argue are against it. And it's the work of the judge to decide which of the cases to use to support ***his*** decision. And when ***he*** makes a decision, and ***he*** reports that decision, that decision becomes authority for that specific point that was raised in court.	CLASSIFICATION – Gender – Male (5 instances of 'he'; 2 instances of 'his'; 1 instance of 'him)
	b. every case is different. When I talk about a precedent, no two cases can be exactly the same. I mean, you can understand that for yourself. The facts will - every case will have different facts.	PARTIES – Excluded
24	NONE	

25	The word 'precedent' is merely a technical word referring to a previous case taken as an example for subsequent cases or as justification	PARTIES – Excluded
26	a. if you've got a case that is exactly the same case as a case in the Transvaal, yes, and you are now say in Durban, yes you've got the right to come to a different conclusion, and say for these reasons, very good reasons must they be, I'm not following my ***brother*** in the Transvaal. Ok so that that you understand. When you then have a new judge and a new case, and the facts are similar to both the previous case that didn't follow the Transvaal, and the Transvaal case um that was decided originally, the judge in the Natal case, in the Durban case, will - if ***he*** wants to follow the Transvaal case - will very pertinently state: 'My ***brother*** in the Transvaal made this decision in 1962, it was wrongly not followed by my ***brother*** in 1968 but now in 1992 I am overruling ***him*** and I am following the Transvaal judgment. Uh ***he*** wouldn't say, ***he*** wouldn't you know its unthinkable of making a whole judgment and not referring to the Transvaal judgment.	CLASSIFICATION – Gender – Male (3 instances of 'brother'; 3 instances of 'he'; 1 instance of 'him')
	b. if you've got a case that is exactly the same case as a case in the Transvaal, yes, and you are now say in Durban, yes you've got the right to come to a different conclusion, and say for these reasons, very good reasons must they be, I'm not following my brother in the Transvaal. Ok so that that you understand. When you then have a new judge and a new case, and the facts are similar to both the previous case that didn't follow the Transvaal, and the Transvaal	PARTIES – Excluded

	case um that was decided originally, the judge in the Natal case, in the Durban case, will - if he wants to follow the Transvaal case - will very pertinently state: 'My brother in the Transvaal made this decision in 1962, it was wrongly not followed by my brother in 1968 but now in 1992 I am overruling him and I am following the Transvaal judgment.	
27	e. if there's a precedent there's a court case for instance in the um Cape Provincial Division and that judge made a decision on a certain set of facts, and ***he*** came to a conclusion, and that is now the law in the Cape. That case is what we call a precedent. It is used and it is followed by other judges in the Cape. If a judge in the Transvaal wants to follow that precedent, ***he*** has to say so in ***his*** judgment. Say that ***he*** is following that precedent for this and this reason and then that precedent becomes binding on the Transvaal as well. Um the facts may change, but ***he*** may not - obviously if ***he's*** following the precedent - ***he*** cannot change uh the law.	CLASSIFICATION – Gender – Male (6 instances of 'he'; 1 instance of 'his')
	f. if there's a precedent there's a court case for instance in the um Cape Provincial Division	PARTIES – Excluded
28	NONE	
29	NONE	
30	c. acting judge	CATEGORIZATION
	d. full judge	CATEGORIZATION
31	c. Judge King	NOMINATION
	d. Judge Foxcroft	NOMINATION
32	Judge President. In other words ***he*** is the highest judge in the Cape Provincial Division. ***He*** is the highest judge, ***he*** is the judge president of the Cape Provincial Division.	CLASSIFICATION – Gender – Male (3 instances of 'he')
33	The judge sits, it is something that ***he*** has prepared, and ***he's*** reading it out to the court.	CLASSIFICATION – Gender – Male (2 instances of 'he')
34	d. Judge President, King	NOMINATION

	e. Foxcroft, J	NOMINATION
	f. and his brother Foxcroft, J	CLASSIFICATION – Gender – Male (1 instance of 'brother')
35	d. ***He*** concurs but for different reasons. And then ***he*** gives a separate judgment. Is that important? Do they look at who's the most senior or which judge has agreed with who? Huh? No. If ***he*** concurred, if the judge concurred ***he*** agreed with ***him***, then it is academic almost. ***He*** might differ on the reasons that ***he*** came to the conclusion, but they concurred, they agreed.	CLASSIFICATION – Gender – Male (6 instances of 'he'; 1 instance of 'him')
	e. Roelf	NOMINATION
	f. Ogilvie Thompson	NOMINATION
	g. In one of the uh great court cases in my field	PARTIES – Excluded
36	a. The judge will, when ***he*** starts giving ***his*** order, just before that, towards the end, ***he*** will say these are the reasons why I decided like I decided. Um during ***his*** judgment ***he*** will play. ***He*** will say 'the advocate for the defence' or ' the advocate for the respondent said the following, I'm not accepting his version. I'm rejecting his authority. Advocate for the other side forwarded these arguments and I find them acceptable. And for these reasons I'm going to follow that. Um but that is very confusing, you know, If you don't know what ***he's*** doing, is this now part of the judgment or what ***he's*** doing. Um … uh… you know. The best is go to the order, go to the end where you look for the ratio decidendi, the reasons for the decision, where ***he*** says, 'OK everything considered now, this is what I've decided.	CLASSIFICATION – Gender – Male (7 instances of 'he'; 2 instances of 'his')
	b. Advocate for the other side	PARTIES – Excluded
37	a. Frances William Reitz, chief justice	NOMINATION
	b. James Buchanan	NOMINATION
	c. Melliers de Villiers	NOMINATION

38	a. **LECTURER:** What are ***his*** initials? Ja look at ***his*** initials. **STUDENT 10:** Oh Judge President **LECTURER:** ***He*** was the judge President. Yes and who sat with ***him***? **STUDENT 10:** [inaudible] **LECTURER:** Who? ***He*** was the Judge President, ***he*** gave the judgment and who sat with ***him***?	CLASSIFICATION – Gender – Male (3 instances of 'he'; 2 instances of 'him'; 1 instance of 'his')
	b. Jones	NOMINATION
	c. Murrans	NOMINATION
39	a. Ratio decidendi is the reason for the judgment. Those are the specific reasons that the judge provides why ***he's*** come to the decision uh in the case. This has usually only got to do with law. Very seldom, but its not impossible, very seldom will you find that the judge will base ***his*** reason for the decision on fact. The way to differentiate between an obiter dictum and a ratio decidendi is to look for something that is involved with law. Obiter dictum is those things that the judge will say that is not binding, that is not binding but that he feels ***he*** cannot keep his mouth shut about.	CLASSIFICATION – Gender – Male (2 instances of 'he'; 1 instance of 'his')
	b. the decision uh in the case	PARTIES – Excluded
40	if she said: 'I sat on the station bench. At quarter to four in the morning, after I'd been to a party. And I can't really remember because I had lots to drink. And then somebody with a dark brown jacket walked in front of me. And then I woke in the hospital'.	PARTIES – Included
41	a. This judge had the unenviable task of evaluating a rape victim's uh evidence before the Constitution, uh. ***He*** did so, ***he*** came to a conclusion that her evidence was fine but, and here's the thing, ***he*** said *obiter dictum*	CLASSIFICATION – Gender – Male (3 instances of 'he')
	b. This judge had the unenviable task of evaluating a rape victim's uh evidence	PARTIES – Included

	before the Constitution, uh. He did so, he came to a conclusion that her evidence was fine but, and here's the thing, he said *obiter dictum:* 'Listen, we live in a new era, I can't take into consideration here now the Constitution that has not been promulgated yet. But I know this rule is going to be declared unconstitutional under the new Constitution. So if I had been under the new Constitution I would not have used the cautionary rule. As it is in this instance I didn't use the cautionary rule because I believed what she said and I I didn't use it at all. She was a good witness and I accepted her word on the face of it it wasn't necessary for me to use it.	
42	NONE	
43	a. So a-a judge can indeed refer to another case only in passing. Uh especially if ***he*** doesn't apply that case in ***his*** judgment. Uh that is possible, so then its obiter dictum. If the judge starts ***his*** decision, says 'Oh there's another case in Namibia and this is what the case said, um I'm not going to follow that case, I'm not bound by that case because I'm not in the Western Cape' or whatever 'I'm not going to follow that case, I think that that case was um was uh not correctly uh decided um and I would rather follow the following authorities.' Then obviously that is not ratio decidendi. That is not the reasons for ***his*** decision, that is obiter dictum. ***He's*** just mentioning it in passing, mostly to show you that ***he*** knows about this case. And that ***his*** judgment was based on the fact that ***he*** considered that case, found it uh wanting and ***he's*** just mentioning it in passing. But, of course, nine out of ten	CLASSIFICATION – Gender – Male (8 instances of 'he'; 7 instances of 'his')

	times if a judge starts analyzing a case then you can be certain that ***he*** is going to follow that case. Uh but you must first see what is the question in the in the case what wh-wh-what was put before court, what authorities did ***he*** use and what did ***he*** decide. And only then can you say, ok this is ***his*** decision. The reasons for ***his*** decision are the following. And they are supported by the following uh authorities. And that is ***his*** ratio decidendi.	
	b. So on the first [inaudible] yes, if the if the judge is quoting another case, that is law. Um eh you can't ever have a rule of thumb, you must apply it uh to f-find whether it is indeed the ratio decidendi. So a-a judge can indeed refer to another case only in passing. Uh especially if he doesn't apply that case in his judgment.	PARTIES – Excluded
44	NONE	
45	a. wonderful and very eccentric and very learned uh judge of appeal	CATEGORIZATION
	b. It is a case by the wonderful and very eccentric and very learned uh judge of appeal Solomon. Um and you must read the case - its not a long case, its only four pages - and you must read the case so as to so as to understand his personality.	PARTIES – Excluded
	c. judge of appeal Solomon. Um and you must read the case - its not a long case, its only four pages - and you must read the case so as to so as to understand his personality. Solomon was one of the of the bright lights of the 1920 the 1920 appellate division. A brilliant, brilliant jurist.	NOMINATION
46	A sixty-five-year, middle-aged old male? How do you change ***his*** frame of reference? Its not just like, you know, chop off ***his*** head	CLASSIFICATION – Gender – Male (2 instances of 'his'; 1 instance of 'him')

	and give ***him*** another head.	
47	NONE	
48	NONE	
49	Now appeal means you go to a higher court than the court where the case was heard in the first instance.	PARTIES – Excluded
50	Arthur Chaskalson the judge, Chief Justice retired was in the audience	NOMINATION
51	NONE	
52	a. The judge sits in ***his*** chambers, the judge is now a senior advocate who's been elevated to a judge. ***He*** sits in ***his*** chambers ***he's*** high on on on human rights and things - which is fine - but ***he*** doesn't understand what a magistrate's court looks like. ***He*** doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance. ***He*** doesn't you know they've never seen that, its just not part of their frame of reference.	CLASSIFICATION – Gender – Male (5 instances of 'he'; 2 instances of 'his')
	b. He doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance.	PARTIES – Included
53	a. And a very civilized English voice on the other side:' Excuse me, but um may I please talk with magistrate Serfontein?' [raised pitch]	CLASSIFICATION – Class
	b. Judge Foxcroft	NOMINATION
	c. I said 'No I don't remember the case your honour or my lord' or I don't know what I called ***him*** or judge	CLASSIFICATION – Gender – Male (1 instance of 'him')
	d. I said 'uh-h. 'I have tonight issued an urgent mandamus' or something 'instructing Pollsmoor Prison to release this man and I would like it if you could send me a full set of reasons why you for a first offender sentenced this man to twelve months in prison.	PARTIES – Included
54	c. Oliver Schreiner. Um there are many articles in the law journal about him.	NOMINATION
	d. brilliant judge	CATEGORIZATION
	e. even his technical cases	PARTIES – Excluded

55	a. old judges	CATEGORIZATION
	b. chief justice of the previous regime, Justice Corbett	NOMINATION
56	NONE	
57	a. there was some sterling judges in the Appellate Division uh especially white, of course white	CLASSIFICATION – Race
	b. but English liberal judges um uh also some Afrikaner professional judges	CATEGORIZATION
	c. the new government still saw the Appellate Division as a bit tainted and uh as not supporting but standing quietly by while the apartheid government ravished human rights.	PARTIES – Excluded
58	a. Oliver Schreiner	NOMINATION
	b. very very famous and very intelligent and wonderful judge	CATEGORIZATION
59	Judge Hoexter	NOMINATION
60	NONE	
61	NONE	
62	Justice Albie Sachs, a fighter for human rights.	NOMINATION
	Although ***he*** practiced for a very limited matter, very limited matter in Mozambique, and the neighbouring countries, and ***he*** is a qualified lawyer um ***he*** was appointed because of ***his*** role in the struggle, because of the sacrifices that ***he*** has made and because of ***his*** passion for human rights.	CLASSIFICATION – Gender – male (4 instances of 'he'; 2 instances of 'his')
63	NONE	
64	NONE	
65	And a judge in the High Court, especially with some standing, a couple of year's standing, you don't need to review ***his*** work, you know.	CLASSIFICATION – Gender – Male (1 instance of 'his')
66	It was confirmed by no lesser luminary than judge Eloff, who was Judge President.	NOMINATION
67	If you plead guilty, it save an enormous amount of time, it saves an enormous amount of time, um and um you are helping the court. And it shows remorse! You admit 'Look, mea culpa, I'm guilty, I'm here, I'm throwing myself on your mercy.'	PARTIES – Included
68	a. In camera means that	PARTIES – Included

	because of the sensitivity of the case uh it shouldn't be held in public. Those cases are usually where children are involved. If the child has been molested then obviously you don't want the public to sit there and look at the poor child giving evidence.	
	b. Um you know if its high priority - Zuma asked that his case be heard in camera and the judge said 'No'. Um but usually if its high profile or if its very sensitive. If it concerns national security as Zuma said it did, national security on the weapons, whatever, then the judge can decide that the court will be heard in camera.	PARTIES – Included
69	And unopposed divorces, why do you need a High Court to listen to unopposed divorces. Have you ever heard an unopposed divorce? I mean, three three minutes. Um if there's an agreement, the judge says 'Ok, the agreement is now an order of the court and the parties are divorced. Thank you'	PARTIES – Included
70	a. you must consider the cases	PARTIES – Excluded
	b. old judges	CATEGORIZATION
	c. new judges	CATEGORIZATION
71	The papers are the things filed in the court file and served upon the other side that you are going to base your case upon in the form of affidavits, expert witnesses, whatever	PARTIES – Excluded
72	The judge will give you an opportunity. ***He'll*** say, uh, please Mr [state's student's surname], address me on this novel interpretation that you have in clause 3. And then you will be able to address ***him*** but I mean if you, uh uh, if ***he*** talks like that you know you're stuffed. You can just as well, you know, pack up and say 'I'm sorry my lord, um uh, I'm relatively inexperienced in these matters and uh, it slipped in, I beg your lordship's indulgence to amend it. And your lordship will not give you an indulgence. ***He*** will	CLASSIFICATION – Gender – Male (7 instances of 'he'; 1 instance of 'him'; 1 instance of 'guy')

	say, well the indulgence I will give you is that I will take the case off the roll for you completely and then you can put it back again when its correct. And then you've wasted costs. You've wasted *thousands* of rand by appearing and preparing to appear for that day for trial in court and its just thrown out because you've made something wrong. You've referred to section 2(1) instead of section 1(2). Uh a. And the ***guy*** sitting on the bench, the judge is a senior advocate of twenty-five year's standing. So, for twenty-five years ***he's*** been looking through these pleadings. So ***he***, it *jumps out* uh uh at him. As soon as ***he*** reads the pleadings and you've made an error it jumps out. ***He's*** an expert, he knows everything.	
73	NONE	
74	NONE	
75	NONE	
76	Judge Cameron was interviewed uh for the Supreme Court of Appeal, he was already a Judge but he was interviewed for the Supreme Court of Appeal, uh he took the very bold step of saying - they didn't ask him - everybody knew that he was gay bit they didn't ask him, they asked him about um uh about his sexual orientation and of course he explained that to them and what he will do and how he thinks that will add value to the job, and then on his own he said	NOMINATION
77	a. Judge Kathy Saxwell Sax sax Sacks Sackswell is an attorney. She specialized in family matters. And she's now a judge here at the Witwatersrand Local Division.	NOMINATION
78	a. old middle-aged white men	CATEGORIZATION
	b. Um but if you're an academic, Judge Carole Lewis who was the Dean of this law school became a judge in the Witwatersrand, and now she's at the Supreme Court of Appeal. And, according to everybody that I've spoken to, a brilliant judge. So, I think	NOMINATION

	it brings more diversity to the bench. It creates more attributes to the bench, she is more academic and her judgments are far better theoretically-founded than her colleagues	
79	A judge gets about a, a junior, a newly appointed judge gets about seven six hundred thousand a year. And a senior advocate, well as I said, gets from four to five up to eight million in a year. So that's a *big* drop uh in salary. You must be very comfortable, uh and have whatever you want, and then you can become a judge as a kind of retirement.	CLASSIFICATION – Class

4: VALUES

JUDGE - QUOTES	VALUES (V)	CONTENT	FORM
1	NONE	-	-
2	you can believe on a spiritual level, you can believe 'this is how law works, law is just a reflection of a higher law' and still be a judge and sit in judgment of others objectively.	INTERNAL GOODS - Objectivity	MORAL EVALUATION
3	if there is something fundamentally wrong in a case. If [there are] things which have not been taken into consideration or if they think that the judge made a mistake then of course you can appeal, even if you pleaded guilty.	JUDGES THEMSELVES – Negative	MORAL EVALUATION
4	What you must do when you sit in judgment on a matter like this is you must look for the law.	INTERNAL GOODS – Objectivity	MORAL EVALUATION
5	NONE		
6	a. Legal certainty is very very important. Your society is based on legal certainty. If you have a society where there's no legal certainty; if you don't know how fast you must drive on the highway; if you don't know uh at what age you can consent to marriage or if you don't know when you must start paying tax or ex/ all these things …then you live in chaos. Then you lived in an uncivilized an anarchic society. Now there is an argument to say that that is not so bad but we won't visit that now. What we're trying to expl/ establish here is how important is legal certainty.	INTERNAL GOODS – Legal certainty	MORAL EVALUATION
	b. But, it is a characteristic of law of good law, of a ordered society that we strive towards certainty.	INTERNAL GOODS – Legal certainty	MORAL EVALUATION
7	The law will be interpreted to give um law will be interpreted to preserve something that people believe in. I mean and that is that is what the judge based his decision on. The ma .. the contract of marriage is so important that the judge said 'I'm not going to be bound by what the dictionary says. I will ex … I will use my discretion' - we'll get to discretion now. 'I will use my discretion to to widen this concept of "in", just so that we have certainty.	INTERNAL GOODS – Legal certainty	PURPOSIVE
8	NONE		
9	But, for legal certainty, what we do is we have the courts. So, what will happen is exactly the same as this one. If you get married in a submarine, and then you subsequently want to declare it ann … null and void um because it was not in a house then you have to go to court and the judge will then decide whether he will interpret the legislation and he will	INTERNAL GOODS – Legal certainty	MORAL EVALUATION

	decide whether it was valid or not. It is the best way		
10	c. Look, a judge has got a discretion. A judge has got a discretion to interpret um uh legislation and the judge will always in a case where he has to interpret something like this, will always favour the interpretation that gives the greater legal certainty. And that's not difficult to establish. Um uh what you what you must establish is, if I interpret this [points to the word 'in' on the blackboard] as the dictionary says, and declare these people's marriage null and void, what will the result be? The result will be hundreds of people are now going to come to court and say 'Ja but we also got married in strange places and we are now also tired of our spouses and we don't want, we also want it null and void. You understand?	INTERNAL GOODS – Legal certainty	AUTHORITY
	d. the judge must make the decision that will create the greatest amount of certainty in society. In other words, uh huh uh uh uh you, if you judge a case, you are not, you must avoid creating chaos.	INTERNAL GOODS – Legal certainty	MORAL EVALUATION
	e. But in general the judge will always decide on the minimum change in society	INTERNAL GOODS – Legal certainty	AUTHORITY
11	But they had the Constitution to consider, and the Constitution is an *overwhelming* authority. So you can't go against the Constitution. So, they decided to declare gay marriages valid, to declare it valid that people of the same sex can get married, create some uncertainty, but in accordance with the Constitution.	INTERNAL GOODS – Legal certainty; Constitutional values	MORAL EVALUATION
12	a. Uh and the Judicial Services Committee consists of a wide spectrum of people involved in the legal world. And it's a huge panel consisting of the Minister of Justice, other law lords [laughs wryly] hmm other law lords, other justices, the chief justice, ummm even a representative from the magistrates' commission.	JUDGES THEMSELVES – Negative	MORAL EVALUATION
	b. he had a deputy in the Supreme Court of Appeal that was waiting in the wings to become the chief justice, Hefer, who was who a-a-a- white uh old judge from the old uh dispensation. He wasn't he wasn't a bad judge, he was as a matter of fact a very good judge but he was a judge appointed by the previous government.	JUDGES THEMSELVES – Ambiguous	MORAL EVALUATION
13	Now your legal feeling, such as it is at this moment, should already tell you that there's	INTERNAL GOODS – Constitutional	PURPOSIVE

	something wrong with that. Uh-h-h you can't have (a) the right to silence; uh (b) the presumption of innocence, (c) decent ordinary human rights of dignity. You can't have that and a Criminal Procedure Act that says you can be forced to make a confession, the confession can be accepted against you and you can uh be tortured, your dignity can be um uh affected. So that was one of the first things, in the case of State versus Zuma, that was one of the first things that went to the Constitutional Court, to test whether the confession was made by a prisoner can be accepted by a subsequent court. And the constitutional court, by the mouth of the then Judge Kentridge, he was a judge for a very short time, he's now in England, um, he found that its unconstitutional and he struck it out.	values	
14	Who's the deputy chief justice, he's on sabbatical at Wits now … he's sitting here in Wits, he's doing sabbatical work, he's also the chancellor of this university	JUDGES THEMSELVES – Positive	AUTHORITY
15	NONE	-	-
16	NONE	-	-
17	NONE	-	-
18	NONE	-	-
19	NONE	-	-
20	So what you do is you become an advocate, you if you're a very good advocate they ask you to become a uh acting judge, if they see that you can do the work then they invite you to become a full-time judge in the provincial division, or the local division, after years of service in the provincial division or the local division, if you are deemed to be fit, they are invited as an acting judge to the Supreme Court of Appeal or to the Constitutional Court.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
21	NONE		
22	NONE	-	-
23	NONE		
24	because you have magistrates in the lower courts and judges in the higher courts.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
25	NONE	-	-
26	a. We work on a system called *stare decisis*, in other words the lower courts are bound by the higher courts.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
	b. So if you've got a case that is exactly the same case as a case in the Transvaal, yes, and you are now say in Durban, yes you've got the right to come to a different conclusion, and say for these reasons, very good reasons must they be, I'm not following my brother in the Transvaal.	INTERNAL GOODS – Rationality	MORAL EVALUATION
	c. Because what you're ultimately aiming at is that all the courts will agree with all the	INTERNAL GOODS – Legal	PURPOSIVE

	legal points that may exist. And for that reason we also have the Supreme Court of Appeal. If there's a dispute between two courts and this dispute is really damaging to legal certainty, that case then goes up to the Supreme Court of Appeal, the Supreme Court of Appeal makes a precedent makes a decision, and *everybody* is bound by that.	certainty	
27	NONE	-	-
28	You appeal to the Supreme Court of Appeal. Which is the highest court. And whatever the Supreme Court of Appeal decides, that's it. Unless it's a constitutional case. That's it. There's nothing higher. You can't go to God or the Privy Council or you know George Bush or whoever you think is powerful. That's it. You stop at the Supreme Court of Appeal and what the Supreme Court of Appeal says - that's law.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
29	a. And unfortunately the only way to learn this is to expose you to the best brains in the business. Um the court the judgments are written by you know the best advocates that there were. The judges. And usually they are highly intelligent and very very good lawyers.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
	b. And they they talk in a language of their own they have arguments of their own and it is extremely long-winded. You can get confused.	JUDGES THEMSELVES – Negative	MORAL EVALUATION
30	In the past if you are a very good advocate and they um the council the bar the minister and the judicial services council think you should be promoted, you are invited to act as a judge. For a couple of weeks, or a couple of months. And if you prove yourself, if you prove to be a good judge, if your judgments are sound then they invite you to become a judge.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
31	As a matter of fic/ fact King at this stage was the JP.	EXTERNAL GOODS – Status	AUTHORITY
32	In other words he is the highest judge in the Cape Provincial Division. He is the highest judge, he is the judge president of the Cape Provincial Division.	EXTERNAL GOODS – Status	MORAL EVALUATION
33	Some of these judgments can become very tedious and become very long-winded and you must distinguish between what is important and not important.	JUDGES THEMSELVES – Negative	MORAL EVALUATION
34	NONE	-	-
35	And it was whether we should have a general enrichment action or not, and three judges said uh no, its not ready yet, and two judges, Roelf and Ogilve, Ogilvie Thopmson said you should have a general enrichment action. And	JUDGES THEMSELVES – Negative	MORAL EVALUATION

	by just missing it with one judge, the South African legal science was put back um thirty, forty, now going on for fifty years.		
36	The judge will, when he starts giving his order, just before that, towards the end, he will say these are the reasons why I decided like I decided.	INTERNAL GOODS – Rationality	Authority
37	Melliers de Villiers became the Chief Justice eventually.	EXTERNAL GOODS – Status	MORAL EVALUATION
38	**STUDENT 10:** Oh Judge President **LECTURER:** He was the judge President. Yes and who sat with him? **STUDENT 10:** [inaudible] **LECTURER:** Who? He was the Judge President, he gave the judgment and who sat with him?	EXTERNAL GOODS – Status	AUTHORITY
39	a. Ratio decidendi is the reason for the judgment. Those are the specific reasons that the judge provides why he's come to the decision uh in the case.	INTERNAL GOODS – Rationality	PURPOSIVE
	b. Obiter dictum is those things that the judge will say that is not binding, that is not binding but that he feels he cannot keep his mouth shut about.	JUDGES THEMSELVES – Negative	MORAL EVALUATION
40	NONE	-	-
41	This is an old rule. It's a rule that comes from the Roman-Dutch law. Uh it's the old its very old pre-constitutional conception of females that females are emotional and they can't that they they don't know what's going on in reality and more so when they've been sexually violated. They lose touch with reality. And they fantasize and you can't trust them. [pulls face toward STUDENTS 1 and 19] That's the old concept of uh of females being raped. This judge had the unenviable task of evaluating a rape victim's uh evidence before the Constitution, uh. He did so, he came to a conclusion that her evidence was fine but, and here's the thing, he said *obiter dictum:* 'Listen, we live in a new era, I can't take into consideration here now the Constitution that has not been promulgated yet. But I know this rule is going to be declared unconstitutional under the new Constitution. So if I had been under the new Constitution I would not have used the cautionary rule. As it is in this instance I didn't use the cautionary rule because I believed what she said and I I didn't use it at all. She was a good witness and I accepted her word on the face of it it wasn't necessary for me to use it. That's the *ratio decidendi*. In this case I didn't use it but' and that's the word you must look for ' but, I just want to say in passing, for instance if you don't think I know it, that there is a Constitution and that I agree with the	INTERNAL GOODS – Constitutional values	AUTHORITY

	Constitution and in future the cautionary rule will be abandoned.'		
42	Common law, England is the common wisdom of the judges	JUDGES THEMSELVES – Positive	MORAL EVALUATION
43	NONE		
44	there are many, there are many pieces of Roman law that has been taken out because they've just become uh anachronistic. Uh or not, the judges perhaps are just a little bit stupid.	JUDGES THEMSELVES – Negative	MORAL EVALUATION
45	It is a case by the wonderful and very eccentric and very learned uh judge of appeal Solomon. Um and you must read the case - its not a long case, its only four pages - and you must read the case so as to so as to understand his personality. Solomon was one of the of the bright lights of the 1920 the 1920 appellate division. A brilliant, brilliant jurist.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
46	A court is um uh a court is a meritocracy, it is something that is based on merit, its based on on um professionalism, its not a political appointment, you're not elected to be a judge or a magistrate.	INTERNAL GOODS - Meritocracy	MORAL EVALUATION
47	NONE		
48	a. the High Court was not a big problem because apparently there was an understanding, there was a sunset clause in the interim constitution that sitting judges will be respected and they will be retrained to uh uh understand the Constitution.	INTERNAL GOODS – Constitutional values	PURPOSIVE
	And indeed the sitting judges were retrained, I don't know how effective that was, its very difficult to train a judge. Believe me. Um its not a its not the easiest thing to do.	JUDGES THEMSELVES – Ambiguous	MORAL EVALUATION
49	You go to a higher court if you are convinced that uh that something was done wrong in the lower court uh and that the sentence uh that the magistrate court or judge came to uh was incorrect. The appeal rests only on the four corners of the record of the case. There is no vive voce evidence to be led in an appeal. You cannot, when you have an appeal, introduce new evidence. So, an appeal is a second bite at the cherry. You've gone through the whole thing, the magistrate or judge has made an error. According to you, something was done incorrectly. You want to take this to a higher authority uh to rectify that in order that the sentence can be changed.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
50	I lectured at the um Justice College and we went all around the country to lecture to all	INTERNAL GOODS – Constitutional	MORAL EVALUATION

	the magistrates and judges to introduce the new Constitution to them. And we also had workshops with um all the stakeholders to determine how the new Constitution's going to work because we didn't have any court cases or any precedents to go on.	values	
51	NONE		
52	a. The judge sits in his chambers, the judge is now a senior advocate who's been elevated to a judge. He sits in his chambers he's high on on on human rights and things - which is fine - but he doesn't understand what a magistrate's court looks like. He doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance. He doesn't you know they've never seen that, its just not part of their frame of reference. They are just concerned about procedural correctness.	JUDGES THEMSELVES – Negative	MORAL EVALUATION
	b. They are just concerned about procedural correctness.	INTERNAL GOODS – Procedural correctness	AUTHORITY
53	And a very civilized English voice on the other side:' Excuse me, but um may I please talk with magistrate Serfontein?' [raised pitch] I said 'Yes its him talking I'm not on duty this weekend *please* who is this?' 'Mr Serfontein this is Judge Foxcroft'. [starts laughing] 'Do you remember the case of State v Ngobe' or whatever. I said 'No I don't remember the case your honour or my lord' or I don't know what I called him or judge um and I said 'uh-h. 'I have tonight issued an urgent mandamus' or something 'instructing Pollsmoor Prison to release this man and I would like it if you could send me a full set of reasons why you for a first offender sentenced this man to twelve months in prison. I'm forwarding the court record to you and if you could reply by Monday afternoon latest I would appreciate it'. So of course I was in big big big trouble.	INTERNAL GOODS – Procedural correctness	MYTHOPOESIS
54	So um you can go and read about Oliver Schreiner. Um there are many articles in the law journal about him. Professor Kahn wrote a beautiful obituary about him when he passed away. Um but he was indeed involved in the Harris case and he was one of the few judges that stood up against the apartheid regime. Uh he was a brilliant judge. Uh even his technical cases, on things like mining rights and um uh administrative law, he was a true blue lawyer, you know, one of the … one of the greats.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
55	The courts, up to that point, as I said on Tuesday, the courts were not wholly trusted	JUDGES THEMSELVES –	PURPOSIVE

	by the new regime or by the new government because they were seen as co-operating with the apartheid government and they were not a hundred percent completely trusted by the new government.	Negative	
56	NONE		
57	a. So the only challenge to the superiority of the Appellate Division the old apartheid Appellate Division, though its unfair to call them the apartheid division of the Appellate Division, there was some sterling judges in the Appellate Division uh especially white, of course white but English liberal judges um uh also some Afrikaner professional judges that were above the apartheid nonsense	JUDGES THEMSELVES – Positive	MORAL EVALUATION
	b. The new government still saw the Appellate Division as a bit tainted and uh as not supporting but standing quietly by while the apartheid government ravished human rights.	JUDGES THEMSELVES – Negative	MORAL EVALUATION
58	Oliver Schreiner is the very very famous and very intelligent and wonderful judge	JUDGES THEMSELVES – Positive	MORAL EVALUATION
59	NONE	-	-
60	NONE	-	-
61	You can't you can never be the judge in your own case. Uh suo iudex non [inaudible] est - you remember that Latin? No. You can never be/ its like um its like um audi alteram partem, the other side must always be heard? Its natural justice, you can never be a judge in your own case.	INTERNAL GOODS – Impartiality	MORAL EVALUATION
62	Justice Albie Sachs, a fighter for human rights. Although he practiced for a very limited matter, very limited matter in Mozambique, and the neighbouring countries, and he is a qualified lawyer um he is he was appointed because of his role in the struggle, because of the sacrifices that he has made and because of his passion for human rights.	JUDGES THEMSELVES – Ambiguous	MORAL EVALUATION
63	You must also remember, a district court magistrate, and a regional court magistrate, to a lesser extent, is *far* removed from a judge. Judges are appointed the best of the best. Well … some people will not agree with that. But the idea is the very *best* senior advocates. The very best of the practicing advocates are appointed as judges. So uh when you reach the stage where you are invited to become a judge, uh you really know your business. You've been through the mill and you really know your law.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
64	NONE	-	-
65	And a judge in the High Court, especially with some standing, a couple of year's standing, you don't need to review his work	JUDGES THEMSELVES – Positive	MORAL EVALUATION

66	It was confirmed by no lesser luminary than judge Eloff, who was Judge President.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
67	NONE		
68	NONE		
69	NONE		
70	NONE		
71	So before the document goes to the judge on the day of the trial, somebody, usually the clerk of the, the candidate attorney of the attorney's office, must go to the file and see to it that it is paginated, in pen, in pen, you paginate it in pen because it changes. And its paginated from page one to page ten thousand. Correctly. If it is not correct then the judge can throw out your case.	INTERNAL GOODS – Procedural correctness	MORAL EVALUATION
72	a. You must be able to see every single thing. If there's a spelling error in your pleadings, oh please. If there's a grammatical error. If there's a technical error, a legal error, if you've made an aversion on a statement that is wrong technically, legally, your case is thrown out. The judge will give you an opportunity. He'll say, uh, please Mr [state's student's surname], address me on this novel interpretation that you have in clause 3. And then you will be able to address him but I mean if you, uh uh, if he talks like that you know you're stuffed. You can just as well, you know, pack up and say 'I'm sorry my lord, um uh, I'm relatively inexperienced in these matters and uh, it slipped in, I beg your lordship's indulgence to amend it. And your lordship will not give you an indulgence. He will say, well the indulgence I will give you is that I will take the case off the roll for you completely and then you can put it back again when its correct.	INTERNAL GOODS – Procedural correctness	MORAL EVALUATION
	b. And the guy sitting on the bench, the judge is a senior advocate of twenty-five year's standing. So, for twenty-five years he's been looking through these pleadings. So he, it *jumps out* uh uh at him. As soon as he reads the pleadings and you've made an error it jumps out. He's an expert, he knows everything.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
73	NONE		
74	a. OK of course the most important civil service and they will kill if I say that they belong in the civil service but the most important civil service job that there is is of course a judge.	INTERNAL GOODS – Status	MORAL EVALUATION
	b. Um judge's doesn't belong in the civil service but they get paid by the government, they get a car, they get a	EXTERNAL GOODS – Material Rewards	MORAL EVALUATION

	government car, um uh and um just for you know for interest's sake, its they're certainly not private I mean they don't earn their own salaries		
75	Judges ladies and gentlemen should be, they were always in the past, the best senior advocates. Uh, are asked to act as judges and then they if they are good then they prove themselves then they are asked by the Minister of Justice to consider becoming a judge.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
76	And of course that was that caused front frontpage highlights and everybody was everybody was asking whether it was necessary to do that and or was it very courageous to do it. Well I don't know you must maar decide for yourself. I know Edwin very well and he is a very courageous person. Sometimes of course everybody's got a got a political agenda and sometimes he is very enthusiastic about HIV/Aids. And the new role that gay people have in the community but perhaps, you know, it is necessary. Uh its something that you must decide for yourself.	JUDGES THEMSELVES – Ambiguous	MORAL EVALUATION
77	You didn't really take notice. OK. Um uh judge must be have an LLB. Must have a good practice and they must be a senior uh advocate.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
78	a. I think it makes the bench more representative. Um I think it makes the bench more diverse. Its not just old middle-aged white men that were successful advocates that can now become judges.	INTERNAL GOODS – representing society on the bench	MORAL EVALUATION
	b. Judge Carole Lewis who was the Dean of this law school became a judge in the Witwatersrand, and now she's at the Supreme Court of Appeal. And, according to everybody that I've spoken to, a brilliant judge.	JUDGES THEMSELVES – Positive	MORAL EVALUATION
79	[T]he problem with becoming a senior advocate and then a judge is what? [some murmurs from class] Hmm? STUDENT 3: The salary. LECTURER: The salary. A judge gets about a, a junior, a newly appointed judge gets about seven six hundred thousand a year. And a senior advocate, well as I said, gets from four to five up to eight million in a year. So that's a *big* drop uh in salary. You must be very comfortable, uh and have whatever you want, and then you can become a judge as a kind of retirement.	EXTERNAL GOODS – Material	MORAL EVALUATION PURPOSIVE

LEGAL ACADEMIC: ANALYTICAL TABLES

1: SOCIAL ACTION (SA)

[A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material]

LEGAL ACADEMIC QUOTATION NO.	SOCIAL ACTION (SA) QUOTATIONS	A	T	S	P	NT	M	Object (not calculated – for guidance only)[6]
1.	a. the *translation* was done by an old friend of mine, Dr van der Merwe	X	X	X				LANGUAGE
	b. He was the uh *author* of Van der Merwe & Rowland, Suid-Afrikaanse Erfreg.	X	X	X				LAW, LANGUAGE
	c. he would *open* his door, he had a huge office like this. And he *opened* his door in the corridor to see when you arrived at the office. And then if you walked down the corridor, he would *shout* at you. He was extremely eccentric. He would *shout* at you and *give* you a piece of Latin to translate	X	X				X	COLLEAGUES
	d. But he would *sit* there from, he was very nervous about the traffic in Pretoria, so he would *drive* in at five o clock in the morning because he didn't want to have to drive in traffic.	X				X	X	-
	e. And then he would *translate* Greek and Latin and then if you came in he would *call* you to translate, if you could translate and what you thought of the translation	X	X	X				LANGUAGE COLLEAGUES
	f. At 24 he was a full professor and had already *written* his first or second book	X	X	X				LAW, LANGUAGE
	g. Um and then the nationalist government *took* him from the university - because the university *fired* him - because he had a criminal conviction. And they *made* him head of Justice College				X	X	X	-
	h. And there he *translated* all these things, he was very very good with languages. And he *translated* all - he and a couple of his colleagues - the all the Afrikaans um in beautiful English.	X	X	X				LANGUAGE
2	Um the only people *reading* journal articles, learned journal articles, are the thirty	X	X	X				LAW (Journal articles)

[6] I have not calculated the number of objects of social action in the same way as I have calculated active/passive, transactive/non-transactive; and semiotic/material actions where the categorization is 'either-or'.

	percent of academics who are involved in the *publishing* of those articles. You know, peer review and editors? They *read* it, but uh other p- he he seventy percent of the other academics never *read* it.							
3	i. Also professor Cockerell who was also here, who decided he doesn't want to stay in academia, and he *went* to the bar.	X	X	X				COLLEAGUES
	j. he *published* widely	X		X		X		-
4	there would be a series of articles or there would be uh textbooks by modern authors by modern academics and then depending on whether the courts *take that into consideration* when such matter comes to the court, the academics then have influence in *changing* the law			X	X	X		-
5	And that is the kind of person that you can *quote* uh with authority. And you can say that the court would *follow* him. If you *quote* John Dugard on an international issue its more likely than not that the court will *follow* what John Dugard said. … If you are a senior professor with an international reputation then the courts will *follow* what you say. And if you are a junior academic, not impossible that the courts will *listen* to you, but it is very unlikely that the courts will be *swayed* by an un- unheard of or unknown academic.			X	X	X		-
6	a. By *writing* simply by writing uh articles, um journal articles, peer peer-evaluated journal articles, these things that are prescribed to you -	X	X	X				LAW (Journal articles)
	b. he often *appeared* in the courts for um people who were oppressed by the apartheid system. Who couldn't afford counsel, and he often *appeared* as *pro amico* for those people where it was where it was a groundbreaking and very important case.	X	X	X				JUDGES INDIGENT PEOPLE
	c. That's also one way that um you can *present* the court with your views.	X	X	X				JUDGES
	d. Unfortunately, professor Dugard during the apartheid era was not uh successful, he *asked* the courts to look outside the scope of the legislation and very few of the judges then um considered that being possible	X	X	X				JUDGES
7	g. And then of course the final the final way in which you can *make* your views known is through *writing* a textbook	X	X	X				LAWS, LANGUAGE
	h. And she *teaches* from that book. She teaches to her students	X	X				X	STUDENTS
	i. the book *is quoted* in court			X	X	X		-
8	a. And whether you are going to whether			X	X	X		-

	you are whether you are going to *be quoted* by the Supreme Court of Appeal or by the Constitutional Court depends on your reputation.							
	b. Um a a academic like Professor Iain Currie or Professor Cora Hoexter who are, I don't know if they've *been rated* but if they were *to be rated* they would be A-rated academics.			X	X	X		-
	c. They are excellent academics who've *published* standard works in both their fields.	X	X	X				LAWS, LANGUAGE
	d. So if you need *to quote* an academic on constitutional law then you would go to Iain Currie, um, and if a judge *quotes* uh Professor Currie, every time a judge *quotes* him his reputation is augmented. So obviously Professor Currie has got a far more persuasive influence on the courts than a junior lecturer would have on the courts.			X	X	X		-
	e. If a junior lecturer would *write* an article	X	X	X				LAW, LANGUAGE
9	They have *appointed* academics to this court, Justice Kate O Regan was a professor at the University of Cape Town and she was *appointed* as a Justice and now she is an acting Deputy Chief Justice.				X	X	X	-
10	NONE							
11	He *writes* about the architecture of judicial buildings. He *writes*, he *compares* the new constitutional court with the Supreme Court, the High Court in Pretoria for example … he's *written* several articles on judicial buildings, as a reflection of the society that we are in.	X	X	X				LANGUAGE, THE COURTS
12	a. Legal academic, they *teach* at tertiary institutions, they *train* lawyers	X	X				X	STUDENTS
	b. they *write* journal articles	X	X	X				LANGUAGE, LAW
	c. they have the ability *to change* the law, if you are a legal academic of very high standing, and people *listen* to you… people *follow* what you say, the courts *quote* you, the courts *follow* on on what your views are			X	X	X		-
13	NONE							-
14	NONE							-
15	you must *mark* scripts	X	X				X	STUDENTS
16	j. If you are *promoted* you become an associate professor or professor and people uh think very highly of you.				X	X	X	-
	k. you can *study* for free	X				X	X	-
17	So you can *make* a pleasant living	X	X	X				
18	he *wrote* a series of books on criminal [law]	X	X	X				
19	Because they could just as easily become	X				X	X	-

	practitioners and *earn* five times what the academics earn. So to sugarcoat that there was a rule that if you become an academic you may *use* twenty percent or your time, at university, for your practice. If you are a practitioning uh a practitioner, either at the bar or at the side-bar. You may *use* twenty percent of your time *to attend to your practice*.							
20	you must be *able* to *support* yourself you know its difficult to support yourself on the salary	X	X	X				LIVING

2: CIRCUMSTANCES OF SOCIAL ACTION (CSA)

LEGAL ACADEMIC QUOTATION NO.	CIRCUMSTANCES OF SOCIAL ACTION (CSA) QUOTATIONS	CIRCUMSTANCE TYPE
1	a. he was a professor at *the University of Tukkies*	LOCATION
	b. he became the head of *Justice College*	LOCATION
	c. He *fell in love* with a professor at Unisa's wife, I'm not going to tell you who that professor is, you won't even know her.	EMOTION
	d. He - when I was at *Justice College*, he would open his door, he had a *huge office* like this. And he *opened his door in the corridor* to see when you arrived *at the office*. And then if you walked *down the corridor*, he would shout at you.	LOCATION
	e. he had *a huge office* like this	RESOURCES
	f. he was very *nervous* about the traffic	EMOTION
	g. he was very nervous about the traffic *in Pretoria*	LOCATION
	h. he *fell in love* with another professor at Unisa's wife, and he divorced his wife and he eventually married this uh lady. But of course the professor at Unisa was of course *extremely cross*, that he's now taking his wife away	EMOTION
	i. So he got a court order, the professor at Unisa, *got a court order* to restrain Van der Merwe from coming close to his wife, or to his house. And of course Van der Merwe ignored the court order and, you know, he carried on with his affair. Um he was *in love* with this girl. And he you know [flicks hand] of course this other professor was a real stick in the mud. So *he had him arrested*. And *he was charged with contempt of court*. And then of course in those days, if you had a criminal charge, you couldn't be a professor.	EMOTION
	j. And they made him head of *Justice College*, which was the *university of the department of justice*, you know, the *small little university within the department of justice that trained judges and prosecutors and things like that*	LOCATION
2	NONE	
3	a. Now he already had *a reputation*, everybody knew him, he published widely, he's a confirmed, very established academic, and he then went to the bar.	RESOURCES
	b. decided he doesn't want to stay in *academia*	LOCATION

	c. he then went *to the bar*	LOCATION
4	NONE	
5	a. Professor John Dugard who was a professor at *this university*	LOCATION
	b. he was a professor at *the University of Leiden*	LOCATION
	c. If you are a senior professor *with an international reputation* then the courts will follow what you say.	RESOURCES
6	he often appeared in *the courts* for um people who were oppressed by the apartheid system	LOCATION
7	NONE	
8	whether you are whether you are going to quoted by the Supreme Court of Appeal or by the Constitutional Court depends on your *reputation*	RESOURCES
9	Justice Kate O Regan was a professor at the *University of Cape Town*	LOCATION
10	NONE	-
11	there's an academic at *UNISA* called professor Wessel	LOCATION
12	Legal academics, they teach at *tertiary institutions*	LOCATION
13	um it is sometimes a difficult profession because uh there's lots of there's lots of *jealousy*, there's lots of um *competition*, there's not a lot - in South Africa its not so bad but in a country like Scotland or England where very little new develops you know its very difficult to think of anything novel in a legal system that's been going for centuries. So the competition is *fierce*	EMOTION
14	a. and um to make it more appetizing the conditions, the *working conditions are very very pleasant*. You have all the *books and materials*, *computers whatever you need* at your disposal, um *you don't have fixed office hours*, you can work at home. Um you have *the opportunity to go to conferences, one international conference per year, two local conferences.*	RESOURCES
	b. you can work at *home*	LOCATION
15	NONE	
16	a. and uh you also get a *title*. If you are promoted you become an associate professor or professor and people uh think very highly of you	RESOURCES
	b. There's *opportunity to get advanced degrees*. University stimulates further degrees, LLMs and LLDs, you can study for free.	RESOURCES
	c. Um there are many many grants many many *opportunities to get money for books and for study*.	RESOURCES
17	NONE	
18	Professor Skeen was the Dean of *this Law*	LOCATION

	Faculty	
19	a. So to sugarcoat that there was a *rule* that if you become an academic *you may use twenty percent or your time, at university, for your practice*. If you are a practitioning uh a practitioner, either at the bar or at the side-bar. You may use twenty percent of your time to attend to your practice.	RESOURCES
	b. if you allow your academics to go to *court* they get experience in *court*	LOCATION
20	Being an academic at *a reputable university*, with international standing like *Wits* is the best place in the legal profession to be	LOCATION

3: SOCIAL ACTORS (SAct)

LEGAL ACADEMIC QUOTATION NO.	SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	a. Dr van der Merwe	NOMINATION
	b. you might remember *him*, I wonder, I wonder whether *he's* still alive	CLASSIFICATION – Gender – Male (many uses of 'he', 'his' and 'him' in quotation)
	c. He fell in love with *a professor at Unisa's wife*	CLASSIFICATION – Gender – Male
	d. he was a *brilliant academic*	CATEGORIZATION
	e. He was *extremely eccentric*	CATEGORIZATION
	f. But of course the professor at Unisa was of course extremely cross, that he's now taking his wife away … [laughs] you know. Its not the kind of thing that *Afrikaners* do, you know *Boere* are very, you know they are very religious	CATEGORIZATION
2	NONE	
3	a. professor Cockerell	NOMINATION
	b. decided *he* doesn't want to stay in academia, and *he* went to the bar. Now *he* already had a reputation, everybody knew *him*, *he* published widely, *he's* a confirmed, very established academic, and *he* then went to the bar. And immediately *he* got enormous briefs, you know, um uh you know constitutional court cases and very important cases. And *he's* doing exceptionally well at the bar.	CLASSIFICATION – Gender – Male (7 instances of 'he'; 1 instance of 'him')
	c. he's a *confirmed*, very *established* academic	CATEGORIZATION
4	*modern* academics	CATEGORIZATION
5	a. Professor John Dugard	NOMINATION
	b. an *internationally-renowned* academic	CATEGORIZATION
	c. *He* is not/ *his* field is international law but *he* is an international jurist. *He* is um the rapporteur for uh for the Palestinian question in the Middle East, um *he* was a professor at the University of Leiden. And that is the kind of person that you can quote uh with authority. And you can	CLASSIFICATION – Gender – Male (3 instances of 'he'; 1 instance of 'his'; 1 instance of 'him')

	say that the court would follow *him*.	
	d. *senior* professor with an international reputation then the courts will follow what you say. And if you are a *junior* academic	CATEGORIZATION
6	a. professor John Dugard	NOMINATION
	b. *he* was an academic member of the bar in order words *he* did his pupilage and was admitted to the bar as an academic member, and *he* often appeared in the courts for um people who were oppressed by the apartheid system. Who couldn't afford counsel, and *he* often appeared as *pro amico* for those people	CLASSIFICATION – Gender – Male (4 instance of 'he')
	c. Unfortunately, professor Dugard during the apartheid era was not uh successful, *he* asked the courts to look outside the scope of the legislation	CLASSIFICATION – Gender – male (1 instance of 'he')
7	a. Professor Hoexter	NOMINATION
	b. that book you know, not only reflects the law as it is at a certain stage uh in life, end of 2006 I think, but it is also *her* view. Certain interpretations certain uh uh innuendos and slants on the law is of course what *she* thinks how the law of uh uh administrative justice should be. Because its *her* book. And *she* teaches from that book. *She* teaches to *her* students and the book is quoted in court. It is a leading textbook on administrative law. And through that, through process of osmosis, um *her* views become the views of the legal profession.	CLASSIFICATION – Gender – Female (4 instances of 'her'; 3 instances of 'she')
	c. OK *those are the big guys*, you know, I'm not uh its not everybody whose a professor that that gets to that.	CATEGORIZATION
8	i. Professor Iain Currie	NOMINATION
	j. Professor Cora Hoexter	NOMINATION
	k. if a judge quotes uh Professor Currie, every time a judge quotes *him his* reputation is augmented.	CLASSIFICATION – Gender – Male (1 instance of 'him'; 1 instance of 'his')

	l. *junior* lecturer	CATEGORIZATION
9	a. Justice Kate O Regan	NOMINATION
	b. *she* was appointed as a Justice and now *she* is an acting Deputy Chief Justice. Made an enormous impact on the constitutional jurisprudence and *she* was never an advocate or a practicing member of a uh a bar in South Africa or anywhere else. *She* was an academic. *She* was an academic and *she* was appointed as such.	CLASSIFICATION – Gender – Female (6 instances of 'she')
10	NONE	
11	a. professor Wessels	NOMINATION
	b. *He* writes about the architecture of judicial buildings. *He* writes, *he* compares the new constitutional court with the Supreme Court, the High Court in Pretoria for example uh where one is open and reflective of human rights and the other is a monumental building reflective of the State uh power at that state uh at that stage uh when Paul Kruger and his government built the building. So if you're interested in that you can go and read, *he's* written several articles on judicial buildings, as a reflection of the society that we are in.	CLASSIFICATION – Gender – Male (4 instances of 'he')
12	a. John Dugard	NOMINATION
	b. Iain Currie	NOMINATION
	c. Cora Hoexter	NOMINATION
13	NONE	
14	NONE	
15	NONE	
16	NONE	
17	a. if you're a full professor like *Cora* or *Iain Currie*	NOMINATION
	b. a *full* professor	CATEGORIZATION
	c. So you can make a pleasant living, you can't have *a Porsche* or you can't have *a vintage rolls Royce*, unless of course you marry a very successful lawyer.	CLASSIFICATION – Class
18	a. Professor Skeen	NOMINATION
	b. *he* was a very dear old man. *He* was a great friend of mine, I was very fond of *him*. Uh and	CLASSIFICATION – Gender – Male (6 instances of 'he'; 1 instance of 'him')

	what *he* did is *he* wrote a series of books on criminal, *he* did a uh *he* did a PhD or Masters degree in criminology from Oxford	
19	Because they could just as easily become practitioners and *earn five times what the academics earn*.	CLASSIFICATION – Class
20	But you know you must be *independently wealthy* and you *must be able to support yourself* you know its *difficult to support yourself* on the salary, and on writing books and journals	CLASSIFICATION – Class

4: VALUES (V)

LEGAL ACADEMIC QUOTATION NO.	VALUES (V)	CONTENT	FORM
1	a. And he was a professor at the University of Tukkies, and later on, because he was *very naughty*	LEGAL ACADEMICS THEMSELVES - Ambiguous	MORAL EVALUATION
	b. he was a *brilliant* academic	LEGAL ACADEMICS THEMSELVES – positive	MORAL EVALUATION
	c. this other professor was *a real stick in the mud*	LEGAL ACADEMICS THEMSELVES – negative	MORAL EVALUATION
	d. *if you had a criminal charge, you couldn't be a professor*. Um he was a professor, I think, at the age of 24. At 24 he was a full professor and had already written his first or second book. And then this thing happened and that ruined his whole career. Um and then the nationalist government took him from the university - because *the university fired him - because he had a criminal conviction.*	LEGAL ACADEMICS THEMSELVES – negative	MORAL EVALUATION
	e. And there he translated all these things, he was very very good with languages. And he translated all - he and a couple of his colleagues - the all the Afrikaans um in beautiful English. I mean he's Van der Merwe from the Free State, he's not an Englishman at all, but *very very good pure English*. Uh, you know *understandable English that students would understand*.	INTERNAL GOODS – good language skills, communicability	PURPOSIVE
2	*Nobody will read it*. *Nobody reads journal articles*. Thirty percent of all journal articles are only read uh how what does that how does the statistics work? Um *the only people reading journal articles, learned journal articles, are the thirty percent of academics who are involved in the publishing of those articles*. You know, peer review and editors? They read it, but uh other p- he he *seventy percent of the other academics never read it*. So you know it's a you know *it's a its like a little mouse in one of these little wheels* but nevertheless perhaps we can cause some excitement.	EXTERNAL GOODS – esteem	MORAL EVALUATION
3	a. Also professor Cockerell who was also	EXTERNAL GOODS –	PURPOSIVE

	here, who decided *he doesn't want to stay in academia*, and he went to the bar. Now he already had a reputation, everybody knew him, he published widely, he's a confirmed, very established academic, and he then went to the bar. And *immediately he got enormous briefs*, you know, um uh you know constitutional court cases and very important cases.	monetary rewards	
	b. Also professor Cockerell who was also here … he's a *confirmed, very established* academic	LEGAL ACADEMICS THEMSELVES – positive	MORAL EVALUATION
4	depending on whether the courts take that into consideration next time when such a court, when such a matter comes to the court, *the academics then have influence in changing the law*	INTERNAL GOODS – being able to change the law	MORAL EVALUATION
5	a. Professor John Dugard who was a professor at this university is an international, an *internationally-renowned* academic.	LEGAL ACADEMICS THEMSELVES – positive	MORAL EVALUATION
	b. If you are a *senior* professor with an *international reputation* then the courts will follow what you say. And if you are a *junior* academic, not impossible that the courts will listen to you, but it is *very unlikely* that the courts will be swayed by an *un-unheard* of or *unknown* academic.	EXTERNAL GOODS – esteem, status	MORAL EVALUATION
6	and *he often appeared in the courts for um people who were oppressed by the apartheid system*. Who couldn't afford counsel, and he often appeared as *pro amico* for those people where it was where it was a groundbreaking and very important case. *That's also one way that um you can present the court with your views*.	INTERNAL GOODS – being able to change the law	PURPOSIVE
7	a. if you're an *authority* and you've been *a professor for a long time* in your field, uh like Professor Hoexter whose just written a *magnificent* book on administrative law	LEGAL ACADEMICS THEMSELVES – positive	MORAL EVALUATION
	b. It is a *leading* textbook on administrative law. And through that, through process of osmosis, um *her views become the views of the legal profession*.	INTERNAL GOODS – being able to change the law	MORAL EVALUATION
8	And whether you are going to whether you are whether *you are going to quoted* by the Supreme Court of Appeal or by the Constitutional Court *depends on your reputation*. Um a a academic like Professor Iain Currie or Professor Cora Hoexter who are, I don't know if they've	EXTERNAL GOODS – status, esteem	PURPOSIVE

	been rated but if they were to be *rated* they would be *A-rated academics*. They are excellent academics who've published standard works in both their fields. So if you need to quote an academic on constitutional law then you would go to Iain Currie, um, and if a judge quotes uh Professor Currie, *every time a judge quotes him his reputation is augmented*.		
9	Justice Kate O Regan was a professor at the University of Cape Town and she was appointed as a Justice and now she is an acting Deputy Chief Justice. Made an *enormous impact* on the constitutional jurisprudence	LEGAL ACADEMICS THEMSELVES – positive	MORAL EVALUATION
10	My colleagues always complain that *legal writing is difficult* and you will now complain to me that legal writing is so difficult because everything must be footnoted and authorized *and you must be very careful not to commit plagiarism and its really difficult not to*, to write academically, legal academic writing is one of the most difficult things to do.	INTERNAL GOODS – academic honesty	MORAL EVALUATION
11	NONE		
12	a. And then finally ladies and gentlemen there's of course *the best* profession of all. Yes. The *best place to be* in the legal field is an academic.	Unclear whether the lecturer is referring to internal or external goods here.	MORAL EVALUATION
	b. they have *the ability to change the law*, if you are a legal academic of very high standing, and people listen to you - like John Dugard - or Iain Currie or Cora Hoexter, *people follow what you say, the courts quote you, the courts follow on on what your views are*	INTERNAL GOODS – being able to change the law	MORAL EVALUATION
13	its not so bad but in a country like Scotland or England where very little new develops you know its very difficult to think of anything *novel* in a legal system that's been going for centuries	INTERNAL GOODS – novelty, originality of thought	MORAL EVALUATION
14	the working conditions are very very pleasant	EXTERNAL GOODS – trappings of the profession	MORAL EVALUATION
15	Unfortunately the *bad* part of an academic's life is you must *mark scripts*, that is really the *bad* part of it but … you know the first ten is fine but after that it does become *very boring*	EXTERNAL GOODS – intellectual stimulation	MORAL EVALUATION
16	Um and uh you also get a title. If you are promoted you become an associate professor or professor and *people uh think very highly of you*.	EXTERNAL GOODS – esteem	MORAL EVALUATION
17	Uh it is not place you should go if you are	EXTERNAL	MORAL

	very materialistic. Salaries are very *humble*	GOODS – monetary rewards	EVALUATION
18	Professor Skeen was the Dean of this Law Faculty and he was *a very dear old man*. He was a great friend of mine, I was very fond of him.	LEGAL ACADEMICS THEMSELVES – positive	MORAL EVALUATION
19	NONE		
20	a. But still, this is the *best* place and you don't have to believe me. Being an academic at a reputable university, with international standing like Wits is the *best* place in the legal profession to be. Um *for a variety of reasons.*	INTERNAL GOODS – basis unclear	MORAL EVALUATION
	b. its difficult to support yourself on the salary, and on writing books and journals, but uh stimulation, for interaction with other people, *for challenges, for intellectual stimulation, intellectual ability uh uh being able to be uh on top of what is going on in your field, there is no better place .. to be*	EXTERNAL REWARDS – Intellectual stimulation	MORAL EVALUATION

MAGISTRATE: ANALYTICAL TABLES

1: SOCIAL ACTION (SA)

[A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material]

MAGISTRATE QUOTATION NO.	SOCIAL ACTION (SA) QUOTATIONS	A	T	S	P	NT	M	Object (not calculated – for guidance only)[7]
1.	NONE							
2	d. the magistrate's court *hears* your case.	X	X	X				A PARTY
	e. you go to your local division. There the judge *decides against* the magistrate.			X	X	X		-
	f. The magistrate wasn't a precedent. What the magistrate *decided* was just you know, binding between the parties.	X	X	X				THE PARTIES
	g. Your opponent, who *got satisfaction* in his favour from the magistrate	X	X	X				A PARTY
3	k. But the magistrates in a magistrates' court *does not create precedent*. Magistrates in a magistrates' court does not create precedent.		X	X	X			LAW
	l. their decisions *are not recorded*				X	X	X	-
	m. They *cannot bind* anybody with their decision.		X	X	X			PARTIES
4	p. Magistrate's court *is bound* by the precedents of the High Court, the Supreme Court of Appeal and the Constitutional Court.			X	X	X		-
	q. So, if a magistrate *sits* in a court case, the magistrate the magistrate can't just *do* what he wants to do.	X				X	X	-
	r. He *is bound* by the South African law. Obviously. He practices South African law. So he *is bound* by South African law. He *is bound* by the precedent of the High Court. So he *can't* - if there's a decision in the High Court, that says 'we accept traffic photographs' you know these photo things that are now so controversial, that's the decision in the High Court, *it is binding on everybody* in the province. *Its also binding on the magistrate*. The magistrate can't say, 'well the High Court they will accept the				X	X	X	-

[7] I have not calculated the number of objects of social action in the same way as I have calculated active/passive, transactive/non-transactive; and semiotic/material actions where the categorization is 'either-or'.

	photographs but *here's my court and I won't accept it*'. So he can't say that. *It is binding*.							
	s. He *practices* South African law.	X	X				X	LAW
	t. the decision of that magistrate, is not is not - I wouldn't say its not binding, its *binding* on the people who are involved in the case - but it has no precedent. *Its not binding on other magistrates* and *its not binding, obviously, on other courts*.	X		X		X		PARTIES OTHER MAGISTRATES JUDGES
5	a. usually all criminal cases *are heard* by the magistrates' court first.	X	X	X				PARTIES
	b. the magistrate will *decide* (a) whether you're going to be released on bail, or whether you're going to be kept in prison	X	X	X				A PARTY
	c. he then *makes* an order.	X	X	X				A PARTY
6	a. You go to a higher court if you are convinced that uh that *something was done wrong in the lower court* uh and that the *sentence* uh that the magistrate court or judge *came to* uh was incorrect.	X	X	X				A PARTY
	b. You've gone through the whole thing, the magistrate or judge has *made* an error. According to you, something was *done* incorrectly. You want to take this to a higher authority uh to rectify that in order that the sentence can be changed.	X	X	X				A PARTY AN ERROR
7	j. A *review takes place* automatically from the magistrate's court to the High Court if a magistrate of sev- of less than seven years seniority, if a magistrate is, has been a magistrate for less than seven years			X	X	X		-
	k. And he *imposes* a fine or prison sentence exceeding three months … that case must go on automatic review to the judge of the Supreme Court to see if the magistrate is not it not um *imposing* too harsh a sentence. That is only magistrates that have been a magistrate for seven years or less. Magistrates that's been um more senior than seven years, if they *impose* a sentence of longer than six months, per count.	X	X	X				A PARTY
	l. Then, because he's still a junior magistrate that case must go on *automatic review* to the judge of the Supreme Court to see if the magistrate is not it not um imposing too harsh a sentence. That is only magistrates that have been a magistrate for seven			X	X	X		-

	years or less. Magistrates that's been um more senior than seven years, if they impose a sentence of longer than six months, per count. Six months per count then *it goes on automatic review*. Please remember there's no, there's no nothing you can do about it, *it must go to the Supreme Court or uh to the High Court for review* by a High Court judge.							
8	a. when I was a magistrate I had to *serve* for a uh limited period of time thank heavens in the um matrimonial court	X		X		X		-
	b. One Friday afternoon I was *sitting* in court and it was late	X				X	X	-
	c. all my colleagues had already *adjourned* - I was the most junior magistrate in the in the court building. And all my colleagues had *adjourned* for the weekend.	X		X		X		-
	d. They've *closed* their courts and they've *gone* - you know they haven't *left* the building but they're *sitting* in their offices and you know *chatting* and *doing* cross-word puzzles and things like that.	X	X				X	OTHER MAGISTRATES
	e. I was the only the only magistrate *sitting* to hear the case and the case was an ordinary maintenance case	X	X	X				THE PARTIES
	f. I went on record, you know you have a tape machine, and I went on record *saying* 'It is now five past five [struggles with coughing], there are no courts available and I am reluctantly *hearing* this case because I'm the only sitting court that can *hear* this case otherwise this man will stay in jail for the rest of the for the rest of the weekend, or another magistrate must come out after hours to *hear* a bail application.	X	X	X				THE PARTIES
	g. I *lose* my temper with the prosecutor							PROSECUTOR
	h. I *take over* the inquisition, because in a maintenance matter you can do it. And I start *cross-examining* him from the bench. And that is something you must never do. But nevertheless I start *cross-examining* him.	X	X	X				THE PARTY PROSECUTOR
	i. I just *let rip* into him, forgetting that I'm the magistrate and not the prosecutor.	X	X	X				THE PARTY
	j. I started *shouting* at him.	X	X				X	THE PARTY
	k. I *sent* him to uh you know the first thing is, he was a first offender. It's the first time that he's been before a	X	X				X	THE PARTY

	court. So you never *send* a first offender to jail. Obviously, you know, you never *send* a first offender to jail. So uh I *gave* him the maximum [gestures with arm and elicits more laughter] sentence that I could which was one year. Twelve months. I *gave* him straight twelve months twelve thousand rand fine uh uh or twelve months.							
	l. But of course what I had *forgotten*, you know I was still a very junior magistrate, what I had *forgotten* is it goes on automatic review to the judge of the Supreme	X	X	X				THE FACT OF REVIEW
	m. it goes on *automatic review* to the judge			X	X	X		-
	n. He doesn't understand *seeing* this woman with four children and this man who refuses to pay the maintenance. He doesn't you know they've never *seen* that, its just not part of their frame of reference. They are just concerned about procedural correctness.	X	X				X	THE PARTIES
	o. I must *look after* the food and I've got ten or twelve people to *serve* and I don't want phone calls now.	X	X				X	DINNER GUESTS
	p. my name came in the law reports as the magistrate who *sent* a first offender to twelve months in prison.	X	X				X	THE PARTY
	q. It goes to the judge to see that the young magistrates don't *send* people to twelve years imprisonment if they're not, if they shouldn't really be, go be there.	X	X				X	THE PARTY
9	You would start by being a junior prosecutor, senior prosecutor uh *being elevated* to the bench becoming a magistrate, senior magistrate, regional court magistrate, senior court magistrate, regional court president and then *be invited* to become a judge in the High Court.			X	X	X		-
10	NONE							
11	a magistrate, nja, is just *trained* here in Pretoria for six months				X	X	X	
12	a. some senior regional court magistrates on criminal matters have *made it* into the High Court	X	X	X				HIGH COURT
	b. he *did* his LLB at the University of the Western Cape	X	X	X				ACADEMIC ACHIEVEMENT
	c. he was very, deeply *concerned* about human rights	X	X	X				HUMAN RIGHTS
	d. he *found* him not guilty based on facts and the Scorpions were very upset	X	X	X				A PARTY

	and they asked him for reasons and he said um his reasons are evident from his judgment and it was not a matter based on law it was merely on facts of the case he *found* it um that there was enough grounds uh for doubt, it was not proved beyond reasonable doubt that this Pieter van der Merwe or Pieter Vermeulen or I don't know what his name is … and he was *found* not guilty.							
13	Ninety-eight percent ladies and gentlemen, you won't believe this, ninety-eight percent [writes '98%' on board] of all legal work criminal and civil, *is done* in the magistrates' court. Unbelievable, I couldn't believe it but its true. Ninety-eight percent of all legal work *is done* in the magistrates' court	X	X				X	LEGAL WORK PARTIES
14	a. And the magistrate, the regional court magistrate in Johannesburg, has got a diary for the High Court, and they *place* the matter on the roll for the High Court in the magistrates' court.	X	X				X	PARTIES
	b. they appear in the magistrates' court a) to be directed to the High Court; b) to consider whether they can get bail or not.	X	X	X				PARTIES
15	a. You you get there at nine o clock in the morning and you must *take* a decision every five minutes and all you get is the worst criminals in Johannesburg appearing before you and all you must do is *decide* which court they must go to.	X	X	X				CRIMINALS
	b. if they put a magistrate there permanently he will go mad, not that magistrates are not mad, I mean they are all mad [more laughter from class]. But if you *put* a person there permanently they will, I mean they will just resign after a week, I mean, its like casualty … uh ward in Hillbrow. You know, you can do it for one day but they *rotate*				X	X	X	
	c. if you're a nice senior magistrate, especially senior regional court magistrate, *you pick and choose* what cases you want and then you've got court 13, or court 25. And your offices is attached to the court. You *walk* out of your office into the court. Um and that's your court. Its your court orderly, its your interpreter, its your prosecutor, its	X	X				X	
16	l. We want her to *be found guilty* and	X	X	X				A PARTY

	she must not come back. That's what we will ask the court to do.							
	m. And old Mrs Gradiz walked in there and I could see [indicates that the magistrate was frowning], *not* in a good mood. And she *sent* her, she *sent* her to jail for a very, very long time.	X	X				X	A PARTY
	n. you think you're going to get a *fine* perhaps and a *reprimand*, and you get twelve and a half years.	X	X				X	A PARTY
17	very few magistrates, district court magistrates will *go up* to the three years and the sixty thousand rand	X	X				X	AN ACCUSED
18	g. Now the chief magistrate is an enormously influential person. Uh he *decides* whether you can have um gatherings in his city.	X	X	X				CITIZENS
	h. He's the person to *decide* where the court's going to be, uh what court will listen to what case, uh the organization of the court, the organization of the regional court …	X	X	X				COURT PERSONNAL AND OTHER MAGISTRATES
	i. Everything, whether there's going to be a march, whether he will *give permission* for a march to be held, um uh whether you can have / if you have a huge pop concert you must *get permission* from the chief magistrate.	X	X	X				CITIZENS
	d. They are still being paid by the civil service, they work in the civil service, their buildings, they've got their own commission. But um they're not completely independent.				X	X	X	-
19	The regional court president is only concerned with the *organization* of the regional court in his region.	X	X	X				ADMINISTRATIV E STRUCTURES
20	NONE							
21	Ordinary magistrates, with an LLB *sit* in the civil court	X		X		X		-
22	e. a senior civil court will be introduced, where senior magistrates would *sit*	X		X		X		-
	f. Jurisdiction of the amount, the cases they could *hear*, R300 000	X	X	X				PARTIES
23	Now the district court, the district magistrates' court ladies and gentlemen, is the lowest court that you can get in the hierarchy, um it doesn't mean that its not important, it *does* virtually all the work. Between the regional court and the district court it *does* virtually the lion's share of the work.	X	X				X	PARTIES
24	the magistrates courts were those courts that *sat* in judgment on the pass laws, they were the primary movers for the *implementation* of apartheid	X	X	X				ULTIMATE OUTCOMES

25	NONE							
26	NONE							

2: CIRCUMSTANCES OF SOCIAL ACTION (CSA)

MAGISTRATE QUOTATION NO.	CIRCUMSTANCES OF SOCIAL ACTION (CSA) QUOTATIONS	CIRCUMSTANCE TYPE
1	you have magistrates in *the lower courts* and judges in the higher courts	LOCATION
2	NONE	
3	Magistrates in a magistrates' court does not create precedent. Why? Well firstly because *they haven't got the authority*.	RESOURCES
4	The magistrate can't say, 'well the High Court they will accept the photographs but *here's my court* and I won't accept it'.	LOCATION
5	he then makes an *order*.	RESOURCES
6	you want to take this to a higher authority uh to rectify that in order that the *sentence* can be changed.	RESOURCES
7	And he imposes a *fine* or *prison sentence* exceeding three months	RESOURCES
8	a. when I was a magistrate I had to serve for a uh limited period of time *thank heavens* in the um matrimonial court	EMOTION
	b. I had to serve for a uh limited period of time thank heavens *in the um matrimonial court*	LOCATION
	c. I was sitting *in court*	LOCATION
	d. I was the most junior magistrate in the *in the court building*	LOCATION
	e. They've closed their *courts* and they've gone - you know they haven't left the building but they're sitting *in their offices*	LOCATION
	f. I went on record, you know you have *a tape machine*	RESOURCES
	g. I went on record saying 'It is now five past five [struggles with coughing], there are no courts available and I am *reluctantly* hearing this case because I'm the only sitting court that can hear this case	EMOTION
	h. And of course, you know, I was tired, I was irritated um uh I was cross with this man, I was cross with my colleagues, cross with the world.	EMOTION
	i. she gives evidence and um I'm very um uh, I've got *lots of empathy with her*. Um and she's really struggling. She is uh a single mother she's um uh uh domestic worker, she gets a pittance for an income. And she must keep four children at school and *this bugger* is lounging around, he's *drinking out his money* and the *rest he gives to his eighteen-year-old girlfriend*.	EMOTION
	j. I *lose my temper* with the prosecutor	EMOTION
	k. And of course the more I ask him the more,	EMOTION

	you know you can hear on the tape, ja *I'm getting more and more irritated* because he's lying and he's getting out he's trying to get out of his responsibilities. Um and you can you know I um *I just let rip into him*, forgetting that I'm the magistrate and not the prosecutor. And then I started shouting at him.	
	l. Now the problem with the system, is: The judge sits in his chambers, the judge is now a senior advocate who's been elevated to a judge. He sits in his chambers he's high on on on human rights and things - which is fine - but *he doesn't understand what a magistrate's court looks like. He doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance*. He doesn't you know they've never seen that, its just not part of their frame of reference. They are just concerned about procedural correctness.	EMOTION
	m. I send him off to jail and *I feel wonderful* you know I say 'rot in hell I hope you never come out.'	EMOTION
	n. Of course three months later on a Saturday evening, on a Saturday evening *in Cape Town*, um I had a dinner party	LOCATION
	o. Now, *I'm irritated* because you know - the food is in the kitchen, I must look after the food and I've got ten or twelve people to serve and I don't want phone calls now. *Grab the phone: 'Yes who's this!'*	EMOTION
9	NONE	
10	NONE	
11	Now they must have *an LLB*. But in the old days mje *just a public service diploma or you know walking past a few law books would have sufficed*.	RESOURCES
12	a. he was with me a magistrate *in Cape Town*	LOCATION
	b. He's got the *gravitas* and the *knowledge* and the professionalism to become a High Court judge	RESOURCES
13	NONE	
14	a. In order not to let the people rot in jail, you bring them to the magistrates' court to what we call a directional court, *Court 13 in Johannesburg*.	LOCATION
	b. And the magistrate, the regional court magistrate in Johannesburg, has got a *diary* for the High Court	RESOURCES
	c. *Doesn't mean* that the magistrates' court *has got authority* to hear that matter? They've *only got authority to send it to the High Court*	RESOURCES
15	a. No no no, it depends. If you become a magistrate and you're so *unlucky* to get this	EMOTION

	court that I talked to you about, the transitional court, the the directional court, uh that's a *hideous* court because *its like a supermarket*. You you get there at nine o clock in the morning and *you must take a decision every five minutes* and *all you get is the worst criminals in Johannesburg appearing before you* and all you must do is decide which court they must go to. Um and because its such a *horrible court* if they put a magistrate there permanently he will go *mad*, *not that magistrates are not mad, I mean they are all mad* [more laughter from class]. But if you put a person there permanently they will, I mean they will just resign after a week, I mean, *its like casualty* … uh ward in Hillbrow.	
	b. the transitional *court*, the the directional *court*	LOCATION
	c. you pick and choose what cases you want and then you've got *court 13*, or *court 25*	LOCATION
	d. And your offices is attached to the court. You walk out of your office into the court.	LOCATION
	e. Um and that's *your court*. Its *your court orderly*, its *your interpreter*, its *your prosecutor*, its uh … *the whole organization is yours*. *You are the king, you are the king of the of the dung heap*.	RESOURCES
	f. You are the king, you are the king of the of the dung heap.	EMOTION
16	a. And old Mrs Gradiz walked in there and I could see [indicates that the magistrate was frowning], *not in a good mood.*	EMOTION
	b. And the woman, *everybody in court* broke down crying, you know, they were not prepared, they didn't, they didn't expect it at all.	LOCATION
	c. And there's *no mercy*. As far as .. drug dealing, credit card fraud, things like that. *Very little mercy*. Even if you plead guilty, even if you plead guilty.	EMOTION
	d. the *sentences* are always postponed to the Friday so that you do all *your sentencing* on Friday	RESOURCES
17	NONE	
18	NONE	
19	the chief magistrate *has got more political power* than the regional court president	RESOURCES
20	NONE	
21	Ordinary magistrates, with an LLB sit *in the civil court.*	LOCATION
22	It would have *a jurisdiction of R300* / well, when I, when I last heard they were considering *a jurisdiction of R300 0000.*	RESOURCES
23	NONE	
24	I told you that the magistrates' court was	EMOTION

	introduced, the new government was introduced and there was a, *I wouldn't say an animosity but a mistrust* between the magistrates' court and the new government.	
25	NONE	
26	NONE	

3: SOCIAL ACTORS (SAct)

MAGISTRATE QUOTATION NO.	SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	NONE	
2	If *your* dispute is less than R100 00 or more than uh uh then *you* go to the magistrate's court and the magistrate's court hears *your* case.	PARTIES – Included
3	NONE	
4	c. So, if a magistrate sits in a court case, the magistrate the magistrate can't just do what *he* wants to do. *He* is bound by the South African law. Obviously. *He* practices South African law. So *he* is bound by South African law. *He* is bound by the precedent of the High Court. So *he* can't - if there's a decision in the High Court, that says 'we accept traffic photographs' you know these photo things that are now so controversial, that's the decision in the High Court, it is binding on everybody in the province. Its also binding on the magistrate. The magistrate can't say, 'well the High Court they will accept the photographs but here's my court and I won't accept it'. So *he* can't say that. It is binding.	CLASSIFICATION – Gender – Male (5 instances of 'he')
	d. But, the decision of that magistrate, is not is not - I wouldn't say its not binding, its binding on the *people who are involved in the case*	PARTIES – Included
5	a. Usually if usually all *criminal cases* are heard by the magistrates' court first. And the magistrate will decide (a) whether *you're* going to be released on bail, or whether *you're* going to be kept in prison	PARTIES – Included and excluded
	b. *he* then makes an order.	CLASSIFICATION – Gender – Male (1 instance of 'he')
6	Now appeal means *you* go to a higher court than the court where the case was heard in the first	PARTIES – Included

	instance. *You* go to a higher court if *you* are convinced that uh that something was done wrong in the lower court	
7	a. if a magistrate is, has been a magistrate for less than seven years, And *he* imposes a fine or prison sentence exceeding three months and I'm not sure, I'm not sure of the amount of money. But three months or a certain amount of thousands of rand in money, Then, because *he's* still a junior magistrate that case must go on automatic review to the judge of the Supreme Court to see if the magistrate is not it not um imposing too harsh a sentence.	CLASSIFICATION – Gender – Male (2 instance of 'he')
	b. And he imposes a fine or prison sentence exceeding three months	PARTIES – Excluded
	c. Magistrates that's been um more senior than seven years, if they impose a sentence of longer than six months, per count.	PARTIES – Excluded
8	m. I had to serve for a uh limited period of time thank heavens in the um matrimonial court um the so-called maintenance court where *people* don't pay their maintenance.	PARTIES – Included
	n. *junior* magistrate	CATEGORIZATION
	o. this uh-w *case* was a long outstanding *case* with a warrant and of course somehow the police on a Friday afternoon - you know don't ask me how they manage to do it on a Friday afternoon- they caught *this man* and of course I was the only the only magistrate sitting to hear the *case* and the *case* was an ordinary maintenance *case*.	PARTIES – Included and excluded
	p. I went on record saying 'It is now five past five [struggles with coughing], there are no courts available and I am reluctantly hearing this *case* because I'm the only sitting court that can hear this *case* otherwise *this man* will stay in	PARTIES – Included and excluded

	jail for the rest of the for the rest of the weekend, or another magistrate must come out after hours to hear a bail application.	
	q. And here he appears and he's one of those typical um people who slips through the holes in the system. He hasn't paid maintenance, his wife was in court. He hasn't paid maintenance for four years. He has a a job, he has an income, of say three thousand rand a month. But he has a girlfriend and he gives all his money to his girlfriend. He doesn't/ he's left his wife, a wonderful decent person, with four children, living without any income.	PARTIES – Included
	r. we call we call the we call the wife and she gives evidence and um I'm very um uh, I've got lots of empathy with her. Um and she's really struggling. She is uh a single mother she's um uh uh domestic worker, she gets a pittance for an income. And she must keep four children at school	PARTIES – Included
	s. and this bugger is lounging around, he's drinking out his money and the rest he gives to his eighteen-year-old girlfriend.	PARTIES – Included
	h. long story short / and he's attitude - this … idiot [outburst of laughter from class] his attitude to me is um 'Well, you know, its my money I can do what I want.' Um and 'I haven't paid my maintenance because I must look after my my girlfriend.' Now, you know, what do you do to a man like this? I said 'But you can't do what you want there's a court order. And, you know, this is the fabric of society, you don't look after your family, you know, your children are all going to become just like you!	PARTIES – Included
	i. And of course he didn't have the tw- I knew he didn't have	PARTIES – Included

	the twelve thousand rands, it was St Athlone's and the people don't have twelve thousand rand and he went to jail for twelve months. Finish and klaar.	
	j. *a very junior* magistrate	CATEGORIZATION
	k. he doesn't understand what a magistrate's court looks like. He doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance.	PARTIES – Included
	l. Of course three months later on a Saturday evening, on a Saturday evening in Cape Town, um I had *a dinner party*, I had *lots of people* there, at my dinner party,and it was about se- seven o clock. You know just after after the people have arrived and they've had their *first course*, then there's a phone call. Now, I'm irritated because you know - the food is in the kitchen, I must look after the food and I've got *ten or twelve people to serve*	CLASSIFICATION – Class
	m. 'I have tonight issued an urgent mandamus' or something 'instructing Pollsmoor Prison to release this man and I would like it I you could send me a full set of reasons why you for a first offender sentenced this man to twelve months in prison. I'm forwarding the court record to you and if you could reply by Monday afternoon latest I would appreciate it'.	PARTIES – Included
9	*senior* magistrate, *regional court* magistrate, *senior [regional] court* magistrate, *regional court president*	CATEGORIZATION
10	*district court* magistrate, and a *regional court* magistrate	CATEGORIZATION
11	NONE	
12	a. Mr Andre LeGransie	NOMINATION
	b. I find it embarrassing always to refer to this, but *he was a man of colour*.	CLASSIFICATION – Race
	c. *he* was with me a magistrate in Cape Town. And *he* was very bright, very bright young	CLASSIFICATION – Gender – Male (9 instances of 'he')

	guy. *He* was really very very clever. And very fair, you know *he* was a - I find it embarrassing always to refer to this, but *he* was a man of colour. From the Cape. And *he* did his LLB at the University of the Western Cape and when *he* was a magistrate, *he* was very, deeply concerned about human rights. You know, obviously. Um and so *he* was a magistrate.	
	d. *He* became a regional court magistrate um and in the beginning of this year *he* was the magistrate in the case with that other buffoon, that politician in the Western Cape	CLASSIFICATION – Gender – Male (2 instances of 'he')
	e. that politician in the Western Cape that was found not guilty on um corruption charges … with that development of that golf course … You remember him … Pipi, its not Morkel, Pieter somebody, van der Westhuizen or you know was an absolute buffoon, he was always, like Rajbansi in the apartheid years 'The tiger is here again', you know, he was found guilty on every single thing uh charge of corruption uh who always came back, you know, if you [inaudible] he's on the voter's roll again and he's standing for himself or he's standing for a new party. Now he was like that what was his name?	PARTIES – Included
	f. In any case, *he* was the magistrate in that case and *he* found him not guilty based on facts and the Scorpions were very upset and they asked *him* for reasons and *he* said um *his* reasons are evident from *his* judgment and it was not a matter based on law it was merely on facts of the case *he* found it um that there was enough grounds uh for doubt, it was not proved beyond reasonable doubt that this Pieter van der Merwe or Pieter Vermeulen or I don't	CLASSIFICATION – Gender – Male (7 instances of 'he', 2 instances of 'his', 1 instance of 'him')

	know what his name is … and he was found not guilty. Uh and *he's* now in the High Court. Andre Legransie. And I think *he* will be you know an excellent High Court judge. *He's* got the gravitas and the knowledge and the professionalism to become a High Court judge.	
13	NONE	
14	a. In order not to let *the people* rot in jail, you bring them to the magistrates' court to what we call a directional court, Court 13 in Johannesburg. And the magistrate, the regional court magistrate in Johannesburg, has got a diary for the High Court, and they place *the matter* on the roll for the High Court in the magistrates' court.	PARTIES – Included and excluded
	b. The main reason is so that the *prisoners* or the *accused* not remain in custody until the High Court can hear them in five or eight or ten weeks or months time.	PARTIES – Included
15	a. You you get there at nine o clock in the morning and you must take a decision every five minutes and all you get is *the worst criminals in Johannesburg* appearing before you and all you must do is decide which court they must go to.	PARTIES – Included
	b. a *nice senior* magistrate	CATEGORIZATION
	c. you pick and choose what *cases* you want	PARTIES – Excluded
16	a. *senior* magistrate	PARTIES – Excluded
	b. And we had a case of a bookkeeper, a lady, single mother, wonderful wonderful civilized, first-class citizen. Worked thirty years for her employer, she stole ten thousand rands every month. Every month for thirty years. And she stole it for her children, to put her children through university and you know she had her psychiatrist and everybody there and everybody came to give	PARTIES – Included

	evidence. First offence. First offence. No criminal record. Wonderful, wonderful employer. You know, the manager was there, the owner of the business was there. Said 'never a better person, we don't want her to go to prison we just want, you know, basically, to remove her. We want her to be found guilty and she must not come back. That's what we will ask the court to do.'	
	c. and I had an old battleaxe for a magistrate. *She's* now senior magistrate here in Johannesburg. But *she* was *extremely* strict.	CLASSIFICATION – Gender – Female (2 instances of 'she')
	d. And *she* sent her, *she* sent her to jail for a very, very long time. … *she* said 'yes, go do that in jail, there are lots of wonderful courses that you can do. Go stand down …'	CLASSIFICATION – Gender – Female (3 instances of 'she')
	e. Mrs Gradiz	NOMINATION
	f. And she sent her, she sent her to jail for a very, very long time. And the woman, everybody in court broke down crying, you know, they were not prepared, they didn't, they didn't expect it *at all*. And they said they will go for rehabilitation, they will go for courses she said 'yes, go do that in jail, there are lots of wonderful courses that you can do. Go stand down	PARTIES – Included
17	if you get a serious *matter*, if you get a serious *matter you* can be hurt very very badly in the magistrates' court.	PARTIES – Included and excluded
18	Now the chief magistrate is an enormously influential person. Uh *he* decides whether you can have um gatherings in *his* city. *He's* the person to decide where the court's going to be, …. Everything, whether there's going to be a march, whether *he* will give permission for a march to be held, um uh whether you can have / if you have a huge pop concert you must get permission from the chief magistrate.	CLASSIFICATION – Gender – Male (3 instances of 'he', 1 instance of 'his')

19	Now a regional court president is, in status, in protocol, is higher, *he* is more senior than a chief magistrate, but the chief magistrate has got more political power than the regional court president. The regional court president is only concerned with the organization of the regional court in *his* region. *He's* got nothing to do with the district court, *he's* got nothing to do with political issues, *he's* got nothing to do with the outside world, *he's* only a president for the regional court.	CLASSIFICATION – Gender – Male (5 instances of 'he', 1 instance of 'his')
20	NONE	
21	*Ordinary* magistrates	CATEGORIZATION
22	f. *senior* magistrates	CATEGORIZATION
	g. And that unopposed divorce *matters* might be moved to this senior civil court.	PARTIES – Excluded
23	it does virtually all the *work*. Between the regional court and the district court it does virtually the lion's share of the *work*.	PARTIES – Excluded
24	Because the magistrates courts were those courts that sat in judgment *on the pass laws*	PARTIES – Excluded
25	NONE	
26	NONE	

4: VALUES (V)

MAGISTRATE QUOTATION NO.	VALUES (V)	CONTENT	FORM
1	you have magistrates in the *lower* courts	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
2	a. The magistrate wasn't a precedent. What the magistrate decided was *just* you know, binding between the parties.	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
	b. And you will - all the other things from the magistrates' court *is worth nothing*! It *loses all its value*.	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
3	NONE		
4	NONE		
5	NONE		
6	a. You go to a higher court if you are convinced that uh that something was *done wrong* in the lower court uh and that the sentence uh that the magistrate court or judge came to uh was *incorrect*.	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
	b. You've gone through the whole thing, the magistrate or judge has made an *error*. According to you, something was done *incorrectly*.	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
7	NONE		
8	a. And [coughs] it was late, it was already after five o clock and I went on record, you know you have a tape machine, and I went on record saying 'It is now five past five [struggles with coughing], there are no courts available and *I am reluctantly hearing this case because I'm the only sitting court that can hear this case otherwise this man will stay in jail for the rest of the for the rest of the weekend, or another magistrate must come out after hours to hear a bail application*.	INTERNAL GOODS (fairness in the administration of justice, fairness to colleagues)	PURPOSIVE
	b. the prosecutor starts asking questions, very inexperienced prosecutor so I lose my temper with the prosecutor as well um and *I take over the inquisition, because in a maintenance matter you can do it*. And *I start cross-examining him from the bench. And that is something you must never do*. But nevertheless I start cross-examining him.	INTERNAL GOODS (fairness in the administration of justice)	MORAL EVALUATION AUTHORITY
	c. Now, you know, *what do you do to a man like this*? I said 'But you can't do	INTERNAL GOODS (rule of	PURPOSIVE

	what you want *there's a court order.* And, you know, *this is the fabric of society*, *you don't look after your family, you know, your children are all going to become just like you!*	law, social importance of administering justice)	
	d. I sent him to uh you know the first thing is, he was a first offender. It's the first time that he's been before a court. *So you never send a first offender to jail. Obviously, you know, you never send a first offender to jail*. So uh I gave him the maximum [gestures with arm and elicits more laughter] sentence that I could which was one year. Twelve months. I have him straight twelve months twelve thousand rand fine uh uh or twelve months.	INTERNAL GOODS (fairness in the administration of justice)	MORAL EVALUATION
	e. Now the *problem* with the system, is: The judge sits in his chambers, the judge is now a senior advocate who's been elevated to a judge. He sits in his chambers *he's high on on on human rights and things - which is fine - but* he doesn't understand what a magistrate's court looks like. He doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance. He doesn't you know they've never seen that, its just not part of their frame of reference. *They are just concerned about procedural correctness.*	INTERNAL GOODS (promotion of human rights, fairness in the administration of justice)	MORAL EVALUATION
	f. So of course I was in *big big big trouble*. Um and the man was released after three months and the judge - *it was a reported case - my name came in the law reports as the magistrate who sent a first offender to twelve months in prison.*	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
9	You would start by being a junior prosecutor, senior prosecutor uh being *elevated* to the bench becoming a magistrate, senior magistrate, regional court magistrate, senior court magistrate, regional court president and then be invited to become a judge in the High Court.	EXTERNAL GOODS (promotion to judge)	MORAL EVALUATION
10	You must also remember, *a district court magistrate, and a regional court magistrate, to a lesser extent, is far removed from a judge.*	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
11	While a magistrate, nja, is *just trained here in Pretoria for six months* and you know par de par. Here they *didn't even*	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION

	have to have an LLB. Now they must have an LLB. But in the old days mje *just a public service diploma or you know walking past a few law books would have sufficed*. Um, nowadays its more formalized. But *magistrates and judges are very very far removed.*		
12	a. one of my colleagues, who is now *a very controversial* character Mr Andre LeGransie, he was with me a magistrate in Cape Town. And he was *very bright, very bright* young guy. He was really *very very clever*. And *very fair*	MAGISTRATES THEMSELVES – positive	MORAL EVALUATION
	b. and when he was a magistrate, *he was very, deeply concerned about human rights*. You know, *obviously*	INTERNAL GOODS (promotion of human rights)	MORAL EVALUATION
	c. And I think he will be you know an *excellent* High Court judge. He's got the *gravitas* and the *knowledge* and the *professionalism* to become a High Court judge.	MAGISTRATES THEMSELVES – positive	MORAL EVALUATION
	d. the *run of the mill* magistrate is *very far from the High Court*.	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
13	*Unfortunately, they are very very important*. Ninety-eight percent ladies and gentlemen, you won't believe this, ninety-eight percent [writes '98%' on board] of all legal work criminal and civil, is done in the magistrates' court. Unbelievable, I couldn't believe it but its true. Ninety-eight percent of all legal work is done in the magistrates' court *so it is an enormously important court*.	MAGISTRATES THEMSELVES – positive	MORAL EVALUATION
14	a. *In order not to let the people rot in jail*, you bring them to the magistrates' court to what we call a directional court, Court 13 in Johannesburg.	INTERNAL GOODS (fairness in the administration of justice)	PURPOSIVE
	b. They've only got authority to send it to the High Court. *Why do they do this? The main reason is so that the prisoners or the accused not remain in custody until the High Court can hear them in five or eight or ten weeks or months time.*	INTERNAL GOODS (fairness in the administration of justice)	PURPOSIVE
15	a. If you become a magistrate and you're *so unlucky* to get this court that I talked to you about, the transitional court, the the directional court, uh that's a *hideous* court *because its like a supermarket*. You you get there at nine o clock in the morning and *you must take a decision every five minutes* and *all you get is*	INTERNAL GOODS – (social impacts of administering justice)	MORAL EVALUATION

	the worst criminals in Johannesburg appearing before you and all you must do is decide which court they must go to. Um and because its such a *horrible* court *if they put a magistrate there permanently he will go mad…* But if you put a person there permanently they will, I mean *they will just resign after a week, I mean, its like casualty … uh ward in Hillbrow*.		
	b. if they put a magistrate there permanently he will *go mad*, *not that magistrates are not mad, I mean they are all mad*	MAGISTRATES THEMSELVES – ambiguous	MORAL EVALUATION
	c. if you're a *nice senior* magistrate, especially senior regional court magistrate, *you pick and choose what cases you want and then you've got court 13, or court 25*	EXTERNAL GOODS (control over circumstances of work)	PURPOSIVE
	d. the whole organization is yours. *You are the king, you are the king of the of the dung heap*.	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
16	a. I had an *old battleaxe* for a magistrate. She's now senior magistrate here in Johannesburg. But she was *extremely strict.*	MAGISTRATES THEMSELVES – positive	MORAL EVALUATION
	b. So, if you steal from your employer, do anything, you know, steal from anybody but don't steal from your employer: a) because its so easy and b) because you never its so *the courts take an extremely dim view of it*. And there's *no mercy. As far as .. drug dealing, credit card fraud, things like that. Very little mercy.* Even if you plead guilty, even if you plead guilty.	INTERNAL GOODS (social importance of administering justice)	MORAL EVALUATION
17	NONE		
18	a. Who's the chief in charge, *chief bottlewasher* in the regional court? In any regional court? [pause] And in the magistrates' court? In the district court?	MAGISTRATES THEMSELVES – ambiguous	MORAL EVALUATION
	b. Now the chief magistrate is *an enormously influential person*. Uh he *decides whether you can have um gatherings in his city*. He's the person to *decide where the court's going to be*, uh *what court will listen to what case*, uh *the organization of the court*, the organization of the regional court even uh *enormously politically powerful person*. Everything, whether there's going to be a march, *whether he will give permission for a march to be held*, um	EXTERNAL GOODS (power)	PURPOSIVE

	uh *whether you can have / if you have a huge pop concert* you must get permission from the chief magistrate. So the chief magistrate is a *hugely influential political person*.		
	c. the magistrates now have their own act and *they see them as no longer being civil servants*. But that's *more perceived than real*. *They are still being paid by the civil service, they work in the civil service*, their buildings, they've got their own commission. But um *they're not completely independent*.	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
19	The regional court president. Now a regional court president is, in status*, in protocol, is higher*, he *is more senior* than a chief magistrate, but the chief magistrate *has got more political power* than the regional court president.	EXTERNAL GOODS (status, power)	PURPOSIVE
20	in the past, there were *lots of very interesting clashes* between regional court presidents and chief magistrates, *especially if they are of two different political persuasions*. Then you can get quite a lot of fireworks.	VALUES – other	-
21	NONE		
22	NONE		
23	Now the district court, the district magistrates' court ladies and gentlemen, is the *lowest* court that you can get in the hierarchy, um it *doesn't mean that its not important,* it *does virtually all the work*. Between the regional court and the district court it *does virtually the lion's share of the work*. So the district court *is is very important*, *although it is um very neglected*.	MAGISTRATES THEMSELVES – ambiguous	MORAL EVALUATION
24	a. Because the magistrates courts were those courts that sat in judgment on the pass laws, they were the primary movers for the implementation of apartheid, they were seen as *civil servants* and *lackeys of the apartheid government.*	MAGISTRATES THEMSELVES – negative	MORAL EVALUAITON
	b. This has now *changed*, we are fifteen years later into the new government and uh the whole magistracy *has changed* and they are now, it seems as if they are now *ready for constitutional jurisdiction*.	MAGISTRATES THEMSELVES – positive	MORAL EVALUATION
25	And if you impress them, *even* in the magistrates' court	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION
26	magistrates have *even* become judges	MAGISTRATES THEMSELVES – negative	MORAL EVALUATION

PROSECUTOR: ANALYTICAL TABLES

1: SOCIAL ACTION (SA)

[A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material]

PROSECUTOR QUOTATION NO.	SOCIAL ACTION (SA) QUOTATIONS	A	T	S	P	NT	M	Object (not calculated – for guidance only)[8]
1.	And everybody, including myself, was *expecting* a, perhaps, house arrest, you know this provisional supervision.	X		X		X		-
2	a. When I was a when I was a specialist prosecutor one of my glorious cases that I *prosecuted* was sommer a very quick case that was sent to my court, I *prosecuted* credit card fraud as a specialist uh uh court.	X	X	X				ACCUSED
	b. sommer a very quick case that *was sent* to my court … So all the credit card fraud *was brought* to my court and you know to to see to it that uniform sentences and harsh sentences and to prevent credit card fraud uh was done they *centralized* all credit card fraud in my in my court.				X	X	X	-
	c. And credit card fraud is not difficult *to prove* … its not a difficult case to *prosecute*	X	X	X				ACCUSED
	d. the prosecutor that *forwarded* the case to my court	X	X	X				ACCUSED OTHER PROSECUTORS
	e. the prosecutor …. *entered* into a plea bargain with the accused, *saying*: 'If you plead guilty on one count, we'll find you guilty on one count and, you know, you'll only be charged on one count.	X	X	X				ACCUSED
	f. When it came to my court I *said*: 'I am not going to accept this.'	X	X	X				ACCUSED PREVIOUS PROSECUTOR
	g. I *said*: 'Look, you're now in a new court, a new prosecutor, the previous prosecutor said that you could plead guilty and we will only sentence you on one count. That's not going to happen. Um, you know. If you want to plead guilty you're welcome, but I'm	X	X	X				ACCUSED

[8] I have not calculated the number of objects of social action in the same way as I have calculated active/passive, transactive/non-transactive; and semiotic/material actions where the categorization is 'either-or'.

	going to *charge* you on all thirty counts.' So he asked: 'Well, is that the same … as one count?' I *said*: 'No its not the same, you know, you're found guilty thirty times, its not the same.' Like if you use this card thirty times, you're going to be penalized thirty times.'							
	h. I *put* the charge to him, all thirty counts, from a to z, all thirty counts, took half an hour *to read* the charge sheet	X	X	X				ACCUSED
	i. But, you can, if you are a good prosecutor, *ask* the magistrate to impose a fine, a jail sentence without the option of a fine. So he pleaded guilty on all thirty charges, and I *asked* for the maximum sentence on all thirty charges.	X	X	X				ACCUSED MAGISTRATE
3	You'll *prosecute* ordinary cases in the district court	X	X	X				ACCUSED
4	a. if you become a senior public prosecutor, you *prosecute* specialized cases like I told you about the credit card fraud, or uh environmental law or tax law, or um labour law	X	X	X				ACCUSED
	b. the director of public prosecutions *invites* you for a interview and if you pass the interview then uh you become a state advocate			X	X	X		-
5	NONE							
6	NONE							

2: CIRCUMSTANCES OF SOCIAL ACTION (CSA)

PROSECUTOR QUOTATION NO.	CIRCUMSTANCES OF SOCIAL ACTION (CSA) QUOTATIONS	CIRCUMSTANCE TYPE
1	I had *an old battleaxe for a magistrate*	RESOURCES
2	a. You know, you have *the real evidence there* you have the *credit card*, the *slip*, you have the *bank statements*, that's not difficult its not a difficult case to prosecute	RESOURCES
	b. one of my glorious cases that I prosecuted was sommer a very quick case that was sent to *my court*, I prosecuted credit card fraud as a *specialist uh uh court*	LOCATION
	c. We had all the *evidence* there	RESOURCES
	d. So when the person, the accused came to *my court*, I said: 'Look, you're now in a *new court*, a new prosecutor	LOCATION
	e. I mean I was a small little prosecutor in *a dirty dingy little court*	LOCATION
3	a. You'll prosecute ordinary cases in *the district court*	LOCATION
	b. you will know how to sit and stand in *a court*	LOCATION
	c. That's also excellent, excellent *experience*	RESOURCES
4	a. there are specialized courts for all these things in *the magistrates' court*. And you can become a public prosecutor there	LOCATION
	b. Now that's excellent, excellent experience	RESOURCES
5	NONE	
6	NONE	

3: SOCIAL ACTORS (SAct)

PROSECUTOR QUOTATION NO.	SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	a. And we had a case of a *bookkeeper*, a lady, single mother, wonderful wonderful civilized, first-class citizen	ACCUSED – Included
	b. I can remember when *I* was a prosecutor	CLASSIFICATION – Gender – Male (use of 'I' together with lecturer's own gender)
2	a. When I was a when *I* was a specialist prosecutor	CLASSIFICATION – Gender – Male (use of 'I' together with lecturer's own gender)
	b. one of my glorious *cases* that I prosecuted was sommer a very quick *case* that was sent to my court	ACCUSED – Excluded
	c. So all the *credit card fraud* was brought to my court and you know to to see to it that uniform sentences and harsh sentences and to prevent *credit card fraud* uh was done they centralized all *credit card fraud* in my in my court.	ACCUSED – Excluded
	d. its not a difficult *case* to prosecute	ACCUSED – Excluded
	e. So, there was *this guy* and he had thirty offences of credit card fraud for American Express. He stole an American Express card and he used it for on thirty individual times.	ACCUSED – Included
	f. Because you can imagine, *American Express*, if this guy's only found guilty on one count *they* only, when *they* institute civil action *they've* only got grounds for one offence.	SOCIAL ACTORS – Included
	c. So when *the person*, *the accused* came to my court, I said: 'Look, you're now in a new court, a new prosecutor, the previous prosecutor said that you could plead guilty and we will only sentence you on one count. That's not going to happen. Um, you know. If you want to plead guilty you're welcome, but I'm going to charge you on all thirty counts.' So *he asked: 'Well, is that the same … as one*	ACCUSED – Included

	count?' I said: 'No its not the same, you know, you're found guilty thirty times, its not the same.' Like if you use this card thirty times, you're going to be penalized thirty times. *And somehow he was tired or he just didn't understood what I said and he*, I put the charge to him, all thirty counts, from a to z, all thirty counts, took half an hour to read the charge sheet, *and he said: 'Ag ja' you know, just wanted to finish it and not plead guilty, thinking he will pay a penalty, a fine.*	
	d. So *he went to jail for thirty years, without the option of a fine*. *He's still there today. He's still in jail, unless he was released on one of these ridiculous amnesties. Thirty years. This was about twenty years ago. So he's still rotting away in jail somewhere*. So please be careful. I mean I was a small little prosecutor in a dirty dingy little court and *he went to jail for thirty years which is longer than life ... imprisonment, because life imprisonment is twenty-five years.*	ACCUSED – Included
3	a. You'll prosecute *ordinary cases* in the district court.	PARTIES – Excluded
	b. Um you won't build up contacts, well perhaps, but you will know how to sit and stand in a court.	SOCIAL ACTORS – Excluded
4	a. And in any case if you become a senior public prosecutor, you prosecute *specialized cases* like I told you about	PARTIES – Excluded
	b. *senior* public prosecutor	CATEGORIZATION
5	NONE	
6	NONE	

4: VALUES (V)

PROSECUTOR QUOTATION NO.	VALUES (V)	CONTENT	FORM
1	NONE		
2	a. When I was a when I was a specialist prosecutor one of my *glorious* cases that I prosecuted was sommer a very quick case that was sent to my court	PROSECUTORS THEMSELVES – positive	MORAL EVALUATION
	b. So all the credit card fraud was brought to my court and you know to to see to it that *uniform* sentences and *harsh* sentences and *to prevent credit card fraud uh was done* they centralized all credit card fraud in my in my court.	INTERNAL GOODS (uniformity, deterrence and prevention of crime)	PURPOSIVE
	c. We had all the evidence there, and the prosecutor that forwarded the case to my court, um *entered into a plea bargain with the accused*, saying: 'If you plead guilty on one count, we'll find you guilty on one count and, you know, you'll only be charged on one count. And, you know, that's the end of it. OK then you plead guilty, *there's no trial*, thank you very much. But that was the previous prosecutor.	INTERNAL GOODS (efficiency and effectiveness in the administration of justice)	PURPOSIVE
	d. When it came to my court I said: 'I am not going to accept this.' *Because you can imagine, American Express, if this guy's only found guilty on one count they only, when they institute civil action they've only got grounds for one offence. Its true, whether you're found guilty for one offence or thirty offences the criminality is the same. But the commercial implications differed*.	INTERNAL GOODS (fairness to the complainant)	PURPOSIVE
	e. I mean I was a *small little* prosecutor in *a dirty dingy little court* and he went to jail for thirty years which is longer than life	PROSECUTORS THEMSELVES – ambiguous	MORAL EVALUATION
3	a. Once you are au fait with that - that's *the best training you can get for court*. Who asked about the articles, yes, that's another thing, if you don't do the articles then go and join the Department of Justice for two years. Um *you won't build up contacts*, well perhaps, but *you will know how to sit and stand in a court. That's also excellent,*	EXTERNAL GOODS (experience)	PURPOSIVE

	excellent experience because *you do it not on your own account, you do it on the state's account*. So if you want to become a good practitioner*, if you want to know what to do in a court, become a public prosecutor.*		
	b. I don't know what they pay public prosecutors now, its not much, um 'bout two hundred thousand a year, to begin with, I think so, I'm not sure.	EXTERNAL GOODS (monetary rewards)	MORAL EVALUATION
4	And you can become a public prosecutor there. You can then become a senior public prosecutor um and if you're a senior public prosecutor, the director of public prosecutions invites you for a interview and if you pass the interview then uh *you become a state advocate*. *Now that's excellent, excellent experience.* Uh and everybody wants to become a state advocate but you can't do that off the street. You must first become a public prosecutor.	EXTERNAL GOODS (promotion, experience)	PURPOSIVE
5	But if you do go, if you do become a public prosecutor, you know, that is where you want to end up. *To be a state advocate*	EXTERNAL GOODS (promotion)	PURPOSIVE
6	Um its not *boring* like being a public prosecutor	EXTERNAL GOODS (intellectual stimulation)	MORAL EVALUATION

STATE ADVOCATE: ANALYTICAL TABLES

1: SOCIAL ACTION (SA)

[A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material]

STATE ADVOCATE QUOTATION NO.	SOCIAL ACTION (SA) QUOTATIONS	A	T	S	P	NT	M	Object (not calculated – for guidance only)[9]
1.	if you're a senior public prosecutor, the director of public prosecutions *invites* you for a interview and if you pass the interview then uh you become a state advocate			X	X	X		
2	a. state advocates *does* the work of an advocate but he only works for the State	X				X	X	-
	b. There's also civil matters that the state advocate's *do*	X				X	X	-
	c. you *work* for the State, you *work* for the Director of Public Prosecutions.	X				X	X	-
3	To be a state advocate and *do* work for the state	X				X	X	-

[9] I have not calculated the number of objects of social action in the same way as I have calculated active/passive, transactive/non-transactive; and semiotic/material actions where the categorization is 'either-or'.

2: CIRCUMSTANCES OF SOCIAL ACTION (CSA)

STATE ADVOCATE QUOTATION NO.	CIRCUMSTANCES OF SOCIAL ACTION (CSA) QUOTATIONS	CIRCUMSTANCE TYPE
1	Now that's excellent, excellent experience.	RESOURCES
2	And you have *virtually the same kind of working conditions that an ordinary advocate has*. You've got *your own office*, *your own set of law reports*	RESOURCES
3	you get High Court *experience*	RESOURCES

3: SOCIAL ACTORS (SAct)

STATE ADVOCATE QUOTATION NO.	SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	NONE	
2	a. Uh state advocates does the work of an advocate but *he* only works for the State	CLASSIFICATION – Gender – Male (1 instance of 'he')
	b. So most of the *work* is civil but there are also civil *work*	PARTIES – Excluded
3	NONE	

4: VALUES (V)

STATE ADVOCATE QUOTATION NO.	VALUES (V)	CONTENT	FORM
1	if you're a senior public prosecutor, the director of public prosecutions invites you for a interview and if you pass the interview then uh you become a state advocate. *Now that's excellent, excellent experience*.	EXTERNAL GOODS (experience)	PURPOSIVE
2	NONE		
3	But if you do go, if you do become a public prosecutor, you know, *that is where you want to end up. To be a state advocate* and do work for the state because *then you get High Court experience at the State's expense, you know*. You know *whether you lose or win its not really important, you don't want to make a lifelong career out of it, you only want to, you only want to get experience*. Unless you want to become a civil servant, that's also possible, there are lots of things that you can do.	EXTERNAL GOODS (experience)	PURPOSIVE

LAWYER: ANALYTICAL TABLES

1: SOCIAL ACTION (A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material)

LAYWER QUOTATION NO.	SOCIAL ACTION (SA) QUOTATIONS	A	T	S	P	NT	M	Object
1	In other words, if you're a natural lawyer, you must have a system - somewhere - against which you can *test* your positive law, your man-made law, the laws on earth.	X	X	X				LAW
2	**LECTURER:** No but you must put it like a lawyer now that's not … **STUDENT 7:** Each person has their own set of morals and principles …. **LECTURER:** Yes yes that's what you said and now you're just putting it in other lay terms, I want you to *talk* like a lawyer. What does that mean? You are hundred percent right. You are hundred percent right. Talk like a lawyer. Morality is subjective. Morality is subjective.	X		X		X		-
3	Natural lawyers, no natural lawyer has ever admitted that you can use force or revolution to overthrow a government that makes unjust laws. Look, if you are really a natural lawyer then the logical consequences of unjust laws - bad laws - … You have a law that is not in rhythm with the higher set of laws. So what do you expect a natural lawyer to do? I expect a natural lawyer to say 'sorry, is not in accordance to the higher law. It is an unjust law and therefore the citizens that is	X	X	X				SOCIETY AT LARGE

	oppressed by this law have the right to disobey that law.							
4	NONE							
5	h. There are certain things uh that you must *know* and certain things uh that you must be able to *do*.	X				X	X	-
	i. you will know where to go and find it. Uh no lawyer can say that he knows the law, the law is very difficult, um, very difficult mistress and nobody can claim to know everything that there is to know about the law. It is a *vast* field, but what you must know is you must know where to find the information, and this is what this course is all about, is to assist you in finding that information.	X	X				X	INFORMATION LAW
6	Please ladies and gentlemen if you're a lawyer you must follow the news. Its one of the things, like if you're a doctor you must read up on the drugs. You must know what drugs to prescribe, what is new on the market.	X	X	X				INFORMATION
7	our laws are not *drafted* with any kind of elegance, ours laws are very poorly *drafted* in this country. … But in South Africa we don't make good laws, they're *drafted* by civil servants … so … your bright lawyers are in private practice. And only the duds go into civil service and they *draft* laws.	X	X				X	LAW
8	**LECTURER:** The what what what government what is the government what is this thing Government Gazette You can't *talk* like	X		X		X		-

	that like a lawyer you can't use 'what what', its not legal phraseology							
9	c. You must know these things ladies and gentlemen, if you are going to become a lawyer you must be informed if our society, in your community and if he's the chancellor of your university … you are going to run into trouble, you must know this, ladies and gentleman, I'm making a joke about this now because its-a hot and it's a long lecture but *please* don't underestimate what I'm saying: A lawyer in society is somebody who's informed.	X		X		X		INFORMATION
	d. People come to you				X	X	X	-
	e. and they pay you a thousand to three thousand rand an hour				X	X	X	-
	f. to get advice from you because you know	X	X	X				CLIENTS
	g. And if you don't know what's going on in your immediate vicinity you're not going to make it. Please you must read your law reports every year/ month, you must read your newspaper every day, you must know a a read the professional journal every uh month or every week two weeks when it comes out, you must know what's going on in the university in the bar in the side-bar, you must know things. You must know which cases are before the courts, you must know who are the most important movers and	X	X	X				INFORMATION

	shakers in the country [gestures 'no' with his hand before the class].							
10	you know you work with laws	X	X	X				LAW
11	If you can't *share* that knowledge, if you can't *convince* somebody else, of your point of view, you can't tell somebody what you did, its useless. Its dead gold in the safe. Its not in anybody's interest, its not, its not worth anything. It is very important that you *project* yourself, that you convince people	X	X	X				CLIENTS OTHER LAWYERS
12	**STUDENT:** Long title. **LECTURER:** Long title. It is the long title. It sounds funny but uh lawyers are like / you must / if you don't use the right word it doesn't work.	X	X	X				LANGUAGE
13	The common law is the law *created* by the jurists. By the lawyers. In England it is the judges, judge-made law, and law made by lawyers.	X	X	X				LAW
14	The judges, since 1910 when we had uh a united uh appellate bench the judges and the lawyers *develops* the common law.	X	X	X				LAW
15	This is exactly the kind of thing that will be expected of you as a lawyer. This is *one* word. Common law. And I have now in fif-fifteen minutes, I don't know how long, given you at least five or six distinct different meanings of that one word. And it would be expected of you as a lawyer one day to *read* a sentence and from that sentence to *deduct* what does the 'common law' mean … in that sentence.	X	X	X				LANGUAGE
16	Many constitution lawyers will say that, you know, 'forget about the bloody Roman-Dutch law, that is	X	X	X				LAW

	old news, look at the Constitution if you want to *interpret* it'. I							
17	Hugo de Groot in the 16th century *said*, in one of his books, you can't trust with money a woman that is not a public uh a 'umbaarkoopvrou' … That is what Hugo de Groot *said*. And that is one of his major uh uh pieces of writing in his [states title of one of De Groot's works].	X	X	X				SOCIETY AT LARGE
18	If you are not good with languages, if you are not good with words, *understanding* words, *writing* words, *speaking* words, then the legal profession is going to be very hostile. A very hostile environment for you. You must be literate, you must be able to *understand* words in their very very difficult and multifaceted way in which they they operate.	X	X	X				LANGUAGE
19	r. the role of the lawyer is to identify legal arguments, legal concepts where misunderstanding took place between two parties, whether it is in a divorce proceeding, whether it is in a contract, whether it is in a will, whether it is in a [pauses slightly], partnership agreement, it doesn't matter.	X	X	X				LANGUAGE
	s. The function and role of the lawyer is essentially to solve miscommunication. [Breathes in deeply]	X	X	X				
20	Now, the first way in which a lawyer will solve miscommunication is by *interpreting* legislation.	X	X	X				LAW
21	Because what lawyers do				X	X	X	-

	is they sit in their office and they wait for people to come off their / to come off the street to bring their problems to them. And it can be anything. It can be from the theft of an artwork to a divorce to a rape to a uh uh uh disputed uh uh uh uh testament, a will.							
22	NONE							
23	And *read* the instructions very carefully, um that is something that lawyers don't always do um they don't read their instructions carefully, their … quick, clever, and wrong is what my wife always says.	X	X	X				LANGUAGE
24	Because its something that you should know as a practicing lawyer. I mean you should *know* the jurisdiction of the courts.	X	X	X				INFORMATION
25	sometimes you must *take* them to court, and then you must take your whole library to court.	X	X				X	LAW REPORTS
26	I don't understand it. You know that is that is what makes you a lawyer. If you don't *read* court cases you're not a lawyer. You know then you must go and start or study dramatic arts or something. But you must *read* your court cases. And you must read them in full.	X	X	X				LAW
27	d. looking very very hastily for some authority	X	X	X				LAW
	e. if the judge asks you 'Please address me on the following point			X	X	X		-
	f. you haven't got the time to *read* the whole case. But you may have time to read the headnote.	X	X	X				LANGUAGE
	g. And then, if you're a good lawyer, you	X		X		X		CLIENTS OTHER

	may be able to *argue* on … argue on that.							LAWYERS
28	NONE							
29	**STUDENT 8:** And then before the times, I mean back in the day, how did lawyers go about sorting it out? **LECTURER:** Umm you have … **STUDENT 8:** Finding the cases.	X	X	X				LAW
30	Yes, preparation is everything regardless of the details and you can't be a good lawyer if you don't prepare.	X				X	X	
31	people immediately talk about your performance in court.			X	X	X		
32	NONE							
33	You must/ that's why you're a lawyer. That is what lawyers do. They *argue* to convince you.	X	X	X				CLIENTS OTHER LAWYERS
34	**LECTURER:** In this short lecture we're going to try and look at the jurisdiction of the courts. Now this is the kind of information uh that I don't think one should be teaching at a university. Um it's the information that you should be getting in your articles. But um there is space in this curriculum now so we're doing it here. But please beware, this is not real knowledge. … so you must know these things of course, if you want to be a lawyer that's just the kind of stuff you must know.	X	X	X				INFORMATION
35	**LECTURER:** Um that's uh yes, the more elegant way to put that, the more lawyerly way to put that is to say that the Constitutional Court has got criminal and civil jurisdiction.	X	X	X				
36	NONE							
37	NONE							
38	**LECTURER:** Custos	X	X	X				CLIENTS

	custodius … What does that mean? Custos custodies. Oi oi oi. ... what does custos custodies mean? These are the words you are going to use when you're a lawyer to impress your clients.							
39	d. **LECTURER:** If you're a lawyer then things have a legal meaning … Ladies and gentlemen if you are opening litigation, you know what litigation is? When you are starting in the first phase of litigation, in other words exchanging documents. If you are just feeling the water, if you exchange your first documents, before you start exchanging pleadings, you are writing to the other side	X	X				X	LANGUAGE OTHER LAWYERS
	e. and you say: 'Look', according to my client, this is what happened. My client says this is what happened. Um … if this is true, we are going to sue you.	X	X	X				OTHER LAWYERS
	f. Um … if you want to, if you want to negotiate, if you want to talk, you know, lets do so.'	X	X				X	
	g. Your first opening. *That* letter, gets a stamp [bangs fist on lecturn]: 'Without prejudice.' Without any harm, nobody is bound by what you say in that letter. Its without prejudice. You are reserving your rights.	X	X	X				LANGUAGE
40	NONE							
41	They've got time to write these short little superficial things. Um in the De Rebus and in Without Prejudice.	X	X				X	

2: CIRCUMSTANCES OF SOCIAL ACTION

LAWYER QUOTATION NO.	CIRCUMSTANCES OF SOCIAL ACTION (CSA) QUOTATIONS	CIRCUMSTANCE TYPE
1	NONE	
2	NONE	
3	NONE	
4	But the very first thing that we work with as lawyers, the very first thing that can create uncertainty of course is *language*.	RESOURCES
5	NONE	
6	NONE	
7	NONE	
8	NONE	
9	Please you must read your *law reports* every year/ month, you must read your *newspaper* every day, you must know a a read the *professional journal* every uh month or every week two weeks when it comes out	RESOURCES
10	*Legislation* and *cases* uh the the the court cases um those are the things that you are going to earn your money with one day. Those are the things those are the *tools of your trade*	RESOURCES
11	NONE	
12	NONE	
13	NONE	
14	NONE	
15	NONE	
16	NONE	
17	*Section forty-nine two* will stop use because it says yes, look at the *Roman-Dutch law*, but if you get an absurdity such as this then ignore it. Obviously that is not the way we think anymore. Um, *we can't use that*.	RESOURCES
18	Ladies and gentlemen, we as lawyers, when you become a lawyer … one day, the *tools that you are going to use in your trade* will *be books, dictionaries* and, most of all, *words.*	RESOURCES
19	NONE	
20	NONE	
21	And you need to broaden your horizon when you are a lawyer. Because what lawyers do is they sit *in their office*	LOCATION
22	NONE	
23	I've never seen anybody die *in a law office*.	LOCATION
24	NONE	
25	a. And its not always clever, if you're a practicing lawyer it might be clever just to keep them like this. Because sometimes you must take them to court, and then you must take your *whole library to court*. You now … it's sometimes much better just to have uh uh the book um and here you are um.	RESOURCES
	b. Because sometimes you must take them *to*	LOCATION

	court, and then you must take your whole library *to court*.	
26	NONE	
27	a. If you talk to the editors of Juta about the the South African Law Reports, the idea of the *headnote* is only for the practitioners. It is made for the practitioners.	RESOURCES
	b. If you sit in court and you are *looking very very hastily* for some *authority* then *you haven't got time*, in court, if the judge asks you 'Please address me on the following point', you haven't got the time to read *the whole case*.	RESOURCES EMOTION
	c. If you sit *in court*	LOCATION
	d. The *only time when you have time to read a case in peace and quiet is when you're at university*.	RESOURCES EMOTION
28	And it is exclusive because *we almost have our own language*, in the old days people used Latin, but *we almost have our own language*.	RESOURCES
29	… *noter uppers*. And you had *indexes*. And they did the same thing but just in hard copy. And you still have them, *noter uppers* and *indexes* in the in the uh uh in the library and you can find any topic uh and all the cases that are decided on that topic. In the *noter upper* or or the *index*.	RESOURCES
30	a. Because what happens, in a funny way, what happens in Stoppard, what happens in the theatre is what's going to happen one day *in court*.	LOCATION
	b. But the good lawyer is distinguished from the exceptional lawyer in the areas where you are *not prepared*. And that's - and I'm going to say now a controversial thing, I don't know if I should say this - um, let's neutralize it and say some people are better lawyers than others because *they can think on their feet*. Because they've got the mental capacity to be not just *witty* but to be *intelligent* in responding to a challenge which *you've not prepared for*. That is the that is the exceptional lawyer.	RESOURCES EMOTION
31	people immediately talk about your performance *in court*	LOCATION
32	NONE	
33	NONE	
34	NONE	
35	NONE	
36	NONE	
37	Now one thing that you can learn from this uh embarrassing episode uh is that you must never, if you're a lawyer, *you must never do anything if you are um in a bad mood* or *if you are emotionally uh unstable*. If you if you've been*, if you've lost your temper, don't do anything.*	EMOTION
38	Custos custodius … What does that mean?	RESOURCES

	Custos custodies. Oi oi oi. ... what does custos custodies mean? These are the *words* you are going to use when you're a lawyer to impress your clients.	
39	**LECTURER:** Where did you get that? What is your authority for that? **STUDENT 9:** [inaudible] **LECTURER:** Yes yes yes! [laughter] Yes! *The dictionary*. Ladies and gentlemen did we not do interpretation of statutes? The first way, the functional approach, *the first thing that you do, is you look at the dictionary meaning*. OK, so now you've got the dictionary meaning: Without harm to anybody. You've got the *dictionary meaning*. That's very good um uh *dictionary meaning*.	RESOURCES
40	And that's why, in the apartheid days unfortunately they prescribed that *you must have English, Afrikaans and Latin*. And I would say *English, Afrikaans, Latin plus a European language. And an African language*. Yes say Afrikaans and or any other African language. English at a first-year level, Latin at a first-year level and a European language at a first year level.	RESOURCES
41	Um people in practice *don't have time* to write journal articles. *They've got time* to write these short little superficial things. Um in the De Rebus and in Without Prejudice. But *they haven't got time to go and do thorough research* like we have, the academics.	RESOURCES EMOTION

3. SOCIAL ACTORS (SAct)

LAWYER QUOTATION NO.	SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	a. a *natural* lawyer	CATEGORIZATION
	b. *Man-made*, *woman-made*, *person-made* law.	CLASSIFICATION – Gender – Inclusive
2	NONE	
3	a. *St Augustine*, both St Augustine and *Thomas Aquinas*	NOMINATION
	b. What do you have, according to *these church fathers*? You have the right to ask the *church fathers* to decide whether this law is just or unjust and then take the steps that they may, that they deem necessary to oppose the law within the status quo.	CLASSIFICATION – Gender – Male (2 instances of 'church fathers')
4	NONE	
5	a. Lawyer, its exactly the same thing, you have to gain certain uh specialist knowledge about certain specialist things so that *when people come to you and ask for legal advice* that, you wouldn't necessarily know everything immediately but the important thing is you will know where to go and find it.	CLIENTS – Included
	b. Uh no lawyer can say that *he* knows the law, the law is very difficult, um, very difficult mistress	CLASSIFICATION – Gender – Male (1 instance of 'he')
6	NONE	
7	a. You know if a lawyer is *a failure*, *a dismal failure*, the only thing that tha remains open to him is to become a politician.	CATEGORIZATION
	b. You know if a lawyer is a failure, a dismal failure, the only thing that tha remains open to *him* is to become a politician.	CLASSIFICATION – Gender – Male (1 instance of 'him')
	c. *bright lawyers* are in private practice. And only the *duds* go into civil service and they draft laws.	CATEGORIZATION

8	**LECTURER:** The what what what government what is the government what is this thing Government Gazette *You can't talk like that like a lawyer you can't use 'what what', its not legal phraseology ….* **STUDENT 15:** It's a document keeps the [gestures with hands] Act and .. **LECTURER:** *OK I don't understand what you're saying*	CLASSIFICATION – Race
9	*a.* *People come to you* / and *they pay you a thousand to three thousand rand an hour*, *to get advice from you* because you know.	CLIENTS – Included
	b. *successful* lawyer	CATEGORIZATION
10	NONE	
11	NONE	
12	NONE	
13	NONE	
14	when the courts, the judges, when they sit, and they decide *law cases*, what do they use? They use legislation and they use the common law. They use *other cases*.	CLIENTS – Excluded
15	NONE	
16	*constitutional* lawyers	CATEGORIZATION
17	a. Hugo de Groot in the 16th century said, in one of *his* books	CLASSIFICATION – Gender – Male (1 instance of 'his')
	b. *Hugo de Groot* in the 16th century - Hugo de Groot was a great Dutch lawyer	NOMINATION
18	NONE	
19	Communication *between two subjects* is one of the most difficult things to overcome, and in part the role of the lawyer is to identify legal arguments, legal concepts where *misunderstanding took place between two parties*, whether it is in a *divorce proceeding*, whether it is in a *contract*, whether it is in a *will*, whether it is in a [pauses slightly], *partnership agreement*, it doesn't matter.	CLIENTS – Included and excluded
20	Now, the first way in which a lawyer will solve *miscommunication* is by interpreting legislation.	CLIENTS – Excluded
21	Because what lawyers do is they sit in their office and *they wait for*	CLIENTS – Included and excluded

	people to come off their / to come off the street to bring their problems to them. And it can be anything. It can be from the *theft of an artwork* to a *divorce* to a *rape* to a uh uh uh disputed uh uh uh uh *testament, a will.*	
22	NONE	
23	If you're a, if you receive *an instruction*, that's *your bread and butter*. That is your profession. Go and sit down, read the *instruction*. Take it in, read it again, make sure you know what the *client* wants. Um you know, there's no rush whatsoever. *We are not working with the lives of other people, you are not a paediatrician or a a cardiac surgeon, nobody's going to die, I've never seen anybody die in a law office*. Um so there's no urgency, although I might be saying something to the contrary - sit, relax see that you know what is going on. And you don't miss anything.	CLIENTS – Included and excluded
24	NONE	
25	a *practicing* lawyer	CATEGORIZATION
26	NONE	
27	a *good* lawyer	CATEGORIZATION
28	We know how to read a *court case*. We know how to read a *contract*.	CLIENTS – Excluded
29	NONE	
30	a. a *good* lawyer	CATEGORIZATION
	b. *exceptional* lawyer	CATEGORIZATION
31	NONE	
32	NONE	
33	NONE	
34	But as soon as we come to the factual part, ladies and gentlemen, as soon as we come to *'how much can this court fine a person* on each du-uh-uh count, that is factual.	CLIENTS – Included
35	NONE	
36	NONE	
37	NONE	
38	Custos custodius … What does that mean? Custos custodies. Oi oi oi. ... what does custos custodies mean? These are the words you are going to use when you're a lawyer to impress *your clients*. So that they will pay you R20 000 an hour.	CLIENTS – Included

39	you are writing to the other side and you say: 'Look', according to *my client*, this is what happened. *My client* says this is what happened. Um … if this is true, we are going to sue you.	CLIENTS – Included
40	And that's why, in the apartheid days unfortunately they prescribed that you must have English, Afrikaans and Latin. And *I would say English, Afrikaans, Latin plus a European language*. *And an African language*. *Yes say Afrikaans and or any other African language*. English at a first-year level, Latin at a first-year level and a European language at a first year level. *Otherwise you can't become a lawyer*.	CLASSIFICATION – Race
41	*academically-oriented* practitioner	CATEGORIZATION

4. VALUES (V)

LAWYER QUOTATION NO.	SOCIAL ACTORS (SAct)	CONTENT	FORM
1	NONE	-	-
2	OK What is *wrong* with equating morality with law? Now I've led you up to the up to the water you must be able to get this one. Why is there such a huge hue and outcry against equating morality and law? [S2 raises hand] No no somebody else. Yes? **STUDENT 7:** Morals differ according to the people. **LECTURER:** No but you must put it like a lawyer now that's not … **STUDENT 7:** Each person has their own set of morals and principles ….	INTERNAL GOODS (objectivity)	MORAL EVALUATION

	LECTURER: Yes yes that's what you said and now you're just putting it in other lay terms, I want you to talk like a lawyer. What does that mean? You are hundred percent right. You are hundred percent right. Talk like a lawyer. *Morality is subjective. Morality is subjective.*		
3	a. OK the second *great problem* with the natural law school is … natural lawyers can never, *they haven't got the moral courage to say*, *'if a law is unjust, you as a just citizen have got the right not to obey it.'* Must I say that again? OK. *Natural lawyers, no natural lawyer has ever admitted that you can use force or revolution to overthrow a government that makes unjust laws.*	LAWYER'S THEMSELVES – negative	MORAL EVALUATION
	b. Look, *if you are really a natural lawyer then the logical consequences of unjust laws* - bad laws - is that if this law, take for instance the apartheid laws, if this law that says 'a black man cannot fall in love with a white woman' that these are the laws of the apartheid, you may not remember it but um but I remember it very well, that is a law against nature, You agree? Its against your its against your brain, it is against what God says, the Christian God, it is against all religions its is against everything that it natural and that is logical. You cannot tell people that they may not fall in love because of the colour or their skin. This is what the apartheid government did. So you have a bad law. You have a law that is not in rhythm with the higher set of laws. *So what do you expect a natural lawyer to do? I expect a natural lawyer to say 'sorry, is not in accordance to the higher law. It is an unjust law and therefore the citizens that is oppressed by this law have the right to disobey that law. Did they do it?* [Pauses] *No.*	LAWYER'S THEMSELVES – negative	MORAL EVALUATION
	c. St Augustine, both St Augustine and Thomas Aquinas said [pause] *'Order is more important than justice'*. *Order is more important than justice*. And therefore, you do not as of right, as a citizen, have the right to disobey an unjust law. What do you have, according to these church fathers? You have the right to ask the church fathers to decide whether this law is just or unjust and then take the steps that	INTERNAL GOODS – order	AUTHORITY

	they may, that they deem necessary to oppose the law within the status quo. OK.		
4	NONE		
5	NONE		
6	NONE		
7	a. I must be careful what I'm saying now, this is just a joke, I'm not serious but um. They take the worst people. They make them MPs. They make them members of Parliament [class giggles]. You know *if a lawyer is a failure, a dismal failure, the only thing that tha remains open to him is to become a politician*. They take these people now that can succeed at nothing else but sitting there and and making noises	LAWYER'S THEMSELVES - negative	MORAL EVALUATION
	b. And then they bombard them with absolute, *hopelessly drafted* legislation, and then they expect these two things to come out on the other side with something coherent. Uh and strangely enough it does, you know, our laws are not great, our laws are not drafted *with any kind of elegance*, ours laws are very poorly drafted in this country.	INTERNAL GOODS - elegance	MORAL EVALUATION
	c. But in South Africa we don't make good laws, they're drafted by *civil servants* … so … *your bright lawyers are in private practice*. And *only the duds go into civil service and they draft laws*. So what do you expect.	LAWYER'S THEMSELVES - negative	MORAL EVALUATION
8	NONE		
9	a. People come to you / *and they pay you a thousand to three thousand rand an hour*, to get advice from you because you know.	EXTERNAL GOODS – monetary rewards	PURPOSIVE
	b. That's your work, I'm sorry, that's the that's the that's the um course that you've chosen uh and if you're not going to do it um you're not going to be a *successful* lawyer.	EXTERNAL GOODS – success	MORAL EVALUATION
10	a. Legislation and cases uh the the the court cases um those are the things that you are going *to earn your money with one day*.	EXTERNAL GOODS – monetary rewards	PURPOSIVE
	b. You must not um you mustn't have any *uncertainty* about legislation.	INTERNAL GOODS – certainty	MORAL EVALUATION
11	Knowledge ladies and gentlemen if you're a lawyer is not very valuable. If you can't *share that knowledge*, if you *can't convince somebody else, of your point of view*, you can't tell somebody what you did, its useless. Its dead gold in the safe. Its not in anybody's interest, its not, its not worth	INTERNAL GOODS – projection, persuasion	MORAL EVALUATION

	anything. It is very important that you *project yourself*, that you convince people, that you tell them step by step what you did.		
12	NONE		
13	NONE		
14	NONE		
15	NONE		
16	Many constitutional lawyers will say that. Many constitution lawyers will say that, you know, 'forget about the bloody Roman-Dutch law, that is old news, look at the Constitution if you want to interpret it'. *It doesn't mean that.*	LAWYER'S THEMSELVES – negative	MORAL EVALUATION
17	a. Hugo de Groot in the 16th century said, in one of his books, you can't trust with money a woman that is not a public uh a 'umbaarkoopvrou', um if a female is not a public merchant you cannot trust her with money. That was the uh uh well it is a little bit chauvinistic, but that was the going concept in the 16th century. Women who are not trained in mercantile things, women who are not trained in business, must not be allowed, in terms of the law, to work with money. That is what Hugo de Groot said. And that is one of his major uh uh pieces of writing in his [states title of one of De Groot's works]. So that is an old authority. *Can we use that as part of our common law? No! Of course not. What will stop us? Section forty-nine two will stop use because it says yes, look at the Roman-Dutch law, but if you get an absurdity such as this then ignore it. Obviously that is not the way we think anymore.* Um, we can't use that.	INTERNAL GOODS – Constitutional values	AUTHORITY
	b. Hugo de Groot was a *great* Dutch lawyer	LAWYER'S THEMSELVES – positive	MORAL EVALUATION
18	NONE		
19	NONE		
20	NONE		
21	NONE		
22	NONE		
23	And read the instructions very carefully, um that is something that lawyers don't always do um they don't read their instructions carefully, their … *quick, clever, and wrong* is what my wife always says.	LAWYER'S THEMSELVES – negative	MORAL EVALUATION
24	NONE		
25	NONE		
26	NONE		
27	NONE		
28	So the legal profession ladies and	EXTERNAL	MORAL

	gentlemen, this profession that you so eagerly want to enter, the legal profession started with a *monopoly*. It started with a *mystery*. It started in a temple. … So the legal profession generally is always surrounded by um things that make it *mon-monopolistic or elitist*. … But law is an *elitist* or an *exclusive* profession. And it is exclusive because we *almost have our own language*, in the old days people used Latin, but we almost have our own language. And *we have all these specialized tools*. We know how to read a court case. We know how to read a contract. We know the mysteries behind the legal texts. And that is that is that is the origin um of the of the legal profession. … But it is a profession and in a profession you are dis you are *distinguished* from other people because you you've got *specialized knowledge* and this is one of them.	GOODS – exclusivity	EVALUATION
29	NONE		
30	NONE		
31	Uh and people must you know *there's one thing that a lawyer can't resist and that is gossip*. And the whole profession is built, in a positive and a negative sense on gossip.	LAWYER'S THEMSELVES – negative	MORAL EVALUATION
32	But what they did do - the Scandanavian people are very good at exhibiting things, what they did do is they showed the whole classification. The whole classification that he did and it is absolutely magnificent because it is so simple. It is so absolutely basic and simple. Uh and it works up to today because it is a system that we all understand. *Even lawyers can understand it*.	LAWYER'S THEMSELVES – negative	MORAL EVALUATION
33	NONE		
34	NONE		
35	Um that's uh yes, the *more elegant way* to put that, the *more lawyerly* way to put that is to say that the Constitutional Court has got criminal and civil jurisdiction.	INTERNAL GOODS – elegance	MORAL EVALUATION
36	NONE		
37	Now one thing that you can learn from this uh embarrassing episode uh is that you must never, *if you're a lawyer, you must never do anything if you are um in a bad mood or if you are emotionally uh unstable*. If you if you've been, if you've lost your temper, don't do anything.	INTERNAL GOODS – objectivity, emotional stability	MORAL EVALUATION
38	a. So that *they will pay you R20 000 an hour*.	EXTERNAL GOODS – monetary rewards	PURPOSIVE
	b. These are the words you are going to use when you're a lawyer to *impress*	EXTERNAL GOODS –	PURPOSIVE

	your clients.	esteem	
39	NONE		
40	NONE		
41	Um people in practice don't have time to write journal articles. They've got time to write these *short little superficial* things. Um in the De Rebus and in Without Prejudice.	LAWYER'S THEMSELVES – negative	MORAL EVALUATION

3. INTERVIEW DATA

001 **TRACY:** Okay, so do you [inaudible] I am just trying to [inaudible].

002 **INTERVIEWEE:** You can, you can. I think Angelo has do that. Yes, you can. I am not sure how it works.

003 **TRACY:** Alright, uhm…

004 **INTERVIEWEE:** Are you going to ask me the questions we have or …

005 **TRACY:** Yes, let me, let, ja, [inaudible] the transcription. The first section is really about your, your conception of an ideal legal person and just exploring different dimensions of that. Some of the questions [inaudible] but we'll just see how it goes.

006 **INTERVIEWEE:** Okay.

007 **TRACY:** First one is if you just give me your view what in essence is a lawyer?

008 **INTERVIEWEE:** Now that is a notoriously difficult question to answer. It is like, you know, what is law. It is, it is very difficult to answer and there, you know, if you, if you have a question as difficult as this to answer it is always useful to use anecdotal evidence to, to say what you, what you really mean I have got two anecdotes that I think that formed my concept of a lawyer and this might not fit in with exactly what you want but perhaps it will.

009 The one, the one concept of course is a very, uhm, the very frame is concept of John Houseman as, as the Yale law professor in the book the Paper Chase and subsequent book, uh, subsequent film by, by the same name. I can't remember when that film came out. It was in the late 70's or in the in the early 80's but it was, uh, this wonderful Yale professor with a, with a bowtie and extremely, extremely well-known, world, world renowned professor and he would have this method of coming into the class with a board or photographs of the class and he would then choose a student and ask that student to describe the certain case or describe the case law and that is what the whole, the whole film is about. You know how do you, how do you study law? Why do you study law? What is, what motivates, you know, these brilliant students to study law because they are the crème de la crème at the best university in the, in the world. And the professor then is the, is the catalyst. He is he is the, the very distant, the very ivory tower figure of absolute knowledge, testing the students every Monday and you know, not hesitating to break them down when they (a) haven't read the case or (b) got something wrong or have a wrong argument.

010 So to answer the question in that way I think as an academic lawyer, I think that is my, that is a model that I, that I think could be the ideal lawyer. I mean, I am very far from that but I think that is some kind of a role model that I, that I have as, as an academic lawyer. This very distant very learned, extremely almost person devoid of emotions with one goal and that is to teach the principles of law to his class.

011 And then it was the other incident that is now more personal, it is more perhaps closer to what you want, is when I was an article clerk I went to the Pretoria High Court and in Pretoria in that stage still in the height of the apartheid years, Pretoria was the capital, it was the capital of the Afrikaner. It was the bastion of everything formal and civil service and traditional and status quo and of course the High Court is on Church Square. And it is in a beautiful, beautiful building that was built by in the time of Paul Kruger by a very famous architect and based on a French renaissance villa which was very, very in vogue at that stage. But it is a beautiful building and it was made of, it has got domes of stained glass and it has got statues, marble statues and teak doors from floor to ceiling and these immense courtrooms.

012 And I went in there one day as an article clerk and I saw all these people rushing in and the Court sitting and enormous activity going on which was, you know, the very essence I would say of the legal workings. Because at that stage or at that time the Transvaal Provincial Division was seated in that court building and everything North of Pretoria came to the Transvaal Provincial Division and it was a very important court.

013 And there in this hurly burly of legal activity, you know, downstairs was the Clerk of the Court stamping papers and the files and the dungeons where you had to go and fetch old files and on the first level you had article clerks like myself running around serving papers, or filing papers or doing things and then in court was complete silence, people leading evidence and the judge is sitting.

014 And in all, in the middle of all this I saw a figure, just a black figure standing in a corner or standing in a courtyard and my duties or whatever I want, took me past him. And when I walked past him I saw it was Judge Cecil Margo. I don't know if you know him but, and he was of course a judge in Johannesburg and he was only there for the day and therefore he did not have a chamber to go and sit in and he was looking at the architecture and the beauty but he was dressed like a judge. He was dressed in a morning suit with a black blazer, striped trouser, black shoes with spats, I don't know if you know what spats is but you can't believe that people still wore spats. He had spats on, he had a walking stick and he had a hat and gloves in his hand and I walked past him at the back and I couldn't believe that you can still see something like this in 1970's, 1980's Pretoria, because it looked like complete anachronism. And he heard me because you know, on the marble, marble floor tiles, you can't, you can't, and he turned around and I don't know if you know what Margo looked like. He had a very serene face.

015 I don't agree with everything that Margo did. He was a very controversial judge and there is a personal, further personal touch to this which I will tell you just now but as I walked past him, he turned around and he looked at me and he bowed and he said "Good afternoon, how are you?"

016 And I thought to myself "Blah!" I mean, I immediately recognised him and he was at the height of his powers. I mean, he was you know, all over South

Africa. He did the Samora Machel investigation. I think at that stage he was involved with the, with the Drakensberg, or you know the Boeing that fell near the Seychelles which allegedly had nuclear fusion fuel on board which was an absolute secret and which would never have been allowed with passengers and there was sabotage and the thing fell and he investigated that because he was also a Colonel in the Air Force. He was, he had a lifelong interest in aviation.

017 And on that moment as a young article clerk looking, you know, towards my life in law I thought this is the epitome of a lawyer's lawyer. I mean, absolutely fair, humble, balanced, and with that apart from this hurly burly. I mean, you know, all those things that you think a judge should have. Not getting involved in the fight. Uh, being completely distant from the from society but also being humble enough to turn around to greet …

018 **TRACY:** To bow to an article clerk.

019 **INTERVIEWEE:** Ja, to bow to an article clerk with his, with his spats and everything. And that is my, that was my, that was my I mean that was my idea of what a judge should look like and what a judge should do, or a lawyer if one wants to put a broader gist uh uh on that. You know, there is no, at that moment there was no doubt in my mind that this man is the epitome of logic, of fairness, of balance, knowledge, of a uh a beacon of morality. Uh you know, he had all the, he had all the attributes of what a good lawyer should be.

020 **TRACY:** Did you think he had those attributes before you had that image? Before his actual [inaudible] with you.

021 **INTERVIEWEE:** No, no, no.

022 **TRACY:** So it all came out at that moment?

023 **INTERVIEWEE:** Absolutely, that moment it came out to me. At that moment I said to myself "God, this is what I want to be. This is my hero. This is what we all should be striving towards." You know, afterwards, unfortunately, you know, life is very cruel. Afterwards you learn about people having feet of clay and I got to know, I got to know Judge Margo much better. You know, the strange coincidence is, I at the moment live in his house. I bought his house when he got incapacitated and he couldn't go up and down the stairs. So uh my study is his study. I am, you know, I am now the occupier of the house that he built for himself and his wife. So…

024 **TRACY:** [Inaudible].

025 **INTERVIEWEE:** Ja, no that is a …[intervenes]

026 **TRACY:** Did it come by chance?

027 **INTERVIEWEE:** Absolutely. No absolutely. I mean, there is not a, I never, I met him. Of course I met him a few times but when I, when we bought his

house he was already very, very ill and senile but I met him at a few book signings, ceremonies and things like that but never on a very personal level but I got acquainted with his, with his, with his circle of friends in Johannesburg and you know, he was not above approach. He also like all of us, and I think that is the essential thing, like Jeremy Clarkson. You probably won't know Jeremy Clarkson. He is another hero of mine. He is a motorcar journalist and when he tests these wonderful super cars he always come to the conclusion, you know, the weakest part of the car is the blob of protoplasm sitting behind the steering wheel. That you know, that is true.

028 The weakest part of our legal system is, you know, the fact that it is being driven by people. Margo was severally criticised for his findings on the Drakensberg disaster. He did defer to the National Party government. He was, although he was Jewish and although he is liberal and he was part of the Jewish Liberal Judicial circle in Johannesburg, somehow he supported the National Party government.

029 And you know, the same thing with the Samora Machel incident. If you read it, you know, you can't believe that a clever intelligent man like that, after months and millions of rands of investigation, can come to the conclusion that nobody is guilty. It was an accident and that has been overturned by the new government. New research had been done and it was very clear that there was something going on. The South African Defence Force was definitely involved and not only afterwards but beforehand. It is true that the pilots were incompetent and they did not know how to fly the Russian aeroplane and they did stray into South African airspace but it is also true that they were probably shot down and Margo never brought that out of course. So, then unfortunately it is true, I still have this idea of the ideal judge …[intervenes]

030 **TRACY:** [Inaudible].

031 **INTERVIEWEE:** As this man, you know, that I had as a student or as an article clerk. And he made an enormous impression on me really but turning around and bowing and greeting me. I mean, that really tingled a …[intervenes]

032 **TRACY:** How far were you into your articles [inaudible].

033 **INTERVIEWEE:** Oeg! That is difficult to say Tracy. That is difficult. I can't think. You know, it was such a, it was such …

034 What I did is my mother was a lawyer an attorney. So what I did is I worked during December holidays. I worked for her firm. Not for her, she was a conveyancer so I didn't work in the Conveyancing Department. I worked for her firm and so you know, it is very blurred. I don't know whether it was during the vacation or, you know, during a university vacation or whether it was when I was doing my articles with Adams & Adams already. So but I was very junior.

035 I mean, I was doing the beat as we call it. In Pretoria what you do is, if you are an article clerk you start with the beat. I mean, it is like a policeman. You come in, in the morning. You take the files that has to be filed or that must go to somewhere and you walk literally to every place. You walk to Church Square. You walk to the Companies office. You walk to the Trademarks office. You walk to the Patent office. You walk to the Deeds office. You walk to the Marks office. You walk to the Commissioner's office or whatever and all other, all other firms in Central Pretoria. So you walked a lot and you know, after six months then you sit in the office and you dish the work out. So it must have been at a very junior stage. I must have been very, very junior at that stage.

036 **TRACY:** Just going back to the first anecdote, it is quite common if you read accounts of especially ethics of legal education how they [inaudible] models, models from films. To kill a mockingbird is ….

037 **INTERVIEWER:** Yes.

038 **TRACY:** There's an interesting article by Kerry [inaudible] where she sort of compares the old set of stereotypes from To kill a mockingbird, The Paper Chase with newer models that, like the TV programmes and some of the newer…

039 **INTERVIEWEE:** The Devil's Advocate with Al Pacino, ja.

040 **TRACY:** Um sort of the newer ones are more ambiguous they …

041 **INTERVIEWEE:** No, no of course. Well, you might remember some, no, you were not here yet. But when I, it was Glenda Webster and …[intervenes]

042 **TRACY:** [Inaudible] Glenda.

043 **INTERVIEWEE:** Ha ja, remember Glenda and I used the to be the coordinator and she took over and it was in that time, I was either the coordinator and, or she copied me the next year but we did is we, as part of the reading for intro, you had to go and see the film The Devil's Advocate and write, yes, and write the essay "What is law?" or "What is a lawyer."

044 **TRACY:** It is fascinating [inaudible] fallen away because it is a really good exercise.

045 **INTERVIEWEE:** Well it is fallen away because there is no infrastructure. What we had to do is we had to put up sessions in the Du Plessis building. Uh for people to go and see the film and even then everybody didn't go and see it. The next year I organised with the Kines at Cinema Nouveau to screen it at virtually no cost, R5,00. R5,00 a student and still they didn't all see it. So you know, the lazy ones just said "Well I didn't have time to go and see it, I can't write the essay and then the whole thing collapsed. You know what, and then of course I called them in for an oral which was very unpleasant. Then there were complaints and then we just abandoned the whole thing. But yes,

that is a very good way of you know, show them either the Paper Chase and then Devil's Advocate. That is a very, very interesting way to get their minds working.

046 **TRACY:** And when more or less in your own like professional career did you see the pictures? Is it also very [inaudible].

047 **INTERVIEWEE:** Yes, yes Tracy. When was that film? When was it? I think it is early 80's. Ja, I know it was early on. Yes, definitely. You form these role models early on because you know, I think there is even a hint in the Paper Chase that the professor, I think he was called Houseman, he is a professor Houseman was also not what he, you know, he wasn't this icy, distant character. He had a, yes of course the main character, the main protagonist in the class that was always picked on by Houseman, fell in love with Houseman's daughter. Then you saw Houseman from another angle as the father, trying to protect his daughter against you know, marrying somebody who is not from the Boston elite. Who is not a Brahman as they say. And then a completely different, unbalanced and emotional and irrational part of Houseman came out. So it is, you know, it is, your role models are notoriously…

048 **TRACY:** The model that you associate with the law [inaudible]…

049 **INTERVIEWEE:** Oh, yes.

050 **TRACY:** [Inaudible].

051 **INTERVIEWEE:** That is so.

052 **TRACY:** Okay, can we move on to the next one. [Indistinct], what for you are the ideals of the ultimate goods that should motivate a legal professional?

053 **INTERVIEWEE:** Look, you know, when you talk about ideals it is always difficult and very easy because, you know, there are no borders. Um I think in an ideal world, I think if you would ask Plato this question, he would describe the ideal goods that a lawyer should strive for is fairness, equality, justice for all … and a … moral arbiter in society that is of a certain predisposition that … has got the intellectual and rational equipment to serve the society. To accommodate the society in their conflicts whether it is a conflict in law whether it is a conflict in contract or a delict or whatever. A lawyer, a person that's involved with the law should I think in an ideal society be completely objective, completely rational, devoid of emotion and of ideology um and should serve the community to reach satisfying ends to conflict.

054 Now of course um I'm talking about a marble statue and Plato's ideal world. There is not such person. People aren't all rational. They are the best mixture of rationality and emotion um and what one can hope for is just that um there is the wisdom to make the distinction of course.

055 That if you are working with a *res publica*, if you are working with things of the public, you are working with the public goods then you are not working with your personal goods and those goods are sacrosanct, they are holy. You must treat them in a certain manner and then, you know, you approach that with a rational and open, objective mind. That doesn't mean that when you go to your own things, go to your own personal stuff that you must also treat them in the same manner because it won't work. If you, you know, if you adjudicate a a dispute between your son and daughter or between even just family member I can imagine that um, you know, you need common sense and perhaps, you know, a good dollop of emotion to solve those things because they are always emotional.

056 So it is, I think the distinction between in what sphere you are … um uh but certainly for, if you talk about ultimate goods um for a lawyer it should be those things. It should be rationality. It should be objectiveness. Uh it should be fairness. It should be equality. All the things that one associates with, with law. Um …

057 **TRACY:** Can I make a bit more personal?

058 **INTERVIEWEE:** Yes.

059 **TRACY:** I know from [inaudible] you were an article clerk and then you became a Prosecutor and then a Magistrate, a Senior Magistrate. What are the goods that motivated you and could you see the ultimate goods? What kept you going?

060 **INTERVIEWEE:** Mmmm, that is a difficult question. You know, you know Tracy, um what I am immediately thinking of, you know you go on your career path and you know, it didn't go as smooth as you have just described it. You know, there were many other little detours and intermezzos and dramas and the other things, but okay. Legally speaking that is basically what happened.

061 Um I started off in law, you know, um I would say basically as, I wouldn't like to call it an accident because that sounds terrible but because it was the natural continuation of what I had been doing. There was nothing better to do. My mother was a lawyer. My father was a, was a businessman and there was no doubt that, you know, uh you should go to university.

062 What do you study at university? Well, uh guidance was very few and far between those days. I can remember going to one of these psychometric tests with a very strange person and he came out with the idea that I should become a backroom scientist. Now you know, that that must be wrong. I don't know where because he tested me and my brother for literally a full day. You know, these funny butterfly tests, the Rorschach tests and the, and he subjected us as, I think secondary school, ja secondary school children, he subjected us for a whole day to a battery of tests and then he came out with this thing that I should be not a scientist like Einstein, which I could perhaps

understand but a backroom scientist. You know, the guy that sits at the rack and does the work and works out the nitty gritty of the scientific project. You know, I am hopeless at maths. I hate science. I am, you know, I am a performer, I am not a, I hate being neglected and shoved into the background. I always feel, you know, that is one of my major traumas that people will forget me. So I don't know where he got that and so that was the guidance I got.

063 Um and I had a very good friend who wanted to study law because he was the winner of the National Orator's competition and he was a very good orator. He wasn't a very good orator. He was a, his father was a professor and he helped him with the intellectual side of the arguments. He had very clever arguments and he had a almost National Socialist, sjoe, I hope he doesn't hear this, but a National Socialist's style. You know, and he looked, he had a fringe like this and he didn't have a little moustache but he looked like, he looked like Hitler and he was also, you know, very prim and proper and that is what made and impression on the judges. You know, you have these other schoolchildren you know, with fussy hair and they don't know where their arguments are and they are nervous and then here you get this upright, you know, and he just bombarded, bombarded through the whole competition. He eventually won the what we called those days the Rapportryers, the Rapportryers. This is also a Afrikaner tradition I don't necessarily understand but it is a cultural organisation and he won the National Orator's Competition and that was a big thing. It was really a big thing.

064 So um and he had this vision of becoming an orator and a lawyer and so that was peer pressure and you know, I won the school's orator's competition. He didn't partake in that. So you know, what he left behind I, I marked up. So I was the local orator and he was the national orator.

065 So there was lots of peer pressure to go into law from that side and from of course from my mother's side um it's something that just happened naturally.

066 You know, there were, obviously I would like to have become an architect but my father was an entrepreneur and he said "Please, you know, there is no work for architects. You are not going to make a living. Just forget about it. I am not going to pay for you to waste your money and not be able to make money." I don't know whether I would be able to do grand designs, you know, designs that made you think for architecture but I have the, you know, I have a very keen interest in architecture and you know I can feel there is something. I don't know whether I would have become a very good architect but I wanted to do that but my father said "No. All the architects I know have no money. They don't, they don't make a living."

067 So um the second push element of course, my mother said "No, go do law, you know. You're a good orator and you are good with words, do law."

068 So there are no lofty ideals I think, at the beginning that I said that these are the things that I want to achieve. There were, there were ideals. Of course you want to become a famous lawyer. You want to become a famous orator. You know, you want to became, in those day law also led to a political career. You could perhaps become a famous politician because those were the things available those days for little white males and those are the things that I think I took into consideration but it was more, more in absence of something else that I could study.

069 What I should have done of course, I should have studied history because that is my passion. I, you know, I am not a, I am a very good academic lawyer. I am a very good legal historian but I am not a good, I am not a good true blue lawyer.

070 You know, I sit in the tearoom and I listen to my colleagues argue a point and if I don't fall asleep which often happens because it's so boring, you know, [indistinct] don't understand what they are arguing about. I can't see the point and I don't, I haven't got that legal killing instinct. I haven't got that, you know, we have one colleague here that is extremely emotional, or not emotional, extremely enthusiastic about her um uh subject which is international law and if I see her going on about international law I often wonder you know, what, what is it that motivates these people because it is not an academic thing. She is also a brilliant academic um but she is an engaged international lawyer. You know, she, she organises anti-terrorist conferences and she invites people and I mean, she eats and drinks and breathes international law and I am not, I must say I am not like that.

071 I'm not, I haven't got the killer instinct of the practical lawyer. I haven't got, you know, I would never have been a successful, that is why after my articles I also, I also decided, you know, this is not for me. I will never be a successful attorney. I cannot do the filing. I cannot do the admin. I don't want to do this, you know, the down side of life, the rubbish side of life. I don't want to do other people's death wishes and their income tax and their motor car accidents and their divorces and their adoption of children. I don't want to do that. I ,you know, I am a more person of the idea than that but I do think …[intervenes]

072 **TRACY:** The aesthetic.

073 **INTERVIEWEE:** Ja, the aesthetic, ja, no definitely but I do think and now that we ponder on the subject, I think if you want to become and I think I have said that in a lecture or two. If you want to become a good lawyer you must have that killer instinct.

074 **TRACY:** Ja, I was going to ask you that [inaudible].

075 **INTERVIEWEE:** My father, my father was never enthusiastic that I have studied law because he was an entrepreneur and when he saw lawyers it was always um crisis. It was always, you know, a court case. You know, the crane

collapsed and two people were killed and you know, uh it was a major catastrophe. So he always associated lawyers with catastrophe and he said you know, it is a cut-throat business. It is a dog eats dog profession and I didn't agree with him then but I am afraid after seeing the profession from the inside and from the outside I must confess that I think he's right.

076 It is a profession where money pays an enormously important role, unfortunately um and you know, I think that is one of the tragedies of the law profession that it has become, you know, it has become a trade rather than a profession. It is you know, people, you see this creeping on, in my days it was absolutely taboo for a law firm to advertise. You know, I can remember learning the rules of the Law Society which states um how large your business card may be and how any colours you may use. I mean, there was a page and a half prescribing you know, what you may and may not put on your business card to prevent people from having too elaborate, and now of course, I mean, you put on the radio and you hear Werksmans, you know, the hoo la la, hoera come to Werksmans. I mean, it really is very, very off-putting. You know, it is such a, and that is not the only firm you know, it is all the large firms and strangely enough not the small ambulance chasing firms but the large prestigious firms. Well they've got the budget I suppose. They are now advertising.

077 In my days it was, I think it was a bar-able offence if you, if you negotiated your fees as a contingency of the, and now it is allowed. You can, you know, you can, it is common purpose, ag common …[intervenes]

078 **TRACY:** Practise.

079 **INTERVIEWEE:** To, for article clerks, not article clerks, for associates to work for a percentage of the fees that they write. Now, that is not good. That is not, I don't care what the requirement of the profession is, that is not good. Those are the goods that you don't need. You don't, if you have a lawyer motivated solely by money and his salary, you know, out of the door is objectivity. Out of the door is fairness. Out of the door is everything that you know, that you can think of.

080 **TRACY:** So the killer instinct has something to with getting the work.

081 **INTERVIEWEE:** Ja.

082 **TRACY:** About getting as much as you can for the work.

083 **INTERVIEWEE:** Yes. The killer instinct is the survival of the fittest. I mean, it means I will, you know, I will trample on my neighbour or on my colleague uh if I can get the work and you must do that because it is an enormously competitive profession, enormously competitive.

084 I look at these classes. We have just finished registration and I have looked at the classes of people, the hordes of young enthusiastic people wanting to study law and it's wonderful in one sense. I haven't lost that romantic idea of

studying law as something being, you know, really wonderful, a classic education.

085 But I wonder where are they all going to get work if they all want to become corporate lawyers. You know, they are going to be very disappointed. If they want to represent people, indigent people, they are going to be very, they are going to be very happy because there is lots of work because those people, 90% of people in South Africa are not represented. This improved now, I am quoting an old statistic but you know, people study law because they want to become rich and that is very sad. I suppose it has been with us for a long time. It is not a new thing but you know, the legal profession should be like uh teaching. You know, you do it because you love it.

086 **TRACY:** It's a service profession.

087 **INTERVIEWEE:** Ja, it is a service it is not something that you use to advance yourself. It is also, it shouldn't be an egoistic and a money grabbing, commercial, cut-throat business. There should be courtesy, there should be professionalism amongst the lawyers and that, you know, from what I hear from my, from [Isobel] and from my friends in the profession that doesn't always happen. Um you know, the courtesy the people used to, because it's so highly competitive. You know, you just can't afford if somebody puts a foot miss, if he misses a court date or he misses a deadline you are not going to, you are not going to condone that. You are going to go for the guttural. Say "No, no, you missed it. You are out of court. Your application is gone or whatever" Um and I don't think that is what law is about, really. I don't think law is a game. I don't think it is a game of uh you know, who is first and who is last. I think law's an art that I think is receding unfortunately.

088 **TRACY:** And [Isobel] how does she, where do you see, motivates her?

089 **INTERVIEWEE:** No, no [Isobel] is motivated by money. [Isobel], oh, yes, definitely. No, [Isobel] is completely motivated by money. She's got, she hated jurisprudence. She has got none of these ideas, lofty ideals of law. She does the part of the law that makes the most money because that is what she wants and she is ruthless. She is absolutely ruthless.

090 Part of her practise is competition law and she did, you know, she did the, hope I am not, I think the case is finished now but she did the case of, one of her clients was a huge [company name deleted] …[intervenes]

091 **TRACY:** You spoke about it in one of your lectures, it's the how much it costs to manufacture one syringe …

092 **INTERVIEWEE:** That is right, ja. So but besides that they were also in cahoots with their opponents and they formed a cartel to keep the prices artificially high.

093 And um uh what happened there is I can remember very clearly, on a Sunday afternoon, we were driving in the vineyards in Stellenbosch or in Elgin as a

matter of fact and there was a call on the car radio, car phone and it was this German CEO of [company name deleted]. And he said "Oh my God, [Isobel] I have got a problem" and he, you know, [Isobel] put the thing off. I couldn't hear what the problem is and he then related to her that they had been doing this for years and years and years, you know, manipulating, massaging the price of a, you know, he did say for a syringe keeping it at R43,00.

094 Now R43,00 doesn't cost, doesn't sound a lot to us now between you and me. But a syringe, the cost of a syringe in reality is three cents and you know, although we don't earn a lot as legal academics, R43,00 for us, is what, we will be able to pay that if it's a life and death situation. For the indigent person lying in the gutter in Zimbabwe, R43,00 [laughs] is you know, 700, trillion Zim Dollars. So it is a, it is a huge, and we don't need the syringe. He does, or she does and they have been doing this for years and years. They have been artificially keeping the price there for years and years and all of a sudden this guy heard that there is a possibility of a investigation by the commission, by the Competition Commission and clever German that he was, he phoned [Isobel] first thing and of course clever lawyer that [Isobel] was says 'Hans' or 'Jurgens' or whatever his name is 'I am flying back tonight, I'll see you at the airport tonight.'

095 So he came to the airport and they immediately that Sunday evening drafted a declaration by this man saying 'I am the CEO. We have done this. This is the details. These are all the other parties that we formed into the cartel. We didn't know that this was wrong. We thought it is normal business practise' ha ha ha, 'And I am now coming forward' ringing bell, what is it? Whistleblower 'Whistleblower, I want protection because I didn't know we were doing wrong but I am know, I have heard that this is wrong and I am prepared to spill the beans' and he spilled the beans. He was dismissed of course but he didn't get a fine and the company, I think got a fine of a 170 million Euro, not Rand because it is an international firm and that's a percentage of the turnover.

096 So you know, that is what [Isobel] is interested in to, you know, and that is cut-throat. I mean, the decent thing would have been to say call the directors together. Let us talk about this thing. Let us see what can be done and let us see who we can save. [Isobel] is not interested in that. If this is her client, her client is the one that pays her and she worked out the best case for him and she got him scot-free, scot-free Tracey. He didn't pay a blue cent and he was CEO. He didn't pay a blue cent. He had to appear once before the commission. He brought everything and it cost 170 million Euro for [Company X].

097 **TRACY:** And she didn't have any conflict in herself [inaudible].

098 **INTERVIEWEE:** No, I don't think so. No, that, well she says it is her client. She protects her client. She does, you know, she does what is good for her client.

099 **TRACY:** And what might have been equitable in the situation is if she got some, you know, if he shared in the punishment.

100 **INTERVIEWEE:** No, but of course yes but Tracy, I mean …[intervenes]

101 **TRACY:** [Inaudible] getting in trouble.

102 **INTERVIEWEE:** Yes, and I mean, he was the main protagonist. Its not that he was a small little which the whistleblower should be, a small little cog in the big wheel and he says *'Hooi*! But these people above me are doing things that are wrong. I am going to tell people because I don't want to get involved.' This was the big cog. I mean he was the, you know, he was the CEO for the company for years. And of course due to the labour law he got a huge golden handshake. He is sitting somewhere on an island with his millions of Euros. The company has paid the, well the company and the cartel has paid 170 Euro bill which is good for the South African taxpayer and there you go.

103 And the irony of the thing is of course, the company, because they saw [Isobel] protected this guy so brilliantly, has now retained [Isobel] as their lawyer. So she's got a huge, this company as a client. You know, not my idea of law [laughs] but that is dog eats dog, you know. It is the one with the best defence or the best lawyer.

104 **TRACY:** Acts fastest.

105 **INTERVIEWEE:** Ja, acts fastest.

106 **TRACY:** I also fell into law by accident but I'll tell you how we are finished with this [inaudible].

107 **INTERVIEWEE:** No, no, no. That is strange because I thought you are also a, you were …[intervenes]

108 **TRACY:** [Inaudible].

109 **INTERVIEWEE:** Doesn't make a noise.

110 **TRACY:** [Inaudible] for the first time I am really using it for an extended period. I just want to make sure that the batteries are [indistinct]. Should we touch on…

111 **INTERVIEWEE:** On two or what?

112 **TRACY:** If we look at first, 1.1.1, you know, in light of the ideal that you've sketched. What values should the legal profession hold? What are the most personal attributes of the legal professional? Obviously it is going to differ now from what you have said your ideal and what is the practical reality.

113 **INTERVIEWEE:** What is the practical, ja. I think you know, I think we should, I think the ideal should always be there. It is very dangerous to throw the ideal away.

114 **TRACY:** Why is it dangerous?

115 **INTERVIEWEE:** Because then you get law as a commercial activity and not as an art. You get law like people practises it in South Africa. You know, they will represent you as long as you can pay for them but the moment that there is no more Legal Aid or there is no more Legal Wise or whatever, you know, they drop you. There is no considerations of saying 'Okay, you know, this is my, this is my contribution to the profession. I have made my life, I made my whole existence, my whole estate, all my money I have made off this profession and it is time to give back something. I am going to represent this guy until the end. I've started it now and it will be hugely detrimental to his case if a new person comes in and he hasn't got the money for a new representative.'

116 But that doesn't happen. I mean, when I was in the criminal courts in Johannesburg, you know, [Isobel] calls them bottom feeders, not that she's any better but she calls the criminal lawyers, people who specialise in criminal law bottom feeders and they really are because it would take a commercial lawyer an afternoon to write R100,000.00, R200,000.00 worth of fees, you know, just a merger and an acquisition deal which is based on a precedent which you knock into shape. That is two three hundred thousand rand. For a criminal lawyer it takes five months, I mean, very, very slow earning fees, would give him a R100,000.00. You know, it really, the criminal law doesn't pay obviously.

117 So, when I was a prosecutor in the Johannesburg courts here at Fox Street, you know, I saw the most atrocious things, people pleading 'Just represent me for this once, you know. Just get me bail and then I will …' If you haven't got R500 you know, to pay my fee, sorry, can't, can't help you.

118 And you know, that is not, you know, that is, you know that is the seventh circle of hell where Danté plays the amorist, you know. Just that those people don't deserve to be called lawyers.

119 **TRACY:** I am just thinking about, you know, comparing it in my mind to my intellectual [inaudible]. I think, you know, you talk about art. I think it is [inaudible] and these guys they have a special trust fund and [inaudible] and then later on I admitted to one of the nurses I was afraid at that time that they would throw him out of the ward and this year …[intervenes]

120 **INTERVIEWEE:** That is very encouraging to hear.

121 **TRACY:** This year in fact, those two paediatric cardiologist for which an one year appointment is R1,600.00 and have offered to treat 24 young indigent children for free.

122 **INTERVIEWEE:** Now you see, that is what is you should do.

123 **TRACY:** You know, [inaudible].

124 **INTERVIEWEE:** That doesn't happen in law. You know, I mean, is it so bad. Well I don't know what will happen now with the economic down but it's so bad, you know, [Isobel]'s firm and it is, you know, 10 partners, it is not a small firm, it is not a big firm but it is 10 partners, they refuse to take any, any private law matter. They only do commercial law. They only do companies. If you are there to represent a company they are interested in you. If you are there to represent yourself then they are not interested. If you've got a, you know, a car accident or even a huge claim for whatever reason, not interested. Only, no private law, no public law, just commercial law.

125 **TRACY:** No *pro bono*?

126 **INTERVIEWEE:** [Laughs]. Ja, now [Isobel] of course however, I am unfair to her. She has got a very hard exterior but a very soft heart uh and she sometimes ends up with doing things for her stupid family and for friends.

127 She had, um one of our friends had a son, or one of our friends' son uh was a jockey and he was a very good jockey. He was a small little man. He had the exact build for a jockey and he was very enthusiastic and very dedicated to being a jockey and then of course he fell off the horse and he broke his leg and he had to find an alternative profession because you know, they get paid very, very well as jockeys but if you don't race you don't earn. You know, you know it's not like academics but he then thought "No, why don't I start a restaurant. That can't, how difficult can it now be to start a restaurant?" and now what is the first thing that you do when you start a restaurant. Oh, no you buy another restaurant. You buy an existing restaurant.

128 So at his tender age of 24 years he signed a contract to buy a restaurant in Durban where, you know, nobody, none of his family is in Durban. For 3.5 million. So the contract stipulates that you should pay the deposit on a certain date. The date came, the deposit wasn't paid and he was sued, you know, which is logical. I mean, what is more logical than that. If you go back on your contract or you don't honour your contract people are going to sue you.

129 So he said no, he thought he will borrow the money but he signed the contract before so [Isobel] asked him, and of course what they do they bring the whole thing to [Isobel]. "Hu, hu, [Isobel], what are we going to do?" and [Isobel] said "Well, you must either pay the money or you must, you know, you must step back from the contract or, you know" and so they said no, they wanted to borrow the money but the people who they wanted to borrow the money from of course didn't have the money and wouldn't borrow the money to them. I mean, who would

borrow a 24-year old three and a half million rand to start a restaurant that is probably already insolvent?

130 So it took her four or five days but she got him, she got him out of the contract, ja. Ja, she, well she went, she did a very clever thing. She went to the landlord and said 'Look, a man of straw, he's got nothing. If you are going to carry on with legal proceedings against him you are going to waste your money. He's got absolutely nothing. He's got a Volkswagen car and that is all he has on his name. So let's, mutual agreement, we just step back to where we were before the contract and we cut our losses.'

131 And they had no option, they had to do it but of course you know, you need a good lawyer to do that. You don't, they can't do it on their own. So she does those kinds of things. She fixes up small things which is perhaps to her credit but not, not very often.

132 **TRACY:** [Inaudible] your ideal then. Thinking in terms of your ideal, Cecil Margo and a fair balance, what would be [inaudible] and what would be the personal attributes?

133 **INTERVIEWEE:** Oe, Tracy, I think, you know, living in a, living not in an ideal world, you know, we have covered this question in the ideal world and how bad it is in the real world.

134 So I suppose, not living in an ideal world, I think I would be comfortable in a society where the lawyers are respected and they are part of the society. The role they have in society is the role of the arbiter. I would be, I would say that such an arbiter in society should be motivated by own interest because we can't get away from that. It would be naïve to rant and rave with the image of Cecil Margo. You know, they don't exist and even in that specific instance it wasn't what it seemed to be. So I would like my lawyer to be um a man that is concerned about his/her own interests … um because self-interest is the strongest motivating force that you can have. But that must be tempered with somebody that has got a real and deep concern for fairness and equity and justice in society. It must be a reasonable man or a reasonable woman. Um I think … a lawyer, a lawyer in reality may be allowed to have commercial interests in law because that motivates them and that cause you to have, on the capitalistic principle the best that is available.

135 I am not advocating for a kind of Legal Aid lawyer that is mediocre, who doesn't care whether there is fairness or whether you know, just as long as he can get a result and get the case file out of the way. I'm not. I'm not arguing for a socialist, Marxist lawyer that is devoid of all self-interest and is driven only by the work ethic or the role in society, the greatest good for society.

136 I think it is good that lawyers are excellent. I think lawyers should be, they should strive for excellence. Um uh when you are faced with a murder charge, you don't want ha huh somebody mediocre defending you. If you are going to go insolvent you want somebody who knows the Insolvency Act better than anybody else, uh to defend you and that person would be the person who is the most successful and success in our society is measured in terms of rands and cents.

137 So in that sense I think there is place in the ideal lawyer, or the lawyer that we would like to have for commercial consecration and self-interest. But at the bottom he must she must be a decent human being. Must be somebody who cares for her society. Who is concerned about uh fellow-human beings. Who is concerned about the aesthetics of law. Who is concerned about equality, justice for all fairness. Those things are, you know, those things are such, such immaterial, such vague concepts that if you don't, if you don't put into the equation they get lost so quickly and if they get lost, you know, you sit with just a dog eats dog equation and that is not good enough. Then I would rather have, you know, the glary-eyed idealistic fighter for human rights.

138 But the ideal is perhaps a merger of the two uh where you have a brilliant lawyer, a very, very well-trained lawyer. A lawyer who will give his utmost, from motivated either by self-interest or by interest in law or whatever but never losing the foundations. As they say in Stellenbosch '*petre fontes*' the original sources where you must go to. You know, the original fountains of law and those, you know, the fountain of truth and justice and those things. You can't, if you haven't got those things you shouldn't study law. You must go do dentistry … [laughs].

001 **INTERVIEWEE:** [Inaudible]

002 **TRACY:** [Inaudible] someone.

003 **INTERVIEWEE:** Oe!. Tracy.

004 **TRACY:** It is a mountain of work.

005 **INTERVIEWEE:** But can't you get money for somebody who can type it?

006 **TRACY:** I, you know, I have [indistinct] already but the transcribing person that I contacted only works with audio tapes and not with the video, so you know, I could give them the interviews but the actual transcribing lectures [inaudible]. If you also don't mind, because as I am doing it, you know, I get to know him very well [inaudible].

007 **INTERVIEWEE:** No, that is of course, you…

008 **TRACY:** [Inaudible] what are the most, will you say are the most important relationships of the legal professional? For example with clients, the counsel, the bench, the [inaudible] profession? What are the loyalties and commitments of these relationships?

009 **INTERVIEWEE:** Shoe! Well I remember just the anecdote which reminds me of this. I don't know if you were here with Judge Sachs, when he spoke at Wits last year.

010 **TRACY:** Uh-huh.

011 **INTERVIEWEE:** And the exact same question was asked of him. He mentioned something about a lawyer and relationships. I don't know, can't remember the context but in any case somebody asked him what are the most important relationships and you know, you know Judge Sachs, he is a little bit long-winded and he went on about every single relationship and he answered everything and he said how important everything is and he answered very, very well.

012 But of course as the devil would have it he didn't refer to counsel, the relationship between a judge and counsel because that was a question, what was the relationship with the judge, what is the relationship and he [inaudible] and Martin Brassey, I don't know if you know him and he got up and he was very cutting. And Judge Sachs said that he works out most of his judgments in the bathroom when he showers or when he does his ablutions in the morning. You know, he thinks and that is where he does his, and Martin Brassy stood up and said, he didn't say my Lord, he said "Judge Sachs, unfortunately I don't have audience in your bathroom but what about the relationship between the judge and counsel? How important is that?" and of course Sachs went all colours of the rainbow because he has forgotten about the counsel and of course I think it shows that there is a problem with the relationship between the judge, with the judge and counsel.

013 So my immediate reaction to answer the question is the relationship between lawyer and client is probably one of the most important relationships. Is that the direction you are enquiring after?

014 **TRACY:** Well is that the one that comes [inaudible] first problem into your mind? Where the primary loyalty lies?

015 **INTERVIEWEE:** In the legal profession, well I suppose so. That is the very nexus of the legal profession. That is what the whole legal profession is about. It is the relationship between the lawyer and the client and as you know of course the relationship between lawyer and client is privileged which is very, very strange because not even the relationship between priest and, what do you call that, and follower, priest and disciple is privileged. If you make a confession to a priest that priest is compelled to come to court and tell Court what was said in the confession. So the relationship between client and, attorney and client is even more special than the relationship between priest and disciple. So that is, you know, that gives me the idea that that is a very important relationship. I think if you don't know how to handle your clients and if you don't, you know, if you don't have a good relationship with your clients, I think, you know, it will be very difficult to have a successful practise.

016 Of course the relationship between the opposing counsel is also important but referring back to what we have discussed last week, you know law is a very, very lonely profession. It is not a very collegial profession. So, whereas I think medical doctors or even, well in our profession, academics are far more collegial towards their fellow-colleagues than opposing counsel. I suppose if you work together then there is an important relationship there but my idea of an opposing counsel is that they are, I mean just that. They are opposing counsel, they are not buddies. They would rather, you know, they would rather die than to concede to opposing counsel.

017 **TRACY:** And so what is the nature of your commitment to them, your loyalty to them?

018 **INTERVIEWEE:** I would say very limited. Mostly, or at the most you know, to be professional and very little more. You know, to be an honest professional and not be conniving and unprofessional but there is very little, what do you call it, goodwill amongst the opposing counsel. You know, especially if they are in that relationship of opposing counsel.

019 If they are not opposing counsel, I suppose once again the relationship between two counsel, the counsel I have in mind is Alfred Cockerell who used to be a professor here and Martin Brassey. And they were great, well they still are I suppose and that is the reason why Cockerell went to the bar. They are great friends and they really enjoyed one another's intellect and they enjoyed one another's view on the law because both

of them are very, very sharp people. Very, very sharp counsel but you know, especially on the side of Martin Brassey. If Alfred would today be on the other side certainly he wouldn't give him the time of day. If they were on the same side, yes, there would be collegiality and they will fight in a team and they will exchange ideas and they will be very, they will be good friends if they are senior and junior counsel but that is not opposing counsel. You asked me the question about opposing counsel. Alfred, well I don't know Alfred that well but I can imagine that he could perhaps be more flexible but Martin Brassey will not give you the time of day if you are on the other side, you know, and he will give you a hard time and he will pull technical points on you whether you are his best friend or whether you are, the first time that he had seen you. And the same …[intervenes]

020 **TRACY:** [Inaudible].

021 **INTERVIEWEE:** Sorry?

022 **TRACY:** Is that appropriate [inaudible]?

023 **INTERVIEWEE:** He is, well you know, that is unfortunately what the legal profession requires from you. That is where we come back to the point that the most important relationship is, unfortunately your client because that is the person who pays your money.

024 Another counsel I can think of is David Unterhalter who is a charming and a wonderful man and you know, butter couldn't melt in his mouth. But if, I mean, if he is on the other side he is an absolute ogre. You know, I have seen David in appearing cases and using the minutest detail and the minutest small technical point to out-manoeuvre his opposing counsel and you know, he is not a popular person. David is not popular at the bar at all. He is know, you know, he is one of the best but also known as somebody that doesn't give an inch. He will drink your blood if you, you know, if you are on the other side. So definitely, obviously the relationship with the bench is important.

025 **TRACY:** Can we just go [inaudible] and I want to know what you think. The relationship with the client, what is appropriate there? How do you keep a good relationship with your client?

026 **INTERVIEWEE:** Well I think what, you know, clients are very difficult things because they don't always understand the law. A client doesn't always understand that, even if you do not win, you don't always necessarily always lose. You know, you might not, you might apply for a certain motion and you may not get the, your motion may not be granted but that doesn't mean that you have lost. It just means that the Court doesn't agree with the way in which you want to do things and that you must do it in another way. That is difficult for the client to understand. Especially, he is a layman, he doesn't understand law.

027 So the best way to stay on the right side of your client is not to keep him in the dark. Not to try and to be too clever and to be too flamboyant and to promise too much but to be very honest, very, very honest with your client and to keep him informed at all times. I think that is an error that very, very many practitioners, especially not so much advocates because we are talking now about counsel as if they are the only part of the profession but especially solicitors, especially attorneys because they don't always have the time and they have far more detail and far more administrative work to do. They don't keep their clients up to date. They don't send them letters. They don't let them know that this is what should have happened or we are looking into this and on top of this we have made an application here. We have applied for your licence. We have done this. This is what we think he is going to do and they just think they will, of course the client will know that if we applied for a licence we must now wait and, but the client doesn't always know that. He thinks you have applied for a licence in the same sense as you have applied for your car licence or for your driver's licence. It will be ready within a week or so. Whereas if you apply for a mining licence it can take years. So that is very, very important. You must keep your client abreast of things. You must inform, you must take him with. You must remember it is his case. It is not, you know, you might, you may be doing it but it is his case and you must take him with you.

028 And you must be, we come back again to this. You must be brutally honest with your client. If your client's case is not as strong as you would like it to be then you must tell him "Look, the previous three or four precedents in this field is against you and not one of them is from the Court, Supreme Court of Appeal, granted but they are both High Court cases and you know, we have got a fight on our hands. We are not going to get this, it is not a pushover." And many clients in order to placate, many lawyers in order to placate the their clients say "Og, no, you know, it is a pushover. It is not worth an application in court and we will get the condonation, thank you very much and finish en *klaar*." And of course when it doesn't happen and there is no condonation and the case is thrown out then it is difficult and I think then that creates a very bad impression and that creates a very bad feeling with clients.

029 **TRACY:** So the best way is [inaudible] your clients?

030 **INTERVIEWEE:** Yes. It doesn't always seem that way because dishonest lawyers won't always, also sometimes win and they also sometimes get a ruling in their favour. It is not to say that only honest lawyers are the lawyers that always win. You know, life is unfortunately not that simple but from a personal perspective, if you accept that the most important relationship in the legal profession is that between attorney and client, or between a lawyer and client, if you are not brutally honest with your client you are playing with fire.

031 That is, you know, lawyers are in an extremely privileged position because many times it involves huge amounts of money. I know [Isobel] sometimes mentions to me the amount of money that they have in their trust account and it runs into the hundreds of millions. It is not just millions, it is hundreds of millions and they are a small firm of 10 people. You know, they are 10 partners, it is not a, and it is not even a medium-sized firm. It is a small firm. Granted they do commercial work. It is a boutique firm and they do only commercial work but you know, if your client gives you that kind of money to look after for him, you know, you must be, if you are not absolutely brutally honest and above any temptation in approach then you know, you can forget about it. You are not going to be a lawyer. So that is very, very important.

032 I am of the opinion that the relationship within the organised profession is sometimes overstated. I think the organised profession is important to do small menial things. I am not a group person and I don't think lawyers are group people. I don't, you know, that is why you have, here in the, if you are an advocate, you are completely on your own. There is no, although they in Johannesburg, they have groups but it is very loosely … That is the ideal situation for a lawyer to be on his own to do his own work, to look after his own practise. To be the individual. Attorneys have these law societies and the law societies they have a place. I think the most important, and this very cynical Tracy, but the most important element of the law society is the fund, the…

033 **TRACY:** Fidelity finance.

034 **INTERVIEWEE:** The fidelity finance. [Telephone conversation]. Hallo? [Pause] hallo Baba. [Pause] no, well I am very happy. I am in the middle of an interview Bob, sorry. No, no I am glad to hear from you. I am very really interested to hear what is the next stage in our little drama. [Pause] ja. [Pause] you know, but are there any developments Bob? [Pause] okay. [Pause] hmmm. [Pause] ja. [Pause] oh dear! [Pause] hmmm. [Pause] ja. [Pause] well then we must get those [inaudible] out of the way. Ja. [Pause] hmmm. [Pause] ja. [Pause] ja. [Pause] well I still have got all my documents. I haven't [pause] ja. Ja, no, I have got them and as soon as you tell me, you know, we can get together and we can do the judgment immediately. I have worked out what I want to sentence him to and we will [pause]. Hmmm, so you just press on my button and I will be there. [Pause] okay. [Pause] soon. Ja, no, no that is fine. That is fine. You know, this month is [pause] ja. Ja. Okay you phone me when you need me Bob. Okay, thank you, bye.

035 I did a, do you know him? We did a huge trial about a medical student that was very, very naughty and, but we haven't done the sentencing. We've done the judgment, I found him guilty on one count. There were two counts. On one count I found him guilty but we haven't done the sentencing. Now, and this was last year. The whole, I mean, this was a

year ago that it happened. So now he is phoning and saying that somebody is back. I couldn't really discover who is back from India now and what difference that would make. You know, the, and I don't know, I was thinking of sentencing him to one month, to one year exclusion from the university, suspended for five years because the count that he was found guilty on was not, it wasn't that serious and of course there is another case against a student where the [indistinct] found him guilty and suspended him for two years.

036 **TRACY:** [Inaudible].

037 **INTERVIEWEE:** [Indistinct] for two years from the university and those two years are at the end at this 2009. So we better put our one in as well but mine is now suspended. Steve didn't suspend his. He just said two years expelled from the university.

038 **TRACY:** He is a repeat offender then?

039 **INTERVIEWEE:** Well it happened, I don't know why they split the four charges. It was too much for Steve to do and they split the charges. It all happened in the same time. So strictly speaking he is not a repeat offender. It was all [indistinct] at the same time. Okay?

040 **TRACY:** [Inaudible].

041 **INTERVIEWEE:** Ja, I think that is very important. That gives like you said [inaudible] although they tell me that, you know, if you are involved in a big case, if you are involved in a really major case like a management buy-out of a mine and you do something wrong, you know, the claim against you can be hundreds of millions of rand and the fidelity fund won't cover that. It is not strong enough but certainly, yes. For the run of the mill lawyer the fidelity fund is a very good thing and I think in that sense the organisation is good and then it looks after big offenders, you know, that steal trust funds and it has got its place. I don't want to say that it has got no place but I seriously don't think that the relationship between a lawyer and his professional organisation is that important. I think that they are just a necessary evil. I don't think that they are, they had done very little good stuff.

042 I can remember when you are an article clerk and you now obviously want to become a member of the profession, one of the requirements, a million requirements that you must do. You know, you must apply, you must register your contract and you must, og! In those days you must swear that you are not a Communist. Can you believe it and you must, there are a million of things that you have to do and one of the things you have to do is, you have to go to a senior member of not the profession but a senior member of the Law Society to see if you are a fit and proper person. You have to go to two mind you. I don't know, it might be …[intervenes]

043 **TRACY:** [Inaudible] I think you [inaudible] anecdote in one of the [inaudible] where you spoke about your interview.

044 **INTERVIEWEE:** Ja, it was very, very unsatisfactory. You know, the guy was not, you know, he was interested and he was not professional. He was not, you know, not inspiring. He couldn't get it over quick enough. He was a big ball. He wasn't, definitely not a role model and I mean, that is the least you can do. Here is a young guy entering the profession. You have got a half an hour with him. I mean, heavens forbid, it takes a half an hour. Spend the half an hour encouraging him saying that you know "Welcome to the profession. Do well. Keep your ears clean. You know, this is what happened to me." You know, like a father figure but this guy was just, oeg, no. Fortunately I can't even remember what his name was, you know but I remember greatly unpleasant. A very, very unpleasant interviewer. You know, he was bombastic and you know, egotistic. Oeg, just everything that lawyers can be, you know and he wasn't even a, he wasn't a leading light in the legal world. He wasn't the greatest criminal lawyer or the greatest attorney that everybody looked up to. He was just the guy that always paid his dues to the Law Society and being a member of the Law Society little management committee for 10 million years and that is why they have made him now this person to interview other people. So not a high opinion of the Law Society. It has got its place but it is not a very important relationship. I don't think so. What are the loyalties or commitments of these relationships?

045 **TRACY:** [Inaudible] but what I am interested in is the hierarchy between, the relationship between judge and counsel which you have already [inaudible] being problematic and the relationship between judges and magistrates.

046 **INTERVIEWEE:** It is not really a relationship, you know. There is not really a relationship there. You never, well yes, of course there, ja there is a relationship.

047 **TRACY:** When magistrates and judges, do they ever, they do sometimes have to [inaudible] each other.

048 **INTERVIEWEE:** Very, very little. It is only on paper that they [indistinct] unless of course you do what I did as I have told you. The anecdote in the class then there is a, you know, as a matter of urgency it happens but the judges are, well I am now obviously seeing it from the perspective of a magistrate but the judges are extremely arrogant as far as the relationship with magistrates are concerned. They consider all magistrates as being, and perhaps they are right, I don't know, but they consider all magistrates to be complete buffoons and complete idiots. Because in the past as you know, the magistrates were really, really hardcore civil servants. They had really little academic training and you know, you grew up in the civil service and you did what your master's

voice told you to do and that is why there was a, the procedure of reviews was instituted. I am sure at the moment it is much better because whether you are a judge or a magistrate you need an LLB. The qualification is now the same and you can be promoted from a magistrate to a judge. Although it doesn't happen often and I am sure that there is now more, well I would hope that there is now more respect for the magistrates because the judges were in my day, the judges were very, very arrogant and extremely highhanded with magistrates. And you know there would never be such a thing as a once a year get-together between the magistrates and the judges.

049 I can remember, which you would imagine is a healthy thing, you know. Once a year in a city like Cape Town where, you know, there is a handful of judges and a handful of magistrates and they both work in the same sphere, they are all lawyers and they are all, they work, they do basically the same work on different rungs of the ladder, you would imagine a cocktail party between those two professions could be something feasible but the judges wouldn't even come to the magistrate's annual ball. When we had a Christmas party or an end-of-year function we would invite a very prominent person to as a keynote speaker and we tried our, I was the chairperson of the social club and we tried whatever we could to get a judge to be the keynote speaker. They were all unavailable. They are not, they are just not interested. You know, I kept on this list of mine of all the judges they could ask until the chief magistrate, the president, Regional Court president called me and said "Look, you are still young. You don't know what is going on but we don't really, we don't really mix" and if you get a judge to come and talk to us it is going to be embarrassing to him, he doesn't want to do it and because of that attitude we of course, we don't want him there because they are extreme, because it is such a mystified profession, that of the judge. I can remember in Wynberg which is a huge court building, sometimes …[intervenes]

050 **TRACY:** [Inaudible].

051 **INTERVIEWEE:** No, no in Cape Town. It is a huge building. I mean, it is very often on the news when there is a high level trial there but it is a magistrate's court building. It is next door to the police station and it is a very traditional magistrate's court building but the entire top floor is devoted to the top court to the best court of the regional magistrates where the regional magistrate president usually has his court. So it is equal to a High Court and what happens is sometimes the *Rondgaande Hof*, what is that now in English? The, I want to say Travelling Court. The …[intervenes]

052 **TRACY:** [Inaudible]. Circuit Court.

053 **INTERVIEWEE:** The Circuit Court. The Circuit Court once in a blue moon comes to Wynberg and they sit in the Wynberg Court as a Circuit Court,

you know, for a week or two rather than to go to Tulbagh or Ceres or Bredasdorp or wherever and Circuit Court …[intervenes]

054 **TRACY:** Circuit Court?

055 **INTERVIEWEE:** And they would come to Wynberg and they would sit there as a Circuit Court and you won't believe it. The Judges on the Circuit Court will (a) not join the Magistrates for tea and (b) they insisted on separate entrances. They insisted on not being contaminated by the magistrates. It is really that bad and they say it is for the safety and they don't want to be, you know, they don't want to be at risk but they had to isolate a special lift where the judge could be taken from the, or the judges could be taken from the car park at the bottom to the top court and that lift must have been isolated and closed and nobody should be allowed to, you know, heaven forbid that the lift would open on 3rd floor and they could see the general public or other magistrates. So the relationship between magistrates and judges is severally strained.

056 It is not a happy, it is not a happy occasion and of course what happens if you have a very senior magistrate, you know, they feel done-in by the judges because the Judge might be much younger but just because, you know, he happened to choose the route of becoming an advocate he became a judge and the magistrate might be an old senior magistrate that did the B Iuris course and never did the LLB and for that reason became a magistrate and he would have been as far as criminal matters are concerned, far more experienced than the judge, because as you know judges are notoriously bad in criminal law because they have never done criminal law. They are all private law practitioners. That is why they became good practitioners because they were so good in private law and then of course if something goes on review and it comes back and turned over, you know, and might even had been turned over on the wrong grounds because the judge didn't understand the practical implication of *mens rea* or how you do something in the magistrate's Court then there would be enormous resentment.

057 So it is not a happy, it is not a social relationship and it is, you know, it is a pity because of historical reasons the two professions moved completely away from one another. Now Dullah Omar brought them back together again. Strangely enough he was of the opinion that it would be a very healthy thing if the two professions were one. And he tried to bring them back together. (A) he increased, well I have said this in class as well, he increased the salaries of magistrates tenfold in his time as Minister of Justice. I can remember it was like Christmas because he really …[intervenes]

058 **TRACY:** [Inaudible] magistrate?

059 **INTERVIEWEE:** Yes, yes. He really increased the, you know, it is from Tracy, let us say, I can't remember but let us say you got R3,000.00 and then next month you got R6,000.00. It was really that good. It was almost a doubling in salary but yet it wasn't enough. You know, they are still trying to catch up because the judges of course also had increases but the salaries, there is a huge discrepancy. There is [indistinct] of the Magistrate Commission which is much better. He took the magistrates as far as he could out of the civil service. He required that the Magistrate must have a LLB. So he was a very good Minister of Justice. He was very, very good to the magistrates.

060 **TRACY:** [Inaudible] because in the classed we always emphasise becoming an attorney, becoming a [inaudible]. We never actually talk about becoming a public prosecutor or becoming a magistrate. What is the route?

061 **INTERVIEWEE:** I did talk about it a little bit. The route is simply, you go to the Department of Justice.

062 **TRACY:** With an LLB?

063 **INTERVIEWEE:** With an LLB, ja. Nowadays with a LLB but in the old days, Tracy you went to the Department of Justice in the same way as you went to the Railways or the Post Office and you filled in Form ZA24368 in triplicate and you became a member of staff and from thereon you did whatever you have to do. Of course now you have got an LLB but …[intervenes]

064 **TRACY:** You don't have to do articles and [inaudible].

065 **INTERVIEWEE:** No, no.

066 **TRACY:** [Inaudible].

067 **INTERVIEWEE:** You become a prosecutor immediately. You have two weeks on the job training. You shadow another prosecutor and then you get your own court. You get your own court. It might be just a traffic court or a juvenile court but you will get your own court and then you learn hard knocks. You know you learn by trial and error. Well then of course, if you are a good prosecutor you become a senior prosecutor. You go to Justice College, you do courses. Of course in our days, that has also changed, I am lying.

068 What you do nowadays you apply to become a magistrate, not a prosecutor. The same applies to the prosecutor but if you want to become a magistrate you do a six month's course in civil and criminal law at Justice College and then only if you pass those courses at the Justice College are you sent up to the Magistrate's Commission to be considered to become a magistrate. Then they investigate whether you

are a good and fit and proper person and then they make you a magistrate.

069 **TRACY:** What sort of people become prosecutors and magistrates? Are they [inaudible]?

070 **INTERVIEWEE:** In my day …[intervenes]

071 **TRACY:** More ethical or better or…

072 **INTERVIEWEE:** Do you want…

073 **TRACY:** What will your advise be to someone to become a public prosecutor or [inaudible] their agenda? Do you think people just do it because they don't have another choice?

074 **INTERVIEWEE:** It is going to sound very strange Tracy, but this is the fact. I can give you a much nicer theoretical answer but the fact is that if you are poor, if you don't have money, you become a prosecutor if you have got an LLB. Why? Because prosecutors are paid a reasonable salary. So you get the same, basically the same experience as an article clerk but it is not on your account. You get five, six, seven times what an article clerk gets and you after you have been a prosecutor or two or three years or you can even apply after you have been a prosecutor to go to the State Attorney's office and you can do your articles there. That used to be the shortcut that people who couldn't get articles and who couldn't afford to get articles took but that was closed even in my day in that, when you became a clerk at the State Attorneys office your salary changed to that of a clerk. Then you are no longer just an employee. You don't get what the prosecutors get. Your salary goes down for those two years until you are qualified of course and then it goes up again.

075 So it is for people who don't want to go into the profession or people who can't go into the profession, if they don't articles. What else do you do with an LLB? You prosecute. It is very, Tracy, it is very, very good experience. It is the, I would say [indistinct], I would make it compulsory for people to spend a year in the lower courts because there you see everything and I mean, if you have been through the lower courts for a year or two, I mean, you know how the legal system works. You have seen the beats from the inside and you really do know and there is no glamour, there is no glory. It is just hard, difficult work. And you know, the salaries nowadays, thanks heavens reasonable but it is not a, it is hard work. It really is hard work.

076 **TRACY:** [Inaudible].

077 **INTERVIEWEE:** Yes, yes there is. Look if you are a good prosecutor you fight crime. I always say like in America, I think and when I went from being a prosecutor to a magistrate I was, you know, I had to make a

little speech and I always like, you know, if you have these little opportunities to make little speeches, I like to be scandalous and I make a big speech about how bad prosecutors are handled and what they should do to reform themselves. I said, I am going to become a magistrate now so it is no longer my problem but you sit on a wonderful profession. You can make the world of it but you don't. You don't make this profession sexy. What happened to the President's sons in America. What did the Kennedy's do? They all became prosecutors. What do they call them? State Attorneys, State, uhm, what do they call them in America? But they all went to the District Attorney's office. They all worked for the District Attorney and I mean that is the same as the state prosecutor. So it is, in America, it is sexy to be a District Attorney because (a) you have got power, (b) you are fighting crime and (c) of course in America you work in a very pleasant environment. You have got plush offices and these things are important. You have got plush offices and plush courts and you know, you have lots of exposure. You are on the television very often if there is a big case. So you make the profession sexy. You get people, prominent people to be prosecutors and you make it very attractive. In South Africa it is not.

078 **TRACY:** [Inaudible].

079 **INTERVIEWEE:** It is but it can be very, very, you asked the question, it can be very, very rewarding. You know, I can remember catching, or not catching, having a person that had stolen a massive amount of money from her employer over 10 years, finding her guilty after four weeks of cross-examination and you know that is, there is nothing more rewarding than that. You know, she was charged in the Regional Court and not in the High Court because they could only prove certain of the, she was so clever she was an accountant at a big engineering firm and she was so clever what she did is she opened bank accounts when everybody was away. When there was nobody on the premises and nobody in the computer room, she went, she opened an account for ABC Steelworks and she registered a debit order for small amounts, 100, two, R300,00 to be paid into ABC Steelworks every month for 10 years and she opened however many of these, we don't know. So what she did, she got R5,000.00 salary and R10,000.00 every month extra onto her, and of course ABC's, sorry what I didn't tell you is ABC Steelworks is then her own account and you know, that is how she ripped the company off. And for 10 years the stupid accountants couldn't pick it up because you know, everybody knew that the money is leaving the company but they couldn't find the leak because these are legitimate, authorised people that the company has to pay money to. And then of course one day something went wrong and they caught her out. So that is enormously rewarding and she was clever. I can remember that she was, you know, when I was in the Regional Court I was very good with cross-examination because you get good after a little while. It is not because I am particularly have got an aptitude for it but if you do it

everyday you get very, very good and we prosecuted drug lords and very important people and when she came to me I struggled. I mean she was like a slippery eel. You couldn't, you couldn't touch her and she knew what she was doing. So it took me, it took a trial of four weeks to get her but she was found guilty and she went to jail for a very long time.

080 So that is enormously rewarding of course but you know, they don't, it is not advertised or it is not made out as such. People see public prosecuting as the last option out. Poor people or if you couldn't get articles. So, where are we now, Tracy?

081 **TRACY:** Uh…

082 **INTERVIEWEE:** With the [indistinct].

083 **TRACY:** Has the knowledge [indistinct] of the profession changed a little [indistinct].

084 **INTERVIEWEE:** Sjoe, that is a difficult one there. I suppose you know, I had a very cynical friend, a colleague at Justice College and he like myself was trained in Roman Dutch Law and the thing of a Roman Dutch lawyer is, you know, that you will never be without an answer. There is nothing that you cannot answer because you have this enormous unbelievable wealth of common law that you can go back to and you are trained to go and search for the solution in the Roman Dutch Law and if you don't find it in the old Dutch Authorities you will definitely find it in where the Dutch Authorities found it in the Roman Law.

085 So at that stage when we qualified, lawyers used to be library lawyers or academic lawyers. If you are a good lawyer and there were not a lot of them around but if you were a good lawyer in the 1960's to the 1980's, 90's I would say, if you are a good lawyer then you were an academic lawyer. You could read Latin. You could discover the …[intervenes]

086 **TRACY:** Even attorneys.

087 **INTERVIEWEE:** Even attorneys. Even attorneys. You know, I am a collector of old manuscripts, old legal manuscripts and you know where you get the most valuable legal manuscripts, the most valuable Roman Dutch Authorities? Auctions on small little towns where the attorney had, not a lot, but five or six he had Voet, he had Groenewegen, he had Huba, perhaps something more, perhaps a couple of Roman Law books because there is nobody to ask. If you wanted to know what the law was you had to look and if you couldn't find it you must look in the old authorities. Even attorneys, even attorneys were people who used the old authorities. My dates are out. I am talking about 30's, 40's, 50's, 60's. Those are the days when people were true blue lawyers. What I call a true blue lawyer. They still, you know, if you wanted a solution in private law definitely. Not so much in criminal law but in private law, if you wanted the solution, you know, it was study. You don't get the

solution on the computer. You don't get it in legislation. You get the solution in the old authorities. Now that …[intervenes]

088 **TRACY:** Sorry, what value did you associate with going back to the old authorities? What is the value [inaudible]?

089 **INTERVIEWEE:** It is that wonderful thing of the test of time. You know, I had a Roman Law lecture yesterday and I was so wishing that you could be there because I said such a lot of things that you would find interesting. A man always tries to be God. Man always tries to be better than himself. Man always strives to be God. People study medicine because, yes, they want to heal people but you know, if you do a psychoanalysis on the majority of doctors, they believe that they are God. They believe that they can give life and death. That is why they study it. And lawyers are the same.

090 **TRACY:** [Inaudible].

091 **INTERVIEWEE:** Ja, no, I am very, we must not start talking about medical people because I am very bad to hear on medical [inaudible] but lawyers are always searching like, perhaps not unlike theologians, lawyers are always searching for the voice of God. They are always looking for the voice of reason. They are looking for the things that are eternal and that brings you to the test of time. The good laws are the laws that stood the test of time. So the values that I associate with the old authority is that those people, Roman Law, Roman Dutch Law, those are the values that survived a very long time. The *corpus juris civilis* of Justinian is the lawyers Bible. It is the voice of God because it comes from the 5th or the 6th, rather the 6th century after the birth of Christ. So that is a long time ago and if those laws are still applicable today there must be something that is good about them. There must be something that is valuable and that is enduring.

092 And that is what I think, you know, my idea of a lawyer is a person that can go and look for the, search for the truth in those old authorities. Tracy, I am talking about nonsense of course here because it doesn't exist anymore. If I look at the children that are in front of me, the new first year class of Roman Law students, and I mean, if Elsje could get her way, she would not even let, allow there to be a Roman Law class but the children that is in my Roman Law class, I mean, the knowledge that they are going to have of Roman Law is so vastly different and diminished from the value that you and I have of Roman Law.

093 **TRACY:** [Inaudible].

094 **INTERVIEWEE:** No, no but I mean you …[intervenes]

095 **TRACY:** Understanding Roman Law [inaudible].

096 **INTERVIEWEE:** It is not your interest but you couldn't become a South African lawyer if you didn't have some Roman Law. I can remember but I am also perhaps a little older than you are né, but I can remember that my Roman Law paper at the end of the 5th year, LLB was in Latin. It was an extract from Justinian's institutes. It wasn't complicated, it was very simple but it was in Latin and there was no translation. The, it was a text from the institute that you had to translate and it was about Roman Law of property. I will never forget that and that was the question of the final year Roman Law exam in Stellenbosch.

097 Now I am, you know, I am not saying that we must do that. I can understand that you can't, look, you just can't in a modern society have people speaking Latin but there is nothing wrong with giving them a translation of a textbook Justinian and saying this is what the Great Emperor, well Justinian wasn't the Great Emperor but let us say for purpose of argument the Great Emperor Justinian said about the division of property or the division of obligations, comment on this. I mean, it is not difficult. It sounds difficult but it is not difficult and that would then give them the sense of this thing that lawyers should have that the truth is in something that is stable. The truth lies in the past. The truth lies in something that has survived. Okay, it is a very [indistinct] idea and it is a very old view of a lawyer and that is what, what we are really trying to answer is, has this changed and it has changed of course.

098 **TRACY:** You know when I interact with people who [inaudible] in mitigation, one of the most [inaudible] thing is that they think that in law [inaudible] are also the truth. It is all about authority.

099 **INTERVIEWEE:** Ja.

100 **TRACY:** [Inaudible] when we seek to solve a problem we are looking for the precedent and the authority and not for the truth although factually [inaudible].

101 **INTERVIEWEE:** Ja.

102 **TRACY:** So it is a bit of a counterweight to…

103 **INTERVIEWEE:** But you must also tell them that law is a prescriptive science not a descriptive science. I don't know what education is. I suppose it is a descriptive…

104 **TRACY:** [Inaudible] more a descriptive science.

105 **INTERVIEWEE:** Ja, it tells you what is happening and what is going on. If children does this that is because they do it. Ja, it is a descriptive science.

106 Law is a prescriptive science. It is not and that is why it is, but yes, I think we are searching for the truth. The lawyer that I have in mind will be searching for the truth. Modern lawyers find the truth on the internet. They find the truth in legislation. Modern lawyers are not comfortable with old authorities. They are not comfortable with the knowledge base that I think is completely essential for a lawyer. If you, you know, journal articles, I don't know where lawyers find their arguments. They probably, you know, they find it in the international conventions, they find it in national conventions, they find it in everything that you can find on the electronic media. They find it in text books, they find it wherever, they find it in the Constitution because the constitution that is the big thing that has changed our knowledge base.

107 You know, all of a sudden with a stroke of a pen we don't have to go and look for the truth. We have got the truth neatly summed up for us in one single document. And that is a wonderful thing. I am not, people always, Ian Currie always, I think he is not fond of me because I always attack the Constitution and I warn against the excesses of the Constitution which I think we have gone through. I am not against the Constitution. Far from it. I believe in all the values of the Constitution and, you know, thank heavens we have got a Constitution but I really think that we have made a huge sacrifice in terms of our knowledge base.

108 You know, I told, I probably told an anecdote about old Dr van der Merwe who was the Head of Justice College and who was a brilliant, brilliant man. I know it sounds terrible because everybody always thinks that their teachers were brilliant people but he truly, well I don't think he is passed away, I think he is still alive but he retired when I left Justice College and he sat early in the morning. He came in because he was afraid of the traffic. I am sure I told this story. He lived in Waterkloof in Pretoria which is quite far from the city centre where the Justice College was and he was afraid of the traffic. He was a very eccentric person and he came in at say five o'clock in the summer and say half past five, six o'clock in the winter, he would come to the Justice College and there would obviously be nobody there and his office was at the end of the corridor and there was a long corridor with all the other offices there and he had a special door opening from his office to look down in the corridor. And he would sit every morning for an hour and translate Latin and Greek for his relaxation. Now that is very, that is my idea of a true lawyer. And he was, he was a brilliant lawyer. He wrote the book on succession and on dealings but you wouldn't know them because they were in Afrikaans and you know, that is the Roman Dutch Lawyer that I think is the ideal lawyer and you know, the short answer, the knowledge base of the legal profession has changed dramatically over the last 10, 20 years, dramatically. And although there are lots to say in its favour there are also things to be said, there is also things that got lost in the equation. You know, I think the fact that a lawyer would

retire to his study and to his library to go and find a solution to a problem, the Roman Dutch lawyer in his armchair in his study doing research, that is gone. It is forever gone. There are no such lawyers in South Africa anymore. We just don't have them. Not even on the you know, if I think of the Judges of the Supreme Court of Appeal it is only Cameron that would be able to that and he is no longer there. He is at the …[intervenes]

109 **TRACY:** [Inaudible].

110 **INTERVIEWEE:** Ja, well, [indistinct] Roux is very clever and she is a brilliant lawyer and she knows her Roman Law but she is not a Roman Dutch lawyer. She is, you know, she is not, she doesn't fit my idea of this studious Roman Dutch lawyer in the armchair doing research into the sources. She would use, she understands the law because she knows Roman Law. She knows where law comes from and she is a very good practical lawyer. She is not a legal historian. She is not a historical scholar. She is a practical, very clever lawyer but I suppose she could do Roman Law research but that would be the last one. That would definitely be the last one.

111 **TRACY:** [Inaudible] last question [inaudible].

112 **INTERVIEWEE:** Ja, Eunice said he would phone me but he …[intervenes]

113 **TRACY:** [Inaudible], the next question is about what should the students know in [inaudible]. Let us say you think you know our legal education [inaudible] and if we talk about knowing the Constitution, that is the Constitution has values. How do these students relate to those values? Do you think for them it is just like [inaudible] and that is one of the dangers of replacing the Constitution has.

114 **INTERVIEWEE:** Look, the Constitution is a magnificent and a marvellous document but it is a document that is more, that sits more comfortable in a, the final Constitution perhaps not so but the interim Constitution was a very typical and almost a cosy European, liberal, intellectual document. The final Constitution is more of an egalitarian document than the interim Constitution and there is a lot of lip service to egalitarianism and it struggled desperately and it struggled very hard to get away from this idea of the model of West European intellectual, liberal Constitution. I think people struggled to get the Constitution. I think people of the previous generation would definitely understand something like the right to life, the right to dignity, definitely because they were the people who suffered and whose dignity was trampled upon. So no matter what Constitution you would put in place, they would definitely understand that the value of the right to dignity is very, very important, specifically in South Africa where it seems that for a very long time people didn't [indistinct] this concept of the right to dignity.

115 So those three, Tracy, the right to life, because life was so objectified in South Africa and still is. It has not changed I am sorry to say. Life is still very cheap in South Africa but that is another matter. It is cheap in another matter but life was so objectified. Dignity was so trampled upon and there was no equality. So I think it will be an insult for me as an academic, especially a white academic to say that I don't think the majority of students and the majority being African students would not understand that. I think they would understand that by pure suffering. They would understand that those values we must never, never trample upon again.

116 Of course, you know, how do you explain the xenophobia then? That might be just an economic thing and it might be, you know, when the Constitution came about I always had this red herring that I threw to the black magistrates and that is, if you then say that there is this wonderful thing called Ubuntu where we reach towards one another if we are in need and we help one another and that is the African way in which we do it, how do you explain the taxi violence and of course that would be like a nuclear explosion in class. I eventually stopped doing it because there were so many complaints because the thing is you can't explain that. You can't explain that. I mean, I know what the healing value of Ubuntu is because in Roman Law you have got the same principle. You know, the Roman Law of obligations is based on Ubuntu. It is not based on that, but Ubuntu is based on that. The first ancient Roman Law, Roman contract was the contract of mutu and mutu is a contract whereby you borrow something for use. Now where does that come from in an ancient civilisation. That is Ubuntu. You don't have enough wine for your guests tonight. You borrow my bottles of wine. You supply to your guests and then tomorrow you buy new wine, you give it back to me. That is the basis of Roman Law for contract. A very few people see this and they, you know, they don't understand when I say Roman Law and Ubuntu is the same. So I understand Ubuntu very, very well but I don't understand the taxi violence. I don't understand how people that can who have such a high estimation of neighbourliness and of helping one another, how that can lead to, you know, people killing one another because they are using the wrong route. Because they are using the wrong, they are infringing upon somebody else's taxi route. I mean, they would burn your taxi and they would necklace you. I mean where, how do you bring that to the bridge in Ubuntu? And we had some wonderful discussions and the net result is that they had to admit, although it killed them to admit it, is that you know, Ubuntu was dead. The capitalism of the taxi industry, this killed Ubuntu. There is no longer this wonderful thing between Africans. Africans have become urbanised and become objectified. They become capitalists. There are no longer the rural, hunter gatherer farmers. It is gone and that is where Ubuntu worked. It didn't work in, it doesn't work in the 21st century urban environment. There is no such a thing.

117 So in a certain sense I think that the values of the Constitution is misplaced. I don't think they understand, I don't think the majority of the population understands the Constitution but the core values I must admit, the core values, even a cynic like myself must admit there is nobody, there is no African person I think in South Africa who doesn't understand that it is important to protect dignity, life and equality. And that we don't ever want to go down that path again. How you explain the xenophobia of the past year, I can't do that. I don't know where that comes from. It is probably also economic. It is also urbanisation. What was that question? That was the question of the values.

118 **TRACY:** [Inaudible] it relates to what should the legal professional know.

119 **INTERVIEWEE:** You want us to address that one as well? It is a very interesting question. Are you not tired Tracy? Have you got time? What time do you go?

120 **TRACY:** [Inaudible].

121 **INTERVIEWEE:** Let us quickly do that one. What should he know? We probably won't finish it but let us spend five minutes on that. You know, my view of what lawyers, you know, first of all a lawyer shouldn't know the law because it is impossible. It is like knowing chess. You can't ever know how to play chess. You can discover different moves. You can discover different strategies and you can do lots of things but you can never master chess and I don't think you can master the law and people who try to master the law are very sad and pathetic people and it is like somebody who try …[intervenes]

122 **TRACY:** have you encountered some of those?

123 **INTERVIEWEE:** Yes, there are some of them walking around here at Wits but it is like somebody trying to memorise all the Heads of state in Africa. You know, if you go sleep, the next morning, you know, half of your knowledge has disappeared because there are new Heads of State. I think what lawyers should know in 2009, I think they should know those things you teach. Well they should know where to get the information. They should know how to do research. They must know where to get the answers to the questions. They won't know, I mean that the whole section there Tracy, is just pre- precedents. I mean, that is just the legal historical precedents. You never refer to them anymore you know, unless you are a historian like I am. The post 46 precedents will fill this whole room. So it is impossible to know the law but you must know how to use those books. You must know how to use LAWSA. You must know how to use the computer. You must know those things otherwise you won't be a successful lawyer. The library is the laboratory of the lawyer. You must know, and it is not even enough to know how the library works. You must nowadays know all the databases. You must know what to do on the computer. You must

know where to find legislation. You must know where to find the provincial ordinances. All those things, you must know and of course we are expected to teach the students all this in a six month course at the beginning of their studies which is virtually impossible but, you know that is the most important things that you know.

124 The theory, you must know the theory of law because that you are never going to know again. If you don't know the theory, if you just base your knowledge of law on precedent or on legislation you are lost because then you are going to become an English lawyer and we all know that the English lawyers are very poor. If you want to become a real lawyer you must know the underlying theory and that is the wonderful thing about South African law. Everything is based on a theory. Now theory and principles. If you don't know your legal principles, if you don't know the requirements for a dealing, if you don't know the requirements for consensus, if you don't have the basics of law under control you are never going to be a good lawyer. You know, you can read a million cases on exactly when a contract comes into force. There a thousands of precedent on that but after you have read all those precedents you won't have the theory. You must have the theory first. Either when it comes to the knowledge of (a) or to the knowledge of (b) or where there is a meeting of the minds. Whatever your theory is, you must know that. You must know the principles.

125 Okay, so that is what a lawyer needs to know. You must know your principles. You must know where to get information and then of course in my mind, but it is also very eccentric, Tracy, in my mind a lawyer should know about the world. If you are …[intervenes]

126 **TRACY:** [Inaudible] very strong [inaudible].

127 **INTERVIEWEE:** If you want to become a good lawyer you must know about art, you must know about literature, you must know about the world of the imagination. You must know about [inaudible], you must know about the world of film. [Telephone ringing]. I will just let it ring a little bit. You …[intervenes]

128 **TRACY:** Why must you know about art?

129 **INTERVIEWEE:** You must know because art is, what you work with in as a lawyer is hard facts. That is why I am so against this four year LLB because the last thing you want and I think what we are creating with the four year LLB is the last thing you want in a lawyer is an educated barbarian. In other words, a person who knows only about the law. You must know about art so that you are a well-rounded person. You are going to work your whole life only with facts and if you don't know the other side, you won't know how to work with those facts. People think that if you are just bombarded with facts all day you will become a good lawyer which is not true. If you don't know the world of the imagination

you won't appreciate the world of reality. You won't appreciate the hard world of contract and mercantile reality and cheques and whatever. If you, that is why at Oxford they train you as a first degree in one of these things, politics, philosophy and economics. Those are the things that you must know. You must, you must know how the world works and you will not understand how the world works if you don't have imagination. You won't understand an argument or see a gap in an argument if you haven't got some artistic feeling. If you have never read some of the great works of literature you won't know how people's emotions work. If you haven't read Stendhal.

001 **INTERVIEWEE:** [Inaudible].

002 **TRACY:** [Inaudible] question, we end off last time talking about how legal knowledge has changed and the questions about what do you think a professional should be able to do.

003 **INTERVIEWEE:** Okay.

004 **TRACY:** And can you [inaudible] a conflict between these two things, what the professional should know and what they should be able to do, specifically in how law is taught here.

005 **INTERVIEWEE:** Ja.

006 **TRACY:** And you know, it is interesting because intro is a skills course.

007 **INTERVIEWEE:** No, no that is true. But yes, of course that is a difficult question. It is a very, very difficult question. You know, starting with the first part of the question what a legal professional should be able to do, well I think the first thing that, you know, what we teach them here that a legal professional should do is obviously to represent the client to be able to, if you have a LLB, if you studied four or five years law and you obtained the degree you should be able to supply legal advise to the public at large. So you know, it sounds so simple if you say that but that is what distinguishes the legal degree from any other degree and I always say that in class, I must have said it in intro a hundred times. You know, when you study LLB it is a professional qualification. You study the LLB, well some people never, you know, practise as a matter of fact. There is a very large proportion of people that don't ever end up in practise but the understanding is that if you have a professional qualification that you can become a member of a very specialised profession. Okay, it is true there is still some in-practise training to do. You still have to pass your articles, your bar exam, your [indistinct] et cetera, et cetera and of course those things are all very important for the more practical aspects of the legal profession. But if you leave the university, you should know, as I have said before, you should know at least where to obtain the information to represent your client. The essential thing that you must do is that you are the person that comes between the Department of Justice or the opponent if it is a private law matter and the Judge. You are the person to protect you client either in a criminal or in a private law matter and that is an enormous responsibility. And it is not everybody that is cut out to do it and that has got very little to do with just pure skills. Strangely enough I think one of the skills that a legal professional must have is the skills of coping with an enormous amount of stress. A legal professional is a person, and I always find that very unattractive of the legal practise, the legal professional is a person that sits in an office, whether you are an attorney or an advocate or a legal advisor or wherever you are in law and you have agents coming to you, either clients or your principal or attorneys when you are an advocate, you have agents coming to you and what they do is they dump their problems, their very complicated and very dangerous and very

serious problems on your desk and you must solve them. That is what the legal professional must do. You must either write an opinion to solve their commercial problem. You must write a brief to an advocate. If you are an advocate you must prepare the pleadings for the court or you must write a solution to your superiors if you are a legal advisor as to what to do in a certain instance. Now it is true, virtually everybody in the legal field refers, if things get, if there are things that you can't do they refer it up to the next level. So if an attorney can't attend to a thing because it is too difficult, then they refer it to an advocate and that is why I don't always understand these students when they look at me blurry-eyed and say "Oe! I want to become and advocate." It is true it is a very glamorous profession. It is very lucrative. It is intellectually very stimulating but it has the downside that everybody brings their problems to you and you are the problem solver. The buck stops there. So if you ask me a legal professional should be able to do, I think if you are a real professional you should be able to solve legal problems. You should be able to competently solve legal problems. Not just solve them in your own mind but solve them so that you can help your client or your superior or whatever, whoever asks you what to do. And this is not easy. This is not, this is why I think the legal professionals are so well paid because this is not a pushover.

008 **TRACY:** [Inaudible].

009 **INTERVIEWEE:** It is not an easy thing to do.

010 **TRACY:** I just, you know, as you talking you are emphasising the problem solving character of the work. How does this relate? You know, we always [inaudible] problem [inaudible] during the exam. Have you got any kind of approximation to what they really would have to do?

011 **INTERVIEWEE:** Look, I always get the feedback from my students when I walk on the street or if I sit in the restaurant and students come up to me and say "Hi, how are you? And it was so wonderful to be at university and we remember your class with fondness" and then one of the questions I always ask them is, how does the university environment compare with practise and they, virtually each and everyone of them, you know, shake their head and say "Look, it is two completely different spheres and while, you know, we don't want to say that we didn't learn anything in university, we learned a lot and it was wonderful but it has got no relation whatsoever with what happens in practise." So yes, I think if you use a Socratic method like I try to do. If you ask the students questions and you try and tease the artist out of them. You definitely, you force them (a) to speak in public and (b) to formulate an answer while they are on their feet without preparation and of course that is, every single question that you ask is a preparation for the legal profession. That is true for, you know, far better than just to stand in front of the class and read your lecture from a piece of paper. You know, then surely then the student will get no benefit of that.

012 **TRACY:** Do you ever consciously to put a student under pressure?

013 **INTERVIEWEE:** Oh, yes. No, absolutely. Always. You know, it was so clear to me this week again, last week was the first week of term and even I am rusty after the summer break but you know, that is, even, you know, from the first lecture that is what I try to do. With, especially with intern student and of course [indistinct] students. You know, they are not always responsive so early in the term but eventually they start catching on and think, you know, if they participate in the class it would help them with the exams and that is what I say to them always and then of course setting the questions not only in the exam but setting the questions specifically in the assignment. I have draft the assignment for my class this year asking them they must identify a Judge that had groundbreaking judgments. Not just any judge but a Judge that has got groundbreaking judgments. They must go and find such a Judge.

014 **TRACY:** [Inaudible].

015 **INTERVIEWEE:** No, no, no. old or current. They are all now trying to cop out of it by using Constitutional Court Judges but I am going to say I want the …[intervenes]

016 **TRACY:** [Inaudible].

017 **INTERVIEWEE:** Ja, I want to …[intervenes]

018 **TRACY:** [Inaudible] it is going to be.

019 **INTERVIEWEE:** Ja, so and as I say that is, you know, they deliver their judgments on MAS. They, you know, one is asked to write the judgment but the judgments are usually …[intervenes]

020 **TRACY:** What is your rational behind asking them, what is it that you want to know, they are going to learn from the assignment?

021 **INTERVIEWEE:** I want them to be able to go and look for something in the law reports. I want them to, you know, first of all I want them to become acquainted with the Judges. I wanted to know that there was such a Judge as LC Steyn and why was he such a bad Judge. I want them to know that there was a Judge like Rumpff and he was he a very good private law Judge but a very bad legal political Judge. He was the, you know, epitome of an Afrikaans Nationalist, apartheid Judge. I want them to go and discover the personalities of the Judges for themselves because that in itself is research. So part of the assignment is they must go and search and I am not just going to give them a court case with the citation and say "Go and search for the court case" because that is very easy. You know, as soon as they know how they citations work they are going to find it. Perhaps I am being a bit too ambitious and then once they have found the Judge, once they have discovered the Judge they must go and they must write about this Judge, about his personality, about what he was like and how did he change South African law. What did he do to change South African law? So they must go and …[intervenes]

022 **TRACY:** [Inaudible].

023 **INTERVIEWEE:** Read one or two court cases. They must go and learn about this Judge and they will never forget him. Once they have done that, once they have, they will never forget him and whenever they get one of his judgments they will always be able to use, you know, this assignment as a little intro or as a little annexure to this judgment. So …[intervenes]

024 **TRACY:** It seems to be there is more in it than just being able to do research and find out about Judges but what is it that you want? You say finding out about their personally, what is it you think they are going to learn there? I am thinking of ethical [inaudible].

025 **INTERVIEWEE:** Well they are going to learn there, you know, that there are such things as good and bad Judges. You know, if you do LC Steyn you are going to discover that he, you know, was never an advocate. That he was forced through by the National Government. That he was a civil servant and that he was extremely executive minded. You know, if you choose something like Oliver Schreiner you are going to discover that he was a magnificent Judge. He was never Chief Justice. He was always sidelined by the government. You know, you are going to see that these people lived not a vacuum but they lived in the real world and they sometimes suffer for that or they sometimes abuse that and it is about 35 of them and I said I will allow them for two to work on one Judge. I mean, there is millions of Judges. I mean, there are lots of Judges that you can write about. I am just thinking of the stars. I mean, but Ogleby Thompson is there if you want a pure, true blue lawyer's lawyer. Watermeyer is there. Toon van den Heever is there. Lord de Villiers, good Lord, let us not forget Lord de Villiers. I mean, he was a wonderful Judge to write about and you know, there is a biography on Lord de Villiers. So and there are lots of articles in the South African law channel. So they will discover that as well. That you go, and there was a series in the De Rebus Proceratoris on the cover, they had the famous Chief. I think they had all the Chief Justices and then also famous South African Judges. So, you know, and I will give them hints. I won't leave them alone. I will give them hints. I will say, go and look for this, go and look for the biographies, go and look for, you know, I won't just leave them alone. But I think it would be wonderful and then when they hand it in I will mark it of course and then we will have a conference day where everybody talks about their …[intervenes]

026 **TRACY:** [Inaudible].

027 **INTERVIEWEE:** Ja, no, no, I think that they, and they learn a lot by South African law by just doing that. So yes, in your assignments you can show them how to do research because a lawyer must also be able to do research. I think that is very important. My colleagues in the side bar, the people that I know that are attorneys tells me that yes, the students arrive in the legal profession. They don't know how to do research. They know little bit about the law. They know a little bit how to formulate and argument. They know little bit about legal principles but if you ask them go and look for this

principle in law, here is a [indistinct], go and find the, we had a discussion last night. A very brilliant article clerk from PE and the attorney said here is contract of insurance. In this contract of insurance there would be certain deadlines. There will be certain return-by dates. There will be certain, I don't know what the technical terms are, you know, a clause that says you must before a certain date do something. He said "Go and identify those things, write a report, write an opinion when those dates are and when we should do what" and what she did, she saw the most blatant ones, blatant terms or modus or whatever in the contract but as soon as it was a little bit obscure and it was a specialised deadline, in other words that you had to mix two things, she missed it completely and, you know, he was upset because here you have a very brilliant article clerk, a very brilliant student, full straight A's and a basic practical thing she couldn't do because, you know, she has got not practical experience. Well university is not a place for practical experience. The articles that is where they must, you know, they must learn how to analyse and dissect a contract. We don't do that at university. We teach you the principles of the contract and I am sure had he asked her, you know, find the consensus in this contract or find the possibilities of repudiation in this contract, she would have found it, she would have been able to find it. But something like that, highly technical …[intervenes]

028 **TRACY:** [Inaudible] detailed [inaudible] detail learning of the facts. The detailed workings, the…

029 **INTERVIEWEE:** It was a trained eye. You know, I am not an expert in insurance law but what he, he is an insurance attorney, and he what he explained to me is that if you have an insurance contract, insurance contracts could be extremely difficult, extremely complex because you have an insurable interest, so the policy is not your contract. And I think this is where she went completely wrong. The policy is not your contract. The policy is only a reduction to writing of what was undertaken. So if you have an insurable interest, you call a broker and you say "This is my insurable interest. Please find out where you can insure this best." The broker then goes and he goes to several underwriters. He goes to several underwriters because if it is a huge contract like a building or a dam or a ship or a, you know, huge thing, then it is too much for a single underwriter to take it and the underwriter [indistinct] extremely specialised. The one will take the cargo, the one will take the engine, the one will take the seaworthiness of the ship, the one will take the machine room, the one will take the people on board. So every time the underwriter agrees to take a portion of the insurable interest that is where the contract comes about. The underwriter and the broker enters into a contract and when the broker has got a full contract, when the whole ship or the whole building or the whole whatever is full, everybody has underwritten it, then he reduces that into a policy and he writes everything that the underwriters want into that policy. But that policy is a piece of paper that you give to the client so that he can see what has been insured. The real contract is somewhere, you know, I almost want to say in cyberspace but somewhere between the broker and the underwriter and you must look at

that document to find out what is the, or what terms are in the contract especially as far as deadlines are concerned and that she didn't do. You know, she only looked at the policy and he, you know, he said "Why are you looking at the policy?" and she said "Well this is the contract" and he said "No, it is not the contract. This is just a policy." Now you see I don't teach insurance law but even if I did I don't think I would have been able to explain it like this because I just don't have experience. I always thought the policy is the contract. If you ask me I would say "Yes, that is where you look for things. You take the policy and you should be able to find everything in the policy" but you don't. You don't find the details in the policy. You find it in the subcontract. So a lawyer should be able to know all those things. A lawyer should know everything.

030 **TRACY:** [Inaudible] shouldn't be allowed to teach insurance law if you don't have that experience?

031 **INTERVIEWEE:** No, no. I don't think, you know, I don't think, I think theoretical and I am shooting myself in the foot here because I am a theoretical lawyer, I am not a practical lawyer but I don't think somebody can or definitely somebody ought not to teach, definitely practical subjects such as criminal and civil procedure if you are not a brilliant practitioner. I can remember I had a brilliant man who taught me criminal and civil procedure, Max Laubscher at Stellenbosch and I mean he is world renowned but he was a hopeless teacher because he was a theoretical teacher. He, you know, he taught criminal and civil procedure from case law and you can't. I mean, when I got into criminal procedure when I started prosecuting and I saw for the first time how an action works in the lower courts, I was absolutely appalled about what I knew (a) about evidence, and that is another one. Evidence is an enormously important subject. Not just for criminal law but also for private law and it is extremely neglected. Not at this university, because you had the brilliant Paisey's and Latsky and …[intervenes]

032 **TRACY:** Zeffert.

033 **INTERVIEWEE:** Zeffert ja. You know, but Zeffert was a practising advocate. He is still a practising advocate so he was in the court day after day. He knows what is going on. So I don't know how I passed criminal law. Criminal procedure because I don't know how you learn those things off by heart because is such a waste of time. It is so logical if you see it in practise. You know, it is just one step following another step. It is as simple as that. So I, you know, if I, if ever I become Minister of Justice I would very, very strongly think of removing criminal and civil procedure from the universities and add on an extra year or make that into the year where people come to the courts compulsory. They go to the courts, they must do their so called …[intervenes]

034 **TRACY:** Community service.

035 **INTERVIEWEE:** Community service in the court. They get nominal pay but they must do their years' service in court so they can see how the courts work. And then at the end of the year they write an examination on criminal and civil procedure and evidence. There is no way that you can do, evidence is perhaps a little bit difficult because evidence is very theoretical but there is virtually no way that you are going to learn how those things work if you have not been in practise. And you know, even with the less practical subject as I have now just said, insurance and, you know, intellectual property, contracts, everything. I don't know how you end up in practise if you, or you pass these subjects if you haven't had practical experience. So practical experience, yes, definitely, very, very important and I think there should be far greater interaction between practise and academia as far as things are concerned, far greater. We should have practitioners coming to give a lecture and we should be going to a practise once a week or once a month to give lectures to practitioners because they don't know everything, just the same way that academics don't know everything and they don't, they can't know everything. We should have practitioners knowing this insurance thing is, I mean, it is just, it is just a dinnertime talk but it is one of the things that opened my eyes.

036 **TRACY:** What is it that we would be [inaudible]?

037 **INTERVIEWEE:** No, I mean, latest developments, theoretical structure. You know who was very good with lecturing and very popular with lecturing at the sidebar is Alfred Cockerel. Do you know Alfred Cockerel?

038 **TRACY:** No.

039 **INTERVIEWEE:** You have never met him? Well he is a very strange character. He was a full professor here and he was quite brilliant but he was not a happy man. He wasn't happy being just an academic and he eventually went for six months pupilage and then he went for, you know, 50/50, 50% of his time at the bar and 505 here and then he went fulltime into the bar and he, you know, he is one of the most sought-after young counsel in Johannesburg at the moment. But he went to the attorneys, to many attorneys, [indistinct], Deneys Reitz, I want to say [indistinct] Tucker, what were they called? Sorrenbergs, Edwin Nathan, [indistinct] wall, all the big firms would invite him and he would come for a lunchtime and he would give a theoretical lecture on the latest developments and historical background of the law of contract because that was his, that is what he did, his inaugural speech, inaugural lecture on and I mean people, the practitioners would, I mean, he was theoretical, he was a theoretical lawyer, he was not a, you know, if you read his articles [indistinct] everything is jurisprudential and very theoretical but they lacked everything that he said up because he had a good structure and immediately the practitioners could see "Look, this is what we lack." We, this is why the students don't understand, the attorneys don't understand what is going on. We haven't got the structure. We don't know where this thing comes from in common law but he does and he places it in perspective

and it is like the accountant going out. So there is a lot of [indistinct] with academics but then you know, you must be like, you must be an Alfred Cockerel. You must be good. You can't go and make a fool of yourself there and academics tend to be very boring and the practitioners don't like that. Some of our colleagues were not successful in giving lectures unfortunately. Some are very, very successful like Ian Curry and Cora Hoopstra and she is still giving lectures I think. So there are lots of things that we can tell the practitioners but what we never do is, we never invite practitioners to come and tell us what is going on in practise. I mean there is now a move in the Supreme Court of Appeal to allow pure economic loss. Now I have understood that perfectly because I am not interested in dealings but I know that it is a major thing and Dendy was always, you know, carrying on about it. So it would be wonderful if we can get a leading practitioner and it would be an enormous honour for them being invited to come to ... to give lecture to the staff and the students. Not just the staff, the staff and the students. Then, you know, it could help us to get a practical slant on things.

040 **TRACY:** So there is a huge [inaudible] between what [inaudible].

041 **INTERVIEWEE:** Ja, Tracy.

042 **TRACY:** What is the value of the university?

043 **INTERVIEWEE:** The university experience. It makes them ready for practise. It makes them, it supplies a theoretical background. It gives them a first taste of what law is and how the law works. It gives them an overview of the whole structure. It gives them a direction of where they are going to find themselves in the profession and things like that. All in my peripheral. You know, if you want to become a practitioner, you know, your, the most important time starts the moment you start with your articles. This is not wasted. I mean, you know, you are not going to any *judice prudence* in a law office and therefore the university is very important. It is time that you can take back and think about things that you will virtually never think about law again and you will learn things that are not essential to practise like you know, get to know the Judges like I am trying to do with the first year students now. You know, practises is so frenetic, is such an enormous pace that you are never going to sit back and think about, you know, what is the characteristic of Lord de Villiers. It is just impossible and, you know, you are never even going to get to Lord de Villiers because virtually all his judgment had been overruled. But you will be the poorer lawyer if you don't know about him. I mean, he was a very, very interesting character and he was very clever. I don't care what my Roman Dutch colleagues say. He was not pro Roman Dutch law, that is true. He was in favour of English law and he didn't know his English law that well but he was a very clever old man. He was a very, very clever old man and of course he was the Chairman of the National Convention in 1910 which, you know, is what, it is more important and it is what lawyers should do. Lawyers are naturally good arbiters and when there is a crossroad in the history of the nation like with the Constitution or the

National Convention that is when you need people like Mohamed, is that now right, Ishmael Mohamed and you De Villiers to be chairpersons of things like that. But then just to answer your question [indistinct] there I a huge divide and it is not just me. I wouldn't know because I am not a practising lawyers but my, I …[intervenes]

044 **TRACY:** You have been in the profession.

045 **INTERVIEWEE:** I have been in the profession, yes.

046 **TRACY:** [Inaudible].

047 **INTERVIEWEE:** Ja, no but, you know, my students tell me that there is a very, very big difference between what happens at university and what happens at practise.

048 **TRACY:** Okay. [Inaudible] killer instinct.

049 **INTERVIEWEE:** Oh, yes.

050 **TRACY:** Any sort of metaphor that encapsulates [inaudible]?

051 **INTERVIEWEE:** Look. I think, you know, I think we have just spoken about that. I think, you know, inverted we have just landed on that topic with this thing of Lord de Villiers being the chairman of the National Convention. You know, the image that I have of a lawyer is, well first of all, I think what we all, well no, I don't know, I can't say for everybody but if I close my eyes and I think about law I always think about Justicia, the goddess of law. The blindfold, the sword and the scales of justice and of course she is female. So I think that is very important. I think that is more an image than a metaphor but I think if you take away or if you don't have any one of those three characteristics, you can hardly be called a lawyer. You know, you must be completely impartial. Definitely my image of a lawyer is somebody that is completely impartial. I can tell you an anecdote. You are so fond of anecdotes. When I was, I am sure I told this in class as well, so please if I repeat it don't be bored. When I was an article clerk in Pretoria but later on one of my activities, one of my civic activities that I [indistinct] was I was a member of the, I don't know, ja, it was then called the Northern Transvaal Society of Arts., Northern Transvaal Society of Arts. I don't know if you know Pretoria at all. The one big building in Pretoria was the Volkskas Building right on the Strydom Square. It was a very strange building.

052 **TRACY:** [Inaudible].

053 **INTERVIEWEE:** So you know the Volkskas Building there? Ja, and it was a very, very strange building. They spent millions upon millions to build the building and it makes a very strong architectural statement. How practical it is I don't know but in any case, the story I want to tell you is, on the top floor, the very, very top floor, I think it is the 36th floor or whatever, but the very top floor they couldn't get a tenant for the top floor because it was, I don't

want to waste your time but there was something wrong with the top floor. It couldn't be divided into offices because they didn't have toilets and things on the very top floor. It was just a vast open space. So they gave it to actors at a rand a year, they made it available to the South African Society of the Arts, the Northern Transvaal branch of the Society of the Arts and the chairman Tracy, of that association was Judge Eloff. The Judge President of the Transvaal Provincial Division way back then. He is still around. I don't think he has passed away. I think he is still around and when I joined the association I was just a, you know, I attended the exhibitions and I was around there and then because I was, you know, always there I was elected to the executive and then I got to know him personally because I had to do all the legal problems and I had to pass it on to him for, you know, to Recklet and I think, if I think of a person or a metaphor of the lawyer then that is probably it. I don't know if you have ever met Judge Eloff. He was a, and I had the very good fortune of not only meeting him as the chairman of our society but also in court because I was by day an article clerk and by night, you know, I was on this committee, this executive. And on this executive, you know, all the other members of the executive were artists. They were painters, they were practical artists. Bettie Cilliers Barnard and Andre Vermierlen and Günter van der Ryst and lots of people, you know, if you know the art scene you will know them and they were extremely temperamental. You can imagine, they were all with the exception of the director of the gallery, myself and Judge Eloff, they were all artists, so we would have an executive meeting every first Thursday of the month and we would have enormous battles about where a certain painting must hang or how much the cleaner lady be paid or must we make tea and coffee available or only tea at the exhibition.

054 **TRACY:** [Inaudible] appreciating [inaudible].

055 **INTERVIEWEE:** And they were absolutely mad. Well they were [inaudible] on, you know, on puffing the magic dragon and things like that. They were really eccentric, and Judge Eloff, he was this tall, I can't say handsome because he was 66, 65 years but tall impressive man, always in a dark suit and a white shirt and he would sit in those meetings and he would allow people first of all to have a royal fight and then he would say "Okay, ladies and gentlemen," very soft spoken, very, very sophisticated but an Afrikaner, not an Englishman but spoke beautiful English and he would then say "Okay, I have now listened to everything and this is my decision" and he would give a decision and everybody would just accept it. I mean, he had such an imposing presence and everybody knew that he is so fair and that he is, you know, he is justice personified that there was no question, not one of his decisions were ever, ever doubted. I think, if I think of a metaphor or a person, a personification of what I think a lawyer should be that is it. You know, (a) because he was this, he was blind to any fear or favour. He had the sword in his hand. If he had to punish people, he punished them and he had the scales in the other hand. And then of course he had this other wonderful thing. He was the Judge President which in those days was the highest judicial official

in Pretoria. I mean, he was the bees knees and he had time to come and sit on these stupid meetings, completely away from his legal world and he, you know, he had time for his civic duty which is also something that I feel very strongly about. That a good lawyer should not just be a lawyer's lawyer. He shouldn't just be making money. He shouldn't just be working at his practise. He must have time for his civic duties. He must plough something back. He must have balance between the one and the other and I can imagine for he was a very busy lawyer, he was a very busy judge, for him to come 18:00 in the afternoon after a very hard day in the Motion Court, it couldn't have been easy but he was always there on time. You know, he never, he never set a foot wrong as far as I could see and I was on the association for five years. So if I think of a metaphor that is what I would say, that is what a lawyers should be.

056 **TRACY:** And the feminine [audible] of the [inaudible].

057 **INTERVIEWEE:** Well you see that is what, now you are opening a whole can of worms because now we are coming to, you know, my philosophy about feminism. I am going to say three words about this because it could take the rest of the afternoon. Due to a variety of reasons, oeg, you are now the last person I should tell this to. I can just see I am going to get into such big trouble here. No, because it starts off by sounding very bad but, you know, I really think it is a very good philosophy and fits in with what I am thinking here. Due to the suppression of the feminine by the masculine over here, it is almost inborn. I mean, it is almost given. I mean, it is since primitive times. Since, you know, the days in the grotto, no what do you call it? In the cave. Men have always dominated women and the result of that is that women either can't or think they can't do certain things. I mean, Isobel is a very good example. She is far more successful than I am. She is far more [indistinct]. She far more, she is clever than I am. She has got a Ph D in French Literature and she is a leading legal practitioner. She got her LLB with Honours, ag with a distinction when she was 40 years old. So, I mean, it is not something that I can ever emanate but if you give Isobel three keys, she will lose two and she will not be able to find them. She will waste hours looking for them and she will not be able to find them and she thinks now that she is not capable of organising keys. You know, this is now just a small thing. She is very clumsy and therefore she thinks she can't do more than two things at a time. So if she gets into the car she must close the door first, she must then put on her seatbelt and she must then put the key in the ignition and start it. She can't do those things all together. It is three different steps and if she gets them mixed up then the key falls down under the seat and there is major catastrophe. You know, like losing you glove at the opera. That is exactly the kind of thing that Isobel would do. So women are, well let, not too much detail because then I am going to get into trouble. But women due to millennia of separation by males and because women, the tradition of labour was that the women would stay at home and the men would go out in the world and learn the practical things and the women would only stay in the sheltered protection of the [indistinct] and the housewife syndrome. You

must go and see Evolutionary Road. It is a magnificent film. So most females, most females are when they are confronted with the problem they have difficulty in handling that problem. Either it is psychologically or it is motor syndrome, there is a problem. That is for 95 or 90% of females. The male on the other hand because he have the advantage of going out and changing culture and doing things, he is used to driving trucks, he is used to fixing machines, he is used to flying aeroplanes in the air. He can do those things and he does them reasonably well. He does them reasonably well but then you get to the 5% or the 10% of females that are not like that. Then you get to the 10% of females that are the, that are in the category that I call the Virginia Wolff category. Now those females are capable of doing what they want to do one million percent better than any man can do it. So while it is true that women have difficulty sometimes doing certain things the exception is also true that there are 105 of women that can take the world in hand and do it a million percent better than any man can do it. If they took all men and they chose one then those would be far better than that one. So how does that translate to Justitia? Well I think law is essentially female. I think law, the image that I have of law is this image of somebody that has got some very important things to do and struggles to do it. But if there is something really serious, if there is, if it comes to the crunch then not only is it a female that can do it, it is only a female that can do it. It is like birth. It is like, you see now [inaudible] I didn't give you. My division of male and female is that female is the replacer or is the harmoniser of nature. She is the one that can replace nature by giving birth. Man is the one that ruins nature. He is the one that goes out and chops down the trees for the firewood. He is the one that creates culture. He makes the machines. He goes out and he ruins the environment because he thinks he must look after his family. Female is by nature the reputing, caring, repairing. Certain things that only females can do and that is bring new life …[intervenes]

058 **TRACY:** [Inaudible].

059 **INTERVIEWEE:** Ja well he must be a very funny man.

060 **TRACY:** [Inaudible].

061 **INTERVIEWEE:** Ja, ja. No, okay. No, you know, you can always play games with those things but essentially, I am sure he was a sex change from a man to a woman, not from a …[intervenes]

062 **TRACY:** From a man to a woman and then to a man again.

063 **INTERVIEWEE:** And then he gave to birth to …[intervenes]

064 **TRACY:** [Inaudible].

065 **INTERVIEWEE:** Okay, that is a bit scary I think. But you know what I mean and law is feminine because it is only a feminine, it is only the feminine that can do the restorative thing. It is only the feminine that can deliver justice. The male creates injustice and it is the feminine that can do, can restore

justice. It is a long story and, you know, it is not [indistinct] verifiable theory but that is why I think it is female, definitely.

066 **TRACY:** Well I think I [inaudible].

067 **INTERVIEWEE:** Ja.

068 **TRACY:** You know, he is completely besotted with issues [inaudible].

069 **INTERVIEWEE:** Ja, absolutely.

070 **TRACY:** [Inaudible].

071 **INTERVIEWEE:** No, no.

071 **TRACY:** [Inaudible].

073 **INTERVIEWEE:** Ja, no that good but not interested.

074 **TRACY:** [Inaudible].

075 **INTERVIEWEE:** No.

076 **TRACY:** Whereas the girls [inaudible] toys they will go for the dollies and the pushing the dolly around [inaudible].

077 **INTERVIEWEE:** Isobel and I can't have children, or not can't, we don't want children and she is now obviously far too old but when we sit in a restaurant, I mean, she obviously has this need to have children but she doesn't want them but she, still the need is there and we then watch the little children. I mean the little boys, Sundays we go to the nursery in Parkwood, the old Keith Kristen in ... Smuts and it is a place where the children can play. They have got jumping castles and lots of things and it is in the open and it is in the middle of the nursery so the children are not a bother and the little girls would sit very quietly at the table. They would eat their food neatly and they would, you know, they would, if they have something they would have crowns and a [indistinct] and they would keep themselves busy at the table or even a few cups and sources, small cups and they would take their orange juice and they would, or their cool drink and they put it in the, and then they would have tea. You know, take late tea and the little boys would be exactly the opposite. They would run from A to B. They would shout. They would fall down. They will hurt themselves. But, I mean, they are just on the go all the time and you know, Isobel always said if she ever had children she would have liked to have a girl because the boys are just too much.

078 **TRACY:** Sure you can argue that that is really the result of socialisation. You can really see it like this age of 18 months. Little girl [inaudible] music group and she was sitting, her mother put her on [inaudible] quietly.

079 **INTERVIEWEE:** Quietly.

080 **TRACY:** [Inaudible] also had two boys [inaudible].

081 **INTERVIEWEE:** Well you will fall off and then get up again and you know, and ja, no.

082 **TRACY:** No it is true.

083 **INTERVIEWEE:** No the boys are very different.

084 **TRACY:** Okay, should we call it a day?

085 **INTERVIEWEE:** Ja, ja, oeg! It is 13:00 already. Where are we now? At 1.6?

086 **TRACY:** Ja, I think I have answered the one [inaudible].

087 **INTERVIEWEE:** Legal ja, well that is the mixture. That is the mixture. I will answer it quickly again next time but that is the mixture between Eloff and Margo I would say. You know, although you know I also have to say the young blonde go getting advocate, you know, with his Porche and, that is also a lawyer. That is also an image that I have in my mind.

088 **TRACY:** Like Andrew [inaudible].

089 **INTERVIEWEE:** He is a bit of a wimp. He is not, he is a very good, they tell me that he is a very good advocate, he is very clever but something more robust, something more, you know, somehow I always associate and I don't know why, I associate advocates with virility and muscular attractiveness, you know. The robust very attractive young advocate. Of course it is mythology. I mean, if you look at the …[intervenes]

090 **TRACY:** [Inaudible].

091 **INTERVIEWEE:** No, no I can't point …[intervenes]

092 **TRACY:** Martin Brassy.

093 **INTERVIEWEE:** No, no. Martin Brassy in the older form, ja, ja.

094 **TRACY:** [Inaudible].

095 **INTERVIEWEE:** But he is not now, there used to be a guy that was the chair of the Ethics Committee and I don't know what his name is but he had, you know, long black, you know, steel black hair with just a touch of grey in his hair and he was very, very attractive and he was also, you know, a real Zorro. A real [inaudible]. You know, that kind of a person but that is, you know, that is mythology, that doesn't exist. I must also tell you about, we don't talk about negative role models né? Ja, there was an advocate who lived next door to us. I must name him because he was really very bad and Tracy, I was still at school and he was a young advocate at the Pretoria bar and he got married to the most beautiful wife, beautiful. Ag, I can't remember her name but she was like a doll, a beautiful, you know, blue eyes and blonde hair and petit and you know, a ballerina and yet still virile, or what do you say?

096 **TRACY:** [Inaudible].

097 **INTERVIEWEE:** Yes, you could see that she would be a very good mother. She had child bearing hips a, you know, and that kind of thing but still very petit but she was really very, and a wonderful personality. In any case, what they did is they well they lived next door to us and my father being a businessman was reasonably wealthy and, you know, I think we lived above our means so we had a very luxurious house in Pretoria in Brooklyn, one of the very, in those days …[intervenes]

098 **TRACY:** [Inaudible].

099 **INTERVIEWEE:** Oh, I drove through Brooklyn the other day and it was, you know, all on the edges is just businesses and some of the old beautiful houses, in any case we lived in a very beautiful house in Brooklyn and they lived next door to us and my father was 50, 60 years old at the end of a livelong struggle of acquiring assets and becoming wealthy and this guy was fresh out of the university and he could already afford a house next door to us. And what would happen is I would either go and baby-sit. They had a baby and I will go and baby-sit or I would when they go away on holiday I would go and housesit their house whereby hangs another long tale but that has got nothing to do with law. So I got to know them very, very well and he was my hero because he was not only a brilliant young advocate and he made mountains and mountains of money but he had a PhD in Greek, in classical Greek from not where but University of Luthern in Belgium, ja. The Catholic University of Luthern. So I mean, he was really everything that I would aspire to. I mean, he was, he looked, I don't know how old he was but I mean, he was, they were, they got their first child, so he was 27, 28 with a PhD in Greek and that that would be a [inaudible] and a LLB and he is making money. And then of course he came to a fall. I wonder where he is nowadays. What he did is he got involved in far-right politics. He was involved with the flag controversy. He was in far-right politics and what he did in the legal profession is he constantly double booked and you know that is one of the things that is absolutely fatal for an advocate. You can perhaps do it once or twice as an accident but if you get a name as a person who double books. You know, he has two clients on the same court day. He just hopes that one case is going to fall away and then he can carry on with the other one and that of course it doesn't always happen and then you have got two clients and the one court must wait for you while you are either postponing the other one or while you are carrying on with the other one. You hope that there is something on their roll and of course this went on for a long time until he wasn't disbarred but he got a penalty of six months not being able to practise. They literally disbarred him for six months after so many transgressions and the he did a very naughty thing. He forged documents to allocate money that his clients gave to him to keep in trust or to his attorney in trust, he forged documents to live off that money because he had no money to live off and he had a very high standard of living. You know, and all of a sudden there is not income

because, I wish I could remember her name, and he was absolutely disgraced. There was actually, there is a Constitutional Court case about him where he took the Department of Justice to court because his case was postponed, this case where he, his forgery case took too long, it was postponed, it was just as the constitution came in and he took them there. It was postponed long and he said it was against his right to a fair trial and postponed to [inaudible] denied and the Judge of course decided against him and he was, I think he got a very light sentence but I think it was something like four years of which two years were suspended and he spend 18 months in Pretoria Central and when he came out there he was of course a broken man. I never heard of him again. Never heard of him again and he was such a brilliant, brilliant man.

100 **TRACY:** [Inaudible] allowed such a brilliant man to do these things [inaudible].

101 **INTERVIEWEE:** Greed, Tracy, greed. You know, why is Carl Niehaus where he is? I mean, how can you as an ordinary member of society, I mean he was, I think the ANC was extremely kind to him. He was an ambassador. He was made as a, okay, [indistinct] not necessary to place the race [indistinct] but he was made as a Johnny come lately. He was made ambassador to The Hague. You know, that is a very high position, Tracy and that is a position that carries a huge pension and a huge salary and he was there for five years. I mean, if you can't live on an ambassador's salary or ambassador's pensions, which he must get, I mean he must get, I don't know, and plus the salary that he gets as chairman of this foundation, if you can't live on that then, you know, who do you think you are. I mean, why do you, I heard last night at the dinner table, his house that he lives in had been rented at R45,000.00 a month. Tracy, R45,000.00 a month and then it is not even your own property. I mean, how stupid must you be? No, and that is exactly what happened to Eugene. It is exactly what happened to him. He, you know, he had this huge [indistinct], three cars and a vintage sport scar and he had a caravan and a 4X4 and a boat and everything. He had this huge house in Pretoria and he also, he moved away from there and he build another even bigger house. He was very fond of thatch, so he build another bigger thatch house in Val de Grace and I mean where does the money come from? Mainly of course, he takes to much work and he worked himself to death. That is also true. He works himself to death. He would come back home 21:00, 22:00 in the evening and 03:00, 04:00 the next morning he would be gone to the chambers again. He worked like a dog. He worked like a dog. But it is not enough.

001 **INTERVIEWEE:** (Unclear) and he of course saw the opera, but I didn't go to that one. Where are we 1.6.

002 **TRACY:** 1.5, we were 1.6 and then you said (unclear) Margot and the Judge who (unclear) the tall Judge

003 **INTERVIEWEE:** Oh Eloff, Eloff, ja, the Arts Association, so we're (unclear) Are we on.

004 **TRACY:** Yes.

005 **INTERVIEWEE:** Okay 1.7, do you think there's been a decline in the ethical conduct of lawyers and to what do you attribute such a decline? You know that's, it's, I immediately have a glib answer for you obviously. I think we all think ethical standards have taken a turn for the worst in South Africa and why did this happen? I don't know. I wonder why that's happened. I read an article about Mr Zuma's candidacy for the Presidency this morning in the Financial, The Business Day and I thought to myself a lot of the article was spent on discussing this controversy about the Mandela appearance and I thought to myself after reading the article, it wasn't a great article, but I thought to myself how we have changed from Mandela to Zuma in three quick steps you know, Mandela, Mbeki and then Motlanthe, when he was just a stand in and then Mbeki it's unbelievable. We were the moral leaders in the world, I mean especially with the stepping of our, the voluntary stepping of our nuclear arms and the abolishment of the death penalty, capital punishment and well, all kinds of things, the acceptance of the democratic government. Where we were really the leading lights, we were on the moral high road internationally. Everybody expected so much of South Africa and everybody was so enthusiastic and you know it was the Rainbow Nation and it was a new beginning and people were so enthusiastic, and how quickly that has tarnished, how quickly that has declined. I suppose coupled with that is the court application this week in the Constitutional Court about whether people living abroad.

006 **TRACY:** Extensions.

007 **INTERVIEWEE:** Ja, should have voting rights. It seems to me and of course, I don't know if I'm subjective, I am not a political animal and I don't care about politics but it seemed to me such a trite question. I mean how can you, how can you make provision for civil servants and soldiers, and people on duty in foreign countries abroad, how can you make special arrangements for them to vote and other people are still citizens of the country, who are living abroad, haven't got the right to vote. It seems to me that it's, it's more complex than, obviously I've not read the case and I'm not a voting systems specialist but it seemed to me that it's a political gain and we have now come to the position where we are using our precious Constitution to gain political points to try and see if we can squeeze any political gain out of a strange interpretation of the Constitution. Look I would be very interested to see what the Constitutional Court says about this. They've set aside two days to

think about the appeal as well as the confirmation and of course if they do the one first, if they confirm it then, well I suppose it will still have to go to appeal but it would be very strange if they confirm something from the High Court on Tuesday and on Wednesday, they hear an appeal and decide that it was wrong. That seems to me completely impossible. But you know anything in law is possible.

008 **TRACY:** (unclear)

009 **INTERVIEWEE:** But Tracy, it must be a fraction, it must be a minute percentage of the population. It must be a fraction of the well, it seems to be mostly white people leaving South Africa. But it must be a fraction of the white population leaving. I mean what on earth, how can they, how could they be so important as to make such a hoo-ha about it. So I think definitely the glib, as I've said the glib answer is, oh most definitely I think ethical.

010 **TRACY:** Since when.

011 **INTERVIEWEE:** Well look, we were morally bankrupt with the Apartheid system so that is almost something that is imposed upon you. You know it's like the original sin of St Augustine, you were born, if you were born a white person in the Apartheid system, you have the original sin and there is, there is no, it doesn't matter what you do, there is no ethical justification for such a legal system. People say, people from the lunatic right, say that, Etienne Marais some time said, that a very small percentage of South Africa's legal system was tarnished by the Apartheid system. Yes, certainly the social laws, the past laws, the security laws, everything that has got to do with the executive and social engineering of South Africa, of course those things were tarnished but the common law, strangely enough, the civil law strangely enough survived the Apartheid system. I'm not too sure that that was, I have great respect for Etienne Marais, but I'm not too sure that is a tenable argument. I think we were on a desperate low when before 1994, before we started with the new Constitution and the new Constitution was just that, it was there to wipe away all the old spider webs and to make a new beginning, to make the wonderful bridge and Ubuntu and all those things and I think everybody was serious about that, despite the enormous political violence that was associated with the transformation of governments. It wasn't a revolution, people were killed which is bad and it can never be justified but the fact is, it was a relatively painless birth and everybody when the new Constitution started, everybody was in agreement that we now have a new start and that we have high ethical values which cherish things like dignity, human dignity and human rights, not even talking about, of our primary rights or our first rights but we, because of our history, we acknowledged that we cherished human dignity and we cherish the right of life and all the other things. That was carried right through the Mandela era. We had a saint as a President so somebody who spent 27 years in prison and then comes out and says "Here's my hand in friendship" it doesn't happen, doesn't happen. That is, that is moral high ground, that is real personal moral high ground and

even to a lesser extent, when I was a magistrate this happened and many of my colleagues on the bench didn't agree with me, we had a workshop with Albie Sachs and it was extremely strange because here is this man that we've always heard of, this ogre, this political enemy of the state, this unbelievable communist and everything that is bad, that you could have heard here. In a hotel in Sea Point one Saturday morning he arrives and he is more than willing, and he greets you and we were a group of magistrates so it was the two groups meeting and it was a delegation from the ANC and a delegation of senior magistrates. He greeted us as if we were old friends, long, longstanding colleagues and we sat down and we had a workshop for the whole Saturday morning and he was a wonderful, wonderful chairperson. He listened to everything the magistrates said, granted he was very critical of what some of the magistrates said because they're from the status quo and the status quo is something that he opposed. But it wasn't confrontational, it was very intellectual, it was very collegial.

012 **TRACY:** He respected your dignity.

013 **INTERVIEWEE:** Oh unbelievably, absolutely and he respected us as being a group of people with a stake in the status quo that had to be listened to. He wasn't nasty and he wasn't, I can imagine if I put myself in that position Tracy, if I had been in a country where I opposed the government and I lived in a neighbouring country because I was banned and I was blown up and half of my body was blown away, ever come back, the last thing I would do is be friendly towards the self same magistrates who implemented the past laws, who were (unclear) and officials in the Apartheid mechanism. You can say (unclear) but the fact is, those were the magistrates that sent all these people, political prisoners to jail, they referred them to the High Court, they were the small cogs in the whole big machine that sent Mandela to prison. They heard all the minor security (unclear), these are the people that, that caused the country to be what it was.

014 **TRACY:** Sorry, did you have to do that?

015 **INTERVIEWEE:** No, no, I never.

016 **TRACY:** Was is after.

017 **INTERVIEWEE:** I had a very, a very well known reputation of being very liberal and because I did my Masters Degree in human rights and then I became a magistrate, so the magistrates were very.

018 **TRACY:** Suspicious.

019 **INTERVIEWEE:** They were very suspicious of me and then, on virtually the very first day in Cape Town that I sat on the bench I got, I got a juvenile delinquent, a juvenile case. And you know what can you do with a juvenile, these people are real criminals, they take drugs, they steal, they murder, they rape but they are 14 years old. So I had one of those in my court and I found him guilty and of course now you have to sentence him and what do you do

with a 14 year old. I adjourned the court and this was really within the first week that I was a magistrate, so I adjourned the court and I went to this Chief Magistrate and said "Well, I've got this enormous problem, this young guy in my court, he's a drug addict, he's got no place to stay, he's a terrible case. He's been to reformatories and he's run away, he's just an absolute terror" and he was there for armed robbery. So it wasn't, it wasn't a light case and the Chief Magistrate, his name will be, I won't mention his name, but he without blinking an eyelid, like a machine he said "Why did you adjourn the court, you're wasting time, the standard punishment for a juvenile is corporal punishment, send him for 11 lashes and that's it, he'll never do it again". Of course then I immediately lost my temper because here I am on the horns of a dilemma, it really is an enormous problem in the Cape, it is an enormously important case and this man wants me to impose corporal punishment. I mean what will 12, look it's a terrible punishment, you heard the children screaming in the basement every afternoon when they administered it and it was a huge big, which I discovered afterwards, a huge big corporal in the police or a sergeant in the police and he had a leather strap, it was a double leather strap with ball bearings sewn into the leather strap, it sounds like medieval punishment but this happened just prior to 1994 before the Constitutional Court case came up and said that corporal punishment is unconstitutional. Every afternoon you heard these children and they're 14 years old, it doesn't matter what else they did and they were sent for 10 or 20 or 9 or 3 lashings of that broad strap with these ball bearings in. I lost my temper with this man immediately and I said "I'm sorry Mr so and so, but I don't propose corporal punishment, I just don't do it, it's against my principles, so if you want to impose it" and I don't think it's a proper sentence. I think will have no effect on this person, it will just harden him, it will just make him confirm that he is an outsider and that he hates society and now he's got the pain association from the status quo to confirm that he hates society. We had a huge fight in the office but he couldn't take the case away from me strangely enough, I could transfer the case if I didn't want to, if I had a problem, and if you had to recuse yourself, or something happened you can't impose a sentence, then you can recuse yourself and transfer the case to a colleague who would then do it, or if you are ill, then you know you can, there is a provision in there but it must you, the magistrate, the sitting magistrate must apply for the case to be transferred and if you don't apply, there's nothing nobody can do. Nobody can take the case away from you which I also discovered only then, that's how you learn the Criminal Procedure Act very quickly. So I sentenced him to community service for, it was an enormous, it came back from the Supreme Court and it was, the Judge said it was a very, very heavy sentence. I think I sentenced him to 24 months of community service every Friday, Saturday and Sunday he must go to Groot Schuur Hospital Children's Ward and help with the ablutions, the cleaning, every Friday and if he misses one, he must come back to the court to impose a harsher sentence. Now I must unfortunately tell you, it would be wonderful if I could say that the punishment worked very well and he never came back but it only lasted about three months and he was back in court

and another magistrate took him for sentencing, and they did eventually impose lashes. Because of that, no political cases, no controversial cases, nothing concerning corporal punishment or whatever were sent to my court. I never, one day they sent a public violence case to my court and I just transferred it. It was accepted by other magistrate gladly or knowing that there would be nonsense, so I had a reputation, you don't, you never send juveniles to his court and you don't do political things. If there's a political case or there is something, high profile, just side step him because he's a bit of a loose candidate as far as they were concerned. So I never got any of these past laws or security legislation or banning orders or anything like that which I'm glad of. But if I come back to the question I think, that was a moral bankruptcy, that was a fire sale. At the end of the Apartheid era, that's about when I was a magistrate, it was absolutely, the work was, everybody had the feeling of a revolution of disintegration of the legal system. There was very little to cause lawyers to be morally good or followed the moral high road. It was also the time of the gangs in the Western Cape and it was a terrible time and then of course everything changed. Everything changed with the new Constitution and I then left, I stopped being a magistrate so I don't know what happened after that. But if I can just look at the country as a whole, and if I see what lawyers do nowadays, the list of lawyers being struck off the roll, in the De Rebus every month just gets longer and longer and longer. There's now over two pages, yes two pages. I looked, I looked as recently as ...uary, in the ...uary De Rebus, and it was two pages of people struck off the roll because of infringement of, well for whatever reason. Mostly it's trust monies. So I think we haven't got, I think we haven't got moral leadership in South Africa. I don't want to describe everything to the political leadership, that's also not true but it is true that they say you get the leader that you deserve. That is, that is very true and I think, I think our leaders are very poor, they are morally very, very close to the perpetrators of the Apartheid state, they've got this wonderful Constitution, but as I say they use it for political point scoring instead of broadening and enriching our human rights culture. It's just used for political point scoring. So unfortunately I think, yes there's been a drastic decline in ethical conduct in lawyers and I think we're getting ahead of ourselves here but even in my classes, in the old days, when I gave a lecture on ethics and I told, I used to tell my class the great temptations that you can get into as an attorney because of the enormous amounts of money that you have to handle on behalf of other people and if you are an attorney and you dabble also in business like most attorneys do, then there's always the problem that you have a cash flow problem, there's always the possibility that you have a cash flow problem and before you open your eyes, before you know what you're doing, (unclear) you are taking from one to pay the other and thinking that the money will come in and it never does and then it is just, it is just such a vicious circle and the pity of the whole thing is you don't have to, you don't have to have Porsche, you don't have to live in a house that costs R45,000 to lease every month. I mean please, why do you, it's absolutely not necessary, you can, I don't understand the choices people

made, but in the past in the time of, in the beginning when I was lecturing (unclear) in a.

020 **TRACY:** And that is just after 1994?

021 **INTERVIEWEE:** Well we're talking about, from 1999 to say 2002, in other words the first experience, when I started talking about ethical behaviour the class was in awe, they first of all didn't know that lawyers had to handle money, there were almost scared of being caught out or being, falling victim to something like this and they listened very, very attentively and there was not a peep out of the class. When I discuss it now, the students are far more, have far more self confidence and I get a lot of cheeky questions, and I say this in the nicest way possible, I'm not, I'm not trying to criticise the students, but questions as to how can we, what can you do to circumvent the, the rules of the Trust Act. What can one do so that you're not caught out. Is it, is it possible to make enough money so that you can perhaps borrow from your trust account and then just pay back from your general account. All kinds of questions, may you borrow money from your trust account to third parties, as a kind of a bank. If the advantage is not for yourself, but you have a friend who needs the money, can you take the money from your trust account. Of course all these questions are negative, because the trust account is completely sacrosanct. But the interesting thing is, the student attitude has changed from being almost scared of the trust account, being scared of too much money in your bank account, being scared of the rules and regulations, to how can we circumvent them, how can we, this is an enormous amount of money lying in your practice, how can you access this.

022 **TRACY:** This is mainly first year students?

023 **INTERVIEWEE:** Mainly, well, first graduate students, so they're not first years, they are first year law but they are post graduate students. I don't know what it would be in the first year students. I don't know what the experience would be there.

024 **TRACY:** (unclear)

025 **INTERVIEWEE:** Ja, how you can obtain it and what you do and ja.

026 **TRACY:** (unclear)

027 **INTERVIEWEE:** You see they are not interested in finding it out as intellectual curiosity, finding out how the law works, or improving their knowledge. I would daresay they want to know for their own personal use.

028 **TRACY:** (unclear)

029 **INTERVIEWEE:** No, mine also, I used the word cheeky and that was perhaps too harsh a word, it's playful, there's always a company (unclear) laughter and its usually against the type (unclear) guy that asked these questions. A rap kind of a person, and they're asking them in a very playful manner, but

the thing is they want to know, they want to know and they, I can remember one of the questions, "Can you use your trust monies to pay for other clients of yours bail money". You have client A who's got R10,000 on trust in your account because you're setting up a company for him. Client B is caught with possession of dagga or diamonds, he hasn't got bail money, can you take your trust money to pay his bail. The argument is, it's all in the practice, you're not using it for yourself, what is wrong with that, it's part of your job. That of course is a hopeless attitude because it's not, it's two completely different things. So why, to what I would attribute the decline, I don't know, I would say that South Africa is a society in transition, a society transition is always, you don't know exactly where the lines are, the lines have changed, so there are some grey areas and people exploit that. People, people use that. Perhaps I'm just over negative, the large portion of the bar and the side bar, the larger portion of that, and I'm sure, well, and I want to say the judges and I then remember the Judge with his.

030 **TRACY:** Motata.

031 **INTERVIEWEE:** Ja, Motata, with his Jaguar, and then this whole chaos with the Judges, this whole, this whole Hlope business, I don't want to say who's guilty or not because if you open your mouth, you, you're clandestined on one side or the other and you're either a racist or a freedom fighter, so I don't even want to talk about it. The damage that it's done to the judiciary is unbelievable and I think, I think it's, it's a sign of a very inexperienced executive or a very inexperienced government. Although the state has been in power for 15 years now, the Constitutional state has been in power for 15 years, it is still reasonably inexperienced and it doesn't know how to, not that the previous government did, they were securocrats, I'm not comparing, but I'm just saying in comparison with perhaps how the United Kingdom or the United States would handle a problem like this, it just seems to, it just seems to snowball. The chaos just gets more and more and more. This small little thing that I read this morning, are they using Nelson Mandela for political, are they exploiting him for political gain. Now, if you had any kind of intelligence or a spin doctor in your makeup, or perhaps I'm wrong, I don't know, but I would imagine the best way to address that is to say "Yes of course, or course we're exploiting him, he's the trademark of the party". Why are you asking, he's our trump card, he our proudest and highest achievement, why will we not use him. But now they're backtracking, they say they're not using him and oh it just gets worse and worse and worse. It's a small little thing that, they didn't, the only wrong thing that they did I think as I can read from newspapers is, they didn't follow the security rules in the letter and they didn't ensure that there was medical assistance at all times and they had to, one big thing that they got wrong, is they had to lift Nelson Mandela onto the stage, there were no, he couldn't walk up the stairs, the stairs were too steep because of scaffolding, so he couldn't walk up, so they had to lift him up. Now that is, I would say that that is wrong, he's 90 years old or 80 what, how old is he.

032 **TRACY:** 90.

033 **INTERVIEWEE:** 90 years old, just from that perspective you don't chuck a 90 year old man up and down a stage and he's this icon. I would imagine that that should have been checked beforehand and they should have made a plan, get everybody off the stage and put the chairs on the ground. But that is a small thing, now it's blown into a federal case, all the national newspapers are writing about it, everybody has an opinion and nobody knows how to handle it. But in any case so I think, I think that the decline is due to poor leadership not only in the country as a whole but also poor judicial leadership. I don't think we have a strong enough judicial leadership and the strong leadership that we have is on the other side, it's the wrong leadership. I mean Hlope is a very enthusiastic leader, he would very much like to become Chief Justice but I don't think everybody will share that, and that unfortunately, that seeps through the whole legal profession. On the other hand Tracy, on the positive side, because I always thing one should be positive, as you know (unclear) Zinneke spent his sabbatical at Wits, and Angela asked me to take him around, organise his admin for him, his parking ticket, his computer, see that he's happy, that he knows where everything is, get students to go to him to do research, all kinds of small little things. I used to do that because I used to be the personal assistant of the MD of the Small Business Development Corporation and that's what you do. You just keep this person happy all day, that's your job. You just see that if he wants something that you get it for him. It's not easy, not everybody can do it, you must have a certain mindset. So I spent two or three days in close proximity with (unclear) Zinneke, we walked through the whole campus and I took him with my car through Senate House, and we went up to the eleventh floor and we walked on the campus and talked to students and we talked to academics. It was two or three days that I really lived with him and everything he did. I must tell you if that man would become Chief Justice after Judge Langa, I would be extremely, extremely happy. I would sleep like a baby because he, he really is very, very impressive. I must say I haven't read all his cases, I'm not an authority on his judgments and some people say that all his judgments are not equally brilliant. But he is an intellectual, he's level headed, he is in touch with what's going around him. He's like that poem, if you can do this and if you can do that, if you can do that, then you'll be (unclear) and he ticks all the boxes, he really is everything. He's an extremely impressive man and he would be a brilliant Chief Justice. So on the other side, there is hope, there are people, there are really brilliant people out there and one must hope that, that the right people get the right positions. But there is hope so, one shouldn't be despondent. But I think, to sum 1.7 up, I really think there has been a decline. The decline is probably attributable to bad leadership, poor leadership and a transition of society.

034 **TRACY:** (unclear)

035 **INTERVIEWEE:** Ja, joh, Look I think it is very challenging, to be, just being a legal professional in South Africa. In 2002 I went to Scotland to do a masters

degree and I was absolutely amazed at what a Scottish legal professional is supposed to do vis-à-vis a South African legal professional. In South Africa we sit with this almost unbelievable rich dish of constitutional and legal challenges. Our whole legal system has been turned upside down almost you can say. Everything that happens in South Africa is a bloody challenge. Everything that you, everything that you do, Elise, and this just to show that it's not just criminal but Elise is now reading the new Companies Act and literally if she's now finished with the page, I just browse through her notes because I haven't got time to go through the whole Companies Act, I just don't have the interest or inclination, although I better do because I teach companies or commercial law to the engineering students. But virtually everything that we know in the Companies Act has been changed. Virtually everything, everything that we would taught at university and that you might have picked up in your career, everything has been changed. It's a thick bill, it looks like one of these (unclear) and she's been studying for, since the beginning of ...uary now and she's far, far from the end. In South Africa everything changes. In South Africa because it's a transitional society, because everything, everything is in a new perspective, I think it is enormously intelligent to be a lawyer here. In Scotland just to give you an example. In Scotland, now you know the situation in Scotland, Scotland has not got the wonderful advantage of the English Common Law. Well, that's another story but Scotland is following Roman Law so the Scottish Common Law is civil law, is Roman Law and although after the Act of Union in 1770, they moved closer to England and they accepted the House of Lords as the final Court of Appeal for Scottish cases. They insisted on having Scottish peers on the House of Lords hearing Scottish cases with Roman background because although the English peers had a Roman background they were not in practice. So that gives you an idea of how dynamic Scottish law is. When I was there in Scotland one of the firemen took a redundant fire engine and he bought it from the, from the fire, from the state, he bought it from the fire station, legitimately for a reduced amount, for a nominal amount but it was a redundant fire engine, so how much do you charge for a redundant fire engine. So he paid a nominal fee, that was one of the points that that you can give consideration, whatever that might be and then he took the fire engine and he modified it. He chopped off the water tank and he changed it into a light, or not such a light, but what they call a LDV, a light delivery vehicle. So he kept the power source of the engine and he took the back side of a truck, of a one tonne truck and he welded it onto where the water tank used to be. He chopped the water tank off. Now the question is, you're not enthusiastic about Roman Law but in Roman Law you have this strange figure called usucapio Usucapio means if you put two things together then in terms of Roman law the ownership changes. If you take a ring and take some gold and these two things belong to two different people and a third person comes and he makes a ring out of it, he moulds the gold into a ring and he sets the diamond into the ring, then the ownership changes. Now the question is, to what does the ownership change, it is the diamond owner, is it the owner of the gold or is it the maker the fabricator, is he the new owner. Now you must

remember in Roman Law you've got other remedies, you can't, the first thing that people say, no the maker can't become the new owner because it's not his thing, how can you say the owner of the diamond, the owner of the gold will have an unjustified enrichment action against the maker but he will still be, if you follow that line of argument, he will still be the new owner of the ring. So this question now came to the Scottish court whether the fire engine which was built for a nominal fee, for a couple of hundred pounds, I think it was exactly £100, if the fire engine which really belonged to the state and the truck that belonged to a mechanic in town, the bringing together of those two constituted a new thing and is the maker of the new thing, the ex-fireman that made this into like a delivery vehicle, is he indeed the new owner and Tracy I can tell you, that kept them busy for four years, four years. When I arrived in Scotland in 2002 the controversy was raging, they were getting one another at the throat because of this case. So you can see how challenging Scottish law is, so there's nothing new in Scottish Law, there's really nothing new. Everything that is new is legislature or the great other thing that is new is of course EU Law, that makes an impact on Scottish Law. So to compare a South African lawyer, to compare a person that practices, I'm not talking about academic, we, you specialise in your area and you keep up-to-date on your own area. But a person, a general practitioner, or even a specialised practitioner like Elise, if you are subject to changes in law for your bread and butter, I think practising law in South Africa is probably the most challenging job that you can do in South Africa, because it is so dynamic. I think it will change, I think the constitutional challenges will be reduced I think the Supreme Court of Appeal, the Constitutional Court is going to merge into one big Court of Appeal and I think the changes are slowly going to subside and it's going to become less and less challenging, but at the moment I think it is enormously challenging practising in this country. If I just mention to a Scottish lawyer that we have received, as we discussed last week, we have just received the new geographical names for the court and areas for the new courts, I mean they will go absolutely bananas, they will, they haven't changed their magisterial districts for six to seven hundred years. We just do it in our stride, although it wasn't done in our stride, it took a long time for us also to do it, but the fact is we with a stroke of the pen, we change all our magisterial districts or all the High Courts, the districts of the High Court, the areas of the High Court. That is not something that happens in other jurisdictions. Now Scotland is also very isolated and it's very far away and it's a very strange country. I'm sure its also very challenging to practice in American tax law because that is a major, major part of American law. Tax law and liability law, that's what they specialise in. Because of the common law I think, to practice in England, well I think it's impossible to practice in England because their, the law of property is completely absurd, it's completely, but at least they have this huge common law that they can use, that you must know before you can practise. So I don't think, it's just if you put it against Scottish law, it places it into perspective. I think it is very challenging. Also because of the transformation and of course the new Constitution.

036 **TRACY:** You mentioned (unclear)

037 **INTERVIEWEE:** Ja, I never did.

038 **TRACY:** (unclear) the story where your judgment went on review (unclear)

039 **INTERVIEWEE:** No, that's a difficult question, I must try. Look the first reaction you have especially because the Judge took it so, took it seriously and so personally, I can assure you, that was the one and only (unclear) I ever got from a Judge as far as professional work is concerned, so the Judges don't phone you, they do everything by writing to you and as I told you there's this status problem between the Judges and magistrates, so Judges don't like to be involved with the magistrates, they don't even like doing these reviews I think. It's the kind of thing we do when we do marketing, we would have preferred not to do the marketing, we would prefer if we could just do our research and we could do the lectures, but we would prefer not to, they, I think they are the same. They don't want to do Motion Court, they don't want to do reviews, they don't want to have anything to do with the magistrates, because it is boring, because you get some very poor magistrates, let's face it, and you get even magistrates that are well qualified, that lose their tempers in court and then go overboard like I did. I must tell you, it's one of these balloons with blades, it's got multi faceted implications. When I sat in that court room Friday afternoon and I saw that poor woman who had four of his children or many of his children and he didn't pay her maintenance for a long time, for I think 18 months or even longer, not a cent and that was her only income for herself and four children and she was in court, she was a witness, she was the complainant, the prosecutor led her evidence, so she was in court for the whole morning and she was in tears and she was distraught and the reason, why he didn't pay maintenance was he was living with his girlfriend, a woman he had two more children, and he was maintaining them, so he couldn't maintain his first wife and it was his third warning. He had no previous conviction but he had three appearances in court already to tell him if you don't pay now you're going to get into trouble and every time he pays for one month and then of course it takes another six months to bring the case to court and then he pays for one month and then it takes six months. So I and also, and that is where I must say I think I was wrong. He was cheeky, he had the attitude of, because of his previous experiences in the court room, he comes in on the Friday, he listens to the magistrate, the magistrate blah, blah, blah and then he goes away again. He had the attitude, you can't do anything to me, I'm paying maintenance, I'm just not paying all my maintenance, so what, so what are you going to do and then I do my job, and that you must never do, and I think I said that in class as well, you must never, never, never set a judgment on others when you yourself are not under control. But he irritated me unbelievably and when he had this attitude, when I asked him if there was anything you want to say, he said "No, I don't think I've done anything wrong" I just thought well, we'll see about that. Then what I did, is I looked in the Criminal Procedure Act and I didn't do anything wrong, I just transgressed a rule of custom. Nowhere in

the Criminal Procedure Act that says you can't send a first offender to jail, there's nowhere that it says you can't but of course, amongst the magistrates and judges in the Cape and in the Transvaal or wherever, it is custom, it is unusual, you do not sentence a first offender in court, but he wasn't a first offender, but that now doesn't come out in the record. He was for the record purposes, he was a first offender and of course what he didn't know is that I had jurisdiction to send him to prison on each count so he had say for 18 months he didn't pay maintenance so I had jurisdiction to send him to prison for 12 months on each count. So I could send him to prison for a long time, for years and years. So what I did is I sent him to prison for one month on each count, so he went to prison for 18 months which is of course very naughty because my jurisdiction is, I could only send somebody to prison for 12 months in those days, it's now changed, but it's now three years. But in those days you could only send people to jail, but I made a hundred percent certain in the papers that I did everything correct, so for each month that he didn't pay maintenance, he was sentenced to one month in prison without the option for a fine and of course he says he hasn't got money to pay maintenance, where will he get the money to pay the fine. Without the option of a fine and nothing is suspended and that's also my prerogative. One month imprisonment, ja it is a bit steep. one month imprisonment for not paying your maintenance I don't think is so bad because most people must survive for the whole month, while you're lying with your new girlfriend. So that's what I did and of course when he realised he's going to prison, when the orderly came to take him down to the cells, he went frantic, he went off his rocker because, now then he started shouting "But now I'm going to lose my job, now what about the family, now nobody's going to get maintenance, how can you send me to jail" which of course is true, I had to take that into consideration and I had to give him, I could give him the 18 months sentence but I could suspend it, if he doesn't pay again, but that's exactly what the previous magistrates did and he got free every time. So I thought no, away you go and he sat for six months because the wheels of justice are done very slowly. So he sat for six months and by six months the court record (unclear) and of course when he saw the 18 months, he just, you know what it's like to mark, if he was a student you would go quickly, the student knows you mark wisely, if you must figure out, oh okay there's one, there's one fact, then there's another fact, then you know it's a poor student. So it's the same with them, if they see everything is in terms of the Act, okay 12 months suspended for such and such a thing, a first offender, then it goes quickly but here is a junior magistrate, well a magistrate with less than seven years' experience sending somebody to jail for 18 months. You know it will jump up at you, it will be one of those things that you will say no this is wrong, it can't be. Then moreover, no option of fine, no suspension, no option of anything, straight to jail. So I suppose when he saw that, he then phoned the prison authorities and he said (unclear) wrongly sentenced, but I'm glad, I can tell you I'm glad he went to prison for six months and I'm sure, I don't know what happened afterwards, but I'm sure he started paying his maintenance because six months in Pollsmoor is not a joke. Six months in Pollsmoor is not

a joke, I'm sure he suffered for six months. So I agree I made an error, I shouldn't have done that. I should have.

040 **TRACY:** What is it you should have done?

041 **INTERVIEWEE:** You should never sentence somebody when you're cross, don't let your personal feelings get involved. If I took a break and I had a cup of coffee or a cup of tea and I came back, he wouldn't have irritated me, I would have known, you don't sentence somebody, you don't sentence a first offender to jail. I should have sentenced him for 12 months suspended for five years, alternative a R2,000 fine and then it would have gone through without any problem. Because when you don't sentence him to jail without the option of a fine you see, and then he still had the suspension, if he didn't pay his fine then there was 12 months waiting for him. So it wouldn't have been the same effect, he would still not pay his maintenance.

042 **TRACY:** (unclear)

043 **INTERVIEWEE:** No I know that first hand, first hand, it's got nothing to do with you whether the wife cries, whether the children are without, I know it sounds very cruel but it has got nothing to do with you, when the same old Chief Magistrate called me in about something else I did, he waived the Magistrates Act at me and he said "You must remember you are a creator of statute, you're a creator of statute" and although I laughed at the moment, when I went away I thought about it and he's quite right, you are a creature of statute, you live within the limits of the law and you as an officer of the court, the last thing that you can do is get emotionally involved, make an emotional judgment, become involved with the social problems of the area, there's just.

044 **TRACY:** What did the wife do?

045 **INTERVIEWEE:** No, the wife was thrilled, she was thrilled beyond belief, she was even prepared to sacrifice her maintenance for the time he was in jail just so that he will at least do something, because you could see what was happening here, this guy used and abused his wife, four children and then the first new green leaf that passed his way, he left everything and he went off to.

046 **TRACY:** So it's difficult say in which scenario is justice best served?

047 **INTERVIEWEE:** No, no, yes I suppose it's difficult but if I had another chance I would have, if I had just been rational Tracy, by just being rational I would never have done that. I would never have sent somebody to 18 months and never, I would have known that you don't send, if I had just discussed it with my colleague across the chronicle and said, what do you think I should do with this guy. He would have said 12 suspended with an option of a fine. It is the more sterile judgment but the other one was emotional and it's, the Judge was 100%, if I had been a Judge I would have done exactly the same. So it's, if you lose your rationality, if you become emotional and you make

judgment on emotions, and everybody does, this is now an extreme example, but I mean every single magistrate gets emotional, every single magistrate gets up tight, every Judge gets emotional, they just handle it better I suppose. But it's not that people don't get emotional, but you must have your emotions under control. You mustn't give way into them.

001 **INTERVIEWEE:** (unclear) sabbatical, is that alright.

002 **TRACY:** Yes.

003 **INTERVIEWEE:** Okay 2.3. Tracy I studied law by, I started studying law by default I think, but let's not start with that. I started studying law first of all a year at University of Pretoria, then a few people know that and then my father unfortunately of course, I'm very fond of my father, passed away at the end of that year but fortunately for me because he never wanted me to go to Stellenbosch, I always wanted to go to Stellenbosch and when he passed away, that was my, it was like (unclear) when the fish bone stuck into his father's throat, a miracle, a miracle, I'm free. But not had the same relationship with my father, we were very close and I was.

004 **TRACY:** Why Stellenbosch?

005 **INTERVIEWEE:** Well Stellenbosch was always, it's the place, it's the Delphi, Stellenbosch for Afrikaans people is, that's where you go, Stellenbosch is like the ivory tower, it's where all the great Afrikaners comes from and where all the great intellectuals studied and it's a way from home, and so exotic, in the Winelands, and it's got this enormous reputation, the Law School has got this enormous reputation.

006 **TRACY:** (unclear)

007 **INTERVIEWEE:** Yes, yes, that's another story. That's less, it is more complicated. But okay, so I went down, I had to do two or three subjects, they gave credit for two or three but I had to do one or two, repeat one or two and of course I had like I said, I had the time of my life, the best four years of my life in Stellenbosch, you can imagine, it's, if I ever had children there it wouldn't be even a slightest doubt in mind, they would all go to Stellenbosch or UCT if they prefered to go to an English university, but I think it is very important to study in an island situation. You must get out of the city, you must get out of the house, you must get out of yourself and you go for five years and you experiment, that's what university is about. It's the, sorry I've still got a lingering cough, but that's what university is about, it's experimenting, it's a test tube, you must be able to do things that you will never, never do again. I studied English literature and history and political science and it was just wonderful, Stellenbosch of course is that kind of a place, it's a mystical place, it's a wonderful, wonderful university. Not so much the university per se but just the atmosphere. It was the best thing, the best thing I've ever done and then of course I had to do my military service and after military service.

008 **TRACY:** (unclear)

009 **INTERVIEWEE:** Yes well I studied a BA law but I had lots of subjects that I started at Tukkies that I wanted to complete such as history, English literature, political science, so I ended up with about five majors, I made it in English, history, political science and then of course what we call private law

and Roman law which is Private Law III and Roman Law 11. You had two years of Roman law at Stellenbosch. It was a massive BA but you could do it if you were slightly interested in the subjects so it wasn't, it was undergraduate, it was so stimulating, I really, really enjoyed it. But I did ja, I did a BA law and then an LLB. Then I became a legal officer in the army which is also.

010 **TRACY:** (unclear) Was there anyone who taught you at Stellenbosch that you particularly remember?

011 **INTERVIEWEE:** Oh yes, oh no there's not a shortage of them. Virtually every lecturer at Stellenbosch is like an icon. There was the perfectionist Professor A B de Villiers. He was our typical Cape lawyer, he was an attorney and then after he was a very successful attorney, he went to Academia, and he was always impeccably dressed with gold cufflinks and a three piece suit and a silk handkerchief, all the trappings that you would find in a platlandse prokureur, and he drove a most beautiful long wheel based Mercedes limousine and he stayed in the most beautiful house in Stellenbosch. I don't know where, well he must have been very, very successful as a attorney because he was fabulously wealthy. Well in our eyes as students, the main old street of Stellenbosch is called Dorp Street, I don't know if you know Stellenbosch. This is where, where all the old houses is called Dorp Street and he had on a huge plot of land, he had a Victorian double storey that looked like a wedding cake, it was a beautiful, beautiful house, with manicured lawns and typically that you would have in your mind the dean's house. He was also the dean for a little while. So in a certain sense, and he was also my lecturer for Roman law, I will always remember him. Of course Lubbe, who is still there, who is an absolute intellectual giant. He teased you in class, you know Lubbe, I don't know what we're going to do with this now. (unclear)

012 **TRACY:** What (unclear)

013 **INTERVIEWEE:** Sorry, sorry, sorry just push that out of the way.

014 **TRACY:** (unclear)

015 **INTERVIEWEE:** Gerhard Lubbe, as law of contract, he's dean at the moment and he is just, he was just a brilliant man. He studied at Yale and never did a PhD only a masters degree and then he came back and he was so brilliant and then was C G van der Merwe who was also Roman law, who I did my masters degree in Scotland with. He was an absolute darling and a wonderful man. A true blue academic not a practical lawyer but a true blue academic. Then there was (unclear) who was the absent minded professor, but also very brilliant. Every single person that lectured me at Stellenbosch was an icon. It's not, it's not like, it's not like a city university like ...or UJ or whatever, where I don't know all my colleagues. Students tell me that they have law of contract with somebody and I said, are you studying at Wits, because I know I Minnet and I know Elsa, but there are about five or six part timers or two or three and I've never been introduced to them, I don't know who they are, I

don't know what they do. They, it's just different. At Stellenbosch also there's also no such a thing as, as a senior lecturer, you're appointed and if you come directly from university they'll probably appoint you as a senior lecturer for two or three years. But you are appointed as a professor, everybody is a professor at Stellenbosch. Then they've got this wonderful history of course, all the greats, J C de Wet would come to lecture once a year, Mortie Malherbe, Verloren van Themart, they wouldn't come of course, they have lost passed away but all these great guys that you've heard of.

016 **TRACY:** (unclear) define them, what does it come down to.

017 **INTERVIEWEE:** Tracy that is so impossible, it's like you're asking me how to describe why is this why better than the other, it's just one of those things. It's got, it's got to do with the way that people lecture at Stellenbosch, the way that, the way that they treat their students, it was a much smaller class. We were 125 final year LLBs and I can't tell you, I don't know, look I suppose we all, I don't know if the students, if my students think the same of me as they, as I thought of my lecturers. I doubt it, it's as if, well I'm definitely much closer to my students. I wouldn't dream of going to visit one of my professors. I would go to him in his consultation hours and it would be, very, very formal, but there would not be a social interaction.

018 **TRACY:** (unclear)

019 **INTERVIEWEE:** Yes, yes, they, you know they've got (unclear) they've nothing else to do. The only thing they've got to do is to teach and to do research and there's virtually nothing else to do at Stellenbosch. It's the Winelands, there's a movie theatre and things, but if you want to do anything culturally, you have to go to Cape Town. So its this concept of a university as an island situation. The people are dedicated. I can tell you a little anecdote of C G van der Merwe. I think that summarises exactly what I'm talking about. When I was at Stellenbosch, I still had to go to the army, it was a dreadful time in the beginning of each year when you got your call up papers and you were called up to Upington or Bloemfontein or Kimberley in the infantry regiment and until such time as you've registered for your degree, you must go, you are liable, they keep on sending you call up instructions where you must go to so, and every year, it's not as if you say, you're doing an LLB, you're not going to be available for five years that they then stop. They send you the call up instructions every year. So I had just registered for my second year at Stellenbosch and one rainy Saturday afternoon, morning, I opened my post box and there was, after I registered, and I sent them the proof of registration, there was a fresh call up notice that I must go to Upington and I must report within two weeks. It was this time of the year, I was half way into, half way into the first term and it was also the deadline for my Roman law essay. I couldn't get, I couldn't get a certain book, Thomas, I couldn't get a copy of Thomas. Obviously students took the books from the library or they were not available, I can't remember but I remembered, I desperately wanted Thomas and I couldn't get Thomas (unclear) So I went to the law

library, the small reading room that they have in the old building, and I asked the secretary there, I'm looking for this book, I can't find it, have you got a copy perhaps in the reading room. She said "Yes we've got a copy but it's not with me it's with, it's not in the reading room, it's with Professor van der Merwe, I can't go and ask him for it, he's using it, he's been using it the whole year". I said "Can't you just phone him and ask him whether I could just borrow it for the weekend, I mean he uses it to do his lectures obviously, but I'm sure he would be able" I went to his office and there lo and behold, it was Saturday afternoon already by that time, he was in his office, he was sitting in his office. I explained to him "Well you know I've done everything now and I've found all the books and this is now the one book that I must have and I see that I must have it but I haven't got it" and he turned around and took the book off his shelf and said "Here's my own copy, take it, use it for the week, and I can see you are". I also told you about the army that called me up and what under pressure I am, I'm not going to finish my Roman law essay and it must be in on Monday and at Stellenbosch it's not like, I don't know if it is, I don't know what it's like here but, if you have a deadline, if you have to hand in an essay on Monday, there's not, there's no threat or there's no system.

020 **TRACY:** Like we have.

021 **INTERVIEWEE:** Like we have, double entering, you must have stamps and must. But there is not, there's no question about it, that you must hand it in and if the door closes on Monday afternoon, and you've not handed it in, you will fail and you will get zero for that essay. It's like, it's like Wimbledon, nobody's going to wait for you at Wimbledon, even if you are Jimmy Connors, if you're not on time and you're not there, you lose the match. That's how it is. So and that is the kind of gesture and he said, "Here's Thomas, it's my own copy, look after it very well, put it in a plastic bag, don't let it get wet, what you're looking for is on page 340 to 354. Read that and you will have no problem". You see that, that's why Stellenbosch was wonderful to me. It was just, it was just, they were so human, they were so, and yet they were at a distance. I never imagined even in Scotland years afterwards, I couldn't call C G van der Merwe, I couldn't call him by his first name. I called him Professor, I couldn't bring myself to call him C G, although he asked me and he begged me and his wife laughed at me and he said, you're now a house friend and we share all this trials and tribulations in Scotland, how on earth can you still call him Professor. But it's just one of those things, I just can't. So it's very difficult to say what it is.

022 **TRACY:** (unclear)

023 **INTERVIEWEE:** Yes, oh yes, true (unclear) ja.

024 **TRACY:** In other words (unclear)

025 **INTERVIEWEE:** There was, the dean in my year was Andreas van Wyk, who wrote the book, de Wet and van Wyk, on Law of Contracts, it's an Afrikaans

book, you wouldn't know about it, and he would, he would have a double period Tracy, double lecture on Friday mornings, double lecture from let us say 9.00am to 12 noon and you would absolutely shat yourself going to those lectures because of the questions that he will ask you and not like I try and do the Socratic methods, running around in the class and asking people who I think don't understand, he's got a list and he goes from the first one on the left to the last one on the right. He goes through, you know it's coming, my question is coming. He asks the first one there, the second one, the third one, four, he goes down in the row and so there is no way you can escape. He asks the entire class and of course if you don't, if you don't answer correctly or if you don't know the answer, he was a past master in making you feel so (unclear) and he, afterwards he would smile and he would, he would make as if it's a, he would be more collegial, but while he was in class he was an absolute, he would ground you into the ground if you don't.

026 **TRACY:** Sarcastic.

027 **INTERVIEWEE:** Yes, extremely sarcastic. But people liked him for it and I didn't enjoy company law, I didn't enjoy company law at all but I knew my company law. There is no ways that you would go to his class without preparing your lecture because if you didn't read the cases, he would just humiliate you and he would, he would just not, you don't want to be there. So agh it's difficult to say, it is just a, it's probably all to do with the beauty of the place and the atmosphere of the place and everything is softer and lighter and bearable there. It's not, the hard harsh city. But anyway I then became a legal officer in the army, which is also very interesting anecdotes but that's best forgotten, that was unpleasant, then I started with my articles of clerkship with Adams & Adams and I think we spoke about that.

028 **TRACY:** Why an attorney, why didn't you go to (unclear) because your mother was an attorney.

029 **INTERVIEWEE:** My mother was an attorney, I didn't think, I didn't think it was possible at that stage and of course now ex post facto, thinking back, I didn't really think about, I didn't think about what to do, it was so natural that you would first do your articles and if you then, then want to do, you could go to the bar.

030 **TRACY:** (unclear)

031 **INTERVIEWEE:** Ja, but I don't know, it was so much easier at that time, that when I was entering the profession. I think it was a three months pupillage, three months' pupillage, no exam or very, very simple exam and it was more a kind of a collegial thing and I knew somebody that could, that I could use as a master, a pupillage master. I don't know, perhaps ja, perhaps I should have done that, I don't know, I don't know.

032 **TRACY:** Your Articles of Clerkship is two years.

033 **INTERVIEWEE:** Two years ja, and that was not pleasant, that was very unpleasant, after the first, after the first week or month at the most, I knew that this was not for me and I met some very, very unpleasant people. Adams & Adams is an extremely unpleasant place to work and I decided what to do to combat that is to work hard, and I did, I worked 18 hours a day, six days a week and that was still not enough, they wanted seven days. If you were not there on Sunday they would ask you on Monday "Well why, what, what happened yesterday".

034 **TRACY:** As far (unclear)

035 **INTERVIEWEE:** No definitely at law school.

036 **TRACY:** Law school.

037 **INTERVIEWEE:** Oh yes, no, no, no I got no ethics. As a matter of fact Adams & Adams was a very bad experience all over. No ethics, no, it was not, we were not made for one another and we didn't like one another and it was. But I had some very nasty characters, people who were as, you move from department to department and shame poor old (unclear) he's deceased now, but he was an absolute pig, an absolute pig. I don't really want to talk about him, and then there was van, what's his name, van Zyl, ja, who, I can't even begin to describe him to you. He was so bad, he was eventually kicked out of Adams & Adams and he was eventually struck from the roll. To top everything, one of the leading cases in estoppel, was about him allowing a secretary to sign legal documents on his behalf and then when it blew up in his face, he wanted to say, "No but I didn't sign it, it was my secretary who signed it" and the court of course decided against him and said "No you've created an estoppel". So he was, and then there was.

038 **TRACY:** What was it that was so terrible, was it the way that they treated people?

039 **INTERVIEWEE:** No they just, they didn't have ethics, they didn't have any ethics. They, there was a man by the name of, the person who looked after me, my, the de facto principal, and I've put him so far out of my mind, I've now forgotten his surname. Anyway it's perhaps better not using his surname, but he was married but he an affair in the office with his secretary and he had a child with his secretary. At that stage in my little life, that was not something that I was used to at all. He didn't try to hide it, he flaunted it, he asked me to go and buy flowers for her, he gave me his Porsche to go and buy flowers for her on Valentines Day and make reservations for them at a hotel for a weekend. I didn't like that, I don't want to be judgmental, I've been living with Elise for 24/25 years without making an honest woman out of her, without marrying her and I don't even think about it, I mean it's not even a moral issue, but at that stage when you're very impressionable and you're very young and you look up to these people and they just have no, they just have no ethics. If he treats his wife like that, if he treats his

colleagues like that, if he treats his articled clerk like that, how does he treat his clients, what does he do to his clients.

040 **TRACY:** Was he a hard worker?

041 **INTERVIEWEE:** Everybody at Adams & Adams is a very hard worker. They come in at four o'clock in the morning, literally at four o'clock in the morning, they work until eight, nine o'clock in the evening, they go home and they're back again at four o'clock and they work seven days a week.

042 **TRACY:** (unclear)

043 **INTERVIEWEE:** They (unclear) this fellow, I can't remember his name, he's such a, of course it became known, I discussed him with my fellow clerks and of course they discussed it with the secretaries and the secretaries told his girlfriend and of course he bullied me, he took it out on me. Every letter that I wrote, he would find something wrong. He was no teacher whatsoever, he was an absolute destroyer. I must have written Tracy, you know if you're an attorney, how many letters do you write, I must have written tens of thousands of letters and at twelve o'clock every day I had to go to him and we would go through the post and he change, even if it was just a comma, he would change every single letter. So you would sit with a pile of post like that, that's finished, duplicate, debit notes, everything and it would take him two hours to go through the whole thing and he would reject all those letters.

044 **TRACY:** (unclear)

045 **INTERVIEWEE:** And I would have to do them all over. (unclear) before you can start with the day's work, before you could start going on. Your in tray is then, but everything in Adams & Adams was an absolute disaster. What was I going to tell you about him?

046 **TRACY:** (unclear)

047 **INTERVIEWEE:** Oh yes, they specialised in trademarks, they specialised in trademarks, they knew everything that was well, on their part of trademarks, they were not even litigants, they didn't even go to court, the litigation department was on the other side. They were just people who registered trademarks and renewed trademarks. There's not a lot to learn, there's not a lot to know about trademarks, registration and trademarks. There is something to learn, it'll take you six months then you know. They've been doing it non stop for their whole career and they were not even qualified. This Oldridge, what's his name, Oldridge, this Brett Oldridge didn't have a degree, he was one of the old school, he did his articles and he became an attorney. Ja, he didn't have a degree, not a B Proc, not a Dip Proc, nothing, he had no degree and he became a trademark agent. So yes he knew his work, he was one of the best in the country, but it's a iota of the law. He didn't have any understanding of law, he didn't have any understanding of anything

beyond law, art and literature and things like that. He didn't understand at all.

048 **TRACY:** A technician.

049 **INTERVIEWEE:** No he was (unclear) and he was a good technician granted, he was a perfectionist and he knew his work and he made enormous amounts of money, because you can imagine, in those days it was the four, the four homelands as well, South Africa, Transkei, Boputhaswana and Venda. So you have to register in each of them, renew in each of them. If you've got a trademark like Coca Cola, you sit in the afternoon, you write fees of R2 million. If you do everything correct, it's R2 million. In those days R2 million was a lot of money. So they were capitalists, they were money driven, they made lots of money, they had no life, they hated one another, the partners at Adams & Adams hated one another. They couldn't stand the sight of each other because I don't know, because the stakes are so high, because they wanted to have more and they blamed their partners because they were working so hard. I don't know, but it was a write off, it was toxic, that's right word, it was toxic and I couldn't wait to get out of there. As I say after two months, or a month, two weeks, I knew this is not for me. I'm never going to be an attorney, never. The one partner asked me to do a record list, in other words a list of all the trademarks of Bodum, it's a milk product and they had the trademark, and if you know what, how to do it, it's very easy, but if you're a first year articled clerk, to second week into, into your articles, it's like a due diligence, you must look at everything. I sat there day after day just staring at those cards and thinking to myself, this is not law, this is not what I want, and of course I didn't do the work properly because I wasn't trained, I didn't know how to do it. It's easy to do it if you know what to do and wanted to look forward, it's difficult to do it if you don't know what you're doing. That already gave me an indication that if this is law, if this is attorney's work, I'm not interested. Even if they pay me a million rand a year, I'm not interested. So that was a very bad, that was very bad, and then of course to get away from that I opened, it's a long story, I don't want to go into now, but I opened a restaurant and hotel in Stellenbosch yes, and for four years I had the hotel and restaurant in Stellenbosch and then that ended up with the amalgamation with Fancourt and I then went back into law, I was the legal advisor to the Small Business Development Corporation. That was very pleasant, it was very repetitive, very simple, straightforward financing contracts, but it was wonderful working with the people. You know what the SBDC is, the Small Business Development Corporation. They got 50% of their capital from the government and 50% from the private sector. So they had lots of money, they really had lots of money and what you do then is people apply for loans and you go out and, well we were not business advisors, business advisors go out, investigate the loan and they aye or nye and when they say aye, then the legal department must go out and draft the legal documents. So it's just a financing contract, so if you've done that and you know what to do, then you've mastered the job. But it was so wonderful going out to the clients in Cape Town, this was now all in Cape Town, and to

see what people do to make a living. In Cape Town, up to well, until very recently, I'm sure it is still there, there's an old lady that opened a silver shop, a shop with Cape silver, well other silver as well, called Sterling Antiques and of course when I saw the file, I immediately grabbed it because I thought this was, I would be interested and she's a fascinating person, and I became extremely good friends with her and whenever I buy silver in Cape Town I buy it through her because she's knowledgeable, she hasn't always got the best in her shop, but if I say I want Cape silver then she gets it for me. You pay for it, it's a service but if I want a piece of Cape silver, Sterling Antiques will get it for me at a higher price that I would get at an auction but it would probably be a better piece as well. So I really enjoyed that and of course in Cape Town is wonderful. It's not a high pressured job after the restaurant and the hotel which was very, very high pressured and very high financed and lots of tension, it was a wonderful, just an ordinary job and then I became the personal assistant to the managing director Ben Vosloo who was also a professor at Stellenbosch and I knew him from there and he came down once for a director's meeting and the secretary, the sekretaris, not the secretary, like a typing secretary, but the sekretaris of the company was not there and I had to take the minutes, and he saw me immediately and he said "Where are you now, are you working for the SBDC, and how did it come" and dah dee dah and the next week or two there was a letter from Head Office saying, kindly transfer Jan-Louis to Johannesburg, I want to train him as my personal assistant and I want to use him here. And so I became involved in the high finance once again with Ben Vosloo, I learned a lot from him, he's not a lawyer, he's a political, he was a professor in political science, a political scientist and also not a pleasant man, I had some very good times with him, he taught me lots of things. But he was one of the first people to leave after '94, when the new government came into power, he couldn't because he was, he would literally sit in his office and he would pick up the telephone and dial and he would get through to P W Botha directly, not a secretary, not wait for the Prime Minister or whatever he was, he had a direct line to P W Botha and the same with Anton Rupert, he would say "Nee man, kom ons gaan vra net vir Anton" and then he would pick up the telephone and he would talk directly to Anton Rupert, so he was very influential, powerful in the Afrikaner Broederbond thing and it was an Afrikaner, it was an Anton Rupert initiative, the whole SBDC and he did well but he was, he was, I always want to say contaminated, he was a through and through Afrikaner aristocracy. He hated Affirmative Action, he hated, I wouldn't say he hated black people, but he believed that the black people needed guidance. Typical, even for an intellectual Afrikaner. Of course he got a PhD from Cornells, so he couldn't be that stupid, that only reinforced his idea that Affirmative Action is absolutely the worst that you could have, and he was contaminated with that, with that brush. When the new government came in 1994 he emigrated to Australia and I think he's still there, which is sorry because, it was a pity because he could have done much better if he didn't have these prejudices. But in any case, then from there I, when he left I.

050 **TRACY:** Other Afrikaners (unclear) like C G van der Merwe (unclear)

051 **INTERVIEWEE:** No, no, look I also studied philosophy at Stellenbosch and my professors in philosophy were Rossouw, who was a brilliant man, a true philosopher, he wouldn't even, if you asked him about racial prejudice, he would say I have a great problem with the concept, how does it work. He was just, it was foreign to him, he was a true philosopher and then Willie Esterhuizen of course was the Afrikaner who spoke to the ANC at Dakar, he was the organiser of the Dakar Meeting. So at Stellenbosch no, there was no racial prejudice there, the teachers that I knew at Stellenbosch were completely different. Ben Vosloo was also from Stellenbosch, he was also a political science professor there, but he was an exception. He was a hard core Afrikaner and you will never, you will never change them. They have been taught that that is how it works and that is their ideology and there is no ways that you're going to change them. And, you can't it's impossible to have such a man in such a power in the new government. He was clever enough to see that it would be completely untenable. But anyway, in that respect he was unpleasant, he was very, he had lots of prejudices. Then I became a prosecutor.

052 **TRACY:** (unclear)

053 **INTERVIEWEE:** What happened is, I was a legal advisor at the SBDC and then a senior legal advisor and then I became Ben Vosloo's personal assistant and then you become a manager. Now for me to become a manager, I had to move out of law because there wasn't a further part development in law. They only had small legal problems, it wasn't a legal firm, it was just a financing firm and to proceed, to progress in the SBDC I had to finally forsake law and say I'm not going to do law any more, I'm now going up into business and I didn't want to do that. I don't know why, I just felt that I don't want to do that, I don't want to, I don't want to go and leave, not have anything to do with law. And the best thing, the best way to get back into law because I'm definitely not going to become an attorney again, and it would have been very difficult to become an advocate at that stage but I was completely out of my depth, I didn't know people in Johannesburg and it would have been very difficult. Although, I don't know, perhaps it would have been a clever thing to do, but I then thought, become a prosecutor, see what's going on in the court, if you like it, you can become a state advocate and then you can go for the bar, which didn't happen, I became a magistrate, I became a senior prosecutor and then magistrate and then I did my LLM in Human Rights and then I went down to Cape Town to become a magistrate there and ja, I started here and I finished it when I was down there and then as soon as I heard that I had a human rights qualification, because that was as rare as hen's teeth, they brought me up to Justice College to lecture human rights in Justice College. That was very interesting Tracy, that was a very interesting couple of years. Not so much at the college itself, because there you had students, I lectured Roman law to the students there as well. You know the students that want to make a career out of the Public Service, they got

bursaries and they spent six months of the year at Justice College and they got lectures. We taught them from the UNISA handbooks. Not so much them, and also not so much the, the other things that we trained prosecutors and magistrates, but that was more interesting because they're more senior people, you got interesting questions, but the real interesting thing was, we went all over the country lecturing to rural magistrates, from rural magistrates and prosecutors right up to some of the provincial judges. We prepared with old Professor van der Vyver, I don't know if you know van der Vyver, he was here at ...before and we went through South Africa and like a flying circus, like a road show, and we lectured everybody on the Constitution. That was fascinating, I must say that was.

054 **TRACY:** (unclear)

055 **INTERVIEWEE:** Both, the interim Constitution, we did everything and then when it was the final constitution, we did the final Constitution again. That was a great experience and of course.

056 **TRACY:** (unclear)

057 **INTERVIEWEE:** It was very exhausting flying all over South Africa, but it was wonderful to see the enthusiasm of people, magistrates in the Transkei, who've never heard of such a thing as the Constitution, sitting for hours upon hours taking notes on this new Constitution and listening to somebody who is obviously from the old order, telling them now what the new government is going to do. They were almost in awe, I thought they would be very aggressive and we did get some aggression, put it in (unclear) I don't even know if you know where that is. We got some, they refused to listen to us, but that's the only, that's the only time there was any aggression, that was also towards the end. But right through South Africa from the judges of Natal, the old white judges to the magistrates and prosecutors in Venda, it was like, it was almost evangelical. You were the, yes you were the bearer of the good news, you are the great white knight and you are bringing this good news to them. And it was exhausting because it was only the two of us, a colleague of mine and myself, so it was two hours on for him and two hours off for me, then two hours on for me, two hours off for him and so you went through the day and then you had workshops in the afternoon. It was exhausting and that's how I met Alfred Cockrell, you know Alfred.

058 **TRACY:** Yes.

059 **INTERVIEWEE:** Ja, that's how I met Alfred.

060 **TRACY:** Did you feel yourself in the position, this great attorney (unclear)

061 **INTERVIEWEE:** Mmm, yes, yes, ja I felt like Livingstone discovering a dark continent and bringing light to a dark continent. I know that's ridiculous, but that's really how I felt. It was, that's how we were received. It was like two great explorers bringing the good news and I was very enthusiastic in my lectures. I don't know why I lost that great enthusiasm but.

062 **TRACY:** That's what I wanted to ask you, do you still feel the same way?

063 **INTERVIEWEE:** I do but I think I need a sabbatical, it will come back after my sabbatical, I'm very tired, my lecturing is very tired, and I get very irritated very quickly with the students and that's just a sign that I must go on sabbatical. But Angelo is now so difficult with his sabbatical.

064 **TRACY:** (unclear)

065 **INTERVIEWEE:** No I haven't applied I must go, I must talk to him about the second half of next year or 2011 and Glenda already told me I can go in 2008 and then of course when he took over he said no, but it doesn't mean that she said you can go, you must apply and I applied and then I was too late because there were lots of other people. And then I met Alfred at one of his workshops and I was immediately impressed with him because he's so brilliant, he's absolutely brilliant. Have you seen him, he's absolutely brilliant. As a matter of fact I came to ...one Saturday morning and Ian Currie and Alfred Cockrell and Unterhalter and some other bright spark, who was he, there was somebody else, they gave a workshop on the new Constitution. I've got enormous respect for Ian Currie, (unclear) Unterhalter was just what he is, a puffed up pommy, I'm a bit critical about Unterhalter, I shouldn't be but he's just more, he's just more bark than bite. He presents himself so brilliantly and his diction is so good. You would think that everything that he will say will sense, it will be brilliant, but it isn't, it's hollow, he's got very limited intellectual depth I think. Whereas, when Cockrell starts talking, when he takes the podium, you're just transported into another world. It's uncanny, he is really and he doesn't try to be, but anyway I met him there on the Saturday and on Monday I emailed him and said look I've got these questions that I would like to put to the magistrates and prosecutors, would you like to look at them and tell me if you think that they are good or tell me what you think of them, and I sent it to him and of course he didn't like them, he tore them apart and he told me what to do and I then redrafted them and I could see exactly what he was getting at. So we got to know one another and a difficult character, very difficult character and to thank him for that I said look there is very little I can do for you, but I can invite you to come and give a guest lecture at the state advocates hall at Justice College and there is, we'll come and fetch you, there's a lunch and we'll pay you for the day. Not that I thought that that was important, but that was very important to him, he immediately wrote back and said how much, what is the cut.

066 **TRACY:** Was he teaching at Wits?

067 **INTERVIEWEE:** He was teaching at Wits, and so I gave the first lecture directly before him, I picked him up early in the morning here, I lived in Mellville, so I picked him up early in the morning at Wits, here outside the gates and we zoomed through to Justice College, I gave my first lecture and he gave the second lecture. We went for lunch with Cecile van Riet, and it was a very pleasant lunch and everything went extremely well and his lecture of course was absolutely spot on and we paid him not only for the full day, we paid him

for his preparation time as well. So for the Civil Service, it was a lot of money, it was R3,500 for one day which is, I thought very handsome. Then on the way back he said, look I don't want to get your hopes up or anything but you know, you are a very, very good lecturer and we need good lecturers at ...and there is an opening there, would you be prepared to come to Wits. I said yes, is the Pope a Catholic. Instead of driving through to Justice College every day, I'm five minutes from home and university is much better than Justice College. So I came for the interview, the interview went very, very well and I got that position.

068 **TRACY:** (unclear)

069 **INTERVIEWEE:** Ja, no, no (unclear) was Dean, that's how it worked, you had a head and a dean. (unclear) I knew because I (unclear) and I asked David and Alfred to provide me with a testimonial and I knew if David wrote a testimonial they would like it and I gave a very good performance, I prepared myself very, very thoroughly and not even old (unclear) could pin me down because I knew he was going to ask a certain row of questions, I can't remember it now of course. (unclear) no but Mohammed said this in this case and this in this case and that is what he really meant. So it was very good, it was one of the best interviews in my life, so there I am, here.

070 **TRACY:** (unclear)

071 **INTERVIEWEE:** Ja, look the impression that I had of ...was through the eyes of Angela, Angela Itzikowitz, David Unterhalter, of course Alfred Cockrell, Carole Lewis and the people who were here were very impressive, Martin Brassey, he asked me some very difficult questions. Carole Lewis was there, Sir Jonathan Klaaren was there, Ian, Ian was there, (unclear) Ferreira, it was a very, very impressive faculty, not that it's not impressive now, but it was a very impressive group of people. David (unclear) was also still there, David (unclear) and Khan was here, but he wasn't at the interview, David (unclear) was there and then David and I knocked, we hit it off immediately, he asked me a question about Pablo Neruda, the poet and he just wanted to make the point and he referred to a poem by Neruda, and of course Neruda is one of my favourites and we just hit it off. We had a five minute conversation.

072 **TRACY:** (unclear)

073 **INTERVIEWEE:** Who, somebody said, I don't this is an application for a poetry lectureship but he was extremely impressed that I knew Pablo Neruda and very, very well. We could talk about it. So what (unclear) how (unclear)

074 **TRACY:** (unclear)

075 **INTERVIEWEE:** Yes, I am a far better teacher than I'm a researcher, that is a great pity because you must be both. Not that that bothers me too much, but not that I don't enjoy researching, I enjoy researching and that is part of an academic's life. I love doing research, I'm not a very good writer, I have great difficulty in writing, so as I say, that's a pity, that holds me back but I worked

flat out when I was ill now and when I was in Cape Town, I worked flat out for my lecture on Herbert Hart because I always felt that I don't understand Hart, I can see that he's brilliant but I can't see the brilliance. I'm a natural lawyer although I can see when you read concepts of law then you can see there's a great mind working here but I can't put my finger on it. I thought you must just, you must now do that, and I worked for 14 or 18 days on my lecture on Herbert Hart and the lecture was last Friday afternoon and it was magical, it was, even though I can feel that I am very tired and I'm not, I need a break, and I must, my teaching is not what it should be, if I (unclear) and I go for it then, then it's still there and I finally discovered why Herbert Hart was so brilliant and it was both me and the students, I think it was a wonderful, wonderful experience. Not that it was such a brilliant lecture but it was just a magical experience, walking into a class knowing nothing about a philosopher and walking out of the class with a conceptual framework that you can engage in a intellectual conversation about this man.

076 **TRACY:** So you felt like the students have attained that?

077 **INTERVIEWEE:** Oh yes, that's what made it so magical. They not only understood it but they engaged in it and they, they got to a position on Herbert Hart that took me the best part of my life and they almost, not exactly, but they almost got there within two hours and that is magical, that is magical.

078 **TRACY:** (unclear)

079 **INTERVIEWEE:** No, no I mustn't be (unclear) because that's all I have, I am a good teacher, I can take a very difficult concept and if I understand it I can bring it over, that I can do very very well and I'm funny and I'm not a fascist, I like people and I like to convey knowledge and information. So I am a good teacher and that's what keeps me, it's just the teaching. (unclear) also asked me in a less, in a more aggressive fashion, what am I doing here, and it is the teaching, it's the teaching, I am very fond of students and I like teaching, it's, I can't think of anything else to do, there's nothing. On Friday evening we saw a hopeless film, Rachel Getting Married, please don't go and see it.

080 **TRACY:** (unclear)

081 **INTERVIEWEE:** No, ja, unfortunately she's a good actress but agh, anyway we were sitting there and one of my students came, one of my old student came in (unclear) in Rosebank and came over to our table, we were just drinking something before the film and he said agh you know practice is boring and so depressing, where are those wonderful days when we were at university, you were absolutely free and absolutely stimulated and inspired and wide eyed and bushy tailed and obviously my lectures were so wonderful and inspiring and I said that is the problem with practice, I get more stimulation out of a Herbert Hart lecture in two hours than they will get in a whole career. Michael my friend had just phoned me, he can't stand his work, he works because he gets a huge salary, because he's a senior partner, but if he could

stop tomorrow he would. I would really desperately miss it if I had to stop tomorrow to not being able to teach, so that's what I'm doing here.

082 **TRACY:** (unclear)

083 **INTERVIEWEE:** I'm (unclear) I'm teaching.

084 **TRACY:** Thank you that was very interesting.

001 **INTERVIEWEE:** They're very similar aren't they?

002 **TRACY:** What the questions?

003 **INTERVIEWEE:** Ja.

004 **TRACY:** Not really (unclear)

005 **INTERVIEWEE:** Ja, if I go wrong.

006 **TRACY:** Okay the 2.1 is what is the function of the academic base of legal education and then (unclear)

007 **INTERVIEWEE:** Well, we've already covered this slightly, just marginally, we've just skimmed past it I think. Let's start with the first part of the question which is what's the function of the academic base of legal education. That is something I've thought about quite extensively and it is, like all these question that's you've posed, it's a very difficult question to answer because having gone through the whole spectrum from a legal student, being a legal student myself, being involved in practice, seeing law in practice and then eventually coming back to academia. In an ideal world the academic phase of legal education should be after the practical phase and I see this with my senior students, with my mature students. Mostly the, mostly the introduction, the post graduate students, they have a far greater, even if they studied something completely different, just the fact that they have already got a degree or some inkling of practice or of just of life, if life can be practised and I use practice in the broadest sense possible there, not of legal practice. First of all, obviously the students are more mature and they have a far, far greater concept of how important these theoretical outlines are. There appreciation for the fact that it is a huge luxury to be taken away from life and being placed in the experimental phase for four years where you are bombarded with theory. Just pure theory, so you have a framework to work from when you work, when you get to practice. Under graduate students, my foundations class, where they should have a great appreciation for how important Roman law will be for the future legal careers and not ever in a direct sense, but in a very, in a very abstract and a very theoretical sense have no, they have no concept of what they're working with. They can't wait for the class to finish, they can't wait for the year to finish. They are literally, they are waiting their lives away because they don't appreciate what's going on. Not all of them of course, there are the bright sparks, very interested and realising that this is the foundation of what they're going to build their legal career on. But, I don't know who said it, youth is wasted on the young. That is unfortunately true and as far as legal training is concerned, and as far these concepts that you're working with, imparting values and of even morality, it is extremely, extremely difficult to impart those values in a fresh under graduate class, a class coming from matric, from school. Whereas it is.

008 **TRACY:** Why is that?

009 **INTERVIEWEE:** I think, I think the schooling age is getting lower, I think the secondary education is getting more, is getting less rather than more, is getting less theoretical. The appreciation for theoretical frameworks is not stressed in secondary school and of course it is also because, first year students are young people, they are boisterous, they are full of life and to bombard them with heavy concepts of theoretical morality and ethics is very difficult, just because of the stage where they are in life. They're not concerned and they shouldn't be, as I sound like a fuzzy duddy, but it's not the English that I wish to portray, I don't think, an 18 or 19 year old man or woman should be deeply concerned about the theoretical frame of morality that they one day are going to adopt for their own practice. This is the time of boisterousness and of experimenting and of exploring life. The last thing that you would be interested in, if you're such a person, is where the lines are drawn, that is what university studies are all about, is to broaden your horizon, you don't want to be limited, you want to be able to think freely.

010 **TRACY:** People often say that the academic phase of education is meant to help students (unclear)

011 **INTERVIEWEE:** Yes, yes of course, no, no, of course eventually we get there eventually by the grace of God we get there. That is what we try to do as teachers, that is what you, that is why you teach. If you use the Socratic method, every single question you ask in the class is aimed at stimulating their thought, because they have got interesting and fresh thoughts and you must stimulate them. They are just not at that stage in their life that they are interested in what you are saying. This is very different in a post graduate class. I made the experiment just didactically when I see the class is lagging, if there is a double lecture and as we now have had a triple lecture in Roman law, but in my post graduate class if there's a double lecture and I see we're doing theories of statutory interpretation which is bone dry, I take out a book at a good break in the lecture, not in the middle of a sentence, but I take out a book and I say look this is the book that I'm reading, it's a book about a professor that has gone off the rails and he is now selling dog food and he's on a trip leaving, leaving his wife, on a trip in Columbia, and when he comes back his wife is completely demented and they immediately, the post graduate class, they are immediately interested and there's like, with you and I, we immediately want to know the rest of the story, you're immediately interested, this is an interesting story and it is of course a wonderful story, it's one of those surrealistic Columbian (unclear) stories. But the post graduates immediately want to read the book, they want to know what is the name of the book, where they can get the book, they want to read the book. In the under graduates, that if I say, class this a book that I'm now reading, it's a licence for them to start chatting, they're not interested in what I'm reading, they're not interested in what the book is about, they chat to one another. I don't think it's wrong, I think that's what people do at that stage, they're not interested in other things, they want to get their bread licence, one student said, we're just interested in getting our bread licence and then we want to go.

012 **TRACY:** How do you link the interest in the book to (unclear)

013 **INTERVIEWEE:** Look the subjects that I teach are all concerned about what you are now calling, learning to think like a lawyer. I do introduction which is learning to think like a lawyer, you must expose the students to concepts, to the building bricks.

014 **TRACY:** Like?

015 **INTERVIEWEE:** Concepts like law and morality, law and religion, law and ethics and then every, those are the easy concepts, (unclear) you know that they're problematic but then also they must know what is the difference between a judge and a magistrate. They must know what's the difference, they must know that there are two sides in a court case, they must know there's a higher court and there's a magistrates court. Everything you do in introduction is to supply them with the building blocks of legal reasoning, to tell them that there is a way in which a lawyer reasons, to tell them that there are certain technical terms that they must come to term with such as (unclear) and (unclear) they must know these technical terms. If they want to argue like a lawyer they must be able to find first of all the arguments of other lawyers and condition themselves and expose themselves to court cases so that they can hopefully pick up the arguments that are put forward in that court case. Then in Roman law the greatests and the only value of Roman law as I've been trying to explain to Elsa is not that we're teaching them an ancient civilisation, that of course is also valuable now in the time when there are no more humanity subjects. But the wonderful thing is in Roman law you have a clove system, there's no more diction for Roman law, no more Roman law cases. It is a closed system of 1000 years and you can experiment by arguing in that system very easily because you know all the arguments. It is not as if there are going to be a court case changing Roman law principle tomorrow, that doesn't happen. Whereas an unjustified enrichment of course, if you have a major unjustified enrichment court case the whole scenery, the whole scenario of unjustified enrichment might change. So (unclear) is also supplying them the concepts and the know how of how other legal thinkers have engaged with what is the, what does a judge do, how does a judge come to his decision, what does the major theories about where law comes from and that all prepares them to think like a lawyer. It is not something that comes naturally, it's not something that you're born with, it is something that must be taught and that you must achieve yourself and that is the academic or the abstract phase of legal learning. You must be, it's like a club you must be introduced into the club and you must be taught the rules of the game. You must know when you stand, you must know when you sit although we don't teach court etiquette and things like that at university, it is a good thing that if students leave here that they know what is on and what is off concerning legal theory and to think like a lawyer, to be able to read a court case and to argue a legal point. By the end of their careers, when they're in their fourth year, when I get them for jurisprudence, the students have changed considerably. They are

like the (unclear) students that I have extremely interested in their work, they also want to pass the subject, of course they know if they don't pass jurisprudence, they won't get their degree so it's a matter of seriousness but they engage on a very fundamental level with very difficult legal concepts and even though class is unbearably large about 250 people, there's not one single class that we don't have extensive interaction. I hardly start with my lecture and then there's a question and then that will lead to more questions and other questions and of course jurisprudence, you know you never get answers, so that is very frustrating but it's also very good. Students at that level, at their final year, I think appreciate the fact that they must have an academic background, that an academic background through legal studies is extremely important because that enables you to not only know how to think as a lawyer, but it also enables you to unlock a far more richer background to the legal question that you have to answer than just doing a simple opinion. So it's between the devil and the deep blue sea, I would like to say that things like introduction must come at the end of the syllabus where students are more serious and they can gauge on these concepts but then how are you going to teach them how to read a court case. So I understand those problems, I would definitely like to see Roman law move to the final year like at UCT and Stellenbosch where you get towards the end of your studies where you know you're going to be a lawyer, you are engaged in being qualified as a lawyer, you are serious about being a lawyer and then you are, you are given yet more tools to think like a lawyer.

016 **TRACY:** From what you said, it seems to me that you think that the academic phase is not about teaching, the underlying word (unclear)

017 **INTERVIEWEE:** Yes, I think so. Look if you're a positivist then morality has got nothing to do with law, then you're not allowed to teach any morality and it would be wrong to indoctrinate students with your own morality or with a morality. I think what one should of course do with your teaching is you should create a certain ethos, you should create an ethic, you should create a moral space in which you teach law because you can't not have that. It shouldn't be, it shouldn't be like the Potchefstroom University which proclaimed itself to be a Christian Higher Education Institution and where they started lectures with pray and thanksgiving. I think that is wrong, we are a secondary university, but we are also training students in a very, very specific profession and if you don't teach them the likes of basic moral conduct then I think you are failing.

018 **TRACY:** (unclear)

019 **INTERVIEWEE:** No, no, a lawyer, a lawyer, not generally, definitely not generally. Because then you're going to become the, you're going to the university at Witwatersrand for general moral conduct or moral re-evaluation, that kind of nonsense.

020 **TRACY:** So would this relate to things such as the traditional topics (unclear) such as (unclear)

021 **INTERVIEWEE:** Yes, there are a myriad of things that you, you know virtually everything that you touch in law, everything that you teach students in law has got a moral aspect to it. You must certainly not suppress that, you mustn't, you must also be very careful not, if you teach to a heterogeneous group, you must be careful you're not going to offend people because you've got Christians, Atheists, Muslims, people from India, Asians with a variety of cultures and religion and you must not and you cannot offend somebody's religious sensitivities because then you're going to alienate them and that is the worst thing that you can do in a jurisprudence class, to alienate somebody on the grounds of religions conviction. So you must be very careful, you must not mix the two and you must know that, what you must teach the law students is a sense of integrity, a sense of moral wellbeing without being denominational and a sense of honesty and uprightness that you, you can trust these people with large amounts of money and they are the custodians of the society, they are the people who look after society, they are the people, they are the pillars of the community and therefore they must uphold certain personal and moral values. But, you cannot say, this is a Christian value and therefore you must uphold it, that will offend half of the class and then they will say no, they will reject that.

022 **TRACY:** So you are teaching, touches on the question are values, etc. conveyed irrespective of what the teacher does, (unclear)

023 **INTERVIEWEE:** Um, look one of the banes of teaching morality is making it so abstract and so academic that it has no specific application, that it has no denominational application. So you can, if you make it very, very legal specific, you can teach a framework of morality. I would think it would be, it would be better to do it, it would be better to do it not explicitly but to do it through for example, roll models, through indirect methods of showing that the, the learners are showing the students why they should have an inherent sense of morality.

024 **TRACY:** So you wouldn't endorse at the academic phase specific (unclear)

025 **INTERVIEWEE:** It would be, it could be very good but then that is like playing with fire. It would be, you will have to, you will have to draft the curriculum very, very carefully. I when they introduced, what is that course that.

026 **TRACY:** (unclear)

027 **INTERVIEWEE:** No, no, no, it's a course on Islam.

028 **TRACY:** Oh yes, yes Wesahl did it.

029 **INTERVIEWEE:** Wesahl did it, I was completely opposed to that because it is denominational, it's religious specific, it can very easily, knowing Wesahl of course, I think the course is in safe hands but if the course ends up in somebody's other hands, even if in my hands, I would not be able to know to teach that course. A, I haven't got the knowledge and B I don't know where to draw the lines. The same with Christian ethics, you could have a course in

legal ethics, I know that my friend, Johan Rossouw at UJ has got a course, a philosophical course in business ethics and I know him quite well to say that it would be, it would be ethics, with a capital letter it would ethics, it would be theoretical ethics, it will not be denominational ethics. He would not say, that businessman must be Christian, to be a good businessman because that is very dangerous.

030 **TRACY:** (unclear) once they finish with Law School (unclear)

031 **INTERVIEWEE:** Yes.

032 **TRACY:** So why can that not be taught at Law School?

033 **INTERVIEWEE:** No, it can, it can but it must be like Hilton said, it must be a pure theory, there must be no denominational.

034 **TRACY:** No religious.

035 **INTERVIEWEE:** No religious overturns in it?

036 **TRACY:** Do you think it would be effective (unclear) students don't have any experience (unclear)

037 **INTERVIEWEE:** It's much better, it's like I think, I think that is an applied subject and I think although we teach things like criminal procedure and civil procedure, I never understood criminal procedure or civil procedure and I did very poorly in those subjects because I couldn't see the sense, I couldn't make out what was going on here. Until the moment I started appearing in a court, and all of a sudden everything made so more, so much more sense. Especially something intellectual like the law of evidence when you're confronted with an evidential problem in court and you're on your two feet, then all of a sudden, it's no longer a joke. Your opponent has now told the magistrate or the judge that the piece of evidence that you wish to present is not acceptable. He doesn't tell you why it's not acceptable and the judge then says please address me on whether this, whether you think that this, this document or this tape recording or this film that you want to introduce is acceptable, is real evidence. And that's when you get very, very nervous and you realise how important your theoretical grounding in the law of evidence is because that's when you need it, that's when you must convince the judge, the magistrate, that this is a piece of real evidence. So in that sense of course, ethics is an implied, is an implied science and I think it would be much better if people see the dangers, lurking in practice before you try and teach them the theoretical parts. At university I think what you should do is just, a background, you must instil in them in a sense of honour, a sense of integrity, a sense of honesty and uprightness but it is impossible to, to impress upon them the urgency or the magnitude of the problem and how important it is. Now that only comes if they have to pay the water and electricity bill, they haven't got any money on their overdraft left and there's R20 million lying in the trust account, then you, I mean there's no university lecturer or professor that would teach you integrity better than that. Then you know, rather face

your demons, go to the people you owe money and say I haven't got money, do what you want, but don't take your trust money, then it drives the point home very, very quickly. But of course it's, the time is too late if you're not a decent upright citizen at that stage when you're qualified and you're confronted with an ethical problem, no amount of training is going to help you.

038 **TRACY:** (unclear)

039 **INTERVIEWEE:** Look working with raw material, so you can change it, you can change it by, by your teaching, you can as we've said earlier when we spoke. All the roll models that I have in law they, they were all these, almost superheroes, people who stand out as (unclear) or just only on their outward appearance, you can see a mile off that Professor A B de Villiers is a legal professor, you knew that he was an important person and that he wouldn't dream of taking, you could trust him with your money or Margot, you could see that this is a very decent and a very upright citizen and that you could trust him. With that kind of examples and with that kind of exposure of the students do, to things like that, I think you can convince them, that there is a model framework and you can convince them that being and having integrity is far more (unclear) or it's better than using your trust accounts for drug money.

040 **TRACY:** (unclear) question 2.1 was about the models that you had and how it related to your teaching so you touched on that now, then what is the mechanism, what is, what makes a student think that because Margot was like that, that I should be like that. How does it work, how do these models work.

041 **INTERVIEWEE:** Look, I think it's the same way that the film stars work or the (unclear) work. It's identification, you identify with those people, you think that is how I want to be. Nowadays it's very difficult, I always thought it would be wonderful if you could wear gowns while we're teaching. Now in South Africa it's very hot and it's not practical. Even in Cambridge when I attended a course in Cambridge, not all of the lecturers wore their gowns and they came into the class and they said please may we take off the gowns, it is compulsory for us to wear the gowns but it's not practical. And then of course the class being an international class, we would say, please what are these gowns, but I think it does help you. I can remember the best lecturer I had at Cambridge was Tony Weir, and he would rather lecture in the nude and he was a very unattractive little fat man, but he would rather lecture in the nude than not lecture in his tattered old, 65 year old gown. He was brilliant, he was really a brilliant man and in a certain sense I identify with that, with him being so clever, he translated one of the great German works in Roman law. It wasn't brilliantly done but the fact is, it is far better than not having a translation. His German is not as good as it should be to translate (unclear) great German commentator and he, he took his sabbatical and he translated the whole (unclear) and of course, now we have in very difficult

English, the German like English, but we now know what (unclear) says, you can quote him, he's open, that is a wonderful, wonderful thing and I identify with it, I'd would love to do the same kind of thing and I idolise Tony Weir and he, he's such a, being a Cambridge don, he's a very civilised man, he invited us, the whole class, at the end of the course to have drinks in his Chambers, or in his rooms, they're not called Chambers, in his rooms in Trinity College. They were very humble Tracy, I mean for somebody to sacrifice his whole life to academia and that's where he lives, it's not as if he's got another house in the country. It was two small little rooms and a kitchen above a corridor, I don't know if you know what Cambridge looks like, really the accommodation is not great. But it was extremely well appointed, it was full of books and leather couches and lamps and little nooks and crannies. I think the drawing room was no larger than this room that we're sitting in but it was really a cozy room, really very, very cozy and his invitation had a little illustration on, of some parrots or something I can't remember, and I asked him during the cocktails, where did you get these beautiful illustrations because they were really beautiful and he had them made specially for us, it was a class of say 50 to 60 people. He had them printed and that's remarkable, now look there is a Cambridge University press, as a don, I'm sure he's got an account or a privilege there, but the effort, and when I got back, he's a major player in Roman law, he's really one of the great names internationally and when I got back, he wrote me a little note on his notepaper saying "You expressed an interest in these prints, I got them from this book" and the full history of how they were produced and they come from France, I was absolutely amazed. I didn't have the, I don't know what, the gumption to enter into correspondence with him but I couldn't believe that such a famous person would take such a lot of time and effort, and just one little question, I just asked him "Tony where did you get these beautiful cards" as a conversation piece, "Where did you get these" and he wrote me a full letter. Now that is something I aspire to, that is how it works, he's in fact a very unpleasant academic, he's extremely snobbish, he's extremely off putting, he laughed in my face when I tried to engage him on unjustified enrichment because they have a different way of looking at it, he's everything that the Cambridge don can be, everything negative that a Cambridge don be. He's snooty, he's unattractive, he's fat, he's probably living for his whole life in those little rooms in Trinity College where he's surrounded by young men, he's probably homosexual, I don't know, don't publish that, but I mean I would imagine that there's no wild female in his life, he's not a, he hasn't got a family, he's a typical (unclear) just a few steps further and then he had these wonderful attributes, caring and entering into correspondence and that is something that I think is wonderful and that I will try and emulate definitely.

042 **TRACY:** (unclear)

043 **INTERVIEWEE:** Ja, yes and took time to, took time to recognise me which is a wonderful, it's a sign of great humanity and a sign of great understanding and accepting that we are all, despite where we are in this brief life, we are all the

same, we're all going to die and rot, there's no special grave for the Margots there's no special tabernacle for the Tony Weirs, we're all going to die in the same way and that is, it's not everybody can see that, it's not everybody that can do it.

044 **TRACY:** So you mentioned things, I don't know if they're all, describe them all as values but it's honour, uprightness, integrity, honesty, are there any others (unclear)

045 **INTERVIEWEE:** Oh there will be. When I used those words, I thought you were going to ask me that. My vocabulary is not strong enough to think of all the words Tracy but, you know integrity and honesty I think is, for a lawyer, is extremely important. You know that thing not to take money out of your trust account. Somebody told me, well you probably won't know him, when the Constitutional Court judges were appointed, I didn't know half of them. I knew some of them but I've never in my life heard of Kate O'Regan, never in my life so, at that stage I was lecturing with Johan van der Vyver who was a professor here at ...and he was, he's left Wits, there was lots of unhappiness when he left Wits, or he left ...with lots of unhappiness but he was on his way to the Carter Institute for Human Rights, where he still is, and we gave a tour for the Department of Justice all around the country to inform the prosecutors and the magistrates and even the judges of the new Constitution. It was a very enlightening experience, it was also very tiring, with great fatigue, we were travelling, every Thursday you'd fly somewhere and then Sunday you'd fly back. And then on Monday of course you start with your ordinary work, so it was very exhausting but it was a great and enlightening, I learnt a lot, especially from old van der Vyver and I sat next to him on the aeroplane and now what do you talk about. Van der Vyver is an Afrikaner like myself and he was chucked out of Potch because he didn't agree with the, what we spoke about earlier, about whether it's a Christian national university, and of course with the Apartheid policy. They also had other similar ludicrous policies about dancing and things and he didn't agree with anything and they wanted him to sign something and he said, just, I won't do that, and he was chucked out of Potch and then came to Wits. So he was a kind of an Afrikaner rebel professor, but very highly regarded in Afrikaner circles. So I was very comfortable with him, he was like an old uncle or old, or a grandfather, it wasn't, it didn't seem as though as something of great learning or in the sense that I would see (unclear) or whatever. But, nevertheless the man was standing, a man who's views I respected, who he is, and he knew lots of people. Who is this Kate O'Regan, where does she come from, surely she can't be qualified to be a Constitutional Court judge, I've never heard of her. And then he told me an anecdote, and he said no, no, no, Jan-Louis you are wrong, of course we did this all in Afrikaans, so he says you are wrong, I know her very well and I think she is more than capable of becoming a Constitutional Court judge. A, of course of her qualifications, she's got impeccable qualifications and B, she has almost unblemished integrity. And I said what do you mean, and he said there was a scheme at UCT whereby if you were pregnant you could claim, you could claim certain,

but you will understand when I'm finished, there was a grant that you could claim from if you couldn't continue with your normal activities, you could get money from this grant, appoint somebody to do A your research or B your teaching even, for you while you were pregnant. She was pregnant while he was at UCT, I don't know what he did at UCT (unclear) van der Vyver and she was struggling because she was very, very pregnant and he went up to, the whole school went up to her and said Kate there is this possibility, you can apply for this and then get somebody to help you with your teaching or your research or writing or proof reading or whatever. It's not a huge amount, it's a couple of thousand rand, but it is available. And he said, she said "No, I don't feel that I need that, I really don't feel that I need to get somebody to assist me. I'm not that incapacitated, I can carry on, it's just going a little bit slower, but I can carry on and I'm not going to use somebody else's money to help me while I can still do it very well". And he said that impressed him as somebody with great integrity. We're all academics, and we all know that there are pots of money lying around, you must know how to access them, but if you know how to access them, you can get quite a lot of money, but you must do it, you must do it with integrity.

046 **TRACY:** (unclear) she acted in a principal way.

047 **INTERVIEWEE:** Yes.

048 **TRACY:** (unclear) that money is really meant for somebody who is incapacitated (unclear) comfortable for her.

049 **INTERVIEWEE:** Ja exactly.

050 **TRACY:** (unclear)

051 **INTERVIEWEE:** Her uncomfort was not enough to take the money from somebody else who was really incapacitated, ja. And that is integrity, that is integrity. There would not be a question asked if she applied for the money, she would of first of all get the money in an instant, and everybody would be glad to give her the money because it was a faculty point. But she just didn't want to because she thought that she didn't deserve it, or that she could have done without it. Now well you see, because one must also try to be too great a (unclear) because you can also damage yourself and I think it is very wrong if there is some money, like Marius told me the other day. (unclear) that there are people here with R60,000 in rent and they don't use it.

052 **TRACY:** Yes.

053 **INTERVIEWEE:** That's also not, that I think is crazy. I can, I can assist them with that little problem and our very good friend, mutual friend old Mike Larkin, it's common knowledge when he left here, he left with a rent of R48,000 and I mean he couldn't take it with, we had to spend it, I had to spend it on commercial books for the library and I think there was a little sticker in front saying it was a donation by Professor Larkin, but that's, he could have used, I don't think one should go that far, I don't think one should

jeopardise yourself just because for the sake of jeopardy. I think that is also very dangerous. I know what the situation is with Kate O'Regan, perhaps she had not so difficult pregnancy and she could go, obviously she did, but if you, if there is such money available and you feel, I wouldn't be, I wouldn't be too strict on myself. I haven't got the integrity that Kate's (unclear) Constitutional Court judge.

054 **TRACY:** I think it's (unclear) your ability to act according to the same principles across different contexts of life.

055 **INTERVIEWEE:** Ja, and consistently.

056 **TRACY:** And not to be swayed here (unclear)

057 **INTERVIEWEE:** And to do it consistently, that is true, ja.

058 **TRACY:** Okay so you don't want to add words to integrity, honesty and.

059 **INTERVIEWEE:** There are, also I have difficulty because it's a second language, there's a wonderful Afrikaans word that they use in testimonials always, it's an old archaic Afrikaans word but it, the word as a phrase "Hy is a man van inbors" Which is now, and it says exactly what I'm talking about. You must be a man of character, you must have, you must, you must have inbors, you've got heart. "Jy is n man van inbors" but he is a man with heart and a man with heart means you're honest, upright, good solid citizen, a good solid family man, you will give to each which is owed to him, you will be honest in all dealings, you will not bear false witness. Tracy, how long can we go on. There's a myriad of things.

060 **TRACY:** Inbors.

061 **INTERVIEWEE:** : Man van inbors. I'm doing an interview my dear. I forgot it again yes, but on Thursday I had it here, you were not here … Oh Thursday I was here … I promised her my old laptop so.

062 **TRACY:** Wow.

063 **INTERVIEWEE:** It's really. It's no longer working, tomorrow my dear, I will make a note in my book, okay. A man van inbors.

064 **TRACY:** How (unclear) how do you try to convey this to your students, what are the means (unclear)

065 **INTERVIEWEE:** Don't say that, that's difficult, that I don't know if I do, I'm certainly, I'm no Tony Weir, I'm not, I'm not that eccentric and I'm not, and the students are also not susceptible to that kind of eccentricity, or I'm no A B de Villiers or Cecil Margot. At ...everything is informal so you don't have this distinction. I often wonder if ever I walk on campus and the students see me, obviously they know me better than I know them because they sit in class, and they say "Morning, morning Mr Serfontein, or good morning professor, I'm not even knowing exactly where I fit in, in the hierarchy, I often

wonder how they, how they distinguish me from others, from other A academics and B, just from other people on campus. Obviously I'm much older than a student, but there's very little distinction between us as teachers and the students and because ...is so democratic, that is what happens here. They don't like distinctions. So it is very difficult Tracy, you can't do it, are you getting my point, you can't do it outwardly.

066 **TRACY:** Distance is a mechanism, the ability to create some sort of gap between yourself (unclear)

067 **INTERVIEWEE:** Oh yes, oh yes of course, (unclear) that they gave you, they are all, I stand in awe of these people because.

068 **TRACY:** They created a gap (unclear)

069 **INTERVIEWEE:** Yes, yes I think so. So that distance is not there, there is nothing.

070 **TRACY:** (unclear)

071 **INTERVIEWEE:** Yes, yes, slightly but I'm also, I'm also very popular and I hate being rude or being strict with my students, not strict, but.

072 **TRACY:** Sarcastic?

073 **INTERVIEWEE:** You know sarcastic, sarcastic I am, that I do, but that's part of my sense of humour and they sometimes, most of the time they enjoy that. They, but that doesn't create the distance or the ideal. I'm afraid at a place like ...where there is no distance, you are reduced to practical teaching, you're reduced to telling them, it is too subtle to try to do it by way of example because I don't think, unlike I don't know about you, but unlike my university experience, even up to today, I admired all my professors, they were great academics and they, just a day or two ago, I quoted one of my old professors again, Professor (unclear) and he wasn't the best teacher, he taught me delicts and I still don't understand delicts, but he was a tower of a man, tower of an intellect, and there's no doubt that everybody looked up to him and that's what you wanted to be, you wanted to be as clever as Lubbe or as, A B de Villiers or Andreas van Wyk. They were all these icons. Now if you're Ian Currie or a Marius (unclear) I don't know, students can look up to you because they are really very clever. But the rest of us, I don't know if students idolise their lecturers any more.

074 **TRACY:** Do you have a sense that they? (unclear)

074 **INTERVIEWEE:** No, they like, they're fond of me, I'm popular, I am, they enjoy my classes and of course that is good because some of the classes are very boring and if you then go to somebody who's got a sense of humour and tells you tales about theatre and eating out and films, then of course it's much nicer. But there's not that, I think they will think of me fondly but not with, not with idolisation, they wouldn't idolise me as somebody that they would,

that they would like to emulate. They do I know, they do, lots of students come up to me later in life and say, you know your lectures were so wonderful. And that is true, I try to make lectures very pleasant but that's all, you don't have that, you don't have that.

075 **TRACY:** So if you have a reputation, if you have a reputation (unclear) that helps

076 **INTERVIEWEE:** Oh yes, yes.

077 **TRACY:** It's interesting you mentioned that, the stories about theatre and, etc. because I (unclear) you were, you do (unclear)

078 **INTERVIEWEE:** Yes.

079 **TRACY:** (unclear) and that in itself is something (unclear) wow I want to know about (unclear) or I want to know about (unclear) oh boy I've never (unclear)

080 **INTERVIEWEE:** No, that is true Tracy, I've never thought of that. I don't (unclear) great a distance, I rather try to, as I said, make the lectures more interesting but I suppose what you say is true, it is a way of creating, creating.

081 **TRACY:** An aspiration.

082 **INTERVIEWEE:** An aspiration ja.

083 **TRACY:** But it's not present (unclear)

084 **INTERVIEWEE:** No, that is perhaps true but it is very difficult, it is very difficult, I find it, when we spoke about this earlier, I told you that the students, if I talk to them directly about integrity, the effect that I get especially the younger students, the effect that I get is that they are more interested in finding the loopholes and how to jibber the system than in what I have to say as perhaps somebody that is represented as a fuzzy duddy, are you telling them, thou ought not to do this, and thou ought to do that. That is definitely my impression and it's not successful, it is not helpful standing in front of a class of young, young South African students saying "You ought not to smoke" or "You ought not to steal" ja or use drugs or be involved in rugby, rather be involved in property deals and of course South Africa is also so corrupt, property deals are just as corrupt as drug deals nowadays. But you know what I mean, it doesn't sit well.

086 **TRACY:** So how do you do it?

087 **INTERVIEWEE:** I think I make a very great effort of A, directly saying it and illustrating it, that I should, should I personally, should I be involved or be confronted with something like that. I will never put my hand in a cookie jar. Now unfortunately, fortunately I've never had the opportunity to put my hand in a cookie jar, I've never had huge amounts of trust money under my control. When I was at Adams & Adams, that obviously wasn't something that a PA or an articled clerk could get close to. So I can't test, I can't say I

tried it and it didn't work, I tried it and I was chucked out of the firm and I had to start all over and my LLB was torn up, or you know, whatever. I can't say from an experienced point of view, so I tell them anecdotes about all the temptations that will lie ahead on their road, by referring to Elise of course, because they, they are, they have a huge trust account and fortunately they're very lucrative and they make lots of money, so there's very little, very little temptation to take the trust monies, they don't have an overdraft so, but it could very easily happen. It could very, R200 million lying over during the weekend, who's going to know, nobody's there, it will only be me (unclear) some time, why not quickly go and gamble and double it. If you're a partner for instance, and that is a temptation, that's a real temptation and so I tell them anecdotes like that.

088 **TRACY:** Stories.

089 **INTERVIEWEE:** Stories and then of course I threaten them, I take the De Rebus, I don't know if I did it when you were there, I take the De Rebus and in the De Rebus there's a list of people being struck from the roll and I take an old De Rebus where's only one name and then I take the recent one where there are two pages of columns, (unclear) people being struck from roll, because that's an unfair comparison because there are far more attorneys and there are far more reasons to be struck from the roll and it's an unfair comparison, but I do show them, in 1965 this is the one single person that was struck from the roll because he misused trust monies. Here's the 2005 list and it's five, six, eight columns and that seems to impress on them that it is a real problem, it happens and the result is that you lose your licence. That is the problem, that is the thing, if you take money from the till, you take money from the trust account, and then of course they don't know about the trust account. Many times I tell them about the trust account and I threaten them and I carry on with the trust account and then this little hand says "Sorry sir, but what is a trust account". So you know, you must make sure that they know what you're talking about. But that I do, I do threaten them, I do.

090 **TRACY:** Have you ever done like a roll play, where they play different rolls and there's an ethical dilemma? Or do you use hypothetical situations where there's an ethical dilemma and get them to discuss it, or not really?

091 **INTERVIEWEE:** No, I haven't done that, I only do roll plays in the Roman law class where I show them what the (unclear) court looked like. And roll play where they have to discuss it, is very difficult. Although in the post graduate class it might work, in the post graduate class it might work, I might consider that because roll plays is very, very, very good. I do it with the conveyance of property in Roman law, you do it with the (unclear) and the scales and then I take those scales. Yes, I'm in an interview. I'm in an interview at the moment sir, I can't talk to you, can you come back in a little while, thank you. Lock the door. And that works very well, they never forget the (unclear) and (unclear) they never forget that and in the exam papers, even if they know nothing,

they write about the (unclear). So roll play is an extremely good way of conveying knowledge and apparently burning it into their memories. So that might be something that I could do in future.

092 **TRACY:** (unclear)

093 **INTERVIEWEE:** Ja, videos would also work, anything.

094 **TRACY:** (unclear) struck off the roll (unclear)

095 **INTERVIEWEE:** One as a second hand car salesman or an insurance salesman.

096 **TRACY:** Or a beggar.

097 **INTERVIEWEE:** Ja that would be good, that would be very good if you could get such a video, that would be very good. But ja, videos work very well but, it's a lot of infrastructure, you must plan and you must organise it, it's unbelievable. Where are we now?

098 **TRACY:** I think we're actually done.

099 **INTERVIEWEE:** Okay, do you feel the students conception (unclear)

100 **TRACY:** (unclear) if you're trying to talk directly (unclear) then they try and find the loopholes (unclear)

101 **INTERVIEWEE:** No, no, that's definitely not pervasive, that was an exception. Once again it was a very young student, it wasn't a senior student. In the post graduate class definitely you don't get that. The post graduate class is very, it's seems to me, it's very under the impression that they are entering a profession and that there are certain rules, especially when we do that lecture on the profession. There are certain rules you address, you address funny, you talk funny, everything is strange, it's not like becoming a dentist, or becoming a journalist, you have a different way of thinking about things, you have a different way of talking, you have a different way of dressing, you have a different way of addressing people and if you don't do all these things you are not going to be a successful professional. So they are very aware of that and so in the post graduate class I don't think you would get the comment that we just want our bread licences, they are very aware that it's something more than just a job, it's a profession and they have to adhere to certain rules. Are you sure you're finished.

102 **TRACY:** (unclear)

103 **INTERVIEWEE:** If you want to come and ask me more questions after, you're welcome.

Interview Schedule

1. Conception of legal professional identity

1.1 What, in essence, is a lawyer?
1.1.1 What are the ideals or ultimate goods that should motivate a legal professional?
1.1.2 What should the legal professional believe in? What values should the legal professional hold?
1.1.3 What are the most important relationships of the legal professional? What are the loyalties or commitments of these relationships?
1.1.4 What should a legal professional know? What should a legal professional be able to do?
1.1.5 How should a legal professional behave in particular contexts?
1.1.6 What are the most important personal attributes of the legal professional?
1.2 With what do you most closely associate being a lawyer? What metaphors come to mind when you think of lawyers?
1.3 Who would you consider to be the quintessential legal professional? Why would such an individual be esteemed?
1.4 Do you think there has been a decline in the ethical conduct of lawyers? To what would you attribute such a decline?
1.5 What are the specific challenges to being a legal professional in present-day South Africa?

2. Identification with professional model & formation of own sense of professional identity

2.1 How does your conception of the model of professionalism you have sketched relate to your role as a teacher?
2.2 Do you consider yourself to be a lawyer?
2.3 Can you briefly sketch your professional history in the law?
2.4 Why did you decide to study law? What motivated you then? How did your initial motivations fare over time? What motivates you now to teach law? What about law or being a lawyer motivates you now to teach law?
2.5 Are there any particular stories or incidents related to the formation of your sense of legal professional identity that stand out for you?

3. Thoughts on legal education & the impartation of values in the classroom

3.1 What, in your mind, is the function of the academic phase of legal education? When should / do students learn about the underlying morality of the profession?

3.2 Is it possible to impart the morality of the profession to students during the academic phase of legal education? Are values / ideals / ethics conveyed irrespective of what the teacher does? What are the most important values (etc) that a teacher can seek to impart?

3.3 How did you try to convey these values / ideals / ethics in the Intro class?

3.4 Do you feel that the students' conception of what it means to be a lawyer or the values they associate with lawyering often conflict with your own? How do you deal with this conflict?